>> ALL RISE.
HEAR YE HEAR YE HEAR YE..THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR. GIVE ATTENTION. YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT.
LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED

>> GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT.
TODAY WE WILL BE TAKING UP FIRST BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE VERSUS THE SECRETARY FOR THE DEPARTMENT OF STATE CASE NUMBER 2023 1671.
JUSTICE KENNEDY IS RECUSED.
AND WE WILL MAKE SURE THAT WE HAVE ENOUGH TIME TO COVER THIS TODAY.
IT IS A VERY IMPORTANT CASE.
WE WILL NOT LET IT GET OUT OF HAND ON TIME.
BUT DO NOT RUSH THROUGH.
IF WE NEED MORE TIME, WE WILL.
AND WE WILL MAKE SURE THAT IT IS EQUAL.

>> GOOD MORNING.
MAY IT PLEASE THE COURT.
I REPRESENT THE BLACK VOTERS MATTER PETITIONER'S.
MANY OF WHOM ARE HERE WITH US TODAY.
OVER TWO YEARS AGO THE LEGISLATURE PASSED A PLAN THAT IT KNEW DID NOT COMPLY WITH THE STATE CONSTITUTION.
BELOW THE TRIAL COURT FAITHFULLY APPLIED THE PRECEDENT.
AND UNSURPRISINGLY IT FOUND A VIOLATION OF THE FLORIDA CONSTITUTION.
ALTHOUGH THE FIRST DCA REVERSED, IT DID SO ONLY BY EXCUSING ITSELF,
IN AN OPINION THAT NONE OF THE RESPONDENTS WANTED TO DEFEND THIS COURT.
THE COURT SHOULD ABSOLVE THIS CASE BY APPEARING TO THE PRECEDENT UNDER TO WHICH THEY HAVE UNQUESTIONABLY SHOWN A VIOLATION OF THE FLORIDA CONSTITUTION.
THIS IS NOT A CLOSE CALL.
BOTH THE HOUSE AND THE SENATE SAY THAT THIS COURT HAD A VIOLATION IN THE DIVISION AND THEY ARE NOT ASKING THE COURT TO CHANGE THAT STANDARD.
NOR DOES THIS COURT HAVE ANY REASON TO DO SO.
AT THIS COURT HAS RECOGNIZED, IT DOES NOT PERMIT NOR DOES IT REQUIRE RACIAL GERRYMANDERING.
WHETHER THE INACTIVE PLAN COMPLIES WITH THE FLORIDA CONSTITUTION SHOULD BE THE SOLE QUESTION BEFORE THE COURT TODAY.
>> WE HAVE TO CONSIDER WHETHER IT COMPLIES WITH THE UNITED STATES CONSTITUTION AS WELL.
>> I DO NOT THINK YOU NEED TO REACH THAT QUESTION TODAY.
BECAUSE THEY DID NOT IMPOSE ANY REMEDY.

IT PASSED THE BATON BACK TO THE LEGISLATURE.
BECAUSE WE DO NOT HAVE AN ACTUAL REMEDIAL DISTRICT BEFORE US TODAY TO JUDGE EQUAL PROTECTION CLAUSE, THE ARGUMENT THAT THE STATE IS MAKING, I THINK UNDER LESIONS OF RACIAL GERRYMANDERING DOCTORING, YOU DO NOT HAVE THE ABILITY TO APPLY IT TO HYPOTHETICAL.
>> THE ARGUMENT UNDER EQUAL PROTECTION IS AS TO THE BURDEN OF PROOF.
NOT TO THE REMEDY.
THE REMEDY WOULD BE BACK TO THE LEGISLATURE.
BUT THAT'S A DISTINCT ARGUMENT FROM THE LEGISLATURE IS MAKING.
TO SATISFY BURDEN OF PROOF YOU NEED TO SHOW THAT THIS HYPOTHETICAL OTHER DISTRICT IS PLAUSIBLE WITHOUT VIOLATING THE EQUAL PROTECTION CLAUSE.
>> YES, YOUR HONOR I DO AGREE THAT THOSE ARE DIFFERENT QUESTIONS.
AND IF IT IS HER BURDEN OF PROOF TO PUT FORWARD A LAWFUL REMEDIAL DISTRICT THEN THE COURT WOULD HAVE TO ENGAGE IN THESE QUESTIONS.
WE DO NOT THINK THAT IT IS NECESSARY TODAY.
WITH AN ANALYSIS OF THE DIMINISHMENT PROVISION.
DURING THE COMPARISON AND FINDING OUT IF THERE IS A VIOLATION.
A WOULD BE PREMATURE FOR THE COURT THAT THE LEGISLATURE IS RAISING.
ESPECIALLY WHEN THE LEGISLATURE SAID BEFORE THE PUBLIC THAT THE DISTRICTS THAT IT PASSED WERE CONSTITUTIONAL.
IF SO,
>> I KNOW THAT THE PARTIES, IT SEEMS LIKE IN BOTH SIDES AGREED TO FOLLOW THIS UNORTHODOX APPROACH OF STIPULATING TO WHAT YOU STIPULATE TO AND HAVING THE COURT MAKE A DECISION WITHOUT A TRIAL.
YOU GUYS DO THIS STUFF ALL THE TIME.
USUALLY THERE IS ALTERNATIVE MAPS AND EXPERTS.
AND YOU GET THE WHY DID YOU DO THIS OR THAT.
IT SEEMS LIKE FROM READING THE PROCEEDINGS, IT WAS JUST A GENERAL UNDERSTANDING THAT BECAUSE OF THE WAY THAT THIS HAD PLAYED OUT IN THE LEGISLATURE THAT PEOPLE WERE AWARE OF THE UNIVERSE OF OPTIONS.
THAT WE HAVE THE BENCHMARK AND THE TWO ALTERNATIVE PLANS.
WE HAVE THE EAST-WEST THING AS WELL.
I'M WONDERING FROM OUR PERSPECTIVE, EVEN IF IN A DIFFERENT SCENARIO WHERE YOU HAVE NOT HAD ALL THE BACKGROUND STIPULATIONS THAT YOU CAN IMAGINE DECIDING DIMINISHMENT AND KICKING THE CAN DOWN THE ROAD ON EQUAL PROTECTION.
IT SEEMS LIKE IN THIS CASE, IT WOULD NOT BE REASONABLE.
BECAUSE IT DOES NOT SEEM LIKE THE ALTERNATIVES AT THE NEXT STEP WOULD BE ANY DIFFERENT FROM WHAT ALREADY HAS BEEN ON THE TABLE.
IS THAT WRONG?
>> IT IS NOT NECESSARILY WRONG.
I THINK IT WENT BACK TO THE LEGISLATURE.
I THINK THEY WOULD CHOOSE THE DISTRICT FROM PLAN 8015 OR PLAN 1819.

IF THE COURT DOES WANT TO REACH THAT QUESTION, WE THINK THAT THE TWO DISTRICTS ARE PROOF POSITIVE THAT THE LEGISLATURE CAN DRAW A DISTRICT THAT COMPLIES AND TAKES TRADITIONAL CRITERIA INTO ACCOUNT.
AS THEY SAID THAT THEY DID WHEN THEY DREW THE DISTRICTS.
>> YOU SEEM TO GIVE A LOT OF WEIGHT TO THE STATES STATEMENT THAT THE DISTRICT WAS CONSTITUTIONAL.
I AM WONDERING, LEAVING THAT SORT OF STIPULATED COMPONENT OF THE RECORD ASIDE, IF WE FOUND THAT A DISTRICT HAD TO VIOLATE EQUAL PROTECTION IN ORDER TO MEET THE NON-DIMINISHMENT STATUTE, I THINK FROM A SUPREMACY CLAUSE YOU WOULD CONCEDE THAT WE WOULD HAVE TO

ADHERE TO THE EQUAL PROTECTION OBLIGATION FIRST, WOULDN'T WE?

>> I THINK IT WOULD BE VERY DIFFICULT TO CONCLUDE IN THE ABSTRACT THAT A DISTRICT WOULD HAVE TO - RACE WOULD HAVE TO PREDOMINATE.
THAT IS BECAUSE THERE IS A DIFFERENCE BETWEEN RACIAL CONSCIOUSNESS AND RACIAL PREDOMINANCE.

IT IS BLACK LETTER LAW.
>> HOW WOULD YOU EXPLAIN THE DIFFERENCE?
>> THE SUPREME COURT HAS DRAWN SOME LINES HERE.
ONE LINE IS INTENTIONALLY DRAWING A MINORITY/MAJORITY DISTRICT OR INTENTIONALLY COMPLYING WITH A MINORITY VOTING PROVISION LIKE THE FCA'S DOES
NOT SHOW RACIAL PREDOMINANCE.
>> CAN IT EVER?
>> I DO NOT THINK SO.
THE LEGISLATURE WOULD NEED TO GO FURTHER.
IN MILLER FOR EXAMPLE THE SUPREME COURT SAID THAT IT PARTY CLAIMING RACIAL GERRYMANDERING HAS TO SHOW UTTER DISREGARD OF TRADITIONAL REDISTRICTING CRITERIA

AND THAT IS NOT WHAT WE SEE.
>> PART OF WHAT IS HARD ABOUT THIS WHOLE AREA IS THAT THERE ARE SO MANY DIFFERENT LESIONS.
THERE ARE SO MANY JUDICIALLY CREATED DOCTRINES AND SO MANY ARTIFICE IS A PHRASE THAT HAVE BEEN INVESTED WITH SPECIFIC MEANINGS.
MEETINGS MAY OR MAY NOT HAVE ANYTHING TO DO WITH THE ACTUAL TEXT OF THE CONSTITUTION.
WHAT I AM GETTING AT IS FOR A MATTER OF FIRST PRINCIPLES, IF WE GO DOWN TO THE STUDS, COULD YOU AGREE IT IS A MATTER OF FIRST PRINCIPLE THAT UNDER FLORIDA CONSTITUTION AND UNDER THE UNITED STATES CONSTITUTION IS ULTIMATELY AN INDIVIDUAL'S RIGHT TO VOTE THAT IS AN ISSUE.
NOT A GROUP'S RIGHT TO VOTE.

>> YES AND NO.
WE RECOGNIZE AN INDIVIDUAL RIGHT TO VOTE.
I THINK THAT THE VRA AND THE FLORIDA CONSTITUTION TO SPEAK IN TERMS OF MINORITY GROUPS ABILITIES TO ELECT THEIR CANDIDATE OF CHOICE.
>> YES.
I SEE THAT TOO.
BUT WITH THE MINORITY GROUP THEY HAVE THE ABILITY TO ELECT THE CANDIDATE OF HIS CHOICE.
YOU WON'T CONCEDE THAT AT THE END OF THE DAY, ONLY INDIVIDUALS HAVE A RIGHT TO VOTE?
IT SEEMS TO ME THAT THAT IS A VERY FUNDAMENTAL FIRST PRINCIPLE THAT CUTS THROUGH THE THICKET DOCTOR NATURALLYSPEAKING.
IF WE KEEP IT AS A TOUCHSTONE OF THE FACT OF WHAT WE ARE REALLY LOOKING FOR IS INDIVIDUALS RIGHT TO VOTE BEING BURDENED ON ACCOUNT OF RACE, IT SEEMS THAT THAT IS A CLARIFYING PRINCIPLE.
IF YOU DO NOT AGREE TO IT THAN WE HAVE A REAL DIVIDE.
BECAUSE I DO NOT THINK OUR CASES, CERTAINLY NOT THE US SUPREME COURT CASES SAY THAT ANY GROUP HAS A RIGHT TO VOTE.
IF I GO INTO A POLLING PLACE, I GO BY MYSELF.
>> I DO NOT.
I THINK REDISTRICTING IS DIFFERENT.
WE ARE LOOKING AT OTHER VOTER ID PROVISIONS BEING ABOUT INDIVIDUAL RIGHTS.
REDISTRICTING IS A COLLECTIVE GROUP OF VOTERS.
>> I THINK YOUR ARGUMENT WORKS AT THE FEDERAL LEVEL WHEN YOU HAVE THE INTENTIONAL STRUCTURE ESPECIALLY WITH SECTION 5. BUT HERE, WE ARE IN THE STATE COURT TALKING ABOUT A STATE CONSTITUTION.
THAT HISTORICAL CONTEXT DOES NOT EXIST FOR THIS CONSTITUTIONAL PROVISION.
REDISTRICTING LAW ASIDE WHICH IS A FEDERAL ISSUE, IN THE CONTEXT OF THE FDA WOULD YOU BE WILLING TO CONCEDE THAT THIS HAS TO DO WITH AN INDIVIDUAL RIGHT VERSUS A GROUPS RIGHT?
>> I STILL THINK THAT IT REFERS TO A GROUP RIGHT YOUR HONOR. .
>> DOES NOT NOT CREATE AN ISSUE WITH

THE 14TH AMENDMENT?
>> I DON'T THINK SO. THIS COURT SAID THAT IT WOULD FOLLOW THE UNITED STATES SUPREME PRECEDENT.
>> HELP ME WITH THAT.
THE SECRETARY MAKES A

PRETTY ROBUST ARGUMENTS THAT WE SHOULD CONCEDE.

I DO UNDERSTAND YOUR ALLIANCE ARGUMENT I DO UNDERSTAND YOUR CONTROLLING PRECEDENT ARGUMENT.
SO, JUST GOING TO THE IF WE DECIDE TO RECEDE, WHAT SHOULD WE RECEDE TO?

I CAN APPRECIATE THE OLD SOIL.THIS IS A TERM THAT HAS BEEN TRANSLATED FROM ANOTHER SOURCE.
HOW DO WE THEN JUMP FROM THIS OLD SOIL CONCEPT TO NOW WE WILL INCORPORATE DOJ GUIDELINES THAT

THE POST DATE THE ADOPTION OF THE FAIR DISTRICTS AMENDMENT?
>> I DO NOT THINK THAT IS JUST ABOUT BRINGING OVER THE OLD SOIL.
BECAUSE I THINK THE SECRETARIES ARGUMENT IS WRONG.
THE ARGUMENT THAT HE MAKES THAT THE 2006 AMENDMENT TO VRA FUNDAMENTALLY CHANGES THE STANDARD.
IT IS BASED ON A FRACTURED SENATE REPORT THAT NO COURT HAS EVER ADOPTED.
>> I AM NOT REALLY CONCERNED WITH THE SENATE REPORT.
BUT HERE WE HAVE STATE CONSTITUTIONAL PROVISIONS AND AN EXPLICIT REFERENCE IN THE CONSTITUTION THAT NEITHER OF THESE ARE SUPPOSED TO DOMINATE.
HOW DO WE GO FROM THE PLAIN LANGUAGE OF THAT TEXT THAT WAS PRESENTED TO THE VOTERS IN FLORIDA AND SAY OKAY, NOW WE'RE GOING TO GO TO DOJ GUIDELINES ON THE LAST LEGALLY ENFORCEABLE PLAN.
HOW DOES THAT GET INCORPORATED INTO THE STATE CONSTITUTION THROUGH JUST THIS PHRASE?
>> THE SECTION 2 AND SECTION 5 WERE WELL KNOWN PROVISIONS AT THE TIME.
IN THE SPONSORS, THE AMENDMENTS, AND THE PUBLIC TALKED ABOUT THAT WE WERE GOING TO TRACK THESE REQUIREMENTS.
THIS IS ONE OF THE MOST POPULAR AND WELL-KNOWN AMONG THE PUBLIC.
I DO NOT THINK THAT THIS WOULD BE A SURPRISE THAT WE ARE INCORPORATING THESE STANDARDS WHEN ADOPTING THIS LANGUAGE.
>> I AM WONDERING ABOUT THE EXTENT TO WHICH YOU HAVE THE SORT OF GERRYMANDERING PUT ON IN THESE CASES.
AND THEN YOU HAVE THE ATTEMPT TO HAVE THE PREDOMINANCE CASES.
IN THE SECTION 2 CONTEXT, IF YOU ARE TRYING TO COMPLY WITH SECTION 2 THAT IT IS OKAY TO BE CONSCIOUS OF RACE.
BUT YOU CANNOT SUBORDINATE THE TRADITIONAL PRINCIPLES.
BUT YOU ARE NOT PUTTING YOURSELF INTO THE SORT OF DANGER ZONE PREDOMINANCE JUST BY HAVING A RACIAL TARGET.
OR AT LEAST SEEING IF THE TARGET CAN BE MET AND THEN BALANCING IT.
IT SEEMS IN THE GERRYMANDERING CASES, YOU STARTED OFF WHERE YOU SAY LOOK, NO MATTER WHAT ELSE WE DO, WE HAVE TO MAKE SURE THAT WE ACHIEVE A RACIAL GOAL, WHICH IT SEEMS LIKE THE FDA KIND OF BAKES THAT IN.

BY SAYING THAT TIER 1 TRUNKS TIER 2. DOESN'T THAT KIND OF STACK THE DECK TO WHERE THE LEGISLATURE, IF THEY COMPLY WITH THE FDA AND WHERE THE WHOLE PROCESS, THE WAY EVERYONE TALKS ABOUT IT THAT WE DO MINORITY DISTRICTS FIRST, DOES THAT NOT IMMEDIATELY PUT YOU IN THE ZONE WHERE YOU ARE HAVING TO WORRY ABOUT STRICT SCRUTINY AND DELIBERATE RACIAL SORTING?
IN A WAY THAT YOU COULD ARGUE AROUND?
IF THE LEGISLATURE COULD SAY THAT THIS IS A MIX OF THINGS THAT WE LOOK AT AND WE ARE TRYING TO BALANCE IT ALL, IT SEEMS LIKE THE FDA TAKES THE OPTION OFF THE TABLE.
>> YOUR HONOR, I DO NOT THINK IT DOES.
THE DIMINISHMENT TEST IS VERY SOPHISTICATED.
AND IT GUARDS AGAINST RACIAL GERRYMANDERING AND PRIORITIZING RACE ABOVE ALL ELSE.
THIS COURT HAS ALREADY SAID THAT THE NON-DIMINISHMENT PROVISION DOES NOT ALLOW THE LEGISLATURE TO USE A RACIAL TARGET OR A RACIAL QUOTA.
>> IT SEEMS LIKE IN THAT SENSE WE ARE TALKING ABOUT A PRE-EXISTING ASSUMPTION FOR A NUMBER THAT WE HAVE TO HIT FOR DIMINISHMENT PURPOSES.
I THINK THEY'RE SAYING THAT IN THE CONTEXT OF YOU ARE LOOKING FOR A GRANULAR AND SPECIFIC ANALYSIS OF DIMINISHMENT.
BUT YOU CANNOT GO IN AND SAY WE WILL KEEP IT AT 65 PERCENT.
THAT SEEMS LIKE A DIFFERENT THING THAN WHAT THE FDA SAYS.
WHATEVER IT TAKES TO AVOID DIMINISHMENT, DEPENDING ON THE FACTS IT COULD BE X PERCENT OR WHATEVER OTHER PERCENT THAT IT HAS TO TAKE PRIORITY OVER TIER 2. THE OTHER THING WITH THE FDA IS IN A NORMAL REDISTRICTING CASE OR WE DO NOT HAVE THE CONSTITUTIONAL STANDARDS, THE LEGISLATURE'S RANGE OF CRITERIA IS MUCH BROADER.
PROTECTING INCUMBENTS AND POLITICAL GERRYMANDERING IS OKAY ETC. IT SEEMS LIKE THE FDA HAD THIS UNINTENDED EFFECT OF CONSTRICTING THE ALLOWABLE TRADITIONAL REDISTRICTING CRITERIA ON THE ONE HAND AND THEN ON THE OTHER HAND REQUIRING THAT RACE BE PRIORITIZED.
WHICH IT KIND OF SEEMS LIKE WE ARE SETTING UP A HEAD-ON CONFLICT.
OR AT LEAST THE POSSIBILITY OF A CONFLICT.
>> I DO WANT TO SAVE TIME.
WHEN YOU SUGGEST THAT THIS MAY REQUIRE A AVOID DIMINISHMENT AT ALL COSTS, I PERSONALLY DO NOT AGREE.
AT THE START OF THE CYCLE THERE WERE FOUR BLACK DISTRICTS THAT WERE CONSIDERED TO BE BLACK VOTERS.
WE NOW ONLY HAVE TWO.
ONE IS CD FIVE AND THE OTHER IS A CD 10.
THE LEGISLATURE CONCLUDED THAT IT DID NOT HAVE TO BE PROTECTED BECAUSE THE MINORITY GROUP HAS SHRUNK IN VOTER TURNOUT AND PERFORMANCE OVER THE DECADE.
>> SO THERE'S NOTHING TO DIMINISH.
ALL THAT SHOWS IS THAT THE BENCHMARK IS GONE.

RIGHT?
>> I'M JUST TRYING TO MAKE SURE THAT THIS COURT UNDERSTANDS THAT THIS DOES NOT LOCK IT IN.
>> WE UNDERSTAND.
BUT YOU LOOK AT THE BENCHMARK PLAN AND SEE WHAT QUOTE UNQUOTE PERFORMS.
IN THAT CASE, DISTRICT AND DECIDED IT NO LONGER PERFORMS.
BUT, THE FDA REQUIRES YOU NOT WITH ASSUMING CERTAIN NUMBERS, BUT IT DOES REQUIRE THAT THE RESULT, BEFORE AND AFTER BE THE SAME.
IN TERMS OF THE ABILITY TO PERFORM.
AND THEN ON THE FACE OF THE FDA, I'M NOT SAYING THAT ANYONE HAS HAD MOTIVES, BUT I THINK WHAT'S VERY DIFFICULT IS THAT THE FDA DOES NOT PASS IF PEOPLE DO NOT HAVE CONFIDENCE THAT THE MINORITY PROTECTIONS ARE NOT GOING TO BE SWALLOWED UP BY THE NONPOLITICAL STUFF.
IT SEEMS LIKE YOU ARE KIND OF BIG IDEA THAT RACE HAS TO BE THE PRIORITY.
WHICH IS NOT THE END OF THE CONVERSATION.
BECAUSE YOU DO STILL HAVE IT.
BUT IT DOES SEEM LIKE THAT IS THE POSITION THAT THE FDA PUTS THE STATE GAME.
>> I THINK THAT IN PRACTICE THE LEGISLATURE HAS SHOWN THAT HE CAN HARMONIZE THE STANDARDS.
PART OF THE REASON THAT WE KNOW THAT IS BECAUSE IT PASSED 30 LEGISLATIVE DISTRICTS AND SIX OTHER CONGRESSIONAL DISTRICTS UNDER THE PROVISION.
THE LEGISLATURE CONTENDS THAT IT IS WORKING WELL.
WE ARE NOT ASKING THE COURT TO CHANGE THE STANDARD.
I THINK THE LEGISLATURE HAS SHOWN THAT IT CAN HARMONIZE THESE PRINCIPLES TOGETHER.
>> I THINK THAT THEY WOULD SAY THAT THE WAY YOU HARMONIZE DESPITE ESSENTIALLY NOT AVAILING ITSELF OF THE PRIORITIZATION THAT IS IN THE FDA.
ESSENTIALLY, IF YOU CAN DO COMPACTNESS AND PRESERVE THE PERFORMANCE OF THE DISTRICTS AND MEET THE TIER 2 CRITERIA, THEN YOU ARE FINE.
AND IN THAT SENSE, IT IS OKAY.
WHICH FLIPS THE FDA ON ITS HEAD.
BECAUSE IT TELLS THE LEGISLATURE, COMPLY WITH TIER 2 AND THEN IF YOU CAN KEEP THE MINORITY DISTRICTS.
DO YOU HAVE A THOUGHT ON THAT?
>> I THINK IT IS TRUE THAT THERE IS A TIER 1 AND A TIER 2. THIS COURT SAID THAT COMPACTNESS MAY YIELD SOME TO COMPLY WITH TIER 1. I DO NOT THINK THAT YIELD SOME SUGGESTS RACIAL PREDOMINANCE AT ALL.
WHEN WE HAVE RACIAL PREDOMINANCE WE HAVE UTTER DISREGARD.
>> UTTER DISREGARD OR IMPOSSIBILITY?
DO YOU CONCEDE THAT UNDER SOME CONFIGURATIONS OF THIS SPREAD I JUST MAY NOT BE POSSIBLE TO NOT HAVE RACIAL CONCERNS PREDOMINATE?
AND IF YOU DO CONCEDE THAT, WHY IS THAT NOT THE CASE WITH RESPECT?

>> I DO CONCEDE THAT.
THERE MAY BE SOME INSTANCES WHERE IT IS NOT POSSIBLE TO RECONCILE.
BUT I DO NOT THINK THAT IS WHAT WE HAVE HERE.
>> BUT THAT IS OUR ARGUMENT.
WE ARE IN A POSITION WHERE WE ARE NOT APPROVING A MAP OR NO MAP.
OR EVALUATING WHETHER OR NOT IT CONFLICTS WITH THE CONSTITUTION.
AND THEY ARE SAYING IT'S IMPOSSIBLE TO DO SOMETHING DIFFERENT WITHOUT VIOLATING.
YOUR CLIENT IS SAYING THAT THE BURDEN OF PROOF IS THE ALTERNATIVE BUT THE LEGISLATURE SAYS RACE PREDOMINATES.

>> YES. THE STATE CERTAINLY USES A LOT OF RHETORIC TO DESCRIBE THE EAST-WEST CD FIVE.
BUT IT PERFORMS VERY WELL ON TRADITIONAL CRITERIA WHICH IS WHAT THE TRIAL COURT FINDS.
I DO RECOGNIZE THAT THE DISTRICT IS LONG.
BUT FOR A LOT OF FACTORS, IT DOES VERY WELL.
ON ADHERENCE TO POLITICAL AND GEOGRAPHIC BOUNDARIES, THIS TALKS ABOUT COUNTY LINE, WATERLINE, WATERWAY OR RAILWAY.
98 PERCENT OF THESE BOUNDARIES FOLLOW ONE OF THOSE.
>> HOW IS THAT POSSIBLE IT CUTS ACROSS FOUR COUNTIES AND NARROWS TO THREE MILES AT ONE POINT.
WHAT 98 PERCENT?
WHICH BOUNDARIES ARE WE INCLUDING?
>> A COUNTY LINE, A CITY LINE, A MAJOR ROADWAY, RAILWAY, AND WATERWAY.
OUR DISTRICT, IF YOU FIND IT WE HAVE A PICTURE OF IT WHERE WE

SHOW EXACTLY HOW IT FOLLOWS THESE LINES.

I THINK THEY CALL DUVAL A SEAHORSE HEAD IF YOU ACTUALLY LOOK AT THE LINES, IT IS FOLLOWING THE DUVAL/NASSAU COUNTY LINE TO A T. AND THEN IT TAKES US 17, TAKES THE BELTWAY AROUND I-295, JOINS BACK UP TO US 17 AND TAKES THE DUVAL/CLAY COUNTY LINE AND RUNS IT STRAIGHT BACK.
JACKSONVILLE HAS TO BE SPLIT.
IT IS TOO BIG FOR ONE CONGRESSIONAL DISTRICT AND IT IS A REASONABLE WAY TO SPLIT THE CITY OF JACKSONVILLE.
AND IT SHOWS THAT THEY WERE REALLY TAKING EXISTING BOUNDARIES INTO ACCOUNT WHICH IS ONE OF THE CORE PRINCIPLES THAT HAS TO TAKE INTO ACCOUNT.
>> FOR YOU TO PREVAIL, WE WOULD HAVE TO SAY THAT IT IS A MATTER OF LAW THAT THE EAST-WEST CONFIGURATION IS COMPACT.
RIGHT?
COMPACTNESS IS A SHALL.

LET'S SAY WE STIPULATE AND CONCEDE THAT IT IS GOOD ENOUGH ON THE POLITICAL AND GEOGRAPHICAL STUFF.
BUT IT STILL HAS TO BE COMPACT.
IF WE ARE GOING TO SAY THAT RACE DID NOT PREDOMINATE OR TRUMP COMPACTNESS JUST TO GET AWAY FROM THE LOADED WORD?
>> I THINK THAT WOULD BE INVERTING THE GERRYMANDERING STANDARD.
WE HAVE TO SHOW THAT RACE PREDOMINATED.
THAT IT CONTROLS OVER ALL ELSE.
THERE IS NOT A TEST THAT WE HAVE TO AFFIRMATIVELY PROVE THAT IT DID AMAZINGLY WELL OR IT SCORED SUPER HIGH IN ALL OF THESE OTHER CRITERIA.
THE LEGISLATURE IS TRYING TO FLIP THE BURDEN BACK ON US FOR US TO PROVE THAT THERE WAS A MOTIVE THAT COULD EXPLAIN THIS DISTRICT.
BUT THAT IS NOT THE STANDARD UNDER DOCTRINE.
I THINK IT WOULD BE AN INAPPROPRIATE BURDEN TO HOLD PETITIONERS TWO.
AND AGAIN I WANT TO EMPHASIZE THAT ALL WE ARE SAYING IS WE THINK FOR THE STATE TO PREVAIL HERE THEY WOULD HAVE TO SHOW THAT THERE IS NO POSSIBLE WAY TO DRAW THIS DISTRICT WITHOUT RACE PREDOMINATING.
AND I WOULD ENCOURAGE THE COURT TO TALK ABOUT 8019.
THEY SAID THIS DISTRICT FAITHFULLY ADHERES TO ALL TIER TWO PRINCIPLES.
>> AND IN THE CALL WITH THAT ONE IS THE SURROUNDING DISTRICTS?
THE DOUGH PART OF THE DOUGHNUT.
>> I DO NOT THINK THE PLACEMENT IS WEIRD AT ALL.
YOU HAVE TO SPLIT JACKSONVILLE IN SOME WAY.
>> COULD YOU ADDRESS THIS WHOLE SCRUTINY THING?
IT IS POSSIBLE THAT WE WOULD HAVE TO GET TO THAT.

>> OBVIOUSLY, I DO NOT THINK THAT THE COURT NEEDS TO GET TO IT FOR THE REASONS THAT I HAVE ALREADY SAID.
IF IT DOES REACH THE ISSUE, IT SHOULD HOLD THAT COMPLIANCE IS A COMPELLING STATE INTEREST.
>> THAT SEEMS VERY WEAK.
HOW COULD THAT POSSIBLY BE THE CASE?
FOR THERE TO BE A COMPELLING INTEREST, THERE HAS TO BE A PREANNOUNCEMENT RECORD OF SOME SORT OF PROBLEM THAT THE LAW AND ACTOR IS TRYING TO REGRESS.
IT JUST IS NOT SEEN, AND THIS IS NOT A CRITICISM OF THE PROPONENTS OF THE FDA, BUT IT DOESN'T SEEM LIKE THIS IS A CITIZEN INITIATIVE PROCESS THAT LENDS ITSELF TO THIS KIND OF THING.
TO THIS MENTAL PROCESS THAT HAS TO BE GONE THROUGH.
>> YES.
A BALLOT INITIATIVE IS CERTAINLY DIFFERENT.
IF THAT IS THE STANDARD IN THE STATE COULD NEVER PASS REMEDIAL MEASURES.
>> THE STATE COULD THROUGH A RATIONAL PROCESS.
THE LEGISLATURE COULD DECIDE LOCAL, THERE IS DISCRIMINATION.

JUST LIKE WHEN CONGRESS PASSED THE VOTING RIGHTS ACT.
THIS DOESN'T SEEM LIKE IF THE PEOPLE OF FLORIDA DECIDED WE WANT PROPORTIONAL REPRESENTATION IN OUR STATE REP OR ELITE UNIVERSITIES AND PUT IT IN THE CONSTITUTION, YOU WOULD NOT BE SAYING THAT IT IS OKAY UNDER FEDERAL LAW, RIGHT?
>> NO.
NOT NECESSARILY.
EVEN THOUGH THERE MAY NOT HAVE BEEN A RECORD, I THINK THERE WAS CERTAINLY A HISTORY THAT THE VOTERS ARE RESPONDING TO.
WE HAVE RECOGNITIONS FROM BOTH THE STATE AND FEDERAL JUDICIARY ABOUT WHAT THEY CALL THE SUBSTANTIAL INABILITY OF MINORITIES TO ELECT CANDIDATES TO HIGHER OFFICE.
THE TRIAL COURT LAYS OUT THAT THERE WAS OVER 100 YEARS BETWEEN RECONSTRUCTION.
WHEN FLORIDA ELECTED ITS FIRST BLACK REPRESENTATIVES TO CONGRESS.
THE FLORIDA VOTERS ENACTED THE DISTRICT AMENDMENTS WITH THAT HISTORY IN MIND.
I THINK IT IS TELLING THAT THE FIRST TIME THAT THEY DECIDED THAT THESE PROVISIONS WERE NOT NECESSARY, THEY ELIMINATED A DISTRICT THAT HAD ELECTED A BLACK CANDIDATE OF CHOICE FOR 30 YEARS.

WE THINK THERE IS AN ADEQUATE RECORD IN THIS CASE.
IF THAT ENDS UP BEING THE HINGE POINT WE WOULD REQUEST A REMAND TO DEVELOP THE EVIDENCE RATHER THAN HAVE THIS COURT TAKE DRASTIC ACTION AND SAY THERE'S NOTHING THAT COULD HAVE SUPPORTED THIS AMENDMENT. I'D LIKE TO RESERVE SOME TIME FOR REBUTTAL.

>>WE CAN START OFF WITH FIVE FOR REBUTTAL AND ADD IF WE NEED TO.

>> MR. CHIEF JUSTICE.

THE PLAINTIFFS IN THIS CASE ARE SEEKING TO DISMANTLE THE RACE NEUTRAL MAP THAT THE STATE DREW IN NORTH FLORIDA
AND TO REPLACE IT WITH A RACIAL GERRYMANDER.
NOTHING IN THE FLORIDA CONSTITUTION REQUIRES THAT RESULT.
THE FEDERAL CONSTITUTION WOULD FORBID IT.
WE HAVE BEEN TALKING ABOUT THE CONSTITUTIONAL ARGUMENT.
AND I WANTED TO SPEND SOME TIME TALKING ABOUT OUR ARGUMENT THAT THE NON-DIMINISHMENT PROVISION HAS NOT BEEN VIOLATED IN THE FIRST PLACE.
THE NON-DIMINISHMENT STANDARD DEPENDS ON ESTABLISHING A VALID BENCHMARK FROM WHICH YOU CAN MEASURE DIMINISHMENT.
IN OUR VIEW, THE NON-DIMINISHMENT STANDARD INCORPORATES PRECONDITION ONE OF THE JINGLES TESTS.

WHICH SAYS THAT IN ORDER TO ESTABLISH A VALID BENCHMARK, YOU NEED TO ESTABLISH THAT THE MINORITY POPULATION IN THE DISTRICT IS REASONABLY COMPACT.
AND THAT IS MORE OR LESS WHAT THE FIRST DISTRICT HELD BELOW.
>> IT SEEMS LIKE A COUPLE OF THE JUSTICES HAVE EXPRESSED CONCERN ABOUT BREAKING ALL OF THE VOTING RIGHTS INTO THE FAIR DISTRICTS.
IT SEEMS LIKE YOU ARE SORT OF NOT ONLY BAKING VOTING RIGHTS ACT INTO IT, BUT BAKING SECTION 2 VOTING RIGHTS INTO SECTION 5 WHERE IT SEEMS LIKE THIS IS COMPLICATED ENOUGH.
WITHOUT MAKING THE BENCHMARK BEING SUPER COMPLICATED.
THIS IS VERY MECHANICAL.
IF YOU LOOK AT THE EXISTING PLAN AND LOOK AT HOW IT PERFORMS THEN YOU SEE WHAT YOU HAVE TO DO FROM THERE.
IT DOES NOT SEEM LIKE THAT WOULD BE A SENSIBLE WAY FOR US TO RESOLVE THIS.
>> I DISAGREE WITH THAT.
I GUESS I WOULD SAY THAT WE TAKE AS A GIVEN THE DETERMINATION IN A PORTION.
THAT AT LEAST AS A STARTING POINT, YOU DO USE GUTTURAL VOTING RIGHTS ACT PRINCIPLES.
THAT THE LANGUAGE IN THE FDA WAS LIFTED FROM FEDERAL VOTING RIGHTS ACT.
IT IS JUST A STARTING POINT.
WE CERTAINLY SOME FLORIDA SPECIFIC REASONS ABOUT THE HISTORY OF THE THIRD DISTRICT AMENDMENT THAT SUPPORTS THAT.
BUT THE OVERARCHING REASON OF WHY THAT WOULD BE REASONABLE, KEEP IN MIND I THINK WE SHOULD STRIVE TO READ THE FAIR DISTRICTS AMENDMENTS.
NOT TO REQUIRE THE STATE TO LOCK IN RACIAL GERRYMANDER FOR ALL TIME.
>> IT DEPENDS ON HOW YOU DEFINE IT.
IF YOU MEAN AN IRREGULAR SHAPED DISTRICT, IT DOES NOT SEEM LIKE IT LOCK SET IN.
IF YOU'RE TALKING ABOUT PRESERVING PERFORMING DISTRICTS, IF THAT IS THE DEFINITION, THEN PERHAPS IT DOES.
>> ON THE CONTRARY.
IF IT IS THE CASE THAT THERE IS NOT A REQUIREMENT IN THE DIMINISHMENT STANDARD THAT THE MINORITY POPULATION BE REASONABLY COMPACT, I THINK IT'S MORE OR LESS WHAT WOULD BE REQUIRED.
YOU WOULD BE REQUIRED TO PROTECT IN THE NAME OF NON-DIMINISHMENT.
>> DID WE CUT YOU OFF?
IS THERE ANYTHING OTHER THAN COMPACTNESS THAT IS RELEVANT WITH A PRE-EXISTING COMMUNITY FOR THE PURPOSES OF DISTRICTING OR REDISTRICTING AS PART OF THE BASE ANALYSIS?
IS IT THAT THERE HAS TO BE A HISTORICAL EXPLANATION OR ROOTEDNESS?
FACTORS RELATED TO RACE?
AGRICULTURAL VERSUS URBAN.
ARE THERE OTHER CONSIDERATIONS THAT ARE PART OF THIS DETERMINATION THAT ARE RELEVANT?

OR IS IT JUST COMPACTNESS?
>> IT IS MORE.
THE WAY THAT WE PUT IT WHICH IS THE WAY THE US SUPREME COURT HAS PUT IT IS THAT THE DISTRICT HAS TO BE IN AN AREA WHERE YOU CAN HAVE A REASONABLY CONFIGURED DISTRICT IN ACCORDANCE WITH TRADITIONAL REDISTRICTING PRINCIPLES.
THE DEFINITION OF A RACIAL GERRYMANDER IS ONE WAY THAT YOU CAN HAVE THIS.
IN THE MILLER CASE A TEXTBOOK EXAMPLE IS WHERE THE STATE SACRIFICES TRADITIONAL REDISTRICTING PRINCIPLES TO MEET A RIGID RACIAL TARGET.
AND THAT IS WHAT THE NON-DIMINISHMENT STANDARD WOULD REQUIRE.
>> SO IN OTHER WORDS, TIER 2 REQUIREMENT.
>> THAT WOULD CERTAINLY BE THE FRONT LINE.
IF THOSE TIER 2 REQUIREMENTS ARE SATISFIED.
THERE COULD BE OTHERS AS WELL.
AND THERE IS EVIDENCE SPECIFIC TO FLORIDA ON WHY IT WOULD MAKE SENSE TO READ THAT REQUIREMENT INTO THE DIMINISHMENT STANDARD.
BUT IF YOU LOOK AT THE BALLOT SUMMARY, IT MENTIONED KIND OF EQUATED THE VOTE DILUTION OF WHAT WAS NECESSARY TO SHOW.
>> THE BALLOT SUMMARY DOES NOT ALWAYS ACCURATELY REFLECT THE TEXT.
IF WE ACCEPT YOUR ARGUMENT BUT GIVEN THE OLD SOIL AND THE WAY THAT THIS TERM IS ORIGINALLY APPEARING, AND INCORPORATES COMPACTNESS, HOW FUNCTIONALLY, I THINK THE PETITIONERS MAKE THE POINT THAT IT IS NO DIFFERENT FROM DILUTION.
YOU HAVE A STATEMENT OF DILUTION.
CAN YOU EXPLAIN HOW IF WE ACCEPT THAT THERE WOULD BE SOME KIND OF RACE NEUTRAL BENCHMARK.
BUT IT WOULD BE A SEPARATE CONCEPT FROM DILUTION?
>> DOESN'T AT ALL JUST RESTATE.
WE AGREE THAT THE STANDARDS ARE DISTINCT.
FOR A NUMBER OF REASONS.
YOU COULD HAVE DILUTION BY PACKING TOO MANY MINORITIES IN A DISTRICT.
BY HAVING TOO MUCH MINORITY STRIFE.
CONVERSELY, IT WOULD BE MUCH EASIER TO ESTABLISH DIMINISHMENT AND DILUTION.
BECAUSE TO MAKE THAT A CLAIM, YOU HAVE TO NOT ONLY HAVE A VALID BENCHMARK, BUT YOU ALSO HAVE TO SATISFY THE TOTALITY OF THE CIRCUMSTANCES.
WE CERTAINLY AGREE THAT THE ELEMENTS ARE DISTINCT.
BUT THEY ARE COMMON IN IMPORTANT RESPECTS.
YOU ARE ASKING WHETHER THE MINORITY POPULATION IN THE BENCHMARK DISTRICT.
THIS IS AN ACTUAL BENCHMARK AND USING THE PHRASE ABILITY TO ELECT WHICH IS LIFTED STRAIGHT FROM THE JINGLES CASE.

THAT OLD SOIL WAS BROUGHT INTO NOT ONLY THE DILUTION PREVENTION, BUT ALSO THE DISTRICTS.
>> BUT ALSO WHAT MINORITY POPULATION ARE YOU TALKING ABOUT?
YOU ARE LOOKING AT A MAP WITHOUT ANY LINES AND SEEING WHERE PEOPLE ARE.
AND WITH THE DIMINISHMENT YOU ARE LOOKING AT AN ACTUAL DISTRICT THAT PERHAPS SHOULD NOT HAVE AFFECTED THESE MINORITY POPULATIONS.
LET ME ASK YOU.
IF TIER 1 BAKES IN A COMPACTNESS REQUIREMENT, WHY WOULD TIER 2 THEN SAY THAT YOU CANNOT BE COMPACT IF NECESSARY TO COMPLY?
DO YOU CARE ABOUT THE SHAPE OF THE OVERALL DISTRICT, BUT NOT THE MINORITY POPULATION?
>> IN TIER 2 WITH COMPACTNESS AND ALL THE OTHER CRITERIA ARE NONNEGOTIABLE.
AND BY THE WAY, I TAKE IT THAT IT'S COMMON GROUND THAT COMPACTNESS IS AT LEAST AN ELEMENT IN THE TIER 1 STANDARD.
EVERYONE AGREES THAT WE HAVE COMPACTNESS IN THEIR.
THE QUESTION IS IF IT CARRIES OVER TO DIMINISHMENT.
WE HAVE NO QUARREL WITH THE IDEA THAT WE LOOK TO A BENCHMARK DISTRICT.
THE QUESTION IS, IS THERE A FURTHER REQUIREMENT ABOUT WHERE THE MINORITY POPULATION NEEDS TO BE IN THE BENCHMARK DISTRICT?
AND THAT IS WHERE I THINK THE CONSTITUTIONAL AVOIDANCE COMES IN.
BECAUSE OTHERWISE WE WOULD HAVE TO READ THE NON-DIMINISHMENT STANDARD TO PRESERVE.
>> BUT THE AVOIDANCE THING IS AN ATTRACTIVE NOTION.
WE WOULD LOVE TO KNOW HAVE THERE BEEN POTENTIAL CONFLICT WITH THE FLORIDA AND FEDERAL CONSTITUTIONS.
BUT THE ONLY WAY YOU GET TO AVOIDANCE IS IF YOU SAY THAT THE AMENDMENT REQUIRES THAT YOU COMPLY WITH SECTION 2. AS LONG AS YOU HAVE AN INDEPENDENT STATE REQUIREMENT THAT YOU NOT DIMINISH MINORITY VOTERS.
WHATEVER THAT MAY MEAN, AND IT'S NOT AN INTENSE TEST, IT SEEMS LIKE YOU ARE REPLACING ONE STATE LAW TEST FOR A DIFFERENT STATE LAW TEST.
THAT WOULD BE SUBJECT TO ALL OF THE SAME EQUAL PROTECTION TYPE CONCERNS.
>> IF I UNDERSTAND YOUR QUESTION, FORGIVE ME IF IT IS NOT RESPONSIVE.
THIS DOES AT THE VERY LEAST AVOID ACUTE CONSTITUTIONAL CONCERNS THAT THE DIMINISHMENT RAISES.
WHEN THE DIMINISHMENT STANDARD REQUIRES SACRIFICING THOSE TIER TWO STANDARDS
AT THE EXPENSE OF THIS RACE BASED TARGET.

THIS BENCHMARK THAT WE ARE TALKING ABOUT ABSOLUTELY IS A RACIAL GERRYMANDER.
THERE IS NO DISPUTE THAT RACE WAS THE REASON THAT THE DISTRICT WAS DRAWN.

THERE IS LITTLE DISPUTE THAT IT IS WOEFULLY NON-COMPACT.
THIS IS A SPRAWLING 200 MILE AREA TO SURGICALLY CAPTURE THE BLACK POPULATIONS.
IT NARROWS TO A THREE-MILE SPACE.
>> WAS THERE ANY DISTRICT THAT WAS LESS COMPACT?
>> NO IT WAS BY FAR THE LEAST COMPACT DISTRICT.
I ENCOURAGE YOU TO LOOK AT THE MAP AS IT RELATES TO TALLAHASSEE.
THIS REFERRED TO GEOGRAPHIC BOUNDARIES.
ACTUALLY WHAT THE MAP DID WAS USE ROADS TO CARVE UP TALLAHASSEE BY RACE.
>> WAS JUST GOING TO ASK IF YOU COULD ADDRESS THE PRESERVATION.
THERE IS A TRANSCRIPT PORTION ABOUT CD5 THE JUDGE ASKS YOU TO CHALLENGE IT WHETHER IT WAS A LEGALLY ENFORCEABLE BENCHMARK.
>> I THINK WE WERE ANSWERING THE COURTS QUESTION OF WHETHER WE WERE ANSWERING BUT THE DISTRICT DID.
HE ANSWERED CORRECTLY THAT WE ARE NOT CHALLENGING.
IN THE NEXT PAGE OF THE TRANSCRIPT, HE SAYS THAT THE QUESTION IS WHETHER THE BENCHMARK IS A BENCHMARK WORTH PRESERVING.
BUT I DO THINK IT'S AN IMPORTANT POINT.
THEY CAN RELY EXTENSIVELY ON THE DECISION TO SAY THAT THIS DISTRICT IS COMPACT.
WHAT THIS DISTRICT WAS FACED WITH WAS IF THE LEGISLATURE'S NORTH-SOUTH SPRAWLING WAS A BETTER REMEDY FOR GERRYMANDER THAN THE SPRAWLING EAST-WEST DISTRICT.
THERE WAS NO ISSUE ABOUT WHETHER EITHER OF THOSE FOR RACIAL GERRYMANDERING.
WHICH WOULD HAVE AFFECTED EQUALLY THE LEGISLATURE'S PROPOSED REMEDY.
THAT IS NOT WHAT THE PARTIES WERE FIGHTING ABOUT.
THE JINGLES ARGUMENT IS SQUARELY PRESERVED IN THE STIPULATION.
WE RAISED IT IN THE FIRST DISTRICT AND WE ARE RAISING AND AGAIN IN THIS COURT.
THE COURT NEEDS TO DECIDE THE QUESTION.
THEY COULD ALSO DESCRIBE THE CASE ON CONSTITUTIONAL GROUNDS.
I DO NOT WANT TO STEAL MR. NORBY'S THUNDER.
HE IS MAKING THE CONSTITUTIONAL ARGUMENT THAT WE ARE AS WELL.
I WOULD KNOW THAT WE HAVE A SEPARATE APPLIED CONSTITUTIONAL ARGUMENT FROM THE LEGISLATURE ADVANCING WHICH I WOULD BE HAPPY TO DISCUSS.
ANOTHER REASON WHY CD5 IS NOT A VALID BENCHMARK IS PRECISELY BECAUSE IT WAS A RACIAL GERRYMANDER.
WE DO NOT THINK THAT A LEGALLY ENFORCEABLE BENCHMARK CAN INCLUDE ONE THAT THIS COURT CONCLUDES IS IN FACT A RACIAL GERRYMANDER.
THAT WOULD BE AN INDEPENDENT REASON WHY THE NON-DIMINISHMENT STANDARD HAS NOT BEEN VIOLATED.
>> I DO UNDERSTAND.

I DO NOT VALUE FOR MAKING THE ARGUMENT.
IF I AM A LEGISLATURE OR SOMEONE WHO IS IMPOSING, THIS IS SUCH A DIFFICULTY FOR DISTRICTING FOR GERRYMANDER.
I DO NOT KNOW WHY WE WOULD SET UP A TEST THAT WOULD REQUIRE LOOKING BACK AT THE ORIGINS OF THESE THINGS AS OPPOSED TO JUST FOCUSING ON OKAY, THIS IS WHAT WE HAVE NOW.
CAN WE MAINTAIN THE PERFORMANCE WITHOUT VIOLATING THE PROTECTION CLAUSE?
>> I DO UNDERSTAND THE CONCERN.
IT IS NOT MUCH OF A CONCERN AS APPLIED IN THIS CASE.
THE CONCLUSION THAT BENCHMARK WAS UNLAWFUL GERRYMANDER ALMOST LEAPS OFF THE PAGE.
>> THAT IS TRUE.
BUT WHATEVER WE SAY IN THIS CASE IS GOING TO BE, THE LEGISLATURE WILL BE STUCK WITH HAVING TO DEAL WITH IT.
IT SEEMS LIKE WE SHOULD TRY TO KEEP THIS AS CLEAN AS POSSIBLE.
NOT TO MENTION THAT IT SEEMS LIKE WE ARE BOUNCING BACK AND FORTH WITH HOW MUCH IS THE BASELINE OR NOT?
IT SEEMS LIKE IN THIS WORLD, YOU JUST TAKE THE LAST PLAN AS YOU FIND IT.
WHICH IF IT HAS BEEN DECLARED UNCONSTITUTIONAL, THEN YOU ARE IN A DIFFERENT WORLD.
BUT IT SEEMS LIKE YOU ARE WANTING TO PICK AND CHOOSE WHEN WE FOLLOW THIS.

>> I DON'T THINK SO. THERE IS NO REQUIREMENT OF PREEXISTING DETERMINATION OF UNCONSTITUTIONALITY. I KNOW THAT THE DEPARTMENT OF JUSTICE SORT OF SEEM TO HAVE A DIFFERENT VIEW EVEN THOUGH THEY LOST THE RILEY CASE.
I DO THINK THE COURT COULD AT LEAST SAY THAT IN THIS KIND OF A CASE, IT IS NOT AS IF WE HAVE TO HAVE TRIAL TESTIMONY AND THE LIKE FOR WHAT HAPPENED BACK IN THE DAY.
IT JUST KIND OF LEAPS OFF THE PAGE.
IF IT WERE MORE OF A COMPLICATED INQUIRY, WHETHER THE SAME RULE WOULD APPLY.
I GUESS I WOULD ALSO SAY, CERTAINLY THE FURTHER BACK YOU HAVE TO GO, THE MORE DIFFICULT IT WOULD BE TO CONCLUDE THAT ANY PARTICULAR BENCHMARK WAS AN UNCONSTITUTIONAL GERRYMANDER.
WE DO NOT THINK THAT THE COURT SHOULD BE REQUIRED TO GIVE EFFECT TO A DISTRICT THAT WAS THE RESULT OF RACIAL DISCRIMINATION.
I'M HAPPY TO ANSWER ANY FURTHER QUESTIONS.
BUT I'M ALSO HAPPY TO TURN IT OVER AT THIS POINT.
>> THANK YOU.

>> MAY IT PLEASE THE COURT.
DANIEL NORBY FOR THE FLORIDA LEGISLATURE.

IN LIGHT OF THE QUESTIONING SO FAR, I WOULD LIKE TO FOCUS MY TIME ON THE PRINCIPAL ISSUES ADDRESSED IN A SEPARATE BRIEF.
THE PLAINTIFF'S BURDEN UNDER THIS COURT'S PRECEDENTS IS TO ESTABLISH A VALID REMEDIAL DISTRICT.
THEIR FAILURE TO SATISFY THAT BURDEN HERE AS TO EITHER CONFIGURATION.
I THINK THERE ARE TWO KEY VIRTUES TO OUR APPROACH.
THIS DOES NOT REQUIRE THIS COURT TO RECONSIDER ITS EXISTING PRECEDENT ON THE NON-DIMINISHMENT PROVISION.
IN OUR APPROACH DOES NOT REQUIRE THIS COURT TO RULE ON THE VALIDITY OF BENCHMARK CD5.
EVEN PRESUMING THAT, THE PLAN SHOULD BE HELD ON THIS RECORD.
FIRST FOR THE QUESTION ON BURDEN OF PROOF.
THE THROUGH LINE ONE THROUGH EIGHT IS THAT A CHALLENGE OR ALLEGING THAT THE LEGISLATURE HAD VIOLATED STATE CONSTITUTIONAL STANDARD MUST SHOW THAT THE LEGISLATURE COULD HAVE COMPLIED WITH THE STANDARD AND THOSE OF THE SUPERIOR PRIORITY.
IF THEY SHOW THAT, THE COURT DECLARED THE DISTRICT INVALID.
IF IT DID NOT, IT UPHELD THE DISTRICT.
OUR BRIEF IT SHOWS THAT THIS IS APPLIED AGAIN AND AGAIN IN THE INITIAL VALIDITY REVIEW AND ULTIMATELY IN THE STATE CONGRESSIONAL DISTRICTS.
>> THE RECORD HERE WOULD BE MUCH MORE STRAIGHTFORWARD FOR THIS ARGUMENT AND OUR CONSIDERATIONS HAD THERE BEEN A TRIAL.
WITHOUT GETTING INTO THE TACTICS OF WHY THAT WAS NOT THE CASE, DO YOU CONCEDE?
AM I RIGHT ABOUT THAT?
IF WE HAD A TRIAL RECORD WE WOULD BE IN A BETTER POSITION THAN WE ARE TODAY TO JUDGE THE ALLEGED FAILURE TO MAKE THE BURDEN?
>> I DO NOT KNOW IF THIS IS NECESSARILY TRUE.
THIS COURT HAS BRIEFING ON STIPULATED FACTS AND PRESENTATIONS.
THIS COURT IS IN THE SAME POSITION AS THE TRIAL COURT TO EVALUATE THE EVIDENCE.
THAT IS WHY WE HAVE INDICATED THAT THE STANDARD OF REVIEW IS NOT THE CLEAR ERROR STANDARD.
THIS COURT IS IN THE SAME POSITION HERE THAT IT IS IN THE VALIDITY CASES.
IT HAS STATISTICAL EVIDENCE AND LEGISLATIVE RECORD.
AND IT IS IN A POSITION TO MAKE THAT APPROACH.
IT IS CONSISTENT WITH PRECEDENT..
AND IT IS AN APPROACH THAT MAKES SENSE.
THE CONCEPT REQUIRES THE PLAINTIFF TO PROVIDE PROOF OF REMEDY.
>> DO YOU THINK THAT CONFLICTS WITH WHAT THE SUPREME COURT HAS SAID ABOUT THE BURDEN AND RACIAL GERRYMANDERING CASES.
BUT THEY ARE ABLE TO SHOW DIMINISHMENT.
IT IS VIOLATING WHAT THE SUPREME COURT SAYS ABOUT THE SHIFTING OF BURDEN?

>> I DON'T THINK SO IN THIS CONTEXT.
WE ARE TALKING ABOUT THE POTENTIAL AVAILABILITY FOR REMEDIAL DISTRICT.
WE TREATED THIS EQUAL PROTECTION CLAIM AS OF THE LEGISLATURE AND SECRETARY OF STATE WERE RAISING AFFIRMATIVE GERRYMANDERING CLAIMS AGAINST A HYPOTHETICAL DISTRICT.
THAT WE HAVE AN UNDERSTANDING TO DO SO.
THAT IS NOT THE ARGUMENT THAT WE ARE MAKING.
THE ONE THAT WE ARE MAKING IS THE ONE THAT THE CHIEF JUSTICE MENTIONED.
THAT IT IS IMPOSSIBLE TO COMPLY WITH BOTH.
IF IT IS NOT POSSIBLE TO COMPLY WITH BOTH IN THE STATE CONSTITUTION, THE SUPREMACY CLAUSE DICTATES WHICH OF THE TWO PREVAILS.
>> CAN WE TALK ABOUT PREDOMINANCE?
I AM CURIOUS WHAT THE WORLD LOOKS LIKE IF YOU PREVAIL IN THIS CASE.
GOING FORWARD IT SEEMS LIKE BEFORE INCLUDING THIS, THE LEGISLATURE APPROACHED THE FDA IN A STRAIGHTFORWARD WAY.
WITHOUT THINKING THAT TRYING TO JUST FOLLOW, IF WE DRAW A CIRCLE AROUND THE CONSTITUTION WITHOUT THINKING AT THIS EQUAL PROTECTION STUFF WAS GOING TO INTRUDE ON THAT, YOU DEAR PERFORMANCE, EVERYONE IS TALKING AS IF WE NEED TO PRESERVE THE MINORITY DISTRICTS.
THEN WE WORK AROUND THAT.
IT SEEMS LIKE NOW THERE IS POTENTIALLY A PARADIGM SHIFT WHERE YOU MAYBE CANNOT KIND OF JUST FOLLOW THE ROADMAP THAT THE FDA ITSELF HAS LAID OUT.
SO WHAT IS THE LEGISLATURE SUPPOSED TO DO GOING FORWARD?
ARE THEY SUPPOSED TO IGNORE THE PRIORITY PART OF THE FDA AND JUST PUT RACE ON THE SAME FOOTING AS ALL OF THE TIER 2 THINGS: WHAT IS REDISTRICTING 2030 LOOKING LIKE IF YOU WIN?
>> IT IS AN IMPORTANT QUESTION.
AND IN ALMOST EVERY CASE IT IS A STRAIGHTFORWARD EXERCISE.
THEY ARE ABLE TO DRAW DISTRICTS THAT COMPLY WITH TIER 1 AND TIER 2 WITHOUT BRACE PREDOMINATING.
TIER 2 SAYS UNLESS THERE IS A CONFLICT WITH TIER 1 THAT THE TIER 2 STANDARD PREVAILS.
IF THERE IS NOT A CONFLICT IN THE LEGISLATURE IS ABLE TO COMPLY, BUT ALSO COMPLYING WITH COMPACTNESS, THERE IS NO CONFLICT OR NEED TO PRIORITIZE BETWEEN THE TWO.
>> FROM A PREDOMINANCE PERSPECTIVE, DO YOU HAVE TO DRAW THE TIER 2 COMPLIANCE MAPS AND BACKTRACK TO SEE WHAT HAPPENED?
IT SEEMS LIKE THERE IS A POTENTIAL DISAGREEMENT HERE.
IF I START WITH THE NECESSITY OF NON-DIMINISHMENT THAT I HAVE PUT MYSELF INTO STRICT SCRUTINY.
IF I AM STARTING WITH THE OTHER STUFF, MAYBE I AM NOT.
HOW DO YOU THINK THROUGH THAT?
>> LET ME GIVE YOU TWO EXAMPLES WHERE THE LEGISLATURE IS ABLE TO COMPLY HERE AND ALSO WITH A NON-DIMINISHMENT PROVISION.

YOU CAN LOOK AT CONGRESSIONAL DISTRICT 24 WHICH IS IN NORTHEASTERN MIAMI-DADE COUNTY.
IT IS A 42 PERCENT BLACK VOTING POPULATION DISTRICT.
IT DOES NOT DIMINISH.
BUT IT IS ALSO A DISTRICT THAT HAS AMONG THE HIGHEST COMPACTNESS SCORES.
THERE IS SIMPLY NO CONFLICT BETWEEN TIER 1 OR TIER 2. THAT IS AN EXAMPLE FOR THE LEGISLATURE IN THE US SUPREME COURT IS RACE CONSCIOUS.
THE RACE DOES NOT PREDOMINATE IN A WAY THAT EQUALS PROTECTION CONCERNS.
IF YOU LOOK AT A MAP, CORAL GABLES IS A CIRCLE.
IT IS ABOUT AS CLOSE AS YOU CAN GET THAT REQUIRES EXACT INEQUALITY.
IT HAS AN EXTRAORDINARILY HIGH COMPACTNESS SCORE.
IT ALSO HAS A 74 PERCENT HISPANIC VOTING POPULATION THAT DOES NOT DIMINISH.
THOSE ARE EXAMPLES.
AND THERE WERE OTHERS WERE THE LEGISLATURE DOES NOT FACE THE CONFLICT.
AND THE INSTANCES WHERE THE FLORIDA CONSTITUTION MAY REQUIRE SOME LEVEL OF RACE CONSCIOUSNESS.
AND IT IS ATTENTION THROUGH CASE LAW.
THEY SAID THAT THE EQUAL PROTECTION CLAUSE SOMETIMES PULLS IN OPPOSITE DIRECTIONS.
SOMETIMES THE CONFLICT IS RECONCILABLE WITHOUT VIOLATING EITHER.
THE DIFFERENCE HERE THAT WAS RECOGNIZED EARLY IS WHAT WAS POSSIBLE IN SOUTH FLORIDA SIMPLY IS NOT POSSIBLE IN NORTH FLORIDA.
>> SO IF THERE IS A SITUATION WHERE SOMEONE PUTS FORWARD ONE MAP THAT MEETS ALL OF THE TIER 2 STAFF AND SOMEONE ELSE PUTS FORWARD A MAP THAT MEETS TIER 2 AND PRESERVES THE MINORITY, BECAUSE OF THE COMMAND, ARE YOU ALLOWED TO CHOOSE THE MINORITY WITHOUT CHOOSING STRICT SCRUTINY ISSUES?
>> I WOULD SAY THAT THE LEGISLATURE'S OBLIGATION IS TO COMPLY WITH ALL PROVISIONS OF THE CONSTITUTION IF IT CAN DO THAT
THERE SIMPLY IS NOT AN ISSUE PRESENTED HERE.
>> BY CHOOSING IT FOR THE RACIAL REASON YOU ARE NOT CREATING AN EQUAL PROTECTION PROBLEM?
>> IF THERE WAS AN EXAMPLE OF A SPECIFIC CHOICE BETWEEN TWO DISTRICTS, THAT MAY RAISE SOME QUESTIONS UNDER THE UNITED STATES SUPREME COURT'S EQUAL PROTECTION PRECEDENT.
I DON'T THINK IT'S NECESSARILY THE CASE IN THE PROCESS OF ORGANIC MAP DEVELOPMENT.
OFTEN THOSE DISTRICTS SIMPLY MAKES SENSE FOR NONRACIAL REASONS.
NORTH FLORIDA, AS WE HAVE KNOWN FOR FRANKLY THE LAST 30 YEARS, THE MATHEMATICAL AND DEMOGRAPHIC REALITY IS THAT THE BLACK POPULATION OF JACKSONVILLE, OF DUVAL COUNTY DOES NOT HAVE THE ABILITY TO ELECT A

CONGRESSIONAL DISTRICT WITHOUT BEING JOINED WITH A POPULATION EITHER TO THE SOUTH OR FAR TO THE WEST IN GASTON COUNTY.
>> YOU MEAN FROM NUMEROSITY?
>> THAT IS RIGHT.
THE LEGISLATURES WE SAW IN THE INITIAL MAPS WERE DOING EXCELLENT WORK TO TRY TO SQUARE THE CIRCLE.
TO TRY TO COMPLY WITH THE NON-DIMINISHMENT PROVISION WHILE AVOIDING RACIAL DOMINANCE.
I WOULD SAY THESE DRAWERS ARE SECOND TO NONE.
THEY ARE EXTRAORDINARY.
>> AS JOSEPH KENNEDY NOTED, THEY ARE INSULATED FROM THE PROCESS.
AND THAT IS KIND OF THE IDEA.
BUT THEY DO NOT HAVE AN INCENTIVE TO DO ANYTHING OTHER THAN GET THE THREE.
>> THAT IS RIGHT.
THE PLAN IN 8015 WAS CERTAINLY BETTER THAN THE BENCHMARK DISTRICT ON SOME STATISTICAL METRIC.
A FRIEND ON THE OTHER SIDE MENTIONED BOUNDARY USAGE.
IT IS SQUEEZED BETWEEN THE GEORGIA BORDER SO IT FOLLOWS GEOGRAPHICAL AND POLITICAL BOUNDARIES IN THOSE AREAS.
IF ONE WERE SETTING OUT TO DRAW CONGRESSIONAL DISTRICTS AND THEIR PRIMARY GOAL WAS BOUNDARIES, THEY WOULD NOT DRAW THIS FROM CHATTAHOOCHEE TO JACKSONVILLE.
AND THERE HAS NOT BEEN ANY EXPLANATION FOR THIS APPENDAGE.
HOW IS THAT APPENDAGE JUSTIFIABLE ON ANY GROUND OTHER THAN RACE?
THIS COURT IN THE FIRST DISTRICT WHERE THIS WAS ARGUED LAST OCTOBER ARE BOTH IN CONGRESSIONAL DISTRICT 2. IF YOU WERE TO TAKE A STRAIGHT LINE, YOU WOULD ENTER AND EXIT DISTRICT 5 TWICE.
THIS DIVIDES LEON COUNTY IN TALLAHASSEE ON THE BASIS OF RACE.
THERE IS NO NONRACIAL GROUNDS FOR THIS CONFIGURATION.
AS OPPOSED TO THE ENACTED MAP.
>> IT SEEMS THAT THE DIFFERENCE OF THE SECRETARY IN THE LEGISLATURE IS DIFFERENT APPROACHES TO THE SAME PROBLEM.
IF WE GO OFF THE BENCHMARK PLAN, IT'S KIND OF INESCAPABLE THAT THERE IS AN ORIGINALLY SUSPECT DISTRICT.
DO YOU SEE THE DIFFERENCE IN THE ARGUMENTS MORE AS ONE WITH HOW TO ADDRESS THE SAME ISSUE?
OR IS IT TRULY TO SEPARATE ARGUMENTS?
>> I THINK THERE MAY BE COMPLEMENTARY APPROACHES.
I THINK THE ARGUMENT ON THE BENCHMARK DISTRICT IS THAT YOU CAN LOOK AT THIS AND DETERMINE THAT THE DISTRICT IS NOT A VALID BENCHMARK.
THAT IT WAS DRAWN FOR RACIAL REASONS AND DOESN'T DESERVE THE RESPECT OF THIS COURT FOR EVALUATING THE BENCHMARK. OUR ARGUMENT IS A LITTLE DIFFERENT WE SAY

EVEN IF YOU PRESUME THE DISTRICT IS VALID, DO WHAT THE LEGISLATURE DID WITH EVERY BENCHMARK DISTRICT. IT IS NOT POSSIBLE TO SHOW A REMEDIAL DISTRICT COULD BE DRAWN AND BOTH DOESN'T DIMINISH AND RACE DOESN'T DOMINATE. THE PLAINTIFF'S HAVE HAD EVERY INCENTIVE TO SHOW HOW IT COULD BE DONE.

IF IT WERE POSSIBLE TO DRAW A CIRCLE OR SQUARE OR MAYBE A LONG RECTANGLE THAT WAS NOT RACE
PREDOMINATE AND DIDN'T DIMINISH SURELY THEY WOULD HAVE DONE SO. THEY HAVEN'T. NO ONE'S BEEN ABLE TO IMPROVE ON THE WORK PRODUCT OF THE 8015 AND 8019 LEGISLATURE. WE HAVE SHOWN WHY BOTH OF THOSE ARE PROBLEMATIC
>> WE WILL OBVIOUSLY MAKE LAW ON THE RACIAL SIDE OF THIS.
BUT DO WE MAKE LAW ON THE COMPACT DISTRICT?
WHAT ARE WE, ONE WAY OF ADDRESSING THIS IS TO JUST SAY RACE WAS THE REASON FOR DRAWING THE DISTRICT.
SO WE DO NOT NEED TO GET INTO THE CIRCUMSTANTIAL EVIDENCE.
IF WE DO SAY THAT PART OF THE PROBLEM IS THAT YOU ARE NOT FOLLOWING TIER 2, THEN WE WOULD HAVE TO SORT OF SAY WHAT OUR REASON IS FOR NOT BEING COMPACT.
NORMALLY THE LEGISLATURE WOULD BE ASKING THE COURT TO HAVE A LOT OF LEEWAY AS FAR AS DEFINING COMPACTNESS.
SO, WHAT ARE WE COMPARING THE DISTRICT TO?
THE ALTERNATIVE DISTRICT.
THE EAST/WEST.
WHAT ARE WE COMPARING THAT TO

TO SAY OBJECTIVELY IT'S A MATTER OF LAW NOT BEING COMPACT?
>> I THINK THIS IS THE LEAST COMPACT CONFIGURATION IN THE ENACTED MAP OR THE BENCHMARK.
THIS EAST/WEST CONFIGURATION, INTO YOUR POINT EARLIER, THE ONLY REASON OR JUSTIFICATION UNDER THE FLORIDA CONSTITUTION FOR DEVIATING FROM COMPACTNESS WOULD BE A RACE-BASED REASON.
THE TIER 2 REQUIREMENTS ARE MANDATORY.
>> THEY ARE SAYING THAT THIS DOES NOT DEVIATE.
IF WE SORT OF ISOLATE THAT ISSUE, THERE WILL ALWAYS BE A LEAST COMPACT DISTRICT.
IS IT BY A CERTAIN AMOUNT?
WE WILL MAKE PRECEDENT ON THAT.
SO WHAT ARE WE LOOKING AT?
>> WE CAN LOOK AT THE SAME THINGS IN PORTION ONE AND TWO.
THE PRESENCE OF ODD APPENDAGES AND BIZARRE SHAPES IN ADDITION TO THE MATHEMATICAL MEASURES.
THERE WILL ALWAYS BE A LEAST COMPACT DISTRICT.
THIS IS A DISTRICT WHO DOES NOT MEET COMPACTNESS.

THESE INCLUDE THE FLORIDA KEYS WHICH ARE LOW ON THE COMPACTNESS MEASURE BECAUSE OF THE GEOGRAPHY OF THE STATE. THAT IS NOT THE CASE HERE,
IT IS POSSIBLE TO DRAW SQUARES AND RECTANGLES.
THERE IS NO GEOGRAPHICAL EXPLANATION FOR THE LOW MATHEMATICAL COMPACT SCORES AND

THE VISUAL COMPACTNESS HERE, IF YOU LOOK IN DUVAL AND LEON COUNTIES THERE ARE APPENDAGES WHICH SUGGEST SOMETHING GOING ON HERE THAT IS PROBLEMATIC FROM A COMPACTNESS STANDPOINT.
THOSE DRIVE COMPACTNESS SCORES.
THE SIZE YOU APPLIED THE INTRAOCULAR TIES.
IT HITS YOU BETWEEN THE EYES.
THAT IS THE SORT OF THING YOU COULD LOOK AT IN THIS CASE.
>> IN YOUR BRIEF ON THE DUVAL DISTRICT, YOU RAISE THE ISSUE OF THE FACT THAT IT DOESN'T PERFORM AS WELL AS THE BENCHMARK.
I DID NOT THINK THAT THEY DO.
BUT IT SEEMS THAT IF THE ONLY PROBLEM WAS THAT IT DID NOT PERFORM, AND IT WOULD BE A WEIRD RULE FOR US TO SAY THAT IF YOU CANNOT KEEP IT AT THE SAME LEVEL OF PERFORMANCE AND YOU HAVE AN OPTION THAT PERFORMS PERHAPS NOT AS WELL, THEN THE LEGISLATURE CAN GO FROM THE BENCHMARK TO NOTHING THAT EVEN COMES CLOSE.
THAT DOES NOT SEEM LIKE IT WOULD BE REASONABLE.
>> IT'S NOT AN ARGUMENT THAT WE MAKE.
IT IS AN ARGUMENT THAT THE SECRETARY MAKES.
BUT I DO NOT THINK IT IS AN ODD RESULT.
THE FLORIDA CONSTITUTION TALKS ABOUT DIMINISHMENT.
IF THE REMEDIAL DISTRICT WHAT ITSELF DIMINISHED, THEN IT CANNOT BE THE VALID.
AT THE CHANCE TO SHOW THAT THE REMEDIAL DISTRICT COMPLIES.
NOT ONE THAT ACCOMPLISHES ANOTHER OBJECTIVE THAT THEY MAY HAVE.
>> SO, WHEN YOU ARE TELLING THE LEGISLATURE WHAT TO DO, DO YOU TELL THEM THAT IF YOU CAN'T MAINTAIN IT AT EXACTLY THE SAME LEVEL, THEN ALL BETS ARE OFF?
THERE WAS THIS DISTRICT.
OBVIOUSLY THE LEGISLATURE PASSED IT AS THE PRIMARY MAP.
IF IT DOESN'T PERFORM IN 14 OF 14, IT WOULD BE STRANGE FOR US TO INTERPRET THE DIMINISHMENT PROVISION TO TELL THE LEGISLATURE THAT IT IS ALL OR NOTHING.
>> I DON'T THINK SO.
THIS COURT SAID THE PLAIN DEFINITION OF DIMINISHMENT IS WHETHER THE NEW DISTRICT IS MORE EQUALLY OR LESS LIKELY TO PERFORM FOR THE CANDIDATE OF CHOICE.
IN THIS CASE HE SAID IT IS LESS LIKELY.

THE DUVAL ONLY DISTRICT IS A WHITE MAJORITY DISTRICT THAT WOULD HAVE ELECTED RICK SCOTT, MARCO RUBIO, AND THE REPUBLICAN CABINET OFFICIALS IN FIVE OF 14 STATEWIDE ELECTIONS BETWEEN 2012 AND 2020.
IT IS A DISTRICT THAT OTHER THAN OUTSIDE OF THIS CASE, THE PLAINTIFFS WOULD BE SAYING IT IS DIMINISHMENT.
FROM 14 OF 14 – 9 – 14 THIS COURT WOULD SAY THAT IT IS DIMINISHMENT.
>> DO YOU THINK THAT THIS IS A COMPACT DISTRICT?
>> IT IS MORE THAN THE ENACTED MAP TO BE SURE.
WE HAVE NOT TAKEN THE CONDITION THAT RACE PREDOMINATES AND THAT IT WOULD BE A RACIAL GERRYMANDER.
THIS IS BASED ON THE NON-DIMINISHMENT CLAUSE.
THE PLAINTIFF SAY THAT LEGISLATURE HAS SAID THAT THE DISTRICT WOULD PERFORM AND COMPLY WITH THE NON-DIMINISHMENT PROVISION.
THE ACTUAL CONTEXT SAYS THAT IT IS A SINGULAR RECEPTION TO THE NON-DIMENSIONAL REQUIREMENT.
IN OTHER WORDS, THIS IS THE NON-DIMINISHMENT PROVISION.
THE LEGISLATURE WAS PUTTING FORWARD AND ATTEND THAT THE GOVERNOR HAD RAISED.
THROUGH THE LEGISLATIVE PROCESS AND IN THE ADVISORY COMMITTEE.

WAS THERE FURTHER QUESTIONS?
>> I HAVE A FINAL QUESTION.
WHAT ARE WE TO MAKE ABOUT THE FIRST DISTRICTS POSITION THAT WE DO NOT MAKE THE PRECEDENT WHEN WE ARE SITTING IN THE ORIGINAL JURISDICTION?
>> THAT IS NOT AN ARGUMENT THAT THE LEGISLATURE PUT FORWARD.
PARTICULARLY IN THE CASE OF THE VALIDITY REVIEW, THE CONSTITUTION PROVIDES THAT THE RESULT OF THE PROCEEDING IS A DECLARATORY JUDGMENT FOR ALL CITIZENS OF THE STATE.
THE LEGISLATURE HAS PRESUMED THAT THIS COURT'S DECISIONS HAVE PRECEDENT TO FOLLOW.
>> THANK YOU. >> THANK YOU.

>> THIS COURT SHOULD AFFIRM AND REMAND FOR ENTRY OF JUDGMENT IN FAVOR OF RESPONDENTS.
>> THANK YOU.
>> JUST A FEW POINTS IN RESPONSE.
MR. CHIEF JUSTICE, YOU HAVE EXPRESSED A NUMBER OF TIMES YOUR CONCERN THAT THE FDA ON ITS FACE REQUIRES MAKING NON-DIMINISHMENT A PRIORITY.
THIS REQUIRES LAWMAKERS TO PRIORITIZE RACE AT ALL COSTS.
IN MANY WAYS, THE FDA IS VERY SIMILAR.
THE STATE HAS AN OBLIGATION TO ALSO COMPLY AND PRIORITIZE THE VRA AS WELL.
IT IS A MOOT POINT IN FLORIDA.
THE SUPREME COURT HAS SAID THAT COMPLIANCE IS NOT RACIAL PREDOMINANCE.
THE FDA IS BETTER THAN THE VRA.

IT REQUIRES IT TO TAKE WITH COMPACTNESS.
THE FDA IS ON FIRMER GROUND HERE.
YOU ALSO ASKED SOME GOOD QUESTIONS ABOUT COMPACTNESS.
OF COURSE, AND A PORTION BUT WHEN THIS COURSE SAID THAT THERE IS NO MATHEMATICAL MEASURE. SOMETHING ALSO SAID IS
THE LEGISLATURE HAS TO MAKE TRADE-OFFS.
BETWEEN COMPACTNESS AND ADHERING TO POLITICAL AND GEOGRAPHICAL BOUNDARIES

NOT ALL COUNTIES ARE DRAWN PARTICULARLY BEAUTIFULLY.
WE KNOW THAT THE GADSDEN COUNTY LINE IS A GOOD EXAMPLE OF THAT.
CITY LINES DO NOT NECESSARILY FOLLOW SOMETHING PARTICULARLY BEAUTIFUL.
BUT IN TIER 2, IT SAYS THAT THERE IS NO PRIORITY AMONG THE KNEES.
THERE IS NO PRIORITY BETWEEN COMPACTNESS AND.
>> I THOUGHT YOU SAID COMPACTNESS WAS FEASIBLE.
>> I'M SORRY.
GO AHEAD.
THEY HELD IN THE LEGISLATURE IS COMPLETELY ENTITLED TO MAKE TRADE-OFFS.
LET ME GIVE YOU AN EXAMPLE.
IF YOU LOOK AT THE ENACTED PLAN, TWO OF THE MOST COMPACT DISTRICTS OR CD 10 AND CD 15.
THE TAMPA BAY AND ORLANDO AREAS.
THEY PERFORMED THE VERY WORST ON ADHERENCE TO POLITICAL GEOGRAPHIC BOUNDARIES.
WHERE THE VERSION OF PLAN 8015 HAS ONLY TWO PERCENT OF ITS BOUNDARIES BUT DO NOT FOLLOW AN EXISTING BOUNDARY.
THAT IS 32 AND 34 PERCENT.
THERE IS A TRUE TRADE-OFF TO BE MADE HERE.
IN THE LEGISLATURE CHOSE TO PUT MORE OF AN EMPHASIS ON BOUNDARIES THAN WITH COMPACTNESS.
>> DON'T PRESUME THAT THE REASON THAT WE DID THAT IS THAT THE BOTTOM LINE, THE GOAL HERE IS ONE PERSON ONE VOTE.
THAT IS THE LEGISLATURE'S FIRST GOAL.
THE VOTING RIGHTS ACT AND THE FEAR DISTRICT AMENDMENT ARE FURTHER ELABORATIONS ON THE PRINCIPAL.
ONE PERSON IN ONE VOTE WITHOUT REGARD TO RACE.
WHEN WE BECOME DETACHED FROM THESE PRINCIPLES, WE LINED UP TYING OURSELVES IN KNOTS ABOUT THESE META-ANALYSES WHEN THE COURT ANCHORING PRINCIPLE EXPLAINS SO MUCH ABOUT WHY FOR EXAMPLE YOU MIGHT HAVE A DISTRICT THAT SCORES LOW ON COMPACTNESS.
IT IS BECAUSE LEGISLATURE WAS TRYING TO CARVE UP THE STATE SO THAT EVERY PERSON WOULD COUNT THE SAME.
AM I WRONG?

DOES THAT NOT ANSWER YOUR POINT ABOUT HOW SOME OF THESE DISTRICTS MAY BE ON COMPACT.
BUT IF YOU TAKE A STEP BACK, A BUTTER INTO BALL MAY BE SITTING IN A WEIRDLY SHAPED DISTRICT WINDS UP HAVING THE SAME VOTE AS SOMEONE IN MIAMI-DADE.
AM I MISSING SOMETHING?
>> I DO TAKEN ISSUE WITH ONE OF THE PREMISES OF YOUR QUESTION THAT IS A PROBLEM OR THAT THE MAPS NEED TO BE DRAWN WITHOUT REGARD TO RACE.
I THINK IT IS THE EXACT OPPOSITE.
TO COMPLY WITH YOUR OBLIGATION, UNDER THE FDA YOU HAVE TO TAKE RACE INTO ACCOUNT.
>> I THINK SHOPPERS IS RENO, JUSTICE O'CONNOR PERHAPS STATED BETTER THAN ANYONE ELSE, TAKING RACE INTO ACCOUNT AND BEING MINDFUL OF THE HISTORY OF PREJUDICE IS VERY DIFFERENT FROM USING RACE AS A BITING PREDOMINANCE TO USE YOUR PRINCIPAL.
IF CD5 HAVE BEEN DRAWN IN THE CONFIGURATION THAT IT IS DRAWN TO MAXIMIZE WHITE PERFORMANCE, IT WOULD LOOK LIKE A DISTRICT PRECISELY OF THE KIND THAT MOTIVATED THE VOTING RIGHTS ACT.
IT WOULD BE A RACIAL GERRYMANDER.
AND INDEED IT IS WHAT WE HAVE BEEN HEARING VERY RIGHTLY FOR GENERATIONS.
I AM CONCERNED THAT THIS LINE BETWEEN WHAT IS A PREDOMINANT CONSIDERATION AND A VALID CONSIDERATION, GETS BORED WHEN WE LOSE SIGHT OF FIRST PRINCIPLES.
>> I AM GLAD THAT YOU MENTIONED SHOP.
THE COURT IS LOOKING FOR GUIDING PRINCIPLES.
BUT HERE ARE SOME BENCHMARKS FOR GUIDANCE.
I ENCOURAGE THE COURT TO LOOK AT THE US SUPREME COURT'S CASES ON RACIAL GERRYMANDERING.
SO SHAW, MILLER, AND TO LOOK AT THOSE DISTRICTS.
WE PUT THEM IN OUR REPLY BRIEF. VISUAL PICTURES OF THEM

THEY SHOW RACIAL GERRYMANDER ON THE BASIS OF SHAPE.
THOSE WERE DISTRICTS THAT SCORED .01 ON THE COPPER SCORE.
HERE ARE THE VERSIONS OF CD5 THAT IS 11 TIMES BETTER THAN THAT.
>> ESPECIALLY IN MILLER, THERE IS A TENSION BETWEEN THE IDEA, THAT YOU USE THE WEIRDNESS OF THE SHAPE TO INFER THAT RACE WAS PREDOMINANT WHEREAS HERE WE HAVE AN ENTIRE PROCESS AND A CONSTITUTIONAL TEXT THAT TELLS YOU THAT YOU CANNOT DIMINISH.
AND THAT IS A PRIORITY.
IN SOME WAYS, THE SHIPS AND EVERYTHING ARGUABLY TO NOT EVEN MATTER.
IF YOU ARE JUST TRYING TO START OFF WITH THE MASTER RULE.
THAT IT RUNS THROUGH THE WAY THE WHOLE PROCESS WORKS.
>> SHAW WAS SINGULAR.
I DO AGREE.
THEY WERE SAYING THIS CANNOT BE BASED ON THE SHAPE.

IN MOST OF THE COURTS OTHER CASES THE STATE IS ATTEMPTING TO COMPLY WITH VRA.
IT IS THE SHAPE THAT TAKES IT OVER THE TOP HERE.
AND I THINK.
>> DO YOU THINK THAT THE COURT IS ASSUMED THAT COMPLYING WITH THE VRA'S COMPELLING INTEREST?
THEY TALK ABOUT THE AUTHORITY THAT CONGRESS HAS.
I DO NOT KNOW THAT WE CAN TRANSLATE ALL OF THE THINGS THAT THE COURT DOES TO TRY AND MAKE IT OKAY.
THE VRA, I DO NOT KNOW THAT WE COULD ASSUME THAT THE STATE GOVERNMENT HAS THE SAME SORT OF LEEWAY TO ADOPT RACE CONSCIOUS MANDATES.
AND HAVE COURTS STRUGGLING TO FIND THESE WAYS TO MAKE IT CONSTITUTIONAL.
>> FOR ALL THE REASONS THAT I HAVE SAID, I DO NOT THINK WE NEED TO REACH THE SCRUTINY ARGUMENT TODAY.
I DO DISAGREE THAT STATES DO NOT HAVE THE POWER TO TAKE ACTION TO PROTECT MINORITY VOTERS ABSENT OF SOME SORT OF MINORITY VOTE FROM CONGRESS.
TIME AND TIME AGAIN WE HAVE EMPHASIZED THAT STATES GET LEEWAY TO GO ABOVE AND BEYOND WHAT IS REQUIRED.
>> THE ABOVE AND BEYOND REQUIREMENT DOES NOT WORK IN THIS CASE THOUGH.

I THINK IT KEEPS GOING BACK TO WHETHER IT IS INDIVIDUAL OR GROUP.
IF YOU TAKE THE POSITION THAT WE CAN SET HIGHER CEILINGS FOR MINORITY GROUPS, THEN IT SEEMS WE ARE LOWERING THE FLOOR BEYOND THE 14TH AMENDMENT.
FOR WHAT YOU WOULD CONSIDER A MAJORITY RACE.
>> PERHAPS I SHOULD NOT HAVE SAID ABOVE AND BEYOND.
BUT THE STATE CAN TAKE ACTIONS THAT FEDERAL LAW DOES NOT REQUIRE IT TO DO.
LET ME GIVE YOU AN EXAMPLE.
IN THIS CASE OUT OF OHIO, IT IS A CASE FROM 93.
THE STATE OF OHIO INTENTIONALLY DREW MAJORITY MINORITY DISTRICTS.
THE DISTRICT COURT THREW IT OUT.
BECAUSE IT BOUGHT THE STATE DID NOT HAVE THE POWER TO DO THAT.
THE SUPREME COURT REVERSED.
IT SAID THAT SECTION 2 WAS A RESTRICTION.
AND A REQUIREMENT OF WHAT STATES MUST DO.
BUT STATES HAVE THE POWER TO GO BEYOND BUT FEDERAL LAW REQUIRES OF THEM.
WITH THE BACKSTOP.
IF IT IS NOT OTHERWISE VIOLATING RACIAL GERRYMANDERING PRINCIPLES.
WE DO NOT THINK THAT THIS VIOLATES THE PRINCIPLES.

EVEN IN THE ABSENCE OF SOME FEDERAL REQUIREMENT THAT FLORIDA DO THIS, THEY HAVE THE POWER TO DO THIS.
I WOULD LIKE TO GO BACK VERY BRIEFLY

TO PLAN 8015. JUST TO EMPHASIZE THAT IT IS IN THE RECORD THAT THE STATE COMPLIED WITH THESE TWO THINGS.
BOTH NON-DIMINISHMENT AND THE CONFESSION CLAUSE TO THE EXTENT THAT THE COURT HAS CONCERNS ABOUT.
>> THAT IS THE DEFAULT ONLY PLAN?
>> YES.
THEY SAID THAT THIS BUT HERE'S TO ALTER TWO PRINCIPLES.
AND THEY AFFIRMED THAT THEY THINK THAT THE DISTRICT ADHERES TO TIER 2. THE LEGISLATURE ALSO SAID THAT ALTHOUGH THERE IS A DECREASE IN THE VOTING AGE PERCENTAGE, THE FUNCTIONAL ANALYSIS PROVES THAT THIS IS A RELIABLE DISTRICT.
I COMPLETELY AGREE WITH THE CHIEF JUSTICE THAT THERE IS A DIFFERENCE.
THAT THE LEGISLATURE IS FULLY ABLE TO PROTECT.
OF COURSE THEY SHED UNDER THE STANDARD.
BUT IF THIS COURT CONCLUDES THAT IT IS NOT POSSIBLE TO RECONCILE THESE, I DON'T THINK THAT WE SHOULD DROP THE DISTRICT ENTIRELY.
PERHAPS THERE QUESTIONS THAT WE SAVE FOR ANOTHER DAY.
>> I AM NOT SAYING I'M TELEGRAPHING ANYTHING.
BUT IT SEEMS LIKE IN THIS LITIGATION THERE HAVE BEEN PEOPLE IN THE GOVERNMENT HAS BEEN TRYING TO WALK A FINE LINE BETWEEN THIS AND AS APPLIED.
SOME OF THE ARGUMENTS SEEM LIKE THEY ARE INEVITABLY HEADING DOWN THE PATH OF WE WILL HAVE TO DECIDE, CAN FDA WORK?
WHEN IT IS ON ITS FACE REQUIRING NON-DIMINISHMENT?
AND IT IS PRIORITIZING ONE SET OF RACIAL GROUPS OVER ANOTHER.
IF IT EVER WERE TO COME TO THE POINT THAT WE THOUGHT THAT THE NON-DIMINISHMENT ESSENTIALLY DOES NOT WORK HERE, WITH THE WHOLE FDA HAVE TO GO?
IT SEEMS LIKE THIS WAS PART OF A PACKAGE DEAL.
THE WAY THIS WAS SOLD WAS THAT YOU COULD HAVE A POLITICAL COMPACTNESS AND THAT WAS NOT GOING TO HURT MINORITY VOTERS.
IF WE TAKE OUT OR NEUTER HALF OF THE BARGAIN, DO THE VOTERS GET A CHANCE TO START FROM SCRATCH?
OR ARE THEY STUCK WITH THE HALF THAT WAS SORT OF LIVED WITH IN EXCHANGE FOR A SENSE THAT IT WOULD NOT HURT MINORITY VOTERS?
I KNOW AT THE TIME THAT THIS WAS ADOPTED THAT IT WAS ONE OF THE MAIN THINGS THAT PEOPLE ARE STRUGGLING WITH.
WHAT HAPPENS TO THESE DISTRICTS?
THIS WAS SUPPOSED TO BE THE REMEDY FOR THAT.

HOW DO WE NEUTER HALF OF THIS THING AND THEN LEAVE THE OTHER PART INTACT?
>> ALTHOUGH THE SECRETARY PRESERVED AN AFFIRMATIVE DEFENSE WITH CONSTITUTIONALITY, MY UNDERSTANDING IS THAT THEY HAVE ABANDONED AND NOT ARGUED THAT THIS IS UNCONSTITUTIONAL.
THE LEGISLATURE HAS NEVER ARGUE THAT.
I THINK TO THE EXTENT THAT THE COURT HAS CONCERNS ABOUT CERTAINLY DOES NOT SUGGEST THAT THE WHOLE THING WOULD NEED TO BE THROWN OUT.
BUT THE BACKSTOP WOULD BE THE APPROPRIATE COURSE.
TO ANSWER YOUR QUESTION, I DO NOT THINK THE ANSWER WOULD BE DIFFICULT TO THROW OUT.
I THINK IT WOULD BE TO SEE WHAT LIMITS WE COULD PUT ON THE PROVISIONS.
PERHAPS THE COURT TAKE A DIFFERENT INTERPRETATION TO AVOID THE CONSTITUTIONAL QUESTION WOULD BE THE RIGHT ANSWER.
JUST TO CONCLUDE, PETITIONERS ARE NOT ASKING FOR ANYTHING EXTRAORDINARY HERE.
WE ARE ASKING TO ADHERE TO THE EXISTING PRECEDENT.
TO CONTINUE TO APPLY THE LAW AS THIS COURSE SET OUT IN 8 CASES..
WE ASK THE COURTS TO REJECT THE STATES INVITATION TO UPSET THE SETTLED LAW.
>> THANK YOU.
WE APPRECIATE THE EXCELLENT BRIEFING AND ARGUMENT.
WE WILL TAKE A 10 MINUTE RECESS.
>> ALL RISE.