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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,

v.

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

Appellees.

Case No.: 1D22-1470
L.T. No.: 2022-ca-000666

APPELLEES' RESPONSE TO APPELLANT'S EMERGENCY MOTION TO REINSTATE AUTOMATIC STAY

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TABLE OF CONTENTS

INTRODUCTION 1
BACKGROUND 4
I. FACTUAL BACKGROUND 4
A. The Fair Districts Amendment protects minority voters from implementation of redistricting plans that diminish their ability to elect their candidates of choice. 4
B. Black voters in North Florida have had the ability to elect their congressional candidate of choice since at least 2015. 8
C. While the Legislature planned to protect CD-5 from diminishment, the Governor forced through a plan which eliminated a historically performing Black district. 10
II. PROCEDURAL HISTORY 14
A. Plaintiffs filed suit the same day the Enacted Plan was signed into law. 14
B. Plaintiffs' temporary injunction motion was supported by extensive evidence. 15
C. The trial court considered all the evidence and held an evidentiary hearing on plaintiffs' motion. 21
D. After considering all evidence, the trial court granted Plaintiffs' motion and ordered the state to use a plan that preserved Black voters' ability to elect their candidate of choice in North Florida. 22
E. After holding an additional hearing, the trial court lifted the automatic stay to preserve Black voters' ability to elect their candidate of choice. 25
STANDARD OF REVIEW 27
ARGUMENT 29
I. The trial court's injunction preserves the status quo by ensuring Black voters in North Florida continue to have the opportunity to elect their candidate of choice while the Governor's novel legal theory is litigated. 29

II. The trial court did not abuse its discretion in determining that compelling circumstances warrant vacatur of the automatic stay. 34

A. The Secretary is unlikely to succeed on appeal, given binding legal precedent and the trial court's well-supported factual findings. ... 35

1. The Enacted Plan violates the Florida Constitution. ... 35

2. The Secretary has failed to show that application of Florida's non-diminishment standard violates the U.S. Constitution. ... 36

a. Predominance ... 39

b. Compelling Interests ... 43

c. Narrow Tailoring ... 50

3. A finding that CD-5 is likely unconstitutional would have significant collateral effects. ... 53

B. The equities overwhelmingly favor vacatur of the automatic stay. ... 55

1. Vacating the stay is the most administratively sensible approach. ... 55

2. Florida voters will suffer irreparable injury if the stay is reinstated. ... 61

C. The trial court did not err in remedying the violation of the Florida Constitution. ... 64

CERTIFICATE OF SERVICE ... 70

CERTIFICATE OF COMPLIANCE ... 71

Appellees, Plaintiffs below, file this response to Appellant Secretary of State's Emergency Motion to Reinstate Automatic Stay, and state as follows:

INTRODUCTION

The narrow question presented by the Secretary's motion is whether the trial court's decision to vacate the automatic stay of its injunction was so unreasonable as to constitute an abuse of discretion. It was not.

Vacatur of the automatic stay pending appeal is the only administratively sensible and equitable outcome. Even with the trial court's injunction in place, Florida's supervisors of elections are currently working—at the Secretary's direction—to implement *both* the Enacted Plan and the remedial Plan to ensure that Florida can implement whichever plan emerges from the appellate process. Reinstatement of the automatic stay would mean that the supervisors would *only* prepare to implement the Enacted Plan, needlessly jeopardizing Florida's ability to implement a remedy in the event this Court or the Florida Supreme Court upholds the trial court's merits decision, which enjoined the Enacted Plan and found its configuration of districts in North Florida unconstitutional. In

such a scenario, forcing Florida's voters to cast their ballots—and elect representatives—under an unconstitutional map would cause irreparable harm.

The trial court did precisely what it was supposed to do: it carefully looked at all of evidence and arguments before it, weighed each of the relevant factors, and determined that, in this case, vacatur was merited. As the trial court has observed and the Secretary has acknowledged, the Supervisors of Elections are capable of preparing for both contingencies. There is no need for this Court to prevent them from doing so by reinstating the automatic stay—particularly when allowing the state to press forward with an unconstitutional districting plan threatens the voting rights of Plaintiffs and countless other Florida voters.

In any event, this is not a close question; the Enacted Plan's configuration of congressional districts in North Florida is unquestionably illegal under the controlling precedent of the Florida Supreme Court. It is settled law that the Florida Constitution prohibits congressional redistricting plans that diminish the ability of racial minorities to elect representatives of their choice. *See* Art. III, § 20(a). The uncontroverted evidence shows the Enacted Plan did

just that—something the Secretary did not contest before the trial court and does not contest in his motion.

In response to this Court's two questions about what is the status quo and whether the trial court's temporary injunction preserved it, the answers are as follows. *First*, the status quo is that Black voters in North Florida have been able to elect their preferred candidates in Congressional District 5 ("CD-5") since at least 2015, and in North Florida for several decades.[1] Plaintiffs filed this challenge on the same day that the Governor signed the Enacted Plan. *No* elections have taken place under the newly configured Enacted Plan, which would eliminate the opportunity for Black voters to elect their preferred candidates in North Florida for the first time in decades. The Enacted Plan has not yet been implemented and voters have not been subject to it, in any form. No candidates have qualified under the Plan yet—indeed, the Secretary cannot even begin

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[1] The Florida Supreme Court previously found that this opportunity had existed, at least to some degree, in North Florida since 1992. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 404 (Fla. 2015) ("*LWV I*") (explaining that "the predecessor of District 5 . . . performed for the black candidate of choice in every election from 1992 through 2000" and then in "every election from 2000 through the present").

accepting petitions for candidates to qualify under the Plan yet. Ballots have obviously not yet been printed, much less sent out. And, as noted, Supervisors are currently preparing to implement either Plan. *Second*, the temporary injunction preserves this status quo by enjoining the newly drawn version of CD-5 in the Enacted Plan that indisputably would eliminate the ability of Black voters in North Florida to elect their preferred candidates. And, again, it does so while still preserving Florida's ability to implement the Enacted Plan to enable the appellate courts to consider this important issue on the merits.

It cannot be that state actors can unilaterally change the status quo by enacting a facially unconstitutional redistricting plan, and then claim that the plan cannot be enjoined because its mere enactment is now the "status quo," shielding themselves from any temporary injunction and guaranteeing "one free unconstitutional election." Such an outcome would be profoundly unjust.

BACKGROUND

I. FACTUAL BACKGROUND

A. The Fair Districts Amendment protects minority voters from implementation of redistricting plans

that diminish their ability to elect their candidates of choice.

A decade ago, Floridians voted by an overwhelming margin of 62.9% to 37.1% to enact the Fair Districts Amendment to the Florida Constitution. App. 18. The Amendment explicitly constrains the Legislature's once-in-a-decade exercise of its reapportionment power, as enumerated within two "tiers" in Article III, Sections 20 and 21 of the Florida Constitution.

Among the "Tier I" standards is a requirement that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to *diminish their ability to elect representatives of their choice*." Fla. Const. Art. III, § 20(a) (emphasis added).

This "non-diminishment standard" prohibits the Legislature from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 625 (Fla. 2012). To evaluate a non-diminishment claim, courts

must determine whether minority voting strength has diminished under the new plan when compared to the old plan. *Id.* at 624-25.

During this *current* redistricting cycle, both legislative chambers recognized that Tier I's non-diminishment standard remained in effect, and took efforts to ensure that the State House and Senate plans complied with Florida Supreme Court precedent on this front. In its brief asking the Florida Supreme Court to approve the newly enacted State House Plan, the Florida House explained how the plan "protects minority voting strength from diminishment, as required by the tier-one standards in article III, section 21" and "satisfies every requirement of federal law and the Florida Constitution." House Br. at 5-6.[2] The House explained that it satisfied the non-diminishment standard to protect against diminishment in 30 minority-performing districts by:

> neither reduc[ing] the number of performing districts nor weaken[ing] the ability of minorities in those districts to elect representatives of their choice. Consistent with [Florida Supreme Court] precedents, the House conducted the necessary functional analysis to assure compliance and protected *all* performing districts from diminishment,

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[2] Br. of the Fla. House of Reps., *In re S. J. Res. of Legis. Apportionment 100*, 334 So.3d 1282 (Fla. Feb. 19, 2022), https://redistricting.lls.edu/wp-content/uploads/FL-in-re-jr-leg-appt-20220219-house-brief.pdf.

> even if minorities did not comprise a majority of the voting-age population.

House Br. at 15. The House also explained that "[l]ogically, if a performing district loses substantial minority population, then the remaining minority voters' ability to elect their preferred candidates is diminished." House Br. at 21. The Florida Senate, too, emphasized how its newly enacted plan complied with the Florida Constitution's non-diminishment standard. It explained that it instructed "the Senate's professional staff to conduct a functional analysis [] to confirm that any map" complied with the non-diminishment provision and, in doing so, protected from diminishment five districts which performed for Black voters, and five which historically performed for Hispanic voters. Senate Br. at 20, 34-36.[3] The Senate concluded by noting that it "has also presumed—consistent with Supreme Court precedent as to the federal Voting Rights Act ("VRA")—that compliance with the Florida Constitution's analogous protections for racial and language minorities represents a

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[3] Br. of the Fla. Senate Supporting the Validity of the Apportionment, *In re S. J. Res. of Legis. Apportionment 100*, 334 So.3d 1282 (Fla. Feb. 19, 2022), https://redistricting.lls.edu/wp-content/uploads/FL-in-re-jr-leg-appt-20220219-senate-brief.pdf.

'compelling interest' justifying the consideration of race." Senate Br. at 38.

The Florida Supreme Court considered these submissions and unanimously held the newly enacted Florida State House and Senate plans were facially valid. *See In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282 (Fla. 2022). In so doing, the Court reiterated the Tier I non-diminishment standard, *id.* at 1286, approvingly cited the Legislature's functional analysis, *id.* at 1289, and concluded that such a functional analysis supported "the Legislature's representation that the 2022 plans do not diminish minority voters' ability to elect representatives of their choice." *Id.* at 1290. Nowhere in that opinion did the Florida Supreme Court question the continuing application of the non-diminishment standard.

B. Black voters in North Florida have had the ability to elect their congressional candidate of choice since at least 2015.

CD-5 was created and adopted by the Florida Supreme Court after that Court invalidated the Legislature's 2012 congressional redistricting plan under the Fair Districts Amendment by finding that partisan intent tainted the entire redistricting process. *See LWV I*,

172 So. 3d at 392-93 (Fla. 2015). In ordering a remedy, the Court provided specific guidance regarding numerous districts, including for CD-5. The Court rejected arguments that an East-West configuration of CD-5 "cause[d] the redistricting map to become significantly less compact." *Id.* at 405–06. In doing so, the Court acknowledged that an East-West configuration of CD-5 would result in a "longer" district "with a correspondingly greater perimeter and area," but explained that "length is just one factor to consider in evaluating compactness" alongside others, such as Florida's existing geography. *Id.* at 406.

When the Legislature failed to pass a remedial map, the Court ordered the adoption of a congressional plan, referred to here as the "Benchmark Plan," which was in place during the 2016, 2018, and 2020 congressional elections. At the time of its adoption, CD-5 had a Black voting age population of 45.12%. *Id.* at 404. As of the 2020 Census, the Benchmark Plan's version of CD-5 had a total Black population of 49.1%, a Black voting age population of 45.2%, and a minority voting age population of 59.8%. App. 90, 100. Benchmark CD-5 extended from Jacksonville to Tallahassee and included all of Baker, Gadsden, Hamilton, and Madison Counties, as well as

portions of Columbia, Duval, Jefferson, and Leon Counties. While both Tallahassee and Jacksonville have substantial Black populations, Black voters also constituted a substantial portion of the lower-density counties that made up the rest of Benchmark CD-5. Gadsden County, for instance, is 55% Black, and Jefferson, Madison, and Hamilton Counties are all more than 30% Black. Supp. App. (Vol. 5) 552-53.

As Plaintiffs' expert demonstrated, as the trial court found, and as the Secretary does not dispute in this litigation, CD-5 was unquestionably a district that allowed Black voters to elect their candidate of choice. Under the Benchmark CD-5, voters elected Black Congressman Al Lawson in 2016, 2018, and 2020. App. 30.

C. While the Legislature planned to protect CD-5 from diminishment, the Governor forced through a plan which eliminated a historically performing Black district.

After release of the 2020 census data, the Florida Senate and House commenced the redistricting process by holding initial hearings in September 2021. From the beginning, both chambers stressed that the Legislature's redistricting effort would be guided by established law. Representative Tom Leek, Chair of the House

Redistricting Committee, "promise[d]" his members that the House would "do this right" and "within the law." Supp. App. (Vol. 1) 6; *see also* Supp. App. (Vol. 1) 10. And both the Senate and the House instructed its members that the Florida Constitution's non-diminishment standard prohibits the Legislature from enacting a congressional plan that diminishes a minority group's existing ability to elect their candidate of choice. *See, e.g.*, Supp. App. (Vol. 1) 54 (recognizing that the Florida Constitution parallels federal retrogression standards); Supp. App. (Vol. 1) 104 (same). And they explained that while the U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), "means the preclearance process established by Section 5 of the VRA was no longer in effect," that decision "does not affect the validity of the statewide diminishment standard in the Florida Constitution." Supp. App. (Vol. 5) 433.

Among the districts that both chambers determined were protected from diminishment was CD-5. To that end, the Legislature performed a "functional analysis" on each of its proposed plans to ensure that Black voters in CD-5 maintained the ability to elect their candidates of choice. *See, e.g.*, Supp. App. (Vol. 1) 115-16 (reporting

that proposed Senate plans "[d]o not retrogress and maintain the ability . . . for racial and language minorities to participate in the political process and elect candidates of their choice"); Supp. App. (Vol. 2) 227–30, (Vol. 3) 236–39, 244–47, 253–56, 261–64 (performing functional analyses of CD-5 for proposed Senate plans). Nearly every congressional plan proposed by the House and Senate redistricting committees maintained the general configuration of CD-5 approved by the Florida Supreme Court and preserved Black voters' ability to elect their candidates of choice in North Florida. *See, e.g.*, Supp. App. (Vol. 1) 116, 119 (Vol. 4) 286, (Vol. 5) 427.

On March 4, 2022, the Legislature passed a redistricting plan that significantly modified CD-5, though the Legislature maintained that its plan would avoid diminishing Black voters' ability to elect candidates of their choice in the district. Recognizing the plan's vulnerability under the non-diminishment standard, however, the legislation included an alternative plan—H000C8015, the "Backup Map" or "Plan 8015"—that was intended to take effect if courts found that the primary plan diminished Black voting power in violation of the Florida Constitution. Supp. App. (Vol. 5) 442–60. The Backup

Map retained the East-West configuration of CD-5 approved in *LWV I.*

Governor DeSantis vetoed the Legislature's Plan on March 29 and called a special legislative session. Supp. App. (Vol. 5) 462–65, 467–69. The Governor released a congressional plan on April 13 that eliminated any district resembling the Benchmark Plan's CD-5. When asked on the House floor whether the configuration of CD-4 or CD-5 in the Enacted Plan would continue to perform for Black candidates of choice, Representative Leek responded that it would not: "[O]ur [House] staff did a functional analysis and confirm[ed] it does not perform." Supp. App. (Vol. 5) 483. The Legislature nevertheless passed the Enacted Plan on April 21, 2022, and Governor DeSantis signed it into law the next day. Supp. App. (Vol. 5) 548–50.

The Enacted Plan splits Benchmark CD-5 into four new districts: new CD-2, CD-3, CD-4, and CD-5. The Enacted Plan disperses over 360,000 Black voters from the Benchmark CD-5 into each of these new districts. App. 90, 95. Black voters now make up only 22.7%, 15.3%, 30.8%, and 12.1% of the voters in those districts, respectively. App. 102. In none of those districts do Black voters have

the ability to elect their preferred congressional candidates. App. 94-95.

II. PROCEDURAL HISTORY

A. Plaintiffs filed suit the same day the Enacted Plan was signed into law.

On April 22, the same day that Governor DeSantis signed the Enacted Plan into law, Plaintiffs filed suit, alleging the plan violated the Florida Constitution. App. 7. Plaintiffs include Black Voters Matter, the League of Women Voters of Florida, Equal Ground Education Fund, and Florida Rising Together, along with many individual Florida voters, some of whom reside in Benchmark CD-5. App. 15-16. Plaintiffs' complaint alleged multiple violations of the Florida Constitution, including that the Enacted Plan (1) was intended to favor the Republican Party, (2) was intended to diminish Black voting strength, and (3) resulted in diminishment of Black voting strength, all of which are violations of the Tier I standards in Article III, Section 20 of the Florida Constitution. App. 38-40. Plaintiffs also alleged multiple Tier II violations in the Enacted Plan. App. 41. Plaintiffs named the Secretary of State, the Attorney

General, the Florida House, the Florida Senate, and several individual members of the Florida House and Senate Redistricting Committees as Defendants. App. 17-18.[4]

B. Plaintiffs' temporary injunction motion was supported by extensive evidence.

Plaintiffs sought a temporary injunction against the Enacted Plan exclusively on the basis that the DeSantis Plan results in diminishment of Black voters' ability to elect their candidate of choice in North Florida in violation of Article III, Section 20(a) of the Florida Constitution. App. 45. In their request for temporary injunctive relief, Plaintiffs asked the trial court to enjoin the Secretary of State from administering the 2022 primary and general elections under a plan which diminished Black voters' ability to elect their candidate of choice in North Florida. App. 47. Plaintiffs also asked the trial court to expedite proceedings so that a lawful congressional plan could be in place in time for the 2022 congressional elections. *Id.*

Plaintiffs' motion was supported by extensive evidence, including an expert report from Dr. Stephen Ansolabehere of Harvard

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[4] The trial court has since dismissed the Attorney General as a named defendant.

University, who has deep experience in redistricting and in advising courts and commissions on redistricting plans. App. 76. In his first report, Dr. Ansolabehere conducted a functional analysis precisely as instructed by the Florida Supreme Court in *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 620 (Fla. 2012). Under the non-diminishment standard, "the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. The non-diminishment standard accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured." *Id.* at 624. And whether a minority group's voting power has been diminished is determined by a "functional analysis" of "whether a district is likely to perform for minority candidates of choice." *Id.* at 625.

Using this framework, Dr. Ansolabehere demonstrated that Black voters in North Florida were able to elect their candidate of choice ever since the Benchmark Plan was adopted in 2015. Dr. Ansolabehere found Black voters were the largest racial group of registered voters in Benchmark CD-5 and "account[ed] for 49.1

percent of the total population and 77.7 percent of the minority population in this district." App. 90. Black voters were also the largest group of voters in each Democratic primary election since 2015 and cast a plurality of votes in the 2016 and 2018 general elections. App. 90-91. Given the extraordinary political cohesion of Black voters in Benchmark CD-5, App. 91, Dr. Ansolabehere concluded that Black voters had the ability to elect their preferred candidates in that district—and, indeed, elected Black Democrat Al Lawson to Congress in 2016, 2018, and 2020. App. 92. None of this evidence was contested below.

Dr. Ansolabehere conducted the same functional analysis on the Enacted Plan and found that the Enacted Plan would diminish Black voters' ability to elect their candidate of choice. He found that the Enacted Plan divides the area and populations that comprise Benchmark CD-5 across newly enacted CD-2, CD-3, CD-4, and CD-5. App. 93. White voters comprise a supermajority of the voting age population and a majority of registered voters in all four of these districts. App. 93 ¶ 44. Among the precincts included in the new district configurations, white voters cast the majority of votes in the 2016, 2018, and 2020 general elections and primary elections. *Id.* In

all four of these districts, white voters cohesively voted for the candidates opposed to the Black-preferred candidates. *Id.* at 93-94 ¶ 48. In all four of these districts, the white-preferred candidates won the majority of votes cast in all eight of the general elections examined. *Id.* at 94. Accordingly, Dr. Ansolabehere found that under the Enacted Plan Black voters would not be able to elect their candidate of choice in North Florida. *Id.* at 95 ¶ 51. Again, none of this evidence was contested.

Plaintiffs also demonstrated that legislative leaders, conducting their own functional analysis of the Enacted Plan, corroborated Dr. Ansolabehere's conclusions. According to House Redistricting Chair Leek, legislative staff "did a functional analysis and confirm[ed] [that the new configuration of districts in North Florida] does not perform" for Black voters. Supp. App. (Vol. 5) 483 (Speaker 12 "will either district four or five perform for black candidates of choice."; Speaker 5: "Thank you, Mr. Speaker. No"). Indeed, at no point during the special session did legislative leaders assert that the Enacted Plan complied with the non-diminishment provision.

Plaintiffs' motion was also supported by an expert report from Dr. Sharon Austin, a political scientist and historian from the

University of Florida, who traced the history of the Black Floridians residing in the Benchmark CD-5 back to the state's long-history of slavery and racial discrimination. As Dr. Austin explained, many counties, cities, and towns that comprised Benchmark CD-5 were built around the cotton and tobacco trades of the state's past that relied on slavery and sharecropping during the 1800s and into the early decades of the 1900s. App. 142. Many of the Black Floridians in this part of North Florida, including many of the 360,000 who have been moved out of CD-5 under the Enacted Plan, are direct descendants of those who were forced to work on the cotton and tobacco plantations in this area. *Id.* And Black Floridians in North Florida, like Black voters throughout the state, have long had to confront discriminatory voting practices and schemes that eliminated their ability to elect representatives to Congress. *Id.*

Plaintiffs' motion was also supported by five current and former senior officials of supervisors of elections offices across the state who affirmed that their offices could implement a different congressional plan in time for the 2022 elections if the trial court found the Enacted Plan to be unconstitutional. Leon County Supervisor of Elections Mark Earley, one of the Supervisors who would be most affected by

redrawing CD-5, as well as his Deputy, Christopher Moore, both stated that their office could implement any remedial plan received by May 27, 2022. App. 196-68, 471-74. Counsel for the Supervisor of Elections of Orange County, who is responsible for a county with over 850,000 voters, swore to the same, App. 458-61. And the Polk County Supervisor of Elections Lori Edwards similarly testified by affidavit that her office could implement a remedial plan imposed by May 27. App. 467-69. Plaintiffs also submitted an affidavit by Representative Tracie Davis, former Deputy Supervisor of Elections for Duval County and 14-year veteran of the Duval County Supervisor's Office, who explained that the Duval Supervisor's Office is capable of managing districting schemes, is practiced in handling precinct splits in congressional plans, and should be able to implement a different remedial plan in time for the primary election as long as it is received by the end of May. App. 464-65.

Finally, in his rebuttal report Plaintiffs' expert Dr. Ansolabehere demonstrated that it would be possible to keep a district which preserved Black voters' ability to elect their candidates of choice while making very few changes to the Enacted Map, preparing possible remedial plans for the Court. Indeed, Dr. Ansolabehere showed that

the constitutional violation at issue could be remedied by simply inserting the Legislature's version of CD-5 from the Backup Map 8015 into the existing Enacted Map. *See* App. 429-30. This approach would adjust only five CDs from the Enacted Plan: CD-2, 3, 4, 5, and 6. App. 421. Dr. Ansolabehere also attempted to match the congressional lines with the new legislatively enacted State House districts wherever possible, thus reducing the number of new precincts that would be required under such a map. *See* App. 429.

C. The trial court considered all the evidence and held an evidentiary hearing on plaintiffs' motion.

Upon Plaintiffs' motion for a temporary injunction, Judge J. Layne Smith swiftly scheduled a hearing, taking care to read over "2,000 pages of materials" from the parties, including multiple expert reports, sworn affidavits, and pleadings. App. 682; App. 483, 8:11. At the temporary injunction hearing, the trial court heard extensive live testimony from Plaintiffs' expert Dr. Ansolabehere. App. 505-39. Dr. Ansolabehere explained his functional analysis of the Benchmark and Enacted Plans, how the Enacted Plan diminishes Black voters' ability to elect their candidate of choice in North Florida, and how such diminishment could be remedied by inserting into the Enacted

Plan the plan that the Legislature had originally passed as their "Backup Map." *Id.*

Even though the trial court explained to the parties that it would "give [them] the time [they] need [to present their evidence]," and that no one should "walk away thinking they couldn't be heard today," App. 555, the Secretary declined to call any witnesses, including the Secretary's own two experts, App. 554. Neither the Attorney General, nor the House, nor the Senate, nor any of the individual legislators offered any other witnesses or spoke in defense of the Enacted Map.

D. After considering all evidence, the trial court granted Plaintiffs' motion and ordered the state to use a plan that preserved Black voters' ability to elect their candidate of choice in North Florida.

After considering the evidence, the trial court concluded that Plaintiffs had "demonstrated the Enacted Plan will result in diminishment of Black voters' ability to elect their candidate of choice." App. 688. Upon review of Dr. Ansolabehere's functional analysis and live testimony, the trial court found his conclusions credible, App. 689, and "buttressed by analysis from the Florida Legislature's redistricting staff, which conducted its own functional analysis and found that Black voters would not have the ability to

elect their preferred candidates to Congress under the Enacted Map in this area," App. 691. Importantly, the trial court found that the Secretary "offer[ed] no credible contrary evidence; her experts neither performed a functional analysis nor contested Dr. Ansolabehere's findings." App. 691.

Next, the trial court held that the Secretary failed to establish that the non-diminishment standard violates the Equal Protection Clause of the United States Constitution. App. 692. Specifically, the trial court found after examining the legislative record that race did not predominate in the Legislature's configuration of CD-5 in Plan 8015 because several race-neutral factors supported the Legislature's proposal. App. 692.

Next, the trial court found that, "[e]ven if the Secretary could show that racial considerations predominated in the drawing of Plan 8015's CD-5, the record indicates that the Legislature's configuration of CD-5 is narrowly tailored to advance compelling state interests." App. 693. The trial court concluded that "compliance with the Fair Districts Amendment's non-diminishment provision is a compelling state interest," as was addressing "voting-related racial discrimination and a lack of representation in North Florida." App.

693-94. And it found that Plan 8015's CD-5 was narrowly tailored to address those compelling state interests. The trial court explained that "the Legislature, which conducted a functional analysis on their redistricting plans, 'had good reasons to believe that' Plan 8015's configuration of CD-5 'was necessary . . . to avoid diminishing the ability of black voters to elect their preferred candidates,'" App. 694 (quoting *Bethune-Hill v. Va. State Bd. of Elections,* 137 S. Ct. 788, 791 (2017), and that CD-5 was in a reasonable range of compactness. As the trial court summarized, "the record demonstrates that Plan 8015's CD-5 is more compact than other congressional districts in the United States from the last redistricting cycle that withstood federal racial gerrymandering claims, such as Texas's 35th Congressional District." App. 695. The trial court also found that "Plan 8015's CD-5 has a higher Polsby-Popper compactness score, indicating a higher degree of compactness, than 65 congressional districts in the United States." App. 695.

The trial court found that "absent injunctive relief, no other remedy exists under Florida law to remedy the harm Plaintiffs will suffer if the 2022 primary and general elections proceed under an unconstitutional districting plan," App. 695, and determined that

granting Plaintiffs' motion would serve the public interest. App. 697. It further rejected the Secretary's argument that it was too late to grant Plaintiffs relief, finding the Secretary's legal authorities inapposite and noting "Florida's primary, one of the latest in the nation, is set for August 23, nearly four months away." App. 698. The trial court also found that a plan that preserved Black voters' ability to elect their candidate of choice in North Florida would be practicable for Florida's supervisors to implement, as it would "affect just a handful of counties and can be implemented quickly and without significant administrative difficulties." App. 699. Indeed, the remedial map was drawn with the specific goal of reducing burdens on election administrators "by following the boundaries of the recently enacted Florida State House map to the greatest extent possible and by minimizing the number of additional precinct splits." App. 700. As the trial court concluded, "[t]he remedial plan the Court adopts requires narrow changes to a plan already passed by the Legislature, prior to being vetoed. It is not in the public's interest to deny the Plaintiffs' relief." *Id.*

E. After holding an additional hearing, the trial court lifted the automatic stay to preserve Black voters' ability to elect their candidate of choice.

The Secretary subsequently filed a Notice of Appeal, triggering an automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2). Plaintiffs filed an emergency motion to vacate the automatic stay the following day. App. 728. While the trial court was available to hear Plaintiffs' motion that same day, the Secretary requested three additional days to file an opposition and prepare for the hearing, which the trial court granted.

The trial court ultimately granted Plaintiffs' motion following a hearing on May 16, 2022. The court explained that keeping the automatic stay in place would ensure that "Plaintiffs and other voters in Florida . . . will lack any remedy whatsoever if the Appellate process strings out long enough." Supp. App. (Vol. 5) 601–02 at 45:24–46:2. Vacatur of the automatic stay would allow employees of "the supervisors of elections and supervisors themselves [to] game plan for both contingencies," ensuring that Florida could administer whichever plan emerges from this appeal. Supp App. (Vol. 5) 602 at 46:4-7. Pursuant to the court's instruction, on May 17, the Secretary instructed Florida's supervisors of elections "to the extent that it is possible, to proceed on two fronts and plan to implement both maps." Supp. App. (Vol. 5) 637. Since that instruction, Florida's supervisors

have begun implementing the remedial plan. As St. Johns' Supervisor Vicky Oakes explained, implementation of the remedial plan has not been too complicated: "Fortunately for us, even under the remedial plan, it happens to follow a lot of our new district lines in terms of precincts."[5] Similarly, "Duval is still preparing new precincts for approval by the Jacksonville City Council, and chief elections officer Robert Phillips said that the office was preparing for either map."[6]

STANDARD OF REVIEW

Under Florida Rule of Appellate Procedure 9.310(b)(2), "[t]he timely filing of a notice shall automatically operate as a stay pending review . . . when the state, [or] any public officer in an official capacity. . . seeks review." *Id.* § 9.310(b)(2). Nevertheless, the maintenance of that stay is not a given: Rule 9.310(b)(2) provides that "[o]n motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay." *Id.* The trial court

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[5] Andrew Pantazi, Florida redistricting lawsuit: State preparing for both court-ordered and DeSantis signed maps (May 19, 2022), available at: https://jaxtrib.org/2022/05/18/florida-redistricting-lawsuit-state-preparing-for-both-court-ordered-and-desantis-signed-maps/.
[6] *Id.*

enjoys "broad discretion" in determining whether to vacate the automatic stay and must take into account the government's likelihood of success on appeal and the likelihood of irreparable harm if the automatic stay remains in effect. *City of Sarasota v. AFSCME Council '79*, 563 So. 2d 830, 830 (Fla. 1st DCA 1990); *see also Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005).

This Court reviews a trial court's decision to vacate an automatic stay for abuse of discretion. *See Fla. Dep't of Health v. People United for Medical Marijuana*, 250 So. 3d 825, 829 (Fla. 1st DCA 2018). In applying this standard, this Court "should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268, 275 (Fla. 2018) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)). At bottom, "[t]he discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness." *Id.*; *see also Smith v. Sears, Roebuck & Co.*, 681 So. 2d 871, 871 (Fla. 1st DCA 1996) (explaining "[i]t is the function of the

trial court, not the appellate court . . . to evaluate and weigh the . . . evidence" and render such findings).

ARGUMENT

I. The trial court's injunction preserves the status quo by ensuring Black voters in North Florida continue to have the opportunity to elect their candidate of choice while the Governor's novel legal theory is litigated.

In its May 18 Order, this Court instructed Appellees to (1) identify the status quo in this case, and (2) address whether the temporary injunction preserved the status quo. Plaintiffs do so here before addressing the merits of the Secretary's motion.

The status quo in this case—the "last actual, peaceable, noncontested condition which preceded the pending controversy"—is a map under which Black voters in North Florida have the ability to elect their candidate of choice. *Bowling v. Nat'l Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931). In every general election since 2016, Florida voters have voted under a congressional plan in which Black voters were able to elect their candidate of choice in CD-5. App. 92 ¶ 39. And indeed, even before 2016, Black voters in North Florida had the ability to elect their candidate of choice in the district that preceded the Benchmark CD-5. *LWV I*, 172 So. 3d at 403-04.

Florida voters were not the only ones who had come to rely on that status quo. Throughout the redistricting process, both the Senate and the House recognized the non-diminishment standard as the governing law and their concomitant obligation to uphold that standard in developing a new congressional plan. *See supra* pp. 6-7. The Florida Supreme Court not only established the law of the land in 2015 in applying the non-diminishment provision to CD-5 in *LWV I* it refused to indulge the Governor's effort to alter that settled precedent earlier this year, *Advisory Op. to Gov.*, 333 So. 3d 1106, 1108 (Fla. Feb. 10, 2022), and demonstrated its commitment to upholding and enforcing the governing law in approving the Senate and House maps under the Florida Constitution's facial review procedure, *See In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d at 190-91. In fact, even the Secretary did not contest that Florida law as it currently stands prohibits the dismantling of CD-5. Mot. 7.

The Governor's signature of the Enacted Plan attempted to upend that status quo. After the Florida Supreme Court declined the Governor's request to issue an advisory opinion authorizing the destruction of CD-5, the Governor unilaterally concluded that the Fair Districts Amendment was unconstitutional, drew his own map,

and forced it through the Legislature under a legal theory that even supporters of his plan admitted was a novel one. *See* Supp. App. (Vol. 5) 478–79, 482–83 (transcript of April 20, 2022 Florida Senate special session proceedings). Indeed, the Governor's theory relies upon the Florida Supreme Court breaking new ground and finding its own state constitution *unconstitutional.* The State's enactment of this plan disrupted the "last actual, peaceable, noncontested condition which preceded the pending controversy," *Bowling*, 135 So. at 544, and caused the controversy that led to the temporary injunction.

Contrary to the Secretary's suggestion, the enactment of a new congressional plan obliterating CD-5—under which no election has taken place—is hardly sufficient to change the status quo in the context of a temporary injunction, particularly where that literal change in circumstances itself prompts the pending controversy. In *Lieberman v. Marshall*, 236 So. 2d 120 (Fla. 1970), for example, the Florida Supreme Court affirmed a temporary injunction that had been issued to restore the peace at a university "after the [student] occupation and rally already had begun." *Id.* at 124 (citing *Bowling*, 135 So. at 544). As the Court explained, "the pending controversy which appellee sought to avoid was the defiant and disruptive

occupation of the Florida Room, and the status quo sought to be preserved was, as it should have been, the last, peaceable, uncontested condition preceding such confrontation and occupation." *Id.* at 126.

More recently, the Third District Court of Appeal confirmed that a temporary injunction was appropriate to preserve landowners' *preexisting rights* that had been purportedly eliminated by new legislation repealing those rights, thus affirming the district court's temporary injunction restraining the city from enforcing the new ordinance, which had already taken effect. *See City of Miami Beach v. Clevelander Ocean, L.P.,* No. 3D21-1345, 2022 WL 610218 (Fla. 3d DCA 2022). Similarly here, it is not the injunction that has altered the status quo—it is the new legislation itself. And because that new legislation disrupted the "last actual, peaceable, noncontested condition which preceded the pending controversy," *Bowling*, 135 So. at 544, the injunction is needed to preserve Plaintiffs' preexisting rights.

The Florida Supreme Court's decision in *Bowling*, which this Court cited in its order directing a response to the instant motion, also makes clear that it would be manifestly unjust to permit a

defendant to escape a temporary injunction where an actor otherwise uses the change in circumstances to attempt to shield themselves from judicial scrutiny:

> [T]he status quo which will be preserved by preliminary injunction is meant the last actual, peaceable, noncontested condition which preceded the pending controversy, and *equity will not permit a wrongdoer to shelter himself behind a suddenly and secretly changed status, although he succeeded in making the change before the hand of the chancellor has actually reached him.*

Bowling, 135 So. at 544 (emphasis added). This is precisely what the Governor did in strongarming the Enacted Plan into law. The trial court's temporary injunction, by contrast, preserves a congressional plan where Black voters in North Florida can elect their candidate of choice, just as they have been doing for the past 30 years, while this litigation proceeds.

As the trial court explained in vacating the automatic stay, "if the answer is nobody can ever do anything about the first election following a decennial census, even if it turns out later on something's unconstitutional, that isn't a very good message to the people." Supp. App. (Vol. 5) 597 at 41:6-11. Appellees would go even further than the trial court: If a court cannot do anything about a facially unconstitutional redistricting plan before that plan takes effect, it not

only undermines public trust in our elections, but also *incentivizes* state actors to ignore constitutional limitations when doing so would bolster their election chances. But the Florida Supreme Court has made clear that "[i]t is [the judiciary's] duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid." *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 607 (Fla. 2012). There is no "one free unconstitutional election" exception to this duty.

II. The trial court did not abuse its discretion in determining that compelling circumstances warrant vacatur of the automatic stay.

The trial court's decision to vacate the automatic stay unquestionably satisfies the "reasonableness test" and thus comes nowhere close to a reversible abuse of discretion. The Secretary has a fleeting chance of success on appeal because his position is foreclosed by controlling precedent of the Florida Supreme Court. And even if that were not so, the decision to vacate the automatic stay is eminently reasonable because it allows Florida's supervisors of elections to prepare to implement both the Enacted Plan and the remedial Plan—ensuring that the State can administer the upcoming

2022 election under whichever plan emerges from this appellate process. Vacatur of the automatic stay therefore guards against the irreparable injury to Florida voters that would result if the State is forced to administer the upcoming election under a map deemed unconstitutional by this Court (or the Florida Supreme Court) due to insufficient time to implement a remedy.

A. The Secretary is unlikely to succeed on appeal, given binding legal precedent and the trial court's well-supported factual findings.

The Secretary's arguments on the merits of this appeal are foreclosed by settled law and by the trial court's well-supported factual findings.

1. The Enacted Plan violates the Florida Constitution.

The Secretary does not dispute—at *any* point in his 53-page brief—that the Enacted Plan violates the Florida Constitution's non-diminishment standard by eliminating the ability of Black voters in North Florida to elect candidates of their choice. Nor could he. The Florida Supreme Court has held that, under the Fair Districts Amendment, "the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts

where doing so would actually diminish a minority group's ability to elect its preferred candidates." *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d at 625. The protection of racial and language minorities is a Tier I standard, "meaning that the voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process." *Id.* at 615. The Florida Supreme Court held during the last redistricting cycle that an "East-West" version of CD-5 was consistent with the Fair Districts Amendment's non-diminishment standard. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) (*LWV II")*.

The t"ial "ourt's determination th"t the Enacted Plan violated the non-diminishment standard was based not only on legal conclusions, but on factual determinations that cannot be disturbed absent a showing of clear abuse of discretion. *See Gold Coast Chem. Corp. v. Goldberg*, 668 So. 2d 326, 327 (Fla. 4th DCA 1996). The Secretary has not, and cannot, demonstrate that he is likely to establish that either the trial court's legal or factual findings were in error.

2. The Secretary has failed to show that application of Florida's non-diminishment standard violates the U.S. Constitution.

The Secretary makes the remarkable claim that "any attempt" to comply with the Fair Districts Amendment's non-diminishment provision in North Florida will violate the Fourteenth Amendment of the U.S. Constitution. Mot. at 27. This argument lacks legal basis and perverts the meaning and operation of state and federal protections against racial discrimination.

Despite having the opportunity to do so, no state or federal court has ever suggested that the Fair Districts Amendment's non-diminishment provision violates the Fourteenth Amendment. The U.S. Supreme Court did not raise any such concern when it cited the Fair Districts Amendment as an exemplar of "[p]rovisions in state statutes and state constitutions [that] can provide standards and guidance for state courts to apply" to ensure that "complaints about districting" are not "condemn[ed] . . . to echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Nor did the Florida Supreme Court find any conflict between the Fourteenth Amendment and the Fair Districts Amendment's non-diminishment provision when it ordered the imposition of the Benchmark CD-5 in 2015, which, notably, was issued *after* the U.S. Supreme Court held unconstitutional Section 4(b) of the VRA, *see LWV II*, 179 So. 3d 258;

when it approved state legislative districts that were drawn to comply with the Fair Districts Amendment's non-diminishment provision a few months ago, *see In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282 (Fla. 2022); or when Governor DeSantis asked for an advisory opinion on this very question, *see Advisory Op. to Gov.*, 333 So. 3d 1106 (Fla. Feb. 10, 2022). This Court should decline the Secretary's novel and unsupported attempt to eviscerate standards duly enacted by the people of Florida to remedy past voting-related discrimination and to prevent against future such discrimination.

Electoral districting violates the Fourteenth Amendment only if "(1) race is the 'dominant and controlling' or 'predominant' consideration in deciding to 'place a significant number of voters within or without a particular district,' and (2) the use of race is not 'narrowly tailored to serve a compelling state interest.'" *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 160-61 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995) and *Shaw v. Hunt*, 517 U.S. 899, 902 (1996)).

A trial court's "assessment of a districting plan . . . warrants significant deference on appeal." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). The trial court's "findings of fact – most notably, as to

whether racial considerations predominated in drawing district lines--- are subject to review only for clear error." *Id.* at 1465 (citations omitted). "Under that standard, [an appellate court] may not reverse just because [it] 'would have decided the matter differently.'" *Id.* (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "A finding that is 'plausible' in light of the full record – even if another is equally or more so—must govern." *Id.* (quoting *Anderson*, 470 U.S. at 574).

a. Predominance

The Secretary argued below that remedying a violation of the Fair Districts Amendment's non-diminishment provision by adopting a district closely based on the Benchmark Map's CD-5, such as Plan 8015's CD-5, would violate the Fourteenth Amendment. But the trial court correctly found that the Secretary did "not establish[] that race was the predominant factor, rather than one of several factors, in the drawing of 8015's CD-5." App. 691. This Court should uphold this finding, which is more than "'plausible' in light of the full record." *Cooper*, 137 S. Ct. at 1465 (quoting *Anderson*, 470 U.S. at 574).

As an initial matter, the Secretary unquestionably bore the burden of proving before the trial court that race-based

considerations predominated in the drawing of Plan 8015's CD-5. This requirement was not "added" by the trial court, as the Secretary claims, *see* Mot. at 21, but rather is clearly established by U.S. Supreme Court precedent, *see Bethune-Hill*, 137 S. Ct. at 797 (explaining that the party "alleging racial gerrymandering bears the burden" to prove predominance). The U.S. Supreme Court has warned that courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," given the "presumption of good faith that must be accorded legislative enactments" and the "distinction between being aware of racial considerations and being motivated by them." *Miller*, 515 U.S. at 916.

As the trial court correctly concluded, the Secretary did not establish that race was the predominant factor in the Legislature's drawing of Plan 8015's CD-5. *See* App. 692. That's because "the Legislature drew 8015 to comply with the Florida Supreme Court's prior rulings regarding CD-5," App. 692 (citing *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015)), and as the U.S. Supreme Court has held, a desire to avoid litigation is specifically one of the race-neutral reasons that may motivate a

legislature to adopt a plan. *See Abbott v. Perez*, 138 S. Ct. 2305, 2327 (2018) (finding race did not predominate where the Legislature chose a plan which would "bring the litigation about the State's redistricting plans to an end as expeditiously as possible").

The Legislature's effort to avoid litigation by hewing closely to Benchmark CD-5 is overwhelmingly supported by the record. Dr. Ansolabehere testified that "Plan 8015's CD-5 closely followed the newly enacted State House legislative district lines," which "is another reason that could have informed the Legislature's decision to draw a plan like Plan 8015." App. 693. The Secretary himself concedes that "Plan 8015's Congressional District 5 largely mirrored the existing Congressional District 5, as revised by the [Florida Supreme Court] in 2015." Mot. at 8. And the Legislature made only minimal changes between the Benchmark CD-5 and Plan 8015's CD-5, altering just those lines necessary to account for population changes, consistent with the "legitimate state objective" of "preserving the cores of prior districts." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 764 (2012) ("The desire to minimize population shifts between districts is clearly a valid, neutral state policy."). This Court must

defer to the trial court's factual finding that racial considerations did not predominate in the Legislature's drawing of Plan 8015's CD-5.

The Secretary's counterarguments have no merit. First, the Secretary claims that the tiered structure of the Fair Districts Amendment proves that race predominated in the Legislature's drawing of Plan 8015. *See* Mot. at 28-29. But the Fair Districts Amendment lists multiple factors within each tier. *Compare* Article III, Section 20(a), *with id.* § 20(b). Furthermore, the Amendment explicitly provides that no consideration necessarily prevails over another within a tier. *See id.* § 20(c) ("The order in which the standards within [Tier 1] and [Tier 2] are set forth shall not be read to establish any priority of one standard over the other within that [tier]."). As the trial court found, the Legislature sought to comply with the Fair Districts Amendment in enacting Plan 8015's CD-5. App. 692. The Secretary has provided no indication that the Legislature's efforts to comply with the non-diminishment provision dominated over the other factors listed in Tier 1 such as the contiguity requirement or the prohibition on drawing a plan or district with the intent to favor or disfavor a political party or incumbent.

Second, the Secretary claims that the Florida Supreme Court "created [CD-5] by prioritizing race." Mot. at 35 (emphasis omitted). To the contrary, the Florida Supreme Court created CD-5 to address the Legislature's violations of the Fair Districts Amendment's provisions related to partisan intent. *See League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271-273 (Fla. 2015). The Secretary has not established that racial considerations predominated in the drawing of the district.

b. Compelling Interests

The trial court's factual finding that race did not predominate in the drawing of Plan 8015's CD-5 is sufficient to reject the Secretary's Fourteenth Amendment argument. But this Court may do so on the additional ground that the Legislature's configuration of Plan 8015's CD-5 was narrowly tailored to advance compelling state interests. App. 692-695. The trial court explained that "compliance with the Fair Districts Amendment's non-diminishment provision" and "addressing the history of voting-related racial discrimination and . . . lack of representation in North Florida" constitute compelling state interests. App. 693-694. The trial court acted well within its discretion in reaching that conclusion.

Compliance with the Fair Districts Amendment's non-diminishment provision constitutes a compelling state interest. App. 693. Like Section 5 of the federal VRA, the Fair Districts Amendment's non-diminishment provision "aims at safeguarding the voting strength of minority groups against . . . retrogression." *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d at 620; *see also id.* at 619 (explaining that the Fair Districts Amendment's non-diminishment provision is independent from the VRA but "follow[s] almost verbatim the requirements embodied in the [Federal] Voting Rights Act").

Like other provisions of the Fair Districts Amendment, the non-diminishment provision was adopted to prevent the intentional and effective discrimination against minority voters in the state. *See id.* at 620. Florida voters who overwhelmingly supported the amendment believed that such provisions were necessary to ensure the state's redistricting processes remain free from the dilution of minority electoral power. *See id.* As the Supreme Court has long presumed with respect to compliance with the VRA's mirror provision, such considerations constitute a compelling state interest. *See, e.g., Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) ("We

have assumed that complying with the VRA is a compelling interest."); *Abbott*, 138 S. Ct. at 2315; *Bethune-Hill*, 137 S. Ct. at 801 ("[T]he Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling."). The trial court correctly followed suit, concluding that "[g]iven the substantive similarity between Section 5 of the VRA and the Fair Districts Amendment's non-diminishment provision, compliance with the latter likewise constitutes a compelling state interest." App. 693.

Remedying the history of voting-related discrimination in North Florida also constitutes a compelling interest sufficient to justify application of the non-diminishment provision in North Florida. The trial court credited Plaintiffs' evidence that, "for much of Florida's history, Black voters in the state have been unable to participate equally in the electoral process, with Black residents of North Florida experiencing particularly severe burdens in access to the franchise." App. 694. It described the State's "centuries-long policy of disenfranchisement that made it impossible for Black voters to even register to vote." *Id.* (citing App. 148-150). As a result, "[b]etween 1876 and 1992, Florida did not elect a single Black candidate to Congress." App. 685 (citing App. 149). The trial court highlighted that

the "lack of political representation was the result of redistricting practices that split the state's Black population into districts where their voters would be drowned out by overwhelming White majorities." App. 694 (citing App. 152). In other words, Florida's redistricting practices specifically led to the diminishment of minority voters' ability to elect their representatives of choice.

As to North Florida specifically, the trial court found that "Benchmark CD-5 united historic Black communities in North Florida that pre-date the Civil War and arose from the slave and sharecropping communities that worked the state's cotton and tobacco plantations." App. 685 (citing App. 147). Voting-related racial discrimination was particularly pronounced in North Florida: for example, according to the federal Civil Rights Commission, of the 10,930 Black adults living in Gadsden County in 1958, only *seven* were registered to vote." *Id.* (citing App. 150). Political discrimination and oppression were felt in every county with a large Black population in North Florida. *Id.* (citing App. 151).

These factual determinations, which cannot be disturbed absent a showing of clear abuse of discretion, *see Gold Coast Chem. Corp.*, 668 So. 2d at 327, provide a "strong basis in evidence" to

conclude that application of the Fair Districts Amendment's non-diminishment provision is necessary to address "identified discrimination" that resulted in a lack of political representation for racial minorities in North Florida. *See Shaw*, 517 U.S. at 909-910 (explaining that a state "may take remedial action when [it] possess[es] evidence of past or present discrimination"). Accordingly, the Secretary is wrong to claim that the record is insufficient to find that the non-diminishment provision is justified by compelling interests. *See* Mot. at 41-42.

The Secretary's arguments to the contrary lack merit. First, the Secretary argues that this Court "must wait for the U.S. Supreme Court" to decide *Merrill v. Milligan*, a pending case regarding the VRA, before adjudicating this appeal. *See* Mot. at 37. Setting aside the fact that *Merrill* implicates Section 2 of the VRA, rather than Section 5, this Court is bound by the Supreme Court's existing precedent that presumes VRA compliance is a compelling state interest and may not accept the Secretary's invitation to speculate about what the Supreme Court might decide in the future. *See Agostini v. Felton*, 521 U.S. 203 (1997) ("Lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own

decisions."); *see also Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) ("Th[is] stay order does not make or signal any change to voting rights law."). But more to the point, the constitutionality of the non-diminishment provision does not rise or fall with Section 5. Indeed, compliance with Florida's non-diminishment provision constitutes a compelling state interest not because the provision is identical to Section 5 of the VRA but because it reflects the state's effort to protect minority voters against the diminishment of their ability to elect candidates of their choice, a purpose that the U.S. Supreme Court has long presumed constitutes a compelling interest.

Second, the Secretary claims "the justifications undergirding the" Supreme Court's presumption "do not apply to a State replicant of the VRA." Mot. at 38. But this is a red herring. The non-diminishment provision, as a creature of state law meant to address state interests, does not need to be justified on the same grounds as the federal VRA. Indeed, the VRA, unlike the Fair Districts Amendment, raised questions concerning federal encroachment on state power that required careful contemplation of Congress's purpose. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 549 (2013).

Florida, by contrast, is free to decide for itself, without regard to such federalism concerns, whether safeguards are needed to defend protected classes from unconstitutional discrimination in redistricting.

Third, the Secretary makes the surprising claim that compliance with the state law does not constitute a compelling state interest. *See* Mot. at 39. But the trial court did not conclude that compliance with *any* state law constitutes a compelling interest; rather, it found that compliance with the Florida Constitution's non-diminishment provision constitutes a compelling interest because of that provision's purpose of safeguarding against discrimination, substantive similarity to the federal VRA, and the history of voting-related discrimination in North Florida, described further below.

Fourth, the Secretary claims the Fair District Amendment's non-diminishment provision "exceeds section 5 of the VRA" because the former applies to all of Florida, whereas the latter currently does not apply to any areas in Florida and previously applied to only five counties. Mot. at 39-40. In reality, Florida's non-diminishment provision is less intrusive than Section 5. Section 5 required certain jurisdictions to obtain preclearance from a federal court or the U.S.

Attorney General before adopting a redistricting plan. *See In Re S.J. Res. of Legis. Apportionment 1176*, 83 So.3d at 624. According to the U.S. Supreme Court, this incursion on state sovereignty raised federalism concerns that demanded especially compelling interests to justify. *See Shelby Cnty.*, 570 U.S. at 549. But the Florida Constitution's non-diminishment provision raises no similar concerns. It is Florida's prerogative to impose restrictions on its own redistricting processes, period. Moreover, the non-diminishment standard that Florida has adopted does not require the state (or any political subdivision) to apply for preclearance before adopting a plan. Compliance is enforced by the courts if and when a litigant challenges and then convinces a court that an enacted plan violates the state constitutional standards. Florida's non-diminishment provision is supported by compelling interests.

c. Narrow Tailoring

The trial court correctly concluded that "[Plan] 8015's CD-5 is narrowly tailored to address the[] compelling interests" of preventing future diminishment of minority voters' ability to elect their candidates of choice in North Florida and remedying historical voting-related discrimination in North Florida. App. 694.

As the trial court explained, the Legislature "had good reasons to believe" that Plan 8015's configuration of CD-5 "was necessary . . . to avoid diminishing the ability of black voters to elect their preferred candidates." *Bethune-Hill*, 137 S. Ct. at 791. The trial court cited "detailed testimony" from the legislative record demonstrating "that [Plan] 8015's configuration of CD-5 is necessary to" comply with Florida's non-diminishment provision. App. 694 (citing testimony from the Chair of the House Redistricting Committee and evidence of the Legislature's functional analysis of its redistricting plans). The Secretary does not quarrel with this conclusion. *See* Mot. at 43-44. "This strong showing of a pre-enactment analysis with justifiable conclusions" demonstrates narrow tailoring to a compelling state interest in the VRA context, *see Wis. Legis.*, 142 S. Ct. at 1249 (citing *Abbott*, 138 S. Ct. at 2325), and likewise does the same in the context of Florida's non-diminishment provision.

Furthermore, application of Florida's non-diminishment provision to North Florida produces a configuration of CD-5 that is well within the bounds of traditional redistricting criteria. The Florida Supreme Court has already found that Benchmark CD-5, upon which Plan 8015's CD-5 is based, meets the traditional redistricting

criteria enumerated in the Fair Districts Amendment and is therefore sufficiently compact to withstand constitutional scrutiny. *See LWV I*, 172 So. 3d at 405-406 (rejecting the "contention that an East-West" CD-5 caused the congressional plan "to become significantly less compact" and noting that "the numerical compactness scores actually favor the East-West orientation"); *LWV II,* 179 So. 3d at 271-73 . The Secretary complains that CD-5 has a lower compactness score than other districts in the state, *see* Mot. at 9, but this merely reflects the physical geography of the state's panhandle. *See* App. 618-619 (crediting testimony by Dr. Ansolabehere regarding the limited value of comparing the compactness of districts in states shaped like "a box or a square" such as Arizona, Wyoming or Colorado, with the compactness scores of districts in Florida, which has "panhandles," "coasts," "rivers," and other "geographical . . . constrictions"). Indeed, the state's congressional map included a district that extended along the top of the state's panhandle from 2002 to 2012, long before the state enacted the Fair Districts Amendment. App. 434. Plan 8015's CD-5 is unremarkable even at a national level: the trial court found that "Plan's 8015 CD-5 has a higher Polsby-Popper compactness score, indicating a higher degree

of compactness, than 65 congressional districts in the United States." App. 695; *see also* App. 434. And "Plan 8015's CD-5 is more compact than other congressional districts in the United States from the last redistricting cycle that withstood federal racial gerrymandering claims, such as Texas's 35th Congressional District." App. 695; *see also* App. 435.[7]

3. A finding that CD-5 is likely unconstitutional would have significant collateral effects.

This Court's finding or suggestion that Plan 8015's CD-5 is inconsistent with the Equal Protection Clause would have grave legal consequences, even apart from its significant consequences on the voters of the district.

First, such a conclusion would suggest that the Florida Supreme Court itself violated the U.S. Constitution when it adopted Benchmark CD-5. That would, in all respects, be an unusual conclusion for an intermediate court to reach about its superior court.

[7] The Secretary's complaint that Plan 8015's CD-5 has a greater length than TX-35, *see* Mot. at 44, is a distraction. CD-5 outperforms TX-35 on compactness, which unlike length is codified in the Fair Districts Amendment and is a traditional redistricting criterion.

Second, such a conclusion could throw the validity of the state's legislative plans into doubt. In passing its State House and Senate Plans, the Legislature determined that 30 House Districts and 10 Senate Districts were protected from diminishment under the Fair Districts Amendment.[8] The Secretary's claim that compliance with Florida's non-diminishment standard violates the Fourteenth Amendment contradicts not only the Florida Senate and House's representations regarding this cycle's state legislative district plans, but also the Florida Supreme Court's approval of those plans on that basis. Similarly, the Legislature determined that eight additional congressional districts beyond Plan 8015's CD-5, many of them Republican-leaning Hispanic-performing districts, were protected from diminishment under the Fair Districts Amendments. There is

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[8] *See* Br. of the Fla. House of Reps. at 7, *In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282 (Fla. Feb. 19, 2022), https://redistricting.lls.edu/wp-content/uploads/FL-in-re-jr-leg-appt-20220219-house-brief.pdf; Br. of the Fla. Senate Supporting the Validity of the Apportionment at 36-27, *In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282 (Fla. Feb. 19, 2022), https://redistricting.lls.edu/wp-content/uploads/FL-in-re-jr-leg-appt-20220219-senate-brief.pdf. Notably, now-Secretary Byrd, formerly Representative Byrd, chaired the House Legislative Redistricting Committee which helped create those districts and determined they merited protection from diminishment under the Florida Constitution.

no reason that a district like Enacted CD-26 (R-Diaz-Balart), which connects disparate Hispanic populations and spans South Florida, is constitutional under the non-diminishment standard if Plan 8015's CD-5 is not.

B. The equities overwhelmingly favor vacatur of the automatic stay.

1. Vacating the stay is the most administratively sensible approach.

The state's election administrators are already implementing the remedial plan. After the trial court vacated the automatic stay, the Secretary asked the state's election administrators to "proceed on two fronts and plan to implement both" the remedial plan and the Enacted Plan. Supp. App. (Vol. 5) 636-37 (emphasis in original). That makes good sense: Allowing the state's election officials to prepare both plans now will ease the state's implementation of the final plan while this exceedingly important case is resolved through the appellate process. Reinstating the stay, therefore, would disrupt rather than facilitate the sensible administration of the state's elections. But that is precisely what the Secretary seeks in this appeal. Citing the U.S. Supreme Court's decision in *Purcell*, the Secretary argues that a stay should be reinstated because it is

already too late to grant Plaintiffs relief for the 2022 elections. That position is contrary to the law, the equities, and the facts.

As the trial court found, "*Purcell* is a creature of the *federal* courts, where it was created as a means of restraining federal interference in the administration of state elections on the eve of an election, as demonstrated by all of the federal precedent the Secretary cites in support of the principle. It has no bearing on state courts." App. 697. New York's highest state court recently concurred, explaining that *Purcell* "does not limit state judicial authority where, as here, a state court must intervene to remedy violations of the State Constitution." *Harkenrider v. Hochul*, 2022 NY Slip Op. 02833, at 28 n.16 (N.Y. Apr. 27, 2022).

The Secretary's citation to cases from four states applying a *Purcell*-like principle only proves the point. The courts in each of those cases applied *state principles* and in circumstances significantly more disruptive to elections than the one presented here. *See In re Khanoyan*, 637 S.W.3d 762, 764-65 (Tex. 2022) (following "[its] settled precedents that" "sharply limit judicial authority to intervene in ongoing elections"); *Liddy v. Lamone*, 919 A.2d 1276, 1287-89 (Md. 2007) (considering whether the state's

laches doctrine applied to a case heard *5 days* before the general election); *Moore v. Lee*, 2022 WL 1101833, at *6 (Tenn. Apr. 13, 2022) (observing that "[t]his Court similarly has shown restraint when asked to enjoin the effectiveness of constitutionally suspect reapportionment plans" close to an election and vacating injunction of senate plan issued one day before the candidate filing deadline); *Chi. Bar Ass'n v. White*, 898 N.E.2d 1101, 1107-08 (Ill. App. Ct. 2008) (relying on state precedent in an appeal heard less than a month before the general election).

Perhaps recognizing as much, the Secretary cites two cases ostensibly for the proposition that the Florida courts have developed their own *Purcell* principle. But, as the trial court found, "[n]either apply here." App. 698. In *State ex rel. Haft v. Adams*, 238 So. 2d 843 (Fla. 1970), the Florida Supreme Court declined to grant a writ of mandamus to prohibit the Secretary from placing certain candidates' names on the ballot, *just three week*s before the primary election, where a candidate, who was seeking to force others off the ballot, had discovered an alleged error weeks earlier and waited to file his suit to "belatedly take advantage" of the situation so that no other candidate could have gained access to the ballot by the time his suit was heard.

See 238 So. 2d at 845. Under those specific circumstances, the Court denied relief; it did not set a bright-line rule that injunctions near elections are disfavored. And in the only other case that the Secretary cites, *State ex rel. Walker v. Best,* 163 So. 696, 697 (Fla. 1935), the Florida Supreme Court refused to order a town clerk to publish a new amendment to the town charter *15 days* before the election, based not on a *Purcell*-like standard, but on the town's charter, which required such amendments to be published not less than 25 days before. Both Plaintiffs and the trial court explained the irrelevance of these cases below. The Secretary had no response then and has no response now. *See* Br. at 45-50.

In any event, these cases are inapposite for the additional reason that we are not days or weeks from an election. Florida's primary, on August 23, is one of the latest in the nation. App. 698. "This is therefore not the typical eve-of-election case in which judicial relief may disrupt an election, and instead more resembles the many other cases in which state courts have enjoined redistricting plans in the months before an election." *Id.*; *see also Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (invalidating plan on February 14, 2022, about three months before North Carolina's May 17 primary

elections); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (invalidating plan on February 7, 2018, about three months prior to Pennsylvania's May 15 primary elections; plan ordered on February 23); *Wis. Legis.*, 142 S. Ct. 1245 (2022) (remanding to state supreme court on March 23 for further proceedings to select a redistricting plan, ahead of August 9 primary elections).

The Secretary argues that the "only rationale the trial court offered for . . . ignoring *Purcell* was that it was a federal court doctrine." Br. at 49. But that's not true—the trial court also rejected the Secretary's argument on its own merits. The trial court found that even if *Purcell* did apply to state courts, there is enough time to implement a remedial plan without confusing the state's election administration. That's because the remedial plan "will affect just a handful of counties" and therefore will have "minimal impacts on the Enacted Plan" and "can be implemented quickly and without significant administrative difficulties." App. 698-99. As the Secretary's email to the state's administrators suggest, the remedial plan is simple enough to implement that their offices can implement two plans at the same time.

In response, the Secretary provides three affidavits—only two from county election administrator offices—that stand for the proposition that implementation of the remedial plan would create administrative inconvenience. But for one thing, the administrators are *already* implementing the remedial plan. Supp. App. (Vol. 5) 636-37. For another, the burdens those affidavits identify—e.g., rescheduling meetings and expending additional funds—show not impossibility but mere inconvenience, and inconvenience is insufficient to overcome Plaintiffs' overwhelming interest in obtaining relief for their constitutional injuries. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (finding that "administrative convenience" is not a sufficient reason to uphold unconstitutional law). As the trial court found, while "its order may cause inconvenience, hard work, and expense" those minor issues "do not outweigh Plaintiffs' rights." App. 698; *see also* Supp. App. (Vol. 5) 606 at 50:8-13.

More still, the Secretary's position is rebutted by affidavits from five current and former senior officials of supervisors of elections offices across the state who show their offices *can* implement a remedial plan in time for the 2022 elections. *See* Affidavit of Mark Earley, Leon County Supervisor of Elections, App. 196-98 (office can

implement any remedial plan received by May 27, 2022); Affidavit of Christopher Moore, Deputy Leon County Supervisor of Elections, App. 471-74 (same); Affidavit of Nicholas Shannin, Counsel for the Supervisor of Elections of Orange County, App. 458-61 (same); Affidavit of Lori Edwards, Pole County Supervisor of Elections, App. 467-69 (same); Affidavit of Representative Tracie Davis, App. 463-65 (testified as 14 year veteran of the Duval County Supervisor's office that the office is well practiced in managing complicated districting schemes and should be capable of implementing a remedial plan if received by the end of May).

The trial court's vacatur of the automatic stay permits the state's election officials to prepare implementation of both the remedial and enacted plans while Plaintiffs' exceedingly important claims are fully adjudicated. Neither the law nor the equities nor the facts counsel in favor of disrupting this practical approach.

2. Florida voters will suffer irreparable injury if the stay is reinstated.

The trial court concluded in its "broad discretion," *City of Sarasota*, 563 So. 2d at 830, that "[a]llowing the automatic stay to remain in place would almost certainly result in irreparable harm to

Plaintiffs and Florida voters," because "[m]aintaining the stay and failing to quickly determine this case on the merits, will force Plaintiffs and many North Florida voters to cast their votes according to an unconstitutional congressional district map." Order Granting Emergency Motion Vacating Stay Pending Appeal at 3. The trial court is correct.

Under Florida law "a continuing constitutional violation, in and of itself, constitutes irreparable harm." *Bd. of Cnty. Comm'rs v. Home Builders Ass'n of W. Fla., Inc.*, 325 So. 3d 981, 985 (Fla. 1st DCA 2021) (upholding trial court's determination "that irreparable harm was presumed based on the existence of a constitutional violation"); *see also Gainesville Woman Care*, 210 So. 3d at 1263–64 (finding that law that violated constitution would lead to irreparable harm absent injunctive relief). Indeed, "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).[9]

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[9] In weighing whether an injury cannot be remedied at law and thus constitutes irreparable harm, the Florida Supreme Court has relied on precedent from federal courts. *See, e.g.*, *Gainesville Woman Care*, 210 So. 3d at 1263–64 (noting that U.S. Supreme Court and lower federal courts "have presumed irreparable harm when certain fundamental rights are violated").

That is because "once the election occurs, there can be no do-over and no redress" for voters whose rights were violated. *League of Women Voters of N.C.*, 769 F.3d at 247.

If Plaintiffs are forced to vote under the Enacted Plan, therefore, they will suffer irreparable harm. A stay would make that a near certainty. As the trial court found, a remedial plan must likely be implemented within the next few weeks to ensure that the 2022 congressional elections proceed under a lawful districting plan. Order at 18. But resolution of the Secretary's multiple appeals will make that deadline almost impossible to meet. As this Court recognized last redistricting cycle, appeals, and the briefing, argument, and judicial judgment they entail, would severely subtract, if not entirely run out, the time available to the State's election administrators to effect Plaintiffs' relief, no matter how quickly this Court or the Supreme Court acts. *See League of Women Voters v. Detzner*, 178 So. 3d 6, 8 (Fla. 1st DCA 2014) ("To allow the appellate process to take its full course through the completion of review by this court followed by possible en banc review, could potentially put the supreme court in the position of having to delay the remedy."). That is all the more likely here because the Secretary has neither moved

to expedite either of its appeals from the trial court's orders nor joined in Plaintiffs' motion to certify their appeal on the merits to the Florida Supreme Court.

The Secretary disputes none of this.[10] Accordingly, the grave constitutional injuries at stake in combination with Plaintiffs' waning window to access relief provide much more than "compelling circumstances" to justify the trial court's decision to vacate the automatic stay. *See Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1084 (Fla. 2d DCA 2005) (compelling circumstances justify vacatur where movant "would suffer definite, irreparable, and irremediable harm to his important constitutional interests" if "the stay were to remain in force during [the] appeal").

C. The trial court did not err in remedying the violation of the Florida Constitution.

The trial court "enjoin[ed] implementation of the Enacted Plan" as Plaintiffs requested and exercised its authority to order the Secretary to implement a remedial plan in recognition that Plaintiffs' constitutional injuries could only be effectively remedied if the state

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[10] The Secretary simply argues the unremarkable point that the Plaintiffs will not suffer irreparable harm if they lose on the merits. Br. at 52.

adopted a congressional plan in time for the 2022 elections. App. 683. In doing so, the trial court acted pursuant to well-settled United States and Florida Supreme Court precedent.

"[A] temporary mandatory injunction is proper where irreparable harm will otherwise result, the party has a clear legal right thereto, and such party has no adequate remedy at law." *Wilson v. Sandstrom*, 317 So. 2d 732, 736 (Fla. 1975). Critical to this inquiry is whether delaying "the remedy would necessarily involve a denial of the right." *Kellerman v. Chase & Co.*, 135 So. 127, 128 (Fla. 1931) . Applying this standard, the Florida Supreme Court has affirmed mandatory injunctions in cases involving a supply agreement for tomatoes and the procurement of greyhounds for dog racing, in the former noting that to find otherwise would constitute "a denial of the right" because "it is a matter of common knowledge that the tomato crop is . . . perishable," *Kellerman*, 135 So. at 128, and in the latter explaining that a mandatory injunction was necessary to protect "the public interest or rights" in dog racing and the state's revenue therefrom, *Wilson*, 317 So. 3d at 737.

Plaintiffs' right to a constitutionally valid congressional plan is at least as clear and at least as important as the rights associated

with procuring tomatoes and racing dogs. There is no question that the Enacted Plan violates the Florida Constitution, *see supra* Section I(A)(1) and without a mandatory injunction implementing a remedial plan Plaintiffs will suffer irreparable harm for which there is no adequate remedy at law by being forced to vote under an unconstitutional congressional plan in the 2022 elections, *see supra* Section II(B)(2); *see also Bowling v. National Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931) (authorizing courts to issue "preliminary mandatory injunction[s]" to restore the status-quo). As the trial court explained, delaying "the remedy would necessarily involve a denial of the right," *Kellerman*, 135 So. at 128, "because 'once the election occurs, there can be no do-overs and no redress' for the voters who rights were violated," Order at 15 (citing *League of Women Voters of N.C.*, 769 F.3d at 247).

The trial court was thus well within its discretion to grant a mandatory injunction. *See Grant v. GHG014, LLC*, 65 So.3d 1066, 1067 (Fla. 4th DCA 2010) ("The grant or denial of an injunction is a matter that lies within the sound discretion of the trial court."). But the trial court was also acting pursuant to its authority under settled U.S. Supreme Court precedent recognizing that "reapportionment is

primarily the duty and responsibility of the State through its legislature or other body" and as such "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Growe v. Emison*, 507 U.S. 25, 33-34 (1993); *see also Branch v. Smith*, 538 U.S. 254, 270, 272 (2003) (finding that federal law expressly authorizes "action by state and federal courts" to "remedy[] a failure" by the state legislature "to redistrict constitutionally"). Such appropriate action includes "adopt[ing] a constitutional plan 'within ample time . . . to be utilized in the [upcoming] election.'" *Growe,* 507 U.S. at 34 (citing *Germano*, 381 U.S. 407 (1965)).

To find, as the Secretary urges, that a mandatory injunction imposing a valid congressional districting plan is inappropriate in a case involving the clear violation of Floridians' voting rights, where delay would render relief impossible, would therefore require ignoring governing precedent from the highest courts of this state and this country as well as common notions of equity. It would also require thrusting the state's 2022 elections into chaos. An order simply

enjoining the state's Enacted Map would leave the state without a valid reapportionment scheme and threaten the constitutional rights of every Floridian. Moreover, it likely would have ceded control of the state's congressional plan to the federal courts, *see Growe*, 507 U.S. at 34 (permitting federal courts to intervene where "state branches . . . fail timely to perform" their duty to validly reapportion), and possibly require the state to conduct at-large elections, *see Branch*, 538 U.S. at 274 (explaining federal law requires at-large elections when a state has not been validly redistricted). Neither Florida nor Federal law require such extreme consequences.

WHEREFORE, Appellees request that the Court deny the Secretary's emergency motion to reverse the trial court's vacatur of the stay.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 19, 2022 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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I certify under Florida Rule of Appellate Procedure 9.045 that this opposition brief is computer generated in 14-point Bookman Old Style.

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