Filing # 180027401 E-Filed 08/18/2023 05:01:42 PM

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE INC, et al., *Plaintiffs*, v. CORD BYRD, in his official capacity as Florida Secretary of State, et al., *Defendants*.	Case No. 2022-CA-000666

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
OF DR. J. MORGAN KOUSSER

Dr. J. Morgan Kousser, by and through undersigned counsel, respectfully asks for leave to file a brief as *amicus curiae* in support of Plaintiffs' positions on the outstanding legal issues. As there is no Florida Rule of Civil Procedure providing for the filing of Amicus Curiae briefs at this stage, Dr. Kousser respectfully requests that this Court exercise its discretion to allow the submittal of an Amicus Curiae brief. In support, Dr. Kousser states the following:

1. On April 22, 2022, Plaintiffs Black Voters Matter Capacity Building Institute, Inc., Equal Ground Education Fund, Inc., League of Women Voters of Florida, Inc., League of Women Voters of Florida Education Fund, Inc., Florida Rising Together, Pastor Reginald Gundy, Sylvia Young, Phyllis Wiley, Andrea Hershorin, Anaydia Connolly, Brandon P. Nelson, Katie Yarrows, Cynthia Lippert, Kisha Linebaugh, Beatriz Alonso, Gonzalo Alfredo Pedroso, and Ileana Caban ("Plaintiffs"), filed a Complaint for Injunctive and Declaratory Relief against Defendants Laurel M. Lee, then Florida Secretary of State, the Florida Senate, and the Florida House of Representatives. On February 8, 2023, the Plaintiffs filed an Amended Complaint for Injunctive and Declaratory Relief against the Defendants, including Defendant Cord Byrd, Laurel M. Lee's

successor as Florida Secretary of State. In their Amended Complaint, Plaintiffs sought to have this Court declare that the congressional map enacted in the 2022 redistricting cycle (the "DeSantis Plan") violated Article III, Section 20 of the Florida Constitution's prohibition against the diminishment of racial or language minorities' ability to elect their candidates of choice; Article III, Section 20's prohibition against the abridgment or dilution of minority voting strength; and Article III, Section 20's prohibition against partisan gerrymandering. Plaintiffs sought to enjoin Defendants from implementing the DeSantis Plan and requested that this Court order or adopt a new congressional districting plan.

2. On August 11, 2023, by joint stipulation, the Plaintiffs agreed to limit the scope of their claims to focus on the diminishment of Black voters' ability to elect their candidate of choice in North Florida, particularly through the Governor and the Legislature's destruction of the Benchmark Plan's 5th Congressional District. The parties further stipulated that the outstanding legal issues for the trial court's resolution include whether the Florida Constitution's non-diminishment provision, facially and as applied to North Florida, violates the Equal Protection Clause of the U.S. Constitution. On August 16, 2023, the parties submitted opening briefing on the outstanding legal issues. Under the terms of the stipulation, responsive briefing is due by August 21.

3. As a historian and university professor with expertise in Florida's history of discrimination against minority voters, Dr. Kousser has a considerable professional and personal interest in the correct resolution of this case, which now revolves around Plaintiffs' claims that actions taken during the most recent round of congressional redistricting unlawfully diminished the voting strength of Black voters in North Florida. Dr. Kousser has also been retained as an expert witness in *Common Cause et al. v. Byrd et al.*, 4:22-cv-109-AW-MAF (N.D. Fla.), where

he has been asked to address issues pertaining to the history of redistricting in Florida, the Fair Districts Amendments, and the history of Black opportunity districts in North Florida.

4. Circuit courts have the inherent power to consider amicus briefs. *See* Br. of Amici Curiae in Supp. of Pls.' Emergency Mot. for Temporary Inj. and Mot. to Accelerate Case, *Speak up Wekiva, et al., v. Fla. Fish and Wildlife Conser. Comm'n*, No. 15-CA-001781 (2d Cir. Ct. Sept. 25, 2015); Governor Charlie Christ's Mot. for Leave to Appear as Amicus Curiae in Supp. of Def.'s Mot. to Dismiss, *Brown, Balart, et al. v. Roberts*, No. 2010-CA-1824 (2d Cir. Ct. June 22, 2010); *see also* Br. of Amicus Curiae Fla. Attorney General in Supp. of Appellee Orange County, *Facella v. Orange Cnty., Fla.*, No. 16-CV-29-A-0, (9th Cir. Ct. App. Div. Sept. 6, 2016); Unopposed Mot. of City of Miami Beach and City of Orlando for Leave to File Br. as Amici Curiae and to Present Oral Arg. at Summ. J. Hr'g, *Pareto, et al., v. Ruvin*, No. 2014-1661-CA-01 (11th Cir. Ct. June 23, 2014).

5. Allowing the filing of this amicus brief will assist the Court in assessing Defendants' Equal Protection challenges to Plaintiffs' non-diminishment claim. In particular, the attached brief demonstrates the need and basis for the Fair Districts Amendments and benchmark Congressional District 5, as it existed from 2015 through 2022. Defendants' as-applied and facial challenge to the non-diminishment principle has made the historical context for voters' enactment of the Fair District Amendments relevant to this litigation. Indeed, Defendants claim in their opening briefs that the Fair Districts Amendments are untethered from instances of past discrimination. *See, e.g.*, Dkt. No. 324, at 14 Fla. Legislature's Trial Br., *Black Voters Matter et al. v. Byrd*, Case No. 2022-CA-000666, ("[The Fair Districts Amendments] is not even arguably tethered to specific, identified instances of past discrimination that demand remediation"). That assertion is belied by the historical record, explicated in detail in the accompanying brief, which

shows that advocacy and debate around the Fair Districts Amendments were animated by and focused on Florida's long history of discrimination in redistricting and voting. That history, leading up to and following the enactment of the Fair Districts Amendments, and the particular demographics of benchmark Congressional District 5 are relevant to this Court's resolution of the legal issues now before it.

6. Counsel for Plaintiffs (Christina Ford) and Defendants (Michael Beato, Andy Bardos, and Daniel Nordby) were contacted on August 16 and 17, respectively, via telephone and email regarding Dr. Kousser's request to file an amicus curiae brief in this matter. Counsel for Plaintiffs responded with no objection. Counsel for each Defendant objected.

WHEREFORE, Dr. J. Morgan Kousser respectfully moves this Court for entry of an Order granting him leave to appear as amicus curiae and deeming the attached Amicus Brief of Dr. J. Morgan Kousser filed as of the date of the Court's Order.

Respectfully submitted this 18th day of August 2023.

BEDELL, DITTMAR, DeVAULT, PILLANS & COXE
Professional Association

By: s/Henry M. Coxe III
Henry M. Coxe III
Florida Bar No. 155193
Primary Email: hmc@bedellfirm.com
Secondary Email: gad@bedellfirm.com
Michael E. Lockamy
Florida Bar No. 69626
Primary Email: mel@bedellfirm.com
Secondary Email: kjl@bedellfirm.com
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
Telephone: (904) 353-0211
Facsimile: (904) 353-9307

Attorneys for Amici Curiae Dr. J. Morgan Kousser

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August 2023, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Filing Portal, which will provide a copy to all counsel of record in this case.

s/Henry M. Coxe III
Attorney

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE INC., et al.

Plaintiffs,

v.

CORD BYRD, in his official capacity as Florida Secretary of State, et al.

Defendants.

Case No.: 2022-ca-000666

BRIEF FOR *AMICUS CURIAE* DR. J. MORGAN KOUSSER IN SUPPORT OF PLAINTIFFS

TABLE OF CONTENTS

I. QUALIFICATIONS AND INTEREST OF AMICUS 1

II. FLORIDA'S HISTORY OF DISCRIMINATION IN VOTING ON THE BASIS OF RACE 2

A. Florida's Long and Notorious History of Racial Discrimination in Redistricting and Voting Demonstrates the Need for the FDA 2

1. 1865-1900 3

2. 1900-1965 6

3. 1965-Present 10

B. Florida's Voters Enacted the FDA Against This Background of Racial Discrimination in Redistricting and Voting 19

C. 2012 Redistricting 24

D. Benchmark CD-5 26

III. CONCLUSION 28

My name is J. Morgan Kousser and I am a historian and an expert in the history of Southern politics and political science. I have extensively studied the history of redistricting in Florida, the Fair Districts Amendments ("FDA"), and the history of Black opportunity districts in North Florida. I have also been retained as an expert witness in *Common Cause et al. v. Byrd et al.*, 4:22-cv-109-AW-MAF (N.D. Fla.), and asked to address these issues. In connection with that case, I have offered an expert report, which discusses these issues in depth. To assist this Court in deciding the instant action, I offer the following *amicus* brief, which summarizes my study of the history of discrimination in voting in Florida and the demographics of benchmark Congressional District 5, as it existed from the Florida Supreme Court's creation of the district in 2012 through the 2022 redistricting cycle.

I. QUALIFICATIONS AND INTEREST OF AMICUS

I am a professor of history and social science, emeritus, at the California Institute of Technology, and I have been a visiting professor at Michigan, Harvard, Claremont, and the Hong Kong University of Sciences and Technology. I received a Ph.D. and Master of Philosophy in History from Yale University. In 1984-85, I was Harmsworth Professor of American History at Oxford. I have published three books and edited another, in addition to 47 scholarly articles, 86 book reviews, and 27 entries in reference works. In addition to my teaching, I have given 81 talks at universities and 51 at scholarly conventions. From 2000 through 2012, I was also editor of the journal *Historical Methods*, which specializes in interdisciplinary and quantitative history.

My work has focused, among other things, on minority voting rights and race relations in Southern states, including Florida. I have authored two books on the subject, including *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party*

South, 1880-1910 (1974), and *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, which was co-winner of the annual Lillian Smith Award of the Southern Regional Council for the best book on the South and co-winner of the annual Ralph J. Bunche Award of the American Political Science Association for the best scholarly work in political science exploring the phenomenon of ethnic and cultural pluralism.

I have previously testified or consulted in 40 federal court cases and 22 state court cases concerning voting rights or redistricting, including in three Florida cases: *Jones v. DeSantis*,[1] *Williams v. DeSantis* (which settled before trial), and *League of Women Voters of Florida, Inc. v. Lee*.[2] I have also testified twice before subcommittees of the U.S. House Judiciary Committee on voting rights, most recently before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary, U.S. House of Representatives, about *Legislative Proposals to Strengthen the Voting Rights Act*, Oct. 17, 2019.

As a historian with expertise in Florida's history of discrimination against minority voters, I have a considerable professional and personal interest in the correct resolution of this case, which asserts that actions taken during the most recent round of congressional redistricting unlawfully diminish the voting strength of Black voters, especially in North Florida.

II. FLORIDA'S HISTORY OF DISCRIMINATION IN VOTING ON THE BASIS OF RACE

A. Florida's Long and Notorious History of Racial Discrimination in Redistricting and Voting Demonstrates the Need for the FDA

Black voters in Florida have struggled against efforts to diminish their votes, or prevent them from voting altogether, since they first gained the right to vote. As the ensuing history

[1] 462 F. Supp. 3d 1196 (N.D. Fla. 2020), *rev'd sub nom., Jones v. Gov. of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

[2] 595 F. Supp. 3d 1042 (N.D. Fla. 2022).

shows, efforts to prevent Black voters from electing their candidates of choice have involved discriminatory redistricting techniques from the very beginning. As the more blunt and overt means of preventing Black voters from actually voting (all-white primaries, destroying ballots, pervasive violence and intimidation at the polls) were curtailed, vote denial efforts in Florida became increasingly focused on redistricting mechanisms calibrated to diminish and constrain Black electoral power.

Every advance in voting rights for Black voters in Florida has been met by countervailing innovations in vote denial or vote dilution on the basis of race. Despite this persistent backlash, Black Floridians have made admirable, heroic gains in the struggle for equal voting rights and representation. The FDA, modeled on the most effective federal civil rights legislation ever passed in the United States, is a crown jewel in that struggle. The FDA's necessity, and the basis for its strong remedial protections, must be understood by placing it in historical context and acknowledging its important role in addressing and redressing Florida's history of restrictions on the ability of Black voters to participate in the electoral process on equal terms.

1. 1865-1900

From the end of the Civil War to the present day, racial conflicts over redistricting have recurred whenever Black Floridians gained (or were poised to gain) political power. The first such conflict took place even before the passage of the 15th Amendment. Prior to the Civil War, neither slaves nor free people of color could vote in the state, which became the third to secede in 1861. After the war, the newly freed people, as well as the formerly free, were enfranchised under the federal Military Reconstruction Acts. When the Military Reconstruction government called a convention to revise the state's antebellum constitution in 1868, Black Floridians sought to solidify their status by helping to shape the document that the body would produce. Even

though racially impartial suffrage was written into the state constitution, Black political equality was severely undercut by two provisions: one on the apportionment of the state legislature, and another on the method of selection of the principal local officials.

First, General George C. Meade, who oversaw Florida Reconstruction as head of the Third Military District, supported a constitution that provided for a severely malapportioned legislature, in a move that would ensure that approximately one-third of the voters, disproportionately from white counties, would elect a majority of the legislature. Thus, although according to the census of 1870, 48.8% of the people in Florida were "Colored," the first redistricting scheme so blatantly discriminated against the counties in which they lived that they never had a chance to achieve representation commensurate with their population.

A second provision of the "moderate" 1868 constitution prevented Black Floridians from holding local offices by giving the governor the power to centrally appoint almost all local officials.[3] Since Florida was 47% Black in 1880 and 42.5% Black in 1890,[4] there were plenty of counties in which Blacks would have been able to elect officials if they could have voted for them. Both blatantly anti-democratic provisions of the state's constitution manifestly had the intent and effect of preserving white supremacy by neutralizing Black communities' ability to elect the candidates of their choice.

White Floridians continued to pass laws that prevented Black voters from exercising their rights to vote. In 1887, the legislature instituted a law requiring voters to register annually and to present their registration certificates at the polls to vote. At about the same time, an unusual

---

[3] Article 5, Section 19, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1868con.html.

[4] https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf, Table 24.

intercensal gerrymander of the state legislature went into effect for the 1888 election, with the effect of disfranchising Black voters. In addition, before the 1888 election, registrars refused to hold office hours on designated days, unlawfully required Black men to produce white witnesses to prove their places of residence, refused outright to register Black men, and registered white Democrats (then the party of white supremacy and former Confederates) fraudulently. On election day, ballots were rejected on the grounds, for instance, that an asterisk or dash was printed on the ticket, that names were written in red ink, and that a ballot had "specks" on it.[5] The chief federal election supervisor in Florida reported to the U.S. Attorney General that at least ten persons were denied registration in each of over 700 precincts and that "over 10,000 Republican votes were thrown out after they were cast."[6] At the time, the Republican party was the party of Black rights and Reconstruction.

In 1889, the legislature passed both an "eight-box" law, which disfranchised illiterate persons by requiring them to deposit separate ballots for each office in a different ballot box, and a poll tax.[7] These laws disproportionately impacted Black Floridians. According to the *Jacksonville Times-Union*, the Democratic victory was "due almost wholly to the operation of the new election law," which was "a God-send to the state, as it prevents ignorance from ruling and controlling the destinies of the Land of Flowers." The replacement of the eight-box by the secret ballot in 1895 merely substituted one *de facto* literacy test for another.

---

[5] Ballots were privately printed and distributed by candidates and political parties in Florida before 1895.

[6] Kousser, *Shaping of Southern Politics*, 98-99.

[7] Charles D. Farris, "The Re-Enfranchisement of Negroes in Florida," *Journal of Negro History*, 39 (1954), 259-83, at 260-61.

Racial violence directly tied to political activity by Black Floridians also repeatedly broke out in Florida. From 1869 to 1873, between 75 and 100 Black and white Republicans were killed in Jackson County, and a larger number were driven out under the threat of such violence.

Thus, from the enfranchisement of Black people in the 1860s through their disenfranchisement in the 1880s and 90s, Florida's election laws were centrally concerned with the maintenance and expansion of white supremacy—including through the manipulation of district boundaries. It is notable that the contest over the very first apportionment of state legislative seats after emancipation was a racial one; from the beginning, questions of apportionment in Florida were suffused with questions of race and power.

2. 1900-1965

After the end of Reconstruction, most Black Floridians did not recover their voting rights until the passage of the Voting Rights Act in 1965. Even though Florida had a sizeable Black minority population at all relevant times, the first Black legislator since 1888 did not take office until 1969, and Florida did not elect a single Black member of Congress between 1877 and 1993.[8] No Black state senator was elected until 1982 and no Hispanic state senator until 1988.[9] The city of Tampa was guarded from 1910 through 1947 by an institution termed the "White Municipal Party," which controlled entry to the city's political institutions. Tampa did not elect a single Black city council member from 1887 until 1983.[10]

---

[8] Canter Brown, *Florida's Black Public Officials, 1867-1924* (Tuscaloosa, Alabama, Univ. of Alabama Press, 1998); J. Morgan Kousser, *Colorblind Injustice: Minority Vote Dilution and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1999), 19; Gerald R. Webster, "Congressional Redistricting in the Southeastern U.S. in the 1990s," *Southeastern Geographer*, 35 (1995), 1-21, at 9.

[9] *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 291 (Fla. 1992).

[10] Pam Iorio, "Colorless Primaries: Tampa's White Municipal Party," *Florida Historical Quarterly* 79 (2001), 297-318, at 301, 312.

When, after the passage of the 19th Amendment in 1920, some Black women attempted to register to vote, a Jacksonville newspaper headlined its story "Democracy in Duval County Endangered By Very Large Registration of Negro Women," and city officials made largely successful efforts to prevent the women from voting. According to one historian, a campaign to register Black voters near Orlando in 1920 was a principal cause of the infamous Ocoee Riots, in which 30-35 Black citizens were killed and most Black-owned buildings were burned to the ground.[11] The efforts of Harry T. Moore, President of the State Conference of the NAACP, to register and organize Black voters in the 1940s led to his assassination in 1951.[12]

Before it was struck down by the U.S. Supreme Court in *Smith v. Allwright* in 1944,[13] which was applied to Florida in 1945 in *Davis v. State ex rel. Cromwell*,[14] the all-white Democratic primary was the most powerful guardian of white supremacy in Florida politics.[15] As in South Carolina and other southern states, some Florida legislators attempted to reinstate the white primary after 1944 by repealing all state laws regulating primaries and authorizing a "private" Democratic primary. The chief sponsor of the private white primary bill, Sen. John E. Mathews, declared that with the demise of the all-white primary, "Southern civilization, ideals and institutions are at stake."[16] The obviously unconstitutional bill did not pass. But in an

---

[11] Robert Cassanello, "The Right to Vote and the Long Nineteenth Century in Florida," *Florida Historical Quarterly* 95 (2016), 194-220, at 214, 219.

[12] Caroline Emmons, "'Somebody Has Got to do that Work:' Harry T. Moore and the Struggle for African American Voting Rights in Florida," *Journal of Negro History*, 82 (1997), 232-43.

[13] 321 U.S. 649 (1944).

[14] 156 Fla. 181 (1945).

[15] Charles D. Farris, "The Re-Enfranchisement of Negroes in Florida," *Journal of Negro History*, 39 (1954), 259-83, at 262-63.

[16] Farris, "Re-Enfranchisement of Negroes in Florida," 271-83. The PAC was the labor political action committee of the CIO, the more liberal of the two national labor federations. "Eleanor Clubs" were mythical clubs of Black women, supposedly inspired by Eleanor Roosevelt, who aimed at undermining white supremacy.

instructive parallel to the passage in the 1960s of "vote dilution" measures to replace "vote denial" laws that had been overturned by the courts or Congress,[17] the Florida legislature in 1947 required all primaries for school boards to be conducted under at-large rules, purposely making it much more difficult for minorities to elect candidates of their choice.[18] This at-large election law for school boards was ruled to have been intentionally discriminatory in *McMillan v. Escambia County*,[19] part of the broad sweep of case law which now recognizes at-large elections as frequently designed to dilute minority electoral power within a jurisdiction.

During this time, Florida's pattern of discrimination against its Black citizens was not limited to voting *per se*; that discrimination manifested itself in all aspects of the state's political and social milieu. However, as the federal court for the Northern District of Florida noted in 1992, this "longstanding general history of official discrimination against minorities has influenced Florida's electoral process" and is inextricably linked to any consideration of Florida's history of voting discrimination.[20]

For example, in the 1950s and 60s, Florida suffered from several notable race-baiting campaigns, such as George Smathers's challenge to liberal U.S. Senator Claude Pepper in 1950 and the successful gubernatorial races of segregationists Farris Bryant in 1960 and Haydon Burns in 1964. Smathers referred to the Fair Employment Practices Commission, which sought to promote non-discrimination in employment during World War II, as "borrowed lock, stock, and barrel from the 1936 published platform of the Communist Party." Burns denounced his

---

[17] *See, e.g.*, Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1990).

[18] Peyton McCrary, "The Struggle for Minority Representation in Florida, 1960-1990," *Florida Historical Quarterly*, 86 (2007), 93-111, at 95-98.

[19] 638 F.2d 1239, 1245 (5th Cir. 1981).

[20] *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992).

opponent, Robert King High, as the "candidate of the NAACP."[21] The state's reputation for political moderation that characterized the scholarship of the post-World War II era has recently been termed an "illusion" by scholars who have, instead, seen Florida during most of the 20th century as adhering to "the racial norms of the Deep South."[22]

Every Florida governor from 1950 until 1970 campaigned and governed as a segregationist, even the moderate Leroy Collins, who declared in 1956 that under his leadership, Florida was "just as determined as any other southern state to maintain segregation." No public university in the state was desegregated before 1958 (the same year as Alabama), and token K-12 school desegregation began only in 1959 (five years after *Brown v. Board of Education*). By 1961, only one Florida county, Dade, had integrated any schools – four Black pupils were admitted to "white" schools in 1959. While in other southern states, such as Arkansas and Virginia, the first elected Republican governors of the 20th century proved to be civil rights advocates, in Florida, Gov. Claude Kirk's most memorable action was to close the Manatee County schools in 1970, rather than integrate them.[23]

[21] Smathers quoted in Jonathan W. Bell, "Conceptualising Southern Liberalism: Ideology and the Pepper-Smathers 1950 Primary in Florida," *Journal of American Studies*, 37 (2003), 17-45, at 40; Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore and London, Johns Hopkins Univ. Press, 1975), 52, 62-67.

[22] Irvin D.S. Winsboro and Abel A. Bartley, "Race, Education, and Regionalism: The Long and Troubling History of School Desegregation in the Sunshine State," *Florida Historical Quarterly*, 92 (2014), 714-745, at 715; Irvin D.S. Winsboro ed., *Old South, New South, or Down South? Florida and the Modern Civil Rights Movement* (Morgantown, West Virginia: West Virginia Univ. Press, 2009).

[23] Earl Black, *Southern Governors and Civil Rights: Racial Segregation as a Campaign Issue in the Second Reconstruction* (Cambridge, Massachusetts: Harvard Univ. Press, 1976), 90-98; David R. Colburn and Richard K. Scher, "Race Relations and Florida Gubernatorial Politics since the Brown Decision," Florida Historical Quarterly, 55 (1976, 153-69, at 154-59, 168; Jack Bass and Walter DeVries, *The Transformation of Southern Politics: Social Change and Political Consequence Since 1945* (New York: Basic Books, 1976), 119.

Meanwhile, "[a]s recently as 1967, § 350.20, Fla. Stat. provided in part: 'The Florida Public Service Commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier.' Additionally, § 1.01(6), Fla. Stat. (1967) provided that "the words 'Negro,' 'colored,' 'colored persons,' 'mulatto,' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or Negro blood.'"[24]

3. 1965-Present

Congress's passage of the Voting Rights Act in 1965 is rightly viewed as a sea change for minority voting rights, including in Florida. For the first time in 80 years, the systematic disenfranchisement of minority voters was challenged by a new wave of legal protections. In addition to providing the basis for an attack on racial discrimination in politics, the Voting Rights Act made it possible to see more clearly just how much discrimination remained. From 1965 to the present, there have been at least 69 instances in which courts or the Justice Department have found that the state, county, or municipal governments of Florida engaged in voting discrimination, or in which governments settled election lawsuits brought by minority plaintiffs.[25] At least nine cases brought under Section 2 of the Voting Rights Act were also

---

[24] *De Grandy v. Wetherell*, *supra*.

[25] I refer to lawsuits under the 14th or 15th Amendment or Section 2 of the Voting Rights Act, settlements or consent decrees, or objections or successful "more information requests" under Section 5 of the Voting Rights Act. The data comes from a database that I have been compiling since 2009, which was the basis of my testimony before the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, summarized in U.S. House of Representatives, *Legislative Proposals to Strengthen the Voting Rights Act*, Oct. 17, 2019, H. Rept. 116-317 *Voting Rights Advancement Act of 2019*, available at <https://www.congress.gov/congressional-report/116th-congress/house-report/317/1?q=%7B%22search%22%3A%22Voting+Rights+Advancement+Act%22%7D&r=3&overview=closed>, pp. 53-56, an article, "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in *Shelby County*?" Transatlantica, 1 (2015), available at < https://transatlantica.revues.org/7462>.

decided under the 14th and 15th Amendments, indicating rulings of discriminatory intent, as well as effect.[26]

One example of a lawsuit brought in this period will demonstrate patterns of discrimination. *Bradford County NAACP v. Starke*[27] challenged a system of electing city commissioners at-large, with numbered posts and a majority-vote requirement. Even though 31% of the population and 24% of the registered voters in the city of Starke were Black, no African American had ever been elected to serve in either city or Bradford County offices. Statistical analyses showed that votes in the county in most elections involving Black candidates were racially polarized and that Black voters were cohesive. There was a well-documented history of discrimination in the city, including physical intimidation of Black voters and a 1927 ordinance that explicitly mandated racially separate housing areas. Socioeconomic data indicated that previous discrimination had a lingering effect in the 1980s. After painstakingly reviewing the evidence, the court ruled that "the at-large election system currently in place in Starke is driven by racial bias and that the at-large system will continue to deny [Black citizens] equal access to the City's political process."[28]

Florida also engaged in a series of ill-conceived purges of the voter rolls that disproportionately impacted Black and Latino voters and that were often overturned or curbed by the courts or the Justice Department. In 2000, the Secretary of State ordered a private company

---

[26] The five cases were *McMillan v. Escambia County,* (N.D. Fla. 1980), *rev'd* 638 F.2d 1239 (5th Cir. 1981), *vacated and remanded* 688 F.2d 960 (5th Cir. 1982), *on remand,* 559 F. Supp. 720 (N.D. Fla., March 11, 1983), *vacated* 104 S.Ct. 1577, *aff'd* [the 688 F.2d 960 decision] 748 F.2d 1037 (5th Cir. 1984); *NAACP v. Gadsden County Sch. Bd*., 73-177 (N.D. Fla. 1980), *rev'd*, 691 F.2d 978 (11th Cir. 1982), *reheard,* 589 F. Supp. 953 (N.D. Fla. 1984); *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985); *Warren v. City of Tampa*, 693 F. Supp. 1051 (M.D. Fla. 1988), and *Baroody v. City of Quincy*, 4:20-cv-217 (N.D. Fla. April 28, 2020).

[27] 712 F. Supp. 1523 (M.D. Fla. 1989).

[28] 712 F. Supp. 1523, 1541 (M.D. Fla. 1989).

that had been hired to compare the state's list of voters to its list of felons to purge voters if there was an 80% probability of a match. This meant that voters could be purged even if their middle initials, suffixes, nicknames, race, or gender information did not match the felon list. Although the errors were so apparent that 20 county Supervisors of Elections refused to use the lists, a majority did use them, including Tampa and St. Petersburg. In a study of the purge and other official actions in Florida during that election, the U.S. Commission on Civil Rights found that Black voters were ten times as likely to have their ballots rejected as white voters and that

> The Florida process ensures that some voters will be wrongfully placed on the purge list and, ultimately, denied their right to vote. Further, it provides that these denials of the right to vote will fall most squarely on persons of color. These statutory provisions that mandate responsibility without accountability are obviously key ingredients in a statutory recipe for voter disenfranchisement.[29]

Despite these obvious inaccuracies in the purge protocol, Florida persisted. According to the Brennan Center:

> In 2004, for example, Florida planned to remove 48,000 "suspected felons" from its voter rolls. Many of those identified were in fact eligible to vote. . . . To compound the problem, the purge list over-represented African Americans and mistakenly included thousands who had had their voting rights restored under Florida law. Under pressure from voting rights groups, Florida ordered officials to stop using the purge list.[30]

Disfranchising those convicted of having committed felonies has long been understood to bear disproportionately on Black people. As the best-known book on the contemporary practice, Manza and Uggen's *Locked Out*, puts it:

> [T]he adoption and expansion of [felon disfranchisement] laws in the United States is closely tied to the divisive politics of race and the history of racial oppression. Concerns

[29] For a short summary, see Ari Berman, *Give Us the Ballot: The Modern Struggle for Voting Rights in America* (New York: Farrar, Straus and Giroux, 2015), 207-14. The Commission's study, *Voting Irregularities in Florida During the 2000 Presidential Election*, is available at https://www.usccr.gov/pubs/vote2000/main.htm. The quotation is the last sentence in chapter 3 of the otherwise unpaginated web version.

[30] Myrna Perez, *Voter Purges* (New York: Brennan Center for Justice, 2008), 1 https://www.brennancenter.org/our-work/research-reports/voter-purges.

> about the role of race are not limited to matters of historical interest. The extraordinarily high proportion of African American men in the criminal justice system today produces the shocking fact that more than one in seven black men is currently denied the right to vote, and in several states over one in four black men are disenfranchised. Just as felon disenfranchisement laws in several states can be traced to patterns of racial exclusion, their effect in diluting the African American vote is no less significant.[31]

Similarly, Brown and Clemons begin their chapter on felon disfranchisement by saying that "Since the turn of the [21st] century, felony disfranchisement has been used increasingly in combination with changes in voting regulations, which generally tend to make it more difficult to vote for many African Americans, Hispanics, and other nonwhites . . . ."[32]

During the post-Civil Rights Act period, redistricting also played a key role in preventing Black voters from electing their candidates of choice. Before *Baker v. Carr*[33] and *Reynolds v. Sims*,[34] Florida was one of the most malapportioned states in the nation. Under the 1923 revision of the 1885 Constitution's redistricting article, which was still in effect in 1960, there could be no more than one state senator per county, and each county had to have at least one House seat. In 1960, Florida ranked 43rd of all states in the percentage of the population required to elect a majority of the Senate, 44th in the percentage required to elect a majority in the House, and last in an index of the combined houses.[35] Rural legislators from predominantly white districts known as the "Pork Chop Gang," because "they fought for 'pork rather than principle,'" ran the legislature with an iron hand, starving public services and especially ignoring the needs of

---

[31] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006), 9-10.

[32] Donathan L. Brown and Michael L. Clemons, *Voting Rights under Fire: The Continuing Struggle for People of Color* (Santa Barbara, Calif.: Praeger, 2015), 35.

[33] 369 U.S. 186 (1962).

[34] 377 U.S. 533 (1964).

[35] William C. Havard and Loren P. Beth, "Representative Government and Reapportionment: A Case Study of Florida," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991), 21-76, at 29.

minorities. The rural faction bitterly opposed equal apportionment of the state legislature and quickly faded when the reform took place.[36] According to a later House Reapportionment Committee, "it was the issue of reapportionment that finally brought down Florida's 1885 constitution, effectively throwing out the old Florida and ushering in the new."[37]

Shortly after *Baker v. Carr* held reapportionment to be justiciable, a three-judge federal court ruled Florida's apportionment unconstitutional and ordered the legislature to reapportion itself. After two special legislative sessions, the legislature produced a plan that a federal district court reluctantly approved, but that the U.S. Supreme Court found wanting.[38] The legislature then adopted another plan, which the U.S. Supreme Court again rejected.[39] Upon remand, the district court took it upon itself to draft a fourth redistricting plan.[40] In sum, not only did the legislature refuse to apportion in a way that allowed all voters, and in particular, minority voters, to have an equal voice in Florida's government, but it repeatedly defied the U.S. Supreme Court's mandate to reapportion fairly.

During the 1960s and 70s, concerns about minority rights became increasingly linked with questions of reapportionment, and especially, with single-member districts. As early as

---

[36] Michael Hoover, "Turn Your Radio On: Brailey Odham's 1952 'Talkathon' Campaign for Florida Governor," *The Historian*, 66 (2004), 701-29, at 705; Jack Bass and Walter DeVries, *The Transformation of Southern Politics* (New York: Basic Books, 1976), 107; Neil Chethik, "Look up, Tallahassee, Florida's back in town," *Tallahassee Democrat*, Jan. 18, 1982, at 1A.

[37] Florida House of Representatives Committee on Reapportionment, "Reapportionment in Florida: Out of the 19th Century, into the 21st," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991),437-55, at 437.

[38] Florida House of Representatives Committee on Reapportionment, "Reapportionment in Florida: Out of the 19th Century, into the 21st," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991), 437-55, at 442 ("interference" comment); *Swann v. Adams*, 383 U.S. 210 (1966).

[39] *Swann v. Adams*, 385 U.S. 440 (1967).

[40] *Swann v. Adams*, 263 F. Supp. 225 (S.D. Fla. 1967).

1966, the NAACP filed a brief in federal court in Florida in favor of single-member districts.[41] In 1972, the NAACP, two white state legislators, Black citizens, and other parties filed suit in both state and federal courts opposing the 1972 redistricting on the grounds of partisan and racial discrimination, alleging discriminatory intent, as well as effect.[42] Because of the pendency of the primary elections and the unsettled nature of voting rights law at the time, the consolidated cases were dismissed by a three-judge court. The court found that, because the most heavily Black state House district (46% Black voting age population) could have had its Black concentration reduced *even more*, the plan could not be ruled to have a racially discriminatory effect. The fact that the plan split the most heavily Black county, Gadsden, adding whiter portions of Escambia County to it to form a district, was also insufficient, in the court's view, to support a finding of racial discrimination.

By 1972, whether to require single-member districts to facilitate effective minority representation had become a major issue in Florida politics. A broad coalition of activists and good-governance groups repeatedly forced the issue's consideration, focusing on the persistent discriminatory effects of multi-member districts. After Florida considered the issue in a variety of contexts, including a referendum in 1978, the 1982 redistricting finally settled the single-member district question and closed an era of extraordinary conflict over redistricting in which minority representation had been a central issue. As a measure of the intensity of the conflict, the Legislature considered the subject of reapportionment in 29 sessions from 1955 through

---

[41] AP, "NAACP Votes Suit To Push District Plan," *Tampa Tribune*, March 27, 1966, at 16-A.

[42] UPI, "Black Leader Says Voting Difficult In Some Districts," *Tampa Tribune*, July 11, 1972, at 2-B. The three-judge federal court stated that no plaintiff had pursued an intention claim. *Wolfson v. Nearing*, 346 F. Supp. 799, 802 (M.D. Fla. 1972) (three-judge court).

1982.[43] In its decision evaluating the 1982 reapportionment, the Florida Supreme Court highlighted the Florida Attorney General's touting of the many new majority-minority single-member districts:

> The attorney general submits that the special needs of minority voters were recognized, illustrated by the fact that the plan includes seven house districts with a Hispanic population of fifty-eight percent or higher; seven house districts with a black population of fifty-two percent or higher; one senate district with a black population of sixty-five percent; and two senate districts with a Hispanic population of fifty-five percent or higher.[44]

Issuing its decision after the Supreme Court's decision in *Mobile v. Bolden*, but before Congress' reversal of *Bolden* in its 1982 amendment to Section 2 of the Voting Rights Act and the Supreme Court's qualification of its *Bolden* ruling in *Rogers v. Lodge*,[45] the Florida Supreme Court believed that a finding of racial discrimination had to be based on proof of discriminatory intent.[46] Since no such intent had been proven, the court took only a few sentences to rebuff challenges to one heavily Latino and three heavily Black districts, which lawyers for the groups asserted were racially gerrymandered.[47] Cases like this requiring proof of intent likely affected the decision of the FDA's framers to include the phrase "or result" in the racial discrimination clause of the FDA.

---

[43] Florida House of Representatives Committee on Reapportionment, "Reapportionment in Florida: Out of the 19th Century, into the 21st," in Susan A. MacManus, *Reapportionment and Representation in Florida: A Historical Collection* (Tampa, Florida: University of South Florida Research Foundation, 1991), 437-55, at 452-55.

[44] *In re Apportionment Law Appearing As Senate Joint Resolution 1 E,* 414 So. 2d 1040, 1045 (Fla. 1982).

[45] *See, e.g.*, Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, North Carolina: Univ. of North Carolina Press, 1999), at 57-58; *Rogers v. Lodge*, 458 U.S. 613 (1982).

[46] The same court's 1992 reapportionment decision explicitly interpreted the 1982 court's opinion to this effect. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 281 (1992).

[47] *In re Apportionment Law Appearing As Senate Joint Resolution 1 E,* 414 So. 2d 1040, 1045 (Fla. April 26, 1982).

In the 1990s, with single-member districts firmly settled in Florida's apportionment scheme, the hydra of racial vote dilution grew yet another head. Faced with single-member districts that were harder to configure in a way that would deny minority voters the opportunity to elect their candidates of choice, white legislators sought instead to weaponize minority electoral power for their own political ends. With voting patterns still polarized along racial lines and rival political factions seeking to harness that polarization to achieve their own political goals, Black and Latino Floridians were caught in a dilemma.

Republican legislators sought to pack minority voters into as few districts as possible, drawing a limited number of seats where minority voters would clearly win and limiting their influence across the legislative body as a whole.[48] Florida's Democratic legislators, in turn, frequently advocated for redistricting plans that would strategically utilize minority voting power to boost white Democratic candidates to victory. In 1992, the Legislature's inability to enact a congressional map precipitated a court-ordered map that created a Black opportunity district in Northern Florida, resulting in the election of a Black congressional representative for the first time in the state since 1876.

But this was not the end of the maneuvering, as litigants from all sides sought to challenge both the legislative and Congressional reapportionments, on a variety of theories, all centered on the use of race in Florida's reapportionment. In one case concerning state legislative redistricting, the U.S. Supreme Court held that Section 2 of the Voting Rights Act did not require minority districts to be *maximized*. In a striking statement that explicitly recognized that Black and Latino voters could often form "effective voting majorities" even if they did not constitute

---

[48] Curt Anderson, AP, "Redistricting just won't go away – Lawmakers need special sessions, courts to finish the job," Naples Daily News, March 17, 1992, at 6B.

actual majorities in districts, Souter advised that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[49] Writing for the Court, Justice Souter reasoned that maximization beyond proportionality was not required, because it might incentivize overpacking of districts in areas where minorities could elect candidates of their choice with smaller concentrations of their voters.[50] But the Court also recognized "continuing discrimination and racial bloc voting"[51] in Florida, and never suggested discrimination had been sufficiently tempered such that redistricting protections for minority voters were no longer necessary to guarantee political equality in Florida. While its configuration changed over the decades, a Black opportunity district remained in some form in Northern Florida until the 2022 redistricting cycle.

The 2000s redistricting cycle represented the next twist in the story of minority representation and reapportionment in Florida. In complete control of the process, Florida Republicans sought to maximize their gains. To accomplish this aim, they shuttled minority populations around on the map to increase the safety of Republican incumbents. For example, in Central Florida, an area of rapid growth of the non-Cuban Latino population, Republicans rejected a Democratic proposal for a Black/Latino coalition district in the Orlando area, and instead custom designed a new, overwhelmingly non-Hispanic white seat for the Speaker of the State House of Representatives, Tom Feeney.[52] This change, along with other gambits in Tampa

---

[49] *Johnson v. De Grandy*, 512 U.S. 997 (1994).

[50] *Id.* at 1020.

[51] *Id.* at 1000.

[52] Sean Mussenden, "New seat for Hispanic in Congress not likely," Orlando Sentinel, Feb. 5, 2002, at D3; Lesley Clark, "Redistricting plan gains in Senate," Miami Herald, March 20, 2002, at 11B; Sean Mussenden, "GOP passes district maps; Democrats vow challenges," Orlando Sentinel, March 23, 2002, at B3; Sean Mussenden, "Senate hands Feeney his district – Speaker's path to Congress opens up," Orlando Sentinel, March 22, 2022, at A1.

Bay, St. Petersburg, and South Florida, produced ripple effects throughout the map, many of which worked against minority voting strength.[53] Republicans treated Black voters as pawns, packing them or stranding them in whatever way would minimize Black power while maximizing Republican power. These maps were again litigated. Although the court challenges ultimately failed, it is notable that the legislature included in its plans a (majority-white) district stretching from Tallahassee to Jacksonville, much like the district at issue in the present litigation.

B. Florida's Voters Enacted the FDA Against This Background of Racial Discrimination in Redistricting and Voting

Advocates for the FDA, as well as public debate concerning its provisions, were animated by—indeed, were focused on—Florida's long and notorious history of discrimination in redistricting and voting. The *Orlando Sentinel* recognized the "potent political history behind the debate," including the history of "draw[ing] congressional and legislative districts that concentrated black voters" while "'bleach[ing]' surrounding districts" of Black voters and diminishing their influence statewide.[54]

The public campaign for the FDA emphasized that one of its key goals was to protect the ability of minority voters to elect their chosen representatives. Proponents generally discussed the protection of minorities in addressing the amendment's provisions and goals, and their campaign materials spotlighted minority support. Proponents also stressed the odd shapes of

[53] Steve Bousquet, "Senate maps for Congress take shape – Lawmakers might need a special session to resolve differences between House and Senate plans." St. Petersburg Times, March 20, 2002, at B1; Bousquet, "Tailored Congress districts approved – Now the court battle begins over the districts drawn to keep the U.S. House firmly in GOP hands," id., March 23, 2002, at 1; William March, "Voting Districts Pan Out For GOP – Redistricting Plan Shifts Minorities, Democrats," Tampa Tribune, March 24, 2002, at 1 (Metro).

[54] Aaron Deslatte, *Gerrymandering Issue Divides Black Caucus*, Orlando Sentinel (July 26, 2009).

districts and the lack of competition in general elections. For example, the press release that the FDA campaign issued when the measure officially qualified for the ballot stressed that the FDA would protect minority rights by "mak[ing] it impossible for legislators to draw districts to diminish the ability of minority voters to elect representatives."[55] And the press release touted not only the bipartisan endorsements of a prominent Republican, former State Comptroller Bob Milligan, and former Democratic governor and senator Bob Graham, but also those of Black state Rep. Perry Thurston and Latino state Rep. Darren Soto.[56]

Newspaper coverage also stressed that protecting minority voters' ability to elect their candidates of choice was an essential goal of the FDA. Thus, the co-chair of the campaign, Thom Rumberger, a lawyer who had represented the Republican Party during the 1992 redistricting, asserted that the redistricting system "is undemocratic and in dire need of change. We must let voters choose their public officials instead of the other way around." In the 2002 redistricting, he noted, "Minorities and demographically similar groups are either 'stacked' into a single district or 'cracked' into numerous ones; either way, their influence with the policymakers sent to Tallahassee and Washington is undermined and diminished. . . . [The initiatives] also have language that protects minority representation."[57] Similarly, Mark Ferrulo, the executive director of Progress Florida, one of the organizations behind the FDA, remarked that the FDA "ensures districts are not drawn to disenfranchise racial or language minorities. This will prevent a particular voting bloc from being diluted over several districts, rendering it politically

---

[55] https://www.eqfl.org/breaking-fair-districts-officially-ballot.

[56] https://www.eqfl.org/breaking-fair-districts-officially-ballot.

[57] Thom Rumberger, "Need for fair districts transcends partisanship," op-ed, *Tallahassee Democrat*, Feb. 18, 2009, at 8A.

impotent."[58] It is worth noting that Ferrulo did not merely stress non-retrogression in minority access districts, but, as Rumberger had, the dispersing of minorities across several districts.

In an editorial endorsing the FDA, the *Miami Herald* wrote of the minority protection provisions, "Districts must maintain the equal opportunity of minority communities to elect representatives of their choice and participate fully in the political process. . . . [The FDA] would enshrine the voting rights of minority communities in the state Constitution, as they are now protected in the U.S. Constitution."[59] Likewise, in an editorial endorsing the FDA, the *Tallahassee Democrat* observed:

> The amendments require, and this is critically important, that district plans may not deny any racial or language minorities the equal opportunity to participate in the political process. The importance of this is subtle. Now our districts are drawn so that they can pack a large number of minority voters into just a few districts. Minorities win seats in the Legislature or Congress, and they can keep getting re-elected — but there aren't enough minority representatives to have any real power once they have that seat at the table.[60]

The addition of the FDA's explicit minority protection provisions gained more support for the FDA from Black leaders than there had been for previous redistricting reform efforts. The NAACP, the Legislative Black Caucus, the Florida Black Caucus of Local Elected Officials, and *Democracia Ahora* endorsed the FDA.[61] "'We're comfortable that we will be represented and the districts will be fairer than they are now,' said state Rep. Geraldine Thompson, D-Orlando, secretary of the legislative Black Caucus that endorsed the [FDA] in April."[62] Indeed,

---

[58] Mark Ferrulo, op-ed, "Giving power to the people—Amendment would end gerrymandered districts," *Florida Today*, April 26, 2009, at 19A (emphasis added).

[59] Editorial, "Take back democracy – Our Opinion: Support drive to fix the way that representatives' districts are drawn," *Miami Herald*, June 21, 2009, at 4L.

[60] *Our Opinion, Yes to Amendments 5 and 6*, Tallahassee Democrat (Sept. 26, 2010).

[61] Deirdre Macnab, "A better way to elect our leaders," op-ed, *Miami Herald*, Jan. 17, 2010, at 5L; Nancy Rudner Lugo, op-ed, "Fair Districts give vote back," *Orlando Sentinel*, Jan. 27, 2010, at A17.

[62] Aaron Deslatte, "Push aims to smooth odd-shape districts," *Orlando Sentinel*, July 23, 2009, at B1.

the majority of the Black Caucus supported the FDA. As the immediate past chair of the Black Caucus, Joe Gibbons, D-Hallandale Beach, put it (according to a reporter's summary): "a majority of the caucus think they don't need huge minority voting blocs to win elections anymore and want to oppose packing minorities into a handful of districts."[63] According to another prominent Black legislator, Rep. Perry Thurston, D-Plantation, "These amendments provide new protections for all voters and especially minorities."[64]

Opponents of the FDA irrationally suggested that it would somehow reduce the number of Black opportunity, or cross-over, districts where Black voters, although a minority, have sufficient white allies to enable Black voters to elect their candidate of choice.[65] Of course, avoiding that outcome was precisely the point of the non-diminishment provision of the FDA, which was modeled on Section 5 of the federal Voting Rights Act. "'These amendments have been drafted very carefully to ensure that minority voters do not lose representation in Florida,' said Ellen Freidin, chairwoman of [FDA sponsor] FairDistrictsFlorida. 'In fact, they provide greater protection than exists today in federal law.'" In other words, the FDA, according to Freidin, would protect minority voters in these crossover districts.[66] Quoting from the text of the law, Freidin emphasized that the FDA's minority representation provisions would clearly

---

[63] Aaron Deslatte, "Gerrymandering issue divides black caucus," *Orlando Sentinel*, July 26, 2009, at B2.

[64] Shannon Coleveccio, "Redistrict plan on ballot – Organizers for the Fair Districts proposal have gathered enough signatures to put the measure – to change the way lawmakers draw legislative districts – on the November ballot," *Miami Herald*, Jan. 24, 2010, at 5B.

[65] Bill Kaczor, AP, "Redistricting proposals may get new challenge – Legislature may ask Court to limit gerrymandering," *Bradenton Herald*, Dec. 10, 2009, at B1.

[66] Catherine Whittenburg, "Plan to redraw state districts called unfair – Two lawmakers say it would hurt minorities." *Tampa Tribune*, Jan. 12, 2010, at 6; Aaron Deslatte, "Bipartisan duo fears for minority districts," *Orlando Sentinel*, Jan. 12, 2010, at B1.

override other provisions, such as the requirement that districts be compact and that they follow political and geographical boundaries.[67]

Addressing the members of Congress, Freidin "said lawmakers who oppose the amendments are protecting personal turf and interests. The precise aim of the proposal is to eliminate that." Even more bluntly, Adora Obi Nweze, president of the Florida Branches of the NAACP, declared that "[i]t should frighten all Floridians to know that some elected officials will stop at nothing to protect their political status by trying to avoid having any rules to stop them from continuing to draw districts that serve themselves rather than the people." According to Nweze, opponents of the FDA were trying to turn the clock back to "a very dark time in our history," and she condemned "the blatant use of scare tactics with African Americans and Hispanics to justify the continued gerrymandering of districts that benefit only politicians."[68] Again and again, proponents pointed to the specific language of the amendments that sought to guarantee non-discrimination and prevent retrogression in the gains in representation that minorities had already made.[69] The campaign for the FDA was heated, with opposition coming in particular from leaders of the Republican Party. Public opinion polls taken before the vote, however, indicated strong bipartisan support from Republicans as well as Democrats, non-

---

[67] Bill Kaczor, AP, "Redistricting amendments to make ballot – Designed to prevent gerrymandering," *Fort Myers News-Press*, Jan. 23, 2010, at B8.

[68] Paul Flemming, "Ballot to address legislative districts," *Tallahassee Democrat*, Sept 19, 2010, at 1; Bill Cotterell, "Fair Districts Fla. draws opposition," *Tallahassee Democrat*, Sept 21, 2010, at 11.

[69] Bill Cotterell, "Redistricting amendment thrown off ballot," *Tallahassee Democrat*, July 9, 2010, at 2 Local; Paul Flemming, "Ballot to address legislative districts," *Tallahassee Democrat*, Sept 19, 2010, at 1; Editorial, "Amendments 4 and 5 [*sic*; they meant 5 and 6; they published correction next day]: yes – It's not fair to let politicians choose their voters," *Tallahassee Democrat*, Sept. 26, 2010, Opinion, at 2; Editorial, "We recommend: on Amendments 5 and 6, yes," *Bradenton Herald*, Sept. 30, 2010, at B6; Editorial, "Vote yes on amendments 5 and 6," *South Florida Sun-Sentinel*, Oct. 13, 2010, at 10A; No byline, "Redistricting measures seek fairness," *Tampa Tribune*, Oct. 14, 2010, at 11; Ellen Freidin, "Know Your Amendments," *Palm Beach Post*, Oct. 17, 2010, at 5S.

Hispanic whites, as well as Blacks and Latinos.[70] In fact, in an election in which Republicans won supermajorities in both houses of the legislature and picked up four Florida congressional seats, the FDA received an overwhelming supermajority – 62.9% of the votes.[71] The FDA thus passed with substantial popular support, and its drafters and proponents made clear that they believed the FDA would remedy Florida's long and notorious history of racial discrimination in voting and districting, protecting the rights of minority voters who lived in crossover districts – not just majority-minority districts. It also attempted to prevent partisan gerrymandering, thereby promoting more competitive elections.

C. 2012 Redistricting

Despite the FDA's passage, the map that the legislature initially passed in 2012 did not comply with its provisions. Following the 2012 redistricting, the Florida courts were called upon to vindicate minority rights under the FDA. The *Apportionment* cases, as the line of cases involving the 2012 redistricting are called, show that even when the voters had clearly instructed the legislature to respect minority rights, the legislature was unwilling to do so without court intervention. Ultimately, there were eight separate challenges to the 2012 redistricting map. In those challenges, the Florida courts considered the latest iterations of a question that had been considered in every reapportionment cycle since the U.S. Supreme Court's recognition of one-person one-vote and the passage of the Voting Rights Act: how to protect Florida's minority voters from discrimination in redistricting.

---

[70] Joseph T. Eagleton and Daniel A. Smith, "Drawing the Line: Public Support for Amendments 5 and 6," in Seth C. McKee, ed., *Jigsaw Puzzle Politics in the Sunshine State* (Gainesville, Florida: University Press of Florida, 2015), 109-25.

[71] Editorial, "Transition time – Scott is handing on to his outsider status," *Tallahassee Democrat*, Nov. 7, 2010, at 2 (Opinion section).

I focus only on the last two cases in the *Apportionment* line, because of their impact on North Florida, where a Black opportunity district had existed since 1993. In North Florida, the Florida Supreme Court required that Congressional District 5 (CD-5) (formerly, CD-3) be redrawn from a North-South (Jacksonville-Orlando) configuration to an East-West (Jacksonville-Tallahassee) configuration on the grounds that the North-South orientation "overpacked … black voters into the district … thereby diluting" their "influence … in surrounding districts".[72] This was one of the principal evils that the FDA was explicitly intended to remedy. The Court examined data showing that an East-West district allowed Black voters "a reasonable opportunity to elect candidates of choice" in this particular area. It also pointed out that Senate staff member Alex Kelly had drawn a possible East-West version of CD-5 with a Black voting age population of 45% and considered that it would pass muster with the FDA. In support of its view that there is no particular percentage of the Black voting age population required to prevent diminishment, the Court quoted approvingly from a 2015 U.S. Supreme Court decision which emphasized that the issue is the "ability to elect a preferred candidate of choice," rather than "a particular numerical minority percentage."[73]

After meticulously examining other districts using the same approach as it took for CD-5, the Florida Supreme Court required the Legislature to redraft eight congressional districts, using specified guidelines.[74] As the Court later set forth in detail, the Legislature failed to follow the guidelines set down by the Supreme Court and, in the end, the Legislature relinquished control to the courts.

---

[72] *Apportionment VII*, at 402.

[73] *Apportionment VII*, at 402-06, quoting *Alabama Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015).

[74] *Apportionment VII*, at 406-413.

Following more litigation in the trial court, the Supreme Court finally implemented a plan.[75] In determining which of the proposed plans to adopt, the Court noted that the North/South version of CD-5 had been the "focal point of the challenge to the Legislature's redistricting plan" and that the trial court had found the North/South district "a key component of the Legislature's unconstitutional intent." While requiring an East/West orientation for the district in *Apportionment VII*, the Supreme Court had not specified any minimum percentage of the Black voting age population or share of registered Democrats, and it had left the shape entirely up to the Legislature. In adopting the proposed East/West version of CD-5 in *Apportionment VIII*, the Court found that CD-5 "does not diminish the ability of black voters to elect a candidate of choice."[76]

D. Benchmark CD-5

Congressional District 5 in the Benchmark map from 2016 contained a Black community of interest that made its constituents both different in kind from the rest of Florida and similar to each other. Benchmark CD-5 covered Floridians that tended to be younger, more economically disadvantaged, and less educated than the median Floridian.[77] Floridians in Benchmark CD-5 had a median age of 35.1 years, compared to the state median of 42.8.[78] The median household income in Benchmark CD-5 was $46,344 — about three-quarters of the median income of $63,062 statewide.[79] In Benchmark CD-5, 22.2% of all persons lived below the poverty line, including 30% of children under 18, compared to the statewide rate of 13.1% of all persons, and

---

[75] *Apportionment VIII*, at 270, 297.

[76] *Apportionment VIII*, at 271-73.

[77] https://censusreporter.org/profiles/50000US1205-congressional-district-5-fl/ (summarizing American Community Survey 2021 1-year survey data).

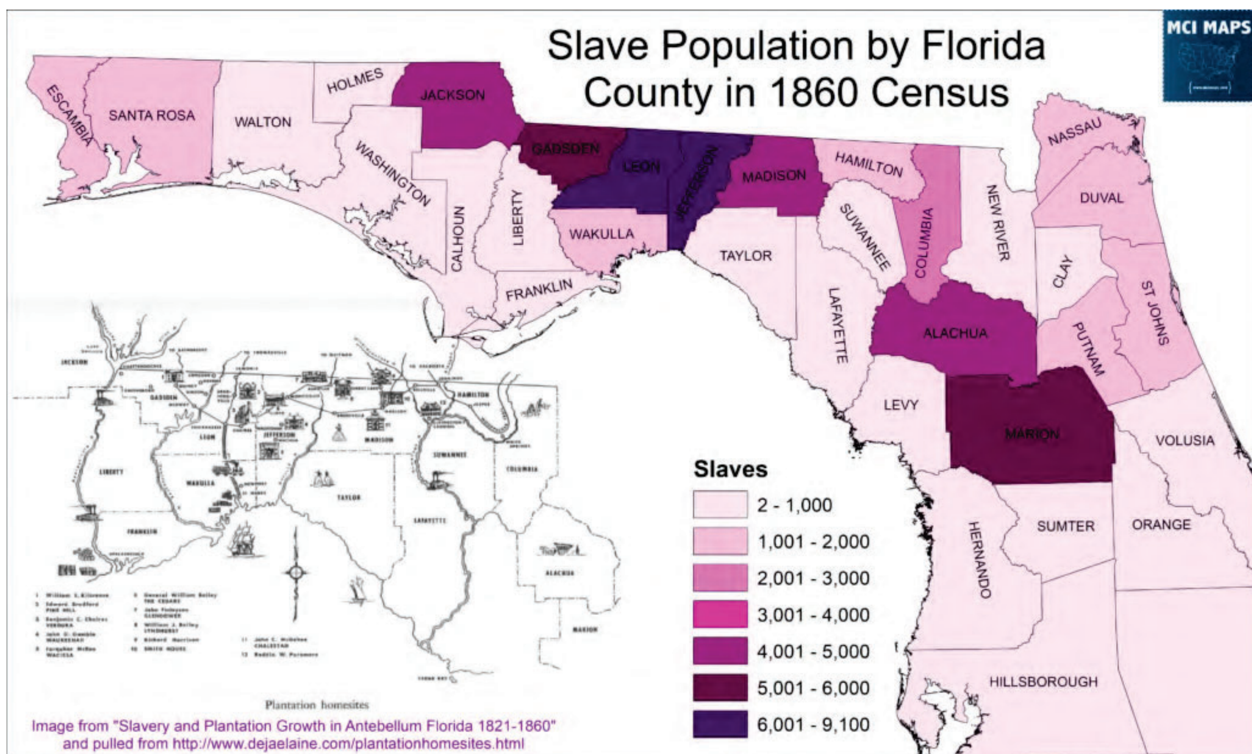
[78] *Id.*

[79] *Id.*

18% of children.[80] 24.1% of Floridians in Benchmark CD-5 had a bachelor's degree or higher, compared to 33.2% statewide.[81]

Moreover, and critically, Benchmark CD-5 also overlaps in large part with the so-called "Slave Belt," where the state's cotton plantations were located before the Civil War.[82] As Florida's state council of the National Endowment for the Humanities put it:

> During the 25 years leading up to the Civil War, a five-county region of North Florida grew into a virtual barony of plantations and farms that echoed the wealthiest precincts of the Old South cotton kingdom. The vast majority of Florida's slaves lived in this central part of the Panhandle along the Georgia border. Called "Middle Florida," it centered on the capital city of Tallahassee and included Gadsden, Leon, Jefferson, Madison, and Hamilton counties —- and eventually expanded into central Florida's Alachua and Marion counties.[83]



---

[80] *Id.*

[81] *Id.*

[82] As the

[83] Florida Humanities, *Florida's Culture of Slavery*, Feb. 4, 2020, https://floridahumanities.org/floridas-culture-of-slavery/.

Thus, unlike the congressional district at issue in *Shaw v. Reno,* where the minority residents had "little in common with one another but the color of their skin," *Shaw*, 509 U.S. at 647, the residents of CD-5 not only share a number of common demographic characteristics identified as relevant in *Shaw*, such as their "age, education, economic status, or the community in which they live" and but also a "lineal connection to the many enslaved people brought to work there during the antebellum period," identified as relevant in *Allen v. Milligan*, 143 S. Ct. 1487, 1505 (2023) (internal citations omitted).[84]

III. CONCLUSION

In sum, my chief opinions relevant to this case are:

- From the very start of Black suffrage to the enactment of the FDA, Black voters in Florida were subject to pervasive discrimination in the political and electoral arena at the state level, specifically including redistricting.

- The FDA was enacted against the background of this long and notorious history of discrimination, and was specifically intended by its proponents to remedy that firmly established history of state-level political discrimination.

- The non-diminishment provision of the FDA was intended by its proponents, and widely understood by those tasked with interpreting it, Republicans as well as Democrats, judges as well as legislators, to protect not only districts with Black voting age populations that constituted an absolute majority (more than 50%), but

[84] MCI Maps, "Lets Talk About the Florida 5th Congressional District," available at https://mcimaps.com/lets-talk-about-the-florida-5th-congressional-district/

also “access” or “crossover” districts that functionally performed in a manner that permitted Black voters to elect their candidates of choice.

- Before its destruction in the recent redistricting, Black voters in Benchmark CD-5 represented a distinct political community of interest, unified by a number of demographic characteristics other than their race which set them apart from Florida at large, and lineally descended from the pre-Civil War “Slave Belt” of the North Florida panhandle.

Dated: August 18, 2023

Dr. J. Morgan Kousser, Ph.D