

**IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA**

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

Appellants,

Case No. 1D22-1470
LT Case No.: 2022 CA 0666

v.

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

Appellees.

**THE SECRETARY OF STATE’S REPLY IN SUPPORT OF THE
EMERGENCY MOTION TO REINSTATE THE AUTOMATIC STAY**

This Court asked Plaintiffs to identify the status quo in this case and to address whether the temporary injunction preserved the status quo. For the Secretary, what is and what is not the status quo is perfectly clear.

I. The Enacted Map Is the Status Quo.

The status quo is the Enacted Map, a map passed by the Florida Legislature—the entity constitutionally tasked to draw congressional maps in the first instance, *see* U.S. Const. art. I, § 4—and signed into law by Governor DeSantis. It was not a “suddenly and secretly

changed status,” like that discussed in *Bowling v. National Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931), but one that was duly enacted in the public eye in an open and transparent manner. (App. 607) (Circuit Court’s comments during the temporary injunction hearing); *see, e.g., State, on Inf. of McKittrick v. Am. Ins. Co.*, 173 S.W.2d 51, 52 (Mo. 1943) (“This rule is not applicable in this case because such a condition does not exist here. No sudden or secret change has been made or is threatened.”).

More importantly, the Florida Legislature was required to pass the Enacted Map this year because of the decennial census. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). Indeed, redistricting laws are unlike other legislation in that they *must* be updated after every decennial census. *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The status quo preceding the Enacted Map is a legal nullity because the prior congressional map is malapportioned and thereby violates the one-person, one-vote standard.

The status quo is also what election officials throughout Florida have been implementing since the governor signed the Enacted Map into law on April 22, 2022. These election officials have been updating voter databases, setting precincts, and sending voter information

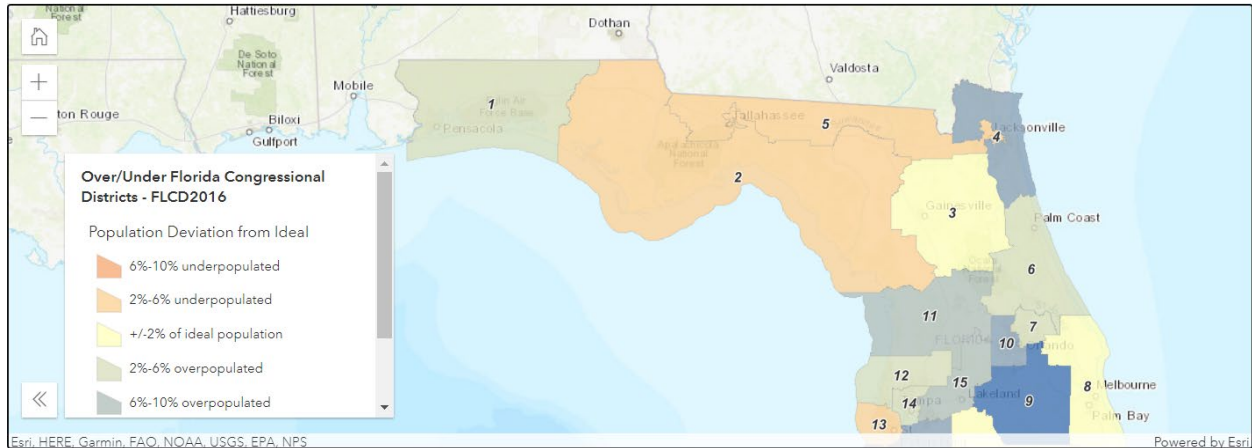
cards based on the Enacted Map. (App. 219-27). For some of these Supervisors of Elections, this work cannot be undone and then redone at this late stage. (App. 219-27, 237). This is the essence of what *status quo* means. Upending the duly enacted map of the people's representatives invites chaos and uncertainty, something the status quo inquiry is intended to defend against.

Plaintiffs now argue that either Benchmark Congressional District 5, which has only been in existence since the 2016 election, or some conceptual black-performing district in north Florida is the status quo. Not so.

Again, Benchmark Congressional District 5 cannot be the status quo because it is now legally invalid. As the following graphic from the Florida Redistricting website¹ demonstrates, due to the decennial census, that district is unconstitutionally malapportioned. *See Wesberry*, 376 U.S. at 7 (“[W]hen qualified voters elect members

¹ The Court can take judicial notice of this graphic pursuant to section 90.202(11), (12), Florida Statutes.

of Congress,” “each vote” must “be given as much weight as any other vote.”).



Benchmark Congressional District 5 is not something voters, candidates, and election officials can rely on. That is why the Florida Legislature had to pass the Enacted Map.

Nor can some conceptual black-performing district in north Florida be the status quo. Any hypothetical district is a district without metes, bounds, precinct lines, and district lines. It is not something that an election administrator can use to set precincts, a candidate can use to run her campaign, or a voter can use to cast her ballot.

What is more, treating a new map that was (incorrectly) ordered by the Circuit Court as the status quo turns the entire inquiry on its head. Any suggestion to the contrary makes little sense, especially

when, contrary to Plaintiffs' insinuation, the Florida Supreme Court has *never* addressed whether Benchmark Congressional District 5, or any other race-based district drawn to comply with the Florida Constitution's non-diminishment standard, satisfies the requirements of the *federal* Equal Protection Clause.

II. The Temporary Injunction Does Not Preserve the Status Quo.

It is only the temporary injunction that prevents the Enacted Map from being implemented and therefore disrupts the status quo. Again, Columbia County Supervisor of Elections Brown has testified that her office has been implementing the Enacted Map and does not have time to implement Proposed Map A in time for the August 23, 2022 primary election. (App. 219-22). And Duval Chief Election Officer Phillips similarly testified as having doubts as to whether Proposed Map A can be implemented before the August 23, 2022 election. (App. 223-27). This testimony remains unrebutted as to Columbia and Duval Counties.

Despite this, Plaintiffs contend that Supervisors of Elections are capable of implementing both the Enacted Map and Proposed Map A. Plaintiffs misuse email correspondence from the Secretary as

support. Neither Supervisor Brown nor Officer Phillips has retreated from their position that implementing a new congressional district is impossible (for Columbia County) and exceedingly difficult (for Duval County). (App. 219-27). The Secretary's email correspondence did not undercut these administrators; it simply directed the Supervisors to work on a dual track to implement Proposed Map A, if possible, and save the work from the Enacted Map because the Circuit Court discussed this as the appropriate course of action in its oral colloquy. (Supp. App. 637) ("On that note, and consistent with the trial court's oral pronouncement during the hearing yesterday, to the extent that it is possible, we ask that you proceed on two fronts and plan to implement both maps." (emphasis in the original)).

Therefore, the Secretary asks this Court to grant her emergency motion to reinstate the automatic stay.

Dated: May 19, 2022

Bradley R. McVay (FBN 79034)
brad.mcvay@dos.myflorida.com
Ashley Davis (FBN 48032)
ashley.davis@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399
(850) 245-6536

/s/ Mohammad O. Jazil

Mohammad O. Jazil (FBN 72556)

mjazil@holtzmanvogel.com

Gary V. Perko (FBN 855898)

gperko@holtzmanvogel.com

Michael Beato (FBN 1017715)

mbeato@holtzmanvogel.com

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK

119 S. Monroe St. Suite 500

Tallahassee, FL 32301

(850) 270-5938

*Counsel for Florida Secretary
of State*

Henry C. Whitaker (FBN1031175)

Solicitor General

Daniel W. Bell (FBN 1008587)

Jeffrey Paul DeSousa (FBN 110951)

Chief Deputy Solicitors General

David M. Costello (FBN 1004952)

Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL

The Capitol, PL-01

Tallahassee, Florida 32399

(850) 414-3300

henry.whitaker@myfloridalegal.com

daniel.bell@myfloridalegal.com

jeffrey.desousa@myfloridalegal.com

david.costello@myfloridalegal.com

*Counsel for Florida Attorney General Ashley
Moody*

CERTIFICATE OF SERVICE

I certify that on this 19th day of May, the foregoing was filed electronically via the Florida Court's E-Filing Portal, which will send a copy of this filing to the following:

Frederick S. Wermuth
Florida Bar No. 0184111
Thomas A. Zehnder
Florida Bar No. 0063274
*KING, BLACKWELL, ZEHNDER
& WERMUTH, P.A.*
P.O. Box 1631
Orlando, Florida 32802
fwerthemuth@kbzwlaw.com
tzezhnder@kbzwlaw.com

John M. Devaney
PERKINS COIE LLP
700 Thirteenth Street N.W.,
Suite 600
Washington, D.C. 20005
jdevaney@perkinscoie.com

Abha Khanna
Jonathan P. Hawley
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite
2100
Seattle, Washington 98101
akhanna@elias.law
jhawley@elias.law

Christina A. Ford
Florida Bar No. 1011634
Joseph N. Posimato
Graham W. White
Harleen K. Gambhir
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
cford@elias.law
jposimato@elias.law
gwhite@elias.law
hgambhir@elias.law

Counsel for Plaintiffs

Andy Bardos, Esq.
GRAYROBINSON, P.A.
301 S. Bronough Street,
Suite 600
Tallahassee, FL 32302
andy.bardos@gray-
robinson.com

Daniel E. Nordby
SHUTTS & BOWEN LLP
215 S. Monroe Street
Suite 804
Tallahassee, FL 32301
ndordby@shutts.com

*Counsel Chris Sprowls and
Thomas J. Leek*

*Counsel for Florida Senate,
Ray Rodrigues, and Wilton Simpson*

/s/ Mohammad O. Jazil
Attorney

CERTIFICATE OF COMPLIANCE
Rule 9.045, Fla. R. App. P.

The undersigned certifies that this computer-generated reply complies with the font requirements mandated under Rule 9.045, Fla. R. App. P and contains 924 words.

/s/ Mohammad O. Jazil
Mohammad O. Jazil
Florida Bar No. 72556