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IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondents.

Case No.: SC22-685
L.T. No.: 1D22-1470
2022-ca-000666

APPENDIX OF EMERGENCY PETITION FOR CONSTITUTIONAL WRIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 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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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
______________________________________/

DEFENDANT SECRETARY OF STATE LAUREL M. LEE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

Secretary of State Laurel M. Lee opposes Plaintiffs' motion for a temporary injunction. For the reasons explained below, she asks that the Court deny the motion.

INTRODUCTION

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). Plaintiffs ask the Court to turn this truism on its head and revert to some racially gerrymandered congressional map that packs Black voters from Florida's First Coast together with Black voters over 200 miles away from Florida's Big Bend. Worse still, Plaintiffs ask that the Court do so on the eve of an election *after* election administrators have already begun (and some have already completed) implementing the State's duly enacted congressional map. This the Court can't do for three independent reasons.

First, the timing. "Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *DNC v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral). For this reason, the U.S. and Florida Supreme Courts have made clear that trial courts can't issue injunctions that alter State election laws in the months preceding an election. Yet Plaintiffs ask the Court to interfere; they ask for sweeping changes to the State's congressional map from Nassau and St. Johns Counties in the east to Leon and Gadsden Counties in the west and as far south as Marion and Volusia Counties.

Second, the law. Temporary injunctions are intended to maintain the status quo, not mandate some affirmative action that alters the status quo. Such a mandate before a "final hearing" is "like awarding an execution before trial and judgment." *Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So. 2d 438, 469 (Fla. 1943) (cleaned up). It's wrong. Yet that's what Plaintiffs seek and what they can't have.

Third, the U.S. Constitution. Plaintiffs ask this Court to mandate a racially gerrymandered district that they claim is required by Article III, Section 20 of the Florida Constitution. But such a district would violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which prohibits the "race-based sorting of voters" absent a "compelling interest" and a "narrowly tailored" means to achieve that interest. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

Plaintiffs have made no attempt to demonstrate how the race-based district they propose could satisfy this high constitutional bar. Indeed, they couldn't do so, even if they tried.

In sum, the request for a temporary injunction is speckled with flaws, each more fatal than the one before it. The motion must be denied.

BACKGROUND

I. Florida's duly enacted congressional plan.

Florida gained a congressional seat in the decennial census. To comply with the U.S. Constitution's one-person-one-vote standard, and to avoid malapportioned districts, the State had to enact a new congressional map. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). The State did so on April 22, 2022, when the Governor signed Senate Bill 2-C (2022) into law. The enacted map divides the State into 28 congressional districts; 27 now have a total population of 769,221 people and one has a total population of 769,220 people. *See* Senate Bill 2-C; floridaredistricting.gov (population summary for P000C0109).[1] The enacted plan looks as follows for north Florida:

This is the plan the supervisors of elections across north Florida are implementing. Supervisor Brown of Columbia County, for example, has already completed the work necessary to ensure that all

[1] Unless otherwise indicated, the cited maps and data come from the State's official redistricting website, floridaredistricting.gov. The Court may take judicial notice of these uncontroverted materials under sections 90.201(1) and 90.202(1), (5), (11), and (12), Florida Statutes.

of Columbia County's voters can cast ballots for congressional district 3 in the upcoming August statewide primary. **Exhibit 1** ¶¶ 6-9**.** Precincts for in-person voting are set for approval by her board of county commissioners on May 19, 2022. *Id.* ¶ 9; *see also* § 101.001(1), Fla. Stat. (requiring same).

Supervisor Hogan of Duval County has also been working hard to implement the enacted plan. He has already inputted the district boundaries for congressional districts 4 and 5 into a geographic information system (GIS) mapping program; used that to delineate relevant street-level addresses for the two congressional districts in his county; set precincts for voters within the relevant software; and begun the work of entering relevant data into his election management system so voters have the right ballots for the upcoming election. **Exhibit 2** at ¶¶ 5-8**.** His board of county commissioners is set to approve the resulting precincts around June 16, 2022. *Id.* ¶ 9**.**

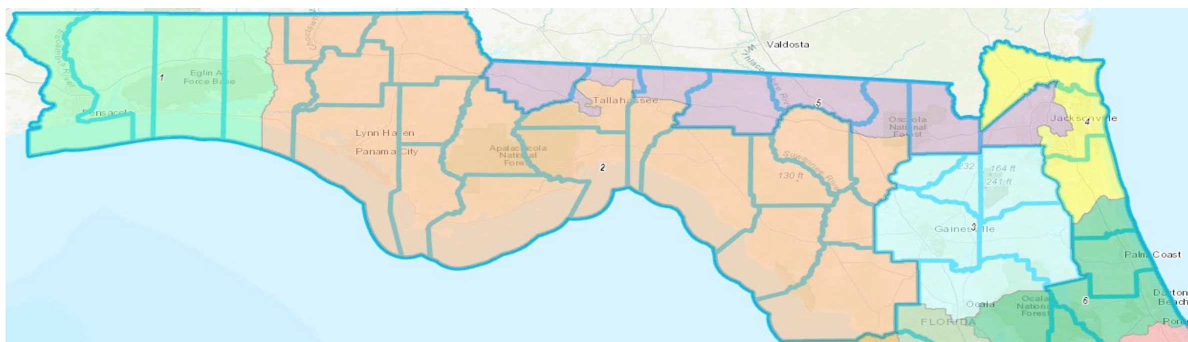
In the words of Supervisor Brown, unwinding this work to implement another congressional plan "is not possible" for the 2022 elections. **Exhibit 1** ¶ 6**.** She has neither the time nor the resources to split her county into multiple congressional districts for the 2022 elections, which would be required if Plaintiffs' race-based alternative were imposed by the Court. *Id.* ¶¶ 6-9. Nor can Supervisor Hogan easily unwind the work he's already done in Duval County to make address-by-address changes for the congressional districts of Duval County's voters. **Exhibit 2** at ¶¶ 15-17**.**

II. Plaintiffs' suggested but still fluid alternative.

But unwinding the work of the supervisors of elections is the only concrete relief sought in Plaintiffs' Motion. Memo. at 20-21. Plaintiffs ask the Court to "enjoin implementation" of the State's duly enacted congressional map and "to ensure that a necessary remedy is timely adopted." *Id.* While Plaintiffs don't propose any specific remedial plan, they suggest that plans 8015, 8016,[2] and 8060 on the Florida redistricting website *might* suffice to remedy their alleged injury. *See id.* at 16, 19. Included

[2] It should be noted that 8016 is a map for the state senate. It appears to have been referenced in error.

below is a map of north Florida from plan 8015—similar to other north Florida configurations Plaintiffs seek—with congressional district 5 in purple and county boundaries highlighted in blue:



As the map illustrates, the remedy Plaintiffs seemingly seek, and which they claim "would have limited geographic scope," Memo. at 18, would actually affect Florida's 2nd, 3rd, 4th, 5th, 6th, 7th, and 11th congressional districts. Eight counties would have to be reconfigured *into* Plaintiffs' preferred congressional district 5, including Columbia and Duval Counties. To the east, congressional lines in two others, Nassau and St. Johns, would change. Even Plaintiffs concede that the cascading effects might reach as far south as Marion and Volusia Counties in north-central Florida. *Id.* at 19.

Plaintiffs say these cascading effects are manageable because Supervisor Scott in Broward can implement any remedial plan like 8015. *Id.* But Supervisor Scott is in the extreme southeastern edge of the State where there are *no* differences between the State's enacted plan and plan 8015.

Plaintiffs also justify the late changes by citing Leon County Supervisor Earley's affidavit where he states that "*his* office can implement a remedial plan if *he* receives notice of the new plan by May 27, 2022." *Id.* at 20 (emphasis added). Notably, Supervisor Earley is careful to speak only to his office in the affidavit. But mere weeks ago, in a federal case challenging Florida's then-delay in enacting a congressional map, Supervisor Earley submitted an affidavit where, in his capacity as President-Elect of the Florida Supervisors of Elections Association, he swore that he had "spoken to numerous Supervisors who strongly believe that May 27, 2022 *would not* give them enough time to complete the

work for their counties, and who believe the deadline for completing that work is *early May or even late April*." **Exhibit 3** at ¶ 22 (*Common Cause Fla. v. Lee*, Case No. 4:22-cv-109 (N.D. Fla.) (Doc. 67-2)) (emphasis added).[3] In that same federal case, Supervisor Edwards of Polk County submitted an affidavit where she said that, for her county, "a new congressional map needs to be in place between April 29, 2022," and "May 13, 2022" to "allow adequate time to prepare for the election and meet the relevant election deadlines in advance of the primary election." **Exhibit 4** at ¶ 19 (*Common Cause Fla. v. Lee*, Case No. 4:22-cv-109 (N.D. Fla.) (Doc. 67-1)). Two of the Plaintiffs in this case (Andrew Hershorin and Brandon P. Nelson) were Plaintiff-Intervenors in the still-pending federal case; the Plaintiffs' lawyers made appearances in the federal case and argued against even a modest stay of those proceedings so that the Florida Legislature could conclude the special session that resulted in enactment of Florida's current congressional map. *See generally* **Exhibit 5** at 2-3, 10-11 (*Common Cause Fla. v. Lee*, Case No. 4:22-cv-109 (N.D. Fla.) (Doc. 68)).

LEGAL STANDARD

To obtain a temporary injunction, Plaintiffs must: (1) demonstrate "a substantial likelihood of success on the merits," (2) show "lack of an adequate remedy at law," (3) prove "irreparable harm," and (4) make plain that the injunction is in the "public interest." *Reform Party of Fla. v. Black*, 885 So. 2d 303, 305 (Fla. 2004); Memo. at 11. But temporary injunctions represent "an extraordinary remedy which should be granted sparingly," *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 752 (Fla. 1st DCA 1994) (cleaned up), and almost always when doing so is necessary to *prohibit* some action and thus maintain the status quo—not to *mandate* action that disturbs the status quo. *See, e.g.*, *Nazia, Inc. v. Amscot Corp.*, 275 So. 3d 702, 705 (Fla. 5th DCA 2019) ("The primary purpose of entering a temporary injunction is to preserve the status quo pending the final outcome of a cause." (citations

[3] The Court may take judicial notice of the docket entries in the still-pending federal case under section 90.202(6), Fla. Stat.

omitted)); *Groff G.M.C. Trucks, Inc. v. Driggers*, 101 So. 2d 58, 60 (1st DCA 1958) ("mandatory injunctions are generally looked upon with disfavor and seldom granted" unless "the right is clear and free from reasonable doubt").

ARGUMENT

The Court can deny the motion for temporary injunction for any one of three independent reasons: (1) it's too late to make changes without throwing sand into the election machinery; (2) it's inappropriate to use these proceedings to grant a mandatory injunction; and (3) it's unconstitutional to carve up the voters of north Florida based on race absent a showing of compelling interest and a narrowly tailored path to achieve that compelling interest.

I. The U.S. Supreme Court and the Florida Supreme Court make clear that injunctions close to elections are highly disfavored.

Stability and predictability in election-related laws promote "[c]onfidence in the integrity of our electoral process," which "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Conversely, courts risk "voter confusion" and "incentive to remain away from the polls" when they order changes on the eve of elections, with the risk "increas[ing]" "[a]s an election draws closer." *Id.* at 4-5. Relying on this *Purcell* principle, the U.S. Supreme Court has "'repeatedly'" held that it's improper to enjoin state election laws close to an election. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283-84 & n.2 (11th Cir. 2020). During the 2020 cycle, all 17 federal district courts that tried to do so met the same fate: either the court of appeals granted a stay of the injunction, or the U.S. Supreme Court did. *See, e.g.*, *RNC v. DNC*, 140 S. Ct. 1205 (2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *application to vacate stay denied*, 140 S. Ct. 2015; *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020), *application to vacate stay denied*, 2020 WL 3456705; *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *Clarno v. People Not Politicians Ore.*, 141 S. Ct. 206 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *A. Philip*

Randolph Inst. of Ohio v. Larose, 831 F. App'x 188, 189 (6th Cir. 2020); *Texas All. for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *Priorities USA v. Nessel*, 978 F.3d 976, 978 (6th Cir. 2020); *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020); *Curling v. Sec'y of State of Ga.*, 2020 WL 6301847 (11th Cir. 2020); *DNC v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020), *application to vacate stay denied*, *DNC v. Wis. State Leg.*, 141 S. Ct. 28.

That trend continues. Just days ago, the U.S. Court of Appeals for the Eleventh Circuit used *Purcell* as one of two independent bases to stay a federal district court's order enjoining Florida from implementing provisions of its election code. The Eleventh Circuit began by asking "[w]hen is an election sufficiently 'close at hand' that the *Purcell* principle applies?" *League of Women Voters of Fla. v. Lee*, Case No. 22-11143, Slip. Op. at 6-7 (11th Cir. May 6, 2022) **Exhibit 6**. It noted that the U.S. Supreme Court has relied on *Purcell* to preserve State election laws where elections were as far as "four months away," and then concluded that "[w]hatever *Purcell*'s outer bounds," the State of Florida "fits within them" because "the next statewide election [is] set to begin in *less* than four months" and the State's election-machinery is already cranking. *Id.* at 7 (emphasis in original).

So too here, especially since this case involves the *same* state and the *same* statewide election. This case is stronger still. Supervisors for Columbia and Duval Counties plainly state that they can't implement *any* remedial plan without increasing the odds of error and confusion. *See* **Exhibits 1 & 2**. Supervisor Brown says that it "is not possible." **Exhibit 1** at ¶ 6. Supervisor Earley states in his federal court affidavit that it's already too late for "numerous Supervisors" to implement any remedial plan with ballots set to be mailed to voters by July 9th—just two months from now. **Exhibit 3** at ¶ 22. And even Plaintiffs' counsel warned in the federal case, while opposing the Secretary's limited request

to stay judicial proceedings until the Florida Legislature's Special Session concluded on April 22, 2022,[4] that waiting is too much of "a gamble," that supervisors need time to do various tasks (like assigning voters to precincts, getting ballots to printers and other administrative projects), and that it's "not practical to ask candidates to wait until that window to learn of the contours of their potential districts." **Exhibit 5** at 2, 10.

Plaintiffs' sudden urge to gamble finds refuge in no legal precedent. In its prior redistricting cases, for example, the Florida Supreme Court waited until *after* a trial on the merits and *after* giving the Florida Legislature an opportunity to adopt a remedial congressional plan before imposing one of its own. *See League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) ("*Apportionment VIII*"). And the Florida Supreme Court did so *almost a year before* the next congressional election but still limited the time for filing motions for rehearing and clarification "[b]ecause of the extremely limited timeframe." *Id.* at 298 (issued on December 2, 2015 for the 2016 congressional election); *see also League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 372 (Fla. 2015) ("*Apportionment VII*") ("We emphasize the time-sensitive nature of these proceedings, with *candidate qualifying* for the 2016 congressional elections now less than a year away." (emphasis added)).

Florida Supreme Court precedent, in fact, neatly follows the commonsense contours of the *Purcell* principle. The state high court has long recognized that "[t]o interfere with the election process at [a] late date, even if a clear legal right were shown, would result in confusion and injuriously affect the rights of third persons." *State ex re. Haft v. Adams*, 238 So. 2d 843, 845 (Fla. 1970). This potential for interference provides reason enough to deny pre-election relief. *Id.*; *see also State ex rel. Walker v.*

[4] True, in that proceeding the Secretary was asked by the three-judge federal panel about a "drop-dead date" by which the State had to have a congressional map. Without the benefit of the supervisors' declarations later filed in the case, she responded that the date was June 13, 2022, the date when candidate qualifying begins for congressional races. But hers is not the office responsible for undertaking the tasks outlined in affidavits now before the Court.

Best, 163 So. 696, 697 (Fla. 1935) (same). Like the Florida Supreme Court, this Court too should follow *Purcell* and deny the request for a temporary injunction this close to the August primary election, especially when Plaintiffs have failed to go to *each* affected supervisor and have them explain whether they can implement the still-unknown remedial plan Plaintiffs seek, and when some have unequivocally said they can't do so.

II. Temporary injunctions *prohibit* action to preserve the status quo; they don't *mandate* action to dismantle the status quo.

Separately, the Court should deny Plaintiffs' Motion because it seeks to mandate action rather than simply prohibit action on the State's part. "The primary purpose of entering a temporary injunction is to preserve the status quo pending the final outcome of a cause," not to mandate the judicial creation of a new status quo *before* a final adjudication on the merits. *Nazia,* 275 So. 3d at 705. But Plaintiffs ignore the many cases cautioning trial courts "that injunctions which compel or mandate affirmative action by a party are disfavored," *Bull Motors, LLC v. Brown*, 152 So. 3d 32, 35 (Fla. 3d DCA 2014), and reminding courts that they should be "even more reluctant to issue [mandatory injunctions] than prohibitory ones." *Grant v. GHG014, LLC*, 65 So. 3d 1066, 1067 (Fla. 4th DCA 2010); *see also Kline v. State Beverage Dep't of Fla.*, 77 So. 2d 872, 874 (Fla. 1955) (explaining that it's the "rare case"); *Groff G.M.C. Trucks*, 101 So. 2d at 60 (explaining that such injunctions are "seldom granted").

Plaintiffs seemingly want this case to be the exception. *This* case. The one where they're attempting to restore a racial gerrymander across a wide swath of north Florida without first putting on any evidence at a trial to show how an alleged race-based gerrymander furthers a compelling state interest through narrowly tailored means sufficient to satisfy the requirements of federal equal protection. This is not that rare case where Plaintiffs have established a clear legal right, "free from reasonable doubt." *Spradley v. Old Harmony Baptist Church*, 721 So. 2d 735, 737 (Fla. 1st DCA 1998). So they can't ask for a mandatory injunction *before* trial that compels the State of Florida to implement some new congressional plan that was never enacted into law. *Id.*; *see also Wilson v. Sandstrom*, 317 So.

2d 732, 736 (Fla. 1975) ("It is a general rule that a mandatory injunction can only be granted on a final hearing") (citations omitted); *Gulf Power Co. v. Glass*, 355 So. 2d 147, 148 (Fla. 1st DCA 1978) (same).

III. Plaintiffs are not entitled to a racial gerrymander in north Florida.

Finally, Plaintiffs' claim of likely success on the merits rings hollow. *See* Memo. at 11-16. Plaintiffs fail to acknowledge that any congressional map must comply with both the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as well as the Florida Constitution, and that the U.S. Constitution must prevail when there's a conflict between the two. *See* U.S. Const. art. VI, cl. 2. Plaintiffs also fail to provide the kind of evidentiary support needed to escape the U.S. Constitution's strong preference for race-neutral districts. *See Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) ("We said in *Cooper* that when a State invokes [a Voting Rights Act rationale] to justify race-based districting, it must show (to meet the narrow tailoring requirement) that it had a strong basis in evidence for concluding that the statute required its action." (cleaned up)).

A. Plaintiffs fail to provide evidence proving that their preferred alternative complies with the U.S. Constitution.

"Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools," the U.S. Supreme Court has made clear that the State also "may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citations omitted). "When the State assigns voters on the basis of race," the Court explained, "it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 911-12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). The U.S. Constitution's Equal Protection Clause thus prohibits the drawing of congressional maps that use race as "the predominant factor motivating the" "decision to place a significant number of voters within or without a particular district," *id.* at 916, unless the map drawers can prove that their "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end."

Cooper, 137 S. Ct. at 1464. That race was the predominant factor motivating the line-drawing decision can be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916.

Here, there's no doubt that race would be the predominant factor in any version of congressional district 5 that Plaintiffs seek. There's direct evidence from the legislative debate saying exactly that. *See generally* Fla. H.R. Comm. on Redist., recording of proceedings, at 0:00-2:55:19 (Feb. 25, 2022), https://thefloridachannel.org/videos/2-25-22-house-redistricting-committee; *id.* at 19:15-19:26 (Chair of the House Redistricting Committee explaining that the districts were drawn to "protect[] a Black minority seat in north Florida"); *id.* at 19:45-19:54 (noting the "attempt at continuing to protect the minority group's ability to elect a candidate of their choice"); **Exhibit 7** (collecting citations to same in memo accompanying veto message pages 2 and 4).

Circumstantial evidence confirms that race predominates. Plaintiffs' preferred versions of congressional district 5 span over 200 miles from east to west, cutting across eight counties to connect the Black population in Duval County with separate and distinct Black populations in Leon and Gadsden Counties. *See* Plan 8015 available at floridaredistricting.gov. The district narrows to a handful of miles to avoid non-minority populations in Leon County with nearly the entirety of the district's Black population residing in Duval and Leon Counties. *Id.*

But there is no evidence that this racial gerrymander furthers a compelling state interest. The U.S. Supreme Court has only ever "assumed" without deciding that compliance with the Voting Rights Act serves a compelling state interest. *Cooper*, 137 S. Ct. at 1464. Even then, congressional district 5 can't rely on that Act's two relevant provisions: § 2's vote-dilution provision or § 5's non-diminishment (or non-retrogression) provision. In plan 8015, the district's Black voting age population is only 43.48%. "When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply." *Cooper*, 137 S. Ct. at 1472 (citing *Bartlett v. Strickland*, 556

U.S. 1, 18-20 (2009)) (plurality opinion); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (explaining that one of the threshold conditions for proving vote dilution under § 2 is that the minority group is "sufficiently large and geographically compact to constitute a majority").

Section 5's non-diminishment standard can't apply either. As an initial matter, § 5 is no longer operative because the U.S. Supreme Court invalidated the formula for determining which jurisdictions are subject to § 5. *Shelby Cnty. v. Holder*, 570 U.S. 529, 553-57 (2013); *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) (suggesting that continued compliance with § 5 may not remain a compelling interest in light of *Shelby County*). Regardless, even before the U.S. Supreme Court invalidated the coverage formula, the State of Florida wasn't a covered jurisdiction subject to § 5. *See In re Senate Joint Resolution of Legislative Apportionment 1176 ("Apportionment I")*, 83 So. 3d 597, 624 (Fla. 2012). Only five Florida counties—none in north Florida—were covered. *Id.*

The only conceivable justification left for satisfying the strictures of the U.S. Constitution's Equal Protection Clause is compliance with the race-based provisions in Article III, Section 20(a) of the Florida Constitution. Importantly, however, the U.S. Supreme Court has never even hinted that compliance with a race-based provision of a state constitution can serve as justification for avoiding the federal guarantees of equal protection. This is for good reason: it would turn the U.S. Constitution's Supremacy Clause on its head. U.S. Const. art. VI, cl. 2. *See generally Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("[A] state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); *United States v. Stanley (Civil Rights Cases)*, 109 U.S. 3, 11 (1883) ("[The Fourteenth Amendment] nullifies and makes void all State legislation, and State action of every kind, . . . which denies to any [person] the equal protection of the laws.")

Assuming the State Constitution's race-based provisions could serve as a compelling state interest, which it doesn't, those race-based provisions still offer no reprieve to congressional district 5. Because the first of Florida's race-based provisions is modeled after § 2 of the Voting Rights Act, *see Apportionment I*, 83 So. 3d at 619-24, it simply isn't implicated where, as here, there isn't a majority-minority district. *See Gingles*, 478 U.S. at 50-51. The second of Florida's race-based provisions is modeled after § 5 and protects against non-diminishment. *See Apportionment I*, 83 So. 3d at 625. But there's no record of a race-based problem that justifies its use as a race-based solution for congressional district 5—a critical flaw that led to the pre-clearance formula's demise in *Shelby County*.

And even if Plaintiffs could muster a compelling state interest, they still can't show that the race-based sorting in their preferred district 5 is narrowly tailored to further that interest. Dr. Johnson, the State's expert, and Mr. Popper, the namesake of the Polsby-Popper compactness metric, explain that this sprawling district fails miserably under traditional redistricting criteria. *See* **Exhibit 8** at ¶¶ 9-20 (Johnson) (criticizing the low compactness scores for plan 8015 and multiple splits compared to the enacted plan); **Exhibit 9** at 5 (Popper) ("the district clearly violates traditional districting criteria" where "its Popper-Polsby score is 10%, and its Reock score is 11%").

In his work focused on north Florida, Dr. Johnson's expert report further shows that, compared to Plaintiffs' preferred plan 8015, the State's enacted plan for congressional districts 2, 3, 4, and 5 divides fewer counties and municipalities. *See* **Exhibit 8** at ¶¶ 9-16. Dr. Johnson also notes that the enacted plan is more compact than plan 8015 (and the plan the Florida Supreme Court adopted in 2015). *Id.* ¶¶ 17-20. And he debunks Plaintiffs' attempt to argue that the 2015-version of congressional district 5 somehow united historic slave populations in north Florida. *Id.* ¶¶ 21-27. He shows that three of the six counties with the largest slave populations—Jackson, Alachua, and Marion—were never in the 2015 plan; that Black voters have moved from "sharecropper counties" to cities like Jacksonville in the 160 years since the 1860 Census referenced by Plaintiffs; and that

congressional districts 2 and 5 in the enacted plan actually keep these groups of Black voters together. *Id.*; *cf.* **Exhibit 10** (presentation of the Governor's Office showing its fewer county splits and improvements to compactness).

Lack of a compelling state interest. Lack of narrow tailoring to further that interest. And lack of evidence for both the interests and the tailoring doom Plaintiffs' merits argument. Nothing in the Florida Supreme Court's prior redistricting cases holds otherwise because those cases did not specifically grapple with the U.S. Constitution's guarantees of equal protection or the more recent cases emphasizing the federal constitutional imperative of race-neutral apportionment. As Plaintiffs must themselves recognize, Memo. at 3-4, the Florida Supreme Court dismantled an earlier north-south configuration that snaked from Jacksonville to Orlando only after concluding that the Florida Legislature's apportionment work was tainted by improper partisan intent. *See Apportionment VII*, 172 So. 3d at 403. There's no evidence, none at all, that partisanship resulted in the enacted plan's current configuration of seats in north Florida. And, unlike the sprawling east-west configuration that the Florida Supreme Court itself recognized *wasn't* "a model of compactness," *Apportionment VII*, 172 So. 3d at 406, the enacted plan's configuration *is* compact. *See* **Exhibit 8** at ¶¶ 17-20. Plaintiffs now bear the burden of proving why this duly enacted configuration is unconstitutional and why their preferred race-based configuration is constitutional. They fall short of the mark.

B. Plaintiffs fail to prove that the Florida Constitution's non-diminishment clause is triggered let alone violated.

Even if the Court could overlook the federal constitutional problems with Plaintiffs' preferred congressional district 5—which the Court can't do—Plaintiffs still haven't established a violation of the Florida Constitution's Tier One non-diminishment standard. That's so because Plaintiffs fail to disentangle race from partisanship; they fail to show that the enacted plan diminishes the ability of Black voters to elect Black candidates. At best, they show an inability to elect Democratic candidates.

Specifically, Plaintiffs rely on Dr. Ansolabehere's expert report for the proposition that in the 2015-version of congressional district 5, Black voters had the ability to elect a Democratic candidate. Memo. at 13-15. Plaintiffs contend that because congressional districts 2, 3, 4, and 5 in the enacted plan prevent Black voters from electing a Democratic candidate, Article III, Section 20(a)'s non-diminishment provision is violated. *Id.* But that's not enough to show that the non-diminishment provision is triggered let alone prove that it's been violated.

The State's expert, Dr. Owens, confirms that Black voters in north Florida vote for the Democratic candidate, but they do so regardless of the candidate's race. **Exhibit 11**. In fact, Dr. Owens's review of elections in north Florida conclusively demonstrates that partisanship—not race—best explains the voting patterns. *Id.* Black voters' support for the Democratic Party's candidates is generally in the 85% to 90% range, regardless of the race of the candidate. If voting patterns are not on the basis of race, but simply correlate with race, then the race-based Tier One standards of the Florida Constitution don't apply.[5] There's no proof that Black voters can't elect Black candidates.

Cutting through all of the other portions of their motion, what Plaintiffs then seek is a 200-mile, winding and non-compact district where Black voters who would make up about 40% of the proposed district (and support Democratic candidates at high levels) can join with a small percentage of white voters drawn into the district (who also support Democratic candidates) so the two groups can elect a Democrat. Tier One of the Florida Constitution expressly prohibits drawing districts on the basis of such partisan intent. Yet, here, Plaintiffs hope to mask their partisan intentions as race-consciousness, without ever exploring whether race is the cause of voting patterns and not merely

[5] Florida's constitutional language is designed to reflect the Voting Rights Act, which uses the phrase "on account of race" in both § 2 and § 5. Plaintiffs here have alleged a correlation, but presented no evidence of causation. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1330 (11th Cir. 2021) (collecting cases for proposition that the Voting Rights Act's "plain language" "requires more" than mere correlation with race).

correlated with partisan voting patterns. The Court shouldn't countenance this at the temporary injunction phase, and should instead require that Plaintiffs establish the necessary causal link at trial.

In sum, the non-diminishment provision wasn't put in place to mandate a safe Democratic congressional district. Plaintiffs must disentangle partisanship from race before they can trigger the non-diminishment provision. Otherwise, the relief they seek would violate Article III, Section 20(a)'s anti-partisan gerrymandering provision by creating a safe Democratic seat. *See* art. III, § 20(a), Fla. Const. ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.").

CONCLUSION

This Court should deny the motion for temporary injunction. The shopkeeper's admonition of "you break it, you buy it," summarizes the *Purcell* principle and the reluctance of both state and federal courts to interfere with election-related statutes; the need to jealously guard against the pre-trial changing of the status quo cautions against the imposition of a mandatory injunction; and the federal constitutional imperative of *not* sorting voters based on race dooms Plaintiffs' argument on the merits of their claim. And, in the final analysis, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. The Court should reject Plaintiffs' request for such an apportionment plan for north Florida.

Dated: May 9, 2022

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Counsel for the Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on May 9, 2022.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

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

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
_____________________________________/

DEFENDANT SECRETARY OF STATE LAUREL LEE'S EXHIBIT LIST

Exhibit No.	Description
1	Affidavit of Columbia County Supervisor of Elections Brown
2	Affidavit of Duval County Supervisor of Elections Chief Election Officer Robert Phillips
3	Declaration of Leon County Supervisor of Elections Earley in Common Cause Florida v. Lee
4	Declaration of Polk County Supervisor of Elections Edwards in Common Cause Florida v. Lee
5	Plaintiff-Intervenors' Response in Opposition to Defendant's Motion to Stay in Common Cause Florida v. Lee
6	League of Women Voters v. Lee, Eleventh Circuit Slip Opinion
7	General Counsel Newman's Memorandum Accompanying Veto Message
8	Declaration of Dr. Johnson
9	Mr. Popper Report to Florida House of Representatives
10	Mr. Kelly's Presentation to Florida Senate
11	Declaration of Dr. Owens

EXHIBIT 1

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.

Case No: 2022 CA 0666

_________________________________/

AFFIDAVIT OF TOMI S. BROWN

STATE OF FLORIDA

COUNTY OF COLUMBIA

BEFORE ME, the undersigned authority, this day personally appeared TOMI S. BROWN, who, being by me first duly sworn, deposes and says, under penalty of perjury:

1. I am over the age of eighteen (18) and am otherwise competent to make the statements in this Affidavit.

2. I have personal knowledge of the matters contained herein.

3. I am the Supervisor of Elections for Columbia County, Florida. I was elected to that position in 2020.

4. The purpose of this Affidavit is to outline the impact on Columbia County if the map adopted by the Legislature in the recent special session and signed by the Governor ("Enacted Map") is replaced with a version of map (like that first used in 2016) that split Columbia County into multiple congressional districts ("Substitute Map").

5. More specifically, it is my understanding that under the Substitute Map, Columbia County would be split between Congressional District 5 (CD-5) and Congressional District 2 (CD-3). Under the Enacted Map, however, all of Columbia County is now within the new CD-3. This in itself necessitated a change in the precincts within Columbia County, which is now complete.

6. Changing the Enacted Plan at this time simply is not possible for upcoming elections. Florida is scheduled to hold a statewide primary election on August 23, 2022. Even before Governor signed the legislation establishing the Enacted Map, our team began their work to meet the timeframes associated with the August 23 primary election. Among other things, we imported the congressional (and other applicable) districts into our GIS map; generated a file for all streets within all precincts; verified the street addresses; and matched the information with registered voters in our County. Due to an employee shortage, we had to outsource some of this work at a cost of approximately $30,000.

7. In other words, new precincts are set, voters have been assigned to those new precincts, and we have completed all of the work required to the implement the Enacted Map. Any Substitute Map would require us undo the work that has been done and restart from scratch. Moreover, going back to multiple congressional districts would make the work more complicated because we would have to ensure that the right voters are assigned to the right precincts and that these precincts match the appropriate congressional districts. This would once again require us out-source work at substantial cost of approximately $30,000. The constricted timeframe would also increase the chance of error at every stage of the process.

8. We would also have to either eliminate or rethink our plan to send new voter registration cards. We had planned to send out voter cards to all register voters showing their congressional district by the end of May at a cost of $35,000 for printing fees. If this works needs

to be re-done, with Columbia County voters in one of two congressional districts because of any Substitute Map, it would impose additional cost and cause voter confusion. Cancellation is an option; however, we would like to send new registration cards reflecting updated information.

9. Finally, any change would affect the required approval of the precincts by the Columbia County Board of County Commissioners. We are currently on the agenda for the board's meeting scheduled for May 19, 2022, to present the new precincts for approval to the board pursuant to section 101.001(1), Florida Statutes. If a Substitute Map is imposed, we would need to cancel that meeting as we try to implement the map. Additional dates would be difficult to come by because our board meets on only the first and third Thursday of every month. And we can only reschedule after we complete all the work necessary to reset precincts and reassign voters in time for the July 9 deadline to mail the first of the ballots for the August primary, which is simply not possible at this late date.

AFFIANT SAYS NOTHING FURTHER.

By: Tomi S. Brown

Tomi S. Brown
Supervisor of Elections,
Columbia County, Florida

STATE OF FLORIDA
COUNTY OF COLUMBIA

The foregoing document was sworn to and subscribed before me this 9th day of May, 2022, by Tomi S. Brown, as Supervisor of Elections for Columbia County, Florida, who is personally known to me or produced ____________ as identification.

Johnna Horne
NOTARY PUBLIC
My Commission Expires:

JOHNNA T HORNE
Notary Public
State of Florida
Comm# HH162407
Expires 8/8/2025

EXHIBIT 2

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

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

Case No: 2022 CA 0666

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.
_______________________________/

AFFIDAVIT OF ROBERT PHILLIPS

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this day personally appeared Robert Phillips, who, being by me first duly sworn, deposes and says, under penalty of perjury:

Overview

1. I am over the age of eighteen (18) and am otherwise competent to make the statements in this affidavit.

2. I have personal knowledge of the matters contained herein.

3. I am the Chief Elections Officer for the Duval County Supervisor of Elections. I began working in the office in 1991. As Chief Elections Officer, I am responsible for legislative services, budget preparation, procurement, calendar, and other election-related duties. My many duties include the implementation of all reapportionment plans in Duval County.

4. The Duval County Supervisor of Elections office administers elections in Duval County. Election administration includes the timely and accurate assignment of voters to the races

in which they can cast ballots; the creation of voting precincts; the preparation of ballots specific to groups of voters who may vote in particular races; the printing of those ballots; and the timely mailing of those ballots to voters consistent with state and federal law. Accurate information concerning delineating this information is also provided to voters on voter information cards.

Implementation of Apportionment Plans

5. The office has been working to implement the enacted city council, state house, state senate, and congressional district maps. This process began around February and March 2022. After the city council, state house, and state senate maps were approved, the office inputted the districts' information on a geographic information system (GIS) mapping program, its voter registration system, and its election management system. Ensuring that this information was accurately inputted took several months to complete.

6. On April 22, 2022, the Governor approved Florida's current congressional district map. Duval County is split into Congressional District 4 and Congressional District 5.

7. After the congressional district maps were approved, the office inputted the district information into the various programs and used that information to ensure that voters were assigned to the right congressional district based on their addresses. With the city council, state house, state senate, and congressional district maps all finalized, the office was able to complete the drawing of voter precincts. The drawing of precincts allows us to then assign the right ballot styles to the right voters—to show to the voter all the races in which that voter may cast a ballot.

8. The office tries to prevent precinct splits—the assignment of more than one congressional district to the same precinct. Splits are burdensome as a programming matter and also lead to voter confusion.

9. Precinct changes must be approved by the Jacksonville City Council. The office submitted the precinct changes to the council on Thursday, May 5, 2022. The precinct changes will be taken up by the council on Tuesday, May 10, 2022. The precinct changes must go through a committee process, as well as public input hearings. Ultimately, the council and mayor must approve the precinct changes. This legislative process is expected to take six weeks. Six weeks from May 5 is June 16, 2022.

10. Around this time, the office must also ensure that the voter registration database and the tabulation database are updated, based on the new maps. This process takes several weeks to complete and should be completed before the candidate qualification period ends.

11. As noted above, updated information is also provided to voters on their individualized voter information cards.

12. The office must provide voter information cards to over 650,000 registered voters. Any further delays in assigning voters to congressional districts numbers will cause issues, especially supply chain issues. Paper shortages and time constraints create a recipe for disaster.

13. The candidate qualification period is from June 13, 2022 to June 17, 2022. After the qualification period ends, ballots must be finalized and prepared for printing and shipping.

14. Under federal law, the office must send vote-by-mail ballots to members of the armed services and overseas citizens no later than 45 days before the primary election. *See* 52 U.S.C. § 20302(a)(8)(A). That date would be July 9, 2022.

15. Imposing a new congressional district map, at this stage, would impose significant burdens on the office. The office has already inputted the enacted congressional district map into its programs and databases and is engaged in the local legislative process needed to approve the new precincts.

16. The office would have to expend significant resources to check to see if the new map created any changes, would have to ensure quality control (i.e., ensure that all voters are assigned to the right congressional district on an address-by-address basis), and would have to submit amended precinct changes to the Jacksonville City Council. A new congressional district map could also lead to more precinct splits.

17. Although the office cannot predict how costly a new map will be or whether it can be completed in time for the upcoming primary election, imposing a new map at this late juncture would increase the chances of administrative mistakes, programming errors, and candidate and voter confusion. Availability of both basic and specialized supplies—like the paper for the ballots themselves—presents other concerns too.

THE AFFIANT SAYS NOTHING FURTHER.

By: ____________________
Robert Phillips

STATE OF FLORIDA
COUNTY OF DUVAL

The foregoing document was sworn to and subscribed before me this 9th day of May, 2022, by Robert Phillips, who is personally known to me or produced ____________________ as identification.

Personally Appeared

NOTARY PUBLIC
My Commission Expires:

LANA G. SELF
Notary Public, State of Florida
My Comm. Expires 08/09/2025
Commission No. HH162692

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

Common Cause Florida, FairDistricts Now, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan, *Plaintiffs*, v. Laurel M. Lee, in her official capacity as Florida Secretary of State, *Defendant*.	Case No.: 4:22-cv-109

DECLARATION OF SUPERVISOR MARK S. EARLEY

Pursuant to 28 U.S.C.§ 1746, I hereby declare as follows:

1. I am a resident of Florida and am fully familiar with the facts set forth below.

2. I currently serve as Supervisor of Elections for Leon County, Florida ("Leon County Supervisor of Elections"). Leon County is located in northern Florida and is home to Florida's capital, Tallahassee. Out of 67 counties, Leon County is the 22nd most populous county in Florida.

3. In addition to my elected office as Leon County Supervisor of Elections, I am currently the President-Elect of Florida Supervisors of Elections, Inc., the state association for Florida's 67 Supervisors of Elections. I have worked in elections administration for over 30 years.

4. I have a degree in mechanical engineering from the FAMU-FSU College of Engineering. I also hold both state and national certifications in the field of election administration as a Certified Elections Registration Administrator and a Master Florida Certified Elections Professional.

5. As Leon County Supervisor of Elections, I hold an elected office. In this role, my duties include administering county, state, and federal elections.

6. In Florida, the Supervisors of Elections administer elections in each county, which includes providing for the distribution of voting systems, assigning voters to districts, preparing ballots, recruiting and training elections officials,

conducting in-person voting and vote-by-mail, and tabulating and canvassing results.

7. On August 23, 2022, Florida is scheduled to hold its 2022 statewide primary election.

8. At this time, I understand that Florida's legislature and Governor have not reached an agreement on a new congressional district plan following the delivery of the 2020 Census data to be used for the 2022 statewide primary election.

9. In order for the primary election to proceed on August 23, 2022, election officials need adequate time to complete an arduous process to prepare for the election and meet certain deadlines prior to the primary. Without adequate time, my staff and I will face an extreme burden moving forward with the necessary election administration processes.

10. For example, in advance of the primary, Florida election officials must have adequate time to prepare and mail ballots to members of the armed services, their dependents overseas, and other citizens residing overseas, and those voters must also have adequate time to return their completed ballots. Under the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), vote-by-mail ballots that include elections for federal office must be transmitted no later than 45 days before a primary election. *See* 52 U.S.C. § 20302(a)(8)(A). The

deadline to transmit vote-by-mail ballots pursuant to UOCAVA is therefore July 9, 2022.

11. Ballot information must be sent to the printer in advance of the July 9, 2022 UOCAVA deadline for transmittal of vote-by-mail ballots. The following window for mailing the very large initial batches of vote-by-mail ballots is open between 40 and 33 days out from the election. In my experience, vote-by-mail vendors that are used to print and mail ballots typically require the data drop of voter information for the large mailings approximately two to three weeks ahead of time to ensure the materials, data integrity, and other factors are in place to turn these mailings around within the statutory guidelines. Three weeks before the July 9, 2022 UOCAVA deadline is June 18, 2022.

12. Ballots cannot be created before candidates for office are determined. By statute, the names of all duly qualified candidates for election must be certified to Supervisors of Elections within seven days after the closing date for qualifying. Fla. Stat. § 99.061(6). The qualifying period in Florida for candidates for Congress, State Senator, and State Representative, among other candidates, is set to begin on June 13, 2022 and to close on June 17, 2022. Fla. Stat. § 99.061(9). Thus, the list of qualified candidates must be certified by June 24, 2022 (within seven days of June 17, 2022). By June 24, 2022 at the latest, vote-by-mail ballots should be sent to the printer in order to allow sufficient time to create and proof

ballots and conduct a quality control testing back in the local elections offices before ballots are approved and ready for transmittal to voters to meet the July 9, 2022 UOCAVA deadline.

13. Redistricting requires elections staff to complete a process of assigning voters to new districts prior to creating and preparing ballots for the election and prior to sending ballots to be printed. This process is replicated for State House, State Senate, and Congressional maps. My staff cannot begin this process unless we have received shapefiles for all maps to be used.

14. As Supervisor of Elections, I assign voters to their voting districts through a process known as geocoding. Geocoding is the process by which census data for every district, precinct, and other boundary such as for local school boards is entered into the districting software used by state and county elections officials. For Florida electoral districts, the geocoding process typically begins with the receipt of district shapefiles from the Legislature, which include geographic data setting the boundaries for legislative districts. After receiving the relevant shapefiles, my staff uses the files and mapping software to update the voting districts that are assigned to particular voter addresses.

15. After voters are assigned to districts, my staff must also perform an audit of the geocoding to ensure its accuracy before ballot preparation.

16. Every voter must also be coded with a State House, State Senate, and

congressional district (among others) in a voter registration system that is separate from the mapping software system. Information in the voter registration system street tables must be aligned with the data and shapefiles in the mapping software system. For most counties, including Leon, this process is not automated. If the system detects errors, street segment and voter information must be reviewed manually on an individual basis to resolve any issues.

17. Once new congressional districts are set, the shapefiles must also be used to determine and align precincts to congressional districts. New precincts must be approved by the Board of County Commissioners. That body meets every two weeks.

18. After the close of the candidate filing period, elections officials must also create and print ballots, review the ballots for potential errors, and then prepare and test voting equipment.

19. Ballot preparation and proofing ballots cannot begin until after the proper geographic boundaries for voting districts are set, geocoding is complete, the candidates are known, and the candidate-filing period closes. The process of generating and proofing ballots is complex and involves multiple technical systems and quality-control measures that precede ballot editing and coding of voting machines. The lines of each of the maps are incorporated into the process for deciding where new precinct lines will be drawn, whether precincts will need to be

split, and where those splits will be placed. Each of the precincts need to correspond to specific polling places, and every voter needs to be assigned to a precinct and to have an available ballot that includes all of the races they will vote for at that precinct. This all needs to be determined before the precincts are finalized to ensure that the vote-by-mail mailings can be sent out accurately and on time, and that the overlapping district combinations are properly reflected in the precinct/splits in the voter registration street tables.

20. After consulting with my staff, which is especially experienced in this work, and based on my 30 years of experience in election administration, I estimate that it will take our office a minimum of four weeks from the date that a new congressional district plan is enacted and shapefiles are delivered to counties in Florida to complete the necessary tasks before sending ballots to the printer, including determination of new precincts, the geocoding process, and delivery of information necessary to create the ballots.

21. As such, my office needs a new congressional districting map approximately four weeks prior to the June 24, 2022 deadline for certification of all duly qualified candidates, at which time ballots would need to be submitted to be printed to meet the July 9, 2022 UOCAVA deadline. Accordingly, in order to be timely implemented in Leon County, a new congressional map needs to be in place by May 27, 2022 at the absolute latest (4 weeks before June 24, 2022) to

allow my staff and I adequate time to prepare for the election and meet the relevant election deadlines in advance of the primary.

22. In my role as President-Elect of Florida Supervisors of Elections, I have spoken with many of my fellow Supervisors of Elections in other Florida counties. While my staff and I believe we could complete all of the work for Leon County if we had finalized maps by May 27, 2022, I have spoken to numerous Supervisors who strongly believe that May 27, 2022 would not give them enough time to complete the work for their counties, and who believe the deadline for completing that work is early May or even late April. Based upon my knowledge of the additional complexities present with the technical processes in other, larger counties, I believe these concerns are well-founded and should be taken into consideration when setting a deadline for a finalized Congressional map. The reasons for the different estimates of time needed to prepare for the election include that I have a well-trained staff with substantial experience administering prior elections, other counties are also larger and more complex than Leon County, and some smaller counties do not have a wealth of technical resources available to them.

23. I understand that Supervisor Lori Edwards of Polk County estimates that it will take her office a minimum of six to eight weeks prior to the June 24, 2022 deadline for certification of all duly qualified candidates to prepare for the

election and meet the relevant election deadlines in advance of the primary. I have no reason to disagree with the reasonableness of Supervisor Edwards' estimate of the time that her office needs to prepare for the election.

24. I understand that the Florida Secretary of State has stated in court filings in this proceeding and in a state-court proceeding that the deadline for the State to have a new congressional map is June 13, 2022. I do not believe it will be possible for any Supervisor of Elections in Florida, whose county is impacted by uncertainty in the drawing of the Florida Congressional district boundaries, to meet the necessary deadlines for realigning the voter registration street indices, re-precincting voters accurately laying out, proofing and printing ballots, and conducting the initial testing of voting equipment with ballots before the UOCAVA mailing deadlines to confidently comply with the July 9, 2022 UOCAVA deadline, and prepare for the August 23, 2022 primary if a new map is not finalized until June 13, 2022.

25. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of April, 2022.

Mark S. Earley

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Common Cause Florida, FairDistricts Now, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan,

Plaintiffs,

v.

Laurel M. Lee, in her official capacity as Florida Secretary of State,

Defendant.

Case No.: 4:22-cv-109

DECLARATION OF SUPERVISOR LORI EDWARDS

STATE OF FLORIDA)
: ss.:
COUNTY OF POLK)

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am a resident of Florida and am fully familiar with the facts set forth below.

2. I currently serve as Supervisor of Elections for Polk County, Florida ("Polk County Supervisor of Elections"). Polk County is located in central Florida. Out of 67 counties, Polk County is the ninth most populous county in Florida.

3. I was elected to my post in November 2000. As Polk County Supervisor of Elections, I hold an elected, non-partisan office. In this role, my duties include administering county, state, and federal elections; maintaining accurate voter rolls; and providing voter registration, campaign finance, and turnout information to the public. I also provide educational programs in schools and to community groups and offer mobile voter registration.

4. The Supervisors of Elections administer elections in each county in Florida, which includes assigning voters to districts, preparing ballots, recruiting and training elections officials, conducting in-person and absentee voting, and tabulating and canvassing results.

5. On August 23, 2022, Florida is scheduled to hold its 2022 statewide

primary election.

6. At this time, I understand that Florida's legislature and Governor have not reached agreement on a new congressional district plan following the delivery of the 2020 Census data to be used for the 2022 statewide primary elections.

7. In order for the primary election to proceed on August 23, 2022, numerous tasks must be completed, many of which cannot be started until initial tasks are finished, and a number of interim deadlines must first be met to prepare for the election. These preparations cannot be completed absent a final congressional district plan.

8. For example, Florida election officials must have adequate time to prepare and mail absentee ballots to members of the armed services, their dependents overseas, and other citizens residing overseas, and those voters must also have adequate time to return their completed ballots. Under the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), absentee ballots that include elections for federal office must be transmitted no later than 45 days before a primary election. *See* 52 U.S.C. § 20302(a)(8)(A). The deadline to transmit absentee ballots pursuant to UOCAVA is therefore July 9, 2022.

9. Ballot information must be sent to the printer in advance of the July 9, 2022 UOCAVA deadline for transmittal of absentee ballots. In my experience, vendors used to print ballots typically require approximately two to three weeks to

create and ship ballots. The Supervisor of Elections must then proofread and conduct a quality control review before ballots are finalized for transmittal to voters. Three weeks before the July 9, 2022 UOCAVA deadline is June 18, 2022.

10. Ballots cannot be created before candidates for office are determined. By statute, the names of all duly qualified candidates for election must be certified to Supervisors of Elections within seven days after the closing date for qualifying. Fla. Stat. § 99.061(6). The qualifying period in Florida for candidates for Congress, State Senator, and State Representative, among other candidates, is set to begin on June 13, 2022 and to close on June 17, 2022. Fla. Stat. § 99.061(9). Thus, the list of qualified candidates must be certified by no later than June 24, 2022 (within seven days of June 17, 2022). By June 24, 2022 at the latest, absentee ballots should be sent to the printer in order to allow sufficient time to meet the July 9, 2022 UOCAVA deadline.

11. Redistricting requires elections staff to complete a process of assigning voters to new districts prior to creating and preparing ballots for the election and before sending ballots to be printed. My staff and I cannot begin this process unless we have received files containing census block data for each district for all maps to be used.

12. After receiving the census block information, my staff uses the files and mapping software to update the districts that are assigned to each voter

address.

13. Every voter must also be coded with a State House, State Senate, and congressional district (among others) in a voter registration system that is separate from the mapping software system. Information in the mapping software system must be transmitted to the information in the voter registration system. This alignment is not an entirely automated process. If the system detects exceptions, voter information must be reviewed manually on an individual voter-by-voter basis to resolve any issues. In the past, there have been several thousand exceptions requiring manual review in connection with a given election, which involves a time-intensive review process.

14. The amount of time required to complete this process corresponds with the number of district boundaries that are redrawn within the counties. In this case, counties will undergo changes to their districts following decennial redistricting—including state, legislative, congressional, and local jurisdiction districts—and a number of counties are likely to have newly drawn district boundaries within their counties' borders.

15. Once new congressional districts are set, the census block files must also be used to manually align precincts to the new districts. New precincts must be approved by the Board of County Commissioners. That body meets every two weeks.

16. After the close of the candidate filing period, elections officials must also create and print ballots, review the ballots for potential errors, and then prepare and test voting equipment.

17. Ballot preparation and proofing ballots cannot begin until after the proper geographic boundaries for voting districts are set, each voter record is assigned to the correct districts, the candidates are known, and the candidate-filing period closes. The process of generating and proofing ballots is complex and involves multiple technical systems and quality-control measures. This process includes confirming candidates for each race and proofing each ballot for content and accuracy.

18. Based on my experience, I estimate that it will take a minimum of six to eight weeks from the date that a new congressional district plan is enacted and census block files are delivered to counties in Florida to complete the numerous tasks described above.

19. As such, a new congressional districting map is needed approximately six to eight weeks prior to the June 24, 2022 deadline for certification of all duly qualified candidates, at which time ballots would need to be submitted to be printed to meet the July 9, 2022 UOCAVA deadline. Accordingly, a new congressional map needs to be in place between April 29, 2022 (8 weeks before June 24, 2022) and May 13, 2022 (6 weeks before June 24) to allow adequate time

to prepare for the election and meet the relevant election deadlines in advance of the primary election.

20. I understand that the Florida Secretary of State has stated that the deadline for the State to have a new congressional map is June 13, 2022. It will be impossible to perform the tasks of creating new precincts and assigning districts to all voters in time to meet the necessary deadlines for printing ballots, complying with the July 9, 2022 UOCAVA deadline, and preparing for the August 23, 2022 primary if a new map is not finalized until June 13, 2022.

21. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of April, 2022

Lori Edwards

EXHIBIT 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMMON CAUSE FLORIDA, et al.,

Plaintiffs, and

MICHAEL ARTEAGA, LENI FERNANDEZ, ANDREA HERSHORIN, JEAN ROBERT LOUIS, MELVA BENTLEY ROSS, DENNY TRONCOSO, BRANDON NELSON, GERALDINE WARE, and NINA WOLFSON,

Intervenor-Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State,

Defendant.

Case No. 4:22-cv-00109-AW-MAF

INTERVENOR-PLAINTIFFS' OPPOSITION TO DEFENDANT SECRETARY'S LEE'S MOTION TO STAY

Intervenor-Plaintiffs Michael Arteaga, Leni Fernandez, Andrea Hershorin, Jean Robert Louis, Melva Bentley Ross, Denny Troncoso, Brandon Nelson, Geraldine Ware, and Nina Wolfson ("Arteaga Intervenors") file this opposition to the Defendant Secretary Lee's ("Secretary") Motion to Stay these proceedings (ECF No. 62).

INTRODUCTION

As of this filing, Florida is one of only three states in the country without a congressional redistricting plan in place. Nevertheless, the Secretary asks this Court to wait three weeks before taking any action to see whether the Legislature and Governor DeSantis ("Governor") can compromise on a redistricting plan. Should the special session fail to produce a congressional plan, the Secretary further asks this Court to wait several more weeks before taking action to see if a state court can timely remedy the impasse.

The Secretary's proposal is untenable. Were this Court to wait to move forward until both the political branches *and* state court system had failed to implement new constitutional maps in time for the 2022 elections, there is a good chance there would not be time for this Court to undertake the complicated work of crafting the necessary remedy without moving election deadlines. While the Secretary appears willing to take that risk, this Court should not. The citizens of Florida should not be subjected to such a gamble.

Ample precedent supports this Court asserting jurisdiction and proceeding with this case while the state continues to attempt to resolve the impasse itself. While *Growe v. Emison*, 507 U.S. 25 (1993), instructs that federal courts should give states the opportunity to timely redistrict, *Growe* and other federal precedent hold that this Court may establish a deadline by which it will adopt a plan if the state has not acted.

And because election dates are fast approaching, the path that will best protect the rights of Florida voters is to implement a scheduling order, hear from the parties on proposed remedial plans, and prepare to adopt a congressional plan should the state fail to do so.

BACKGROUND

I. Status of Congressional Impasse

Approximately three weeks ago, at the commencement of this action, the Plaintiffs and the Arteaga Intervenors alleged that the Florida Legislature and Governor were likely to reach an impasse over congressional redistricting. *See* ECF No. 1, 10-1. After that filing, the Legislature waited several weeks to send its congressional plan to the Governor for his signature. When the plan did finally reach the Governor, he vetoed it within hours, announcing at a press conference that he believed the plan to be unconstitutional for its inclusion of a Black opportunity district in North Florida.[1] While a special legislative session is scheduled for April 19-22, that provides little assurance that a map will be adopted. Indeed, throughout the first session, Florida's legislative leaders explicitly rejected the Governor's proposed map, as the two political branches failed to reach agreement upon the

[1] *See* PBS, *Florida Gov. DeSantis vetoes Republican-drawn congressional maps* (Mar. 29, 2022), available at: https://www.pbs.org/newshour/politics/florida-gov-desantis-vetoes-republican-drawn-congressional-maps.

inclusion of a Black opportunity district in North Florida.[2] The Arteaga Intervenors are aware of no public statements by Florida's legislative leaders indicating that they intend to ignore the requirements of the Florida Constitution's Fair District Amendments in the special session, as the Governor's preferred map would require.

II. Status of State Court Action

The Arteaga Intervenors filed their state court complaint on March 11, 2022. Counsel for the Secretary and Attorney General Moody refused to accept service. On April 1, three weeks after the case was filed, and shortly after the parties conducted their meet-and-confer in this case, counsel for the Secretary appeared and answered the complaint. In her Answer, the Secretary asserted it would be improper for the state court to take any action unless and until the special session fails to produce a map. **Ex. 1** (Secretary's Answer).

As of this filing, counsel for Attorney General Moody still has not appeared, still has not answered the complaint, and still has not indicated whether she will answer before the date she is required to do so, which is April 20, 2022. There is no case schedule in place, and there has not yet been a case management conference. The first such conference is scheduled for Tuesday, April 12.

[2] *See, e.g.*, Memo from Chair Rodrigues Regarding an Update on State Legislative and Congressional Redistricting (Feb. 28, 2022) (explaining the importance of ensuring "non-diminishment in the ability of racial and language minorities in that district to elect representatives of their choice"), available at: https://www.floridaredistricting.gov/pages/senate-committee.

III. Congressional Primary Deadlines

Florida's congressional primary is August 23, 2022. Federal law requires states to mail military and overseas ballots 45 days in advance of an election, *see* 52 U.S.C. § 20302 (8), which means that primary ballots must be sent to those voters no later than July 9, 2022. Before ballots can be mailed, they must also be printed and assembled to be sent to the correct voter, and election officials must engage in geocoding to assign voters to the correct districts.

Aspiring congressional candidates in Florida may qualify for the ballot either by filing a minimum number of petition signatures or by paying a filing fee. The deadline to file petitions is May 16, 2022. *See* Fla. Stat. § 99.095. In an apportionment year, such as this one, a candidate can collect signatures from voters residing anywhere in the state. *See* **Ex. 2** at 4 (Florida Candidate Petition Handbook). In an apportionment year, the window to qualify by paying a filing fee is later than usually prescribed in non-apportionment years—this year, June 13 to June 17, 2022.[3] *See* Fla. Stat. § 99.061(9). The state may begin accepting such qualifying forms 14 days before the window opens, *id.* at § 99.061(8), which is May 30, 2022.

[3] In non-apportionment years, the qualifying window for federal candidates is 120 to 116 days before the primary, instead of 71 and 67 days before the primary, as it is this year. *See* Fla. Stat. §§ 99.061(1), (9).

ARGUMENT

I. Precedent permits this Court to establish a schedule to be prepared to remedy the impasse now.

While the Secretary boldly proclaims that *Growe v. Emison*, 507 U.S. 25 (1993), requires this Court to stay this case and sit on its hands while the state attempts to remedy the impasse, *Growe* does no such thing. If anything, *Growe* instructs that federal courts should be prepared and ready to remedy impasse when called to do so.

It is true that *Growe* imposes limits on the timing and scope of the *remedies* that federal courts may provide in the redistricting process, but it does not handcuff courts in the way the Secretary suggests. In *Growe*, the U.S. Supreme Court explained the federal district court overstepped its bounds by "actively prevent[ing] the state court from issuing its own congressional plan," even though the state court at issue—the Minnesota Special Redistricting Panel—was prepared to timely act. 507 U.S. at 26. And that was indeed what happened. The district court at issue in *Growe* repeatedly took affirmative action that halted the state proceedings, including by: (1) *staying* the Minnesota Special Redistricting Panel's proceedings, (2) *enjoining* the parties to the state proceedings from implementing the Minnesota Panel's remedial redistricting plan, and (3) proceeding to *adopt* its own districting plans even when the state court was otherwise ready to timely implement a plan. *Id.* Under those circumstances, it was not surprising that the U.S. Supreme Court held

that the district court had improperly "tied the hands" of a state that was willing and able to redistrict. *Growe* thus stands for the principle that federal courts should not proceed to actually reapportion a state's political boundaries until the state has failed to timely redistrict.

The Arteaga Intervenors are not asking this Court to do anything remotely similar to what the district court did in *Growe*. Instead, they are simply asking the Court to adopt a briefing and hearing schedule and be prepared to act if the state fails to timely redistrict, which is now a distinct possibility. Setting a briefing schedule or hearing date will not interfere with the political process or state judicial process. The Legislature and the Governor remain free to compromise and enact a new redistricting plan during the pendency of this litigation, and the state court is free to set the wheels in motion on a state judicial resolution, though it has yet to do so.

If anything, *Growe* suggests this Court should move forward now. *Growe* instructed that "[i]t would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed" to reapportion the state. 507 U.S. at 36. *Growe*'s predecessor, *Scott v. Germano*, 381 U.S. 407 (1965), similarly encouraged federal courts to take ownership of these kinds of disputes when called on to do so. In *Germano*, when it was not clear whether Illinois would produce timely redistricting plans, the U.S. Supreme Court remanded the case to the district court with explicit instructions to

(1) "enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate"; (2) "retain jurisdiction of the case"; and (3) "in the event a valid reapportionment plan for the State Senate is not timely adopted . . . enter such orders as it deems appropriate, including an order for a valid reapportionment plan[.]" 381 U.S. at 409-10.

And for decades, consistent with this precedent, federal courts have done precisely what is asked of the Court here: establish a schedule to resolve an impasse and be prepared to act if the state fails to timely do so itself. *See, e.g.*, *Favors v. Cuomo*, 866 F. Supp. 2d 176 (E.D.N.Y. 2012); *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. Jan. 15, 2002); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 862 (W.D. Wis. 1992).

While the Secretary has argued that this Court should stay its hand until both the state political and judicial processes have irreversibly failed to redistrict, the Secretary's approach would functionally preclude federal courts from remedying claims like this one, particularly because the State has asked the state court to not take any action until after the special session. Were this Court to wait to move forward until both the political branches *and* state court system had failed to implement new constitutional maps in time for the 2022 elections, there is a good chance there would not be time for this Court to undertake the complicated work of

crafting the necessary remedy. The stakes are too high for Florida voters and election administrators to take that risk. We are only two months away from the final qualifying deadline, and there is no congressional plan in sight. And as of this filing, Florida is one of only three states in the country without a congressional plan in place.[4] Should this Court need to order a new congressional plan, it will need time to do so. Redistricting plans do not spring from thin air; they take time to develop, as this Court has already recognized in requesting recommendations for a special master.

While the Secretary has compared this case to one in Wisconsin, where a federal court panel did enter a stay while a state court proceeded to remedy impasse, Wisconsin's circumstances were markedly different. The Wisconsin federal case, *Hunter v. Bostelmann*, 3:21-cv-00512 (W.D. Wis.) (three judge panel), was convened in mid-August 2021 in light of Wisconsin's anticipated impasse. But the Wisconsin federal panel did not agree to stay the matter right away, even though it was asked to do so. *See id.* at ECF No. 26, 60. It did so in mid-November only after the Wisconsin Supreme Court had (1) fully accepted jurisdiction of the state court impasse action, (2) accepted briefing from the parties on the proper criteria for a new redistricting plan, and (3) set a briefing and hearing schedule that was set to conclude

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[4] *See* FiveThirtyEight, "The Latest With Redistricting," (Apr. 4, 2022) ("Only Florida, Missouri and New Hampshire have yet to approve a new map, and we could be waiting for a while: In all three states, stakeholders in the redistricting process are at odds about what kind of map to pass.").

six weeks before the date by which the Wisconsin Elections Commission had told the federal court it needed new maps.[5] *See* **Ex. 3** (Wisconsin Supreme Court ordering simultaneous exchange of proposed plans in impasse dispute). The upshot is that the Wisconsin federal court would have had a six-week buffer to develop a remedial plan if the state court process failed. This Court does not have that luxury of time here.

II. The Court should establish a schedule that will allow it to remedy the impasse without imposing chaos on Florida's election administrators.

As set out above, Florida's congressional qualifying window (by filing fee) opens June 13 and closes June 17. As the Court has already recognized, it is not practical to ask candidates to wait until that window to learn of the contours of their potential districts and then make nearly instantaneous decisions on whether to run for Congress.

Even more importantly, however, Florida's election administrators need time to prepare for the primary election. An August 23 primary requires election officials to send ballots to military and oversees voters no later than July 9. *See supra* at 5. As the Common Cause Plaintiffs describe in more detail, Florida's election administrators must send ballots to the printers no later than June 18. And to send

[5] The Wisconsin Elections Commission had previously explained it needed maps in place by March 1, 2022. *See* ECF No. 41 at 2, *Hunter v. Bostelmann*, 3:21-cv-00512 (W.D. Wis. Sept. 7, 2021). The Wisconsin Supreme Court's briefing process was set to conclude by January 4, 2022, and oral argument was to take place in mid-January. *See* **Ex. 3**.

finalized ballots to the printers, the administrators need time to assign precincts to the appropriate congressional districts and perform other administrative tasks. To give election administrators at least some cushion and to minimize the possibility of costly errors, the Arteaga Intervenors recommend this Court adopt a congressional plan by mid-May 2022 based on the following schedule:

Date	**Event**
April 15	Parties' simultaneous exchange of proposed maps, briefs in support, and supporting expert reports, if any
April 22	Parties' simultaneous responses to proposed maps
April 25-29	Discovery window for expert depositions
May 2-4	Hearing
Mid-May	Court adopts congressional plan

This schedule provides for simultaneous exchange of maps and responses to those maps. A simultaneous exchange of proposed plans puts all parties on an equal playing field; courts adjudicating impasse disputes this redistricting cycle have required simultaneous exchanges precisely for this reason. *See, e.g.*, **Ex. 3**; **Ex. 4** (Pennsylvania Supreme Court ordering simultaneous exchange of proposed plans in impasse dispute). The proposed schedule also provides a brief window for expert depositions, a hearing, and sufficient time for this Court to render a decision.

CONCLUSION

For the reasons stated above, the Court should deny the Motion to Stay and adopt the schedule set out above. Alternatively, if the Court stays this case until the

special session is over, it should order a briefing and hearing schedule that would take effect immediately after a special session fails to produce a congressional plan.

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 2,549 words, excluding the case style and certifications.

Dated: April 6, 2022

Respectfully submitted,

/s/ *Frederick S. Wermuth*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *Frederick S. Wermuth*
Frederick S. Wermuth
Florida Bar No. 0184111

Exhibit 1

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

MICHAEL ARTEAGA, et al.,

Plaintiffs,

v. Case No. 2022 CA 000398

LAUREL M. LEE, in her official capacity as Florida Secretary of State, and ASHLEY MOODY, in her official capacity as Florida Attorney General,

Defendants.

_____________________________________/

SECRETARY OF STATE LAUREL LEE'S ANSWER AND AFFIRMATIVE DEFENSE

Defendant Secretary of State Laurel Lee answers and asserts an affirmative defense to the Plaintiffs' complaint for injunctive and declaratory relief. Unless specifically admitted, the Secretary denies each and every allegation in the complaint. The Secretary responds to the allegations in each numbered paragraphs of the complaint as follows:

Nature of the Action

1. Admit that Florida's congressional districts are currently malapportioned. Deny that the Florida Legislature and Governor DeSantis will not reach a consensus concerning new congressional district maps; although Governor DeSantis has vetoed the Florida Legislature's redistricting legislation, he called a special session to address redistricting. If the Florida Legislature and Governor DeSantis do not reach a consensus, admit that this court should declare the current maps malapportioned and implement new congressional district maps.

2. Admit.

3. Admit.

4. Admit.

5. Deny that the Florida Legislature and Governor DeSantis are unlikely to reach a consensus following the special session. Deny that Governor DeSantis's concerns regarding Congressional District 5 are "baseless." Admit that Governor DeSantis petitioned the Florida Supreme Court for an advisory opinion. The Secretary denies any other factual and legal allegations in this paragraph.

6. Admit that Governor DeSantis has commented on and vetoed the Florida Legislature's redistricting legislation. The Secretary denies any other factual and legal allegations in this paragraph.

7. Deny that the Florida Legislature and Governor DeSantis are unlikely to reach a consensus during the Florida Legislature's special session. The Secretary denies any other factual and legal allegations in this paragraph.

8. Deny that there is a high likelihood of an impasse. But admit that this Court should establish a schedule in the unlikely event that the Florida Legislature and Governor DeSantis cannot reach a consensus during the Florida Legislature's special session. The Secretary denies any other factual and legal allegations in this paragraph.

Jurisdiction, Parties, and Venue

9. Admit.

10. The Secretary is without knowledge of the allegations in this paragraph; therefore, she denies the allegations in this paragraph.

11. Admit.

12. Admit.

13. Admit that the Attorney General is Ashely Moody and that she is the chief legal officer of the State. The Secretary denies any other factual and legal allegations in this paragraph.

Factual Allegations

I.

14. Admit.

15. Admit.

16. Admit.

II.

17. Admit.

18. Admit.

19. Admit.

20. Admit.

21. Admit that the current congressional districts are malapportioned. The Secretary otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations; therefore, she denies them.

22. Admit.

23. Admit.

24. Admit.

25. Admit.

III.

26. Although Governor DeSantis has vetoed the Florida Legislature's redistricting legislation, he has called a special session to address redistricting. The Secretary denies any other factual and legal allegations in this paragraph.

27. Although Governor DeSantis has commented on and vetoed the Florida Legislature's redistricting legislation, he has called a special session to address redistricting. The Secretary denies any other factual and legal allegations in this paragraph.

28. Deny that Governor DeSantis's request for a Florida Supreme Court advisory opinion was an attempt to "derail" the redistricting process. Admit that Governor DeSantis proposed congressional district maps to the Florida Legislature and that the redistricting subcommittee received public testimony. The Secretary denies any other factual and legal allegations in this paragraph.

29. Although Governor DeSantis has vetoed the Florida Legislature's redistricting legislation, he has called a special session to address redistricting. The Secretary denies any other factual and legal allegations in this paragraph.

30. Although Governor DeSantis has vetoed the Florida Legislature's redistricting legislation, he has called a special session to address redistricting. The Secretary denies any other factual and legal allegations in this paragraph.

31. Although Governor DeSantis has vetoed the Florida Legislature's redistricting legislation, he has called a special session to address redistricting. Deny that the Florida Legislature and Governor DeSantis are unlikely to reach a consensus during the special session. The Secretary denies any other factual and legal allegations in this paragraph.

IV.

32. Admit that there is a need for a new congressional district map. But deny the assumption that the political branches of the Florida government will not agree on a new map. The Secretary denies any other factual and legal allegations in this paragraph.

33. Admit that there is a need for a new congressional district map. But deny the assumption that the political branches of the Florida government will not agree on a new map. The Secretary denies any other factual and legal allegations in this paragraph.

34. Admit that there is a need for a new congressional district map. But deny the assumption that the political branches of the Florida government will not agree on a new map. The Secretary denies any other factual and legal allegations in this paragraph.

35. Deny that a political deadlock is a near certainty. Admit that state court intervention is necessary if the Florida Legislature and Governor DeSantis reach an impasse after the special session. The Secretary denies any other factual and legal allegations in this paragraph.

Claims for Relief

Count I

36. The Secretary realleges and reincorporates by reference paragraphs 1 to 35.

37. The referenced constitutional provision and cases speak for themselves. Any remaining allegations are denied.

38. The referenced constitutional provision and cases speak for themselves. Any remaining allegations are denied.

39. Admit.

40. Admit.

41. Admit that the current congressional districts are malapportioned. The Secretary otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations; therefore, she denies them.

a. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

b. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

c. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

d. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

Count II

42. The Secretary realleges and reincorporates by reference paragraphs 1 to 35.

43. The referenced statute speaks for itself. Any remaining allegations are denied.

44. Admit.

45. Admit that the current congressional districts are malapportioned. The Secretary otherwise lacks knowledge or information sufficient to form a belief about the truth of the allegations; therefore, she denies them.

a. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

b. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

c. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

d. Admit if the Florida Legislature and Governor DeSantis reach an impasse after the special session; otherwise deny.

Affirmative Defense: Ripeness

1. The complaint is not ripe for adjudication because the political branches are not yet at an impasse.

2. On March 29, 2022, Governor DeSantis vetoed the congressional map presented to him.

3. On March 29, 2022, Governor DeSantis called for a special session of the Florida Legislature for the sole purpose of enacting another congressional map.[1]

4. The special session will convene from April 19, 2022 to April 22, 2022.

5. The leaders of the Florida House of Representatives and Florida Senate have stated that "[o]ur goal is for Florida to have a new congressional map passed by the Legislature, signed by the Governor, and upheld by the court if challenged. Therefore, it is incumbent upon us to exhaust every effort in pursuit of a legislative solution. We look forward to working with our colleagues and Governor DeSantis during the upcoming special session on a congressional map that will earn the support of the legislature and the governor and fulfill our constitutional obligation for the 2022 redistricting process."[2]

6. Unless and until the political branches reach an impasse, the matter is not ripe for adjudication.

[1] Proclamation, Fla. Exec. Office of the Gov. (Mar. 29, 2022), https://www.flgov.com/wp-content/uploads/2022/03/SLA-BIZHUB22032913200.pdf.

[2] Joint Statement: Florida Senate President Wilton Simpson, House Speaker Chris Sprowls on 2022 Redistricting, Fla. Leg. (Mar. 29, 2022), https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?DocumentType=Press%20Release&FileName=823.

DATED this 1st day of April, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on this 1st day of April, 2022.

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)

Exhibit 2

2022 Candidate Petition Handbook

Florida Department of State
Division of Elections
R. A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, FL 32399-0250
850.245.6280

(Rev. 11/2/2021)

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Chapter 1: Introduction

This handbook explains the process for collecting signatures to qualify as a candidate by petition method. Information herein applies only to candidate petitions. It does not apply to initiative petitions.

The information contained in this publication serves only as a reference guide. To the extent that this handbook covers material beyond that contained in law or rule, the Division of Elections offers such material to candidates merely as guidelines. This publication is not a substitute for the Florida Election Code or applicable constitutional and rule provisions, the text of which controls.

The following statutes and rules should be reviewed in their entirety:

- Section 99.095, Florida Statutes
- Section 99.09651, Florida Statutes
- Section 99.097, Florida Statutes
- Rule 1S-2.045, Florida Administrative Code

(See Appendix E)

All applicable forms and publications are publicly available on the Division of Elections' website at: dos.myflorida.com/elections/forms-publications.

Please direct questions to the Bureau of Election Records help desk at **850.245.6280**.

Chapter 2: Forms

What petition form should be used to obtain signatures from registered voters?

All candidates[1], except Presidential candidates, must use **Form DS-DE 104, Candidate Petition Form**.

The most current versions of petition forms are available on the Division of Elections' website.

Petitions on previous versions of Form DS-DE 104 are not valid.

A separate petition is required for each candidate.

Who is responsible for reproducing the petition form?

Candidates are responsible for reproducing the petition form.

Can the petition form be altered?

Form DS-DE 104 must be reproduced as is without any change to text or format with the following limited exceptions:

- **Form DS-DE 104** may be reduced or enlarged proportionally in size as a whole document. However, the form cannot be less than 3 inches by 5 inches and no larger than 8 1/2 inches by 11 inches.
- **Form DS-DE 104** may be included within a larger advertisement, provided the form is clearly defined by a solid or broken border.
- Candidates may use color highlights, circles, X's, arrows, or similar markings that draw attention to items on the form, as well as using cross-outs, line-throughs, or similar markings on items on the form that are not applicable to their candidacy.
- Candidates may translate petition forms into a minority language at their own expense. Petition forms may be two-sided with English on one side and a minority language on the other. However, the double-sided petition may be signed by only one person. If both sides of the form are completed, the Supervisor of Elections will check only the English side of the form for signature verification.

[1] Municipal candidates may use a different form if provided for by city charter or ordinance.

Is a disclaimer required on a petition?

No. A petition is not a political advertisement as defined in Section 106.011, Florida Statutes. However, if the petition is included as a part of a larger advertisement that is a political advertisement, the political advertisement will need a disclaimer. A missing disclaimer on such an advertisement does not invalidate an otherwise properly executed petition but does constitute a violation of Chapter 106, Florida Statutes.

Chapter 3: Collecting Signatures

How many signatures are needed?

The requisite number of signatures for qualifying by petition method for specified offices in a year of apportionment such as 2022 is different than other years. See s. 99.09651, F.S., for formula for candidates for U.S. House of Representatives, State Senate, and State House of Representatives. Petition signatures for these offices may be obtained from any registered voter in Florida regardless of party affiliation or district boundaries. See s. 99.095(1)(d), F.S., for formula for candidates for county and district offices. The requisite number of signatures for these offices may be obtained from any registered voter in the respective county, regardless of district boundaries.

- United States Senator – 144,419 signatures
- Representative in Congress – 2,568 signatures
- Governor – 144,419 signatures
- Attorney General – 144,419 signatures
- Chief Financial Officer – 144,419 signatures
- Commissioner of Agriculture – 144,419 signatures
- State Senator – 1,798
- State Representative – 599
- Circuit Court Judge, State Attorney (6th and 20th Circuits) and Public Defender (20th Circuit) – (*see* Appendix A)
- Special District Candidate – 25 signatures

Note: 2022 is a year of apportionment, which occurs every ten years. In election years other than a year of apportionment, the general requirement is to obtain signatures equal to 1% of the registered voters in the geographical area for the last general election, with the exception of special district candidates.

When can a candidate start collecting signatures on petitions?

A candidate can collect signatures as soon as a completed **Form DS-DE 9**, Appointment of Campaign Treasurer and Designation of Campaign Depository, is filed with the filing officer (*see* Appendix B). Petitions signed prior to the date Form DS-DE 9 is filed with the filing officer are **not** valid.

- **Exception:** Special district candidates are **not** required to file Form DS-DE 9 if they do not collect contributions or make expenditures other than the filing fee or signature verification fee.

- **Exception:** Federal candidates do **not** file Form DS-DE 9.

How long are signed petitions valid?

Signatures for all candidates are valid only for the next general election qualifying period for that office immediately following the filing of the DS-DE 9.

Example:
Candidate A is a 2024 State Representative candidate. The candidate may not begin collecting signatures until after the 2022 qualifying period.

Example:
Candidate B is a 2022 State Representative candidate. In the year of apportionment, petitions can be collected from any Florida voter regardless of district boundaries. In September 2021, a special election is called for this office with qualifying set in 2021. Candidate B wants to change to the special election. Candidate B may transfer only those petitions signed by voters within the district for the special election.

Example:
Candidate C is a 2022 State Representative candidate. In September of 2021, a special election is called for this office. Candidate C wants to qualify for the special election but does not want to transfer the petitions already signed to the special election. Candidate C may accomplish this by filing a new Form DS-DE 9 and opening an entirely separate campaign depository for the special election. Candidate C must start anew with contributions and petition gathering for the special election while maintaining the former campaign account for the general election. Petitions for the special election must be signed by voters within the district only. Candidate C may not use the funds or petitions previously collected for the special election. Candidate C may not use the funds or petitions gathered in the special election for the subsequent general election.

Example:
Candidate D is a 2024 County Commission candidate. The incumbent for that office resigns to run for another office. The office will now appear on the 2022 ballot for a term to end in 2024. Candidate D may choose the following options:

1. Remain a candidate for the 2024 County Commission and keep petitions.
2. Change elections from 2024 to 2022 and transfer petitions to the 2022 election.
3. Both - Remain a 2024 candidate and retain petitions. File a separate DS-DE 9 and separate campaign account for the 2022 candidate. (See page 4 regarding petitions during the year of apportionment.)

Where can candidates collect signatures on petitions?

The Election Code does not govern where signatures can be collected. The candidate should check with the property owner.

Can a candidate pay someone to collect petitions?

Yes. Nothing in the Election Code prohibits a candidate from paying any person to collect petitions. See Chapter 5: Fees and Undue Burden Oath for information on what happens when an undue burden oath is filed.

May a voter revoke their signature on a petition after receipt of the petition by the Supervisor of Elections?

No authority exists for a voter who has signed a petition to revoke their signature after it has been received by the Supervisor of Elections. *(See Rule 1S-2.045(4)(d), Florida Administrative Code.)*

Chapter 4: Verifying Petitions

Where are petitions submitted?

Signed petition forms are submitted for verification to the Supervisor of Elections in the county in which the voter is registered.

It is the responsibility of the candidate to ensure that the signed petition form is properly filed with the Supervisor of Elections of the county in which the signer is a registered voter. In the case of a misfiled petition, the filing date of the petition is the date such petition is filed with the proper county. If the Supervisor of Elections determines that the signer of a petition is not registered in their county, the supervisor shall notify the candidate that the petition has been misfiled, and shall return the petition to the candidate so that it can be refiled.

When is the deadline for submitting petitions to the Supervisor of Elections?

No later than noon on:

- **March 28, 2022** – Circuit Court Judge, State Attorney (6th and 20th Judicial Circuits), and Public Defender (20th Judicial Circuit)

- **May 16, 2022** – U.S. Senator, Representative in Congress, Governor, Attorney General, Chief Financial Officer, Commissioner of Agriculture, State Senate, State Representative, County, School Board, and Special District

Is this petition valid?

. . . if the petition is signed and dated before the filing date of Form DS-DE 9?

A petition signed and dated before the filing date of Form DS-DE 9 is invalid (except for federal candidates and special district candidates who have not collected contributions and whose only expense is the signature verification fee or filing fee). Form DS-DE 9 is not valid until filed (received) by the qualifying officer.

. . . if the petition is missing a required group, seat or district designation?

In the year of apportionment, any candidate for *county or district* office seeking ballot position by the petition process may obtain the required number of signatures from any registered voter in the respective county, regardless of district boundaries. (Section

99.095(2)(d), Florida Statutes) - Incorrect or lack of district designation on the petition will not invalidate the petition during year of apportionment. *(Exception – Judicial Candidate petition requirements do not change.)*

Note: Petitions collected for elections outside of the year of apportionment for an office that requires a group, seat or district designation, must contain the designation or it is invalid.

. . . if a candidate changes the office that they are running for?

In the year of apportionment, incorrect or lack of district designation on the petition will not invalidate the petition for any candidate for *county or district* office seeking ballot position by the petition process. *(Exception – Judicial Candidate petition requirements do not change.)*

Note: For petitions collected for elections outside of the year of apportionment, if a candidate changes the office that they are running for, any previously submitted petitions are not valid for the new office. This includes changing seats, groups, or districts.

Example:
Changing from County Commissioner, Seat 1 to County Commissioner, Seat 5 in the year of apportionment will not invalidate all previously verified petitions.

Example:
Changing from Circuit Court Judge, 17th Judicial Circuit, Group 1, to 17th Judicial Circuit, Group 5, will invalidate all previously verified petitions.

. . . if a candidate changes election years?

If a candidate changes from the 2022 election to the 2024 election, the petitions verified for the 2022 qualifying period will not be valid for the 2024 election.

. . . if a candidate changes to an intervening special election?

If a candidate changes from a regularly scheduled election to an earlier, intervening special election being held for that office, the petitions verified for the regular election that are from voters *within the county or district* are valid for the special election.

. . . if a candidate elects not to participate in an intervening special election?

If there is an earlier, intervening special election and the candidate decides not to participate in the special election, any petitions verified prior to the special election will remain valid for the regularly scheduled election.

. . . if a candidate's party affiliation on the petition is not the same as the party affiliation listed on the candidate's Form DS-DE 9?

The party affiliation listed on the petition must match the party affiliation listed on Form DS-DE 9, or if NPA is listed on the petition, the DS-DE 9 must indicate NPA. If they do not match, the petition is invalid.

ATTENTION: Recent law (s. 11 of Chapter 2021-11, Laws of Florida) requires a person seeking nomination as a candidate of a political party to be a member of that political party for the 365 days BEFORE the beginning of the applicable qualifying period. Additionally, the law requires a person seeking to qualify for office as a candidate with no party affiliation to not be a member of any political party for the 365 days BEFORE the beginning of the applicable qualifying period.

The candidate's party affiliation as indicated in their registration records is irrelevant and has no bearing on the validity of the petitions. The candidate's voter registration party affiliation does not become an issue until such time as they file qualifying documents during the qualifying period.

Example 1 – Invalid Petition:
Candidate A files Form DS-DE 9 indicating that they are running as a Republican candidate. Their petition forms also indicate that they are running as a Republican candidate. After submitting a number of petitions for verification, Candidate A submits a new DS-DE 9 indicating that they are running as a Democratic candidate. All previously verified petitions will not be eligible for qualifying as a Democratic candidate.

Example 2 – Valid Petition:
Candidate B files Form DS-DE 9 indicating that they are running as a Republican candidate. Their petition forms also indicate that they are running as a Republican candidate. Candidate B's voter registration party affiliation is Democrat. After submitting a number of petitions for verification, Candidate B changes their voter registration party affiliation to Republican. All petitions verified prior to Candidate B's change in voter registration remain valid. (See Party Affiliation on page 10 – Attention: Recent Law.)

Example 3 – Valid Petition:
Candidate C circulates petitions as an NPA candidate and is registered as a voter with party affiliation. As long as Form DS-DE 9 indicates that the candidate is running with no party affiliation, the petitions are valid. (See Party Affiliation on page 10 – Attention: Recent Law.)

Example 4 – Invalid Petition:
Candidate D files Form DS-DE 9 indicating that they are running as a Republican candidate. After they have begun collecting signatures, the candidate files a new DS-DE 9 changing from a Republican candidate to an NPA candidate. The petitions indicating that the candidate is a Republican candidate are no longer valid and do not count towards the total amount needed to qualify as a petition candidate. (See Party Affiliation on page 10 – Attention: Recent Law.)

Example 5 – Valid Petition:
Candidate E circulates petitions for a nonpartisan office but is registered as a voter with party affiliation. As long as the petition indicates that the candidate is running for a nonpartisan office, the petitions are valid.

Example 6 – Valid Petition:
Candidate F changes party affiliation on their voter registration record while running for a nonpartisan office. If the candidate is running for a nonpartisan office, changing their voter registration party affiliation will have no effect on previously verified petitions.

. . . if a candidate puts their party affiliation on a petition for a nonpartisan office?

A candidate for a nonpartisan office must check the block that indicates "Nonpartisan" on the petition when collecting petitions for a nonpartisan office. While the candidate may be a member of a party and still run in a nonpartisan race, they must collect petitions as a nonpartisan candidate and indicate this on the petition. If a nonpartisan candidate indicates that they are running as a party affiliated candidate, it will invalidate the petitions.

Note: If the petition indicates conflicting or incorrect information regarding the candidate's status as a nonpartisan, no party affiliated, or party affiliated candidate, the petition is invalid.

. . . if the petition is signed by a voter who is not registered in the geographical area represented at the time of signing or verification?

In the year of apportionment, any candidate for *county or district* office seeking ballot position by the petition process may obtain the required number of signatures from any registered voter in the respective county, regardless of district boundaries. (Section 99.095(2)(d), Florida Statutes) - Incorrect or lack of district designation on the petition will not invalidate the petition during year of apportionment. *(Exception – Judicial Candidate petition requirements do not change.)*

If a petition is signed by a voter who is not registered in the geographical area represented, it is not valid for that county. Form DS-DE 104 requires the person to attest that they are a registered voter in said "county and state" at the time a person signs the petition. Thus, at the time of signing, the person must have been a registered voter in the county. Additionally, Rule 1S-2.045, Florida Administrative Code, states a petition is invalid if the "petition is signed by a voter who is not a registered voter in the county, district, or other geographical area represented by the office sought unless otherwise specified in Sections 99.095 and 99.09651, Florida Statutes, at both the time of signing and verification of the petition."

. . . if the voter signs more than one petition for the same candidate?

Only one candidate petition per voter per candidate may be verified as valid.

When a supervisor is confronted with a situation where the same voter signs two or more candidate petitions for the same candidate for the same office, only one petition may be validated. For example, if the first petition submitted by the voter is valid, it remains valid even if a second petition by the same voter is submitted contrary to the above statute; however, the second petition may not be validated. The supervisor must ensure that only one petition per voter per candidate is counted as valid. Under Section 104.185, Florida Statutes, a person who knowingly signs a candidate petition more than one time for a

candidate commits a misdemeanor of the first degree. If the supervisor believes the voter or candidate violated the above statute by the submission of more than one petition per voter per candidate, the supervisor may file an elections fraud complaint with the Division of Elections or refer the matter to the local state attorney.

A voter may sign petitions for different candidates in the same race. There is nothing in the Election Code that prohibits a voter from signing petitions for more than one candidate in the same race or election.

. . . if the petition form is signed by an inactive voter?

A petition signed by an inactive voter is valid as long as it meets all other requirements. A voter's active or inactive status is immaterial.

. . . if the petition form is incomplete?

See Rule 1S-2.045(5)(f), Florida Administrative Code, for details on what information must be on the petition.

. . . if the petition is prefilled by the candidate?

The only entries that must be filled in by the voter are the signature and the date. Therefore, a candidate or petition gatherer is allowed to prefill all other information.

. . . if the petition is dated after the date the candidate submits the petition to the supervisor?

Rule 1S-2.045(5)(f), Florida Administrative Code, requires that the petition form contain "the date the voter signed the petition as recorded by the voter." If the date has not occurred, or occurred after the date the supervisor receives the petition, the voter obviously could not have signed the petition on that date, and it should not be counted as valid.

. . . if the voter with a public records exemption signs the petition?

No special processes apply when voters with **public records exemptions** sign petition forms. Like any other voter, if the voter with a protected address wants to sign the petition, the voter may elect to place a business address or some other address. If the voter lists an address other than the legal residence where the voter is registered, the supervisor must treat the petition as if the voter had listed the address where the voter is registered.

. . . if the petition does not have a disclaimer?

A petition does not meet the definition of a political advertisement as defined in Section 106.011, Florida Statutes (as it does not expressly advocate the election of a candidate). Thus, on its own, a petition need not contain a disclaimer. However, if the petition is included as a part of a larger advertisement that does meet the definition of a political advertisement, the political advertisement would need a disclaimer. A missing disclaimer on such an advertisement does not invalidate an otherwise properly executed petition but does constitute a violation of Chapter 106, Florida Statutes.

. . . if the petition does not have the voter's original signature?

Rule 1S-2.045(5)(f)4., Florida Administrative Code, provides that the Supervisor of Elections shall not verify a signature on a petition unless it contains the voter's original signature. Thus, copies of petitions, electronic submission (such as email), or petitions with electronic signatures are not valid.

. . . if a candidate is not registered to vote in the geographical area represented by the office sought?

Only the voter's registration status affects the validity of the petition. The candidate's eligibility for office has no bearing on the validity of the petitions.

. . . if the petition contains a shortened version of a political party's name in the block that asks for the name of the political party?

If the supervisor can determine with certainty to which party the shortened version refers, the petition should be verified.

Example:
Form DS-DE 9 indicates that the candidate is running as a Republican candidate. The petition has the acronym RPOF in the name of political party block. This would be acceptable as there is only one party commonly known as RPOF, i.e., Republican Party of Florida.

Chapter 5: Fees and Undue Burden Oath

What is the verification fee?

There is a fee of 10 cents per signature or the actual cost of checking such signatures, whichever is less, to be paid to the Supervisor of Elections for the cost of verifying the signature.

The fees must be paid in advance of verifying the petitions.

Who is responsible for the verification fee?

Section 99.097(4), Florida Statutes, provides that the Supervisor of Elections shall be paid in advance by the candidate. Thus, there are three ways to pay for the verification fees.

- The verification fee is paid with a campaign check or the campaign's petty cash.
- The candidate pays the verification fee with personal funds and reports it as an in-kind contribution or is reimbursed by the campaign.
- Someone else pays the verification fees and is reimbursed by the campaign.

Because the statute specifically states that the candidate shall pay the verification fee, ultimately, the candidate is responsible for paying the fee. If someone else pays the verification fee, it is the candidate's responsibility to ensure that the person is reimbursed by the campaign.

What is an undue burden oath?

If a candidate cannot pay the signature verification fee without imposing an undue burden on the candidate's resources, the candidate may file an undue burden oath (*see* Appendix C). Candidates must file an undue burden oath with each Supervisor of Elections' office where petitions will be submitted. The undue burden oath filed in each county must be properly notarized.

If any person is paid to solicit signatures on a petition, a candidate may not subsequently file an undue burden oath.

If an undue burden oath has been filed and payment is subsequently made to any person to

solicit signatures on a petition, the oath is no longer valid and a fee for all signatures previously submitted to the Supervisor of Elections and any that are submitted thereafter shall be paid by the candidate who submitted the oath.

If a candidate receives monetary contributions, as defined in Section 106.011, Florida Statutes, after the candidate has filed an undue burden oath and subsequently paid a signature gatherer, the monetary contributions must first be used to reimburse the Supervisor of Elections for any signature verifications fees that were not paid because of the filing of the oath.

Chapter 6: Certification to the Division of Elections

Which candidate petitions must be certified to the State?

Supervisors of Elections must certify the number of verified petitions for the following offices to the Division of Elections:

- U.S. Senate
- Representative in Congress
- Governor
- Attorney General
- Chief Financial Officer
- Commissioner of Agriculture
- State Senator
- State Representative
- Circuit Court Judge
- State Attorney
- Public Defender
- Multi-county Special District

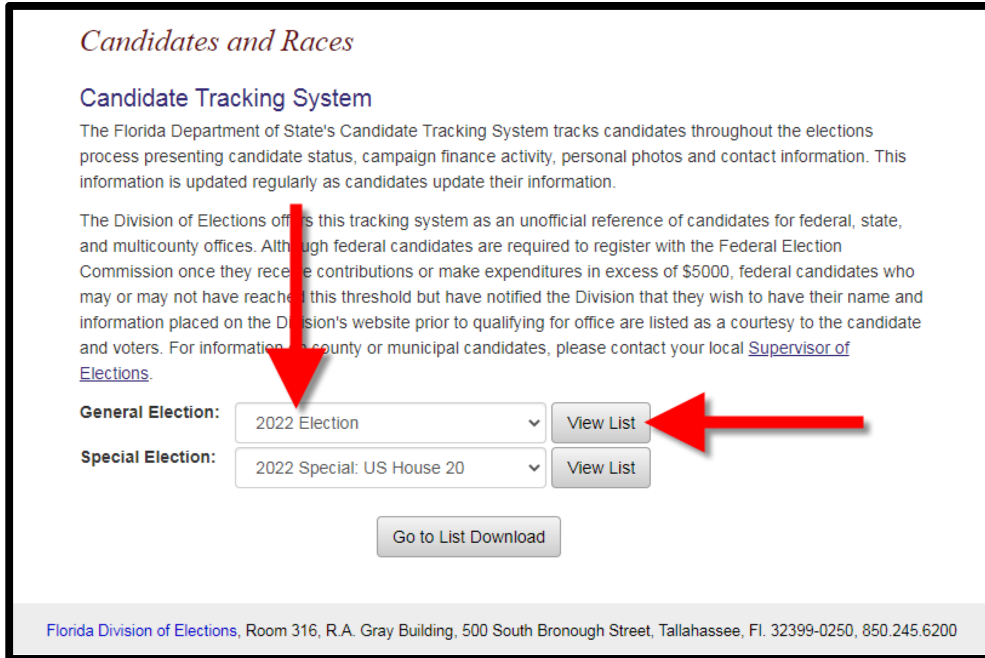
Who determines whether the candidate's name is placed on the ballot?

After receipt of the certifications from the Supervisor of Elections, the Division of Elections will determine whether the required number of signatures has been obtained in order for the name of the candidate to be placed on the ballot and will notify the candidate and the supervisor. (**NOTE**: This certification only excuses you from paying the qualifying fee and any party assessment when seeking to qualify for this office. The certification does not excuse you from submitting other qualifying papers required by the Florida Election Code.)

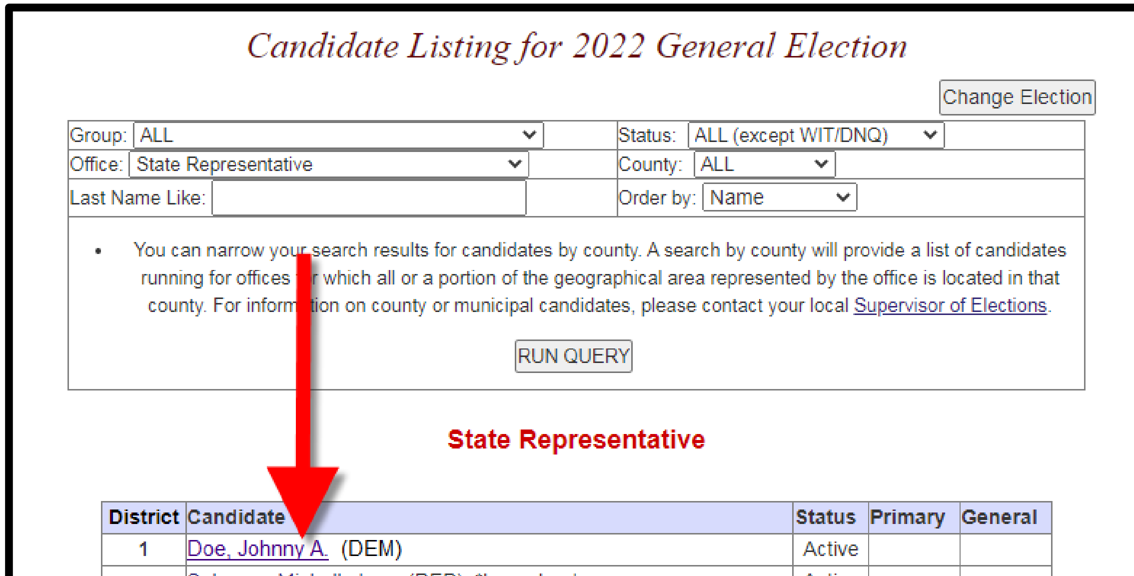
How do I confirm the number of signatures certified to the Division of Elections?

To check the number of signatures certified to the Division of Elections, search for the candidate's name on the Candidate Tracking System.

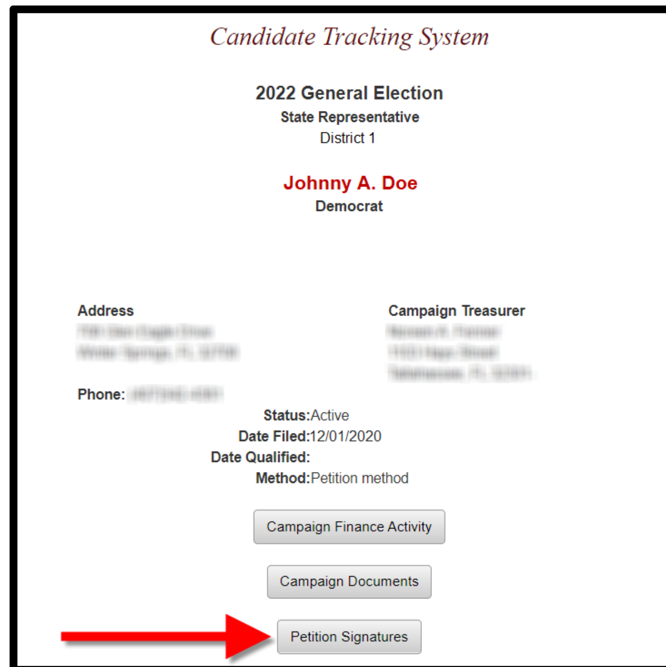
Select an **Election** and click **View List**.



Then click on the candidate's name.



Click **Petition Signatures** at the bottom of the screen.



The Petition Signatures button will **not** appear on a candidate's page if no petitions have been received and processed by the Supervisor of Elections.

The page will display the total required signatures, total verified, and the last date petitions were verified from a county to the Division of Elections.

Candidate's Petition Signatures

2022 General Election

State Representative

District 1

Johnny A. Doe

Democrat

Total Required	Total Verified
599	800

County	Last Verified Date	Total Verified Number
Escambia	07/30/2021	200
Okaloosa	07/10/2021	600

What do I do if I believe the totals are incorrect?

You will need to contact the Supervisor of Elections for the county in question.

What is the deadline for Supervisor of Elections to certify signatures to the Division of Elections?

No later than 5:00 p.m. on:

- **April 18, 2022** – Circuit Court Judge, State Attorney (6th and 20th Judicial Circuits), and Public Defender (20th Judicial Circuit)

- **June 6, 2022** – U. S. Senator, Representative in Congress, Governor, Attorney General, Chief Financial Officer, Commissioner of Agriculture, State Senate, State Representative, and Multi-county Special District

Certifications received from the Supervisor of Elections after the deadline will not be accepted.

Appendix A

2022 Petition Signatures Required for Circuit Court Judge, State Attorney (6th and 20th) and Public Defender (20th)

Judicial Circuit	Signatures Required
1	5,868
2	2,949
3	1,198
4	9,012
5	8,990
6	11,049
7	7,512
8	2,755
9	11,055
10	5,507
11	15,643
12	6,314
13	9,344
14	2,028
15	10,203
16	570
17	12,670
18	7,876
19	4,891
20	8,993

Appendix B: DS-DE 9 Appointment of Campaign Treasurer and Designation of Campaign Depository for Candidates

APPOINTMENT OF CAMPAIGN TREASURER AND DESIGNATION OF CAMPAIGN DEPOSITORY FOR CANDIDATES
(Section 106.021(1), F.S.)

(PLEASE PRINT OR TYPE)

NOTE: This form must be on file with the qualifying officer before opening the campaign account.

OFFICE USE ONLY

1. CHECK APPROPRIATE BOX(ES):
☐ Initial Filing of Form   Re-filing to Change: ☐ Treasurer/Deputy ☐ Depository ☐ Office ☐ Party

2. **Name of Candidate** (in this order: First, Middle, Last)

3. Address (include post office box or street, city, state, zip code)

4. Telephone
(   )

5. E-mail address

6. **Office sought** (include district, circuit, group number)

7. **If a candidate for a nonpartisan office, check if applicable:**
☐ My intent is to run as a Write-In candidate.

8. **If a candidate for a partisan office, check block and fill in name of party as applicable:** My intent is to run as a
☐ Write-In ☐ No Party Affiliation ☐ ____________________ Party candidate.

9. **I have appointed the following person to act as my** ☐ Campaign Treasurer ☐ Deputy Treasurer

SAMPLE

10. Name of Treasurer or Deputy Treasurer

11. Mailing Address

12. Telephone
(   )

13. City	14. County	15. State	16. Zip Code	17. E-mail address

18. **I have designated the following bank as my** ☐ Primary Depository ☐ Secondary Depository

19. Name of Bank

20. Address

21. City	22. County	23. State	24. Zip Code

UNDER PENALTIES OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING FORM FOR APPOINTMENT OF CAMPAIGN TREASURER AND DESIGNATION OF CAMPAIGN DEPOSITORY AND THAT THE FACTS STATED IN IT ARE TRUE.

25. Date

26. Signature of Candidate
X

27. **Treasurer's Acceptance of Appointment** (fill in the blanks and check the appropriate block)

I, ____, do hereby accept the appointment
(Please Print or Type Name)

designated above as: ☐ Campaign Treasurer ☐ Deputy Treasurer.

________________________ **X** ____
Date   Signature of Campaign Treasurer or Deputy Treasurer

DS-DE 9 (Rev. 10/10)   **Rule 1S-2.0001, F.A.C.**

Appendix C: DS-DE 19A Affidavit of Undue Burden – Candidate

AFFIDAVIT OF UNDUE BURDEN
(Section 99.097(4), Florida Statutes)

IMPORTANT: (1) Paying signature gatherers will preclude or invalidate the filing of an undue burden oath. Section 99.097(6), Florida Statutes, provides: (a) If any person is paid to solicit signatures on a petition, an undue burden oath may not subsequently be filed in lieu of paying the fee to have signatures verified for that petition. (b) If an undue burden oath has been filed and payment is subsequently made to any person to solicit signatures on a petition, the undue burden oath is no longer valid and a fee for all signatures previously submitted to the supervisor of elections and any submitted thereafter shall be paid by the candidate, person, or organization that submitted the undue burden oath. If contributions as defined in s. 106.011 are received, any monetary contributions must first be used to reimburse the supervisor of elections for any signature verification fees that were not paid because of the filing of the undue burden oath. [Note: The second sentence in (b) applies only when payment is made to a signature gatherer after an undue burden oath had been filed.]
(2) Upon a candidate terminating the campaign, any candidate who qualified by the petition process and who has surplus funds, must first apply the surplus funds to the reimbursement of the signature verification fee (if applicable). *See* s. 106.141(7), Florida Statutes.

****

I certify under oath that I intend to qualify as a candidate for the office of

______________________________ and that I am unable to pay the fee for verification of petition signatures for that office without imposing an undue burden on my personal resources or on resources otherwise available to me.

X

SAMPLE

Signature of Candidate **Print Candidate's Name**

Address **City**

( )

State **Zip** **Telephone Number**

STATE OF FLORIDA

COUNTY OF __________________

____
Signature of Notary Public
Print, Type or Stamp Commissioned Name of Notary Public below:

Sworn to (or affirmed) and subscribed before me by means of

online notarization ☐ *OR* physical presence ☐

this ________ day of ______________________, 20_____.

Personally Known ☐ *OR* Produced identification ☐

Type of Identification Produced:________________

DS-DE 19A (11/2/2021)

Appendix D: DS-DE 104 Candidate Petition Form

CANDIDATE PETITION

Notes: *- All information on this form becomes a public record upon receipt by the Supervisor of Elections.*
- It is a crime to knowingly sign more than one petition for a candidate. [Section 104.185, Florida Statutes]
- If all requested information on this form is not completed, the form will not be valid as a Candidate Petition form.

I, ______________________________ the undersigned, a registered voter
(print name as it appears on your voter information card)

in said state and county, petition to have the name of ______________________________

placed on the Primary/General Election Ballot as a: [*check/complete box, as applicable*]

☐ Nonpartisan ☐ No party affiliation ☐ ____________ Party candidate for the office of

____
(insert title of office and include district, circuit, group, seat number, if applicable)

SAMPLE

Date of Birth (MM/DD/YY) or **Voter Registration Number**	**Address**

City	**County**	**State**	**Zip Code**

Signature of Voter	**Date Signed (MM/DD/YY)** [*to be completed by Voter*]

Rule 1S-2.045, F.A.C. **DS-DE 104 (Eff. 09/11)**

Appendix E: Legal References and Rules Cited

Florida Statutes

- 99.095 Petition process in lieu of a qualifying fee and party assessment.
- 99.09651 Signature requirements for ballot position in year of apportionment.
- 99.097 Verification of signatures on petitions.
- 100.371 Initiatives; procedure for placement on ballot.
- 104.31 Political activities of state, county, and municipal officers and employees.
- 104.185 Petitions; knowingly signing more than once; signing another person's name or a fictitious name.
- 106.011 Definitions.
- 106.15 Certain acts prohibited.

Florida Election Code

- Chapters 97 – 106, Florida Statutes

Florida Administrative Code

- Rule 1S-2.045 Candidate Petition Process

Forms

- DS-DE 9 Appointment of Campaign Treasurer and Designation of Campaign Depository for Candidates
- DS-DE 19A Affidavit of Undue Burden - Candidate
- DS-DE 104 Candidate Petition Form

Candidate Tracking System – Division of Elections

- dos.elections.myflorida.com/candidates

Exhibit 3

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
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November 17, 2021

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*Address list continued on page 4.

You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

Pending before the court is an original action filed by petitioners Billie Johnson, et al. This order provides scheduling expectations for the parties in the event new maps are not enacted into law, and it becomes necessary for this court to award judicial relief.

The court intends to issue an opinion on or about November 30, 2021, answering the first three questions posed in this court's order dated October 14, 2021, and briefed by the parties and amici, namely: (1) Under the relevant state and federal laws, what factors should we consider in evaluating or creating new maps? (2) The petitioners ask us to modify existing maps using a "least-change" approach. Should we do so, and if not, what approach should we use? and (3) Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?

Upon issuance of the court's decision on the first three questions, the parties are encouraged to review discovery and record development needs and are advised that the following deadlines will apply:

IT IS ORDERED that by 4:00 p.m. on December 3, 2021, if parties desire discovery, they shall submit a joint proposed discovery plan that details from whom and how discovery will be sought, with all discovery to be completed on or before December 23, 2021;

IT IS FURTHER ORDERED that on or before 12:00 noon on December 15, 2021, each party (including all intervenors) may file a proposed map (for state assembly, state senate, and congress), complying with the parameters set forth in the court's forthcoming decision, a supporting brief, and an expert report; or, a party may file a letter-brief stating the party supports a map proposed by another party. Any brief filed in support of a proposed map shall not exceed 50 pages if a monospaced font is used or 11,000 words if a proportional serif font is used. A letter-brief filed in support of another party's proposed map shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that any expert report filed in support of a proposed map and accompanying its supporting brief shall strive for brevity and shall contain an executive summary not to exceed five pages if a monospaced font is used or 1,100 words if a proportional serif font is used;

IT IS FURTHER ORDERED that on or before 12:00 noon on December 30, 2021, each party may file a responsive brief which shall not exceed 25 pages if a monospaced font is used or 5,500 words if a proportional serif font is used. A party that elects to support another party's proposed map may file a letter-brief that shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that any non-party that wishes to file a non-party brief amicus curiae in support of or in opposition to a proposed map must file a motion for leave of the court to file a non-party brief. Wis. Stat. § (Rule) 809.19 (7). Non-parties should consult this court's Internal Operating Procedure III.B.6.c., concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it and shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 12:00 noon on January 4, 2022. Any proposed non-party brief for which this court does not grant leave will not be considered by the court;

IT IS FURTHER ORDERED that on or before 12:00 noon on January 4, 2022, each party may file a reply brief, which shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used. A party that elects to support another party's proposed map may file a letter-brief that shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that the form, pagination, appendix, and certification requirements shall be the same as those governing standard appellate briefing in this court for a brief-in chief, response, and reply;

IT IS FURTHER ORDERED that any party that filed a proposed map and subsequently determines that it merits a correction or modification, may file a motion seeking the court's leave to amend the proposed map. Such motion shall include a description of the amendments, the reasons for them, a proposed amended map, and shall state whether the motion is unopposed by other the parties. The court may request responses from the other parties; unsolicited responses to such a motion will be disfavored;

IT IS FURTHER ORDERED that the parties are advised that the court may elect to conduct a hearing and/or oral argument on one or more of four consecutive days beginning January 18, 2022; and

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.70, 809.80 and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 noon of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email."

Sheila T. Reiff
Clerk of Supreme Court

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Exhibit 4

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CASES CONSOLIDATED

Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty and Janet Temin,
Petitioners

v.

No. 464 M.D. 2021

Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries,
Respondents

Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak,
Petitioners

v.

No. 465 M.D. 2021

Veronica Degraffenreid, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries,
Respondents

PER CURIAM **O R D E R**

AND NOW, this 20th day of December, 2021, in consideration of the petitions for review filed in the above-consolidated actions, which are addressed to this Court's original jurisdiction, and consistent with the process established in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), it is hereby ORDERED:

1. Any applications to intervene, *see* Pa. R.A.P. 1531(b), shall be filed by December 31, 2021. Answers thereto shall be due within four (4) days of the date the application to intervene is filed.

2. Any party to this proceeding who wishes to submit to the Court for its consideration a proposed 17-district congressional reapportionment plan consistent with the results of the 2020 Census shall file the proposed plan by January 28, 2022.

3. If the General Assembly and the Governor fail to enact a congressional reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties.

4. In the event the Court must select a congressional reapportionment plan, the Court will hold a final hearing beginning on January 31, 2022, to receive evidence and consider all timely filed proposed plans. The Court will also consider revisions to the 2022 election schedule/calendar as part of the hearing. The hearing will begin at 9:30 a.m. in Courtroom 3001 of the Pennsylvania Judicial Center, Harrisburg, PA. It shall be the responsibility of Petitioners to secure the services of a court reporter(s) throughout the duration of the hearing.

5. Consistent with the authority granted to the General Assembly under the Elections Clause of the United States Constitution, art. I, § 4, cl. 1, Petitioners are hereby directed to serve immediately a copy of this Order on the Pennsylvania Senate Majority and Democratic Leaders and on the Pennsylvania House of Representatives Majority and Democratic Leaders and file proof of service with this Court.

Order Exit
12/20/2021

EXHIBIT 6

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

Nos. 22-11133; 22-11143; 22-11144; 22-11145

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., et al.,

Plaintiffs-Appellees,

versus

FLORIDA SECRETARY OF STATE, et al.,

Defendants-Appellants,

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket Nos. 4:21-cv-00242-MW-MAF; 4:21-cv-00186-MW-MAF; 4:21-cv-00187-MW-MAF; 4:21-cv-00201-MW-MJF

Before NEWSOM, LAGOA, and BRASHER, Circuit Judges

PER CURIAM:

The district court here permanently enjoined three provisions of Florida law governing elections in that state. It also subjected Florida to a "preclearance" regime whereby the state—for the next decade—must seek and receive the district court's permission before it can enact or amend certain election laws. The state now asks us to stay that decision pending appeal. After careful consideration, we grant the state's motion.[1]

I

Florida's governor signed Senate Bill 90 into law on May 6, 2021. Plaintiffs sued, challenging four of SB90's provisions, three of which are relevant here: (1) a provision regulating the use of drop boxes for collecting ballots (the "Drop-Box Provision"), Fla. Stat. § 101.69(2)–(3); (2) a provision requiring third-party voter-registration organizations to deliver voter-registration applications to the county where an applicant resides within a proscribed period of time (the "Registration-Delivery Provision") and specifying

---

[1] We note that we write only for the parties' benefit. Because an "order[] concerning [a] stay[is] not a final adjudication of the merits of the appeal, the tentative and preliminary nature of a stay-panel opinion precludes the opinion from having an effect outside that case." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1280 n.1 (11th Cir. 2020) (quotation marks omitted).

information that third-party voter-registration organizations must provide to would-be registrants (the "Registration-Disclaimer Provision"), Fla. Stat. § 97.0575(3)(a); and (3) a provision prohibiting the solicitation of voters within 150 feet of a drop box or polling place (the "Solicitation Provision"), Fla. Stat. § 102.031(4)(a)–(b).[2]

Plaintiffs[3] challenged those provisions, as relevant here, on several grounds. First, they asserted that the provisions discriminated on the basis of race in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. Second, they contended that the Solicitation Provision was unconstitutionally vague or overbroad in violation of the First and Fourteenth Amendments. And finally, they argued that the Registration-Disclaimer Provision compelled speech in violation of the First Amendment.

[2] Plaintiffs also challenged a provision governing mail-in voting, Fla. Stat. § 101.62(1), but the district court rejected plaintiffs' contentions regarding that provision and refused to enjoin it. Accordingly, that provision is not relevant to the state's motion for a stay pending appeal.

[3] On appeal, we consolidated four separate cases. Each set of plaintiffs has brought slightly different claims: The Harriet Tubman Freedom Fighters challenge only the Registration-Disclaimer Provision; The League of Women Voters challenge only the Registration-Disclaimer and Solicitation Provisions; and Florida NAACP and Florida Rising Together challenge all four provisions. For simplicity's sake—and because plaintiffs' claims are all interwoven—we will address each claim generally rather than specifying which plaintiff goes with which claim.

The district court largely agreed with plaintiffs that "SB 90 runs roughshod over the right to vote, unnecessarily making voting harder for all eligible Floridians, unduly burdening disabled voters, and intentionally targeting minority voters." Specifically, the court held that all of the above-mentioned provisions were intentionally discriminatory, violating the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. Moreover, the court held that the Solicitation Provision violated the First and Fourteenth Amendments because it was unconstitutionally vague and overbroad. And it held that the Registration-Disclaimer Provision violated the First Amendment because it impermissibly compelled speech.

Accordingly, the district court permanently enjoined those provisions of SB90. It then sua sponte considered whether it would stay the injunction pending appeal and refused to do so. Finally, based on its determination that the Florida legislature had intentionally discriminated against black voters, the court subjected Florida to "preclearance" under Section 3 of the VRA: For the next decade, it held, "Florida may enact no law or regulation governing [third-party voter-registration organizations], drop boxes, or line-warming activities without submitting such law or regulation" to the district court for its advance approval. The state now moves this Court to stay the district court's decision pending appeal.

II

A

Under the "'traditional' standard for a stay," we "consider[] four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 425–26 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). But of course, that "traditional" four-factor standard does not always apply. For example, in some circumstances—namely, "when the balance of equities . . . weighs heavily in favor of granting the stay"—we relax the likely-to-succeed-on-the-merits requirement. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (quotation marks omitted). In that scenario, the stay may be "granted upon a lesser showing of a 'substantial case on the merits.'" *Id.* (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 26, 1981)).

Under what has come to be called the "*Purcell* principle," *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the "traditional test for a stay" likewise "does not apply" in the particular circumstance that this case presents—namely, "when a lower court has issued an injunction of a state's election law in the period close to an election," *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022)

(Kavanaugh, J., concurral).[4] In such a case, an appellate court considering a stay pending appeal is "required to weigh . . . considerations specific to election cases." *Purcell*, 549 U.S. at 4–5. For instance, the reviewing court must be cognizant that "orders affecting elections . . . can themselves result in voter confusion." *Id.* at 4–5. And that risk only increases as an election draws closer. *Id.* at 5. For that reason, the *Purcell* principle teaches that "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurral). And if a district court violates that principle, the appellate court "should stay [the] injunction[]," *id.*, often (as it could not do under the "traditional" test) while "express[ing] no opinion" on the merits. *Purcell*, 549 U.S. at 5.

So, an important question: When is an election sufficiently "close at hand" that the *Purcell* principle applies? *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). As the district court noted, the Supreme Court has never specified precisely what it means to

---

[4] We note plaintiffs' contention that the state has "waived" any argument that the *Purcell* principle applies because it "never raised *Purcell* below as a basis for denying injunctive relief." We disagree. We are doubtful that the *Purcell* principle is subject to the ordinary rules of waiver (or perhaps more accurately here, forfeiture, *see United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (en banc)). As when considering jurisdictional limitations, we have an independent obligation to "weigh . . . considerations specific to election cases." *Purcell*, 549 U.S. at 4. When we are "[f]aced with an application to enjoin" voting laws close to an election—or, as here, a request to stay such an injunction—we are "*required* to weigh" the injunction's impact for an upcoming election. *Id.* (emphasis added).

be "on the eve of an election" for *Purcell* purposes. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). In *Purcell* itself, the Court stayed an injunction that a lower court had issued "just weeks before the election." *Purcell*, 549 U.S. at 4. In *Milligan*, by contrast, the Court granted a stay even though the primary election was still "about four months" away. *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissenting).[5]

Whatever *Purcell*'s outer bounds, we think that this case fits within them.[6] When the district court here issued its injunction, voting in the next statewide election was set to begin in *less* than four months (and local elections were ongoing). Moreover, the district court's injunction implicates voter registration—which is currently underway—and purports to require the state to take action now, such as re-training poll workers. And although the district court satisfied itself that its injunction—including the requirement that the state preclear new voting rules—was not too draconian, we are reminded that "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with

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[5] *See also Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir.) (per curiam) (noting that a stay was warranted in light of *Purcell* notwithstanding its observation that the election was "months away"), *motion to vacate stay denied*, No. 19A1054, 2020 WL 3456705 (U.S. 2020).

[6] It may be, in marginal cases, that "[h]ow close to an election is too close" will depend on a number of factors. *Milligan*, 142 S. Ct. at 881 n.1 (Kavanaugh, J., concurral). But because we determine that this case easily falls within the time period that triggered *Purcell* in *Milligan*, we need not endeavor to articulate *Purcell*'s precise boundaries.

administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral).

Because the election to which the district court's injunction applies is close at hand and the state "has a compelling interest in preserving the integrity of its election process," *Purcell* controls our analysis. *Purcell*, 549 U.S. at 4 (quotation marks omitted).

B

Of course, even under *Purcell*, a state's interest in proceeding under challenged election procedures is not "absolute." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). Instead, we agree with Justice Kavanaugh that *Purcell* only (but significantly) "heightens" the standard that a plaintiff must meet to obtain injunctive relief that will upset a state's interest in running its elections without judicial interference. *Id.*[7] In Justice Kavanaugh's view, the plaintiff must demonstrate, among other things, that its position on the merits is "entirely clearcut." *Id.* Whatever the precise standard, we think it clear that, for cases controlled by *Purcell*'s analysis, the party seeking injunctive relief has a "heightened" burden.

[7] To put it slightly differently, *Purcell* stands for the proposition that when an election is close at hand, it is "ordinarily" improper to issue an injunction. *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurral). That leaves room for the "extraordinary" case where an injunction—despite its issuance on the eve of the election—might be proper.

Here, of course, we have the converse of that situation. The plaintiffs in this case have already obtained injunctive relief upsetting the previously applicable state election procedures, and the question before us is whether the state is entitled to a stay pending appellate review of the district court's injunction. In that posture, it seems to us, *Purcell* effectively serves to *lower* the state's bar to obtain the stay it seeks. The state need not show, for instance—as a plaintiff would to obtain a "late-breaking injunction" in the first place—that its position is "entirely clearcut," *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). Rather, it need only show that plaintiffs' position is *not*.[8]

Accounting for *Purcell*, we hold that the state is entitled to a stay of the district court's order enjoining the operation of SB90's Drop-Box, Registration-Delivery, and Solicitation Provisions and subjecting Florida to preclearance. The district court's determination regarding the legislature's intentional discrimination suffers from at least two flaws, either of which justifies a stay. And, although we think it presents a closer question, we hold that the district court's determination that the Solicitation Provision is

[8] We are of course aware that Justice Kavanaugh provided three additional factors—*all* of which must be satisfied to justify an injunction under *Purcell*. *See Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). But because we determine that the underlying merits of the district court's order in this case are vulnerable on several grounds, we need not go any further.

unconstitutionally vague and overbroad is sufficiently vulnerable to warrant a stay.[9]

i

The first two flaws come from the district court's determination that SB90 is the product of intentional race discrimination. That inquiry is guided by an eight-factor test—the first five of which come from the Supreme Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and the remaining three from our ensuing caselaw. We have summarized the *Arlington Heights* factors as follows: "(1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators." *Greater Birmingham Ministries v. Sec'y of State for Al.*, 992 F.3d 1299, 1322 (11th Cir. 2021) ("*GBM*"); *see also Arlington Heights*, 429 U.S. at 266–68. And we have added the following considerations: "(6) the foreseeability of the disparate impact; (7) knowledge of that impact[;] and (8) the availability of less discriminatory alternatives." *GBM*, 992 F.3d at 1322.

[9] We decline to weigh in on the merits of the Registration-Disclaimer Provision. That provision has been repealed by a newly enacted statute, which Florida's Governor has already signed. That law will go into effect—thereby mooting any challenge to the Registration-Disclaimer Provision—as soon as the district-court-ordered preclearance regime ceases to operate. And that regime will cease to operate upon the issuance of this opinion.

First, we find the district court's historical-background analysis to be problematic. We have been clear that "old, outdated intentions of previous generations" should not "taint [a state's] legislative action forevermore on certain topics." *Id.* at 1325. To that end, *Arlington Heights*'s "historical background" factor should be "focus[ed] . . . on the 'specific sequence of events leading up to the challenged decision'" rather than "providing an unlimited lookback to past discrimination." *Id.* (quoting *Arlington Heights*, 429 U.S. at 267); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) ("The 'historical background' of *a legislative enactment* is 'one evidentiary source' relevant to the question of intent." (emphasis added) (quoting *Arlington Heights*, 429 U.S. at 267)).

In its assessment of SB90's historical background, the district court led with the observation that "Florida has a grotesque history of racial discrimination." It began its survey of that history beginning immediately after the Civil War and marched through past acts of "terrorism" and "racial violence" that occurred during the early and mid-1900s. And it concluded by seeming to chide the Supreme Court for suggesting that "[o]ur country has changed" since the Voting Rights Act was enacted in 1965. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). At least on our preliminary review, the district court's inquiry does not seem appropriately "focus[ed]" or "[]limited," as *GBM* requires. 992 F.3d at 1325.

Second, the district court failed to properly account for what might be called the presumption of legislative good faith. The Supreme Court has instructed that when a court assesses whether a

duly enacted statute is tainted by discriminatory intent, "the good faith of the state legislature must be presumed." *Perez*, 138 S. Ct. at 2324 (cleaned up).

For starters, in its 288-page opinion, the district court never once mentioned the presumption. And while we do not require courts to incant magic words, it does not appear to us that the district court here meaningfully accounted for the presumption at all. For instance, the court imputed discriminatory intent to SB90 based in part on one legislator's observation, when asked about the law's potentially disparate impact, that based on "the patterns of use" some voters "may have to go about it a little different way" once SB90 becomes law. Applying the presumption of good faith—as a court must—that statement by a single legislator is not fairly read to demonstrate discriminatory intent by the state legislature. Moreover—even if we do not presume good faith—that statement at worst demonstrates an "awareness of consequences," which is insufficient to establish discriminatory purpose. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group.").

ii

Separate and apart from its intentional-discrimination finding, the district court determined that the Solicitation Provision was unconstitutionally overbroad and vague. Although we think

that issue presents a closer call than the intentional-discrimination finding, the state has met its burden to obtain a stay.

The Solicitation Provision precludes any "person, political committee, or other group or organization" from "solicit[ing] voters inside the polling place" or within 150 feet thereof. Fla. Stat. § 102.031(4)(a). And it defines "solicit" as follows:

> [S]eeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; selling or attempting to sell any item; and engaging in any activity with the intent to influence or effect of influencing a voter.

Id. § 102.031(4)(b).

The district court held that the language "engaging in any activity with the intent to influence or effect of influencing a voter" was impermissibly vague because it "fails to put Floridians of ordinary intelligence on notice of what acts it criminalizes" and because it "encourages arbitrary and discriminatory enforcement." And it determined it was also unconstitutionally overbroad because it "prohibits a substantial amount of activity protected by the First Amendment relative to the amount of unprotected activity it prohibits."

The state has a substantial argument that the statute passes constitutional muster. First, as to vagueness, the state correctly points out that the panel that ultimately decides the merits of its appeal might determine that the language the district court found problematic is limited by the surrounding examples of prohibited conduct. *See United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated.").

Turning to overbreadth, we note that "succeeding on a claim of substantial overbreadth is not easy to do." *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1371 (11th Cir. 2021) (quotation omitted). And the district court below failed to contend with any of the "plainly legitimate" applications of the Solicitation Provision, and thereby arguably failed to balance its legitimate applications against its potentially unconstitutional applications. *See Williams*, 553 U.S. at 292 ("[W]e have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (emphasis omitted)).

Therefore, the underlying merits of the vagueness and overbreadth challenges to the Solicitation Provision, at the very least, aren't "entirely clearcut." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral).

* * *

In the circumstances of this case, and accounting for the fact that our review is governed by *Purcell*, we conclude that the state is entitled to a stay pending appeal. The motion for a stay pending appeal is **GRANTED**.

EXHIBIT 7

STATE OF FLORIDA
Office of the Governor
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001
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850-717-9418

RON DESANTIS
GOVERNOR

MEMORANDUM

To: Ron DeSantis, Governor of Florida

From: Ryan Newman, General Counsel, Executive Office of the Governor RDN

Date: March 29, 2022

Re: Constitutionality of CS/SB 102, An Act Relating to Establishing the Congressional Districts of the State

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Congressional District 5 in both the primary and secondary maps enacted by the Legislature violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it assigns voters primarily on the basis of race but is not narrowly tailored to achieve a compelling state interest.

"Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools," the U.S. Supreme Court has made clear that the State also "may not separate its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal citations omitted). "When the State assigns voters on the basis of race," the Court explained, "it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 911-12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

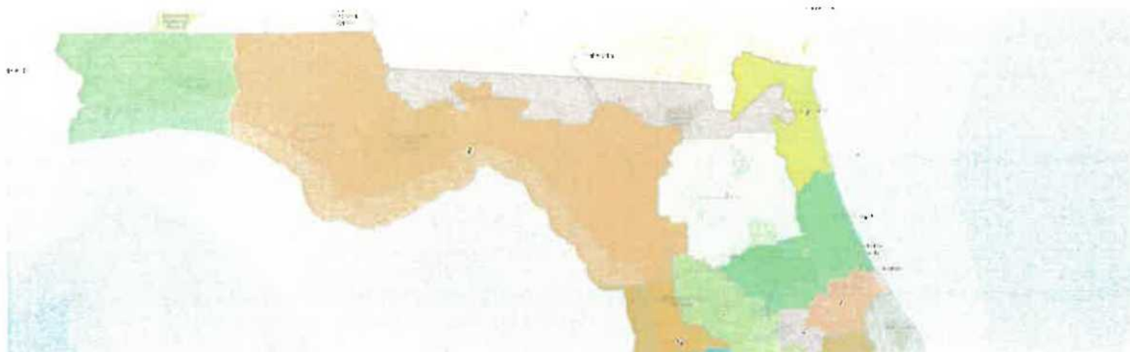
For these reasons, the Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution to prohibit state legislatures from using race as the "predominant factor motivating [their] decision to place a significant number of voters within or without a particular district," *id.* at 916, unless they can prove that their "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end," *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (citation omitted). That race was the predominant factor motivating a legislature's line-drawing decision can be shown "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916.

Although non-adherence to traditional districting principles, which results in a non-compact, unusually shaped district, is relevant evidence that race was the predominant motivation of a legislature, such evidence is not required to establish a constitutional violation. "Race may predominate even when a reapportionment plan respects traditional principles, . . . if '[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017) (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (alteration in original)). "The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Id.* at 799. A legislature "could construct a plethora of potential maps that look consistent with traditional, race-neutral principles," but "if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." *Id.* It is the "racial purpose of state action, not its stark manifestation," that offends the Equal Protection Clause. *Miller*, 515 U.S. at 913.

In light of these well-established constitutional principles, the congressional redistricting bill enacted by the Legislature violates the U.S. Constitution. The bill contains a primary map and secondary map that include a racially gerrymandered district—Congressional District 5—that is not narrowly tailored to achieve a compelling state interest. *See generally* Fla. H.R. Comm. on Redist., recording of proceedings, at 0:00-2:55:19 (Feb. 25, 2022), https://thefloridachannel.org/videos/2-25-22-house-redistricting-committee/ (committee presentation and discussion of the maps later passed by the Legislature).

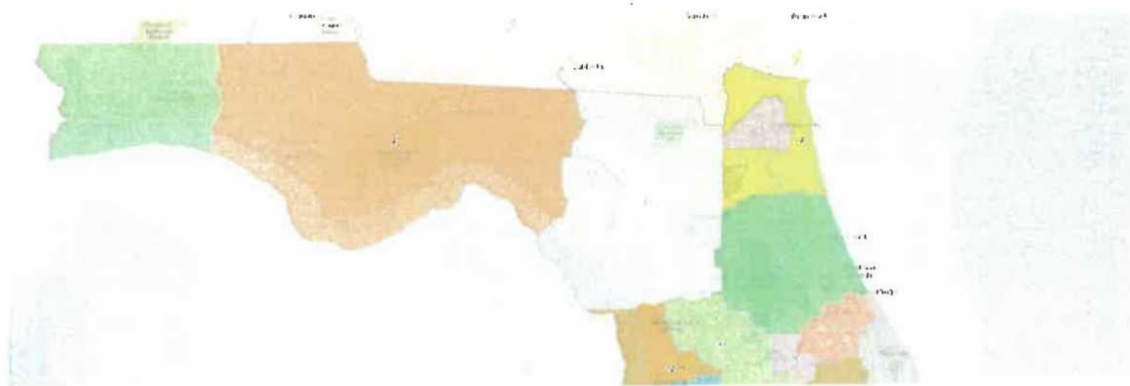
In the secondary map, which was the original map reported out of the House Congressional Redistricting Subcommittee, District 5 is a sprawling district that stretches approximately 200 miles from East to West and cuts across eight counties to connect a minority population in Jacksonville with a separate and distinct minority population in Leon and Gadsden Counties. The district is not compact, does not conform to usual political or geographic boundaries, and is bizarrely shaped to include minority populations in western Leon County and Gadsden County while excluding non-minority populations in eastern Leon County. Because this version of District 5 plainly subordinates traditional districting criteria to avoid diminishment of minority voting age population, there is no question that race was "the predominant factor motivating the legislature's decision" to draw this district. *Miller*, 515 U.S. at 916.

District 5 in the Secondary Map (Purple)



In response to federal constitutional concerns about the unusual shape of District 5 as it was originally drawn, and which is now reflected in the secondary map, the House Redistricting Committee drew a new version of District 5, which is reflected in the primary map. This configuration of the district is more compact but has caused the adjacent district—District 4—to take on a bizarre doughnut shape that almost completely surrounds District 5. The reason for this unusual configuration is the Legislature's desire to maximize the black voting age population in District 5. The Chair of the House Redistricting Committee confirmed this motivation when he explained that the new District 5 was drawn to "protect[] a black minority seat in north Florida." Fla. H.R. Comm. on Redist., recording of proceedings, at 19:15-19:26 (Feb. 25, 2022).

District 5 in the Primary Map (Purple)



Despite the Legislature's attempt to address the federal constitutional concerns by drawing a more compact district, the constitutional defect nevertheless persists. Where "race was the criterion that, in the State's view, could not be compromised, and race-neutral considerations came into play only after the race-based decision had been made," it follows that race was the predominant factor, even though the district

otherwise respects traditional districting principles. *Bethune-Hill*, 137 S. Ct. at 798 (cleaned up).

Such was the case here. Even for the more compact district, the Legislature believed (albeit incorrectly) that the Florida Constitution required it to ensure "a black minority seat in north Florida." Fla. H.R. Comm. on Redist., recording of proceedings, at 19:15-19:26 (Feb. 25, 2022). Specifically, according to the House Redistricting Chair, the primary map's version of District 5 is the House's "attempt at continuing to protect the minority group's ability to elect a candidate of their choice." *Id.* at 19:45-19:54. The Legislature thus used "an express racial target" for District 5 of a black voting age population sufficiently large to elect a candidate of its choice. *Bethune-Hill*, 137 S. Ct. at 800.

Because racial considerations predominated even in drawing the new District 5, the Legislature must satisfy strict scrutiny, the U.S. Supreme Court's "most rigorous and exacting standard of constitutional review." *Miller*, 515 U.S. at 920. And to satisfy strict scrutiny, the Legislature "must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id.* That, the Legislature cannot do.

There is no good reason to believe that District 5 needed to be drawn as a minority-performing district to comply with Section 2 of the Voting Rights Act (VRA), because the relevant minority group is not sufficiently large to constitute a majority in a geographically compact area. In the primary map, the black voting age population of District 5 is 35.32%, and even in the secondary map, with the racially gerrymandered, non-compact version of District 5, the black voting age population increases only to 43.48%. *Compare* Fla. Redist. 2022, H000C8019, https://bit.ly/3uczOXb (available at floridaredistricting.gov/pages/submitted-plans) (last visited Mar. 28, 2022), *with* Fla. Redist. 2022, H000C8015, https://bit.ly/36hFRBB (available at floridaredistricting.gov /pages/submitted-plans) (last visited Mar. 28, 2022). "When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply." *Cooper*, 137 S. Ct. at 1472 (citing *Bartlett v. Strickland*, 556 U.S. 1, 18-20 (2009) (plurality opinion)); *see also Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (explaining that one of the threshold conditions for proving vote dilution under Section 2 is that the minority group is "sufficiently large and geographically compact to constitute a majority").

Nor is there good reason to believe that District 5 is required to be drawn to comply with Section 5 of the VRA. Section 5 is no longer operative now that the U.S. Supreme Court invalidated the VRA's formula for determining which jurisdictions are subject to Section 5. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 553-57 (2013); *see also Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) (suggesting that continued compliance with Section 5 may not remain a compelling interest in light of *Shelby County*). In any event, even before the coverage formula was invalidated, the State of

Florida was not a covered jurisdiction subject to Section 5. *See In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I)*, 83 So. 3d 597, 624 (Fla. 2012). Only five counties in Florida were covered—Collier, Hardee, Hendry, Hillsborough, and Monroe—and none of them are in northern Florida where District 5 is located. *See id.*

The only justification left for drawing a race-based district is compliance with Article III, Section 20(a) of the Florida Constitution. But District 5 does not comply with this provision. Article III, Section 20(a) provides 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." The Florida Supreme Court has noted that these "dual constitutional imperatives follow almost verbatim the requirements embodied in the Federal Voting Rights Act." *Id.* at 619 (cleaned up). The first imperative, which prohibits districts that deny or abridge the equal opportunity of minority groups to participate in the political process, is modeled after Section 2 of the VRA, and the second imperative, which prohibits districts that diminish the ability of minority groups to elect representatives of their choice, is modeled after Section 5. *Id.* at 619-20.

Like the VRA, these provisions of the Florida Constitution "aim[] at safeguarding the voting strength of minority groups against both impermissible dilution and retrogression." *Id.* at 620. Although judicial interpretation of the VRA is relevant to understanding the Florida Constitution's non-dilution and non-diminishment provisions, the Florida Supreme Court nonetheless recognizes its "independent constitutional obligation" to interpret these provisions. *Id.* at 621.

Relevant here is the Florida Constitution's non-diminishment requirement. Unlike Section 5 of the VRA, this requirement "applies to the entire state." *Id.* at 620. Under this 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 existing districts "serve[] as the 'benchmark' against which the 'effect' of voting changes is measured." *Id.* at 624 (cleaned up). Where a voting change leaves a minority group "less able to elect a preferred candidate of choice" than the benchmark, that change violates the non-diminishment standard. *Id.* at 625 (internal quotation marks omitted); *see also id.* at 702 (Canady, C.J., concurring in part and dissenting in part) (noting that the dictionary definition of "diminish" means "to make less or cause to appear less" (citation omitted)).

The Florida Supreme Court has acknowledged that "a slight change in percentage of the minority group's population in a given district does not necessarily have a cognizable effect on a minority group's ability to elect its preferred candidate of choice." *Id.* at 625. The minority population percentage in each district need not be

"fixed" in perpetuity. *Id.* at 627. But where the reduction in minority population in a given district is more than "slight," such that the ability of the minority population to elect a candidate of choice has been reduced (even if not eliminated), the Legislature has violated the Florida Constitution's non-diminishment requirement as interpreted by the Florida Supreme Court.

Given these principles, there is no good reason to believe that District 5, as presented in the primary map, complies with the Florida Constitution's non-diminishment requirement. The benchmark district contains a black voting age population of 46.20%, whereas the black voting age population of District 5 in the primary map is only 35.32%.[1] *Compare* Fla. Redist. 2022, FLCD2016, https://bit.ly/3Iv6FeW (available at floridaredistricting.gov/pages/submitted-plans) (last visited Mar. 28, 2022), *with* Fla. Redist. 2022, H000C8019, https://bit.ly/3uczOXb (available at floridaredistricting.gov/pages/submitted-plans) (last visited Mar. 28, 2022). This nearly eleven percentage point drop is more than slight, and while the House Redistricting Chair represented that the black population of the district could still elect a candidate of choice, *see* Fla. H.R. Comm. on Redist., recording of proceedings, at 59:44-1:00:17 (Feb. 25, 2022), there appears to be little dispute that the ability of the black population to elect such a candidate had nevertheless been reduced, *see id.* at 1:00:18-1:00:58 (noting that the benchmark district performed for the minority candidate of choice in 14 of 14 previous elections and that the new district would not perform for the minority candidate of choice in one-third of the same elections).

Moreover, the House Redistricting Chair claimed that the only criterion that mattered was whether the new district still performed at all. *See id.* at 1:06:09-1:06:30 ("It is not a diminishment unless the district does not perform."); *see also id.* at 1:05:05-1:05:13 ("Is it less likely to perform? Honestly, I don't know."). But that view is plainly inconsistent with the Florida Supreme Court precedent described above, which prohibits any voting change that leaves a minority group "less able to elect a preferred candidate of choice." *Apportionment I*, 83 So. 3d at 625 (internal quotation marks omitted). In sum, because the reduction of black voting age population is more than slight and because such reduction appears to have diminished the ability of black voters to elect a candidate of their choice, District 5 does not comply with the non-diminishment requirement of Article III, Section 20(a) of the Florida Constitution. Therefore, compliance with the Florida Constitution cannot supply the compelling reason to justify the Legislature's use of race in drawing District 5 in the primary map.

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[1] The benchmark district itself is a sprawling, non-compact racial gerrymander that connects minority communities from two distinct regions of the State; however, for purposes of this point, I assume that the district can be used as a valid benchmark against which to judge the new maps.

In the secondary map, by contrast, District 5 complies with the Florida Constitution's non-diminishment requirement, but in doing so, it violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The U.S. Supreme Court has warned that a "reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. As described earlier, District 5 in the secondary map does precisely this.

That the district is believed to be necessary to comply with the Florida Constitution's non-diminishment requirement does not alone suffice to justify the use of race in drawing bizarre, non-compact district boundaries for the sole purpose of cobbling together disparate minority populations from across northern Florida to form a minority-performing district. Mere compliance with a state constitutional requirement to engage in race-based districting is not, without more, a compelling interest sufficient to satisfy strict scrutiny. The Fourteenth and Fifteenth Amendments to the U.S. Constitution and the VRA, which enforces the Fifteenth Amendment, exist to *prevent* states from engaging in racially discriminatory electoral practices. Indeed, one such weapon that states long used, and that the VRA was designed to combat, "was the racial gerrymander—the deliberate and arbitrary distortion of district boundaries for racial purposes." *Id.* at 640 (cleaned up).

Here, the Florida Constitution's non-diminishment standard would be satisfied only by a sprawling, non-compact district that spans 200 miles and repeatedly violates traditional political boundaries to join minority communities from disparate geographic areas. Such a district is not narrowly tailored to achieve the compelling interest of protecting the voting rights of a minority community in a reasonably cohesive geographic area. As applied to District 5 in the secondary map, therefore, the Florida Constitution's non-diminishment standard cannot survive strict scrutiny and clearly violates the U.S. Constitution.

For the foregoing reasons, Congressional District 5 in both maps is unlawful.

EXHIBIT 8

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

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
______________________________________/

DECLARATION OF DR. DOUGLAS JOHNSON

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the President of National Demographics corporation and have consulted on redistricting nationally. A copy of my CV is attached.

3. I was hired by the Florida Secretary of State on April 22, 2022, to serve as an expert witness and to testify regarding my analysis of northern Congressional Districts 2 through 5 in the enacted, the 2016, and the plaintiff's proposed Congressional maps for:

a. The number of County and City splits;

b. The compactness of the districts;

4. I was also asked to review the discussion of the "Slave Population by Florida County" map on pages 5 and 6 of "Plaintiff's Memorandum of Law"

OPINIONS

5. Districts 2 through 5 of the enacted Congressional District map divide fewer counties than either the 2016 or the plaintiff's preferred map.
6. Districts 2 through 5 of the enacted Congressional District map divide fewer cities, towns and villages than either the 2016 or the plaintiff's preferred map.
7. Districts 2 through 5 of the enacted Congressional District map are significantly more compact than either the 2016 or the plaintiff's preferred map.
8. District 5 in both the 2016 and plaintiff's preferred map is not drawn to follow the claimed community of interest of "Slave Population" counties as alleged in "Plaintiff's Memorandum of Law."

COUNTY SPLITS ANALYSIS

9. Districts 2 through 5 of the enacted Congressional District map include five county splits, compared to eight (60 % more) in plaintiff's preferred map (H000C8015 used for this report, and S035C8060 is very similar) and the 2016 map.
10. Duval County has a 2020 Census population of 995,567, which is significantly higher than the 769,221 population of each Congressional District, so every map has to split Duval County. Not counting Duval County, the number of county splits are four in the enacted map, seven in the plaintiff's preferred map and in the 2016 map (75% higher).
11. Here is a listing of the five counties each split once in the enacted map:

Walton	CD 1 / CD 2
Lafayette	CD 2 / CD 3
Duval	CD 4 / CD 5
Marion	CD 3 / CD 6
St Johns	CD 5 / CD 6

12. Here is a listing of the seven counties split a total of eight times in the 2016 map:

Holmes	CD 1 / CD 2
Leon	CD 2 / CD 5
Jefferson	CD 2 / CD 5
Columbia	CD 2 / CD 6
Duval	CD 4 / CD 5
St Johns	CD 5 / CD 6
Marion	Two splits, resulting in three parts: CD 2 / CD 3 and CD 3 / CD 6

13. Here is a listing of the seven counties split a total of eight times in the plaintiff's preferred map:

Walton	CD 1 / CD 2
Leon	There are two splits of Leon County, resulting in three parts. Both splits are CD 2 / CD 5.
Jefferson	CD 2 / CD 5
Columbia	CD 2 / CD 5
Duval	CD 4 / CD 5
Marion	CD 3 / CD 6 (I have not counted the other Marion County split, involving CDs 6 and 11, because it does not involve any of CDs 2 through 5)
St Johns	CD 4 / CD 6

CITY, TOWN AND VILLAGE SPLITS ANALYSIS

14. Districts 2 through 5 of the enacted Congressional District map split only one city, town or village. That split is Jacksonville. Jacksonville's 2020 Census population is 949,611. Since that is significantly larger that the Congressional District population of 769,221, Jacksonville must be divided. No city, town or village that is small enough to fit within one Congressional District is divided in the enacted map.

15. Districts 2 through 5 of the 2016 Congressional District map split Jacksonville, Tallahassee, Lake City, and Ocala. The split of Ocala is a zero-population split, and the split of Jacksonville is required due to its size while three cities, towns, or villages that are small enough to fit within one Congressional District are divided in the 2016 map.
16. Districts 2 through 5 of the plaintiff's preferred Congressional District map split Jacksonville and Tallahassee. The split of Jacksonville is required due to its size. Thus, the populations of one city, town, or village that is small enough to fit within one Congressional District is divided in the plaintiff's preferred map.

COMPACTNESS ANALYSIS

17. Districts 2 through 5 of the enacted Congressional District map are significantly more compact than the same districts in the 2016 and in plaintiff's preferred map.
18. At 0.46 the average Polsby-Popper compactness score for the enacted map's districts 2, 3, 4 and 5 is nearly twice the average of the 2016 (0.25) or plaintiff's preferred map (0.27).
19. Congressional District 3 has a nearly identical Polsby-Popper score in all three maps (0.5 in the enacted, 0.53 in the 2016, and 0.54 in the plaintiff's preferred map). Among the three other Congressional Districts (2, 4 and 5), the **least**-compact District in the enacted map (CD 4, at 0.32) is significantly **more** compact than the **most-**compact districts in the 2016 (CD 1 at 0.21) and the plaintiff's preferred map (CD 1 at 0.25).
20. In the 2001/2022 redistricting cycle, the bi-partisan Arizona Independent Redistricting Commission (AZIRC) enacted a definition of compactness[1] that declared that a Polsby-

[1] The Arizona Constitution states "To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals," and one such other goal is "Districts shall be geographically compact and contiguous to the extent practicable." At one point in the legal back and forth over Arizona's 2001 map, a Judge ordered the Commission to formally adopt definitions of the various criteria and what constitutes a "significant detriment," leading to adoption of the 0.17 standard after review of sample districts

Popper score of less than 0.17 is a "significant detriment" to compactness.[2] The AZIRC is comprised of two Democrats, two Republicans, and an independent jointly selected by the other four Commissioners. Under the AZIRC's bi-partisan definition, in both the Florida 2016 map and the plaintiff's preferred map, Congressional District 3 barely escapes that category (at 0.17 in the 2016 map and 0.18 in plaintiff's preferred map). And Congressional District 4 falls well short of even that very low benchmark (0.10 in the 2016 map and 0.11 in plaintiff's preferred map).

SLAVE COUNTY MAP COMMUNITY OF INTEREST ANALYSIS

21. "Plaintiff's Memorandum of Law" includes on Page 6 a map of "Slave Populations by Florida County in the 1860 Census. The Memorandum on page 5 states "Benchmark CD-5 unites 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 abundant cotton and tobacco plantations, as shown below."
22. A comparison of the geography and the demographics of Congressional District 5 show the inaccuracy of this claim. First, three of the six counties with the largest slave

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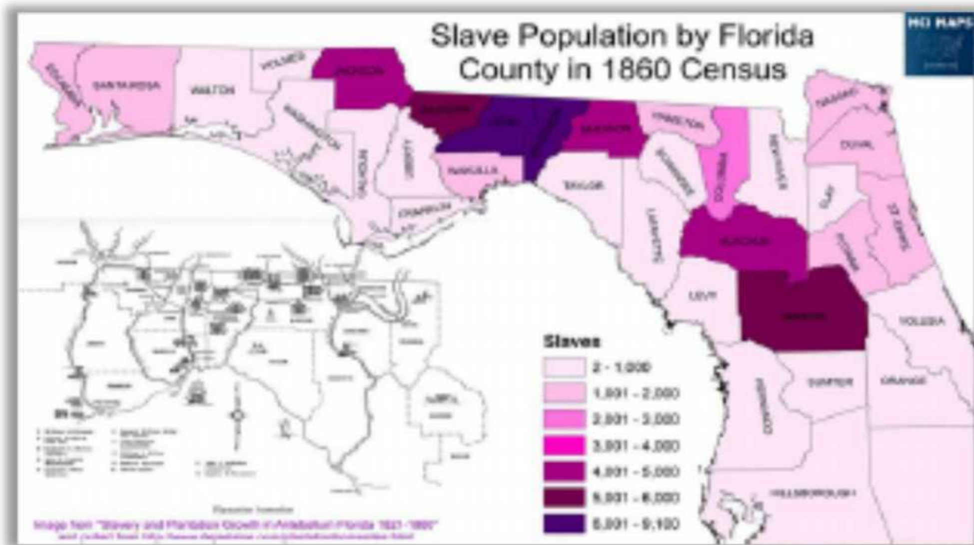
reflecting a range of compactness scores. [I was the lead technical consultant to the Commission at the time and put together and presented the materials used in the Commission's decision on this issue.]

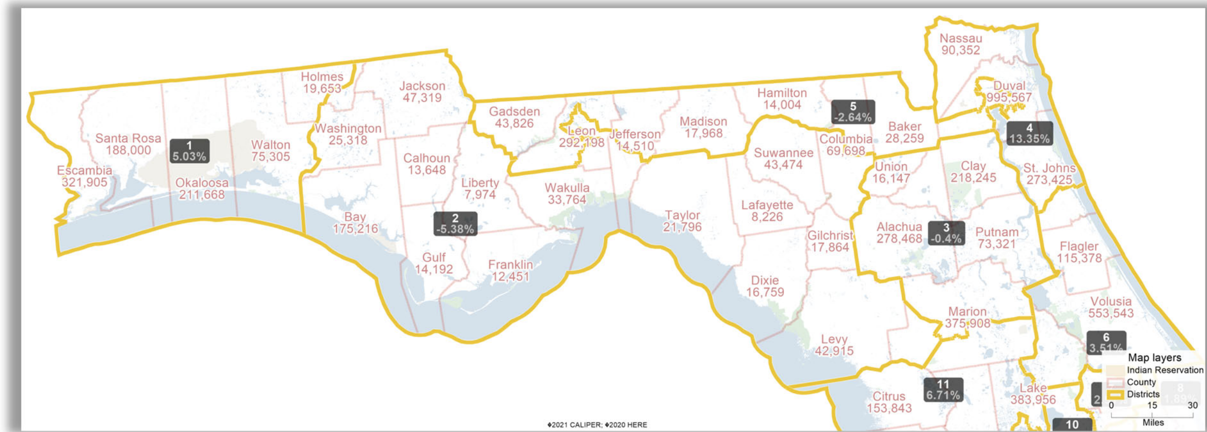
[2] https://azredistricting.org/2001/Definitions.asp

populations in the 1860 are **excluded** from "Benchmark CD5"



Plaintiff's Preferred Map

2016 Map



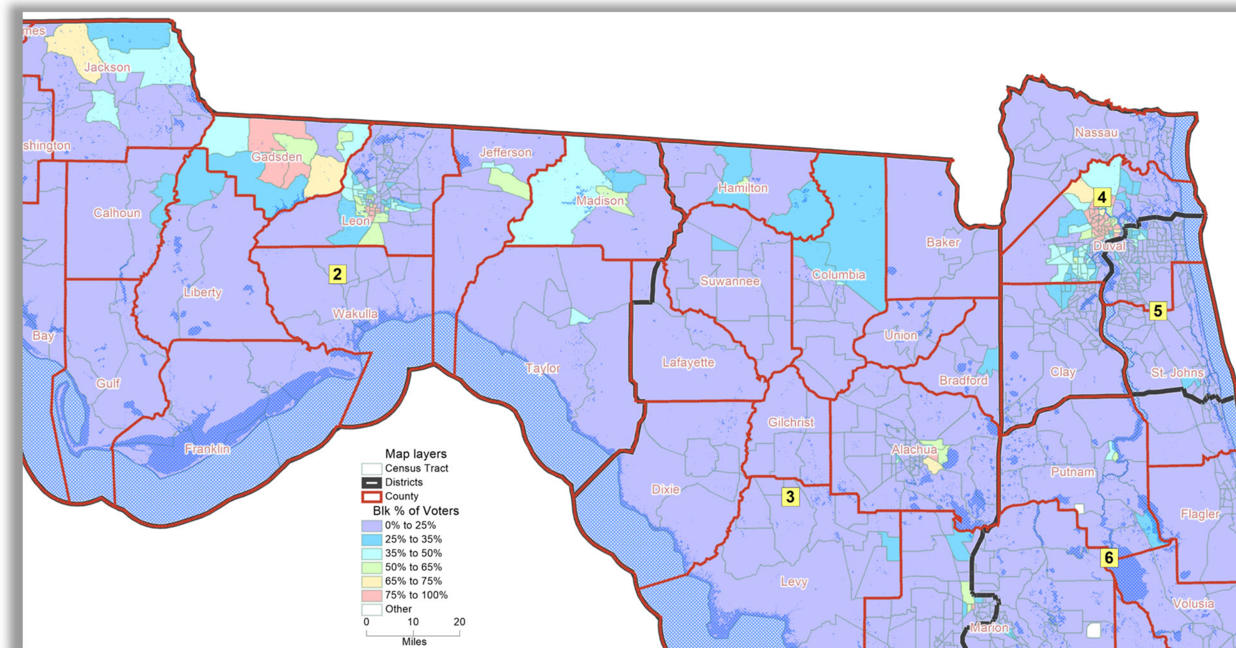
23. The counties of Jackson, Alachua and Marion are clearly shown in the darker-purple colors indicating a large number of slaves in the 1860 census. But none of these counties are included in Congressional District 5 in either the 2016 map nor the plaintiff's preferred map.

24. Demographically, the claims that benchmark CD5 somehow reflect the 1860 Census numbers are also rebutted by the simple math of the 2020 Census: in the 2020 Census data for both the 2016 map's CD5 and for the plaintiff's preferred map's CD5, over half of the Congressional District's total Black or African-American population is in Duval county. And Duval County, at 31.9% Black or African-American, is just slightly **more** Black or African-American than the combined total of the other counties that CD5 traverses in the 2016 map and in the plaintiff's preferred map:

County	2020 Total Population	2020 Black or African-American	Percent Black or African-American
Baker	28,259	4,108	14.5%
Hamilton	14,004	4,674	33.4%
Jefferson	14,510	4,776	32.9%
Madison	17,968	6,555	36.5%
Columbia	69,698	12,772	18.3%
Gadsden	43,826	24,018	54.8%
Leon	292,198	94,754	32.4%
Duval	995,567	317,860	31.9%

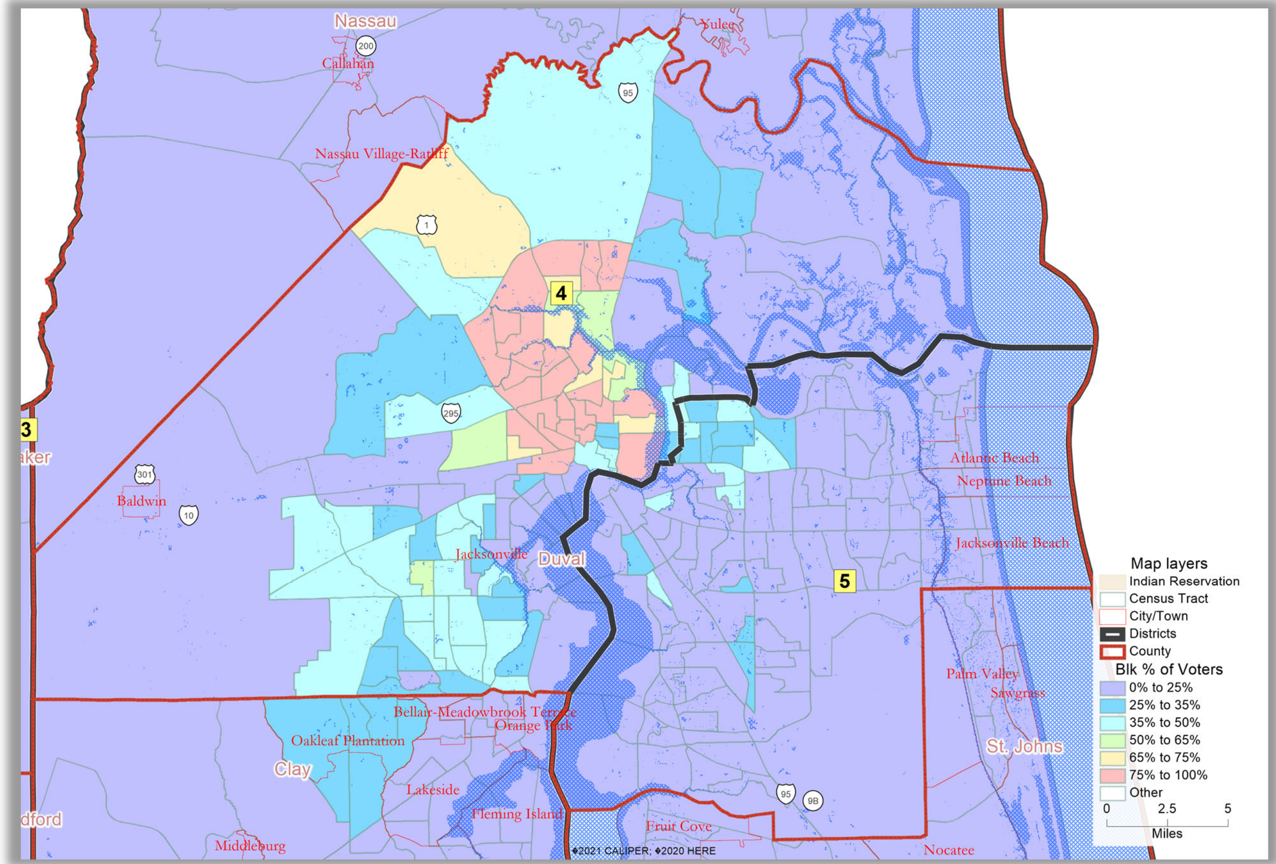
7-Co. total (excl. Duval)	480,463	151,657	31.6%
8-Co. total	1,476,030	469,517	31.8%
Duval Co. % of CD	67%	68%	

25. Clearly the demographics of the region have shifted significantly in the 160 years since that Census occurred. A map showing the Black or African-American percentage of the 2020 General Election voters shows both the concentration of Black or African-American voters in the cities and the resulting significant change from the "Sharecropper Counties" pattern shown in the 1860 map:

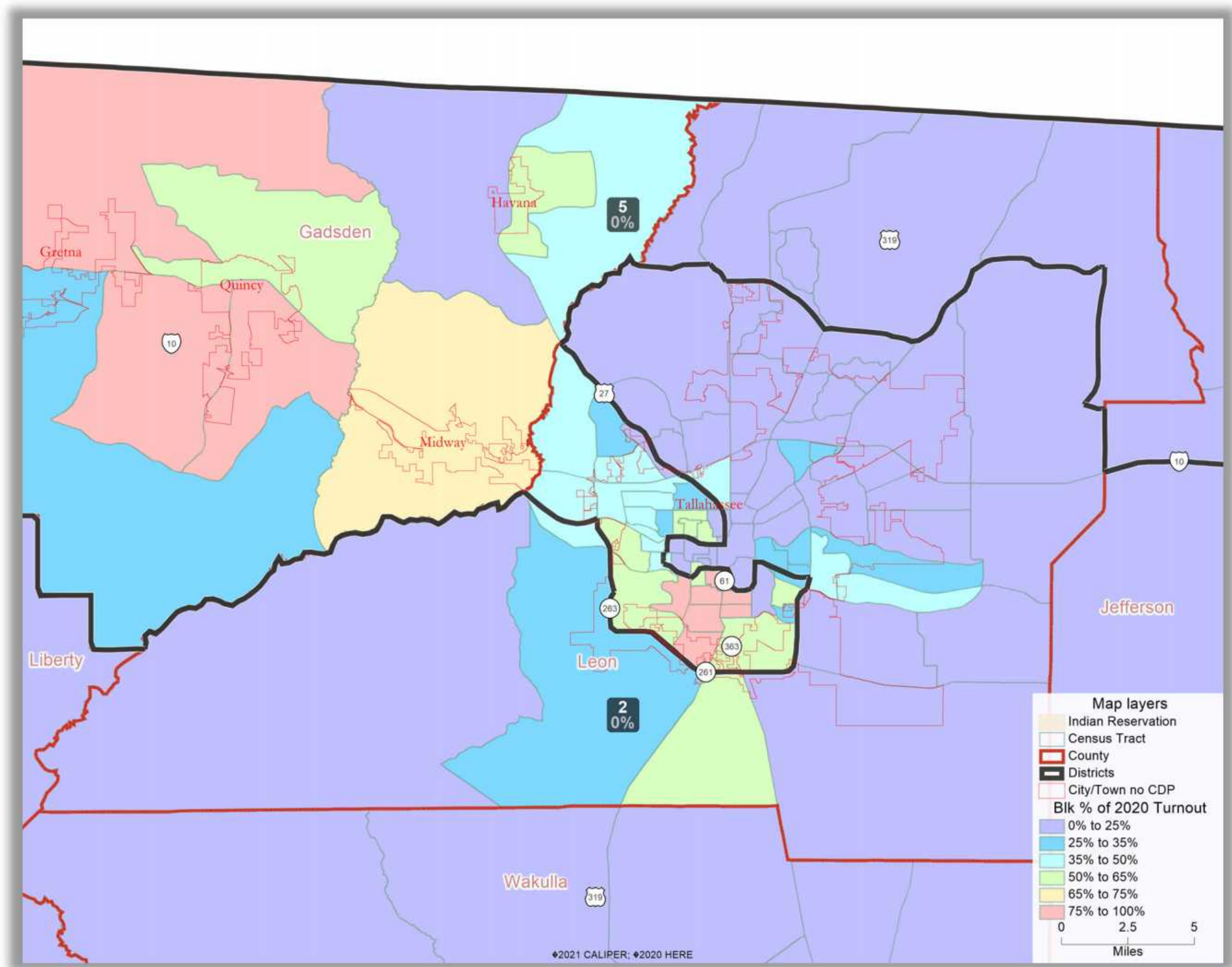


26. While the enacted map declines to split Tallahassee and link the geographically distant pockets of Black or African-American voters, the map does keep the individual communities together. District 2 unites Jackson, Gadsden, Leon, Jefferson and Madison counties. And in Duval County, which is larger in population than a Congressional District and thus must be divided, the enacted map's division of the county keeps all of

the county's majority-Black Census Tracts united in CD4 while almost perfectly following the St. Johns River as the clear geographic and Congressional District boundary through the county:

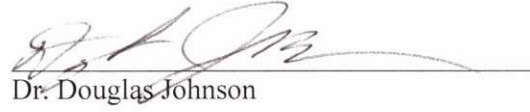


27. But the enacted map does not do what the plaintiff's preferred map does: split Leon County and the City of Tallahassee into three separate parts, assigning two parts to District 5 and the third to District 2. As shown in the image below, in both maps Congressional District 5 comes across northern Leon County to Gadsden County before curling back into Leon County to pick up the most-heavily-Black or African-American Census Tracts inside Tallahassee:



Gadsden
Havana
Gretna
Quincy
Midway
Tallahassee
Liberty
Leon
Jefferson
Wakulla
5
0%
2
0%
Map layers
Indian Reservation
Census Tract
County
Districts
City/Town no CDP
Blk % of 2020 Turnout
0% to 25%
25% to 35%
35% to 50%
50% to 65%
65% to 75%
75% to 100%
0
2.5
5
Miles
©2021 CALIPER; ©2020 HERE

This the 7th day of May, 2022.

By: 
Dr. Douglas Johnson

ACKNOWLEDGMENT

> A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Los Angeles)

On 5-7-2022 before me, Sean M. Tribble Notary Public
(insert name and title of the officer)

personally appeared Douglas Mark Johnson,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature ______________________ (Seal)

EXHIBIT 9

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

February 18, 2022

My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 32 years. I have special knowledge and expertise in the area of voting law and have written both popular and scholarly articles on the subject.[1] I have particular expertise in the areas of racial and political gerrymandering. In 1991, with Professor Daniel Polsby, I wrote an article describing a mathematical way to measure the geographic compactness of congressional districts.[2] This standard is now known as the "Polsby/Popper" criterion and is one of the most widely used tests of district compactness. In 1997, I brought a lawsuit that ultimately led to New York's 12th Congressional District being enjoined as an unconstitutional racial

[1] *See, e.g., How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

[2] Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991).

gerrymander.[3]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at DOJ, I managed voting rights investigations, litigations, consent decrees, and settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and both vote denial and vote dilution claims under Section 2.

In 2013, I joined Judicial Watch. In my time there, I have filed voting rights lawsuits in federal and state courts alleging claims under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act, the NVRA, and a number of state constitutional provisions. Among other things, I am currently representing plaintiffs pursuing gerrymandering claims in Maryland State court.

In preparation for my testimony, I looked at Florida's proposed congressional districts in maps drawn by the Florida House Redistricting Committee (*see* H000C8011, dated

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[3] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).

2/10/2022; H000C8003, dated 11/29/2021; H000C8001, 11/29/2021, available at https://redistrictingplans.flsenate.gov/). In sum, my testimony is that proposed Congressional District 3 is highly vulnerable to being enjoined in a lawsuit that could be filed in federal court on the basis of principles embodied in the landmark ruling of *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny.

In *Shaw*, the Supreme Court first held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" states a federal, constitutional claim "under the Equal Protection Clause." 509 U.S. at 642. Two years later in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court upheld a lower court ruling invalidating a Georgia district on the basis of *Shaw*. The Court explained that "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." 515 U.S. at 911. Assigning voters on that basis "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id*. at 912.

The racial intent behind the district challenged in *Miller* was apparent "when its shape is considered in conjunction with its racial and population densities." *Id*. at 917. Because "[r]ace was … the predominant, overriding factor" in its design, the district could not be "upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id*. at 920. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id*. The Court noted in particular that "creating a third majority-black district to satisfy the Justice

Department's preclearance demands" under Section 5 of the Voting Rights Act was not enough under the circumstances to justify the challenged district:

> As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws. … The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.

Id. at 921.

More recently, in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017), the Court made clear that a plaintiff challenging a district under *Shaw* was *not* required to "establish, as a prerequisite to showing racial predominance, an actual conflict between the enacted plan and traditional redistricting principles." The Court recognized that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'" *Id*. at 798 (citation omitted). *Bethune-Hill* is also noteworthy in that the Court, under a deferential review for "clear error," did not overturn the district court's finding that a district with 55% BVAP was necessary to avoid liability under Section 5 of the Voting Rights Act. But the Court in another case summarized *Bethune-Hill's* findings as follows:

> [W]here we have accepted a State's "good reasons" for using race in drawing district lines, the State made *a strong showing of a pre-enactment analysis with justifiable conclusions*. In *Bethune-Hill*, the State established that the primary mapdrawer "discussed the district with incumbents from other majority-minority districts[,] … considered turnout rates, the results of the recent contested primary and general elections," and the district's large prison population. … The State established that it had performed a "functional analysis," and acted to achieve an "informed bipartisan consensus."

Abbott v. Perez, 138 S. Ct. 2305, 2335 (2018) (emphasis added). Significantly, the Court in *Abbott* rejected a proposed justification for a race-based district where the State of Texas

argued that it was necessary to comply with Section 2 of the Voting Rights Act, but had not made the required strong showing. *Id*. at 2334. Similarly, in *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the Court rejected a claim that a race-based district was necessary to comply with Section 2 when the State of North Carolina could not show the preconditions required to make such a claim.

Turning to Congressional District 3 in the proposed plan, I believe it will be vulnerable to a serious—and probably a winning—*Shaw*-type claim under the Fourteenth Amendment. I understand that there will be little dispute that the district was drawn with its racial characteristics as the predominant consideration. I also understand that the shape of the district will be well-explained by the effort to include African-American populations around Tallahassee and Jacksonville. Moreover, the district clearly violates traditional districting criteria. Its Popper-Polsby score is 10%, and its Reock score is 11%. These are very low compactness scores for any U.S. congressional district, and in both cases these are the lowest compactness scores in the State of Florida.[4]

I also believe that the defenders of District 3 will be unable to justify the district so as to satisfy their burden of strict scrutiny. To begin with, I am unaware of the existence of any sort of "a strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott*, 138 S. Ct. at 2335. But further, even if the race-based character of the districts could be justified under federal or Florida law, the district's noncompactness will compel the legal conclusion that it is not "narrowly tailored" to achieve its goals, as it must be to satisfy strict

[4] District 3 also has the third worst Area/Convex Hull score in the State. However, I do not consider the Area/Convex Hull test to be a reliable compactness measure. There are too many district indentations and distortions it simply cannot "see." Accordingly, it is too forgiving.

scrutiny. *See Miller*, 515 U.S. at 921 ("The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.").

As a final point, the fact that the BVAP in District 3 is at around 44% according to the House Committee's online information (or 42% according to the Princeton Gerrymandering Project) will defeat the State's ability to justify the district. The Supreme Court has held that no Section 2 claim is possible where the minority VAP is less than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) ("It remains the rule … that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). The Supreme Court has at least suggested that the same rule applies in the context of Section 5. *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) ("The court's order suggests that it may have intentionally drawn … a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority"; and, if so, "it had no basis for doing so. *Cf. Bartlett* …"). *See also In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 625 (2012) ("Just as Section 2 jurisprudence guides the Court in analyzing the state vote dilution claims, when we interpret our state provision prohibiting the diminishment of racial or language minorities' ability to elect representatives of choice, we are guided by any jurisprudence interpreting Section 5.").

In sum, if I were asked by a client whether Congressional District 3 complies with the federal constitution, my answer would be an emphatic no.

R. D. P.

EXHIBIT 10

SB 2-C Congressional Plan 0109

J. ALEX KELLY

EXECUTIVE OFFICE OF THE GOVERNOR

4.19.22

Comparing SB 2-C Plan 0109 to SB 102 Primary Plan 8019

DISTRICTS IDENTICAL IN PLANS 8019 & 0109

10 Districts Identical:

- 1-2 (Panhandle)
- 20-25 (Southeast)
- 27-28 (Southeast)

IMPROVEMENTS IN PLAN 8019

18 Districts Improved:

- 3-19
- 26 (Southwestern portions)

Comparing SB 2-C Plan 0109 to SB 102 Primary Plan 8019

- Starting with the Legislature's Primary Plan 8019:
  - Maintained the same number of performing majority-minority districts.
  - Maintained the Legislature's Panhandle districts.
  - Maintained the Legislature's Southeast districts.
  - Addressed federal constitutional concerns by using the EOG's Northeast districts (w/ minor improvements).
  - Tier 2 improvements through a compromise (hybrid of the Legislature's and EOG's plans) for Gulf Coast counties, stretching from Citrus to Lee counties and impacting some inland counties.
  - Tier 2 improvements by returning to concepts from the House Congressional Redistricting Subcommittee's Central Florida in Plan 8011, with inclusion of one concept from the Senate's Plan 8060.
  - Tier 2 improvements to boundaries by eliminating EOG's adherence to Census Designated Places and adopting the Legislature's Tier 2 focus on use of roadways and waterways.

Tier 2 Comparing SB 2-C Plan 0109 to SB 102 Primary Plan 8019

SB 102 PRIMARY PLAN 8019

- Counties Kept Whole: 49
  - 18 counties split 48 ways
  - Differences:
    - Where there are differences in county splits, 7 counties split 17 ways (Citrus, Collier, Hillsborough, Marion, Polk, Sarasota, Volusia)
    - FL's 7 largest counties split 24 ways (Broward, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, Pinellas)

SB 2-C PLAN 0109

- **Counties Kept Whole: 50**
  - **17 counties split 46 ways**
  - Differences:
    - Where there are differences in county splits, **7 counties split 16 ways** (Citrus, Collier, Hillsborough, Marion, Polk, Sarasota, Volusia)
    - **FL's 7 largest counties split 23 ways** (Broward, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, Pinellas)

Tier 2 Comparing SB 2-C Plan 0109 to SB 102 Primary Plan 8019

SB 102 PRIMARY PLAN 8019

- Boundaries: 87.50% use of Tier 2 boundaries
  - Therefore: 12.50% Non-Geo/Pol boundary lines

SB 2-C PLAN 0109

- **Boundaries: 88.50% use of Tier 2 boundaries**
  - **Therefore: 11.50% Non-Geo/Pol boundary lines**

Tier 2 Comparing SB 2-C Plan 0109 to SB 102 Primary Plan 8019

SB 102 PRIMARY PLAN 8019

- Compactness:
  - Reock: 0.48
  - Area/Convex Hull: 0.82
  - Polsby Popper: 0.42
  - Least mathematically compact CD 4's Polsby Popper is 0.17 (below 0.20)

SB 2-C PLAN 0109

- Compactness:
  - Reock: 0.47
  - Area/Convex Hull: 0.81
  - **Polsby Popper: 0.43**
  - **Only Plan w/ all CDs > 0.20 Reock & Polsby Popper**
  - **Improved visual compactness for several CDs**

Tier 2 Comparing SB 2-C Plan 0109 to SB 102 Primary Plan 8019

SB 102 PRIMARY PLAN 8019

- City Splits: 16
  - Differences:
    - Cape Coral (Lee) – split in 2 CDs
    - Plant City (Hillsborough) – split in 2 CDs
    - Port Orange (Volusia) – split in 2 CDs
    - Lakeland (Polk) – whole
    - Longboat Key (Manatee & Sarasota) – whole
    - St. Petersburg (Pinellas) – whole

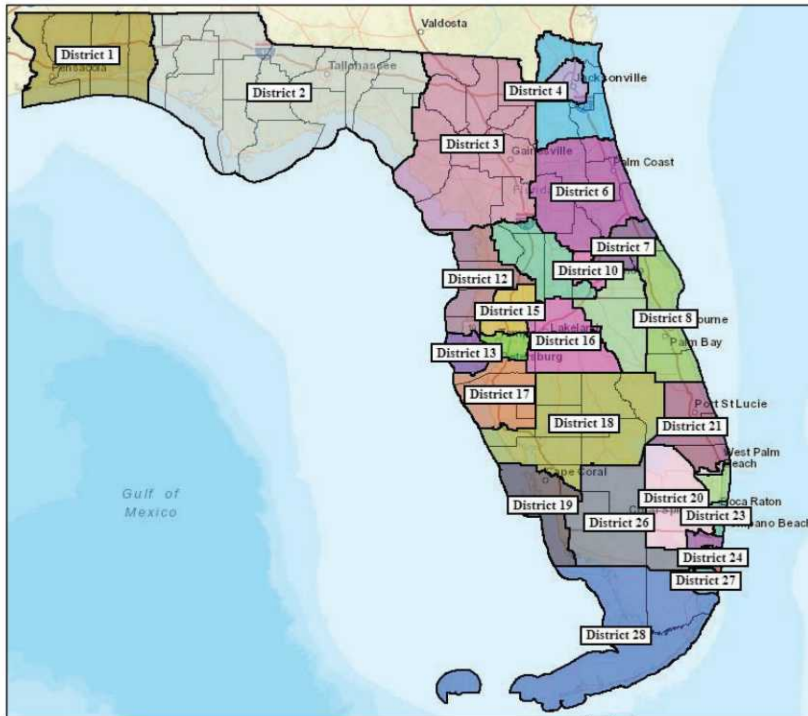
SB 2-C PLAN 0109

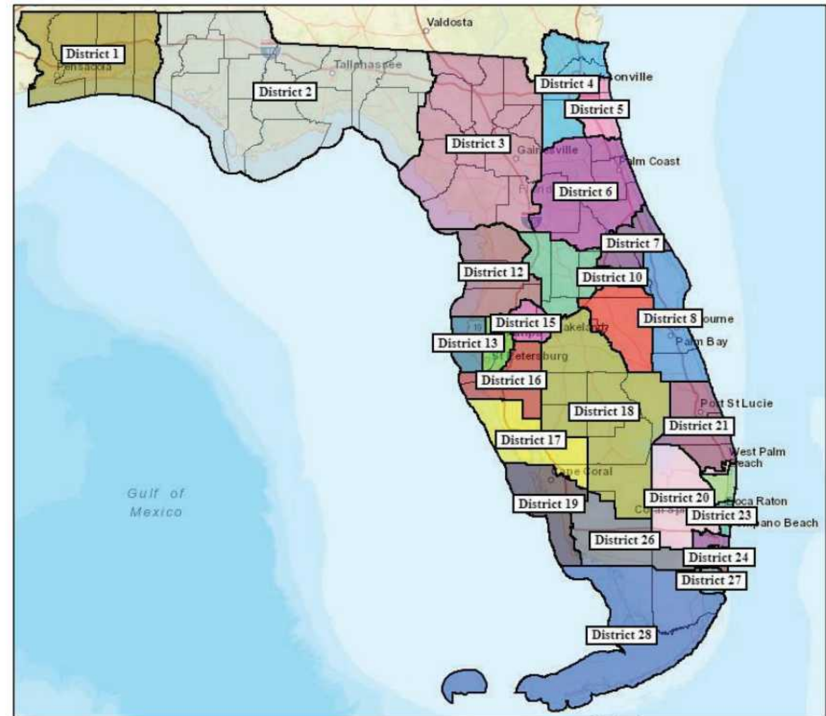
- City Splits: 16
  - Differences:
    - **Cape Coral (Lee) – whole**
    - **Plant City (Hillsborough) – whole**
    - **Port Orange (Volusia) – whole**
    - Lakeland (Polk) – split in 2 CDs
    - Longboat Key (Manatee & Sarasota) – split in 2 CDs (due to keeping Sarasota County whole)
    - St. Petersburg (Pinellas) – split in 2 CDs

Statewide

SB 102 PRIMARY PLAN 8019

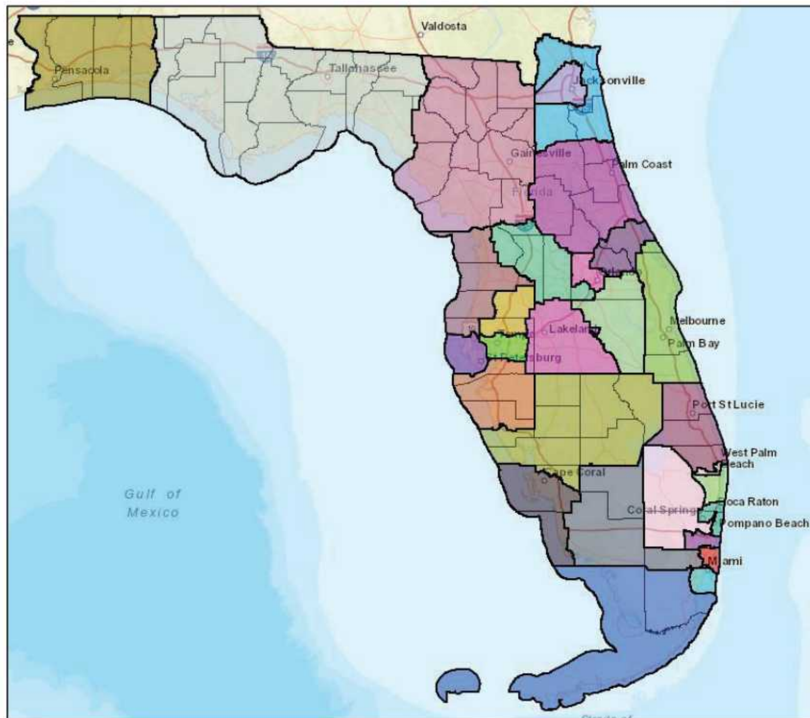
SB 2-C PLAN 0109

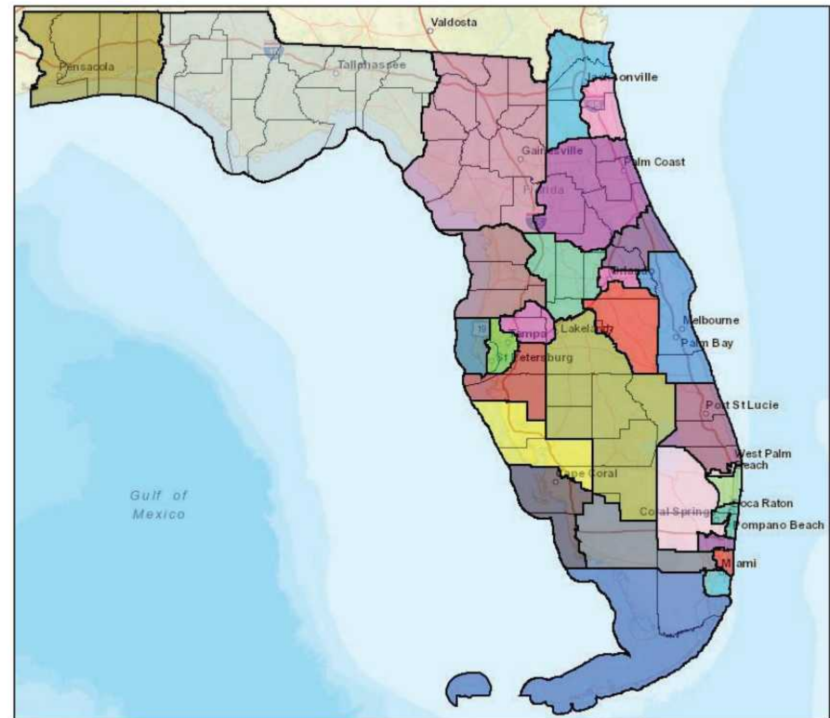




Statewide Without District Labels

SB 102 PRIMARY PLAN 8019	SB 2-C PLAN 0109

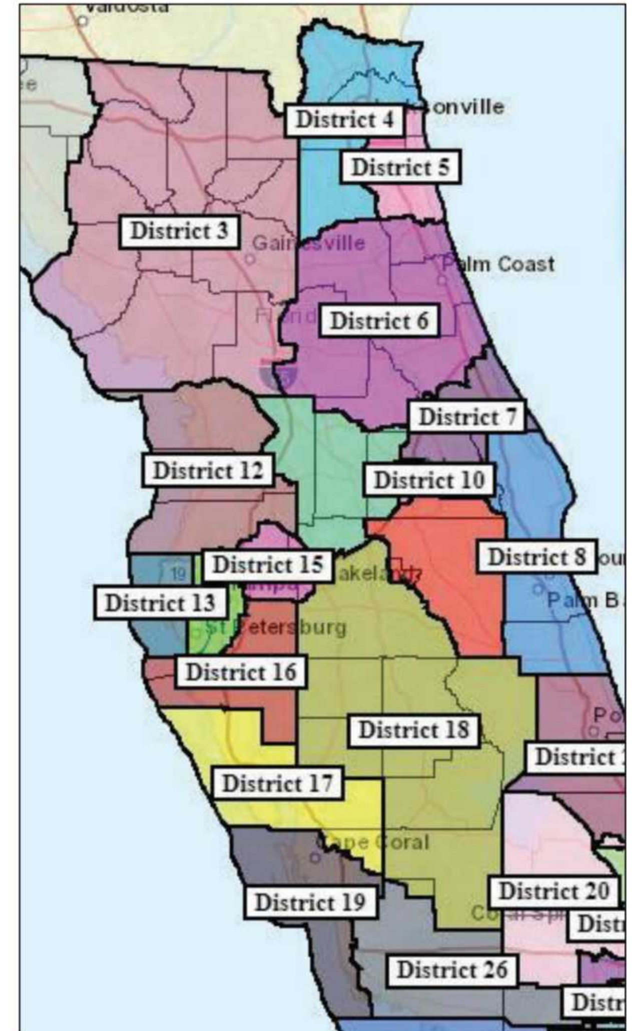




Focusing on the 18 Districts with Changes

SB 102 Primary Plan 8019

SB 2-C Plan 0109



Focusing on the 18 Districts with Changes

Without District Labels

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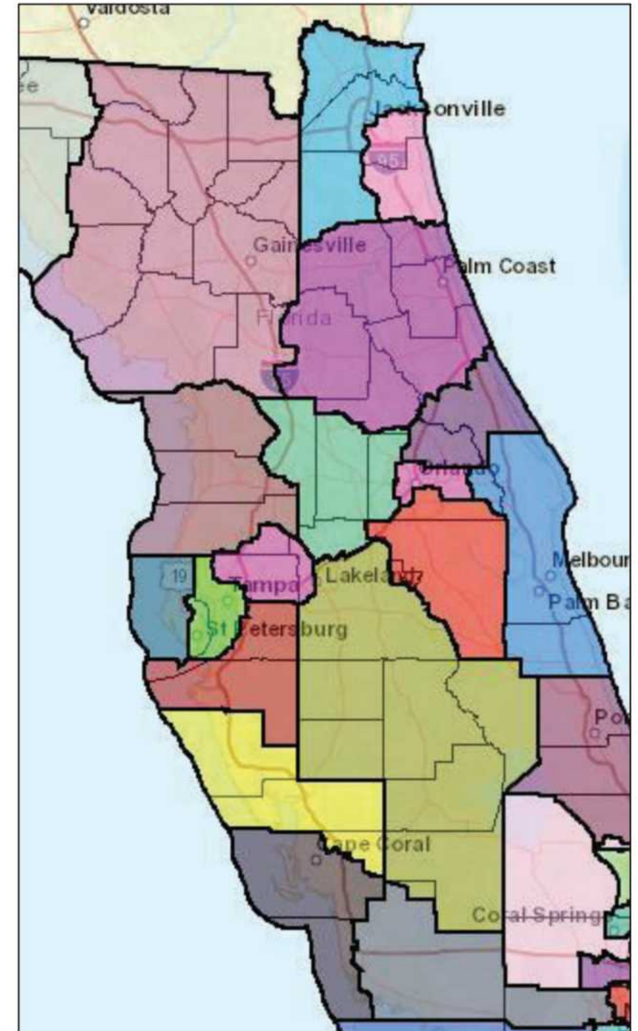
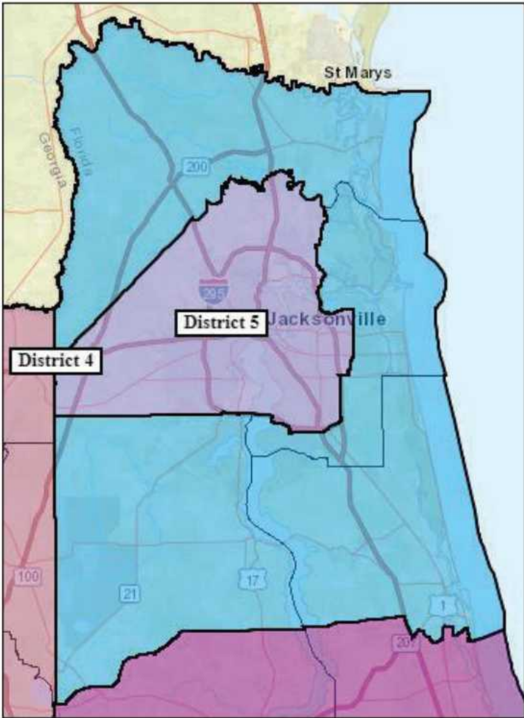
SB 2-C Plan 0109

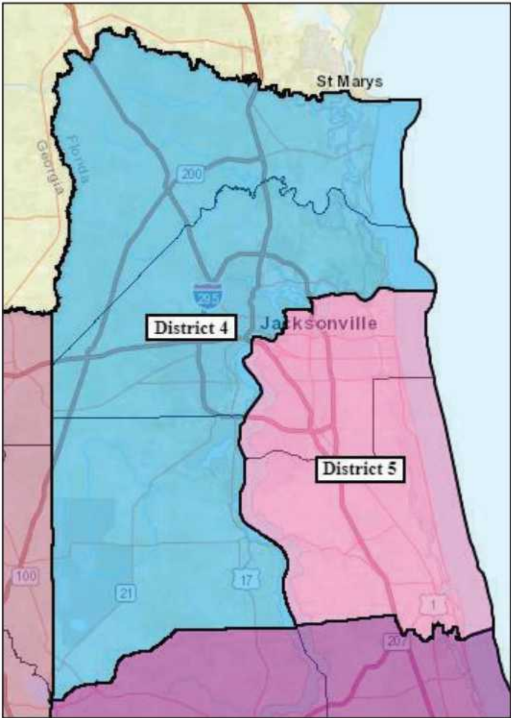


Districts 4-5

SB 102 PRIMARY PLAN 8019



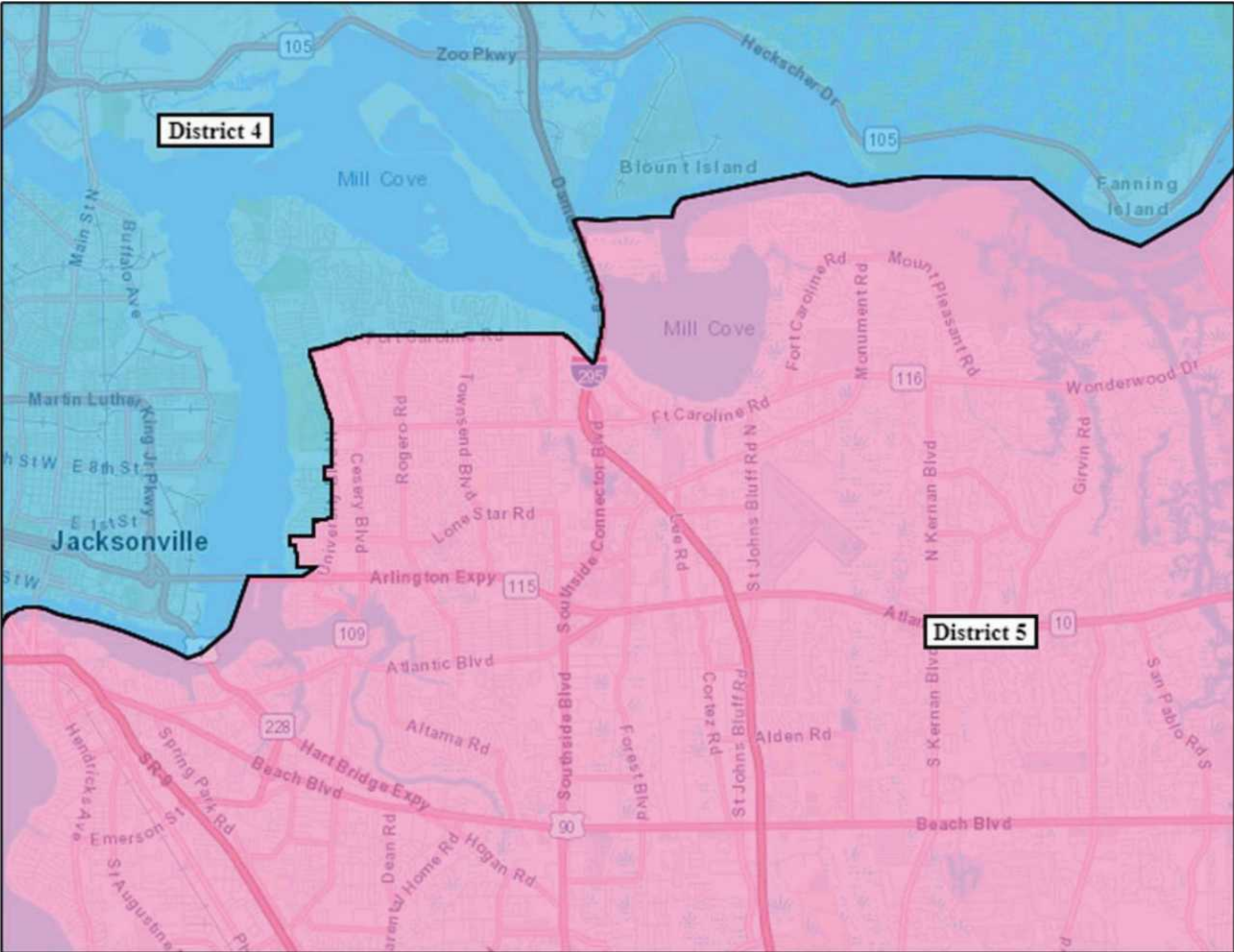
SB 2-C PLAN 0109



App. 0943

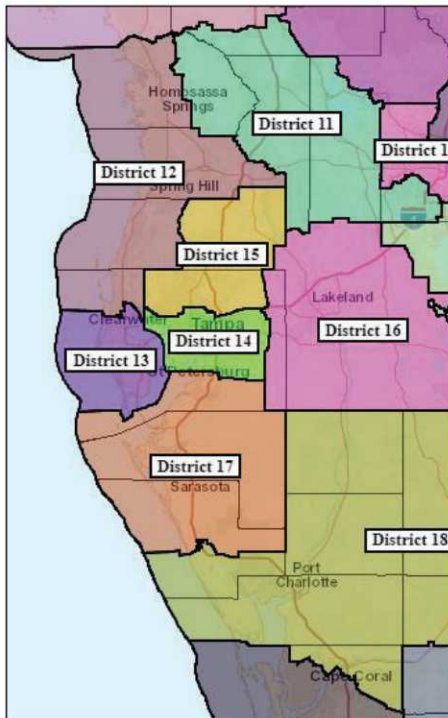
SB 2-C Plan 0109

Districts 4-5



Districts 11-18

SB 102 PRIMARY PLAN 8019



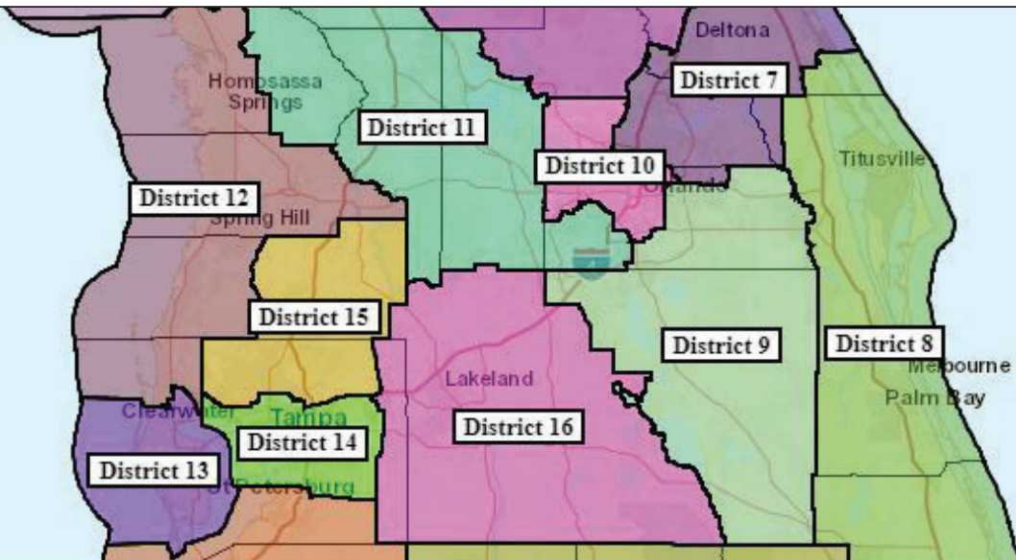
SB 2-C PLAN 0109

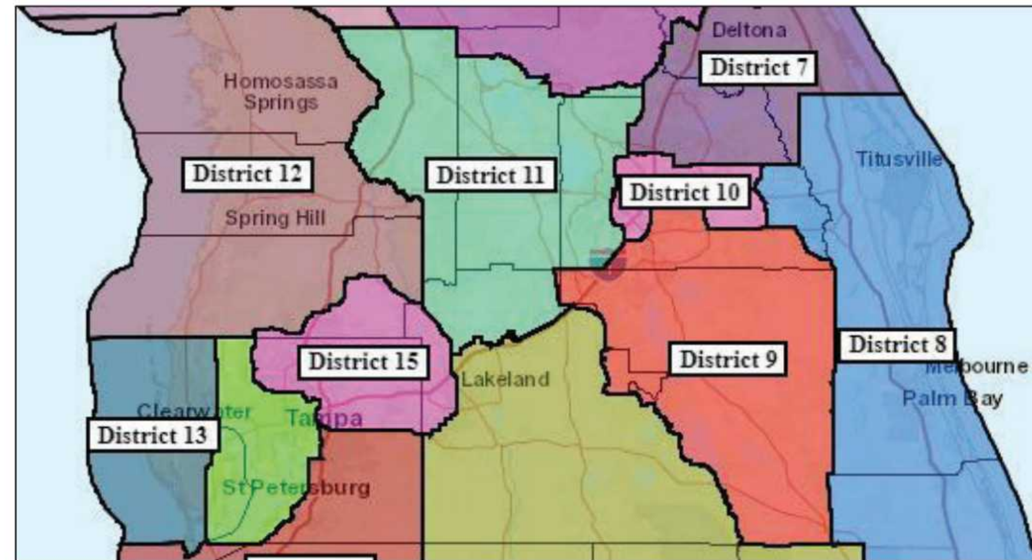
App. 0945

The I-4 Corridor and Tier 2 Improvements

SB 102 PRIMARY PLAN 8019

SB 2-C PLAN 0109

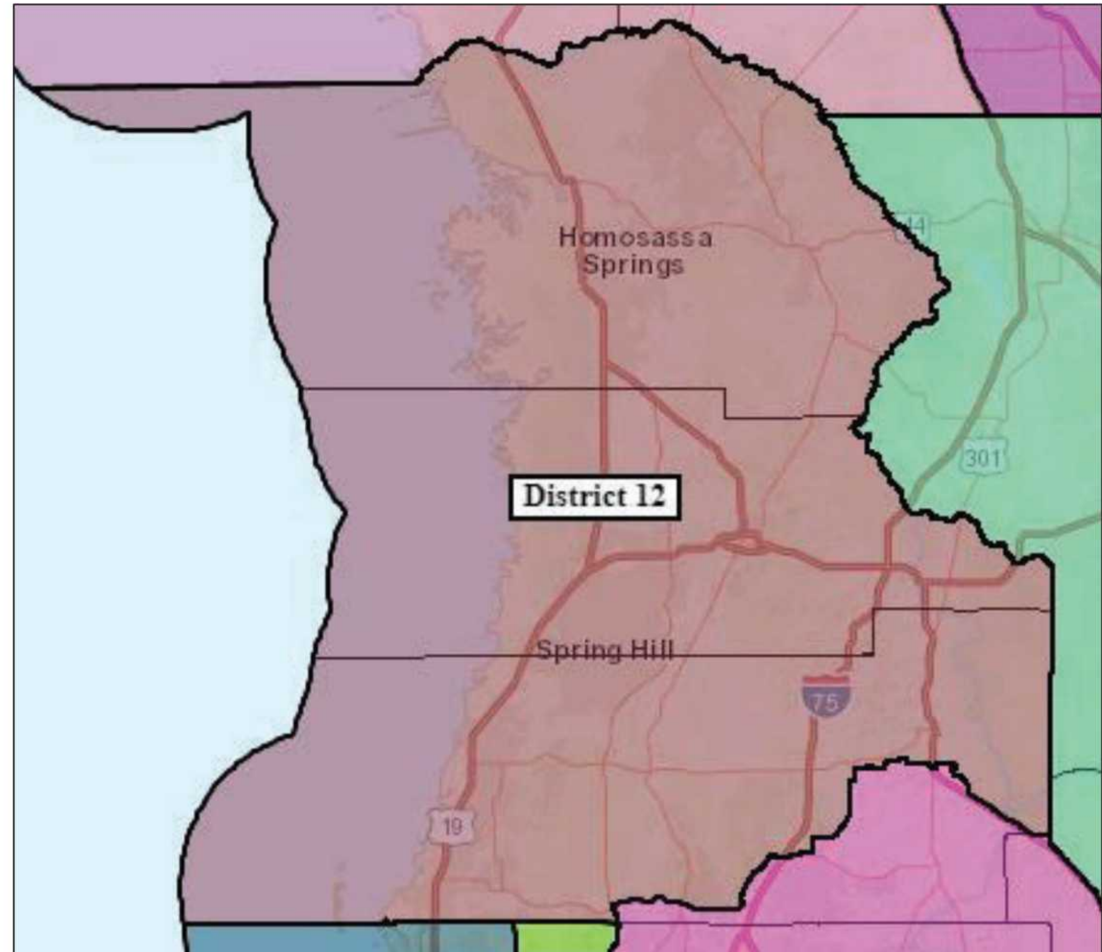




App. 0946

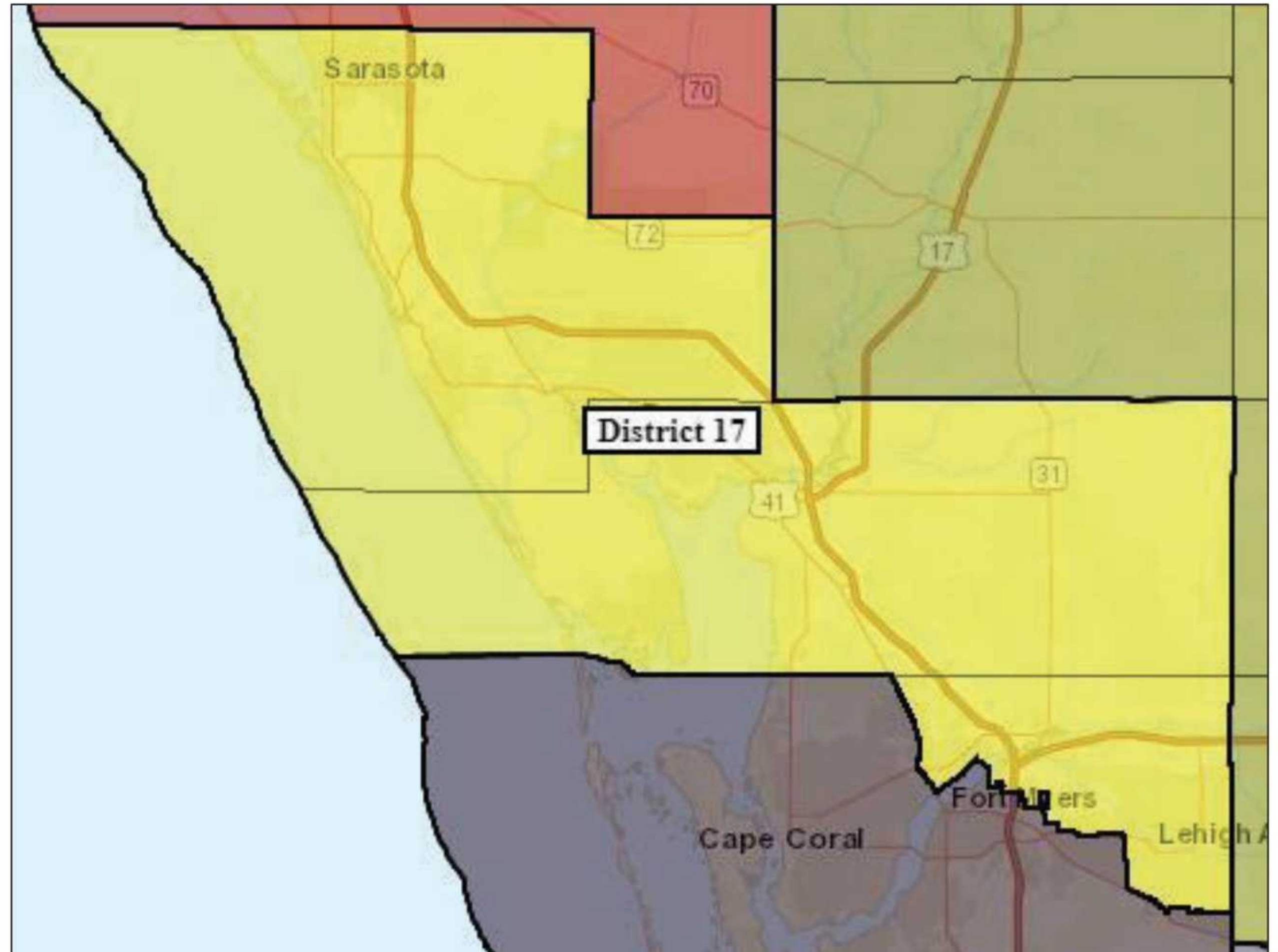
SB 2-C Plan 0109

District 12



SB 2-C Plan 0109

District 17

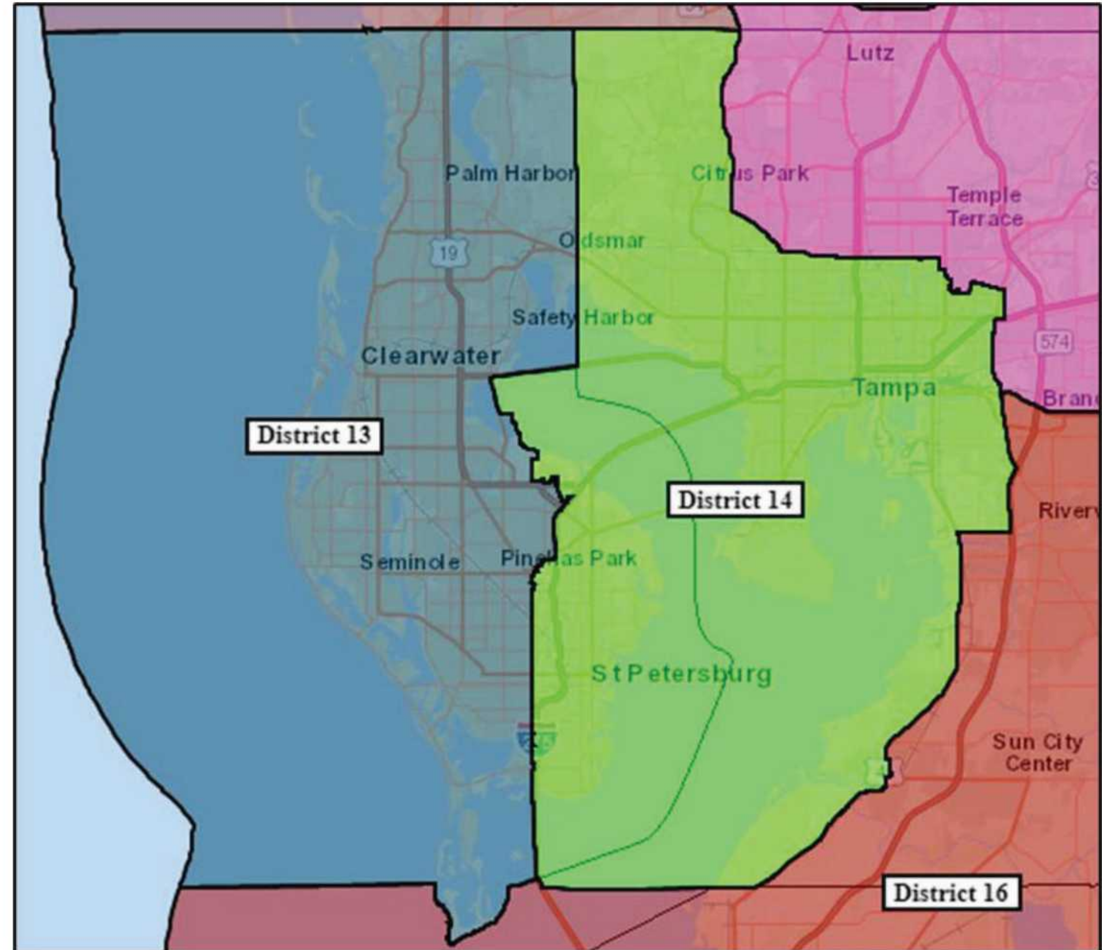


SB 2-C Plan 0109

Districts 13-16

SB 2-C Plan 0109

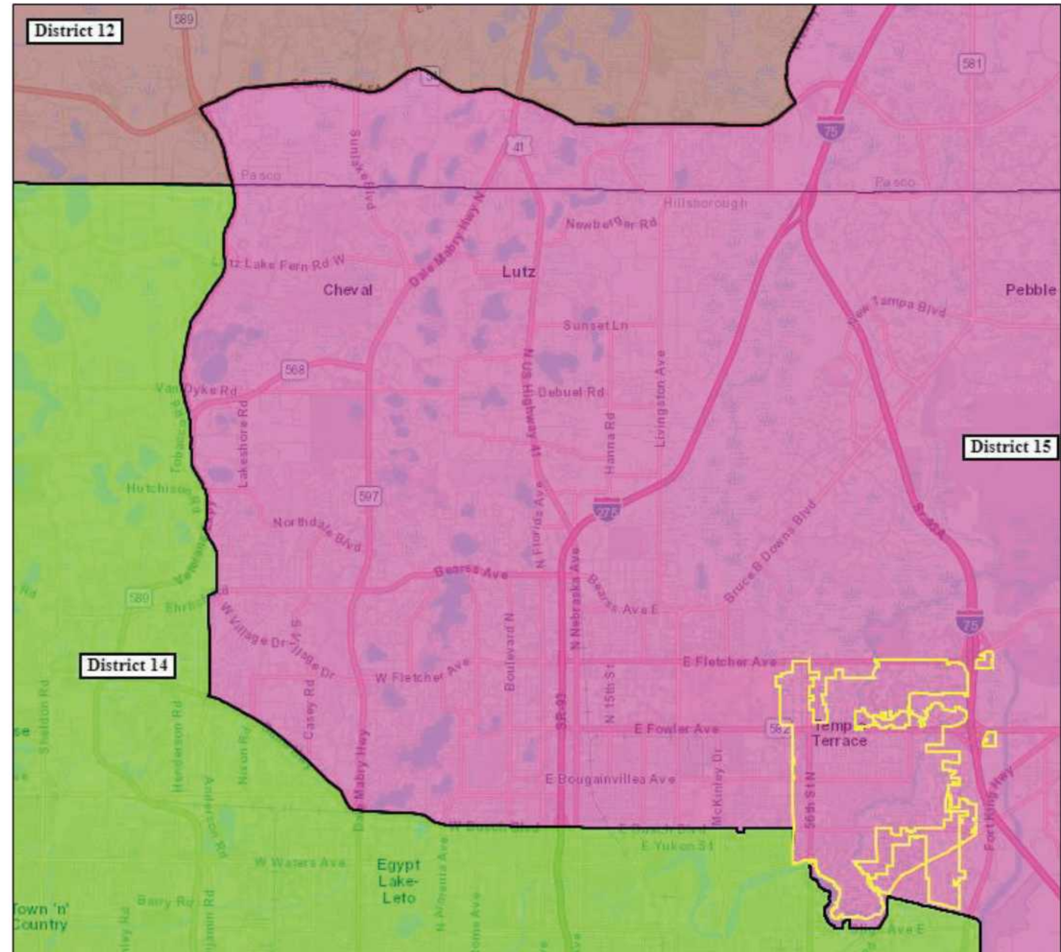
Districts 13-16



SB 2-C Plan 0109

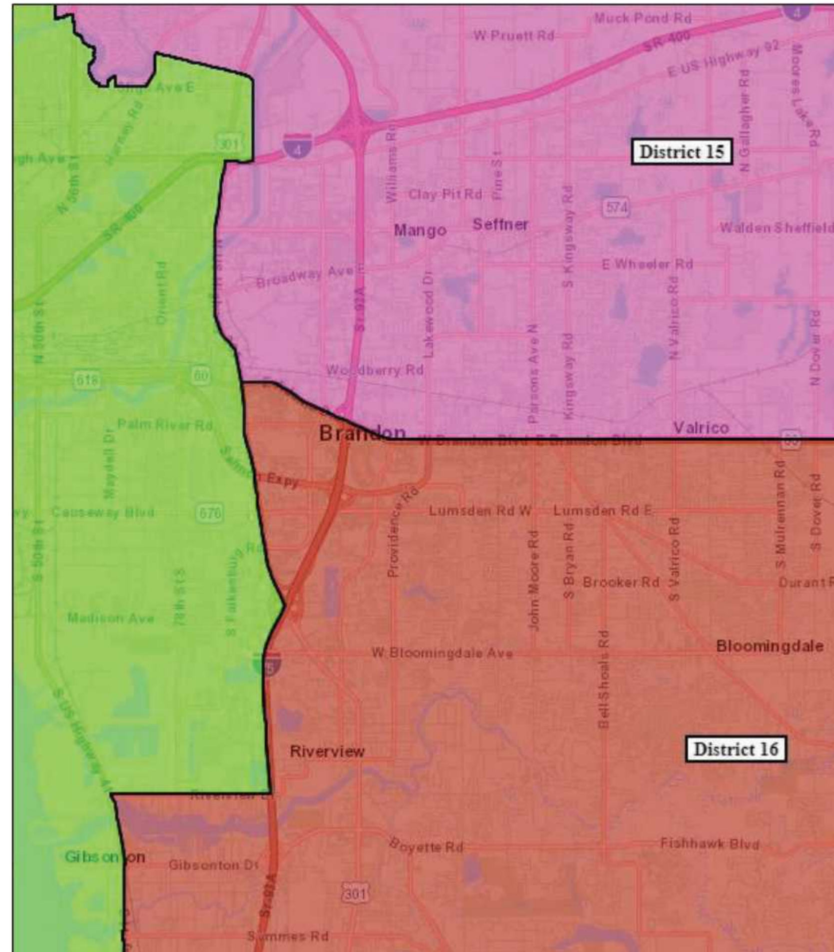
Districts 12, 14-15

Temple Terrace is highlighted



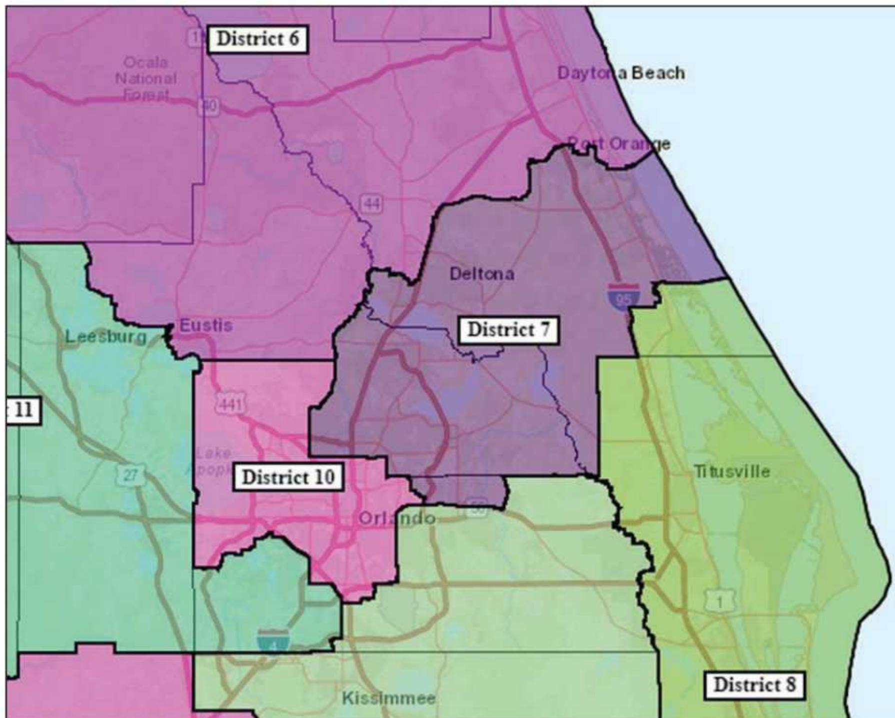
SB 2-C Plan 0109

Districts 14-16

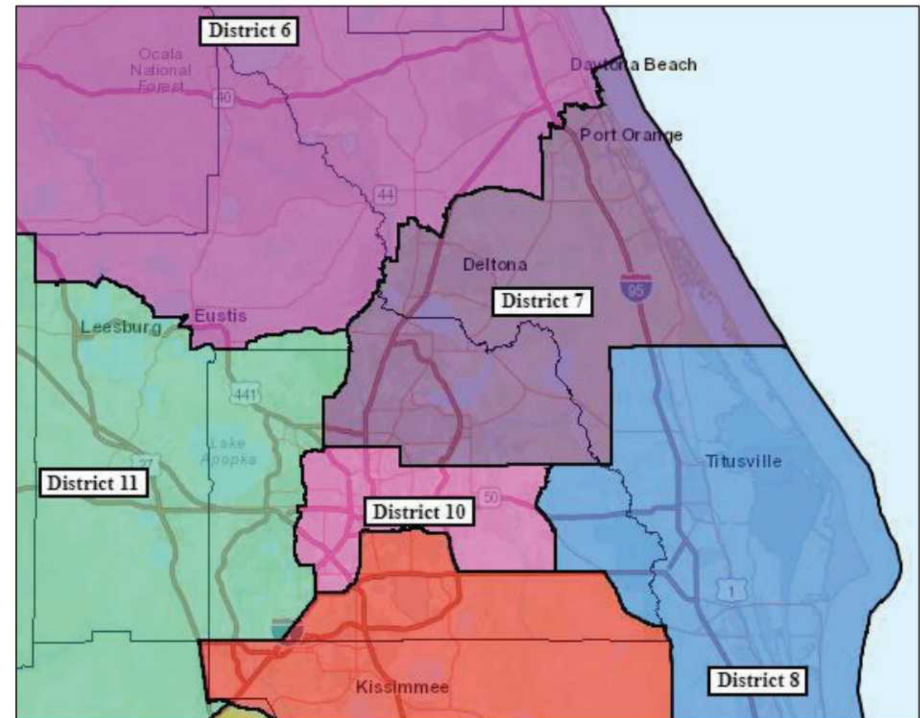


Districts 6-11

SB 102 PRIMARY PLAN 8019

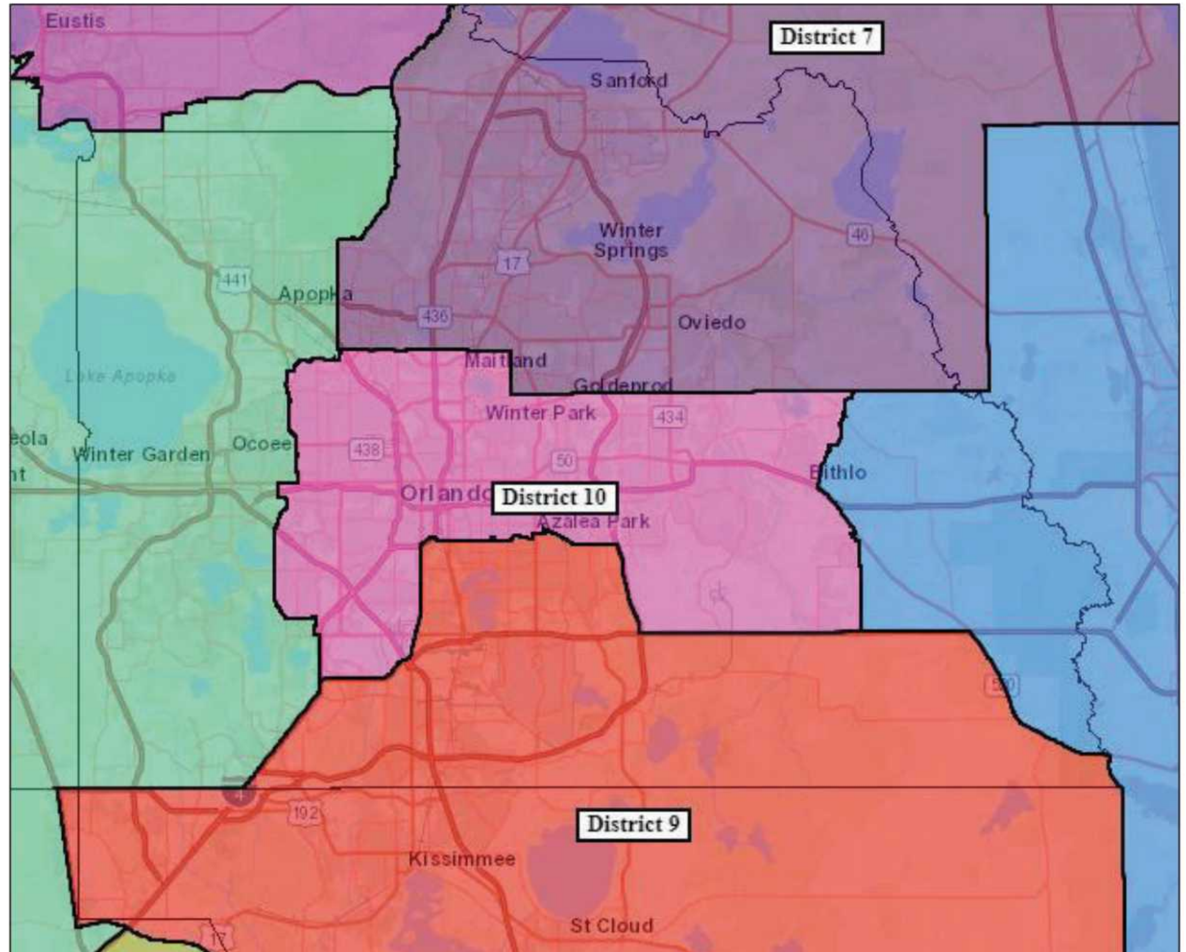


SB 2-C PLAN 0109



SB 2-C Plan 0109

Districts 7-11

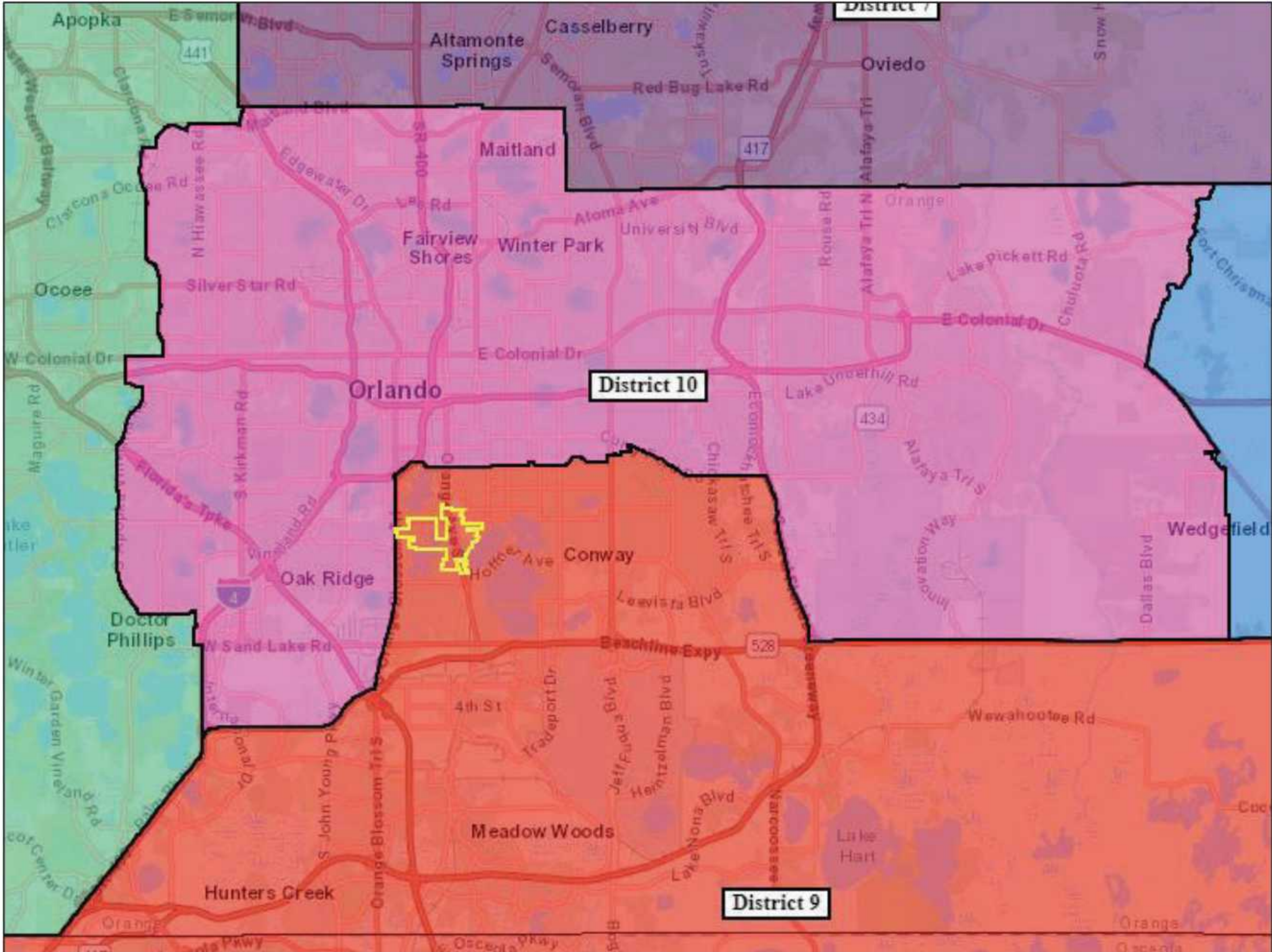


App. 0954

SB 2-C Plan 0109

Districts 7-11

Edgewood is highlighted

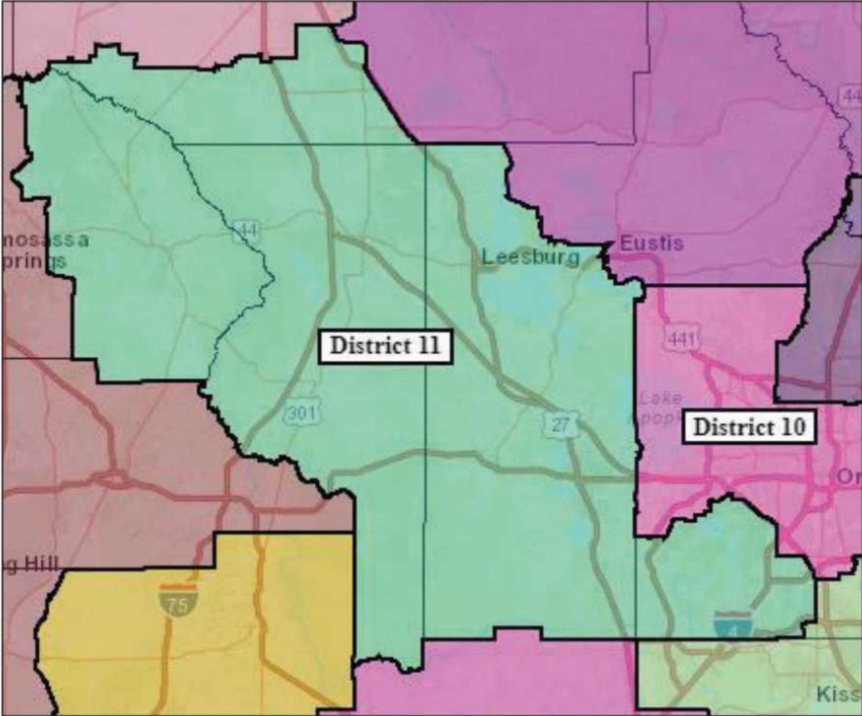


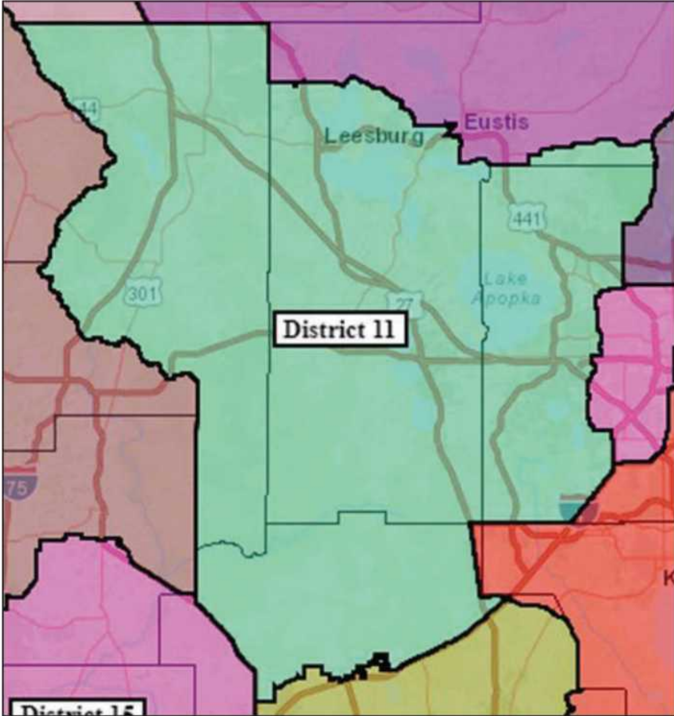
App. 0955

Districts 6, 10-12

SB 102 PRIMARY PLAN 8019

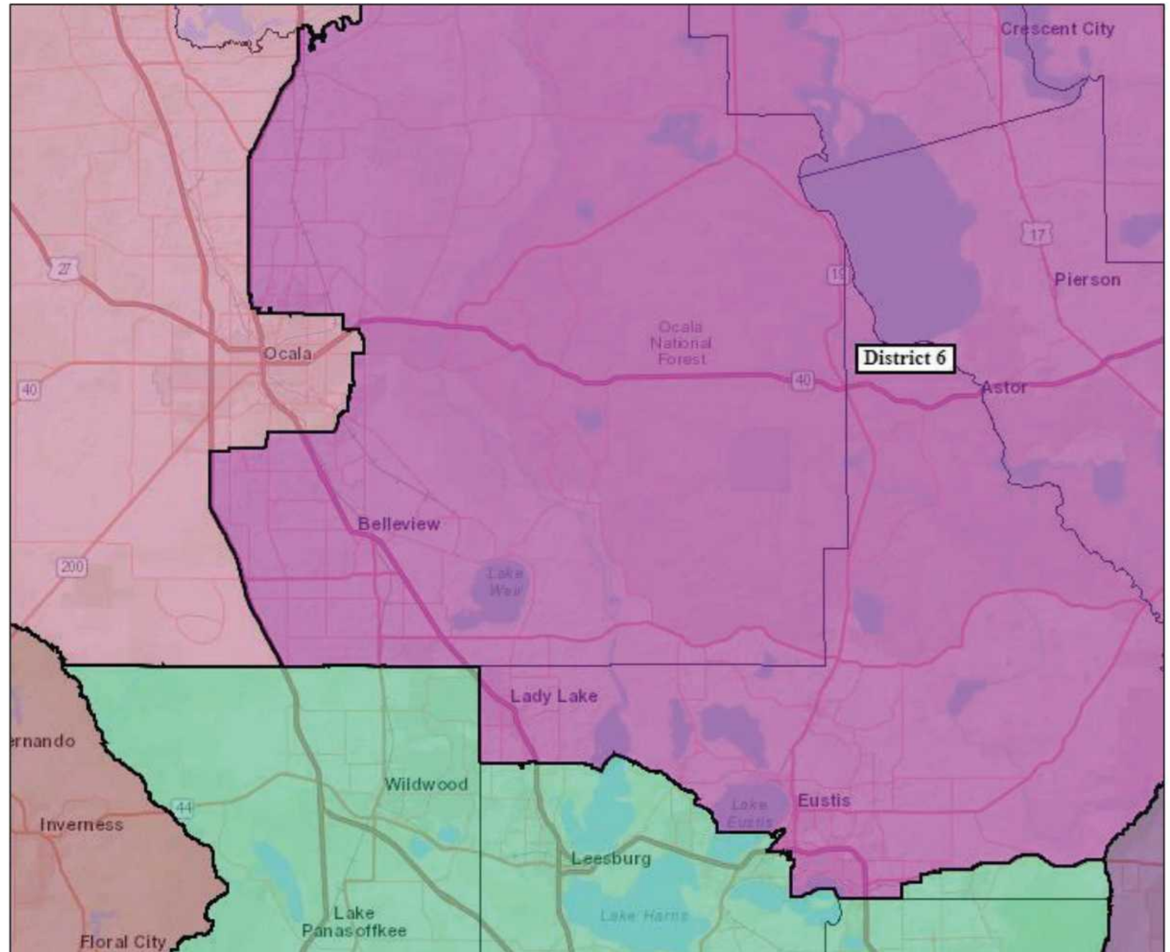
SB 2-C PLAN 0109





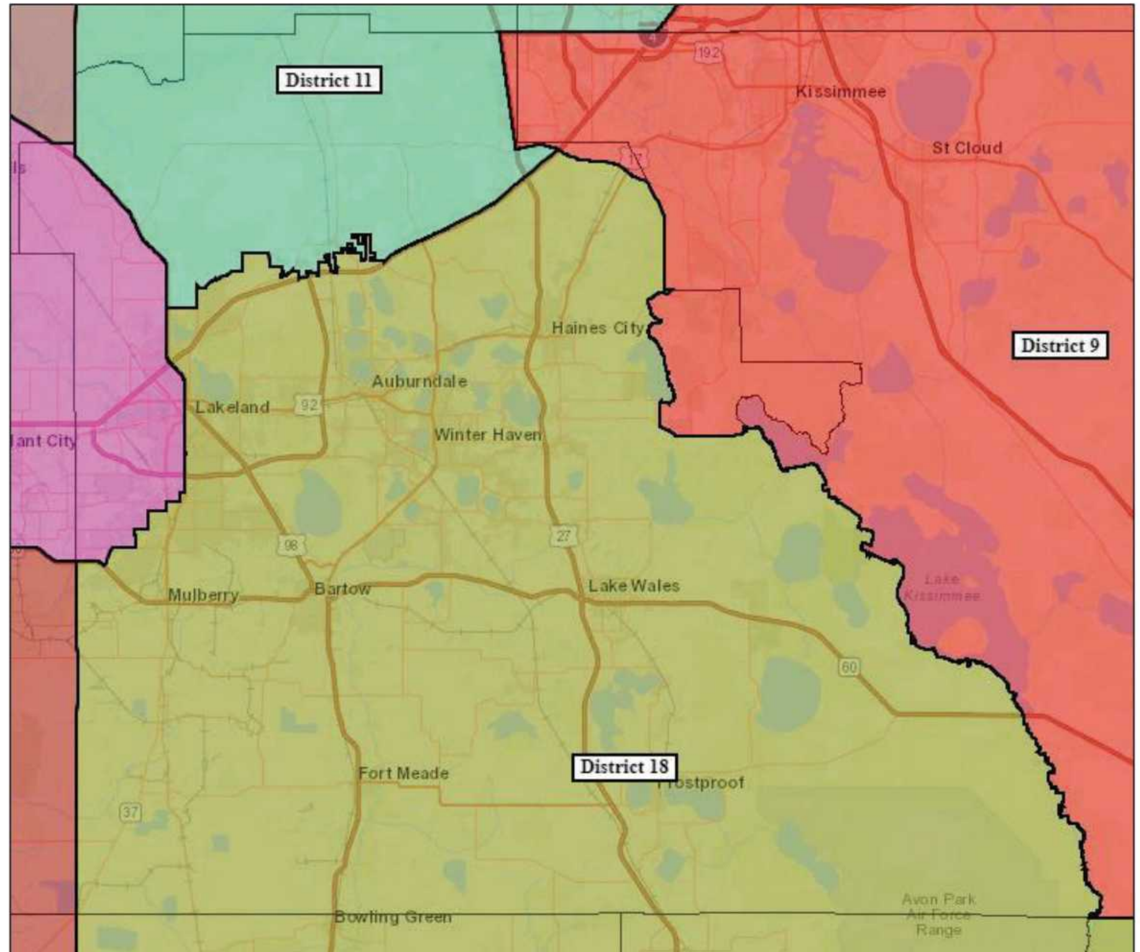
SB 2-C Plan 0109

Districts 3, 6, 11



SB 2-C Plan 0109

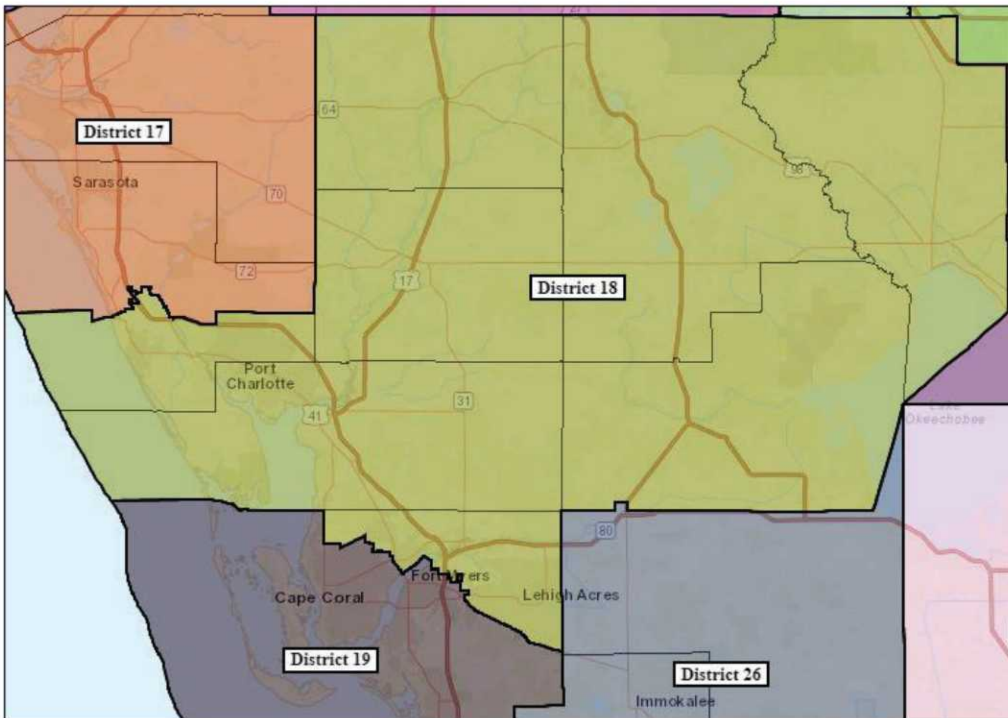
Districts 9, 11, 15, 18



App. 0958

Districts 17-19, 26

SB 102 PRIMARY PLAN 8019



SB 2-C PLAN 0109

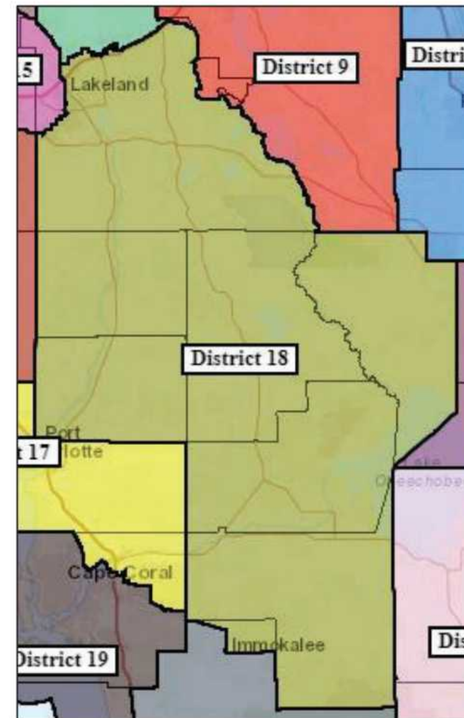


EXHIBIT 11

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

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
_______________________________/

DECLARATION OF DR. MARK OWENS

STATE OF Texas

COUNTY OF Smith

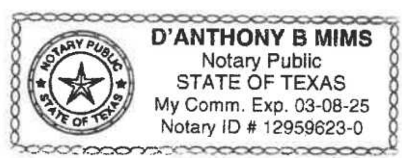
Before me, the undersigned authority, personally appeared Mark Owens, who, after first being duly sworn, deposes and says:

1. I was retained by Defendant Secretary of State in *Black Voters Matter Capacity Building Inst. et al. v. Lee et al.*
2. I prepared an expert report in support of the Secretary's response in opposition to the Plaintiffs' motion for a temporary injunction. The expert report is true and correct to the best of my knowledge.
3. If called to testify under oath, my testimony would be consistent with my report.

FURTHER DECLARANT SAYETH NOT.

By: Mark Owens
Dr. Mark Owens

Sworn to and subscribed before me this 9 day of May 2022, by Mark Owens who (check one) [ ] is personally known to me, [✓] produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or [ ] produced other identification, to wit:



Print Name: D'Anthony B Mims

Notary Public

Commission No.: 12959623-0

My Commission Expires: 3/8/2025

Executive Summary

I have been asked by Defendant's counsel to evaluate the U.S. Congressional District map enacted by the State of Florida. Specifically, to analyze the expert report of Dr. Stephen Ansolabehere on behalf of the Plaintiff in the case *Black Voters Matter Capacity Building Institute, Inc., et al., v. Lee et al.* (Case No. 2022-ca-000666). This analysis entails replicating Ecological Inference results for all statewide elections to compare how the candidate preference of non-Hispanic Black voters varies under the Enacted, Benchmark, Senate, and Backup maps to better understand representation of this group.

This report focuses its attention to a comparison of Florida's Fourth Congressional District in the Enacted Map to Florida's Fifth Congressional District in the other district plans studied. The scope of the racially polarized voting analysis I provide is centered on this comparison, because it draws the most attention in the functional analysis report submitted on behalf of the Plaintiff by Dr. Stephen Ansolabehere.

This study confirms Dr. Ansolabehere's findings from Table 11 that show that Black voters in any composition of the district are supportive of the Democratic candidate. My extension of Dr. Ansolabehere's analysis to all elections offers a comprehensive view of how consistently the preferred candidate of Black voters in the past decade has been a Democratic candidate, regardless of a candidate's race. My report offers detailed evidence of the consistency of this trend across the district plans being compared and the history of elections within those District plans. The findings do not show evidence that Black voters are any more or less supportive a Democratic candidate based on the race of a candidate. The absence of significant variation in candidate preference among candidates from the same party offers no statistical evidence of any diminishment in the ability of minority voters to elect representatives of their choice on the basis of race (Art. III, § 21(a)).

Qualifications and Expertise

I am a tenured associate professor of Political science at The University of Texas at Tyler. In the seven years I have taught at UT Tyler, I have taught courses on Congress, voting behavior, state politics,

and research methods at the undergraduate and graduate level. I have authored numerous journal articles on legislative politics and social behavior, which can be found in in *American Political Research*, *Legislative Studies Quarterly*, *Social Sciences Quarterly*, and other academic journals.

In the past year, I assisted a non-profit organization prepare districting plans of state and federal legislative offices for public submission in the state of Oklahoma. My compensation to prepare and write this report is $350 per hour.

Data

The data used for this report comes solely from the bce.csv file provided from the expert report for the Plaintiff and the Census block file ("Block20_PL.txt") at floridaredistricting.gov. I joined the two datasets together to make one comprehensive dataset titled "flredist" to ensure the process of generating the estimates would remain consistent with what was previously submitted by Dr. Ansolabehere.

Election analysis

The analysis of Florida's Fourth U.S. Congressional District (Enacted Map) and the prior U.S. Congressional District 5 that I provide replicates the results of the Ecological Inference (EI) analysis provided by Dr. Stephen Ansolabehere in this case. The replication relies on the data produced for the initial submission and the redistricting resources provided as part of the Public Law and available at https://www.floridaredistricting.gov/pages/resources. The replication results used the same methods and code to generate the estimates provided by Dr. Ansolabehere. I have done this because I have no disagreement with how the prior analysis was conducted. This report offers additional Ecological Inference estimates for each plan, by election, to illustrate the consistency of voting patterns across time and to measure if there are statistically significant and meaningful differences in how the enacted 4th U.S. Congressional District in Florida compares to Florida's 5th U.S. Congressional District from the 2020 election.

The entirety of this report can be directly compared to the EI results that were presented in Table 11 of the report from Dr. Ansolabehere. The initial estimate generated by averaging eight statewide

elections that occurred in 2016, 2018, and 2020 will be compared to estimates from all of the 14 individual statewide contests between 2012 and 2020. Reporting the EI results in this way shows how estimates of candidate preference of specific communities of interest vary across elections over time (or in this case how little variation there is) and how those estimates compare to the other compositions of the district.

Florida's Elections: 2012 to 2020

In Table 1, I report the results of the fourteen individual elections where data was provided at the Census block level by the Florida State House and Florida State Senate at floridaredistricting.gov. Each row indicates the voting preference among Non-Hispanic Black voters for a Democratic candidate. Columns 1 through 3 tell the year and office of the election before identifying the race and ethnicity of the candidates seeking that office, with the race of the Democratic nominee listed first. The next four columns identify the name of the Democratic candidate and the estimated percentage of the two-party vote they received in the areas that comprise the Enacted CD-4, Benchmark CD-5, and Senate Plan CD-5.

The best way to understand these results is to remember that these EI results are estimated at the Census bloc level, using population information from the Census and precinct election results that were disaggregated to the Census block level by the state. This allows the statistical approach to estimate preferences at a granular level and then sum the totals, based on how the Census blocs are assigned to districts in the Block Equivalency file for each District plan.

A comparison of all Democratic candidates for statewide and federal office from 2012 to 2020 shows that the support for a Black Democratic candidate among Black voters is not statistically higher than support for a White Democrat running for a separate office on the same ballot. Additionally, the support for the Democratic candidate among Black voters is consistent across almost all elections. In the Enacted district, Black voters show the most cohesiveness in their support of the nominee for Governor, Andrew Gillum (92%, [90.6, 93.2]) in a single election. As an anecdote, the estimate calls for rigorous analysis to compare the 2018 governor election to other statewide elections in 2018 and other elections

with high turnout. In each district plan the EI results show Andrew Gillum (Governor 2018) received the highest support of Black voters and Tim Murphy (Senate 2016) received the lowest. Looking at the elections separately show how the context of each election has varied in the last decade.

Table 1: Ecological Regression Estimates of the Percent of Non-Hispanic Black Voters Voting Democratic in Each Election under the Enacted, Benchmark, and Senate maps

(Confidence Interval in Parentheses to indicate Margin of Error)

Year	Office	Candidate Race/Ethnicity	Democratic Candidate	Enacted CD-4	Benchmark CD-5	Senate CD-5	Backup CD-5
2012	U.S. Senator	W – W	Nelson	89% (88.3, 90.6)	91% (89.6, 92.2)	91% (89.7, 92.3)	92% (90.5, 93.0)
2012	U.S. President	B/W – W/W	Obama	88% (87.0, 89.5)	91% (89.4, 92.5)	91% (89.3, 92.4)	92% (90.3, 93.2)
2014	CFO	W – W	Rankin	79% (77.7, 80.0)	84% (82.6, 85.7)	84% (82.4, 85.5)	85% (83.6, 86.5)
2014	Agriculture Com.	B – W	Hamilton	82% (81.1, 83.5)	87% (85.8, 88.9)	87% (85.5, 88.6)	88% (86.7, 89.6)
2014	Attorney General	W – W	Sheldon	78% (76.6, 78.9)	84% (82.2, 85.4)	83% (81.9, 85.0)	85% (83.1, 86.0)
2014	Governor	W – W	Crist	81% (80.0, 82.1)	88% (86.2, 89.5)	88% (85.9, 89.1)	89% (87.2, 90.2)
2016	U.S. Senator	W – H	Murphy	77% (76.0, 78.1)	82% (80.1, 83.1)	82% (80.2, 83.0)	82% (81.0, 83.8)
2016	U.S. President	W/W – W/W	Clinton	88% (86.5, 89.1)	90% (88.6, 91.8)	90% (88.4, 91.4)	91% (89.6, 92.6)
2018	CFO	W – W	Ring	89% (88.0, 90.6)	90% (88.5, 91.5)	90% (88.5, 91.6)	91% (89.4, 92.3)
2018	Agriculture Com.	W – W	Fried	89% (88.0, 90.7)	90% (88.7, 91.8)	90% (88.5, 91.6)	91% (89.7, 92.6)
2018	Attorney General	B – W	Shaw	90% (88.4, 91.0)	90% (88.5, 91.6)	90% (88.4, 91.4)	91% (89.4, 92.3)
2018	Governor	B – W	Gillum	92% (90.6, 93.2)	93% (91.2, 94.3)	93% (91.0, 94.1)	94% (92.1, 95.1)
2018	U.S. Senator	W – W	Nelson	89% (88.0, 90.5)	90% (88.6, 91.6)	90% (88.5, 91.5)	91% (89.5, 92.3)
2020	U.S. President	W/B – W/W	Biden	89% (87.3, 89.9)	90% (88.0, 91.1)	89% (88.0, 91.0)	90% (88.9, 91.7)

Table 1 shows the margins of error for an estimate of the preference of Black voters for Andrew Gillum, a Black Democratic Nominee, overlap with the estimated candidate preference for other White Democratic nominees for state office on the same ballot; Nikki Fried (89%, [88.0, 90.7]) and Jeremy Ring (89%, [88.0, 90.6]). A scan of all estimates also shows the 2018 Governor election as the highwater mark in each of the district plans included in Dr. Ansolabehere's report, however, it is not statistically different

from other elections in the column. Each district plan also shows that estimates of the preference of Black voters for incumbent Senator Bill Nelson in 2012 and Andrew Gillum in 2018 are not statistically different, presenting a consistent trend in the preference for a Democratic candidate among this group of voters regardless of the candidate's race and a null finding for the expected pattern. The expected pattern, in this comparison across the decade, is rejected in the Enacted, Benchmark, Senate, and Backup plans.

Federal Office

Table 1A subsets the original table by the elections for federal office to compare similar elections. This also makes it easier to compare the different district plans across the rows. The EI results to estimate the candidate preference of Black voters are similar across all three maps and there is clear overlap with the confidence intervals that estimate the margin of error. The lone exception is the 2016 Senate election where the estimates show that the incumbent Senator Marco Rubio, a Hispanic Republican, received a larger share of the two-party vote from Black voters than other Republican nominees.

Table 1A: Ecological Regression Estimates of the Percent of Non-Hispanic Black Voters Voting for the Democratic Nominee for Federal Office

Year	Office	Candidate Race/Ethnicity	Democratic Candidate	Enacted CD-4	Benchmark CD-5	Senate CD-5	Backup CD-5
2012	U.S. Senator	W – W	Nelson	89% (88.3, 90.6)	91% (89.6, 92.2)	91% (89.7, 92.3)	92% (90.5, 93.0)
2012	U.S. President	B/W – W/W	Obama	88% (87.0, 89.5)	91% (89.4, 92.5)	91% (89.3, 92.4)	92% (90.3, 93.2)
2016	U.S. Senator	W – H	Murphy	77% (76.0, 78.1)	82% (80.1, 83.1)	82% (80.2, 83.0)	82% (81.0, 83.8)
2016	U.S. President	W/W – W/W	Clinton	88% (86.5, 89.1)	90% (88.6, 91.8)	90% (88.4, 91.4)	91% (89.6, 92.6)
2018	U.S. Senator	W – W	Nelson	89% (88.0, 90.5)	90% (88.6, 91.6)	90% (88.5, 91.5)	91% (89.5, 92.3)
2020	U.S. President	W/B – W/W	Biden	89% (87.3, 89.9)	90% (88.0, 91.1)	89% (88.0, 91.0)	90% (88.9, 91.7)

Florida's 2016 Senate election is the lowest estimate of Black voter support for a Democratic candidate in all four district plans compared in the expert reports. What is striking about this deviation is that it occurred at the same time as Florida's 2016 presidential election in an all-White candidate contest of Hillary Clinton and Donald Trump. Clinton received the same level of support from Black voters as

President Barack Obama four years before and one percent less than Joe Biden and Kamala Harris four years later (an insignificant difference in the estimates). The support for Senator Bill Nelson among Black voters in the 2012 presidential election year and 2018 midterm year indicates a long-term consistency of partisan preference that is visible across time, office type, and the race of a Democratic nominee.

Governor and State Cabinet Elections

A comparison of the elections for state office in Florida in 2014 and 2018 indicates similarly consistent support for the Democratic nominee in the Enacted district compared to the previous district or alternative. In this case, we see voter behavior in these two elections was consistent down the ballot but different between elections. The EI results for the 2014 election estimate Black voter support in the areas that are now part of the Enacted CD-4 district was higher for Black Democratic nominee for Agriculture Commissioner, Thad Hamilton, than William Rankin for Chief Financial Officer and George Sheldon for Attorney General – but not significantly more than Governor Charlie Crist. While Black voters in the Enacted district were less likely to vote for a Democratic nominee in 2014 than 2018 and other configurations of the district, the behavior was consistent across all elections on the ballot.

Table 1B: Ecological Regression Estimates of the Percent of Non-Hispanic Black Voters Voting for the Democratic Nominee for State Office

Year	Office	Candidate Race/Ethnicity	Democratic Candidate	Enacted CD-4	Benchmark CD-5	Senate CD-5	Backup CD-5
2014	CFO	W – W	Rankin	79% (77.7, 80.0)	84% (82.6, 85.7)	84% (82.4, 85.5)	85% (83.1, 86.0)
2014	Agriculture Com.	B – W	Hamilton	82% (81.1, 83.5)	87% (85.8, 88.9)	87% (85.5, 88.6)	88% (86.7, 89.6)
2014	Attorney General	W – W	Sheldon	78% (76.6, 78.9)	84% (82.2, 85.4)	83% (81.9, 85.0)	85% (83.1, 86.0)
2014	Governor	W – W	Crist	81% (80.0, 82.1)	88% (86.2, 89.5)	88% (85.9, 89.1)	89% (87.2, 90.2)
2018	CFO	W – W	Ring	89% (88.0, 90.6)	90% (88.5, 91.5)	90% (88.5, 91.6)	91% (89.6, 92.6)
2018	Agriculture Com.	W – W	Fried	89% (88.0, 90.7)	90% (88.7, 91.8)	90% (88.5, 91.6)	91% (89.7, 92.6)
2018	Attorney General	B – W	Shaw	90% (88.4, 91.0)	90% (88.5, 91.6)	90% (88.4, 91.4)	91% (89.4, 92.3)
2018	Governor	B – W	Gillum	92% (90.6, 93.2)	93% (91.2, 94.3)	93% (91.0, 94.1)	94% (92.1, 95.1)

The 2018 estimates show that in these state office elections, the Enacted map is again consistent with the voting behavior we would expect from the Benchmark map, and that the voting preferences of Black voters seem more aligned with political party than the race of the candidates.

Conclusion

The report above focuses on whether Black Democratic candidates draw more support from Black voters than White Democratic candidates do and finds that this is not the case. Black voters in the geographic regions considered for the Florida's 4th U.S. Congressional District in the Enacted Map and Florida's 5th U.S. Congressional District from the Benchmark Map shows strong cohesion in support of one political party regardless of the race and ethnicity of the candidate who wins the political party's nomination. A candidate's race cannot be identified as the cause of polarized voting because the election outcome of a contest between a Black Democratic nominee and a White Republican nominee closely mirrors concurrent elections that have no difference in the race of candidates for the two major parties.

May 9, 2022

Mark E. Owens, Ph.D.

Mark Owens

Curriculum Vitae

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EDUCATION

University of Georgia - Ph.D. in Political Science	2014
University of Oxford - Visiting Doctoral Student in the Department of Politics	2013
Johns Hopkins University - M.A. in Government	2008
University of Florida - B.A. in Political Science, *magna cum laude*	2006

ACADEMIC POSITIONS

University of Texas at Tyler	
Associate Professor & Honors Faculty	2020 - present
Assistant Professor	2015 - 2020
Reinhardt University - Adjunct Professor of Public Administration	May 2014 & May 2017
Bates College - Visiting Assistant Professor	2014 - 2015

PROFESSIONAL EXPERIENCE

APSA Congressional Fellow, *Office of the President Pro Tempore*, United States Senate.	2015 - 2016
Legislative Assistant, two former U.S. Representatives. Washington, D.C.	2007 - 2009

BOOKS

Owens, Mark, Ken Wink, and Kenneth Bryant, Jr. 2022. *Battle for the Heart of Texas: Political Change in the Electorate*. Norman, OK: University of Oklahoma Press.

Bryant, Jr., Kenneth, Eric Lopez, and Mark Owens. 2020. *Game of Politics: Conflict, Power, & Representation*. Tyler, TX: The University of Texas at Tyler Press (Open Source Textbook).

ARTICLES & PEER REVIEWED CHAPTERS

12 Howard, Nicholas O. and Mark Owens. 2022. "Organizing Staff in the U.S. Senate: The Priority of Individualism in Resource Allocation." *Congress & the Presidency*. **Forthcoming**.

11 Johnson, Renee M. Cassandra Crifasi, Erin M. Anderson Goodell, Arkadiusz Wiśniowski, Joseph W. Sakshaug, Johannes Thrul, and Mark Owens. 2021. "Differences in beliefs about COVID-19 by gun ownership: A cross-sectional survey of Texas adults." *BMJ Open* 11(11): 1-7.

10 Goldmann, Emily, Daniel Hagen, Estelle El Khoury, Mark Owens, Supriya Misra, and Johannes Thrul. 2021. "An examination of racial/ethnic differences in mental health during COVID-19 pandemic in the U.S. South." *Journal of Affective Disorders* 295(1): 471-478.

9 Owens, Mark. 2021. “Changes in Attitudes, Nothing Remains Quite the Same: Absentee Voting and Public Health.” *Social Science Quarterly* 102(4): 1349-1360.

8 Johnson, Renee M. and Mark Owens 2020. “Emergency Response, Public Behavior, and the Effectiveness of Texas Counties in a Pandemic.” *Journal of Political Institutions & Political Economy* 1(4): 615-630.

7 Howard, Nicholas O. and Mark Owens. 2020. “Circumventing Legislative Committees: Use of Rule XIV in the U.S. Senate.” *Legislative Studies Quarterly* 45(3): 495-526.

6 McWhorter, Rochell, Mark Owens, Jessie Rueter, Joanna Neel, and Gina Doepker. 2020. “Examining Adult Learning of ‘Giving Back’ Initiatives.” In *Handbook of Research on Adult Learning in Higher Education*. Hershey, PA: IGI Publishers. With Rochell McWhorter, Jessie Rueter, Joanna Neel, and Gina Doepker.

Reprinted in 2021 by Information Resources Management Association (Ed.), in *Research Anthology on Adult Education and the Development of Lifelong Learners* (pp. 1039-1066). IGI Global.

5 Madonna, Anthony J., Michael Lynch, Mark Owens and Ryan Williamson. 2018. “The Vice President in the U.S. Senate: Examining the Consequences of Institutional Design.” *Congress & The Presidency* 45(2): 145-165.

4 Owens, Mark. 2018. “Changing Senate Norms: Judicial Confirmations in a Nuclear Age.” *PS: Political Science and Politics* 51(1): 119-123.

3 Carson, Jamie L., Anthony J. Madonna, and Mark Owens 2016. “Regulating the Floor: Tabling Motions in the U.S. Senate, 1865-1946.” *American Politics Research* 44(1): 56-80.

2 Carson, Jamie L. and Mark Owens. 2015. “Lawmaking.” In Robert A. Scott and Stephen M. Kosslyn, eds. *Emerging Trends in the Social and Behavioral Sciences*. New York: Wiley.

1 Carson, Jamie L., Anthony J. Madonna, and Mark Owens 2013. “Partisan Efficiency in an Open-Rule Setting: The Amending Process in the U.S. Senate, 1865-1945.” *Congress & The Presidency* 40(2): 105-128.

BOOK REVIEWS

Owens, Mark. 2021. “Lewallen, Johnathan. Committees and the Decline of Lawmaking in Congress.” *Congress & the Presidency* 48(3): 404-406.

AWARDS

Burns “Bud” Roper Fellow. American Association of Public Opinion Researchers.	2021
Prestige Impact Award, Dean of the College of Arts & Sciences at UT Tyler.	2019
Outstanding Faculty Mentor Award, UT Tyler Office of the Provost.	2019
Certificate in Effective Teaching Practices, American College and University Educators.	2019
Teaching and Learning Award, UT Tyler Center for Excellence in Teaching and Learning.	2018
Community Engaged Learning Award, Harward Center at Bates College.	2015
Outstanding Teaching Assistant Award, University of Georgia Provost.	2013
Charles S. Bullock, III Scholar, UGA School of Public and International Affairs.	2009

GRANT & CONTRACT SUPPORT

10. Texas Vaccine Hesitancy Survey, (Co-Investigator). 2022. — $2.6 million
    PI's: Paul McGaha (UT Tyler HSC) & Paula Cuccaro (UT SPH-Houston)
    Scope of Survey: Statewide survey of hard to reach respondents (Feb. to Nov).
    Funded by: Texas State Department of Health and Human Service.
    • Included a $1.1 million sub-award directly to UT Tyler.

9. El Paso County Social Survey, (Investigator). 2022. — $38,100
    PI's: Gregory Schober, UTEP
    Scope of Survey: Countywide survey, oversampling low-income households (April-May)
    Funded by: University of Texas at El Paso (UTEP).

8. Southern Cities Survey, (Co-PI). 2020. — $12,000
    PI's: Emily Goldmann (NYU) & Mark Owens
    Scope of Survey: Sample of 5 major Southern Metropolitan areas in May.
    Funded by: UT Tyler & New York University School of Global Health.

7. Small Grant, Center for Effective Lawmaking (Co-PI). 2020. — $2,300
    PI's: Mark Owens & Nicholas Howard (Auburn-Montgomery)
    Scope of Work: Content Analysis of all Senate committee reports, 1985-2020.
    Funded by: UVA & Vanderbilt.

6. Texas Mental Health Survey, (Co-PI). 2020 — $45,000
    PI's: Renee Johnson (JHU) & Mark Owens
    Scope of Survey: Three wave statewide panel (April, May, & June)
    Funded by: UT Tyler & Johns Hopkins Bloomberg School of Public Health

5. East Texas Surveys on Education & Property Tax Reform, (Co-PI). 2019 — $10,000
    PI's: Kyle Gullings (UT Tyler) & Mark Owens
    Scope of Work: Regional sample to compare East Texas to DFW and Houston.
    Funded by: UT Tyler

4. Faculty Undergraduate Research Grant, (PI) Studying Vote Centers in Texas. 2018. — $3,000
    Scope of Work: Mentor undergraduates to gather data and submit FOIA requests.
    Funded by: UT Tyler Office of Research and Scholarship.

3. Congressional Research Grant, (PI) Bicameralism's Effect on Appropriations. 2015. — $3,133
    Scope of Work: Archival visits to Concord, Tempe, and Washington, D.C.
    Funded by: The Dirksen Congressional Center.

2. Faculty Development Grant, (PI) Majority Party Power in a Bicameral Congress. 2015. — $2,575
    Scope of Work: Mentor undergraduate researchers to analyze archived documents.
    Funded by: Office of the Dean of Faculty at Bates College.

1. Richard Baker Award, (PI) Majority Party Power in a Bicameral Congress. 2011. — $1,000
    Scope of Work: Archival visits to Austin, TX and Washington, D.C..
    Funded by: Association of Centers for the Study of Congress.

COMMENTARY

Owens, Mark. "Why our poll got it wrong on Biden but right on so much more." *Dallas Morning News.* Sunday November 15, 2020. Page, 5P.

Howard, Nicholas O. and Mark Owens. "Are Amendment Strategies Learned Through Experience or Contingent on the Institution?" *LegBranch.* May 27, 2019.

Bryant, Jr. Kenneth, Ken Wink, and Mark Owens. "Conflicting Attitudes of Texans on Wall and Border Policies." *Austin American-Statesman.* March 11, 2019.

Owens, Mark. "Are Courtesy Meetings Nuked?" *LegBranch.* July 10, 2018.

Owens, Mark. "East Texans support Trump, but at lower levels than 2012." *Tribtalk: Texas Tribune.* November 8, 2016.

INVITED TALKS

Texas A&M San Antonio	"Public Attitudes on Equity and Inclusivity."	2022
Delta Sigma Theta Sorority, Tyler Alumnae	"Social Action & Election Education"	2022
League of Women Voters Tyler/Smith County	"Your options under TX's new Election Law"	2022
Texas Associated Press Managing Editors	"Texas Politics Panel."	2021
League of Women Voters Oklahoma	"All about Redistricting."	2021
League of Women Voters Tyler/Smith County	"Essential Conversation on Voting in Texas."	2021
League of Women Voters Oklahoma	"Representation & Redistricting."	2021
Kilgore College	"Why We Poll Texans."	2020
Smith County Republican Women Club	"Understanding the 2020 Election Polls"	2020
League of Women Voters Tyler/Smith County	"Processes of the Electoral College."	2020
Kilgore College	"What Primary Voters in Texas Care About."	2019
League of Women Voters Tyler/Smith County	"Census & Redistricting Forum."	2019
Tyler Area Chamber of Commerce	"Public Input on Transportation."	2019
League of Women Voters Tyler/Smith County	"Representation & Redistricting."	2018
Bates College, Martin Luther King, Jr Day	"Legacy of the Voting Rights Act of 1965."	2015
Rothemere American Institute, Oxford, UK	"Effect of Bicameralism on Policy."	2013

CONFERENCE PRESENTATIONS

The Citadel Symposium on Southern Politics	2014 - 2022
Congress & History Conference	2012, 2016, 2018
Election Science, Reform, and Administration Conference	2020
American Association of Public Opinion Researchers Meeting	2020, 2021
American Political Science Association Meeting	2011 - 2016, 2020
Midwest Political Science Association Meeting	2011 - 2018
Southern Political Science Association Meeting	2011 - 2014, 2017 - 2022
Southwest Social Science Association Annual Meeting	2017, 2021

PROFESSIONAL SERVICE

Co-Chair. Election Sciences Conference within a Conference at SPSA, San Antonio, TX.	2022
Speaker: AAPOR Send-a-Speaker Program.	2020 - 2021
Field of Study Advisory Committee. *Texas Higher Education Coordinating Board.*	2018 - 2021
Co-Editor. *PEP Report* for the APSA Presidency and Executive Politics Section.	2018 - 2019

Grant Reviewer. Hurricane Resilience Research Institute (HuRRI), University of Houston. 2018
Grant Reviewer. Administration on Children, Youth, and Families, US Dept. of HHS. 2007

TEACHING EXPERIENCE

Graduate Course	Institution	Recent Evaluation	Years Taught
Scope & Methods	UT Tyler	4.6	2017 - 2021
Seminar on American Politics	UT Tyler	4.4	2015 - 2022
Budgeting & Public Finance	UT Tyler; Reinhardt	5	2014 - 2017
Program Evaluation	UT Tyler	4.7	2018
Advanced Quantitative Research	UT Tyler	3.8	2018

Undergraduate Course			
Campaigns & Elections	UT Tyler; Bates; UGA	4.6	2013 - 2020
Congress & Legislation	UT Tyler; UGA	4.3	2013 - 2021
Research Methods	UT Tyler	4.4	2016 - 2022
Southern Politics	UT Tyler	4.6	2018 - 2021
U.S. Presidency	UT Tyler; Bates	3.9	2014 - 2017
Intro. to Texas Government (Honors)	UT Tyler	4.1	2020 - 2021
Intro. to American Government	UT Tyler; Bates; UGA	3.8	2013 - 2019

CURRENT COMMUNITY INVOLVEMENT

KVUT 99.7FM UT Tyler Radio (NPR), Advisory Board Member. 2021 - 2023
Secretary (2022-23)

League of Women Voters - Tyler/Smith County, TX, Nominating Committee. 2020 - 2022
Chair of Nominating Committee (2021-22)

Filing # 149296470 E-Filed 05/10/2022 01:41:17 PM

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., EQUAL GROUND EDUCATION FUND, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA EDUCATION FUND, INC., FLORIDA RISING TOGETHER, PASTOR REGINALD GUNDY, SYLVIA YOUNG, PHYLLIS WILEY, ANDREA HERSHORIN, ANAYDIA CONNOLLY, BRANDON P. NELSON, KATIE YARROWS, CYNTHIA LIPPERT, KISHA LINEBAUGH, BEATRIZ ALONSO, GONZALO ALFREDO PEDROSO, and ILEANA CABAN,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, ASHLEY MOODY, in her official capacity as Florida Attorney General, the FLORIDA SENATE, the FLORIDA HOUSE OF REPRESENTATIVES, WILTON SIMPSON, in his official capacity as the President of the Florida Senate, CHRIS SPROWLS, in his official capacity as the Speaker of the Florida House of Representatives, RAY RODRIGUES, in his official capacity as Chair of the Senate Committee on Reapportionment, and TOM LEEK, in his official capacity as Chair of the Chair of the House Redistricting Committee,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

The Secretary does not seriously dispute that the DeSantis Plan diminishes the electoral power of Black voters in CD-5—who were previously capable of electing their candidate of choice—by cracking its Black voters among four separate districts across North Florida. Under existing Florida Supreme Court precedent, that concession alone is sufficient to prove a diminishment claim under Article III, Section 20(a) of the Florida Constitution and should entitle Plaintiffs to relief.

The Secretary's arguments to the contrary are as unavailing as they are creative. She argues that the Fair Districts Amendment's non-retrogression principle is no longer enforceable in Florida, paying no heed to state prerogatives to establish constitutional protections greater than those afforded by the federal constitution. And she argues that today, nearly four months away from the primary, is too late to provide Plaintiffs relief for their constitutional injuries, no matter that multiple courts, including in this cycle, have resolved redistricting challenges functionally indistinguishable from this one in less time, ensuring that voters are not forced to cast their ballots under unlawful or unconstitutional maps.

The Secretary's arguments are nothing but a transparent attempt to muddy a straightforward constitutional challenge. The DeSantis Plan plainly dilutes Plaintiffs' electoral power in violation of the Florida Constitution. For these reasons, and those stated below, Plaintiffs respectfully request that the Court grant their motion for a temporary injunction.

ARGUMENT

I. Plaintiffs have established a clear violation of the Fair Districts Amendment's non-diminishment standard.

The Fair Districts Amendment established new standards to constrain the Legislature's once-in-a-decade exercise of its congressional reapportionment power, which are enumerated

within two "tiers" in Article III, Section 20 of the Florida Constitution. *See* Art. III, § 20, Fla. Const. Among the "Tier I" standards is a requirement that "districts shall not be drawn with the intent or result of . . . diminish[ing] the ability" of racial or language minorities "to elect representatives of their choice." *Id.* § 20(a). Although Plaintiffs brought their Motion for a Temporary Injunction under this specific provision, the Secretary all but ignores it, failing even to mention the provision until 13 pages into her brief. The reason for her evasiveness is clear: it is incontestable that the dismantling of Benchmark CD-5 under the DeSantis Plan strips Black voters in North Florida of their ability "to elect representatives of their choice."

The report of Plaintiffs' expert, Dr. Ansolabehere, establishes that Black voters in Benchmark CD-5 have been able to elect a candidate of their choice since the district was created in 2015. Black residents are the largest group of registered voters in the district and "account[ ] for 49.1 percent of the total population and 77.7 percent of the minority population in this district." *See* Ex. 2 ¶ 32. Given the political cohesion of Black voters in Benchmark CD-5, Black voters had the ability to elect their preferred candidates and exercised that power by electing Democrat Al Lawson to Congress in 2016, 2018, and 2020. *Id.* ¶¶ 39-40.

The DeSantis Plan diminishes the electoral ability of Black voters by carving up Benchmark CD-5 and cracking its Black population among four new districts: New CD-2, CD-3, CD-4, and CD-5. *Id.* ¶ 43. The resulting Black populations of those districts are now 22.7%, 15.3%, 30.8%, and 10.9%, respectively. Ex. 2 tbl. 2. By contrast, white voters now comprise the majority of the population in each of these districts and cast the majority of votes in 2016, 2018, and 2020 in both the general and Democratic primary elections. *Id.* ¶¶ 47-48. The result is that the approximately 370,000 Black voters who were in Benchmark CD-5 are no longer able to elect their preferred candidates. There is no longer a minority-performing congressional district in North

Florida, and the electoral preferences of Black voters have been subrogated to those of the white voters in the four districts into which Black voters have been cracked and displaced.

Faced with these indisputable facts, the Secretary's first gambit is to argue that the Fair Districts Amendment's non-diminishment standard does not apply because "there's no record of a race-based problem that justifies its use as a race-based solution. . . ." Def. Sec'y of State Lee's Resp. in Opp. to Pls.' Mot. ("Opp.") at 14 (May 9, 2022). But a violation of the non-diminishment standard does not hinge on whether there is a "race-based problem," a term that is found nowhere in the Fair Districts Amendment and that the Secretary does not even attempt to define. Instead, the non-diminishment standard requires a straightforward comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting change is measured." *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 615 (Fla. 2012). 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. This inquiry requires "consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of political data and how a minority population group has voted in the past." *Id.* The Florida Supreme Court has specifically provided that its functional analysis "will involve review of the followings statistical data: (1) voting age-populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history." *Id.* at 627. Dr. Ansolabehere conducted exactly this type of analysis. *See* Ex. 2 ¶¶ 32-67.

This standard required the Secretary to respond to Dr. Ansolabehere's diminishment analysis with a comparative electoral analysis of her own, which she has completely failed to do. The Secretary's primary offering is an affidavit from Dr. Mark Owens that never analyzes the only

two relevant questions -- whether Black voters had the ability to elect their preferred candidates under Benchmark CD-5 and whether they have lost that ability under the DeSantis Plan's dispersion of Black voters across four white majority districts. Dr. Owens focuses instead on whether the race of candidates in Benchmark CD-5 and new CD-4 affects the level of support they have among Black voters in those CDs and concludes that "the voting preferences of Black voters seem more aligned with political party than race of the candidates." Opp., Ex. 11 at 9. But the analysis of whether a minority group is able to elect its preferred candidate does not depend on "the race of the candidate," but rather "the status of the candidate as the chosen representative of a particular racial group." *See Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) (discussing Voting Rights Act); *see also In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 620 ("Our interpretation of [the FDA's non-diminishment standard] is guided by prevailing United States Supreme Court precedent."). The FDA's non-diminishment standard focuses only on whether the ability of Black voters to elect their preferred candidates has been diminished. *See id.* at 625 ("[T]he Legislature cannot . . . weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates."). Only Dr. Ansolabehere answers that question, and he does so by providing exactly the type of comparative electoral analysis the Florida Supreme Court requires. His conclusion that the DeSantis Plan diminishes the voting power of Black voters in North Florida is unrebutted.

Nothing in the affidavit of the other expert witness the Secretary proffers, Dr. Johnson, saves the Secretary's failure to rebut the violation of the non-diminishment requirement established by Dr. Ansolabehere. Dr. Johnson does not address the DeSantis Plan's diminishment of Black voting strength at all, focusing instead on comparisons of the number of political boundary splits and compactness in the versions of CDs 2-5 of the DeSantis Plan, the 2015

Benchmark Plan, and the Florida Legislature's Plan 8015. But under the Fair Districts Amendments, non-diminishment is a Tier One requirement that takes precedence over boundary splits and compactness, which are Tier Two criteria. As the Florida Supreme Court held in *In re S. J. Res. of Legis. Apportionment*, the "constitutional directive is that tier two [is] subordinate to tier one," and if there is a conflict between the tier requirements, "the Legislature is obligated to adhere to the requirements of section 21(a) (tier one) and then comply with the considerations in section 21(b) (tier two) to the extent 'practicable' or 'feasible' . . . ." 83 So. 3d at 615. By ignoring the non-diminishment requirement, Dr. Johnson improperly elevates Tier Two criteria above the Tier One requirement, which renders his analysis irrelevant.

Moreover, Dr. Johnson's comparison of the various maps' compliance with traditional redistricting principles is not factually accurate. As demonstrated in Dr. Ansolabehere's Rebuttal Report, the Proposed CD-5 that would replace the DeSantis Map's CD-5 scores nearly identically to the Benchmark Plan CD-5 on the compactness and political boundary splits criteria, and in some places even improves upon the DeSantis Map. *See* Ex. 13 ¶¶ 48-60. Most important, this version of CD-5 complies with the Tier One non-diminishment requirement, unlike the DeSantis Map that is the flawed basis for Dr. Johnson's analysis.

II. There is time for a narrow remedy in advance of the 2022 elections.

A. The *Purcell* doctrine does not constrain this Court.

Relying almost exclusively on the "*Purcell* principle," the Secretary argues that no matter the merits of this case, it is too late for this Court to offer Florida voters any relief. Opp. at 9. But *Purcell* does not bind this court. Purcell is a *federal* doctrine, created by *federal* courts, as a tool to restrain *federal* judicial interference in the administration of state elections close to an election, as demonstrated by all of the *federal* precedent the Secretary cites in support of the principle. *See id.* at 7-8. The *Purcell* principle does not bind state courts. As New York's highest state court

recently explained in enjoining that state's congressional plan after that state's qualifying period had already passed, *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).

Nor is there a Florida-specific *Purcell* principle that would foreclose relief in every circumstance as an election was nearing, as the Secretary implies. *See* Opp. at 9. Reaching back fifty years, the Secretary cites *State ex rel. Haft v. Adams*, 238 So. 2d 843 (Fla. 1970), in which 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 weeks before the primary election, over the allegation that such candidates did not pay the proper filing fee by a few dollars. In denying relief, the Court emphasized that the candidate seeking to force others off the ballot had discovered the 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 id.* at 845. Under the circumstances, the Court denied relief; it did not set a bright-line rule that injunctions near elections are disfavored. In the only other case that the Secretary cites, *State ex rel. Walker v. Best,* 163 So. 696, 697 (Fla. 1935), the Court refused to order a town clerk to publish a new amendment to the town charter 15 days before the election, when the town's charter required such amendments to be published not less than 25 days before. The case plainly does not stand for the principle that injunctive relief should be foreclosed in the weeks before an election. Nor are we "weeks" from an election. Florida's primary is not until August 23, nearly four months away, and is one of the latest in the nation. *See* Ex. 11. This is decidedly not the typical eve-of-election case in which judicial relief may disrupt an election. *See 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); *Rivera v. Schwab*, No. 2022-CV-000089 (Kan. D. Ct. 2022) (invalidating plan on April 25, 2022, about three months prior to Kansas's August 2 primary elections), appeal docketed No. 125092 (Kan.).

While she now disclaims it as an error, the Secretary of State represented in federal court proceedings just a few weeks ago that a congressional plan could be put in place as late as June 13, 2022. *See* Def. Sec'y of State Lee's Reply in Supp. of her Mot. to Stay at 6, *Common Cause Fla. v. Lee*, No. 4:22-cv-109-AW/MAF (N.D. Fla. Apr. 8, 2022), ECF No. 73. It is indeed true that Plaintiffs' counsel believed that date was too late for a court to implement a remedial map if Florida were to conduct its primary election on August 23. That is precisely why, in this proceeding, Plaintiffs have asked this Court to enjoin the DeSantis Plan and ensure a remedy is in place no later than May 27, approximately three weeks sooner than the Secretary's first announced drop-dead date for a plan. The only party to this proceeding who has substantially changed their position on the date by which a congressional plan must be in place is the Secretary.

B. Plaintiffs' requested relief is narrow and practicable.

The record demonstrates that there is sufficient time to implement a congressional plan prior to the 2022 elections that ensures that Black voters in North Florida will have the opportunity to elect the candidate of their choice. That relief would be narrow, it would affect only a handful of counties and Supervisors, and it would instill confidence in Florida voters that they were electing their representatives under a plan consistent with the Florida Constitution.

While the Secretary criticizes Plaintiffs' proposed remedies from their April 26 briefing as requiring changes to counties "as far south as" Marion and Volusia, Opp. at 1, the fact that Plaintiffs' initial remedy *did not* affect any county south of Volusia or Marion was notable in itself.

But to the extent that this Court has any concern about the remedies Plaintiffs proposed in their opening brief, Plaintiffs' expert Dr. Ansolabehere has prepared for the Court illustrative remedial plans that make even fewer changes to the Enacted Map, and yet still permit Black voters to continue to elect the candidate of their choice in North Florida.

While Dr. Ansolabehere's initial proposals include swapping the Enacted Map's version of North Florida for the version in the Legislature's "Backup Map" (Plan 8015) or the Senate Map (Plan 8060)—both of which retained Black voters' ability to elect their candidate of choice, *see* Ex. 1 ¶ 52—it is also possible to remedy the constitutional violation at issue by simply inserting the Legislature's version of CD-5 from Plan 8015 straight into the existing Enacted Map. *See* Ex. 13 ¶¶ 36-47. Using this approach, Dr. Ansolabehere has produced two additional proposals, both of which remedy the constitutional violation Plaintiffs allege, but exhibit different benefits and tradeoffs. Dr. Ansolabehere's first proposal, Proposal A, alters only five CDs from the Enacted Plan, CD-2, 3, 4, 5, and 6. Most importantly, however, where lines must be changed, Dr. Ansolabehere attempts to match those 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* Ex. 13 ¶ 38. Dr. Ansolabehere's second proposal, Proposed Map B, is designed to make "as few changes to the Enacted CDs as possible," and thus, in Proposed Map B, only four CDs (CD-2, CD-3, CD-4, and CD-5) are altered. *See* Ex. 13 ¶ 43.

The upshot of Dr. Ansolabehere's proposals is that a remedy is available, a remedy can be implemented quickly, and a remedy need affect only a handful of Supervisors of Elections. While the Secretary relies on two Supervisors' Offices who explain that a new map would impose administrative burdens on their office, an administrative burden should not be sufficient to justify violating constitutional rights. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (explaining

that "administrative convenience" is not a sufficient reason to uphold unconstitutional law). Plaintiffs do not doubt the sincerity of Supervisor Brown, who the Secretary puts forward because she doubts her ability to implement a new congressional plan in time for the 2022 elections. But the roadblocks that Supervisor Brown identifies are *fixable* problems, which include self-identified problems such as needing to cancel and reschedule a meeting with the Board of County Commissioners. Opp., Ex. 1 ¶ 9. And while Plaintiffs appreciate that Columbia County would need to expend additional funds to implement a new map, such expense could have been avoided in the first place had Florida implemented a constitutional map from the beginning. Similarly, while Mr. Phillips of Duval County cites the increased burden on the Duval County Supervisor of Elections Office if a new plan is implemented, *id.*, Ex. 2 ¶ 17, Representative Tracie Davis (who worked at the Duval County Supervisor's Office for 14 years and ultimately served as Deputy Supervisors of Elections there) has explained that that office is seasoned in managing complicated districting schemes, knows how to handle precinct splits in its congressional plan (as it had under the Benchmark Plan), and should be able to implement a remedial plan in time for the primary election so long as it is received by the end of May. Ex. 15 ¶¶ 5-8.

Ultimately, many of Florida's Supervisors and their staff are not ready to cede their voters to an unconstitutional redistricting plan should this Court find that the Enacted Map violates the Florida Constitution. Leon Supervisor of Elections, Mark Earley, for example, one of the Supervisors who would be most affected by a redrawing of CD-5, has explained that his office can implement any remedial plan received by May 27, 2022. *See* Ex. 12. Supervisor Earley's deputy Christopher Moore agrees. *See* Ex. 17. The same holds true for the Supervisor of Elections of Orange County, who oversees a county with over 850,000 voters, as long as relief is ordered in the next few weeks. *See* Ex. 14 ¶ 9 (explaining that "so long as final boundaries for congressional

districts are set no later than May 27, 2022, the Orange County Supervisor and staff will have adequate time to prepare for the election and meet each relevant election deadline in advance of the August 23, 2022, Primary Election"). While Orange County is not likely to be affected by a remedial map if one of Dr. Ansolabehere's narrower remedies is chosen, that a county with nearly a million voters could adapt to a new congressional plan within a few weeks demonstrates the feasibility of Plaintiffs' requested remedy.

Finally, while the Secretary cited a declaration from Polk Supervisor Lori Edwards which she submitted in separate litigation approximately a month ago, which suggested that Supervisor Edwards hoped to have a congressional plan in place by late April or early May, *see* Opp. at 6, Supervisor Edwards affirms to this Court *today* that her county could implement a revised congressional plan as long as it is received by May 27 and would diligently do so to comply with the Florida Constitution. Ex. 16 ¶ 7. The Secretary's reliance on Supervisor Edwards' prior declaration was misplaced, as Secretary Edwards explains in her own words now:

> I understand the Secretary of State [] has cited my previous declaration in Common Cause Florida et al. v. Lee, Case No.: 4:22-cv-109 (N.D. Fla.) as support for the argument that it is too late to implement a congressional redistricting plan that complies with the Florida Constitution, if ordered by this Court. My testimony [there] was and is different, as was the circumstances at the time of my prior declaration, and the scope of remedial possibilities now appears much clearer and narrower.

Ex. 16 ¶ 5.

The upshot is that Florida's Supervisors *can* implement a new plan in advance of the 2022 elections, even if it imposes a small burden on their offices, and even if it takes a little time—a small ask where the constitutionality of Florida's congressional plan is at stake. Where Plaintiffs assert clear violations of their constitutional rights and a remedial plan would require only narrow

changes to a plan already passed by the Legislature, it would be manifestly unjust to deny them relief.

III. The Secretary's primary defense of the DeSantis Plan relies on an unsupported and novel legal argument.

The Secretary's chief argument in support of the DeSantis Plan rests on the novel notion that Florida could not enact a plan that preserves Black voters' ability to elect their candidates of choice because doing so would violate the U.S. Constitution. It is novel because even supporters of the view said it was. *See* Ex. 1-V at 14 (transcript of April 20, 2022 Florida Senate special session proceedings). And it's novel because the Secretary attempts to end-run a duly enacted state constitutional provision meant to protect minority voting strength by suggesting that compliance with those protections constitutes discrimination against the very voters it attempts to protect.

The Secretary cannot carry the burden of what she contends. To prove an unconstitutional gerrymander the Secretary must show that: "(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, 260-61 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995) and *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) ("*Shaw II*")). But the Secretary cannot show that race was the predominant motive for the Legislature's drawing 8015's CD-5, instead of just one of several districting objectives motivating the Legislature. Nor can the Secretary prove that the Legislature's consideration of race was not narrowly tailored to advance a compelling state interest.

A. The Secretary has not proved race predominated in Plan 8015.

The Secretary faces a heavy burden to establish that race predominated in the drawing of 8015's CD-5. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (explaining that the burden of

proof lies with the party claiming "a state law was enacted with discriminatory intent"). 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 to legislative enactments" and the "distinction between being aware of racial considerations and being motivated by them." *Miller*, 515 U.S. at 916. The party challenging the legislature's decision "must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

The Secretary has not established that race was the predominant factor in the drawing of 8015's CD-5. While the Secretary points to supposed "direct evidence" from the legislative debate, *see* Opp. at 12, those quotations merely demonstrate that race was one factor considered in creating CD-5, not that it was the predominant factor. The Secretary's alleged circumstantial evidence, the length of CD-5, is equally unavailing. *See* Opp. at 12. The Secretary does not explain how this constitutes circumstantial evidence of racial intent, particularly where 8015's CD-5 hews closely to the Benchmark CD-5. *See Lee v. City of L.A.*, 908 F.3d 1175, 1185 (9th Cir. 2018) (holding that "[t]he circumstantial evidence . . . fails to create a genuine dispute on racial predominance" where the challenged congressional district was "not any more bizarrely shaped than it was with its previous boundaries").

It is easy to imagine a host of reasons, many of which are race neutral, as to why the Legislature pursued a plan like 8015. By preserving the core of Benchmark CD-5, for example, the Legislature made minimal changes to North Florida that were required to account for population changes. Of course, the U.S. Supreme Court has recognized that "preserving the cores of prior districts" is a "legitimate state objective" in redistricting. *See Karcher v. Daggett*, 462 U.S.

725, 740 (1983); *see also Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) ("The desire to minimize population shifts between districts is clearly a valid, neutral state policy").

More than anything, however, the Legislature likely drew 8015 to comply with the Florida Supreme Court's prior rulings regarding CD-5. *See League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) (upholding trial court's adoption of an "East-West" version of CD-5). As the U.S. Supreme Court has explained, a desire to avoid litigation is specifically one of the race-neutral reasons that may motivate a Legislature to adopt a plan. *See Abbott*, 138 S. Ct. at 2327 (finding race did not predominate where the Legislature chose a plan which would "bring the litigation about the State's districting plans to an end as expeditiously as possible").

B. Even if the Secretary could show racial predominance, federal precedent supports the Legislature's drawing of CD-5.

Even if the Secretary could show that racial considerations predominated in the drawing of 8015's CD-5, the Secretary would have a heavy burden to demonstrate that the Legislature's configuration of CD-5 is not narrowly tailored to advance compelling state interests under existing federal precedent.

To put it plainly, compliance with the Fair Districts Amendment's non-retrogression provision is a compelling state interest. This provision of the Fair Districts Amendment "follow[s] almost verbatim the requirements embodied in the [Federal] Voting Rights Act." *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 619 (citation omitted and second alteration in original); *see also* Ex. 1-D at 42 (recognizing that Florida's Constitution incorporates federal retrogression standards); Ex. 1-E at 15 (same). Though Section 4's coverage formula was struck down, Section 5 of the Voting Rights Act (VRA) remains valid federal law. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (ruling on the validity of Section 4(b), not Section 5, of the VRA). And the U.S. Supreme Court has repeatedly assumed that compliance with the VRA constitutes 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 v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) ("[T]he Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling."). Given the substantive similarity between Section 5 of the VRA and the Fair Districts Amendment's non-retrogression provision, compliance with the latter likewise constitutes a compelling state interest.

In opposing Plaintiffs' requested relief, the Secretary mischaracterizes federal precedent regarding Section 5. Though the U.S. Supreme Court invalidated Section 4(b)'s coverage formula in *Shelby County v. Holder*, the Court specifically noted that it "issue[d] no holding on § 5 itself, only on the coverage formula." 570 U.S. at 557. Contrary to the Secretary's claims, in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015), the Supreme Court did not suggest that continued compliance with Section 5 may not remain a compelling interest in light of *Shelby County*. Opp. at 13. Rather, the Supreme Court merely stated that it "d[id] not decide whether, given [*Shelby*], continued compliance with § 5 remains a compelling interest." *Ala. Legis. Black Caucus*, 575 U.S. at 279. And in fact, the U.S. Supreme Court continued to assume that Section 5 compliance constituted a compelling interest in the years after *Alabama Legislative Black Caucus*. *See Bethune-Hill*, 137 S. Ct. at 801.

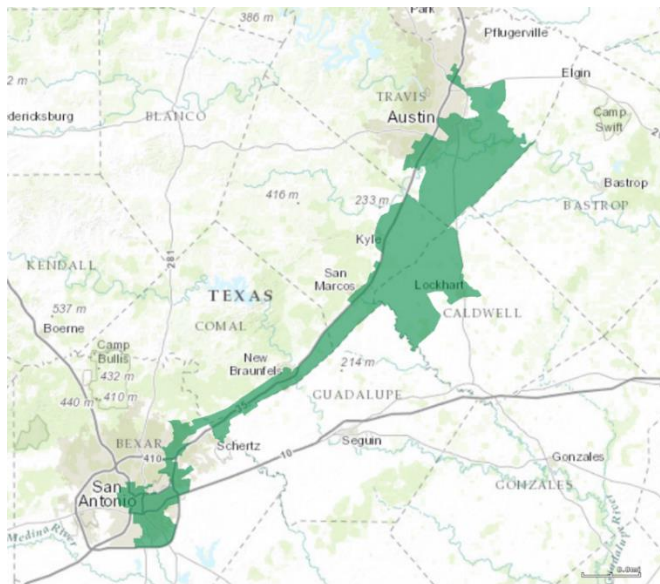
More fundamentally, addressing the history of voting-related racial discrimination and a lack of representation in North Florida also constitutes a compelling state interest for CD-5. *See Miller*, 515 U.S. at 920 (1995) (explaining that there is a "significant state interest in eradicating the effects of past racial discrimination"). While the Secretary claims there is "no record of a race-based problem" that would justify CD-5, *see* Opp. at 14, this assertion ignores the voluminous

evidence, both from judicial precedent and from the evidentiary filings accompanying Plaintiffs' motion for a temporary injunction, outlining how Black voters in North Florida have long been deprived of the ability to elect candidates of their choice.

Plaintiffs presented 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. *See* Pls.' Mem. in Supp. of Mot. For Temp. Inj. ("Br.") at 5-6 (Apr. 26, 2022). As a result, between 1876 and 1992, Florida did not elect a single Black candidate to Congress. *Id.* at 6. As Dr. Sharon Austin describes, "[t]his lack of political representation was the result of redistricting practices that split the state's Black population into districts where their votes would be drowned out by overwhelming White majorities." Ex. 3 at 13.

Plan 8015's CD-5 is narrowly tailored to address these compelling state interests. The legislative record includes detailed testimony that 8015's configuration of CD-5 is necessary to ensure minority voters' continued ability to elect candidates of their choice. *See, e.g.*, Fla. H.R. Comm. on Redist., recording of proceedings, at 19:45-19:54 (Feb. 25, 2022), https://thefloridachannel.org/videos/2-25-22-house-redistricting-committee (last accessed May 10, 2022) (Chair of House Redistricting Committee noting the Committee's aim "to protect the minority group's ability to elect a candidate of their choice"). The Legislature, which conducted a functional analysis on their redistricting plans, *see* Ex 1-V at 13, thus "had good reasons to believe that" 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. This "strong showing of a pre-enactment analysis with justifiable conclusions," amply demonstrates a compelling state interest. *Wis. Legis.*, 142 S. Ct. at 1249 (citing *Abbott*, 138 S. Ct. at 2335).

The Secretary also cannot demonstrate a lack of narrow tailoring simply because Governor DeSantis was able to draw a plan with better compactness scores or slightly fewer splits of political boundaries. As an initial matter, the Fair Districts Amendment explicitly categorizes compactness and utilization of political boundaries as "Tier Two" standards that must give way when in conflict with "Tier One" standards, including the non-retrogression principle. *See* Fla. Const. Art. III, § 20; *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 615. Moreover, courts have denied racial gerrymandering claims against districts that are even less compact than Plan 8015's CD-5. *See* Ex. 13 ¶ 56 (explaining that 8015's CD-5 "is more compact . . . than other CDs in the United States from the last redistricting cycle that withstood federal court challenges" such as Texas's CD-35, as shown below).



The fate of Texas's 35th congressional district is instructive here. While plaintiffs challenged the district as an unconstitutional racial gerrymander, the U.S. Supreme Court upheld it, explaining that the Legislature could have "had 'good reasons' to believe that the district at issue (here CD35) was a viable Latino opportunity district that satisfied the *Gingles* factors." *Abbott*, 138 S. Ct. at 2332. Notably, the first *Gingles* factor is that the minority population is

sufficiently compact, *see Gingles*, 478 U.S. at 50, and it is hard to imagine that the U.S. Supreme Court could conclude that TX-35 was reasonably compact without concluding the same for Proposed CD-5.

IV. Plaintiffs seek a return to the status quo that existed in North Florida prior to the DeSantis Plan.

Despite the Secretary's framing, Plaintiffs seek a temporary *prohibitory* injunction to return to the status quo before the unlawful DeSantis Plan was enacted. Plaintiffs said so in their motion for temporary relief, Pls.' Mot. for Temp. Inj ("Mot."). at 3-4 (Apr. 26, 2022) ("Plaintiffs request that the Court temporarily enjoin implementation of the DeSantis Plan."); in their briefing supporting that motion, Br. at 2 ("Plaintiffs seek temporary relief enjoining Defendants from administering the 2022 primary or general election for Congress under the DeSantis plan."); and now again in this reply, *infra* at 18. The Secretary's argument that the Court "should deny Plaintiffs' Motion because it seeks to mandate action rather than simply prohibit action on the State's part," Opp. at 10, is therefore no more than sleight-of-hand, a further attempt to muddle Plaintiffs' clear right to temporary relief.

To the extent the Secretary's argument relates to the manner the Court chooses to ensure a lawful congressional plan is in place for the 2022 elections, the Secretary also misses the mark. Plaintiffs have made abundantly plain that the nature and enactment of any remedial plan is in the Court's discretion. *See* Mot. at 3. Plaintiffs have merely "request[ed] that the Court expedite its consideration of this motion, including the scheduling of any hearings" and "ensure that a necessary remedy is timely adopted and a lawful congressional plan is in place in North Florida in time for the 2022 congressional elections," *id.*; Br. at 20-21 (same), which the Court can accomplish in a variety of ways, including by selecting a map itself if the Legislature fails to enact a lawful one in time for the 2022 elections. As the U.S. Supreme Court has explained, state courts

have wide latitude in remedying unconstitutional districting schemes. *See Growe v. Emison*, 507 U.S. 25, 33 (1993) ("The 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." (internal quotation marks omitted)). Such a remedy may entail a court-adopted remedial plan, but it does not require one.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court temporarily enjoin implementation of the DeSantis Plan. Plaintiffs further request that the Court expedite its consideration of this motion to ensure that a necessary remedy is timely adopted and a lawful congressional plan is in place in North Florida in time for the 2022 congressional elections.

Dated: May 10, 2022

Respectfully submitted,

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Exhibit 13

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.

Case No. 2022-ca-000666

REBUTTAL REPORT OF DR. STEPHEN ANSOLABEHERE

IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

EXECUTIVE SUMMARY

1. On April 26, 2022, I submitted my first expert report in this matter. Using a functional analysis, that report concluded that the Enacted Map resulted in the diminishment of Black voters' ability to elect their candidate of choice in North Florida as compared to the Benchmark Plan as adopted by the Florida Supreme Court in 2015. My first expert report also concluded that the North Florida portions of the Legislature's Backup Map (H000C8015) or the Senate Map (S035C8060), both of which preserved Black voters' ability to elect, could be exchanged for the Enacted Map's version of North Florida while having a minimal effect on the rest of the Enacted Map. Specifically, those remedial approaches would have required changes to only 7 of Florida's 28 congressional districts (CDs).

2. In response to Defendants' submissions, I have been asked by counsel in this matter to create a U.S. Congressional District ("CD") map that restores Black voters' ability to elect the candidate of their choice in North Florida while making *even fewer* changes to the Enacted Map than my original remedial proposals. I determined that such an approach was possible by carefully inserting the version of CD-5 drawn by the Florida Legislature (Plan H000C8015) straight into the Enacted Map, rather than by exchanging all of the Legislature's North Florida districts for those in the Enacted Map.

3. This report presents two Proposed Maps and compares them to the Enacted Map. The Proposed Maps make no changes to Enacted CD-1 or to

any Enacted CDs in Central Florida or in South Florida. Each Proposed Map offers different tradeoffs and benefits.

4. Proposed Map A is designed to minimize the administrative burden within the counties affected by Proposed CD-5 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, while still restoring CD-5 as a district where Black voters have the ability to elect the candidate of their choice. By following the legislatively enacted State House district lines where possible, we can reduce the number of new precincts and additional ballot forms that would be required under a new plan. This version of the map alters only five CDs, including specifically CD-2, CD-3, CD-4, and CD-5, as well CD-6. In addition, Proposed Map A would split a total of only 22 Voting Tabulation Districts (VTDs or precincts) that are not already split by legislative districts and that have populated areas on both sides of the split (*i.e.*, excluding divisions where one part has no people). The Enacted Map, by comparison, splits 12 VTDs that are not already split by legislative districts and that have populated areas on both sides of the districts. That is a difference of only 10 additional VTD splits that would require some re-precincting across all of North Florida.

5. Proposed Map B is designed to make as few changes to the Enacted CDs as possible while restoring CD-5 as a district in which Black voters have the opportunity to elect their candidates of choice. Specifically, in

Proposed Map A, only four CDs (CD-2, CD-3, CD-4, and CD-5) would need to be altered.

6. Each of the Proposed Maps, which incorporate the version of CD-5 from the Legislature's Map H000C8015 into the Enacted Map, show that it was possible to restore the ability of Black voters to elect their candidate of choice in North Florida, without making changes to CDs beyond those neighboring CD-5. As discussed in my initial report in this matter, the version of CD-5 from Plan 8015 as passed by the Legislature is a district in which Black voters will have the opportunity to elect their candidate of choice to Congress.

7. In this rebuttal report, I also briefly analyze the conclusions by Dr. Douglas Johnson and Dr. Mark Owens. I respond to Dr. Johnson by noting that the Florida Constitution requires compliance with Tier I criteria like non-retrogression before Tier II criteria like compactness, and I respond to Dr. Owens by explaining that Dr. Owens has not refuted my core conclusion that Black voters are no longer able to elect their candidates of choice under the Enacted Map.

8. My qualifications and expertise are presented in my initial report in this matter. I am compensated at a rate of $600 an hour. My compensation is in no way contingent upon the conclusions or results of my analysis.

METHODOLOGY

A. Maps Compared in this Analysis

9. The Enacted Map is Plan P000C0109 and was enacted into law on April 22, 2022. See Map 1.

10. This analysis compares the Enacted Map to two proposed maps: Proposed Map A and Proposed Map B.

11. Proposed Map A incorporates CD-5 from the Legislature's Backup Map H000C8015 and changes only CD-2, CD-3, CD-4, CD-5, and CD-6 from the Enacted Map. This map follows legislative district boundaries where possible in Marion and St. Johns Counties. Doing so reduces administrative burdens by improving the extent to which legislative districts are nested within Congressional Districts thereby reducing the number of additional precincts or combinations of ballots that need to be created. See Map 2.

12. Proposed Map B incorporates CD-5 from the Legislature's Backup Map H000C8015 and keeps all districts from the Enacted Map unchanged except for CD-2, CD-3, CD-4, and CD-5. See Map 3.

B. Data Sources

13. Maps analyzed in this analysis come from the Florida Redistricting website: https://www.floridaredistricting.gov/pages/submitted-plans.

14. Census, voting, and district boundary data are from the U.S. Census Bureau API. Maps are from the redistricting website of the Florida State government: https://www.floridaredistricting.gov/pages/submitted-plans. Precinct level data comes from the Voting and Election Science Team:

https://dataverse.harvard.edu/dataverse/electionscience. Precinct data is cross walked to census block data following the process of the ALARM Census data: https://github.com/alarm-redist/census-2020.

C. Criteria for Evaluation

15. Throughout the course of this rebuttal report, I use various criteria to analyze maps.

16. Compactness is measured two ways: area dispersion and perimeter irregularity. The most commonly used measure of area dispersion, which I relied on in my expert reports in *Romo v. Detzner* in the last Florida congressional redistricting cycle, is the Reock score. This measure begins with the insight that a circle is the most compact geometric shape. Reock computes the area of the district divided by the area of the smallest inscribing circle of the district, *i.e.*, a circle whose diameter is the same as the overall length of the district. The highest value of Reock is 1, which is attained if the district is a perfect circle. The lowest value of Reock is 0. A perfectly square district has a Reock of .64. Reock detects long, narrow districts. Additionally, the irregularity of the boundary of a district is measured using the Polsby-Popper score. Polsby-Popper also takes the circle as the standard for the most compact shape. This measure calculates the area of the district and divides that area by the area of a circle with the same perimeter (circumference) as the district. Polsby-Popper ranges from a high of 1 to a low of 0, and higher values correspond to greater compactness. Polsby-Popper detects districts that have indentations or

jagged borders. There are many different compactness measures; these are the two most commonly applied.

17. Political boundaries include county boundaries and boundaries of incorporated municipalities or places. A county or a municipality is split if two or more districts divide that area.

18. Finally, I tally the number of Voting Tabulation Districts (VTDs) that are divided by CD boundaries. The State of Florida participates in the Census Voting Tabulation District program. This program, started in the early 1970s, creates a standard "precinct" called a Voting Tabulation District. The Census collects and reports population data at the "block" level. Blocks are very small areas, usually consisting of approximately 100 people, but some have 0 or 1 person. Working with states and counties, the Census defines VTDs as clusters of blocks that are equal to precincts. Most states use the VTDs directly as precincts, though some modifications in precincts occur following redistricting or even from one election to the next. I use the VTDs as the standard definition of the precinct areas.

19. There are three sorts of VTD splits created by CD boundaries. First, some VTDs are divided by CDs and by state legislative districts. These are districts that must be divided regardless of the configuration of the CDs. Second, some VTDs have zero-population splits. That is, some parts of the VTD, such as a road, have no population and are assigned to another CD. These zero-population splits are not consequential for election administrators,

as they do not involve creating a new precinct in which people can vote or consolidating two precincts. I call these zero-population VTD splits. Third, some VTDs are divided in a way that places populated areas in the VTD in one CD and populated areas of the VTD in another CD. Such splits are consequential to election administrators as they may require merging part of one precinct with another or creating an entirely new precinct. I call these populated VTD splits.

COMPARISON OF MAPS

A. Enacted Map

20. Enacted CD-2 consists of part of Walton County and part of Lafayette County, and the entirety of Bay, Calhoun, Franklin, Gadsden, Gulf, Holmes, Jackson, Jefferson, Leon, Liberty, Taylor, Wakulla, and Washington Counties.

21. Enacted CD-3 consists of part of Lafayette County and part of Marion County and the entirety of Alachua, Baker, Bradford, Columbia, Dixie, Gilchrist, Hamilton, Levy, Suwanee, and Union Counties.

22. Enacted CD-4 has the highest overlap with the population of Benchmark CD-5. Enacted CD-4 consists of the western side of Duval County, plus the entirety of Clay County to the south and Nassau County to the north.

23. Enacted CD-5 has almost no overlap with Benchmark CD-5. It consists of the southeastern quadrant of Duval County and the northern two-thirds of St. Johns County.

24. Enacted CD-6 consists of part of Marion County and part of St. Johns County. These portions are altered slightly in the Proposed Maps. The remainder of Enacted CD-6 is left unchanged by the Proposed Maps.

B. Proposed CD-5

25. Proposed CD-5 was introduced by the Florida House Committee on Redistricting as part of Plan H000C8015 and was adopted by the Florida Legislature in its Backup Map (which was later vetoed by Governor DeSantis). The entirety of that map, including its version of CD-5, is discussed in my initial report in this case.

26. Proposed CD-5 follows the footprint of Benchmark CD-5. Proposed CD-5 consists of part of Columbia County, part of Duval County, part of Leon County, and part of Jefferson County, as well as the entirety of Baker, Gadsden, Hamilton, and Madison Counties. These are the same counties that were included in this district in the Benchmark Map.

27. Proposed CD-5 divides Jefferson County along Interstate 10. Jefferson County was also divided in the Benchmark Map, and it is divided in the State House District map.

28. Proposed CD-5 also divides Columbia County along Interstate 10. Columbia was similarly divided in the Benchmark Map. The division of Columbia County in Proposed CD-5 does not follow the boundary of any State House or State Senate Districts.

29. Proposed CD-5 divides Leon County along similar lines to the division of Leon County in the State House Districts and under the Benchmark Map. In many precincts, the division of Leon County follows the same precincts as State House Districts 7, 8, and 9.

30. Proposed CD-5 takes the entirety of the western side of Duval County. Its northeastern boundary in Jacksonville follows Interstate 295, which is similar to the boundary followed by the State Senate District 5 and State House District 14.

31. Proposed CD-5 is identical in Proposed Maps A and B.

C. Proposed CD-2

32. Proposed CD-2 is identical in Proposed Maps A and B.

33. Proposed CD-2 consists of part of Walton County, part of Jefferson County, and part of Columbia County, and the entirety of Bay, Calhoun, Dixie, Franklin, Gulf, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Suwanee, Taylor, Wakulla, and Washington.

34. Fourteen of these 19 counties were in Benchmark CD-2, were incorporated into Enacted CD-2 and would remain in Proposed CD-2.

35. Proposed Map A and B treat CDs 3, 4, 5, and 6 differently. Proposed Map A alters the boundaries in CD-2, CD-3, CD-4, CD-5, and CD-6. Proposed Map B alters the boundaries in only CD-2, CD-3, CD-4 and CD-5. These maps offer a least change map within counties (Proposed Map A) or a

least change of CDs map, depending on which tradeoffs and values the court wishes to prioritize. I discuss those maps below.

PROPOSED MAP A

36. Proposed Map A is designed to minimize the administrative burden within the counties affected by Proposed CD-5 by following the boundaries of state legislative districts to the greatest extent possible and by minimizing the number of additional precinct splits.

37. Proposed Map A restores the East-West version of CD-5 that was in the Benchmark Map by incorporating CD-5 from H000C8015 into the Enacted Map. Proposed Map A incorporates Proposed CD-2 as described above.

38. Proposed Map A seeks to relieve the potential administrative burden on counties by following state legislative district boundaries where possible and by minimizing the number of precinct splits in Marion and St. Johns Counties. Proposed CD-5 follows state legislative district boundaries in several areas. Proposed Map A applies that same approach to Proposed CD-3, Proposed CD-4, and Proposed CD-6. Enacted CD-1 and Enacted CD-7 through Enacted CD-28 are unchanged from the plan adopted by the State. See Map 2. Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-6 are reconfigured to attain populations of exactly 769,221 persons.

39. Proposed Map A's version of CD-3 consists of entirety of Alachua, Bradford, Clay, and Union Counties, and part of Marion County. Only the

division of Marion County differs from other version. The boundary between Proposed Map A's CD-3 and CD-6 follows to the greatest extent possible the state legislative district boundaries in this county, especially to the north and east of the city of Ocala.

40. Proposed Map A's boundary between CD-4 and CD-6 also mirrors State House district boundaries in St. Johns County, especially west and south of St. Augustine.

PROPOSED MAP B

41. Proposed Map B was designed to make as few changes to the enacted congressional districts as possible.

42. Proposed Map B restores the East-West version of CD-5 that was in the Benchmark Map by incorporating Proposed CD-5 from H000C8015 into the Enacted Map. Proposed Map A incorporates Proposed CD-5 as described above. Proposed Map A also includes Proposed CD-2 is as described above.

43. Under Proposed Map B, Enacted CD-1 and Enacted CD-6 through Enacted CD-28 are unchanged from the plan adopted by the State. See Map 2. Enacted CD-2, Enacted CD-3, and Enacted CD-4 must be reconfigured to attain populations of exactly 769,221 persons.

44. Proposed Map B's version of Proposed CD-3 consists of part of Marion County and part of St. Johns County, as well as the entirety of Alachua, Bradford, Clay, and Union Counties.

45. The configuration of Proposed CD-3 in Marion County is exactly the same as under the Enacted Map. Proposed CD-3 and Enacted CD-6 divide that county.

46. To equalize the populations of CD-3 and CD-4, while keeping Enacted CD-6 intact, Proposed CD-3 must gain population in St. Johns County. That population gain is accomplished by taking precincts from the western side of St. Johns County, south of Fruit Cove and west of World Golf Village.

47. Enacted CD-4 consists of the entirety of Nassau County, the eastern side of Duval County, and most of the northern half of St. Johns County. Its configuration resembles the configuration of that CD under the Benchmark Map.

RESPONSE TO DEFENDANTS' EXPERTS

A. Reply to Dr. Johnson

48. Dr. Johnson implicitly criticizes my initial report by responding that the DeSantis Plan scores better on traditional redistricting criteria such as compactness or political splits than either the Benchmark Plan or the Plans I put forth as possible remedies in my initial report. I respond simply by noting that the Florida Supreme Court has made clear that compliance with Tier I factors such as non-retrogression are to be prioritized over Tier II factors like achieving compactness and reducing political and geographic splits. *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 615 (Fla. 2012). In any event, as I demonstrate below, the Proposed CD-5 fares

reasonably well on compactness and political boundary splits. It is nearly the same as the Benchmark Plan CD-5, which was approved by the Florida Supreme Court, and in some places even improves upon the Enacted Map.

i. Compactness

49. The compactness of Proposed CD-5 is nearly the same as Benchmark CD-5, under the Map approved by the Florida Supreme Court in 2015.

50. According to the District Compactness Report accompanying the Benchmark Map and available through the Florida Redistricting website, the area dispersion (Reock) of the Benchmark CD-5 is .12, and the perimeter dispersion (Polsby-Popper) is .10. See Table 1.

51. The District Compactness Report accompanying Plan H000C8015, and available through the Florida Redistricting website, reports that the area dispersion measure (Reock) for Proposed CD-5 is .11 and the perimeter compactness measure (Polsby-Popper) for Proposed CD-5 is .11. See Table 1. Hence, the Proposed CD-5 has nearly identical configuration to Benchmark CD-5. Proposed CD-5 is slightly less compact in its area dispersion and slightly more compact in its perimeter than the Benchmark version of CD-5.

52. Benchmark CD-5 was created and approved by the Florida Supreme Court to replace a district in which Black voters had the ability to elect their candidates of choice but was noticeably less compact and split every

county and municipality that it covered. While the Florida Supreme Court in *League of Women Voters v. Detzner* explained Benchmark CD-5 was not "a model of compactness," it also explained that Florida's own geography played a role in the shape of the district and that it would tolerate some level of non-compactness of Benchmark CD-5 in order to adhere to Tier I criteria, namely creating a version of CD-5 in which Black voters could elect their candidates of choice.[1]

53. Neither the Florida Legislature nor the Florida Supreme Court have set a specific number for any given metric that a redistricting plan must meet to comply with the Florida Constitution. Dr. Johnson suggests that the appropriate number for Reock is one used by the Arizona Independent Redistricting Commission. The figure does was set by a commission as a rubric to guide their deliberations. It was not set by a legislature or by a court. No rationale is offered as to why the standards applicable in Arizona ought to be applied in Florida. It is my experience that redistricting practices depend on local geographies. Arizona's geography and demography are quite different from Florida's. Arizona is a nearly perfectly square state, without coastlines, peninsulas or panhandles. There is one significant population center in

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[1] Specifically, the Florida Supreme Court explained, "[t]he reality is that neither the North–South nor the East–West version of the district is a 'model of compactness,' as the trial court stated. Other factors account for this phenomenon, 'including geography and abiding by other constitutional requirements such as ensuring that the apportionment plan does not deny the equal opportunity of racial or language minorities to participate in the political process or diminish their ability to elect representatives of their choice.'" League of Women Voters v. Detzner, No. SC14-1905, July 9, 2015. https://caselaw.findlaw.com/fl-supreme-court/1707310.html

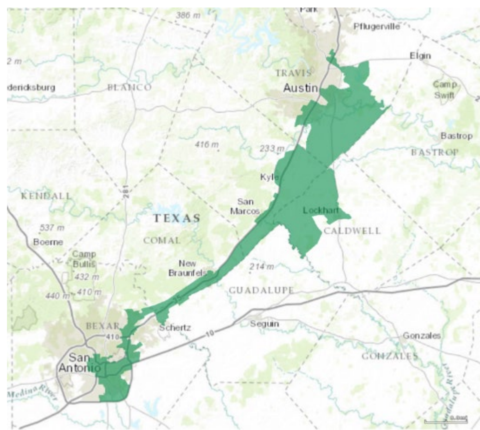
Arizona (the Phoenix-Tempe metro area), and that is located in the center of the state. In the absence of any prior court decisions or legislative guidance, it may be appropriate to use standards set elsewhere. However, in this instance, the Florida Supreme Court did decide, after weighing Tier I and Tier II criteria, that the level of compactness in Benchmark CD-5 was acceptable.

54. Comparison with other CDs throughout the United States indicates that there are many districts with comparable or lower compactness scores. Proposed CD-5 is more compact than 66 CDs throughout the United States as of 2020 in terms of perimeter compactness.[2]

55. The compactness of Benchmark CD-5 and Proposed CD-5 is limited because they are long districts. But their length is explained in part by the fact that they follow the northern border of Florida, which is essentially a long straight line. In fact, between 2002 and 2012, Florida had a congressional district (CD-4) that similarly spanned the top of North Florida and reached all the way from Leon County to Duval County, much like Benchmark CD-5 and Proposed CD-5, except for the fact that it connected those counties' white populations rather than the Black populations. See Map 4. This district had an area dispersion (Reock) of .18 and perimeter compactness (Polsby-Popper) measure of .07, which is lower than the perimeter compactness of Proposed CD-5.

[2] See Stephen Ansolabehere and Maxwell Palmer, "A Two-Hundred Year Statistical History of the Gerrymander," *The Ohio State University Law Review* 77 (2016): 741-762.

56. Even with Proposed CD-5's long shape, it is more compact in area dispersion (Reock) than other CDs in the United States from the last redistricting cycle that withstood recent racial gerrymandering challenges. For example, Proposed CD-5 is more compact than Texas CD-35, which was subject to extensive federal litigation, challenged as a racial gerrymander, and upheld by the United States Supreme Court in *Abbott v. Perez*, 138 S. Ct. 2305 (2018). Texas's 35th Congressional District, while also long in shape, did not even follow any particular geographic boundary like Proposed CD-5 does:

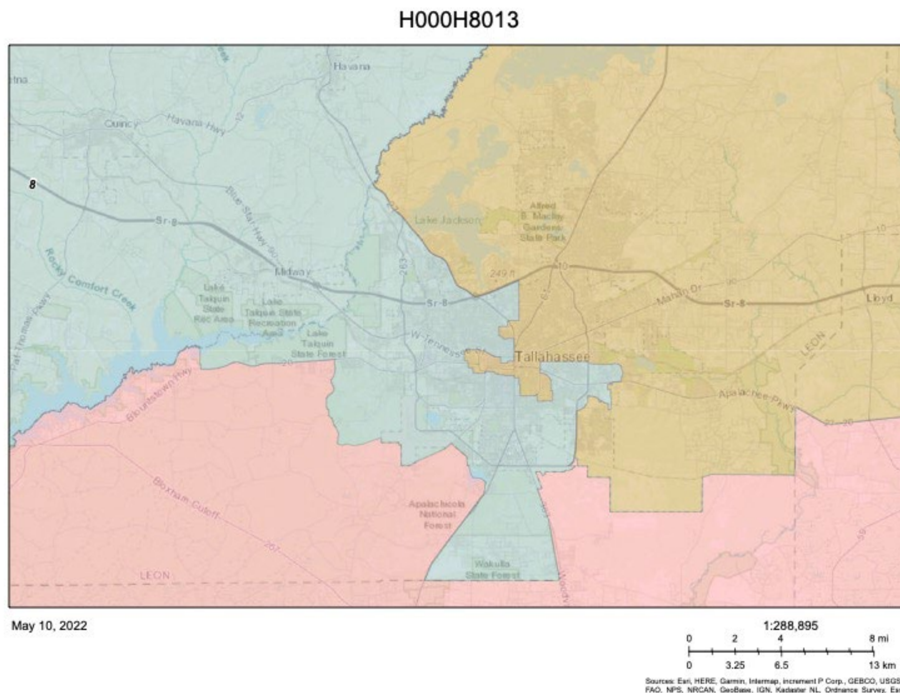


ii. Division of Political Boundaries

57. The Proposed Maps divide only two more counties than the Enacted Map in North Florida. The configuration of Enacted CD-2, Enacted CD-3, Enacted CD-4, and Enacted CD-5 divides Duval, Lafayette, Marion, St. Johns, and Walton Counties. The configurations of all three versions of Proposed CD-2, Proposed CD-3, Proposed CD-4, and Proposed CD-5 divide Columbia, Duval, Jefferson, Leon, Marion, St. Johns, and Walton Counties.

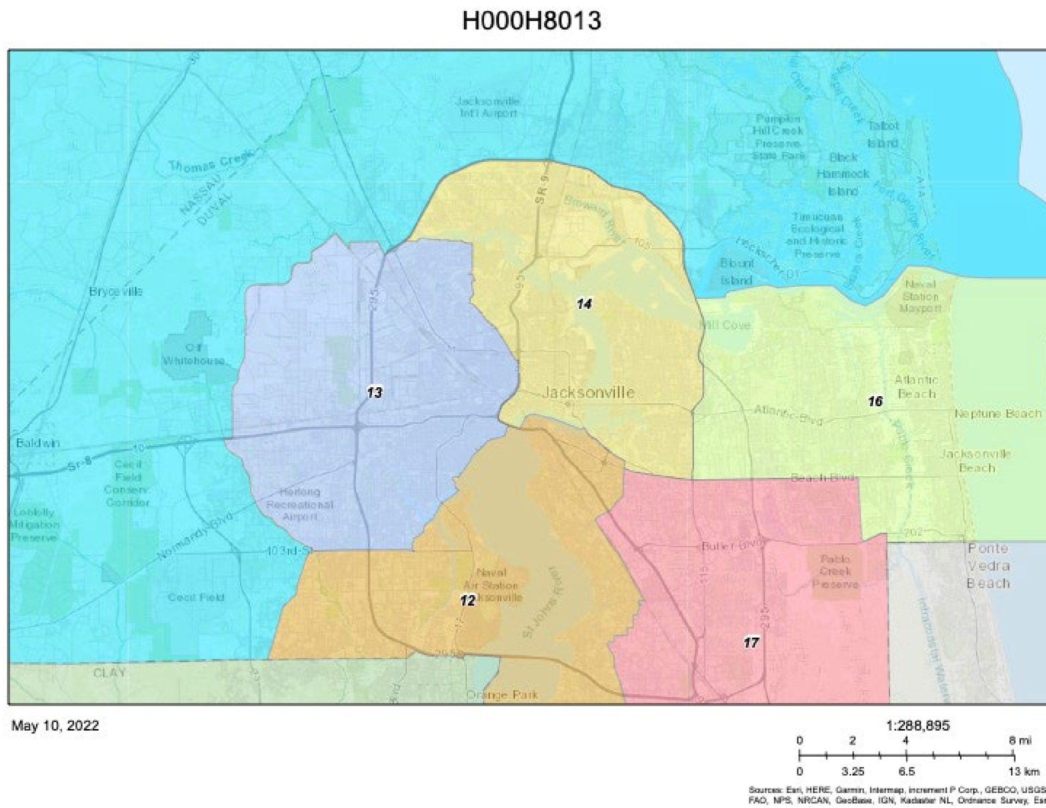
58. The division of municipalities is similar in the Proposed and Enacted Maps. The Enacted and Proposed Maps both divide Jacksonville. In addition, the Proposed Maps divide Tallahassee. The Enacted Map divides one Census Designated Place (not incorporated): St. Augustine South. The Proposed Map divides one Census Designated Place (not incorporated): Bradfordville.

59. While Dr. Johnson questions the configuration of Proposed CD-5 in key areas like Leon County, Proposed CD-5 mirrors state legislative district boundaries. For example, the State House District 8 has a very similar (and often identical) boundary in Leon County, as shown below.



Map: Florida House District 8 in Leon County

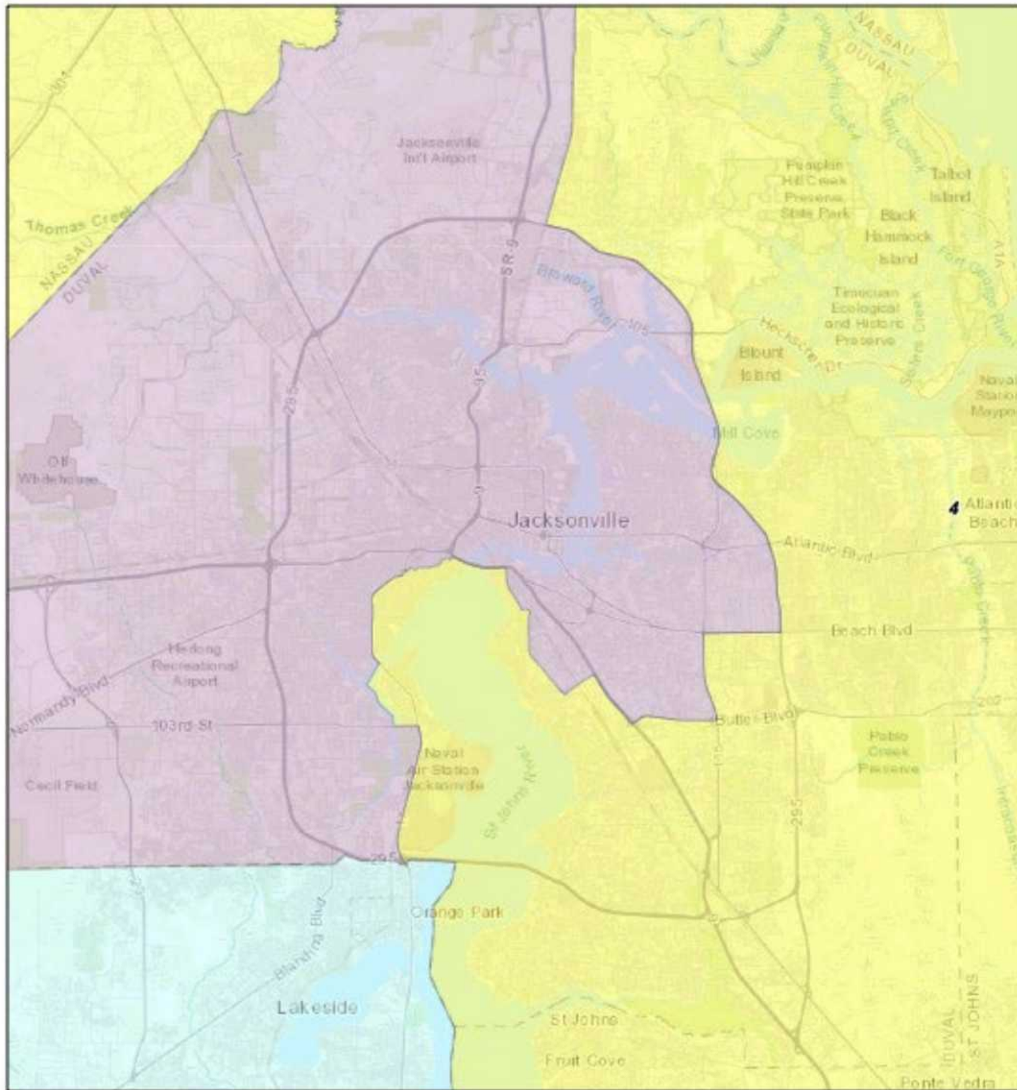
60. Dr. Johnson further questions the boundary of Proposed CD-5 in Duval County. But Proposed CD-5 follows the boundary of the State House Districts along Interstate 295. And while Dr. Johnson believes that the St. Johns River is the “clear geographic” boundary for districts in Duval County, the Florida Legislature created State House District 14, which spans both banks of the St. Johns River in Duval County, shown below.



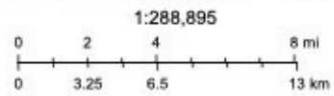
Map: Florida State House Districts in Duval County

This configuration of Jacksonville mirrors the approach in Plan 8015, as shown below:

H000C8015



May 10, 2022



Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community

Map: Boundary of Florida CD-5 and CD-4 in H000C8015 in Duval County

iii. Division of Voting Tabulation Districts (Precincts)

61. The configuration of CDs in North Florida, under the Enacted Map and under the Proposed Maps, divides VTDs (precincts) within Counties. Precincts correspond to administrative units in which voting happens: voters are assigned to precincts where polling places are located, and precincts correspond to a unique ballot (*i.e.*, one State House District, one State Senate District, and one Congressional District). It is helpful to elections administrators to keep VTD divisions to a minimum. However, equal population requirements necessarily require the division of some VTDs.

62. For the Enacted Map and for each Proposed Map, I tabulated the total number of split VTDs. I further distinguished those VTDs split by both a CD and by a legislative district (either a House District or a Senate District) and those VTDs split by a CD boundary but not by a legislative district boundary. Among the latter cases, I distinguish zero-population splits and populated splits. Only this last group – populated splits of VTDs divided only by CD boundaries – should be of concern to election administrators. See Table 2.

63. Proposed CD-5 splits Columbia, Duval, Jefferson, and Leon Counties. First, consider Columbia County. This county has a total of 25 VTDs (regardless of the map drawn). Columbia County is kept whole under the Enacted Map, but it is divided under the Proposed Maps. Under the Proposed

Maps, the boundary between CD-2 and CD-5 bisects the county along Interstate 10. The Proposed Maps split 4 (out of the 25) VTDs. However, 3 of these are zero-population splits. Only one VTD, then, is a populated split, *i.e.*, a division of a precinct in which there are people in both sides of the dividing line. Thus only one precinct will need to be reconfigured in Columbia County. See Table 2.

64. Second, consider Jefferson County. This county has 16 VTDs, two of which are split by the Proposed CD-5. The division of Jefferson County follows Interstate 10. See Table 2.

65. Third, consider Duval County. The Enacted Map splits 7 of 295 VTDs in Duval. Three of these splits are populated splits that do not follow House District or Senate District Boundaries. The Proposed Maps split 24 of 295 VTDs in Duval. Of these 24, 12 correspond to VTD splits made by House or Senate Districts and three are zero-population splits. That leaves just 9 VTD splits created by Proposed CDs in Duval County that are not zero-population splits.

66. Fourth, consider Leon County. The Enacted Map does not divide Leon County, so there are 0 split VTDs in the county. The Proposed Map splits 25 of 157 VTDs in Leon County. Of these, 12 follow state legislative district boundaries and 7 are zero-population splits. As a result, there are just 6 VTD splits created by Proposed CDs in Leon County that are not zero-population splits and will require re-precincting. See Table 2.

67. Enacted and Proposed CD-3 and CD-6 divide Marion County. Proposed Map A is identical to the Enacted Map in Marion County. Both Maps divide 13 of 111 VTDs in the county. Four of these follow state legislative district boundaries and four are zero-population splits. Thus, the CDs in the Enacted Map create five VTD splits in Marion County that are not zero population splits and will require re-precincting. See Table 2.

68. Proposed Map A in Marion County has only two such split VTDs that are not zero population splits. Proposed Map A splits a total of 7 VTDs. Of the 7 split VTDs in Proposed Map A, 5 follow state legislative district boundaries, and only two do not. Thus, Proposed Map A carries less administrative burden due to the need to reconfigure precincts in Marion County than the Enacted Map.

69. Enacted CD-4 and Enacted CD-6 divide St. Johns County. They split a total of 7 out of 77 VTDs. Two of these follow state legislative district lines and one is a zero-population split. As a result, the Enacted Map creates populated VTD splits in four precincts in St. Johns County. See Table 2.

70. Proposed Map A results in fewer total VTD splits and fewer substantial splits than the Enacted Map. Proposed Map A splits only 5 VTDs in St. Johns County, and 3 of them follow state legislative district boundaries, meaning there are only 2 substantial VTD splits, as compared to 4 in the enacted map. Proposed Map B's version of CD-3, CD-4 and CD-6 in St. Johns

County creates more (12) and more substantial (10) VTD splits in St. Johns County compared to the Enacted Map. See Table 2.

71. Across all counties, the Enacted Map has 12 VTD splits that do not follow existing state legislative district lines and are not zero-population splits. Proposed Map A has 22 VTD splits that are non-zero splits. Compared to the Enacted Map, the Proposed Map A splits 10 VTDs (precincts) that have some population and that would not otherwise be split by state legislative district boundaries. Proposed Map A would place a moderately higher administrative burden on Duval and Leon Counties, but lower burden on Marion and St. Johns Counties.

D. Reply to Dr. Owens

72. Dr. Owens responds to my initial report by agreeing with my finding that Black voters overwhelmingly prefer Democratic candidates in Benchmark CD-5 and that none of Enacted CD-2, Enacted CD-3, Enacted CD-4, or Enacted CD-5 would afford Black voters the ability to elect their preferred candidates.

73. His response is that Black voters prefer Democratic candidates regardless of their race. This finding does not dispute the fact that Black voters are able to elect their *preferred* candidates in the Benchmark CD-5 or in the version of CD-5 in H000C8015.

74. Dr. Owens offers an incomplete analysis of the value of creating a district in which Blacks have the ability to elect their preferred candidates.

In particular, it ignores the important effects of the composition of a district and of the race of the candidate on participation rates of Black voters. Extensive literature in political science has established that the composition of the district has a significant effect on the participation of racial minorities. Specifically, the higher the percent Black in a district the higher the participation of Blacks in the election, and when there is a Black candidate running in a Black district, there is an added boost in Black participation.[3] The effect of the racial composition of districts on *turnout* is particularly important even if there is no measurable effect on the *percent* of votes won by a Black candidate (compared to a White Candidate). Dr. Owens ignores this important and well-established effect of the racial composition of districts on turnout, and, thus, on voters and on election outcomes.

CONCLUSION

75. Proposed Maps A and B offer minimally disruptive ways to retain CD-5 as a district in which Black voters will have the opportunity to elect their candidates of choice. Proposed Map A offers an approach that largely adheres to state legislative district boundaries; it also minimizes the splitting of VTDs,

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[3] See, Bernard Fraga, "Candidates or Districts? Reevaluating the Role of Race in Voter Turnout," *American Journal of Political Science* 60 (2016): 97-122; Bernard Fraga, "Redistricting and the Causal Impact of Race on Voter Turnout," The Journal of Politics 78 (2016): 19-34; Danny Hayes and Seth McKee, "The Intersection of Race, Redistricting, and Turnout" *American Journal of Political Science* 56 (2012): 115-130; Ebonya Washington, "Black Candidates Affect Voter Turnout" Quarterly Journal of Economics 121 (2006): 973-998; Amir Shawn Fairdosi and Jon C. Rogowski, "Candidate Race, Partisanship, and Political Participation: When Do Black Candidates Increase Black Turnout?" *Political Research Quarterly,* 68 (2015): 337-349.

thereby lowering the potential administrative burdens of the map. In Marion and St. Johns Counties, the number of split VTDs in Proposed Map A is lower than in the Enacted Map. Proposed Map B offers an approach that minimizes the number of districts that would be changed: it shows that one need only change CD-2, CD-3, CD-4, and CD-5 to comply with the Tier I non-diminishment standard.

76. Above all, the Proposed Maps provide feasible ways to maintain the representation that 367,461 Black Floridians in North Florida received under Benchmark CD-5 and that would be diminished under the Enacted Map. It is possible to restore a version of CD-5 that maintains the representation of Black voters in North Florida, and it is possible to do so without affecting Enacted CD-1 or any Enacted CDs in Central or South Florida. The net effect on the number of precincts split is an additional 10 out of 645 precincts that would need to be reconfigured.

77. I make the foregoing statements with knowledge that they will be used as evidence in court and do declare under penalty of perjury under the laws of the State of Florida that they are true and correct to the best of my knowledge and belief.

Executed this 10th day of May 2022.

Dr. Stephen Ansolabehere

Tables

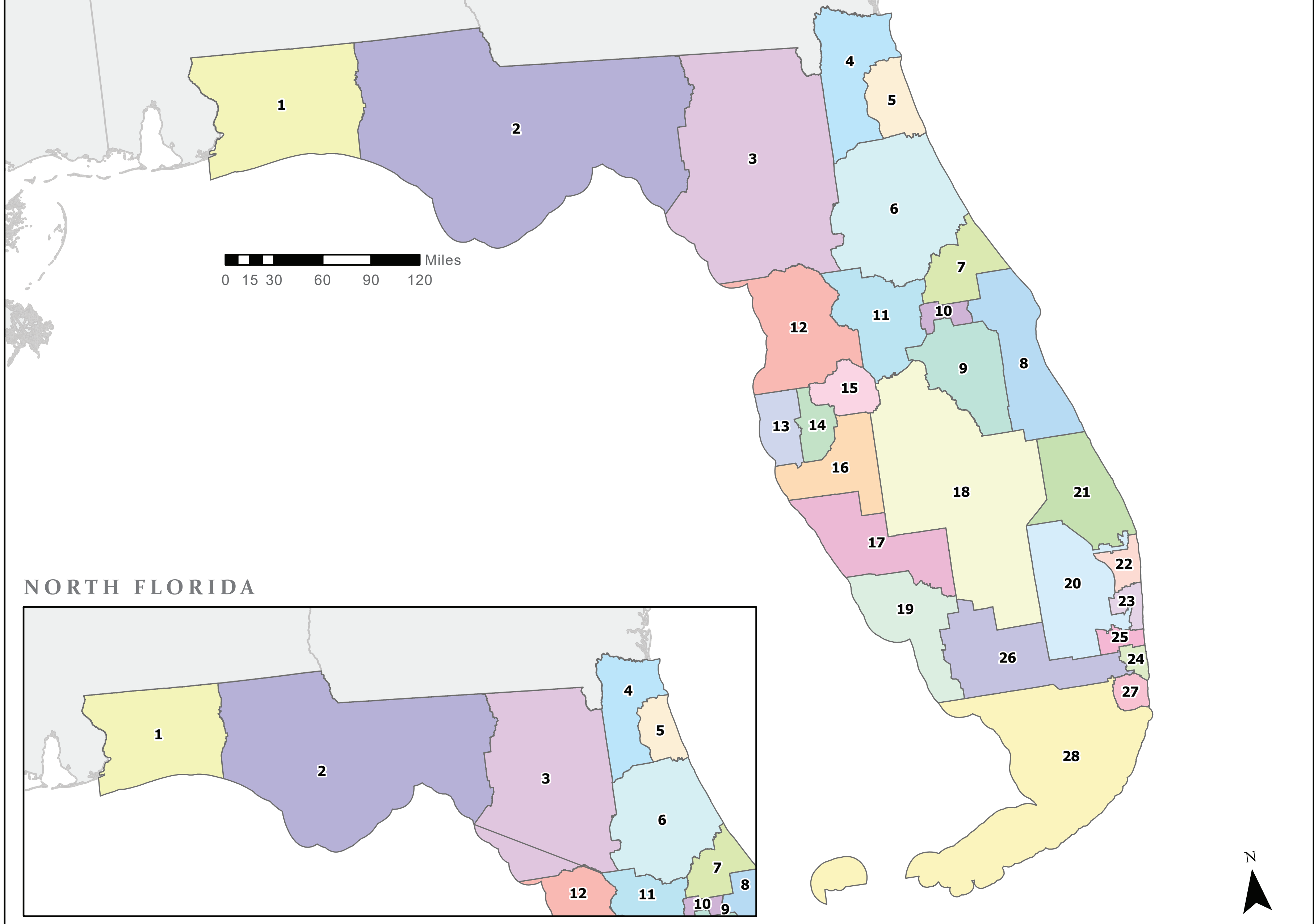
Table 1. Compactness Measures for North Florida Districts Under the Enacted Map and Proposed Maps A and B						
Congressional District	Enacted Map		Proposed Map A		Proposed Map B	
	Reock	P-P	Reock	P-P	Reock	P-P
CD-2	.46	.48	.28	.25	.28	.25
CD-3	.57	.50	.43	.31	.43	.28
CD-4	.38	.32	.25	.14	.31	.16
CD-5	.56	.52	.11	.11	.11	.11
CD-6	.74	.48	.69	.39	.72	.49

*Reock is an area compactness measures. P-P stand for Polsby-Popper, a perimeter compactness or regularity measure.

Table 2. VTD Splits for North Florida Districts Under the Enacted Map and Proposed Maps Versions A and B					
				VTD Not Split by HD or SD	
Map	Total Number of VTDs (Precincts)	Total Number of Split VTDs	VTDs Split by CD and by HD or SD	Zero-Population VTD Splits	Populated VTD Splits
Columbia County					
Enacted	25	0	0	0	0
Proposed A and B	25	4	0	3	1
Duval County					
Enacted	295	7	3	1	3
Proposed A and B	295	24	12	3	9
Jefferson County					
Enacted	16	0	0	0	0
Proposed A and B	16	2	0	0	2
Leon County					
Enacted	157	0	0	0	0
Proposed A and B	157	25	12	7	6
Marion County					
Enacted	111	13	4	4	5
Proposed A	111	7	5	0	2
Proposed B	111	13	4	4	5

St. Johns County					
Enacted	77	7	2	1	4
Proposed A	77	5	3	0	2
Proposed B	77	12	0	2	10

Map 1


ENACTED MAP
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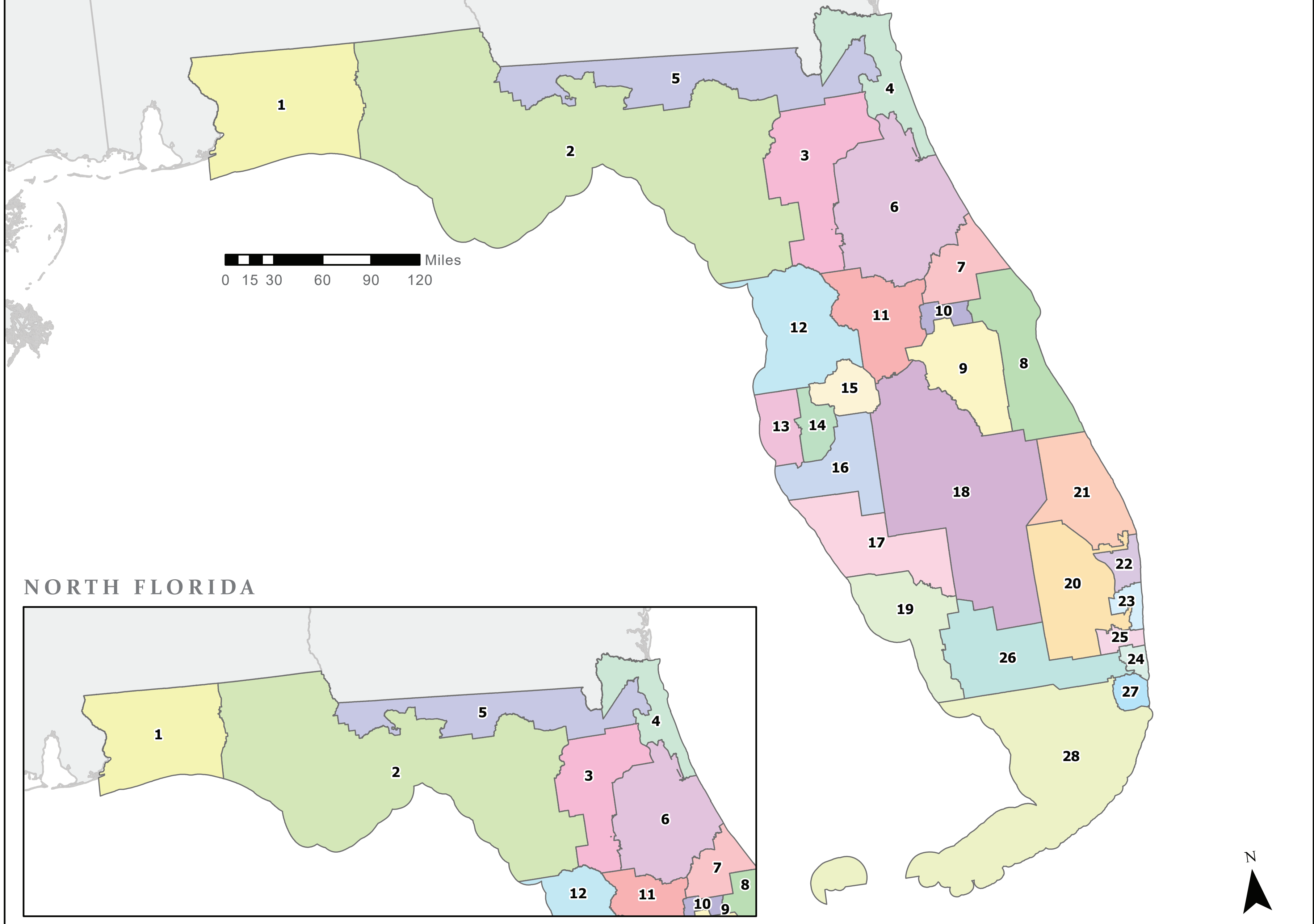
Map 2


PROPOSED MAP A
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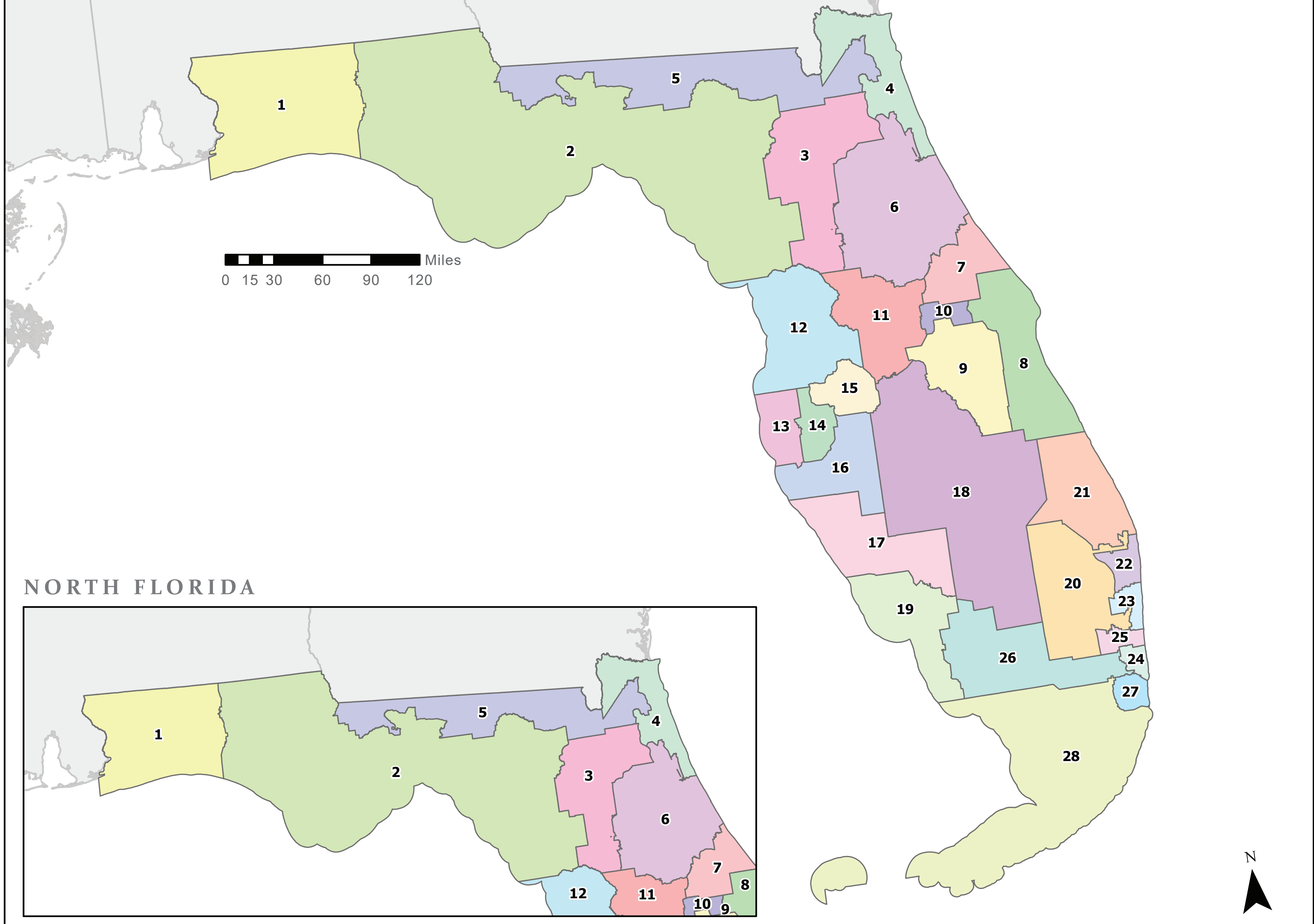
Map 3


PROPOSED MAP B
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NORTH FLORIDA
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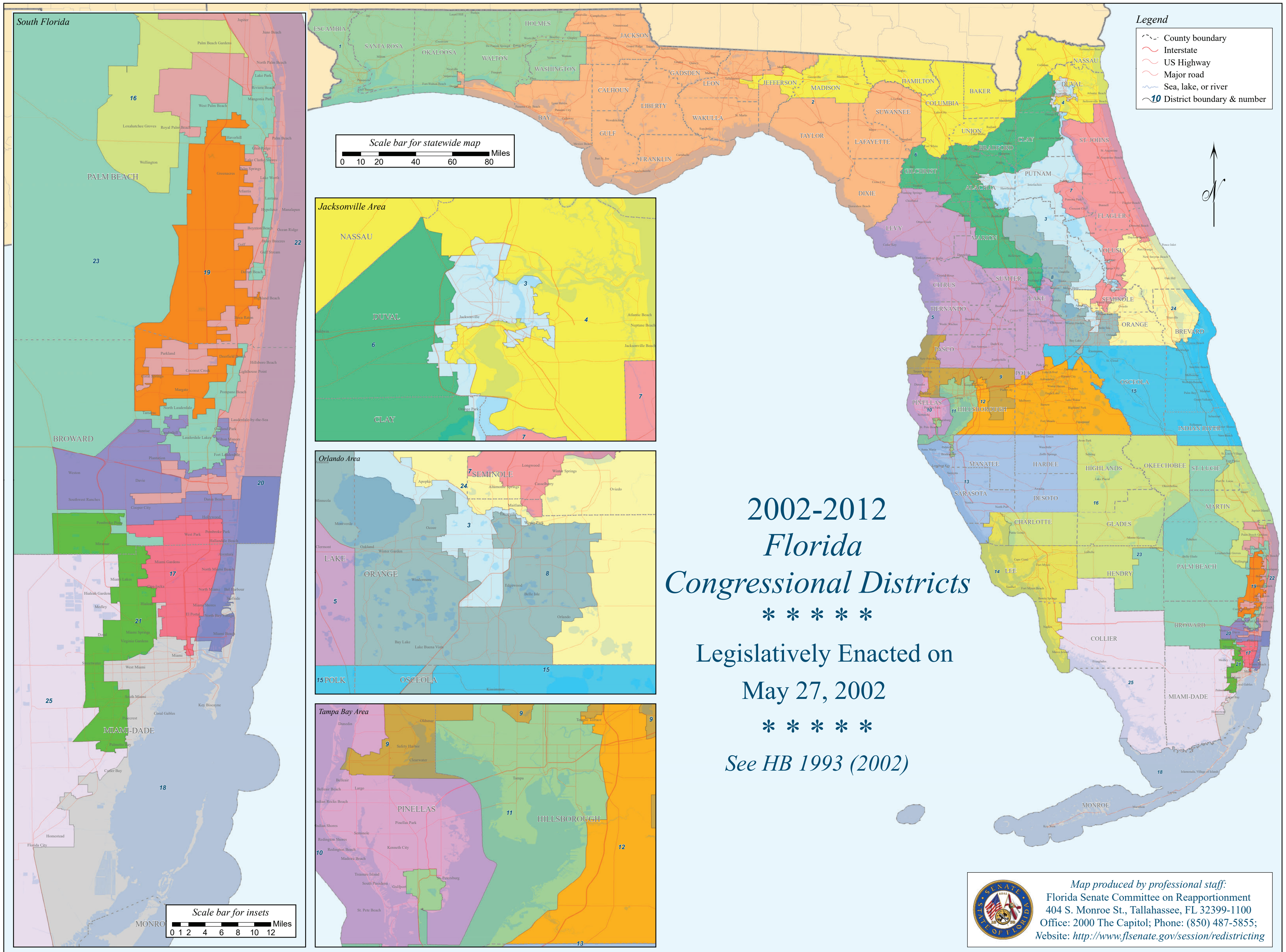
Map 4



2002-2012
Florida
Congressional Districts
* * * * *
Legislatively Enacted on
May 27, 2002
* * * * *
See HB 1993 (2002)
South Florida
Jacksonville Area
Orlando Area
Tampa Bay Area
Scale bar for statewide map
Scale bar for insets
Miles
Legend
County boundary
Interstate
US Highway
Major road
Sea, lake, or river
District boundary & number
Map produced by professional staff:
Florida Senate Committee on Reapportionment
404 S. Monroe St., Tallahassee, FL 32399-1100
Office: 2000 The Capitol; Phone: (850) 487-5855;
Website: http://www.flsenate.gov/session/redistricting

Exhibit 14

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as
Florida Secretary of State, et al.,

Defendants.
_______________________________________/

AFFIDAVIT OF NICHOLAS A. SHANNIN, GENERAL COUNSEL FOR BILL COWLES, ORANGE COUNTY SUPERVISOR OF ELECTIONS

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared Nicholas A. Shannin, Esquire, who, being first duly sworn, deposes and says that:

1. I am now, and for over 27 years have been, a member in good standing of the Florida Bar, and I am fully familiar with the facts set forth below.

2. I am the General Counsel for the Orange County Supervisor of Elections in Florida. Orange County is located in the middle of Central Florida, and with over 850,000 registered voters is the fifth most populous county in Florida.

3. I have served as General Counsel for the Orange County Supervisor of Elections and its staff for over a decade. Doing so, I have assisted the Supervisor and his staff with the legal and administrative duties attendant to properly complying with federal, state, and local laws throughout dozens of Primary, General, and Special Elections.

4. In the conduct of my duties I am directly familiar with the processes required to administrate those elections, including the labor and technical difficulty inherent in the formatting of specific precincts for the voters for each upcoming election, including the special care required to ensure that the congressional, state, and county political boundaries are incorporated within those precincts so that each voting precinct may be allocated a unique and appropriate ballot style.

5. Because of Orange County's size and the fact that it is home to multiple congressional districts, state house and senate districts, and single-member county commission districts local commission and school board districts, it is necessary to prepare for well over 200 unique ballot styles for the Primary Elections.

6. This level of work and detail requires adequate time to allow for the precinct boundaries to be accurately drawn and organized, and the ballots

designed, proofed, printed, and mailed within the time necessary to meet the statutory deadlines to transmit vote-by-mail ballots, particularly to its overseas voters.

7. This year, Florida is scheduled to hold its 2022 state-wide Primary Election on August 23, 2022. As a result, the statutory date for which vote-by-mail ballots are to be mailed overseas is July 9, 2022.

8. I have consulted with the Orange County Supervisor of Elections and his staff to determine the amount of lead time necessary to conduct the technical and administrative tasks necessary to ensure that each of those precincts are correctly drawn and the process for ballot design, proofing, printing, and mailing is timely administered.

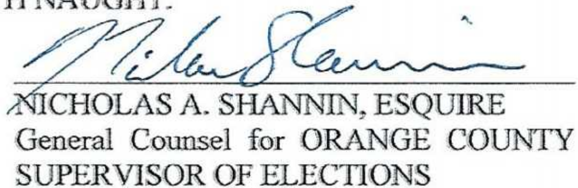
9. Notwithstanding each of the difficulties outlined above, Supervisor Cowles' well-trained and efficient staff has assured me that so long as final boundaries for congressional districts are set no later than May 27, 2022, the Orange County Supervisor and staff will have adequate time to prepare for the election and meet each relevant election deadline in advance of the August 23, 2022, Primary Election.

10. As General Counsel for the Orange County Supervisor I have been closely following the legislation and subsequent litigation related to the

congressional maps. I can ensure that Supervisor Cowles is updated with regard to any potential changes as the process swiftly proceeds through the court system. Because Supervisor Cowles is aware of the potential for modification to the presently set congressional districts, Supervisor Cowles will be able to implement any newly authorized congressional maps upon judicial direction to do so.

11. On behalf of the Orange County Supervisor of Elections and his staff, the undersigned thanks each of the parties and the Court for working together to proceed with all deliberate speed through the judicial process to allow Supervisor Cowles and his fellow Supervisors as much time as is possible to properly administrate each of their duties in compliance with federal, state, and local law, and with the United States and Florida Constitutions.

FURTHER AFFIANT SAYETH NAUGHT.



NICHOLAS A. SHANNIN, ESQUIRE
General Counsel for ORANGE COUNTY
SUPERVISOR OF ELECTIONS

SWORN TO AND SUBSCRIBED before me by means of physical presence, on May 7, 2022, by NICHOLAS A. SHANNIN, who did take an oath and who is personally known to me.

Notary Public, State of Florida

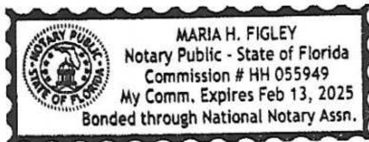


Exhibit 15

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *et al.*, Plaintiffs, v. LAUREL M. LEE, in her official capacity as Florida Secretary of State, *et al.*, Defendants.	Case No. 2022-ca-000666

AFFIDAVIT OF TRACIE DAVIS

STATE OF ~~FLORIDA~~ XXXXXXXX Texas
COUNTY OF ~~DUVAL~~ XXXXXX Dallas

BEFORE ME, the undersigned authority, personally appeared Tracie Davis, who, after first being duly sworn, deposes and says:

1. I am Tracie Davis, a resident of Florida, over the age of twenty-one, and under no disability. I have personal knowledge of the facts described in this Affidavit.

2. I currently serve as the member of the Florida House of Representatives representing District 13 in the city of Jacksonville, in Duval County, Florida. I was first elected to the Florida House of Representatives in 2018.

3. From 2001 to 2015, spanning most of my career, I worked in the Supervisor of Elections Office for Duval County, where I ultimately served as Deputy Supervisor of Elections, the highest unelected position in the Duval County Supervisor Elections Office. In my role as Deputy Supervisor of Elections, my duties include participating in and closely observing virtually every aspect of the administration of county, state, and federal elections in Duval

County.

4. Among my experiences at the Duval County Supervisor of Elections office, I worked with staff involved in redrawing precincts (re-precincting) for Duval County as part of the 2012 congressional and legislative redistricting process, and I know firsthand the ability of the staff, who still work in the Duval County Supervisor of Elections Office, to implement new redistricting plans.

5. The redistricting process, and associated re-precincting, entails assigning voters to their proper congressional district, State Senate district, and State House district and, further, assigning voters to manageably sized precincts that share a common ballot style (i.e., list of electoral races) or a number of ballot styles within a precinct. The latter instance, which entails having a number of ballot styles within a precinct, occurs when it is not administratively practicable (timewise, staff wise, location wise, or a combination of these factors) to have separate polling places to serve voters in a geographic area split by various electoral district boundaries. These are common problems that Duval County faces and has the technical resources to address.

6. Historically, Duval County has been divided among multiple congressional, State Senate, and State House districts, and has found it reasonably necessary to have split precincts, in which more than one ballot style has been used in certain precincts. The Duval County Supervisor of Elections office is capable of handling elections with split precincts, to the extent such splits cannot be resolved by drawing new precinct lines.

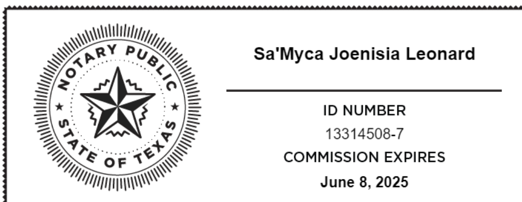
7. On August 23, 2022, Florida is scheduled to hold its 2022 statewide primary election. This is among the latest primaries in the country. The associated deadline to transmit vote-by-mail ballots to overseas and uniformed voters is July 9, 2022.

8. The Duval County Supervisor of Elections Office has competent and professional staff well capable of handling the redistricting and re-precincting process. Based on my experience and knowledge of the Duval County Supervisor of Elections Office, if the Court were to set in a place a remedial congressional district plan by May 27, 2022, the Duval County Supervisor of Elections Office would have adequate time to prepare for the primary election and meet the relevant election deadlines under the current elections schedule.

FURTHER AFFIANT SAYETH NOT.

____
Tracie Davis

SWORN TO AND SUBSCRIBED before me this 9th day of May 2022, by Tracie Davis, who (check one) ☐ is personally known to me, ☑ produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or ☐ produced other identification, to wit:



Notarized online using audio-video communication

____
Print Name: Sa'Myca Joenisia Leonard
Notary Public, State of ~~Florida~~ Texas
Commission No.: 13314508-7
My Commission Expires: 06/08/2025

Exhibit 16

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *et al.*, Plaintiffs, v. LAUREL M. LEE, in her official capacity as Florida Secretary of State, *et al.*, Defendants.	Case No. 2022-ca-000666

AFFIDAVIT OF LORI EDWARDS
POLK COUNTY SUPERVISOR OF ELECTIONS

STATE OF FLORIDA
COUNTY OF POLK

BEFORE ME, the undersigned authority, personally appeared Lori Edwards, who, after first being duly sworn, deposes and says:

1. I am Lori Edwards, a resident of Florida, over the age of eighteen, under no disability, and I have personal knowledge of the facts described in this Affidavit.

2. I currently serve as Supervisor of Elections for Polk County, Florida. Polk County is one of ninth-most populous county in the state. Polk County is home to about 453,000 registered voters, and it has 167 precincts.

3. In my role as Polk County Supervisor of Elections, my duties include administering county, state, and federal elections.

4. I understand the Secretary of State in the above-captioned case has cited my previous declaration in Common Cause Florida et al. v. Lee, Case No.: 4:22-cv-109 (N.D. Fla.) as support for the argument that it is too late to implement a congressional redistricting plan that complies with the Florida Constitution, if ordered by this Court. My testimony was and is different, as was the circumstances at the time of my prior declaration, and the scope of remedial possibilities now appears much clearer and narrower.

5. It is true that, in order for the primary election to proceed on August 23, 2022, elections officials need adequate time to prepare for the primary. The recently enacted congressional redistricting plan P000C0109 splits Polk County into four separate congressional districts. This complicates the task of organizing precincts to address the number of ballot styles needed so that each voter in Polk County has a ballot that reflects the electoral races that fit the combination of electoral districts covering the voter's place of residence. Nevertheless, as recent experience confirms, the process of doing so would by no means be impossible if, by the end of May, the Court were to order a remedial congressional district map with the roughly the same or fewer congressional district splits in Polk County.

6. The Polk County Supervisor of Elections Office, just as many other counties' elections offices, must periodically contend with changes to electoral districts and changes to precincts for a variety of reasons. The number of precincts split by district lines may sometimes make it difficult to redraw a precinct map quickly.

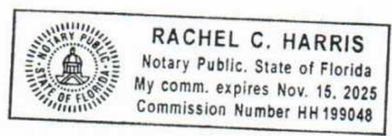
7. If the Court were to implement a remedial plan, the Polk County Supervisor of Elections office would be capable of implementing the new plan if ordered to do so by the end of May 2022. If ordered to do so, the Polk County Supervisor of Elections office will work diligently to implement such a map that complies with the Florida Constitution.

FURTHER AFFIANT SAYETH NOT.

Lori Edwards

____
Lori Edwards
POLK COUNTY SUPERVISOR OF ELECTIONS

SWORN TO AND SUBSCRIBED before me this _____ day of May 2022, by ________________________, who (check one) ☐ is personally known to me, ☐ produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or ☐ produced other identification, to wit:



____
Print Name: Rachel Harris
Notary Public, State of Florida
Commission No.: 199048
My Commission Expires: 11/15/22

Exhibit 17

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, *et al.*,

Defendants.

Case No. 2022-ca-000666

AFFIDAVIT OF CHRISTOPHER MOORE
DEPUTY SUPERVISOR OF ELECTIONS OF LEON COUNTY, FLORIDA

STATE OF FLORIDA
COUNTY OF LEON

BEFORE ME, the undersigned authority, personally appeared Christopher Moore, who, after first being duly sworn, deposes and says:

1. I am Christopher Moore, a resident of Florida, over the age of eighteen, under no disability, and I am fully familiar with the facts set forth below.

2. I am the Deputy Supervisor of Elections for Leon County, Florida, which is the highest unelected position in the Leon County Supervisor of Elections Office. I have been employed with the Leon County Supervisor of Elections office for 16 years. In my role as Deputy Supervisor of Elections, my duties include participating in and closely observing virtually every aspect of the administration of county, state, and federal elections in Leon County. I and other staff that I supervise provide technical support and advice to other County Supervisor of Elections offices related to redistricting and elections administration on occasion when requested.

3. Among the roles I have held in Leon County Supervisor of Elections Office, I previously had primary responsibility for the office's geographic information systems (GIS) needs, which included work in implementing redistricting plans and revising electoral precinct boundaries. In my current role, I still oversee the office's GIS work, and I am actively involved in working to implement redistricting plans and revising electoral precinct boundaries for the Leon County Supervisor of Elections Office. Because my technical GIS background and staff oversight, I am familiar with the various GIS tools and software used in work related to elections administration, and I am also aware of the functionality of some GIS tools used by other Supervisor of Elections Offices that have not been implemented in the Leon County Supervisor of Elections Office.

4. I have reviewed the April 26, 20222 Affidavit of Leon County Supervisor of Elections Mark S. Earley in this case, agree with its contents, and share his assessment that the Leon County Supervisor of Elections office can meet the upcoming primary election deadlines if a new congressional plan is in place by May 27, 2022.

5. If, for instance, the Court were to adopt a map containing the east-west configuration of Congressional District 5 ("CD-5") in plan H000C8015, as passed by the Legislature on March 4, 2022, it would require Supervisor Earley to decide whether to redraw precincts within Leon County to have only one ballot style (that is, list of competing candidates and ballot issues) per precinct or to deploy street-level splits within existing precincts, such that there are multiple ballot styles within one or more precincts. Either way, the Leon County Supervisor of Elections Office could implement the new redistricting plan and administer the elections in the current election cycle on the current elections schedule. In the case of plan H000C8015, the boundaries of CD-5 would split roughly 17 precincts, in addition to precincts

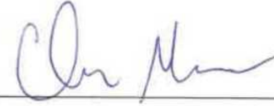
split by the new Florida House and Florida Senate district plans.

6. It is not uncommon for elections administrators to split precincts, such that they administer elections in which more than one ballot style is used within a precinct. Deciding whether or not to deploy the street-level split model within precincts does encumber an election administrator to consider concerns of ballot style complexity for poll workers, staff technical expertise in GIS, and programming and proofing ballot styles for the election. One benefit of using splits at the street level (and not redrawing precinct boundaries), is that the County Supervisor of Elections Office need not submit a new precinct map to the County Board of Commissioners for approval since the boundaries have not technically been altered. But whether or not a county elections office decides if they need approval from the Board of County Commissioners, such approval has never been withheld in Leon County to my knowledge. The administrative action of submitting the boundaries for approval need not delay or prevent the Leon County Supervisor of Elections Office from moving forward with work in our "reprecincting" (staging) database environment in our voter software package if the Court were to impose an alternative congressional redistricting plan by May 27, 2022. Our office may be in an advantageous position to other counties having an in-house GIS staff expert, but that administrative decision was made long ago and was the primary reason I was recruited to join this office in 1999.

7. Although Leon County Supervisors Office uses its own in-house GIS staff expertise, there are available software tools to aid in implementing new redistricting and reprecincting plans. There is a GIS vendor in the State that offers a program with an interface to the voter registration database to replace the required data tables updates for redistricting once the mapping tasks have been completed. I am aware that there are counties in Florida currently

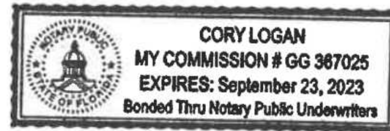
licensing that solution. The Leon County Supervisor of Elections Office can, nonetheless, efficiently implement new redistricting and reprecincting plans without need of such software.

FURTHER AFFIANT SAYETH NOT.



Christopher Moore

SWORN TO AND SUBSCRIBED before me this 10th day of May 2022, by Chris Moore, who (check one) ☑ is personally known to me, ☐ produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or ☐ produced other identification, to wit:



Print Name: Cory Logan

Notary Public, State of Florida

Commission No.: #GG367025

My Commission Expires: 9/23/2023

Filing # 149533878 E-Filed 05/13/2022 10:37:22 AM

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' EMERGENCY MOTION TO VACATE AUTOMATIC STAY PENDING APPEAL

Plaintiffs, pursuant to Rule 9.310(b)(2) of Florida Rules of Appellate Procedure, respectfully request that the Court, on an emergency basis, vacate the stay of the Order Granting Plaintiffs' Temporary Injunction, and as grounds therefore state:

INTRODUCTION

This Court must vacate the automatic stay triggered by the Secretary's appeal of its Temporary Injunction Order blocking implementation of the Enacted Plan. While the Secretary's notice of appeal "shall automatically operate as a stay pending review," this Court has authority to vacate the stay under compelling circumstances. Fla. R. App. P. 9.310(b)(2). Here, compelling circumstances exist because an automatic stay pending appeal is tantamount to a reversal of the Temporary Injunction Order: The Secretary's appeal will almost certainly last beyond the date by which a remedial plan must be in place for the 2022 congressional election.

Recognizing that Plaintiffs' access to relief was on the clock, this Court ensured the speedy resolution of Plaintiffs' motion for relief in advance of the 2022 election. It made itself immediately available for a hearing on Plaintiffs' motion for temporary injunctive relief, and after

careful consideration of live and written testimony and hundreds of pages of briefing, found that the Enacted Plan diminishes the ability of Black Floridians in North Florida to elect candidates of their choice in violation of the Florida Constitution. To avoid the irreparable harm that would follow from allowing the election to go forward under the Enacted Plan, the Court ordered the state to adopt Plaintiffs' Proposed Plan A.

The Secretary's appeal, and the stay it automatically triggers, may effectively overturn the Court's considered effort to ensure Plaintiffs' access to relief by preventing the Secretary and Supervisors of Elections from beginning preparations to implement the remedial plan. But the Secretary cannot demonstrate she has a likelihood of success on appeal—indeed, her position is contrary to binding Florida Supreme Court precedent. On the other side of the scale, *per se* irreparable harm will occur if the automatic stay is allowed to remain in place indefinitely. Vacatur of the automatic stay is, therefore, not only a reasonable application of this Court's discretion, but necessary to remedy the constitutional violations that the Court adjudged. For the same notions of justice and equity that drove the Court to temporarily enjoin implementation of the Enacted Plan and to order implementation of Plan A, the Court should now vacate the automatic stay.

LEGAL STANDARD

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.* A court may vacate an automatic stay under this provision when its finds that "compelling circumstances" exist. *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018).

In making that determination, the Court considers (1) the government's likelihood of success on appeal, and (2) the likelihood of irreparable harm if the automatic stay is reinstated. *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) (same). At bottom, the Court should vacate the automatic stay where "the equities are overwhelmingly tilted against maintaining the stay." *Id.* at 828 (quoting *Tampa Sports Auth. v. Johnson*, 914 So. 2d 1076 (Fla. 2d DCA 2005)). The Court enjoys "broad discretion" in making these determinations. *See City of Sarasota*, 563 So. 2d at 830.

DISCUSSION

Compelling circumstances justify vacatur of the automatic stay in this case. *First*, the Secretary does not have a likelihood of success on appeal. Indeed, "the automatic stay rule is founded in judicial deference to planning-level governmental decisions." *Tampa Sports Auth.*, 914 So. 2d at 1083. But that deference "diminishes" where the illegality of the government's decision has been established and is unlikely to be disturbed on appeal. Such is the case here. This Court's determination that the Enacted Plan is unconstitutional 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). Defendants have not, and cannot, demonstrate that they are likely to demonstrate that either the Court's legal or factual findings were in error, much less that the Court's decision should be reversed.

After careful consideration of a voluminous record, this Court correctly determined that the Enacted Plan "would diminish the ability of Black voters to elect their candidate of choice in North Florida" in violation of the Florida Constitution, and the Secretary "*offer[ed] no credible contrary evidence*." Order at 10 (emphasis added). The Legislature's own analysis proved as much,

and the Secretary's experts "neither performed a functional analysis nor contested [plaintiffs' expert's] findings." *Id.* Moreover, the Secretary cannot show that application of the Florida Constitution's non-diminishment standard violates the Fourteenth Amendment of the U.S. Constitution because she failed to show that race was the predominant factor in the drawing of 8015's CD-5. And this Court further found that even if racial considerations did predominate, they were narrowly tailored to advance compelling government interests. *Id.* at 11-14. The Court based its findings on binding Florida Supreme Court precedent. As a result, the Secretary cannot win on appeal unless the Florida Supreme Court is willing to reverse its own precedent from just a few years ago. *See In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 625 (Fla. 2012) (finding that "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"). The first factor, thus, overwhelmingly favors vacatur of the automatic stay pending appeal.

Second, allowing the automatic stay to remain in place would almost certainly result in irreparable harm to Plaintiffs and countless other Florida voters, who may be forced—simply as a result of the delay following from the stay—to vote under an unconstitutional map, which operates to diminish the political power of Black voters in North Florida in particular. A remedial plan likely must be in place within the next few weeks to ensure that the 2022 congressional election proceeds under a lawful districting plan. Order at 18. But the resolution of the Secretary's appeal will probably last well beyond that date. The Secretary filed a notice of appeal in the First District Court of Appeal but has not moved to expedite those proceedings. And even if she did, this appeal will also likely involve additional review by the Florida Supreme Court. If the automatic stay remains in force throughout the pendency of these appellate proceedings, it may be infeasible to

implement an alternative to the Enacted Plan for the 2022 election—and this Court has already held that "if the 2022 primary and general elections [are] conducted under the Enacted Plan, Plaintiffs' constitutional rights would be violated." Order at 15-16. Such a constitutional injury is sufficient to demonstrate "compelling circumstances" to justify vacating an automatic stay. *See Tampa Sports Auth.*, 914 So. 2d at 1084 (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").

The equities clearly favor vacatur for the additional reason that allowing county elections officials to implement the remedial map immediately will ease administrative burdens. Just yesterday, after news of this Court's order, Robert Phillips of the Duval County Supervisors of Elections' Office confirmed that Duval County could implement this Court's order, thanking the court for its speed, and noting, "The fact they ruled so quickly makes it easier."[1] But every day that passes while the stay is in place makes that implementation harder. This Court can ease any additional burdens of implementation by vacating the stay now.

While the Court should vacate the automatic stay now, it should at minimum issue an order stating that the Court will vacate the automatic stay on May 27, 2022—the date by which several Supervisors have stated a plan would need to be in place to give them sufficient time to implement it— if a higher court has yet to resolve the State's appeal by that date. Fla. R. App. P. 9.310(b)(2) (authorizing the Court to "impose any lawful conditions" on an automatic stay). This course would ensure that Florida's election administrators will have sufficient time to implement Proposed Plan A and to ensure relief will be available to Plaintiffs and Florida voters.

---

[1] Andrew Pantazi, *Judge Strikes Down Congressional Map for Reducing Black Voting Power,* WJCT News (May 11, 2022, 3:09 PM), available at https://news.wjct.org/first-coast/2022-05-11/judge-strikes-down-congressional-map-for-reducing-black-voting-power.

WHEREFORE, Plaintiffs request that the Court vacate the automatic stay pending appeal pursuant to Rule 9.310(b)(2).

Dated: May 13, 2022

Respectfully submitted,

/s/ Frederick S. Wermuth
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Counsel for Plaintiffs

+Admitted Pro hac vice
**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 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.

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111

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Filing # 149637684 E-Filed 05/16/2022 11:57:44 AM

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

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
_______________________________________/

DEFENDANT SECRETARY OF STATE LAUREL LEE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE THE AUTOMATIC STAY

The Court should deny Plaintiffs' motion to vacate. Case after case makes clear that vacatur of the automatic stay granted to public officers by Florida Rule of Appellate Procedure 9.310(b)(2) is the exception—not the norm. *See, e.g.*, *DeSantis v. Scott*, No. 1D21-2685 (Fla. 1st DCA Oct. 27, 2021) (reinstating the automatic stay vacated by the Second Judicial Circuit); *DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145 (Fla. 1st DCA 2020) (same); *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825 (Fla. 1st DCA 2018) (same). To obtain such relief, Plaintiffs must "establish an evidentiary basis" of "the most compelling circumstances" to vacate the stay. *Dep't of Envt'l Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998). This they can't do, especially when the rushed remedial map the Court *mandated* at the temporary injunction hearing has changed since its approval—*after* the opportunity to cross-examine the map drawer had passed. *See* **Exhibit 12** (Second Expert Declaration of Dr. Johnson).

I. STANDARD

"[A] trial court may vacate an automatic stay only 'under the most compelling circumstances.'" *Fla. Educ. Ass'n*, 325 So. 3d at 150 (quoting *People United for Med. Marijuana*, 250 So. 3d at 828). As the

party seeking to vacate the automatic stay, Plaintiffs have the burden of demonstrating that (1) the equities overwhelmingly tilt against maintaining the automatic stay, (2) they are likely to prevail on the merits of the appeal, and (3) they'll suffer irreparable harm if the automatic stay is maintained. *Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc.*, 317 So. 3d 1168 (Fla. 1st DCA 2020) (citing *People United for Med. Marijuana*, 250 So. 3d at 828). Placing the evidentiary burden on Plaintiffs makes sense because the primary "purpose of the automatic stay provision" "is to accord judicial deference to governmental decisions." *Scott*, No. 1D21-2685, order at 2. The stay "also seeks to protect the public against 'any adverse consequences realized from proceeding under an erroneous judgment.'" *Fla. Educ. Ass'n*, 325 So. 3d at 150 (citation omitted).[1]

II. ARGUMENT

Plaintiffs fail to satisfy all three elements necessary for vacatur of the automatic stay. Compelling circumstances do not exist to vacate the stay, and Plaintiffs' motion should be denied.

A. The Equities Weigh in Favor of Maintaining the Automatic Stay.

The equities tilt decidedly in favor of maintaining the stay. Three reasons predominate. *First*, during the temporary injunction hearing, this Court stated the following:

> Generally, I don't like to override stays from the standpoint that I think there's a presumption that at least – First of all, I fully expect the appellate court to get this and move as swiftly as they can. They're good people. They're going to be conscientious about doing it. Whether they agree with me or not, they're going to do their job.
>
> So I think everybody in the government, regardless of the branch, ought to all be on the same page that we need to get this right as soon as we can. So if I'm a supervisor of elections out there and I'm thinking, well, okay, one guy at least said this needs to be different, that doesn't necessarily mean I'm going to sell out and crunch my numbers and make everything fit that, because we don't know if that will stick.
>
> So if you seek to have a stay, my initial response would be okay, all right. So let's get it to the appellate court so it can make the determination it needs to make as soon as

[1] This Court emphasized the latter point at the hearing held on Plaintiffs' Motion for Temporary Injunction. *See* **Exhibit 13** at 152:14 – 153:11.

> possible so that whatever the final answer is gets out to the people that need to put this into place.

Exhibit 13 at 152:14 – 153:11. Put differently, this Court stated that it favors maintaining automatic stays, and that maintaining the automatic stay would be warranted in this case because the appellate process will be "swift[]." *Id.* The Secretary agrees, and to that end filed her Notice of Appeal on Thursday approximately one hour after the Court issued its Order Granting Motion for Temporary Injunction. Moreover, Plaintiffs sought pass-through jurisdiction to the Florida Supreme Court on Friday. **Exhibit 14**. Given the deliberate speed of the appeal, the stay should be maintained.

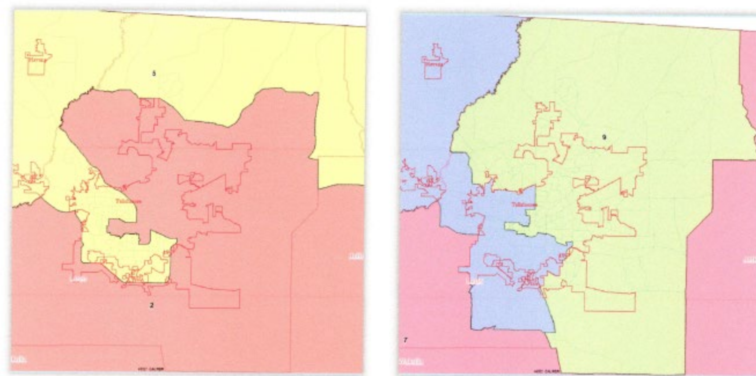
Second, and more importantly, Floridians are entitled to have confidence that their congressional map is generally free of errors. The parties and this Court knew that Proposed Map A, as originally provided to the Court and the parties, though *without* the underlying data files, contained flaws. Dr. Ansolabehere admitted as much during the temporary injunction hearing. **Exhibit 13** at 73:3-6 (Dr. Ansolabehere testifying about an error in congressional district 6 in Proposed Map A as originally submitted, noting "it could have been something that got screwed up when I uploaded the file. But that should not be there").

The Defense called Dr. Ansolabehere's error a non-contiguity, but Plaintiffs said that it wasn't so in footnote 2 of their proposed order to the Court and well beyond the direct-cross-re-direct strictures of the hearing itself. But, as Dr. Johnson notes in his second expert declaration, there was a non-contiguity in congressional district 6 based on his review of the PDF provided by Plaintiffs that showed the original Map A. **Exhibit 12 ¶¶** 11-14. There was also a non-contiguity in congressional district 3. *Id.*

While Plaintiffs corrected both non-contiguities in the amended version of Map A later submitted to the Court, there are still more concerns with the remedial map created by Plaintiffs'

expert in only a day. **Exhibit 13** at 73:7-12. Consider the following based on the Secretary's quick review of the material provided to her:

- Dr. Ansolabehere failed to disclose that his amended Map A made three changes from the Enacted Map that affected congressional districts 3, 9, 12, 18, 26, and 28. **Exhibit 12** ¶¶ 15-17.
- Dr. Ansolabehere claimed that congressional district 5 in Map A "divides Leon County along similar lines to the division of Leon County in the State House Districts and under the Benchmark Map." Reply Ex. 13 ¶¶ 29, 31. But Dr. Johnson calls this claim "false." **Exhibit 12** ¶ 27. As Dr. Johnson explains, "the State House district that comes into southern Tallahassee is not the same State House district that comes across the northern part of Leon County," and "the State House district that comes into southern Tallahassee has significantly different boundaries." *Id.* "A simple visual glance shows the significant geographic differences between the two maps:"

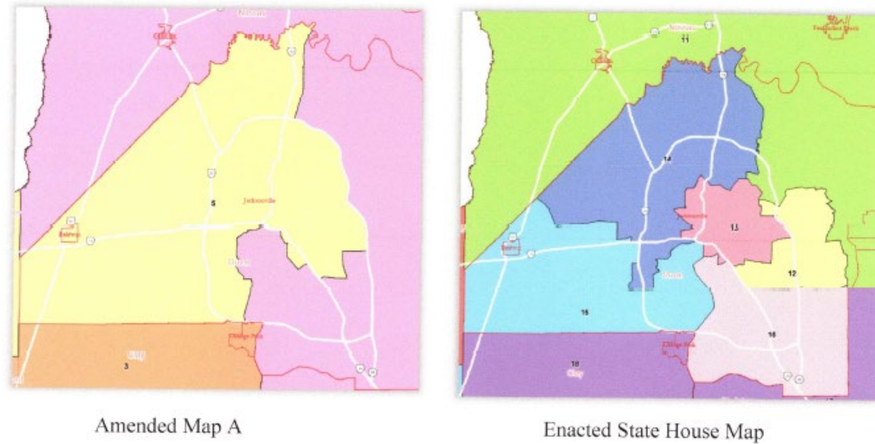


Amended Map A | Enacted State House Map

Id.

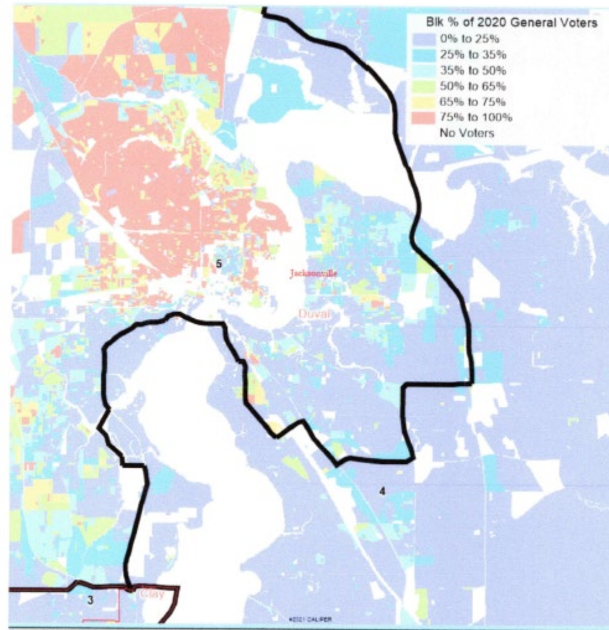
- Dr. Ansolabehere claimed that congressional district 5 "takes the entirety of the western side of Duval County. Its northeastern boundary in Jacksonville follows Interstate 295, which is similar to the boundary followed by the State Senate District

5 and State House District 14." Reply Ex. 13 ¶¶ 30-31. But Dr. Johnson calls this claim "at best misleading" because "[o]ther than both maps following the northern city border of Jacksonville, Amended Map A and the Enacted State House Map are completely different":



Amended Map A　　　　Enacted State House Map

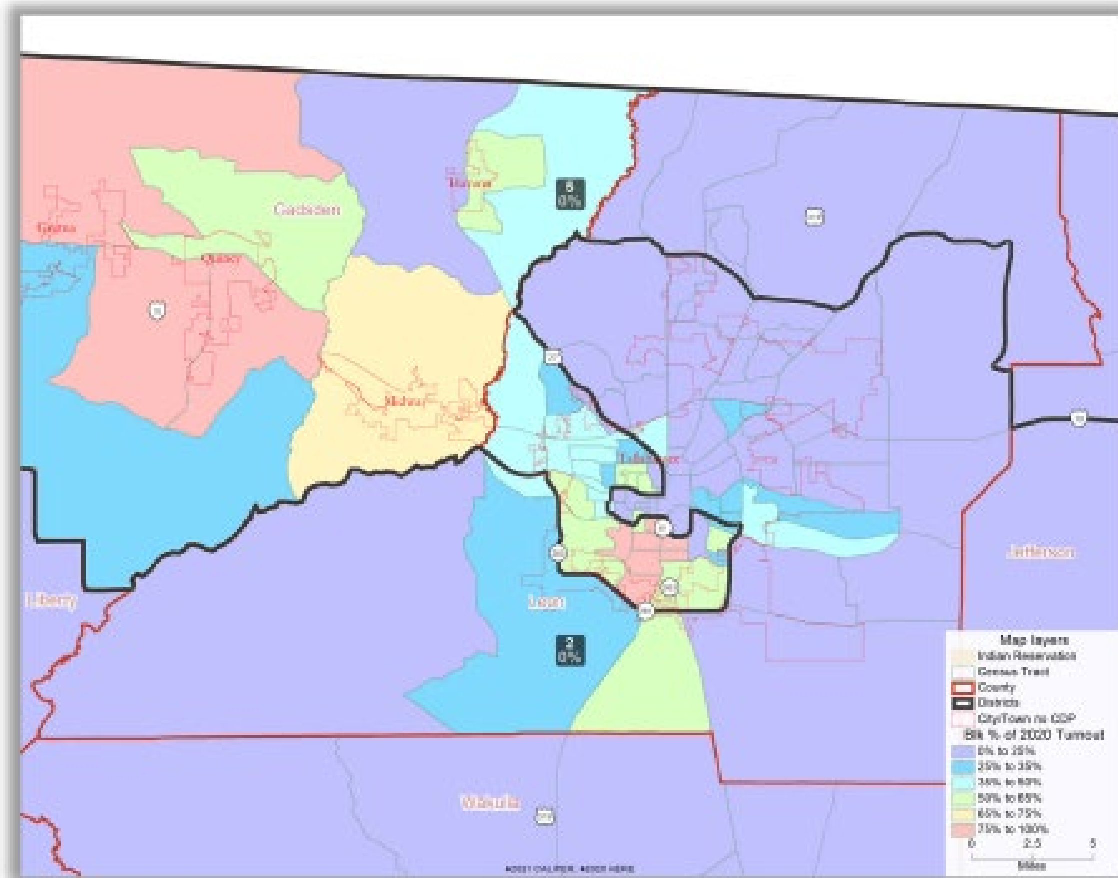
Exhibit 12 ¶ 29. Dr. Johnson further states "plaintiff followed racial data fairly precisely in drawing the boundary between CD4 and CD5 along the St. Johns River and I-95 corridor," which again underscores the Secretary's concerns that race predominates in any iteration of congressional district 5 that stretches 200 miles from east to west:



Id. ¶ 30.

- Reviewing the boundaries of congressional district 5 in Map A also reveals that Dr. Ansolabehere followed the racial composition of Leon County with surgical precision, with a very precise hook separating the Black and White populations in Tallahassee: *Id.* ¶ 28.
- Congressional districts 2 through 5 in the Enacted Map continue to be more compact than those same districts in Map A. *Id.* ¶¶ 20-22.
- Map A also splits 8 counties in north Florida. *Id.* ¶ 18. Excluding Duval County, which must be split because of its population, that's "75% more" splits than the Enacted Plan. *Id.* And Plaintiffs still fail to provide affidavits from all the affected supervisors saying that they can implement this new map at this late date.

If Plaintiffs' maps went through the usual legislative process and were subject to public comment, these issues could have been appropriately scrutinized. But that didn't happen here. Plaintiffs created the map in a day, giving the State hours to prepare for cross-examination of the map drawer, and then "fixed" errors in the map while shielding it from further scrutiny.



Requiring Florida to now hold its congressional elections pursuant to a new, hastily crafted map will necessarily "result in voter confusion and consequent incentive to remain away from the polls." *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). This is precisely why courts should not rush to change election rules before an election. *See* Resp. in Opp. to Pl. Mot. for Temp. Inj. at 7-10 (citing *Purcell* and the Florida *Purcell*-like cases); *see also In re Khanoyan*, 637 S.W.3d 762, 765 (Tex. 2022); *Moore*

v. Lee, 2022 Tenn. LEXIS 133, at *15 (Tenn. 2022); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (Ill. App. Ct. 2008); *Liddy v. Lamone*, 919 A.2d 1276, 1287 (Md. 2007).

Third, supervisors of elections, as well as congressional candidates and their campaigns, have been relying upon the enacted congressional district map for three weeks. The supervisors have been updating voter information data, procuring materials to print and ship ballots, and obtaining legislative approval for their new precinct lines. Because of the enacted map, congressional candidates know where they are going to run, and their campaigns know which voters' doors to knock.

The Secretary provided the affidavits of Duval County Supervisor of Elections Chief Election Officer Robert Phillips and Columbia County Supervisor of Elections Tomi Brown. *See* Resp. in Opp. to Pl. Temp. Inj. Mot. Exs. 1 & 2. They have expressed deep concern about the imposition of a new map at this late juncture. *Id.* Indeed, Supervisor Brown's statement that it "is not possible" to impose a new map in her county is unrebutted. *Id.* Ex. 1 ¶ 6. Supervisor Brown's and Officer Phillips's affidavits state unequivocally that imposing a new map would lead to prohibitive costs, increase chances of error, and voter confusion. *Id.* Ex. 1 & 2. Plaintiffs failed to produce any affidavits from the supervisors of elections from Gadsden, Jefferson, Madison, Hamilton, Baker, or Nassau Counties—the counties predominately affected by Proposed Map A—that suggest otherwise. And Plaintiffs attempt to undercut Duval County's concerns based on a quote from a newspaper story taken out of context, where the Duval official never said that "Duval County could implement this Court's Order." Mot. to Vacate at 5. Plaintiffs' spin on hearsay within hearsay stands in stark contrast to Mr. Phillips's second affidavit where he states that Plaintiffs take his comments "out of context," that he "stand[s] by [his] first affidavit in this case," and that "[i]mplementing any map other than the enacted map remains exceedingly difficult and increases the chances for error and voter confusion and decreases voter confidence." **Exhibit 15 ¶ 7.**

The State has already informed the supervisors that this Court's decision will be (and now has been) appealed, which triggers an automatic stay. **Exhibit 16.** As such, supervisors must continue to use the current, enacted congressional map (SB 2C) pending the appellate process. *Id.*

It makes little, if any, sense to force north Florida counties to stop midstream and redo their efforts with a new map, only to have the temporary injunction reversed by either a three-judge First District Court of Appeal panel, an *en banc* First District Court of Appeal panel, or the Florida Supreme Court. This Court echoed the same point at the preliminary injunction hearing. *See* **Exhibit 13** at 152:14 – 153:11. Efficient election administration, as well as confidence in the electoral process, would be severely undermined by this start-stop-start approach.

B. Plaintiffs Are Not Likely to Prevail on the Merits of the Appeal.

It is far from certain that Plaintiffs will prevail on appeal. After all, "statutes," including statutes that set congressional districts, "are presumed constitutional, and the challenging party has the burden to establish the statute's invalidity beyond a reasonable doubt." *People United for Med. Marijuana*, 250 So. 3d at 828 (quoting *Jackson v. State*, 191 So. 3d 423, 426 (Fla. 2016)).

Plaintiffs' non-diminishment claim is not likely to prevail—especially considering the Secretary's Equal Protection Clause argument, according to which Plaintiffs have failed to show that the race-based district they ask this Court to impose satisfies strict scrutiny, the U.S. Supreme Court's most rigorous standard of review. *See Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017); *see also Wis. Leg. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) (rejecting a court ordered map containing an additional black majority legislative district that was selected by the state Supreme Court without adequate justification).

In a recent opinion, the Florida Supreme Court, when applying the non-diminishment standard to state legislative maps, took no position on the Equal Protection Clause concerns that the Governor raised in an advisory opinion request:

> Governor Ron DeSantis recently sought an advisory opinion from this Court, in part seeking our views on the meaning and application of the non-diminishment standard in article III, section 21(a). For the reasons we explained in *Advisory Opinion to the Governor re Whether Article III Section 20(a) of the Florida Constitution Requires the Retention of a District in Northern Florida*, 333 So. 3d 1106 (Fla. 2022), we declined to issue the advisory opinion. Our decision today should not be taken as expressing any views on the questions raised in the Governor's request.

In re Sen. J. Res. Of Legis. Apportionment 100, 334 So. 3d 1282, 1289 n.7 (Fla. 2022). At best, then, the law remains unsettled. It also bears emphasis that during the last redistricting cycle, when the Florida Supreme Court approved benchmark congressional district 5, the court was not presented with, and took no position on, whether application of the non-diminishment provision to that district violated the Equal Protection Clause. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402 (Fla. 2015) (*Apportionment VII*); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) (*Apportionment VIII*).

This Court also failed to adequately address the Secretary's *Purcell* and mandatory injunction arguments. **Exhibit 13** at 131:14 – 149:6. Given relevant Florida Supreme Court precedent, as well as the weight of federal and other state precedent, there is a strong possibility that either the First District or the Florida Supreme Court will embrace those arguments to vacate the temporary injunction. *See, e.g.*, *State ex rel. Haft v. Adams*, 238 So. 2d 843, 845 (Fla. 1970) (providing the *Purcell*-like reasoning that judicial "interfere[nce]" with the "orderly holding of" elections "would result in confusion and injuriously affect the rights of third persons"); *Wilson v. Sandstrom*, 317 So. 2d 732, 736 (Fla. 1975) ("It is a general rule that a mandatory injunction can only be properly granted on a final hearing.").

C. Plaintiffs Will Not Suffer Irreparable Harm.

Plaintiffs also failed to establish that they will suffer irreparable harm if the stay is maintained. As the Secretary will demonstrate on appeal, Plaintiffs do not have a fundamental constitutional right to reside in a racially gerrymandered congressional district that violates the Equal Protection Clause

of the Fourteenth Amendment to the U.S. Constitution. *See* U.S. Const. amend. XIV, § 1; *Cooper*, 137 S. Ct. at 1455. As a result, maintaining the automatic stay will not harm Plaintiffs.

III. CONCLUSION

For the foregoing reasons, the Secretary asks that this Court deny Plaintiffs' motion.

Dated: May 16, 2022

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Counsel for the Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on May 16, 2022.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

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

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
_______________________________________/

DEFENDANT SECRETARY OF STATE LAUREL LEE'S EXHIBIT LIST

Exhibit No.	**Description**
12	Declaration of Dr. Douglas Johnson
13	Transcript of May 11, 2022, Hearing before Circuit Judge J. Layne Smith
14	Appellees' Suggestion for Certification, filed with the Court May 13, 2022
15	Second Affidavit of Robert Phillips
16	Email from Brad McVay, General Counsel, to Florida Supervisors of Elections

EXHIBIT 12

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

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

Plaintiffs,

v. Case No: 2022 CA 0666

LAUREL M. LEE, in her official capacity
as Florida Secretary of State, et al.,

Defendants.
_______________________________________/

DECLARATION OF DR. DOUGLAS JOHNSON

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. My qualifications are stated in my original report. The following is true of my own personal knowledge and I otherwise believe it to be true.
2. I was asked to review the amended "Map A" map of Congressional Districts provided by the plaintiffs.

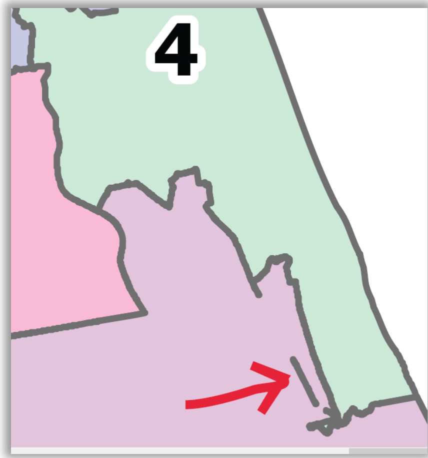
OPINIONS

3. Despite plaintiff's sworn statement, it appears clear that two non-contiguous parts of the original "Map A" shown in the Reply Brief PDF map were changed to make them contiguous in the amended "Map A" provided as a census block assignment file.
4. Despite plaintiff's statement that Districts 7 through 28 are unchanged from the enacted map (P000C0109) in fact there are three small changes, one of which includes a change in the border between CD12 and CD3.

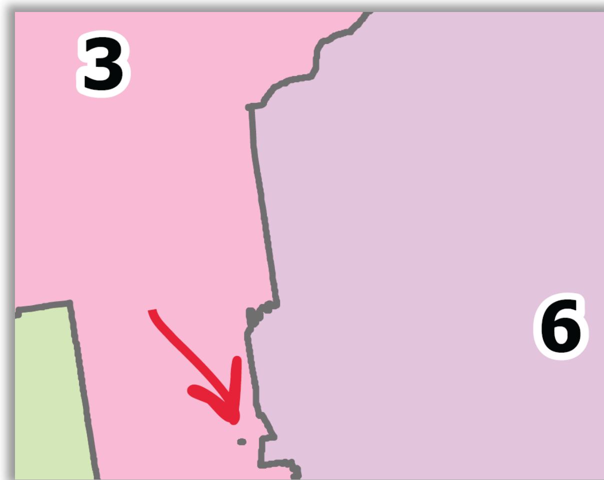
5. Congressional Districts 2 through 5 in the Amended Map A split just as many cities and counties as Districts 2 through 5 in what I termed "plaintiff's map" (H000C8015) in my original report.
6. Congressional Districts 2 through 5 in the Amended Map A are significantly less compact than even what was "plaintiff's map" (H000C8015) in my original report.
7. Amended Map A has never been reviewed or discussed by the Legislature and there has been no opportunity for public comment on it.
8. Amended Map A links distant pockets of distant and unrelated concentrations of Black/African-American population in the same manner as the plaintiff's previously preferred map. (Discussed and mapped in my original report.)
9. Amended Map A divides Leon County and the City of Tallahassee along lines explained predominately by race.
10. Amended Map A divides Jacksonville along boundary lines explained predominately by race.

AMENDED MAP A CHANGES FROM ORIGINAL MAP A

11. Despite plaintiff's sworn statement to the contrary, the PDF map of Original Map A (provided in plaintiff's Reply Brief) clearly contained a non-contiguous area within CD6, which is clearly seen with any PDF viewer that allows a viewer to zoom in on the map (I added the red arrow to highlight the non-contiguous area):



12. Using my Maptitude redistricting software, I was able to identify the "gap" between that area and the rest of CD4 as Census Block 121090212091009. In the PDF map this Census Block is clearly assigned to CD6 while the one or two Census Blocks north of it are assigned as non-contiguous pieces of another district (likely CD4, but that cannot be confirmed in the PDF map).
13. In the PDF map of Original Map A, CD3 also contains a non-contiguous piece of another CD (again I added the red arrow to highlight the non-contiguous area):



14. This is clearly a non-contiguous area in the PDF map provided of the original Map A, but was changed to make it contiguous in the census block assignment file provided for Amended Map A.

UNDISCLOSED DIFFERENCES FROM ENACTED MAP DISTRICTS 7-28

15. Census Block 120830010031087 was moved from D12 in the Enacted Map to D3 in Amended Map A. This is a zero-population river block that is entirely in the Withlacoochee River, and that river is the border of D12 and D3. The Enacted map used the east bank of the river as the border, and Map A uses the center of the river.
16. Census Block 120860141001018 was moved from Enacted Map district 28 to district 26 in Amended Map A. This is a zero-population census block that includes only the middle lanes of Hwy 836 on the north edge of Tamiami in Miami-Dade County.
17. Census Block 121050157024030 was moved from Enacted Map district 9 to district 18 in Map A. This is a zero-population census block along the border of what appears to be a creek or irrigation canal on the Polk County / Osceola County border.

COUNTY SPLITS ANALYSIS

18. Districts 2 through 5 of Amended Map A contain eight county splits, the same number as plaintiff's previously preferred map (H000C8015). Duval County's population exceeds the population of a Congressional District and thus the County must be split. Excluding Duval County, Amended Map A and plaintiff's previously preferred map both split 7 counties – 75% more than the four counties split in the Enacted Map.

CITY, TOWN AND VILLAGE SPLITS ANALYSIS

19. Districts 2 through 5 of Amended Map A contain the same divisions of Jacksonville and Tallahassee included in plaintiff's previously preferred map. The split of Jacksonville is required due to its size. Where the Enacted Map splits no city, town, or village that is small enough to fit within one Congressional District, Amended Map A divides one (Tallahassee).

COMPACTNESS ANALYSIS

20. Districts 2 through 5 of the enacted Congressional District map are significantly more compact than the same districts in Amended Map A, which is significantly less compact than even plaintiff's previously preferred map Districts 2 through 5.
21. At 0.46, the average Polsby-Popper compactness score for the enacted map's districts 2, 3, 4 and 5 is more than double the average of Amended Map A (0.20) [plaintiff's previously preferred map averaged 0.27].
22. In Amended Map A, CD3's Polsby-Popper score drops to 0.31. It was 0.50 in the Enacted Map and from 0.54 in plaintiff's previously preferred map. This low 0.31 score is the highest of all the four focus districts (2 through 5) in Amended Map A, but remains less-compact than even the **least** compact district (among these 4 districts) in the Enacted Map (CD4 at 0.32).

Districts 2 - 5		Polsby-Popper Compactness		
District	Adopted	2016	Plaintiff	Amended Map A
2	0.48	0.21	0.25	0.25
3	0.50	0.53	0.54	0.31
4	0.32	0.17	0.18	0.14
5	0.53	0.10	0.11	0.11
Average	0.46	0.25	0.27	0.20

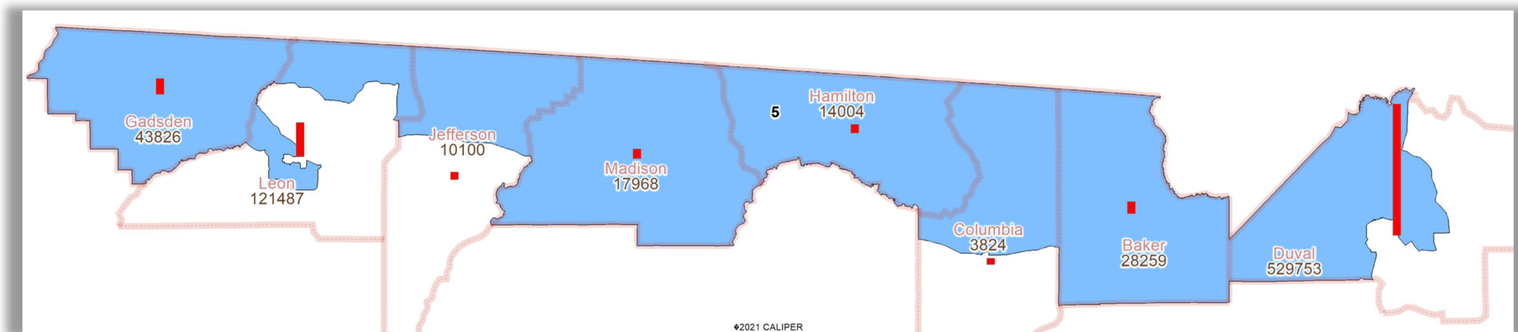
LINKING DISTANT POCKETS OF POPULATION

23. Amended Map A provides a tenuous and sparsely populated 116-mile link between Gadsden / Leon counties in the west and Duval County in the east. Amended Map A links the two distant regions using a string of sparsely populated counties – and splitting two of those five those counties to further depopulate the "bridge."

24. Of the 769,221 people in Amended Map A Congressional District 5, 529,753 (68.9%) reside in Duval County while 165,313 (21.5%) reside at the far west end in Leon or Gadsden Counties. Combined, over 90 percent of the District population reside at the extreme ends of the 204-mile-long district.

25. At just 74,155, the total population in the five "bridge" counties are less than ten percent of the District population. The "bridge" geography does not even encompass the Interstate 10 corridor, as Jefferson County and Columbia County are both split right along the freeway (excluding the southern side of the freeway corridor from the District), and CD5 completely excludes the Suwannee County section of the Interstate 10 corridor:

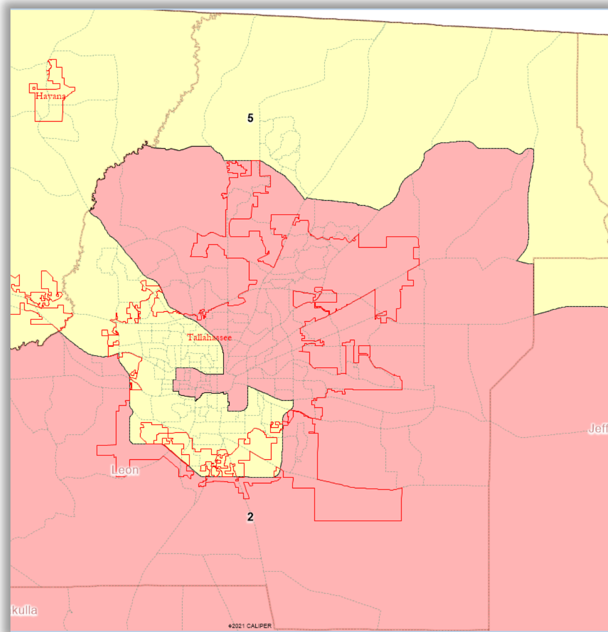
Amended Map A Population by County:



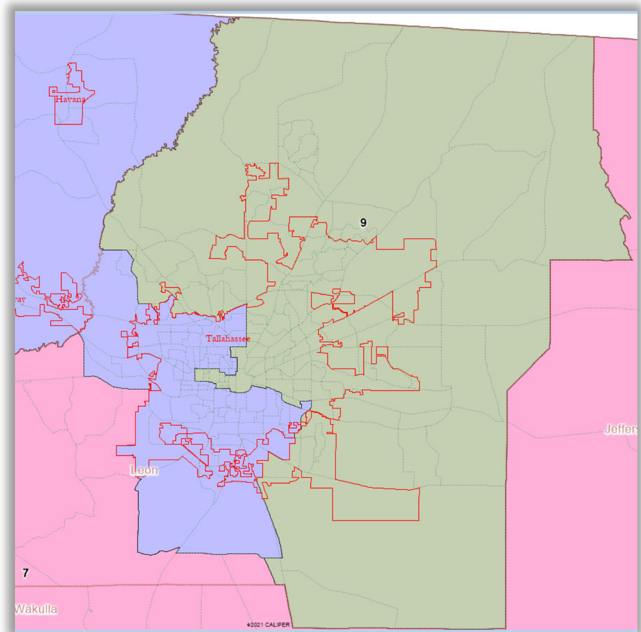
LEON COUNTY / TALLAHASSEE SPLIT

26. Amended Map A divides Leon County and Tallahassee along the exact same lines as plaintiff's previously preferred map, with the same problems I discussed in my original report.

27. Plaintiff's claim that Amended Map A follows the same lines as the adopted State House map is false. In fact, the State House district that comes into southern Tallahassee is not the same State House district that comes across the northern part of Leon County. In addition, the State House district that comes into southern Tallahassee has significantly different boundaries than those in Amended Map A. A simple visual glance shows the significant geographic and population differences between the two maps:

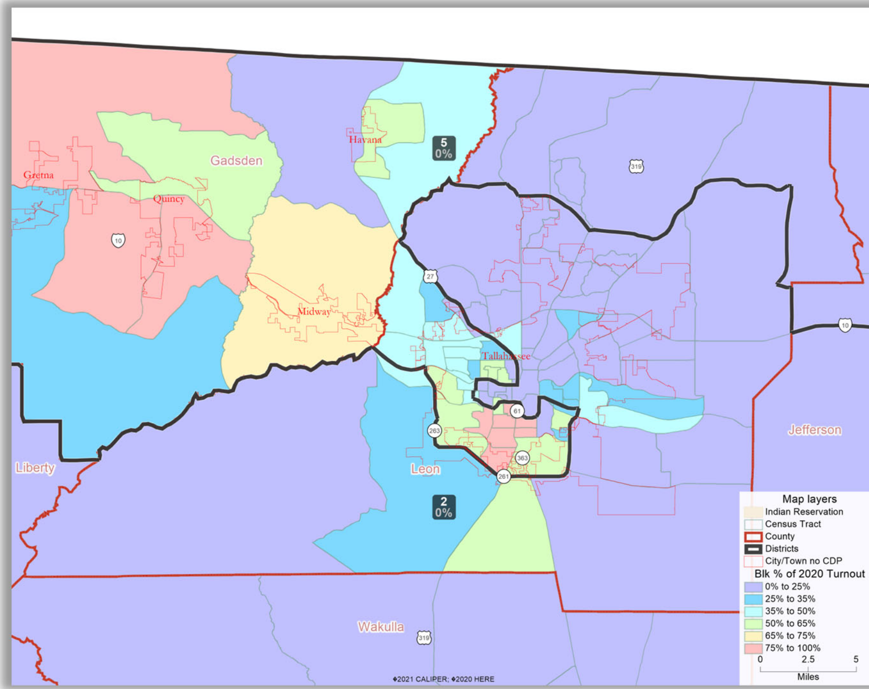


Amended Map A



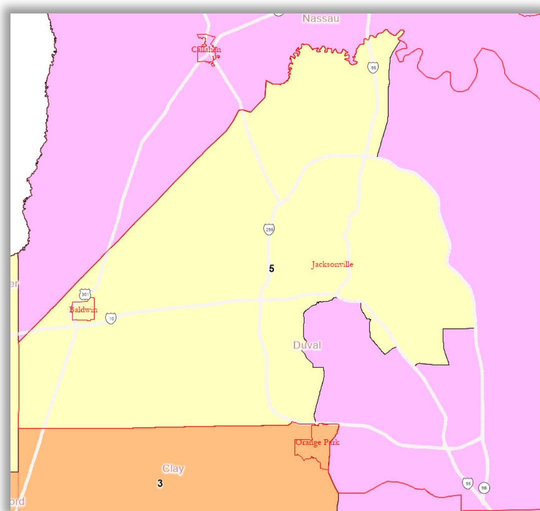
Enacted State House Map

28. Amended Map A maintains the same Leon County-to-Gadsden County-to-Leon County configuration of CD5, picking up only the most-heavily-Black Census Tracts inside Tallahassee, as I discussed in my original report:

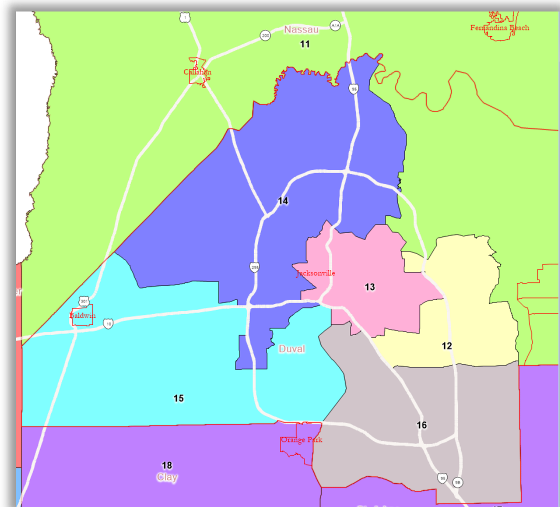


DUVALL COUNTY / JACKSONVILLE SPLIT

29. Plaintiff's claim that Amended Map A follows the same highways through Jacksonville as the enacted State House map is at best misleading. Other than both maps following the northern city border of Jacksonville, Amended Map A and the Enacted State House Map are completely different:

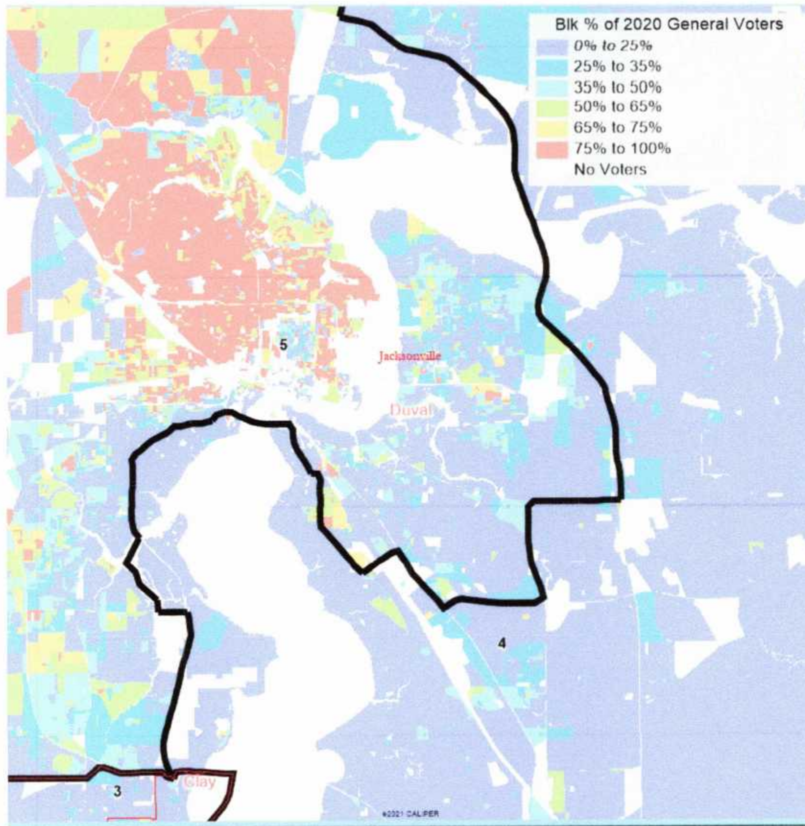


Amended Map A



Enacted State House Map

30. Clearly plaintiff's claim to have followed State House district lines is false. The data show the plaintiff followed racial data fairly precisely in drawing the boundary between CD4 and CD5 along the St Johns River and the I-95 corridor:



This the 13th day of May, 2022.

By:
Dr. Douglas Johnson

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Los Angeles)

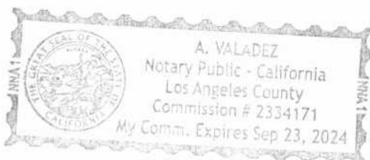
On 05-13-2022 before me, A. Valadez, Notary Public,
Date *Here Insert Name and Title of the Officer*

personally appeared Dr. Douglas Johnson
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature A. Valadez
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

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Title or Type of Document: Court declaration Document Date: 05-13-2022

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Signer's Name: ____	Signer's Name: ____
☐ Corporate Officer — Title(s): ____	☐ Corporate Officer — Title(s): ____
☐ Partner — ☐ Limited ☐ General	☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact	☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator	☐ Trustee ☐ Guardian or Conservator
☐ Other: ____	☐ Other: ____
Signer Is Representing: ____	Signer Is Representing: ____

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EXHIBIT 14

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

LAUREL M. LEE, in her 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' SUGGESTION FOR CERTIFICATION

Appellees Black Voters Matter Capacity Building Institute, Inc., Equal Ground Education Fund, Inc., League of Women Voters of Florida, Inc., League of Women Voters of Florida Education Fund, Inc., Florida Rising Together, Pastor Reginald Gundy, Sylvia Young, Phyllis Wiley, Andrea Hershorin, Anaydia Connolly, Brandon P. Nelson, Katie Yarrows, Cynthia Lippert, Kisha Linebaugh, Beatriz Alonso, Gonzalo Alfredo Pedroso, and Ileana Caban, respectfully suggest that the order under review by this Court should be certified for immediate review by the Florida Supreme Court and state:

1. Florida Rule of Appellate Procedure 9.125(a) authorizes this Court to certify that a judgment requires immediate resolution by the Supreme Court because

the issues are of great public importance. This is the procedure required to invoke the Florida Supreme Court's constitutional authority to review such decisions pursuant to Article V, Section 3(b)(5) of the Florida Constitution.

2. As the district court determined, "this case is one of fundamental public importance." Order at 1. The Secretary seeks to overturn the district court's order finding that Florida's 2022 congressional plan (the "Enacted Plan") violates Article III, Section 20 of the Florida Constitution by diminishing the ability of Black voters in North Florida to elect candidates of their choice and ordering the state to implement a remedial plan. In so ordering, the district court recognized that "time is of the essence" in a case like this one; for Florida voters to obtain relief in advance of the 2022 elections, Florida's election apparatus needs to begin implementing such a new plan within just few weeks.

3. The Secretary's appeal thus concerns the administration of the state's elections and the fundamental right to vote, issues the Florida Supreme Court has made clear are of exceeding public importance. Addressing precisely this issue last redistricting cycle, the Florida Supreme Court granted an extraordinary writ staying this Court's prior ruling on a challenge to a districting plan because of "the importance and statewide significance of" the issues at stake and noted that this Court could certify its decision in that appeal for Supreme Court review in part due to "the statewide importance of [the] litigation." *League of Women Voters of Fla. v.*

Data Targeting, Inc., 140 So. 3d 510, 511, 514 (Fla. 2014). Appreciation for the public interest at stake in districting litigation pervaded the Court's decisions throughout the cycle. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 (Fla. 2015) (describing Fair Districts Amendment as "designed to restore the core principle of republican government") (internal quotation marks omitted); *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 614 (Fla. 2012) (describing Court's "important responsibility to ensure that the joint resolution of apportionment comports with both the United States and Florida Constitutions"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("This Court has an obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts.") (internal quotation marks omitted). As the Court explained, "the right to elect representatives—and the process by which we do so—is the very bedrock of our democracy." *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 599-600.

4. The Court's respect for the right to vote has carried forward. Just a few months ago, the Florida Supreme Court acknowledged the public importance of the issues at stake in this case when presented with Governor DeSantis's request for an advisory opinion, inviting that Court to find CD-5 unconstitutional. The Court recognized "the importance of the issues presented by the Governor," but declined his invitation, noting the (then) lack of a factual record necessary to the Court's

considered adjudication of such weighty issues.[1] *See Advisory Op. to Gov.*, 333 So. 3d 1106, 1108 (Fla. 2022).

5. This Court too has determined that cases concerning the state's districting are of such great public importance and urgency that certification was warranted not only of an appeal addressing the merits of a challenge to the constitutionality of a districting plan, *League of Women Voters v. Detzner*, 178 So. 3d 6, 6-8 (Fla. 1st DCA 2014), but also one concerning a third-party discovery dispute concerning privilege and trade secret rights arising out of that claim, *Non-Parties v. League of Women Voters of Fla.*, 2014 WL 2770013, at *1 (Fla. 1st DCA June 19, 2014) (en banc). And this Court granted pass-through certification when those plaintiffs still had roughly two years to obtain relief before the next election. *League of Women Voters*, 178 So. 3d at 7 (granting pass through to ensure sufficient time for the Supreme Court to grant relief despite "plaintiffs['] acknowledge[ment] that the 2016 election is approximately two years away").

6. This appeal comes with yet more urgency. As the district court found, while there is still time to implement a remedial plan in time for the 2022 congressional elections, that window will likely close within a few weeks, *see* Order

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[1] This case now has the factual record that the Florida Supreme Court desired, including specifically the required "functional analysis" needed to determine whether there has been diminishment in minority voters' ability to elect their candidates of choice. *See Advisory Op. to Gov.*, 333 So. 3d at 1108; *see also* Order at 7-10.

at 16-19, leaving Plaintiffs to suffer irreparable harm without chance for relief, *see id.* at 15; *see also League of Women Voters*, 178 So. 3d at 8 ("The decision to certify [an] appeal must not be made in isolation but rather in light of all of the facts and circumstances of the case.").

7. This appeal, therefore, cannot wait for briefing, argument, and judgment in this Court, even under an expedited schedule. No matter how quickly this Court moves, the time the parties would spend briefing the issues at stake and the Court would spend weighing their competing arguments, would severely subtract from the time available for the Supreme Court to receive the same briefing and complete the same analysis in order to provide final word on the constitutionality of the Enacted Plan. As this Court explained in certifying related questions last cycle, "[t]o 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." *Id*. at 8. Similarly, this appeal requires immediate certification to the Supreme Court if Plaintiffs are to be granted relief in time for the 2022 elections.

WHEREFORE, the Plaintiffs respectfully request the Court certify the trial court's order for immediate resolution by the Florida Supreme Court.

Rule 9.125(e)(3) Certificate

The undersigned attorneys express a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the Supreme Court and is both of great public importance and will have a great effect on the administration of justice throughout the state.

Dated: May 13, 2022

Respectfully submitted,

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Counsel for Plaintiffs
+Admitted Pro hac vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 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.

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111

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EXHIBIT 15

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

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

Case No: 2022 CA 0666

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.

_______________________________/

SECOND AFFIDAVIT OF ROBERT PHILLIPS

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this day personally appeared Robert Phillips, who, being by me first duly sworn, deposes and says, under penalty of perjury:

1. I am over the age of eighteen (18) and am otherwise competent to make the statements in this affidavit.

2. I have personal knowledge of the matters contained herein.

3. I am the Chief Elections Officer for the Duval County Supervisor of Elections. I began working in the office in 1991. As Chief Elections Officer, I am responsible for legislative services, budget preparation, procurement, calendar, and other election-related duties. My many duties include the implementation of all reapportionment plans in Duval County.

4. The Duval County Supervisor of Elections office administers elections in Duval County. Election administration includes the timely and accurate assignment of voters to the races in which they can cast ballots; the creation of voting precincts; the preparation of ballots specific

to groups of voters who may vote in particular races; the printing of those ballots; and the timely mailing of those ballots to voters consistent with state and federal law. Accurate information concerning delineating this information is also provided to voters on voter information cards.

5. I have reviewed the Plaintiffs' motion to vacate the automatic stay in this case, including footnote one, which references my prior testimony in this case and a newspaper quote attributed to me.

6. While the newspaper quote attributed to me is accurate, the Plaintiffs' use of it takes the quote out of context.

7. I stand by my first affidavit in this case. Implementing any map other than the enacted map remains exceedingly difficult and increases the chances for error and voter confusion and decreases voter confidence.

THE AFFIANT SAYS NOTHING FURTHER.

By: ______________________
Robert Phillips

STATE OF FLORIDA
COUNTY OF DUVAL

The foregoing document was sworn to and subscribed before me this 16th day of May, 2022, by Robert Phillips, who is personally known to me or produced ____________________ as identification.

Personally appeared

____
NOTARY PUBLIC
My Commission Expires:

LANA G. SELF
Notary Public, State of Florida
My Comm. Expires 08/09/2025
Commission No. HH162692

EXHIBIT 16

From:	McVay, Brad R.
To:	Adkins, Janet; Andersen, Mark; Anderson, Chris; Anderson, Shirley; Arnold, Melissa; Arrington, Mary Jane; Baird, Maureen "Mo"; Ballard, Seth; Barton, Kim; Beasley, Bobby; Bennett, Michael; Brown, Tomi; Cannon, Starlet; Chambless, Chris H.; Chason, Sharon; Conyers, Grant; Corley, Brian; Cowles, Bill; Davis, Vicki; Dehn, Dan; Doyle, Tommy; Driggers, Heath; Dunaway, Carol; Earley, Mark; Edwards, Jennifer J.; Edwards, Lori; Farnam, Aletris; Griffin, Joyce; Hale, Bryce; Hanlon, John; Hart, Travis; Hays, Alan; Hogan, Mike; Hoots, Brenda; Hutto, Laura; Jones, Tammy; Keen, Bill; Kinsey, Jennifer; Knight, Shirley; Latimer, Craig; Lenhart, Kaiti; Lewis, Lisa; Link, Wendy; Lux, Paul; Marconnet, Amber; Marcus, Julie; Matthews, Maria I.; McNeill, Justin "Tyler"; Meadows, Therisa; Milton, Christopher; Morgan, Joe; Negley, Mark; Oakes, Vicky; Osborne, Deborah; Overturf, Charles; Riley, Heather; Rudd, Carol F.; Sanchez, Connie; Scott, Joe; Scott, Lori; Seyfang, Amanda; Smith, Diane; Southerland, Dana; Stafford, David H.; Stamoulis, Paul; Swan, Leslie; Treppiedi,Vincenza; Turner, Ron; Villane, Tappie Ann; Walker, Gertrude; White, Christina; Wilcox, Wesley; Adkins, Janet; AdminManateeCounty; Anderson, Shirley; Armstrong, Linda; Arnold, Melissa; Baird, Maureen "Mo"; Ballard, Seth; Barksdale, Matt; Barton, Kim; BayCountySOE; Bennett, Michael; Bobanic, Tim; Bridges, Christina; Brittain, Paula; Brown, Tomi; Burger, Joanne; Cannon, Starlet; Carter, Leslie; Chason, Sharon; ClayCountySOE; CollierCountySOE; Conyers, Grant; Corley, Brian; Dehn, Dan; Delesdernier, Carl; Dickerson, Katrina; Doyle, Tommy; Driggers, Heath; Dunaway, Carol; DuvalCountySOE; Earley, Mark; Farnam, Aletris; Figueroa, Annette; Fryman, Melinda; GadsdenCountySOE; Gibson, Stephanie; Greene, Celina; Hankemeyer, Kim; Hart, Travis; Hays, Alan; HighlandsCountySOE; HillsboroughCountySOE; Hogan, Mike; Hoots, Brenda; Hutto, Laura; Jackson, Brayden; JacksonCountySOE; James, Thomas; Jones, Tammy; Keen, Bill; Kinsey, Jennifer; Lenhart, Kaiti; LeSuer, Timothy; Lewis, Lisa; LibertyCountySOE; Long, Sarah; Lux, Paul; Mahan, Kemie; Marcus, Julie; MarionCountySOE; Marisa Crispell; MartinCountySOE; Mayo, Wendy; McGirr, Louise; McNeill, Justin "Tyler"; Meadows, Therisa; Merrick, Jason; MiamiDadeCountySOE; Miller, Scott; Milton, Christopher; Molina, Imaltzin; MonroeCountySOE; Moore, Christopher; Moreno, Luis; Morgan, Joe; Morley, Tiffany M.; Mosca, Alex; NassauCountySOE; Negley, Mark; Norris, Tina; Nunez, Jorge; Oneal, Casondra; OrangeCountySOE; Osborne, Deborah; OsceolaCountySOE; Overturf, Charles; PalmBeachCountySOE; Pearson, Maria; PinellasCountySOE; PolkCountyElections; Ponce, Jose; Reeves, Barbara; Riley, Heather; Rodriguez, Robert; Rorapaugh, Robin; Rudd, Carol F.; Sacerio, Ed; Sanchez, Connie; SarasotaCountySOE; Savary, Evelyn; Sawczyn, Jamie; Scott, Joe; Scott, Lori; SeminoleCountySOE; Seyfang, Amanda; Smith, Diane; Southerland, Dana; Stafford, Katelyn; Stamoulis, Paul; Steven, Scarselli; StJohnsCountySOE; Swan, Leslie; Teaman, Jason; Thompson, Holly; Treppiedi,Vincenza; Trutie, Suzy; Tyson, Chase; Villane, Tappie Ann; WakullaCountySOE; Walker, Gertrude; Wilkinson, Lori; Earley, Mark; Overturf, Charles; JeffersonCountySOE
Cc:	Davis, Ashley E.; Matthews, Maria I.; Marconnet, Amber; O"Brien, Colleen E.
Subject:	RE: Please read -- 2nd Update on state redistricting case (U.S. congressional map)
Attachments:	Notice Of Appeal To DCA.pdf

Dear Supervisors,

As forecasted in the below communication from this morning, the trial court in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)) entered this afternoon a written Order Granting Motion for Temporary Injunction. The Secretary's Notice of Appeal immediately "stayed" the trial court's ruling pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), causing SB 2-C (the state's current, enacted congressional map) to remain in effect for the upcoming 2022 elections absent further direction from the courts. Therefore, you should continue implementing SB 2-C, the map the Florida Legislature enacted and the Governor approved on April 22, 2022.

The Secretary's Notice of Appeal is attached herein and includes the Order Granting Motion for Temporary Injunction.

We will continue to promptly update you with any additional developments.

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From: McVay, Brad R.
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Subject: Please read -- Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

Yesterday afternoon, in the state court redistricting case (*Black Voters Matter et al v. Lee*, *et al* /2022CA000666, 2nd Jud. Cir.), the trial court held a hearing on Plaintiffs' motion for a temporary injunction and *orally* ruled that they have a likelihood of success on the merits of their claim that SB 2-C (the state's current, enacted congressional map) violates the non-diminishment standard of Article III, Section 20 of the Florida Constitution in portions of North Florida. The trial court indicated that it will soon issue an order in *writing* temporarily enjoining SB 2-C and ordering a different map be put in place – i.e., Plaintiffs' "Proposed Map A." The Secretary intends to appeal the decision to the First District Court of Appeal immediately, but cannot do so until the written order is issued.

The Secretary's appeal will immediately "stay" the trial court's ruling pursuant to the Florida Rules of Appellate Procedure, causing SB 2-C to remain in effect for the upcoming 2022 elections absent further direction from the courts.

We will continue to provide updates and guidance as information becomes available.

Brad McVay
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Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the sender or the Department of State. Parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before relying upon the information provided.

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, et al.,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' NOTICE OF FILING AFFIDAVIT IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION TO VACATE STAY PENDING APPEAL

Plaintiffs hereby give notice of the filing the Affidavit of Dr. Stephen Ansolabehere in support of Plaintiffs' Emergency Motion to Vacate Stay Pending Appeal.

Dated: May 16, 2022

Respectfully submitted,

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Counsel for Plaintiffs

+Admitted Pro hac vice
**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 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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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, *et al.*,

Defendants.

Case No. 2022-ca-000666

AFFIDAVIT OF DR. STEPHEN ANSOLABEHERE

STATE OF MASSACHUSETTS
COUNTY OF SUFFOLK

BEFORE ME, the undersigned authority, personally appeared Stephen Ansolabehere, who, after first being duly sworn, deposes and says:

1. I was retained by Plaintiffs in *Black Voters Matter Capacity Building Inst., Inc. et al. v. Lee et al.*
2. This afternoon, I evaluated the Secretary's opposition to Plaintiffs' motion to vacate the automatic stay and Dr. Johnson's corresponding affidavit.
3. Dr. Johnson flags several Census blocks in his analysis which he says have been moved. All of them are zero population blocks, whose assignment to CDs do not affect the representation of any person in the state of Florida.
4. Dr. Johnson flags two points where he believes there may be discontinuities or non-contiguous areas in the map. The first concerns Interstate 95 in St. Johns County. Census Blocks 12109212901008, 121090212091009, and 121090212091010 correspond to Interstate 95. Each of these blocks has zero population. I performed integrity checks for

discontinuities in CD boundaries and non-contiguous blocks. I found none in the entire map, which, of course, includes St. Johns County. When I prepared Corrected Map A, I fixed the line that Dr. Johnson has highlighted. It corresponds to I-95 and has zero population. The assignment of the 3 Census Blocks corresponding to I-95 in this area of the map is of no consequence to the representation of any population because these are zero population blocks.

5. As Plaintiffs' counsel explained to the court last week, I originally assigned these zero population blocks to CD-4. Assigning them to CD-6 would make the map more compact, and that is my recommendation.

6. Second, Dr. Johnson highlights a black dot in CD-3 in the PDF version of Map A. I do not know what that dot is. I have inspected that area in my software and do not see a non-contiguous area or block. I have run further integrity checks and have found no non-contiguous areas. I have further checked to make sure that all Census Blocks are assigned to CDs.

7. In Paragraphs 15, 16, and 17, Dr. Johnson notes three census blocks that are in different districts in Map A than under the Enacted Map. Each of these Census blocks, as he indicates, have zero population. The three Census Blocks are 120830010031087, 120860141001018, and 121050157024030. They correspond to a river border, the lanes of a highway, and an irrigation canal. They are on the border between districts and are road or waterways. Because they have no population and because they border districts, their assignment is of no consequence in the map. Should the Court have any concern, they can be easily assigned back to the same CDs as assigned in the Enacted Map.

8. If called to testify under oath, my testimony would be consistent with this affidavit.

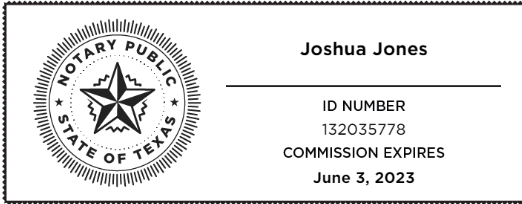
FURTHER AFFIANT SAYETH NOT.

Stephen Daniel Ansolabehere

Stephen Ansolabehere

Texas, Harris County

SWORN TO AND SUBSCRIBED before me this 16th day of May 2022, by Stephen Daniel Ansolabehere, who (check one) ☐ is personally known to me, ☑ produced a driver's license (issued by a state of the United States within the last five (5) years) as identification, or ☑ produced other identification, to wit: DRIVER LICENSE



Notarized online using audio-video communication

Print Name: Joshua Jones

Notary Public, State of ~~Massachusetts~~ Texas

Commission No.: 132035778

My Commission Expires: 06/03/2023

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., EQUAL GROUND EDUCATION FUND, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA EDUCATION FUND, INC., FLORIDA RISING TOGETHER, PASTOR REGINALD GUNDY, SYLVIA YOUNG, PHYLLIS WILEY, ANDREA HERSHORIN, ANAYDIA CONNOLLY, BRANDON P. NELSON, KATIE YARROWS, CYNTHIA LIPPERT, KISHA LINEBAUGH, BEATRIZ ALONSO, GONZALO ALFREDO PEDROSO, and ILEANA CABAN,

Plaintiffs,

Case No: 2022 CA 0666

NOTICE OF APPEAL OF A NONFINAL ORDER

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, ASHLEY MOODY, in her official capacity as Florida Attorney General, the FLORIDA SENATE, the FLORIDA HOUSE OF REPRESENTATIVES, WILTON SIMPSON, in his official capacity as the President of the Florida Senate, CHRIS SPROWLS, in his official capacity as the Speaker of the Florida House of Representatives, RAY RODRIGUES, in his official capacity

as Chair of the Senate Committee on Reapportionment, and TOM LEEK, in his official capacity as Chair of the Chair of the House Redistricting Committee,

Defendants.
_________________________________/

DEFENDANT SECRETARY OF STATE LAUREL LEE'S
NOTICE OF APPEAL

Notice is given that Secretary of State Laurel Lee, Defendant/Appellant, under Florida Rules of Appellate Procedure 9.030(b)(1)(B) and 9.130(a)(3)(B), appeals to the First District Court of Appeal the Order Granting Motion for Temporary Injunction, a nonfinal order, which was rendered on May 12, 2022. A copy of the order is attached.

This notice of appeal triggers an automatic stay pending review. Fla. R. App. P. 9.310(b)(2) ("The timely filing of a notice [of appeal] shall automatically operate as a stay pending review . . . when the state, any public officer in an official capacity, board, commission, or other public body seeks review."); *see DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145, 150 (Fla. 1st DCA 2020) ("Rule 9.310(b)(2) provides for an automatic stay when the state or a public officer seeks review of a trial court's order.").

Dated: May 12, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on May 12, 2022.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

Attachment 1

Filing # 149498934 E-Filed 05/12/2022 04:23:44 PM

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

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., EQUAL GROUND EDUCATION FUND, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA EDUCATION FUND, INC., FLORIDA RISING TOGETHER, PASTOR REGINALD GUNDY, SYLVIA YOUNG, PHYLLIS WILEY, ANDREA HERSHORIN, ANAYDIA CONNOLLY, BRANDON P. NELSON, KATIE YARROWS, CYNTHIA LIPPERT, KISHA LINEBAUGH, BEATRIZ ALONSO, GONZALO ALFREDO PEDROSO, and ILEANA CABAN,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, ASHLEY MOODY, in her official capacity as Florida Attorney General, the FLORIDA SENATE, the FLORIDA HOUSE OF REPRESENTATIVES, WILTON SIMPSON, in his official capacity as the President of the Florida Senate, CHRIS SPROWLS, in his official capacity as the Speaker of the Florida House of Representatives, RAY RODRIGUES, in his official capacity as Chair of the Senate Committee on Reapportionment, and TOM LEEK, in his official capacity as Chair of the House Redistricting Committee,

Defendants.

Case No. 2022-CA-000666

ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION

The Court held an evidentiary hearing on the Plaintiffs' Motion for Temporary Injunction on May 11, 2022. The parties stipulated to the admission of all filed exhibits. The Court heard testimony, reviewed the pleadings, sworn affidavits, and other filed exhibits, and considered counsels' arguments. Moreover, it has critically read pertinent cases decided by state and federal courts and the federal and state constitutions. The Court makes the following findings of fact and conclusions of law:

INTRODUCTION

This case is one of fundamental public importance, involving fundamental constitutional rights. If this Court had the luxury of time, it would take longer to render this order. Notwithstanding, because time is of the essence, the Court renders this order now.

This lawsuit challenges the congressional district plan adopted by the Legislature and signed by Governor DeSantis after the 2020 Census (the "Enacted Plan"). Plaintiffs, who include several nonpartisan civic organizations and Florida voters, filed this suit the same day the Enacted Plan was signed. Plaintiffs are waging multiple attacks on the Enacted Plan. However, their motion for temporary injunction is directed to only one issue. The other issues pled remain to be decided another day after discovery and a trial on the merits.

Plaintiffs now move for a temporary injunction enjoining Secretary of State Laurel M. Lee from implementing the Enacted Plan during the 2022 primary and general elections for Congress regarding benchmark Congressional District 5. Plaintiffs base their motion solely on the ground that the Enacted Plan violates the non-diminishment standard of Article III, Section 20(a) of the Florida Constitution because it diminishes the ability of Black voters in North Florida to elect their candidate of choice. Plaintiffs argue that they and other Florida voters will suffer irreparable harm if the violation is not remedied prior to the 2022 elections, and furthermore claim that an injunction will serve the public interest.

After a hearing and consideration of testimony, exhibits, pleadings, legal memoranda, and oral argument, the Court grants Plaintiffs' motion for a temporary injunction. The Court enjoins implementation of the Enacted Plan and orders the implementation of Plaintiffs' Proposed Map A.

BACKGROUND

I. The Fair Districts Amendment

On November 2, 2010, Floridians voted by an overwhelming margin of 62.9% to 37.1% to enact the Fair Districts Amendment to the Florida Constitution. Pls.' Ex. 1-A. The Amendment established new standards to constrain the Legislature's once-in-a-decade exercise of its congressional reapportionment power. The amendment places two tiers of constraints on the Legislature. Article III, Section 20 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). The inclusion of this italicized phrase—known as the "non-diminishment standard"—in Tier I "mean[s] that the voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process." *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d 597, 615, 677 (Fla. 2012).

The Florida Supreme Court has held that the 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." *Id.* at 625. 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.

II. Benchmark CD-5

In 2015, the Florida Supreme Court invalidated the Legislature's 2012 congressional redistricting plan under the Fair Districts Amendment after finding that partisan intent tainted the entire redistricting process. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015) ("*LWV I*"). The Court provided specific guidance regarding numerous districts, including Congressional District 5 ("CD-5"), in North Florida. Relevant here, 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. The Court acknowledged that an East-West configuration 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." *Id.* at 406.

The Court eventually 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 election cycles. At the time of its adoption, the Benchmark Plan's version of "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%. Pls.' Ex. 3 ¶ 32 & tbl.1. 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. Pls.' Ex. 1-Y. The Benchmark CD-5 can be seen below:

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. Pls'. Ex. 3 at 8, fig. 1. For much of the state's history, Black voters in these communities—and, indeed, in the state more broadly—have been unable to participate equally in the electoral process. In the wake of Reconstruction, the State commenced a centuries-long policy of disenfranchisement that made it impossible for Black voters to even register to vote. *Id.* at 9–11. These policies had their desired effect: Between 1876 and 1992, Florida did not elect a single Black candidate to Congress. *Id.* at 10. The state's discriminatory voting practices and laws hit the Black residents of North Florida particularly hard. The federal Civil Rights Commission reported that of the 10,930 Black adults living in Gadsden County in 1958, only *seven* were registered to vote. *Id.* at 11. Political discrimination and oppression were felt in every county with a large Black population in North Florida. *Id.* at 12.

The enactment of the federal Voting Rights Act of 1965 increased voter-registration rates in the state's Black communities and provided Black Floridians a means of challenging discriminatory redistricting schemes. *Id.* at 12–17. Through decades of litigation, Black Floridians fought against districting plans that fractured the state's Black populations, particularly in North Florida, eventually obtaining a district that enabled them to elect their candidate of choice. *Id.*

III. The Enacted Plan

The Legislature commenced the redistricting process in September 2021, after receiving the 2020 census data from the U.S. Census Bureau. Both the Florida Senate and the House Legislature 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.*, Pls.' Ex. 1-D at 42 (recognizing that the Florida Constitution parallels federal retrogression standards); Pls.' Ex. 1-E at 15 (same).

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.*, Pls.' Ex. 1-G at 3–4 (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"); Pls.' Ex. 1-H at 54–57, 62–65, 70–73, 78–81 (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.*, Pls.' Exs. 1-G, 1-I, 1-J, 1-K, 1-L.

On March 4, 2022, the Legislature passed a redistricting plan that significantly modified CD-5—but, the Legislature maintained, 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—Plan 8015, or the "Backup Map"—that was intended to take effect if courts found that the primary plan diminished Black voting power in violation of the Florida Constitution. Pls,' Ex. 1-Q. The Backup Map retained the East-West configuration of CD-5 approved in *LVW I*.

Ultimately, Governor DeSantis vetoed the Legislature's Plan on March 29 and called a special legislative session. Pls.' Exs. 1-S, 1-T. Governor DeSantis 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." Pls.' Ex. 1-V at 13. The Legislature nevertheless passed the Enacted Plan on April 21, 2022, and Governor DeSantis signed it into law the next day. Pls.' Ex. 1-W.

The Enacted Plan splits the Benchmark CD-5 into four new districts: new CD-2, CD-3, CD-4, and CD-5. The Enacted Plan disperses over 360,000 voters from the Benchmark CD-5 into each of these new districts. *See* Ansolabehere Rep. ¶ 32, 51. In each of these new districts, minority voters (and Black voters) are now a substantial minority of the voters in the district and are subsumed by that district's white voters. Specifically, Black voters now make up 22.7%, 15.3%, 30.8%, and 12.1% of the voters in those districts, respectively. *Id.* at tbl. 2. The Enacted Plan is shown below:

IV. Procedural History

Plaintiffs include several Black Florida voters who resided in Benchmark CD-5 under the previous congressional plan and now reside in the new CD-2 or CD-4, *see* Pls.' Exs. 4–6 (affidavits

of voter plaintiffs Gundy, Wiley, and Young), and organizations including Black Voters Matter, the League of Women Voters of Florida, Equal Ground, and Florida Rising Together, *see* Pls.' Exs. 7–10 (affidavits of organizational plaintiffs).

Plaintiffs filed this suit on April 22, the day that Governor DeSantis signed the Enacted Plan into law. Plaintiffs allege that the Enacted Plan violates multiple provisions of the Fair Districts Amendment, both at a plan-wide level and with regards to the configuration of specific districts. Plaintiffs filed the present motion for temporary injunction on April 26 on a limited basis, arguing only that the Enacted Plan's configuration of CD-5 violates the non-diminishment standard of Article III, Section 20(a) of the Florida Constitution. Plaintiffs ask this Court to enjoin Secretary of State Laurel M. Lee from administering the 2022 primary and general elections under the Enacted Plan.

LEGAL STANDARD

To obtain a temporary injunction, a movant must demonstrate: "[1] a substantial likelihood of success on the merits; [2] lack of an adequate remedy at law; [3] irreparable harm absent the entry of an injunction; and [4] that injunctive relief will serve the public interest." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017) (quoting *Reform Party of Fla. v. Black*, 885 So. 2d 303, 305 (Fla. 2004) (per curiam)). "The grant or denial of an injunction is a matter that lies within the sound discretion of the trial court." *Grant v. GHG014, LLC*, 65 So. 3d 1066, 1067 (Fla. 4th DCA 2010).

ANALYSIS

I. Plaintiffs have shown a substantial likelihood of proving that the enacted plan violates the non-diminishment standard of Article III, Section 20.

A. Plaintiffs have demonstrated the Enacted Plan will result in diminishment of Black voters' ability to elect their candidate of choice.

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." *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d 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. This inquiry requires "consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of political data and how a minority population group has voted in the past." *Id.* Similarly, a court's review of minority voting power "will involve the review of the following statistical data: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history." *Id.* at 627.

Plaintiffs' expert, Dr. Stephen Ansolabehere, conducted such a functional analysis on both the Benchmark and Enacted Plans. As the Florida Supreme Court has instructed, Dr. Ansolabehere's analysis considered "the racial composition of the population and eligible electorate, the racial composition of registered voters, the racial composition of voter participation, and an analysis of election outcomes." Ansolabehere Rep. ¶ 17. After reviewing Dr. Ansolabehere's reports in this matter and considering his live testimony, the Court finds his testimony to be credible.

First, considering the Benchmark Plan, Dr. Ansolabehere found that Benchmark CD-5 was a district in which Black voters had the opportunity to elect their preferred candidates. Relevant to this analysis were the following findings: Benchmark CD-5 has a minority population of 472,361

people, which is 63.1% of the total population of the district. *Id.* ¶ 32. It has a Black population of 367,467, which accounts for 49.1% of the total population. *Id.* Racial minorities are the majority of registered voters in Benchmark CD-5, and Black voters are the largest group of registered voters. Black voters comprise 45.3% of registered voters in Benchmark CD-5. *Id.* ¶ 34. Minority voters cast the majority of votes in the 2016, 2018, and 2020 general elections under Benchmark CD-5. *Id.* ¶ 35. Black voters were by far the largest group of all voters in all of these elections (ranging from 44.4% to 47.2% percent of all voters). *Id.* Black voters were the largest racial group of voters in all of the Democratic primaries under Benchmark CD-5, and a majority of all voters in two of the three primaries. Black voters vote cohesively in elections in Benchmark CD-5. *Id.* ¶ 36. Under Benchmark CD-5, Black voters elected a Black candidate in each of the U.S. House elections held under Benchmark CD-5. In 2016, 2018, and 2020, approximately 90% of Black voters in Benchmark CD-5 chose Congressman Al Lawson to be their Representative in the U.S. House. *Id.* ¶ 39.

From these factual findings, Dr. Ansolabehere concluded that Benchmark CD-5 was a district in which Black voters had the ability to elect their preferred candidates to Congress. *Id.* ¶ 40. The Court finds the same.

Next considering the Enacted Plan, Dr. Ansolabehere found that there was no district in North Florida that would allow Black voters to elect their preferred candidates. *Id.* ¶ 41. Relevant to this analysis were the following findings: 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. *Id.* ¶ 42. None of these Enacted CDs in North Florida are majority-minority voting age population districts. *Id.* ¶ 44. None of the Enacted CDs in this area are majority-minority in voter registration. *Id.* ¶ 45. White voters are the majority of registered voters in all four of these districts. In the precincts

incorporated into each of the Enacted CDs in this area, white voters cast the majority of votes in the 2016, 2018, and 2020 general elections and primary elections. *Id.* ¶¶ 46-47. In all four of these districts, white voters cohesively voted for the candidates opposed to the Black-preferred candidates. *Id.* ¶ 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.* ¶ 49.

From these factual findings, Dr. Ansolabehere concluded that none of the new districts in North Florida are districts in which Black voters have the ability to elect their preferred candidates to Congress. *Id.* ¶ 41; *see also id.* ¶¶ 50-51. This conclusion is 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. *See* Pls.' Ex. 1-V at 13 (House Redistricting Chair Leek explaining "our staff did a functional analysis and confirmed that it does not perform [for the Black candidate of choice]"). The Court finds the same.

The Court finds the Enacted Plan would diminish the ability of Black voters to elect their candidate of choice in North Florida. The Secretary offers no credible contrary evidence; her experts neither performed a functional analysis nor contested Dr. Ansolabehere's findings. Plaintiffs have shown a substantial likelihood of proving that the Enacted Plan violates the non-diminishment standard of Article III, Section 20.

B. Application of the Florida Constitution's non-diminishment standard does not violate the Equal Protection Clause of the U.S. Constitution.

The Secretary argues that application of the Florida Constitution's non-diminishment standard violates the Fourteenth Amendment of the U.S. Constitution, insofar as the former results in a configuration of CD-5 that maintains the ability of Black voters in North Florida to elect their candidate of choice. The record before this Court does not support such a finding.

Electoral districting violates the federal Equal Protection clause where "(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, 260-61 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995), and *Shaw v. Hunt*, 517 U.S. 899, 902 (1996) ("*Shaw II*")).

The Secretary faces a heavy burden to establish that race predominated in the drawing of 8015's CD-5. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (explaining that the burden of proof lies with the party claiming discriminatory intent). 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.

The Secretary has not established that race was the predominant factor, rather than one of several factors, in the drawing of 8015's CD-5. Race neutral reasons exist for Plan 8015's CD-5. The Legislature made minimal changes between the Benchmark CD-5 and 8015's CD-5 that were required 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 Cnty. Comm'n*, 567 U.S. 758, 764 (2012) ("The desire to minimize population shifts between districts is clearly a valid, neutral state policy"). The record demonstrates the Legislature drew 8015 to comply with the Florida Supreme Court's prior rulings regarding CD-5. *See League of Women Voters of Fla.*, 179 So. 3d at 272 (upholding trial court's adoption of an "East-West" version of CD-5). As the U.S. Supreme Court has explained, a desire to avoid

litigation is specifically one of the race-neutral reasons that may motivate a Legislature to adopt a plan. *See Abbott*, 138 S. Ct. at 2327 (finding race did not predominate where the Legislature chose a plan which would "bring the litigation about the State's districting plans to an end as expeditiously as possible"). Finally, as Dr. Ansolabehere demonstrated, Plan 8015's CD-5 closely followed the newly-enacted State House legislative district lines. This, too, is another reason that could have informed the Legislature's decision to draw a plan like Plan 8015.

Even if the Secretary could show that racial considerations predominated in the drawing of 8015's CD-5, the record indicates that the Legislature's configuration of CD-5 is narrowly tailored to advance compelling state interests. First, compliance with the Fair Districts Amendment's non-diminishment provision is a compelling state interest. While the Fair Districts Amendment is independent from the Voting Rights Act, this provision of the state constitution "follow[s] almost verbatim the requirements embodied in the [Federal] Voting Rights Act." *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 619 (citation omitted and second alteration in original); *see also* Pls.' Ex. 1-D at 42 (recognizing that Florida's Constitution parallels federal retrogression standards); Pls.' Ex. 1-E at 15 (same). The U.S. Supreme Court has repeatedly assumed that compliance with the VRA constitutes 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 v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) ("[T]he Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling."). Given 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.

Second, addressing the history of voting-related racial discrimination and a lack of representation in North Florida in itself constitutes a compelling state interest for CD-5. *See Miller*, 515 U.S. at 920 (1995) (explaining that there is a "significant state interest in eradicating the effects of past racial discrimination"). Plaintiffs presented 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. *See* Pls.' Mem. in Supp. of Mot. For Temp. Inj. ("Br.") at 5-6 (Apr. 26, 2022). As a result, between 1876 and 1992, Florida did not elect a single Black candidate to Congress. *Id.* at 6. As Dr. Sharon Austin describes, "[t]his lack of political representation was the result of redistricting practices that split the state's Black population into districts where their votes would be drowned out by overwhelming White majorities." Pls.' Ex. 3 at 13.

Plan 8015's CD-5 is narrowly tailored to address these compelling state interests. The legislative record includes detailed testimony that 8015's configuration of CD-5 is necessary to ensure minority voters' continued ability to elect candidates of their choice. *See, e.g.*, Fla. H.R. Comm. on Redistricting, recording of proceedings, at 19:45-19:54 (Feb. 25, 2022), https://thefloridachannel.org/videos/2-25-22-house-redistricting-committee (last accessed May 10, 2022) (Chair of House Redistricting Committee noting the Committee's aim "to protect the minority group's ability to elect a candidate of their choice"). The Legislature, which conducted a functional analysis on their redistricting plans, *see* Pls.' Ex 1-V at 13, thus "had good reasons to believe that" 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. This "strong showing of a pre-enactment analysis with justifiable conclusions," demonstrates a compelling state interest. *Wis. Legis.*, 142 S. Ct. at 1249 (citing *Abbott*, 138 S. Ct. at 2335).

The fact that the Enacted Plan's CD-5 is more compact or contains slightly fewer splits of political boundaries does not change this outcome. The Fair Districts Amendment explicitly categorizes compactness and utilization of political boundaries as "Tier Two" standards that must give way when in conflict with "Tier One" standards, including the non-diminishment principle. *See* Fla. Const. Art. III, § 20; *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 615. Moreover, courts have denied racial gerrymandering claims against districts that are even less compact than Plan 8015's CD-5. In particular, 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. Finally, while Plan 8015's CD-5 is not the most compact district, the record also demonstrated that it is far from the least compact. Indeed, 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.

II. Plaintiffs have no adequate remedy at law.

The Court finds 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. Under settled law, plaintiffs lack an adequate remedy at law where, as here, their injuries result from a violation of a fundamental constitutional right. *See, e.g.*, *Gainesville Woman Care*, 210 So. 3d at 1263–64 ("In light of finding that the [challenged law] is likely unconstitutional, there is no adequate legal remedy at law for the improper enforcement of the [law]."); *see also League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018) (granting temporary injunction in voting-related case because injury could not

"be undone through monetary remedies" (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987))); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1282 (N.D. Fla. 2018) (same).

III. Plaintiffs and other Florida voters will suffer irreparable harm absent a temporary injunction.

The Court also finds that Plaintiffs have shown they will suffer irreparable harm absent temporary injunctive relief. Florida "law recognizes that 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);[1] *see also, e.g., Larios v. Cox*, 305 F. Supp. 2d 1335, 1343–44 (N.D. Ga.) (per curiam) (three-judge court) (holding that stay of court's order finding state legislative plans unconstitutional would result in "irreparable harm to the plaintiffs, and to all voters in Georgia who have had their votes unconstitutionally debased," and that the court had "a responsibility to ensure that future elections will not be conducted under unconstitutional plans"), *aff'd*, 542 U.S. 947 (2004). 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. Plaintiffs demonstrated a clear likelihood that if the 2022 primary and general elections were

[1] 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").

conducted under the unlawful Enacted Plan, Plaintiffs' constitutional rights would be violated. Unless the Plaintiffs are provided injunctive relief they will suffer irreparable harm.

IV. Granting Plaintiffs injunctive relief will serve the public interest.

Finally, the Court concludes that granting Plaintiffs' motion serves the public interest. Plaintiffs have shown a clear likelihood that the Enacted Plan violates their fundamental right to vote and "enjoining the enforcement of a law that encroaches on a fundamental constitutional right presumptively 'would serve the public interest.'" *Green v. Alachua Cnty.*, 323 So. 3d 246, 254 (Fla. 1st DCA 2021) (quoting *Gainesville Woman Care*, 210 So. 3d at 1264); *see also Gainesville Woman Care*, 210 So. 3d at 1264 (finding that it "would be specious to require . . . that the trial court make additional factual findings" to determine that enjoining unconstitutional law would be in the public interest).

Nevertheless, citing the U.S. Supreme Court's decision in *Purcell*, the Secretary argues the public would be harmed by granting Plaintiffs relief because imposing a remedial plan this close to the 2022 elections will cause voter confusion. This Court disagrees. *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 the federal precedent the Secretary cites in support of the principle. It has no bearing on state courts. As New York's highest state court recently explained in enjoining that state's congressional plan after that state's candidate qualifying period had already passed, *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 cites *State ex rel. Haft v. Adams*, 238 So. 2d 843 (Fla. 1970). There, the Florida Supreme Court denied a writ of mandamus prohibiting the Secretary from placing certain candidates' names on the ballot three weeks before the primary election.

The Secretary also cites, *State ex rel. Walker v. Best,* 163 So. 696, 697 (Fla. 1935). There, the Florida Supreme Court refused to order a town clerk to publish a new amendment to the town charter *15 days* before the election.

Neither apply here.

We are not days or weeks from an election. Florida's primary, one of the latest in the nation, is set for August 23, nearly four months away. *See* Pls.' Ex. 11. 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. *See 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); *Rivera v. Schwab*, No. 2022-CV-000089 (Kan. D. Ct. 2022) (invalidating plan on April 25, 2022, about three months prior to Kansas's August 2 primary elections), appeal docketed No. 125092 (Kan.). And, notably, this Court finds that the Plaintiffs moved as quickly as they could have, filing suit the same day the Governor signed the Enacted Plan into law.

Even if *Purcell* did apply to state courts, the Court finds that there is time to adopt a remedial plan without creating the confusion the Secretary predicts. As Dr. Ansolabehere demonstrated through his Proposed Map A, a remedial plan would have minimal impacts on the Enacted Plan. Proposed Map A alters only five congressional districts—CDs-2, 3, 4, 5, and 6—

and, importantly, follows the lines of the state's recently enacted State House districts wherever possible. Ansolabehere Rebuttal Rep. ¶ 4. As a result, Proposed Map A will affect just a handful of counties and can be implemented quickly and without significant administrative difficulties.

In response, the Secretary cites to two affidavits from Supervisor of Elections' Offices that explain a remedial plan would cause their offices administrative burdens. The Columbia County Supervisor states that a remedial plan will create the need to cancel and reschedule a meeting with the Board of County Commissioners, Def's. Ex. 1 ¶ 9, and expend additional funds to implement a constitutional map. A representative of the Duval County Supervisor's Office also explained that a new congressional plan would impose burdens on his office, though he did not say that his office could not implement a remedial plan. Def's. Ex. 2.

This Court appreciates that its order may cause inconvenience, hard work, and expense. Notwithstanding, these concerns do not outweigh Plaintiffs' rights. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (finding that that "administrative convenience" is not a sufficient reason to uphold unconstitutional law).

Moreover, the Secretary's suggestion that a remedial plan would impose insurmountable burdens is belied by Plaintiffs' 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. Leon County Supervisor of Elections Mark Earley, one of the Supervisors who would be most affected by redrawing of CD-5, as well as his Deputy, Christopher Moore, both stated that their office can implement any remedial plan received by May 27, 2022. Pls.' Exs. 12, 17. Counsel for the Supervisor of Elections of Orange County, who is responsible for a county with over 850,000 voters, swore to the same, Pls.' Ex. 14. 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. Pls.' Ex. 16. Plaintiffs also submitted an affidavit by Representative Tracie Davis, who worked at the Duval County Supervisor's Office for 14 years, serving eventually as Deputy Supervisors of Elections, 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 remedial plan in time for the primary election as long as it is received by the end of May. Pls.' Ex. 15 ¶¶ 5-8.

The remedial plan the Court adopts require 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.

V. Plaintiffs' Proposed Congressional Map A is an appropriate narrow remedy.

Because this Court has found a violation of the Florida Constitution and that there is time to remedy the violation, this Court must consider what remedy is appropriate. This Court finds that a narrow remedy—one that addresses only the diminishment discussed in this order—is the most appropriate.

Plaintiffs' expert, Dr. Ansolabehere, prepared several possible remedial plans for this Court to consider. After considering the expert reports, the affidavits from election administrators, and live testimony from Dr. Ansolabehere, the Court finds that Proposed Map A is the best remedial option available to Florida's administrators and voters. At its core, Proposed Map A takes the Legislature's version of CD-5 from Plan 8015, and places it within the existing Enacted Map. Proposed Map A is designed to minimize the administrative burden within the counties affected by Proposed CD-5 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, while still restoring CD-5 as a district where Black voters have the ability to elect the candidate of their

choice. Proposed Map A will affect only five enacted congressional districts (out of twenty-eight such districts). The districts affected are CD-2, CD-3, CD-4, CD-5, and CD-6. Compared to the Enacted Plan, Plan A will require election administrators to create a de minimis number of new precincts out of more than approximately 650 precincts in North Florida. The Court thus orders implementation of Proposed Map A for this year's congressional elections.[2]

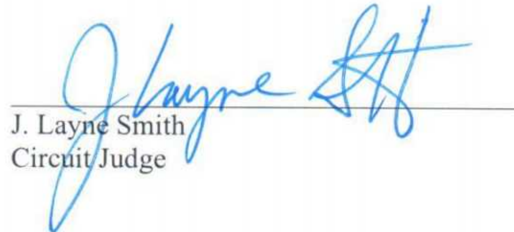
VI. Bond

Finally, in their motion, Plaintiffs requested that the Court set no more than a nominal bond and proposed that Defendants waive entry of a bond. The Secretary did not address the bond issue in her filings or oral argument. The Court sets a bond in the amount of $1,000.

CONCLUSION

The Court grants Plaintiffs' motion for a temporary injunction. The Court orders the Secretary of State to take all necessary steps to implement the final corrected version of Proposed Map A, as submitted to the Court and to counsel for the Secretary of State on May 12, 2022, in time for the 2022 congressional elections, while the rest of this case proceeds to a trial on the merits.

DONE AND ORDERED on May 12, 2022.



J. Layne Smith
Circuit Judge

Copies to counsel of record via e-service

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[2] During the temporary injunction hearing, the Secretary's counsel asked Dr. Ansolabehere whether Proposed Map A was contiguous. After the hearing, Dr. Ansolabehere confirmed that Proposed Map A was contiguous. Nonetheless, Dr. Ansolabehere has now assigned a portion of I-95 to CD-6, rather than CD-4, which will make for a more visually pleasing map. This change does not move any persons. Dr. Ansolabehere has prepared a corrected version of Proposed Map A, which is the version of the map this Court now orders to be implemented.

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In the First District Court of Appeal

CASE NO. 1D22-1470
LOWER COURT NO. 2022-CA-000666

Florida Secretary of State,
Defendant-Appellant,
v.
Black Voters Matter Capacity Building Institute, Inc., et al.,
Plaintiff-Appellees.

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INTRODUCTION & SUMMARY OF THE ARGUMENT[1]

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). The Circuit Court turned this truism on its head when it granted a temporary injunction prohibiting the Secretary from implementing the State's duly enacted congressional map (Enacted Map) and requiring the Secretary to *immediately* implement a racially gerrymandered map drawn by Plaintiffs' expert—in a single day—that packs black voters from Florida's First Coast together with black voters 200 miles away from Florida's Big Bend. The court took this drastic step because it held that the Enacted Map diminishes the ability of black voters to elect representatives of their choice in violation of article III, section 20(a) of the Florida Constitution. But the State constitution's non-

[1] The Circuit Court has dismissed Plaintiffs' claims against the Attorney General because she is an improper defendant. Nevertheless, the Attorney General agrees with the Secretary of State's arguments in opposition to the temporary injunction entered below. She thus intends to join the Secretary's arguments in full either under her discretion to "appear in and attend to . . . all suits" in which "the state may be" "anywise interested," § 16.01(4), Fla. Stat., or as co-counsel for the Secretary.

diminishment provision is "without effect" if applying it violates the U.S. Constitution. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992).

There is no question that race was the predominant factor motivating the creation of Congressional District 5. Race predominates whenever traditional redistricting criteria like compactness and fidelity to political and geographic boundaries are subordinated to it. *Cooper*, 137 S. Ct. at 1463-64; *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). And that is precisely what article III, section 20(b) of the Florida Constitution required here. Compliance with it required relegating traditional redistricting criteria to "Tier 2" status and elevating the race-based non-diminishment standard to "Tier 1." With respect to Congressional District 5, the Legislature undoubtedly followed these constitutional commands. Indeed, the design of the district, statements from the chair of the legislative committee that drew the district, and the Circuit Court's own order all confirm that race was the predominant factor in placing voters within or without the district. The purpose of the district, after all, was to ensure that enough black voters were placed within it to avoid diminishing their ability to elect candidates of their choice. (App. 694). Plaintiffs

themselves claim that the district was drawn with the purpose of uniting dispersed black communities throughout north Florida. But that only confirms the overriding racial motive for the district.

The proponents of Congressional District 5 must therefore satisfy strict scrutiny, the U.S. Supreme Court's "most rigorous and exacting standard of constitutional review." *Miller v. Johnson*, 515 U.S. 900, 920 (1995). But they cannot do so because the district is not narrowly tailored to achieve a compelling interest. To date, compliance with section 2 of the Voting Rights Act (VRA) has been presumed (though never actually held) to be a compelling interest. *See Cooper*, 137 S. Ct. at 1469. And compliance with section 5 of the Act, while once presumed to be a compelling interest, is no longer required anywhere, *see Shelby County v. Holder*, 570 U.S. 529 (2013), and in any event, has never been required in north Florida, *see Jurisdictions Previously Covered by Section 5*, Dep't of Justice, bit.ly/3Obni3o. No one disputes that Congressional District 5 is not needed to comply with the VRA. Here, then, the non-diminishment provision requires the drawing of a race-based district that is *not* required by the VRA. But the U.S. Supreme Court has never

approved a racially gerrymandered district where there were not good reasons to believe that such a district was required by the VRA.

Nor did the Circuit Court or Plaintiffs establish that remedying past racial discrimination is a compelling interest in this context. Even if they had, they have not shown that prioritizing the non-diminishment of a minority group's power to elect into office its preferred candidate is the least restrictive means of remedying such discrimination. Therefore, the map imposed by the Circuit Court's temporary injunction is not narrowly tailored to achieve a compelling interest.

Given the serious federal constitutional concerns raised by the Florida Constitution's non-diminishment provision as applied in north Florida, Plaintiffs are not clearly entitled to relief. And because they are not clearly entitled to relief, now is not the time for judicial interference in the upcoming election. "Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *DNC v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral). For this reason, the U.S. and Florida Supreme Courts have made clear that trial courts, in all but perhaps

the most extraordinary circumstances, cannot issue injunctions that alter State election laws in the months preceding an election. But the Circuit Court still mandated sweeping changes to the State's congressional map from Nassau and St. Johns Counties in the east to Leon and Gadsden Counties in the west and as far south as Marion and Volusia Counties. It did so while ignoring the protests of affected supervisors of elections, one of whom said that implementing a map at this late juncture simply is not possible.

Finally, the Circuit Court erred in mandating the imposition of a new map for north Florida through a temporary injunction. Temporary injunctions are meant to maintain the status quo, not mandate some affirmative relief that alters the status quo. Such a mandate before a "final hearing" is "like awarding an execution before trial and judgment." *Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So. 2d 438, 469 (Fla. 1943) (cleaned up). It is wrong.

For these reasons and those that follow, the Circuit Court erred in issuing the temporary injunction and then vacating the automatic stay to which the Secretary is entitled under Florida Rule of Appellate Procedure 9.310. Plaintiffs should be ordered to respond to this filing

on or before **noon on May 19, 2022**, which is an equivalent amount of time since afforded to the Secretary here.

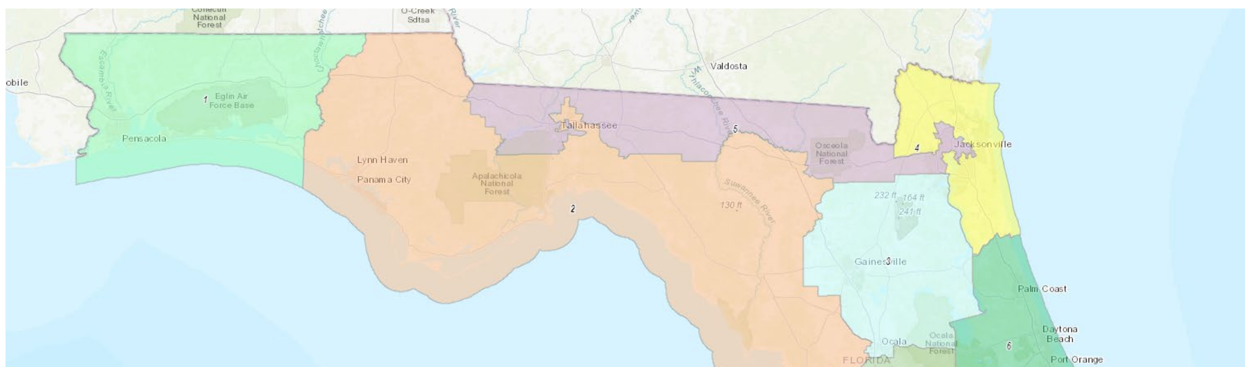
STATEMENT OF THE CASE & FACTS

I. PREVIOUS, PROPOSED, AND ENACTED MAPS.

A. Previous Congressional District 5

During the last redistricting cycle, the Florida Legislature drew Congressional District 5 in a north-south configuration, spanning from Jacksonville to Orlando. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402 (Fla. 2015) (*Apportionment VII*). After the Florida Supreme Court held that the district was drawn with impermissible partisan intent, the court redrew the district in an east-west configuration, spanning from Jacksonville to Gadsden County. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) (*Apportionment VIII*).

2015 Benchmark Congressional District 5 (Purple)



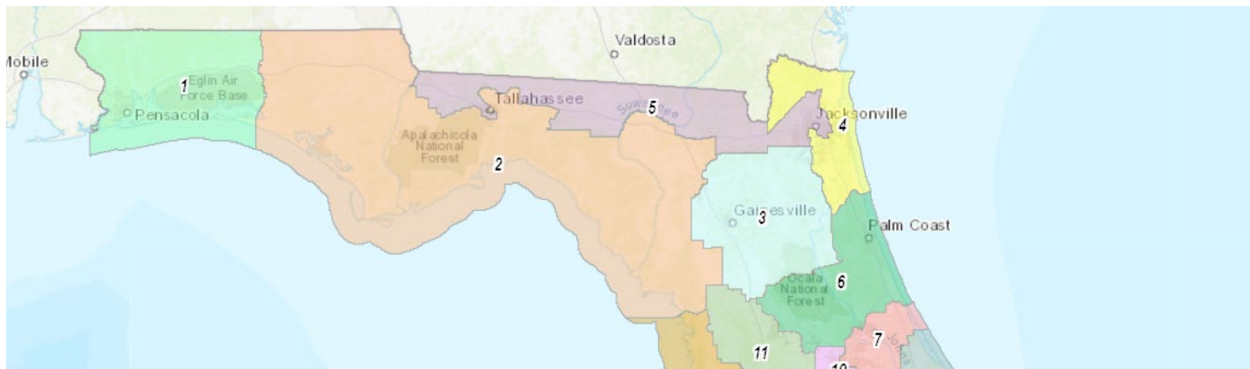
In redrawing the district, however, the court paid paramount attention to its racial composition. In fact, the court rejected arguments that the east-west configuration, as opposed to the north-south configuration, "would prevent black voters from electing a candidate of their choice." *Apportionment VII*, 172 So. 3d at 404. The court analyzed the total black population and the total black voting age population in north-central Florida and whether black voters could elect a candidate of their choice under the east-west configuration. *Id.* at 404-05. Although the configuration was not "a model of compactness" and had an "unusual" and "bizarre" shape, the court concluded that the district was necessary to allow racial minorities to elect a candidate of their choice. *Id.* at 406; *see also Apportionment VIII*, 179 So. 3d at 272-73.

B. 2022 Proposed Congressional Districts.

Florida gained a congressional seat based on the State's population growth revealed by the 2020 census. Both to incorporate the new congressional district and to comply with the U.S. Constitution's requirement that districts be equally apportioned, the State had to enact a new congressional district map. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

The Florida Legislature initially passed a redistricting bill on March 4, 2022, which the Governor vetoed. The vetoed bill contained a primary and secondary congressional district map. Home, Fla. Redistricting (last visited May 16, 2022), https://www.floridaredistricting.gov. The secondary map, called "Plan 8015," was introduced as an alternative that would go into place should a court invalidate the Legislature's primary map. *Id.* Plan 8015's Congressional District 5 largely mirrored the existing Congressional District 5, revised by the court in 2015:

Plan 8015 (Congressional District 5 in Purple)[2]



The legislative record is clear that the committee responsible for drawing Plan 8015 did so to "protect[] a black minority seat in north Florida" and "continu[e] to protect the minority group's ability to elect

[2] Submitted Plans, Fla. Redistricting (last visited May 16, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under "Plan Name," type "8015," click "H000C8015," and select "Web Map").

a candidate of their choice." (App. 211) (citing additional legislative statements). The resulting black voting-age population in that proposed district would have been 43.48%.[3]

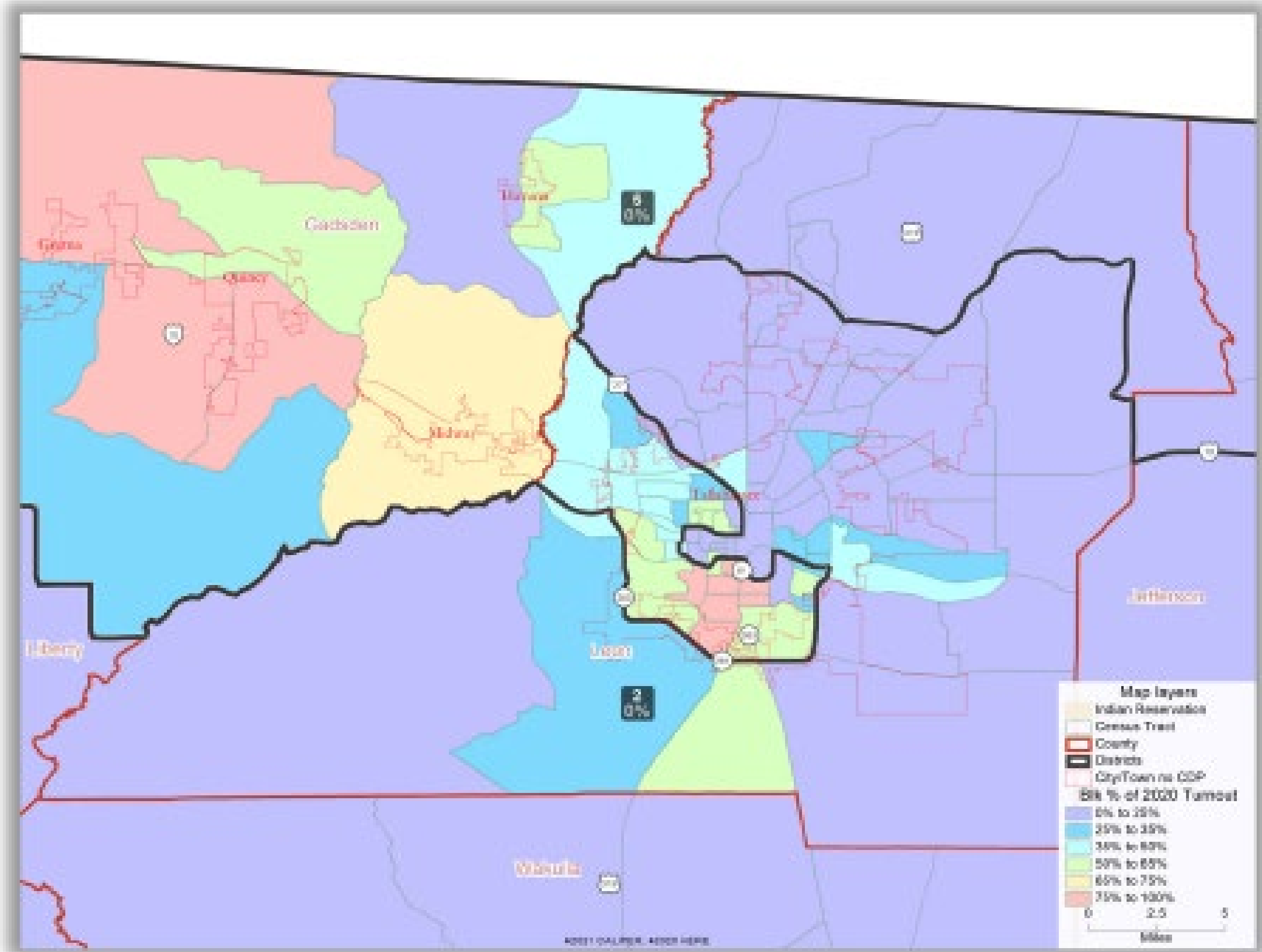
The only way to draw the district was for race to predominate over race-neutral districting criteria. The resulting proposed district split four counties[4]; had the lowest compactness score of any district in Plan 8015[5]; and as the figure below shows, was bizarrely drawn to

[3] Submitted Plans, Fla. Redistricting (last visited May 16, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under "Plan Name," type "8015," click "H000C8015," and select "VAP Summary Report").

[4] *Id.* (under "Plan Name," type "8015," click "H000C8015," and select "Assigned District Splits").

[5] *Id.* (under "Plan Name," type "8015," click "H000C8015," and select "District Compactness Report").

join together high concentrations of black voters in Duval, Leon, and Gadsden Counties based on their race alone. For example, in Leon County, the district boundaries were drawn as such:



(App. 758).

On March 29, 2022, Governor DeSantis vetoed the bill and convened a special legislative session from April 19 to April 22, 2022. (App. 324-31). A memorandum accompanying the veto message

contained the Governor's reasons for the veto: the primary and secondary congressional district maps "assign[] voters primarily on the basis of race but" are "not narrowly tailored to achieve a compelling state interest," and thus are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (App. 324-25).

C. Florida's Enacted Map.

On April 21, 2022, during the special legislative session, the Florida Legislature passed a new congressional districting bill with the following congressional district map:

Plan 109

(App. 202). The next day, the Governor signed the bill into law. Home, Fla. Redistricting (last visited May 16, 2022), https://www.floridaredistricting.gov/. The Enacted Map eliminated

the racially gerrymandered version of Congressional District 5 and instead drew the congressional districts in north Florida based on race-neutral traditional districting criteria. As a consequence, the districts in north Florida are more compact and include fewer county splits than the north Florida districts in Plan 8015. (App. 334).

II. PLAINTIFFS' LAWSUIT AND TRIAL COURT'S ORDERS.

A. Plaintiffs' Complaint and Motion for Temporary Injunction.

Once the Governor signed the bill into law, Plaintiffs filed this lawsuit. (App. 7). They alleged that the Enacted Map violated several provisions of the Florida Constitution. (App. 7-44).

The next week, Plaintiffs filed a motion for temporary injunction and an accompanying memorandum of law. (App. 45-75). Plaintiffs alleged that the north Florida congressional districts in the Enacted Map, which *avoided* the racially gerrymandered version of Congressional District 5, violated article III, section 20(a) of the Florida Constitution because it diminished the concentration of black voters in the north Florida district. (App. 50-75). Plaintiffs did not offer any remedial map, beyond identifying several alternatives, including Plan 8015's racially gerrymandered district. But they asked

the Circuit Court to replace Florida's Enacted Map with a map retaining the concentration of black voters in the challenged district. (App. 50-75).

Plaintiffs relied on the functional analysis of Dr. Stephen Ansolabehere, a government professor at Harvard. (App. 76-136). Dr. Ansolabehere has never administered an election in Florida, never set precincts in Florida, and never set ballot styles in Florida. (App. 548-49). Evaluating Congressional District 5, Dr. Ansolabehere stated that black voters in north Florida overwhelmingly support Democratic candidates and that under Benchmark Congressional District 5, black voters had the ability to elect a Democratic candidate. (App. 76-136). Dr. Ansolabehere stated that under the race-neutral Enacted Map, however, black voters could no longer elect a Democratic candidate. (App. 76-136).

Plaintiffs also relied on the expert report of Dr. Sharon Austin. (App. 137-91), who suggested that the Benchmark Congressional District 5 "unit[ed] 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 abundant cotton and tobacco plantations." (App. 58-59, 146-47). Finally, they submitted affidavits

from Leon County and Broward County Supervisors of Elections, which stated that their respective offices could implement revised district lines if imposed by May 27, 2022. (App. 192-99).

B. The Secretary's Response in Opposition.

On May 9, 2022, the Secretary filed a response in opposition to the motion for temporary injunction. (App. 2002). Her arguments were threefold: (1) a congressional district map that is drawn on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment unless it can satisfy strict scrutiny; (2) under the *Purcell* principle, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006), and parallel Florida Supreme Court precedent, *see State ex rel. Haft v. Adams*, 238 So. 2d 843 (Fla. 1970); *State ex rel. Walker v. State*, 163 So. 696 (Fla. 1935), it was too late for the court to impose a new congressional district without significantly disrupting election administration and causing confusion; and (3) Plaintiffs failed to establish that they were entitled to a *mandatory* temporary injunction. (App. 200-17).

The Secretary produced reports from two experts, Dr. Douglas Johnson and Dr. Mark Owens, and several election administrators, including Columbia County Supervisor of Elections Tomi Brown and

Robert Phillips, the Chief Election Officer of the Duval County Supervisor of Elections Office. (App. 219-27, 332-44, 382-96).

Dr. Johnson explained that the Enacted Map's districts were more compact and divided fewer counties, cities, and towns than any of Plaintiffs' proposed maps. (App. 334-37). Dr. Johnson also explained that Benchmark Congressional District 5 did not preserve "sharecropper counties," contrary to Plaintiffs' expert's testimony. (App. 337-42). The most populous sharecropper counties—Alachua, Jackson, and Marion Counties—were not in the benchmark district. (App. 337-42). And Dr. Johnson noted that black voters from those historic sharecropping communities have moved to cities such as Jacksonville in the 160 years since the 1860 Census. (App. 337-42).

Supervisor Brown and Mr. Phillips explained that imposing a new congressional district map at this late juncture would cause significant disruptions. (App. 219-27). Supervisor Brown put it bluntly: "it is not possible" to implement a new map in time for forthcoming elections. (App. 221). Implementing a new map would force her to redo weeks-worth of work at an added expense of $30,000; would force her to spend $35,000 in printing fees to update

voter cards; and would force her to resubmit her precinct maps to the board of county commissioners. (App. 221-22).

Mr. Phillips expressed similar concerns. He stated that if a new map is imposed, the Duval County Supervisor of Elections Office would have to expend significant resources to analyze changes to the Enacted Map, to ensure quality control to avoid misassigning voters to districts, and to submit precinct changes to the Jacksonville City Council. (App. 226-27). Mr. Phillips stated that it would take approximately six weeks for the council to approve the precinct changes. (App. 226-27). In other words, Mr. Phillips stated that "imposing a new map at this late juncture would increase the chances of administrative mistakes, programming errors, and candidate and voter confusion." (App. 227). He reiterated the point later in the proceedings before the Circuit Court when Plaintiffs attempted to take a newspaper quote out of context. (App. 770-71).

And Supervisor Earley's sworn affidavit from a related federal case included the point that "numerous supervisors" have told him, in his capacity as President-Elect of the Florida Supervisors of Elections, that they *cannot* implement any new remedial map at this juncture. (App. 236). This stood in stark contrast to affidavits from

supervisors that Plaintiffs provided and that either focused on specific offices only or dealt with counties so far south that they would not be affected by an injunction centered on north Florida. (App. 192-94, 457-61).

C. Plaintiffs' Reply.

Plaintiffs' reply in support of their temporary injunction, filed the day before the temporary injunction hearing, contained two new maps created by Dr. Ansolabehere. (App. 397, 419-52). The first, Proposed Map A, "incorporates CD-5 from the Legislature's Backup Map [8015] and changes only CD-2, CD-3, CD-4, CD-5, and CD-6 from the Enacted Map." (App. 423). According to Dr. Ansolabehere, Congressional District 5 in Proposed Map A "follow[s] the boundaries of state legislative districts to the greatest extent possible" and "minimiz[es] the number of additional precinct splits," (App. 429), when he used Voting Tabulation Districts (VTDs) as the equivalent of precincts. (App. 439-42). Consistent with the Legislature's vetoed proposal, the BVAP of Congressional District 5 in Dr. Ansolabehere's Proposed Map A would be 43.48%. *Supra* footnote 2.

Plaintiffs also submitted new affidavits from additional current and former election officials. All of these officials stated that in their

opinion a new congressional district map could be implemented in their respective counties if the court granted the temporary injunction before May 27, 2022. (App. 457-74).

D. Temporary Injunction Hearing.

On May 11, 2022, the Circuit Court held a four-hour hearing. The only live witness was Dr. Ansolabehere. During his testimony, Dr. Ansolabehere—having never administered an election in Florida—admitted that he could not speak to the impact on the ability of supervisors of elections to send updated voter registration cards to their constituents or about the nationwide paper shortage that is affecting their offices. (App. 548-49). Dr. Ansolabehere also admitted that he never testified on behalf of a Republican governor during his redistricting work. (App. 551). And, most significantly, Dr. Ansolabehere said that he had never helped group Florida voters into precincts and did not know whether *any* affected supervisor in north Florida set precincts based on VTDs thereby rendering useless his conclusion that the new, proposed maps would cause minimal precinct changes. (App. 541-42).

Regarding his eleventh-hour remedial maps, Dr. Ansolabehere testified that Proposed Map A was produced in only one day and that

it contained a contiguity error in Congressional District 6, where portions of the district were separated from other portions. (App. 548). As he put it, "it could have been something that got screwed up when I uploaded the file. But that should not be there." (App. 547-48).

Dr. Ansolabehere testified that Proposed Map A's Congressional District 5, although not remarkably compact, was more compact than other congressional districts in the United States. On direct, he highlighted Texas's 35th Congressional District as a non-compact district, (App. 535-37), and then on cross-examination was forced to admit that the Texas district was majority-Hispanic and stretched only 80 miles, compared to Congressional District 5, a non-majority black district that spans over 200 miles from east to west. (App. 546).

After the parties presented closing arguments, the Circuit Court issued an oral ruling in favor of Plaintiffs. According to the Circuit Court, the Florida Supreme Court deemed Benchmark Congressional District 5 to have "met constitutional muster" in 2015. (App. 615). The Circuit Court agreed with Dr. Ansolabehere's functional analysis and concluded that the Enacted Map diminishes black voters' ability to elect a candidate of their choice in north Florida as a matter of

Florida law. (App. 616-21). The court gave only a cursory mention to the Secretary's Equal Protection Clause, *Purcell*, and mandatory injunction arguments. (App. 605-21). The court asked Plaintiffs to draft a proposed order. (App. 622-23).

E. Adopted Order.

On May 12, 2022, the court adopted Plaintiffs' proposed order after making only minor edits. (App. 681). The court concluded that Plaintiffs established the four temporary injunction elements.

i. Substantial Likelihood of Success.

The court found that the Enacted Map diminished black voters' ability to elect a candidate of their choice in north Florida in violation of article III, section 20(a) of the Florida Constitution. (App. 688).

With respect to the Secretary's Equal Protection Clause arguments, the court order strays from binding U.S. Supreme Court precedent. The U.S. Supreme Court's precedents explain that if race was the predominant factor motivating the "decision to place a significant number of voters within or without a particular district," *Bethune-Hill*, 137 S. Ct. at 797 (citation omitted), strict scrutiny must be satisfied. Drawing congressional districts on the basis of race must achieve "a compelling state interest" and must be accomplished

through “narrow tailoring.” *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). But the Circuit Court added additional standards. The court put the burden on the Secretary to establish that “race predominated in the drawing of *8015’s CD-5*”—that is, the legislature’s plan vetoed by the Governor. (App. 692) (emphasis added). The court also stated that it must “‘exercise extraordinary caution in adjudicating claims that a State has drawn lines on the basis of race,’ given the ‘presumption of good faith that must be accorded legislative enactments.’” (App. 692) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

Applying that standard, the Circuit Court concluded that race did not predominate in drawing Congressional District 5 because, when “the legislature drew 8015” to mirror Benchmark Congressional District 5, it did so “to comply with the Florida Supreme Court’s prior rulings regarding CD-5,” to “avoid litigation,” and to track state legislative districts. (App. 692-93). Yet, the court continued, 8015’s configuration of CD-5 is necessary to ensure minority voters’ continued ability to elect candidates of their choice and to otherwise address the history of voting-related racial discrimination and a lack of representation in north Florida. (App.

693). In other words, race did not predominate but drawing a district along racial lines was "necessary."

The Circuit Court further noted that the Florida Constitution's non-diminishment provision was modeled on section 5 of the VRA and that compliance with the State provision served a compelling state interest. (App. 693). The court also dismissed concerns that the Enacted Map's districts are "more compact" and "contain[] slightly fewer splits of political boundaries." (App. 694-95).

ii. Adequate Remedy at Law and Irreparable Harm.

Next, the court concluded that Plaintiffs lacked an adequate remedy at law and would suffer irreparable harm. (App. 695-97). The court held that these two elements were met because Plaintiffs' "fundamental right to vote" was violated. (App. 695-97).

iii. Serving the Public Interest.

Finally, the court concluded that injunctive relief would serve the public interest. (App. 697). Again, the court found that Plaintiffs' fundamental right to vote was being violated. (App. 697). The court also addressed the Secretary's *Purcell* arguments. The court stated that *Purcell* was a "creature of the *federal* courts" and "has no bearing

on state courts." (App. 697) (emphasis in the original). The court cited only one case for this proposition, *Harkenrider v. Hochul*, 2022 NY Slip Op. 02833, at 28 n.16 (N.Y. Apr. 27, 2022). (App. 697). As for the Florida Supreme Court cases that the Secretary provided, *State ex rel. Haft v. Adams* and *State ex rel. Walker v. Best*, the court stated that the at-issue election in *Haft* was three weeks away and the at-issue election in *Walker* was fifteen days away. (App. 698). The Circuit Court concluded that "neither" case "appl[ied] here" because "[w]e are not days or weeks from an election." (App. 698).

"Even if *Purcell* did apply to state courts," the court continued, "there is time to adopt a remedial plan." (App. 698). The court stated that Proposed Map A "alters only five congressional districts" and "follows the lines of the state's recently enacted State House districts wherever possible." (App. 698-99). In the court's view, Proposed Map A "can be implemented quickly and without significant administrative difficulties." (App. 699).

As for the Secretary's arguments about the significant disruption to the State's preparation for forthcoming elections, as supported by Supervisor Brown's and Mr. Phillips's sworn testimony, the court stated that "these concerns do not outweigh Plaintiffs'

rights." (App. 699). The court relied on only one case, *Taylor v. Louisiana*, 419 U.S. 522 (1972)—without any accompanying discussion of the Supreme Court's later decision in *Purcell* or subsequent applications of *Purcell* as recently as this term, *see, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022)—for the proposition that administrative convenience is not a sufficient reason to uphold an unconstitutional law. (App. 699). The court credited affidavits from the Orange, Leon, and Polk County supervisors' offices and the affidavit of Democratic Representative Davis. (App. 699-700).

F. Vacatur of Automatic Stay.

The Secretary filed her notice of appeal to this Court within an hour of the trial court rendering its written order. (App. 702). The next morning, Plaintiffs moved to vacate the automatic stay triggered under Rule 9.310(b)(2) of the Rules of Appellate Procedure. (App. 728). The trial court vacated the stay after a hearing on May 16, 2022, at which the court considered, among other things, affidavits from Dr. Johnson and Dr. Ansolabehere. (App. 784). Dr. Johnson noted flaws in Dr. Ansolabehere's remedial map. (App. 750-60). Dr. Ansolabehere responded that the flaws were harmless. (App. 778-83).

STANDARD OF REVIEW

A Circuit Court abuses its discretion by vacating an automatic stay triggered under Rule 9.310(b)(2) when the party seeking to vacate the stay below fails to make the necessary evidentiary showing of compelling circumstances, when the government is likely to succeed on appeal, or when reinstatement of the stay is unlikely to cause irreparable harm. *DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145, 151 (Fla. 1st DCA 2020) (citing *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828-29 (Fla. 1st DCA 2018)). The evidentiary showing below is crucial because it protects the public against "any adverse consequences realized from proceeding under an erroneous judgment," and accords "a commensurate degree of deference" to the political branches. *Id.* at 150 (citing *St. Lucie Cnty. v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984)).

ARGUMENT

The Circuit Court erred in vacating the automatic stay. The Secretary is likely to prevail on appeal for any one of three reasons. Plaintiffs will not suffer irreparable harm either. And Plaintiffs failed to establish below a compelling interest rooted in evidence.

I. THE SECRETARY IS LIKELY TO SUCCEED ON APPEAL.

A. The Circuit Court's imposition of a racially gerrymandered district violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The Circuit Court undertook the drastic measure of temporarily enjoining the State's Enacted Map and imposing in its place a map of its choosing that unquestionably mandates a racially gerrymandered district on the theory that state law commands it. (App. 689-91) (citing *In re Sen. J. Res. of Legis. Apportionment*, 83 So. 3d 597 (Fla. 2021) (*Apportionment I*)). Yet "[u]nder the Equal Protection Clause [of the Fourteenth Amendment to the U.S. Constitution], districting maps that sort voters on the basis of race are by their very nature odious." *Wis. Legis.*, 142 S. Ct. at 1248 (citations omitted). Such "race-based sorting of voters" cannot satisfy the U.S. Constitution absent a "compelling interest" and a "narrowly tailored" means to achieve that interest. *Cooper*, 137 S. Ct. at 1464. State law provides no basis for ignoring these federal constitutional requirements. This is especially clear in U.S. Supreme Court cases decided since *Apportionment I* and in light of *Apportionment VIII*'s silence on the issue of federal equal protection. *See generally In re*

Sen. J. Res. of Legis. Apportionment 100, 334 So. 3d 1282, 1289 n.7 (Fla. 2022) (noting that the court took no position on the Equal Protection Clause arguments raised in the Governor's advisory opinion request).

1. Plaintiffs' claim turns on the theory that the Enacted Map violates the non-diminishment provision of article III, section 20. But the non-diminishment provision is "without effect" if applying it would violate the U.S. Constitution. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *see also* U.S. Const. art. VI, cl. 2. So if the State cannot draw a map that complies with the Florida Constitution's non-diminishment requirement without violating the U.S. Constitution, it need not comply with the non-diminishment requirement. Yet, as every map considered by the trial court makes clear, the State cannot thread this constitutional needle in north Florida. Given the region's unique racial demographics, any attempt to comply with non-diminishment would violate the Equal Protection Clause.

As an initial matter, there should be no dispute that race predominated in the creation of Congressional District 5. Race is the predominant factor in redistricting when "[r]ace was the criterion

that, in the [mapmaker's] view, could not be compromised." *Bethune-Hill*, 137 S. Ct. at 798. This occurs when "the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations." *Id.* at 797. Put another way, race predominates when "race for its own sake is the overriding reason for choosing one map over others." *Id.* at 799. The Circuit Court's finding that "[t]he Secretary has not established that race was the predominant factor, rather than one of several factors in the drawing of 8015s CD-5" is clearly erroneous. It is even belied by the Circuit Court's own findings.

For starters, the provision of the Florida Constitution relied upon by the Circuit Court has been interpreted to *compel* race to predominate in this circumstance. Article III, section 20(a) of the Florida Constitution states that "no apportionment plan shall be drawn with the intent … to diminish [the] ability [of racial minorities] to elect representatives of their choice." Art. III, § 20(a), Fla. Const. And according to article III, section 20(b), traditional districting criteria such as compactness and adherence to political and geographic boundaries are so-called "Tier 2" requirements that must be subordinated to the "Tier 1" requirement of avoiding the

diminishment of minority voting power. *See* art. III, § 20(b), Fla. Const. The U.S. Supreme Court's decision in *Cooper* makes clear that when a provision of state law commands that traditional race-neutral criteria be subordinated to race-based criteria, as necessarily occurred here given the facts on the ground in north Florida, then race predominates. Specifically, the *Cooper* Court characterized racial predominance as "demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" 137 S. Ct. at 1463-64. That standard is met here where "Tier 1" subordinated "Tier 2."

There is also no question that race actually did predominate in the drawing of Congressional District 5 in the court-ordered map. With respect to Plan 8015, upon which Proposed Map A is based, the Chair of the House Redistricting Committee specifically explained that Congressional District 5 was drawn to "protect[] a Black minority seat in north Florida." *See generally* Fla. H.R. Comm. on Redistricting, recording of proceedings, at 0:00-2:55:19 (Feb. 25, 2022), https://thefloridachannel.org/videos/2-25-22-house-redistricting-committee; *id.* at 19:15-19:26; (App. 325-31) . Likewise,

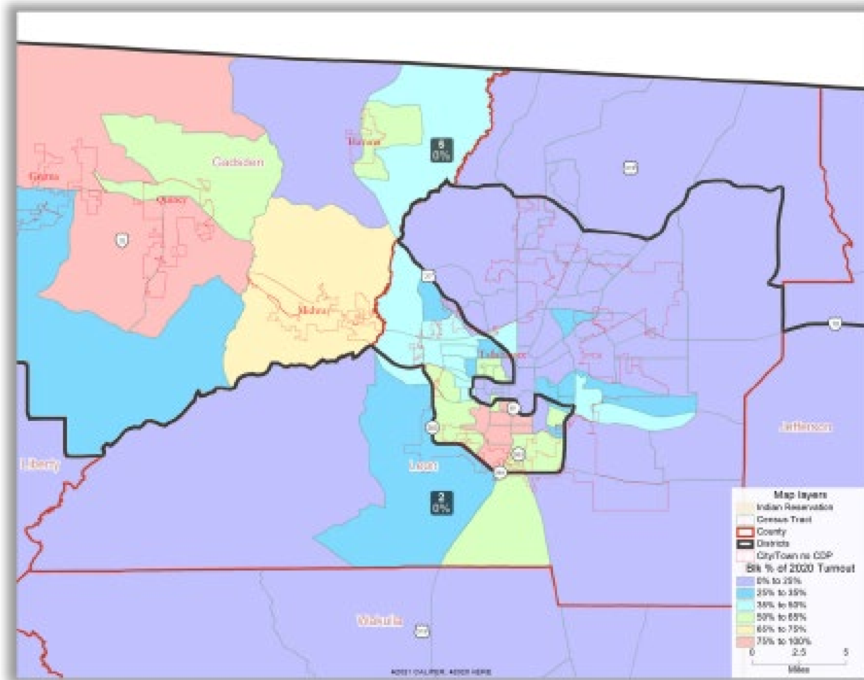
with respect to Plaintiff's remedial plan, Dr. Ansolabehere argued that it "restore[d] the ability of Black voters to elect their candidate of choice in North Florida." (App. 422). Even the Circuit Court found that the "legislative record includes detailed testimony that 8015's configuration of [Congressional District 5] is necessary to ensure minority voters' continued ability to elect candidates of their choice." (App. 694). When, as here, the map drawers admit that they used "race for its own sake [a]s the overriding reason for choosing one map over others," race obviously predominated. *Bethune-Hill*, 137 S. Ct. at 799 (2016).[6]

Circumstantial evidence removes any doubt that race was a predominant factor. Evidently to ensure that enough black voters were included in the district to avoid diminishment, Congressional District 5 splits four counties[7] and has the lowest compactness score

[6] *See also Bush v. Vera*, 517 U.S. 952, 1000 (1996) (Thomas, J., concurring in judgment) (A State's "concession that it intentionally created majority-minority districts [i]s sufficient to show that race was a predominant, motivating factor in its redistricting."); *LULAC v. Perry*, 548 U.S. 399, 517 (2006) (Scalia, J., concurring in judgment and dissenting in part) ("[W]hen a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered.").

[7] Submitted Plans, Fla. Redistricting (last visited May 16, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under

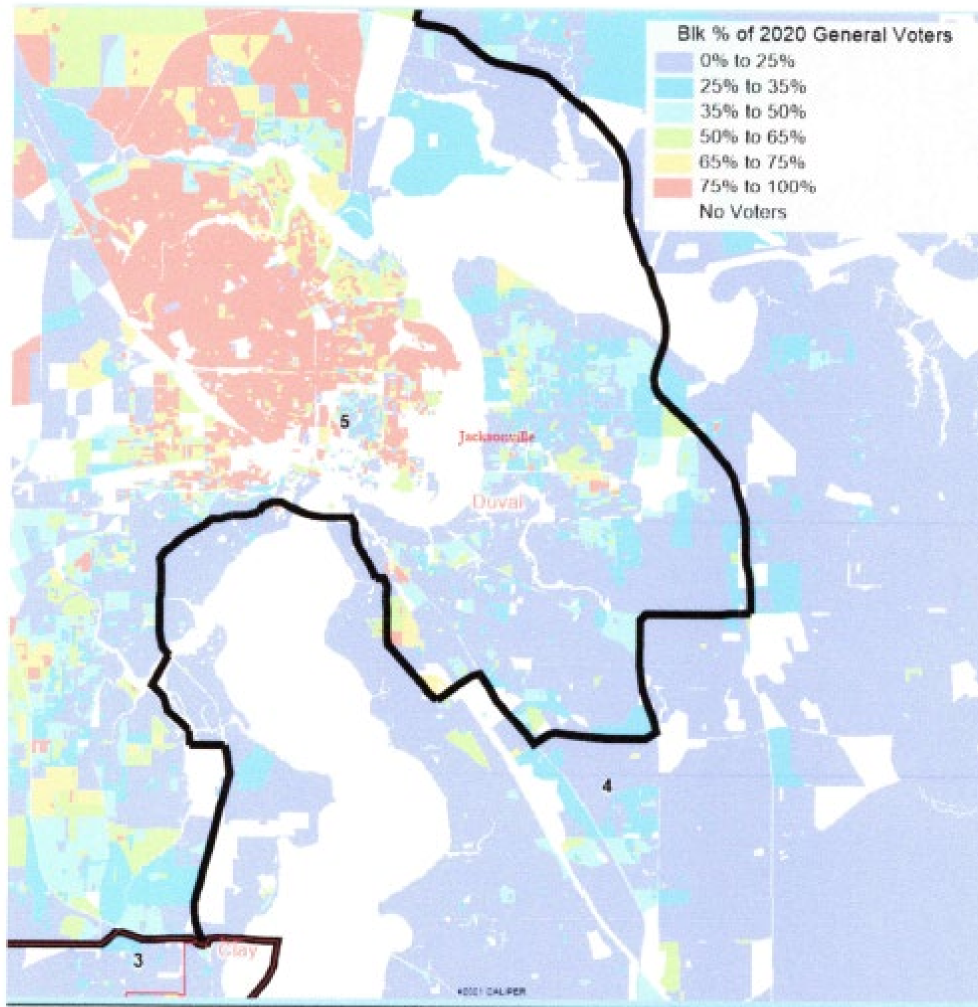
of any district in Plan 8015.[8] Moreover, as Dr. Johnson makes clear in his second expert report, Congressional District 5 in Proposed Map A was surgically drawn with exact precision to follow the racial composition of Leon County:



"Plan Name," type "8015," click "H000C8015," and select "Assigned District Splits").

[8] *Id.* (under "Plan Name," type "8015," click "H000C8015," and select "District Compactness Report").

(App. 758). As well as in Jacksonville:



(App. 759).

None can seriously dispute that application of traditional districting principles—like compactness, population equality, and fidelity to political and geographical boundaries, *see* art. III, § 20(b), Fla. Const.—would rule out Congressional District 5. After all, the

district sprawls 200 miles, spans eight counties (splitting four in the process), and is "one of the least compact" districts that could possibly be drawn. *See Apportionment VIII*, 179 So. 3d at 272. At one point, it narrows to a handful of miles to avoid non-minority populations in Leon County. And, as Plaintiffs claim and the Circuit Court purported to find, the district "unites" "historic Black communities" that are scattered across north Florida. (App. 402, 685).

As such, the "overriding reason" that the Circuit Court "cho[se]" a remedial map that contains Congressional District 5, *see Bethune-Hill*, 137 S. Ct. at 799, is that it prioritized non-diminishment of minority voting power *over* traditional districting principles. Said differently, in the tug-of-war between neutral redistricting principles and race, "[r]ace [is] the criterion that" the trial court has "not . . . compromised." *See Bethune-Hill*, 137 S. Ct. at 798. Nor could the court make such a compromise. *Every* map that Plaintiffs' expert presented to the trial court retained Congressional District 5 to avoid non-diminishment. Plaintiffs' inability to draw a different district that both does not diminish minority voting power and does not prioritize

race confirms that, given the unique racial demographics of north Florida, such a district cannot be drawn.

And Plaintiffs are not the only ones who have tried and failed. Despite years of heated redistricting litigation in which north Florida was a "focal point," *Apportionment VII*, 172 So. 3d at 402, no one has yet identified a version of Congressional District 5 that does not diminish minority voting power in violation of the Florida Constitution without prioritizing race over traditional districting principles. The lack of proposed alternatives is what led the Florida Supreme Court to bless the benchmark map in the first place. *See id.* at 402–06. History repeated itself this redistricting cycle—"*every* draft congressional plan proposed and debated by the Legislature"—except the Enacted Plan—"maintained the general configuration of" the district. (App. 68). None proposed an alternative map that would result in non-diminishment without prioritizing race over neutral districting standards. It simply was not possible when something more than a "slight" change would result in a violation of the State Constitution's race-based non-diminishment standard. *Apportionment I*, 83 So. 3d at 627.

To avoid this obvious defect, the trial court zeroed in on Congressional District 5, reasoning that there are now "[r]ace neutral reasons" for maintaining the district, "like "preserving the cor[e]" of the district moving forward or "comply[ing] with the Florida Supreme Court's prior rulings regarding" the district. But this ignores that Congressional District 5 was created *by prioritizing* race. *See Apportionment VII*, 172 So. 3d at 406 (acknowledging that the district is not "compac[t]" and violates other principles of districting, but was necessary to avoid "diminish[ing] [the] ability" of minorities to "elect representatives of their choice"). None of the cases the trial court cited involved a circumstance like this one, where the district that the mapmaker perpetuated for "race-neutral reasons" was initially created for race-based reasons.

The law, the facts, and common sense thus point in but one direction: race predominates in any north Florida district that connects black populations from Jacksonville to Tallahassee. The Circuit Court's finding to the contrary with respect to Congressional District 5 in the remedial map is clear error.

2. There is no compelling justification for a racially gerrymandered district in north Florida. As adopted by the Circuit

Court, Congressional District 5 does not serve any compelling state interest that could be consistent with the federal constitution's guarantee of equal protection.

The Circuit Court wrongly assumed that the race-based provisions of article III, Section 20(a) of the Florida Constitution, which are modeled after the federal VRA, are coextensive with the Act. Article III, section 20(a) provides 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." The Florida Supreme Court has observed that these "dual constitutional imperatives follow almost verbatim the requirements embodied in the Federal Voting Rights Act." *Apportionment I*, 83 So. 3d at 619 (cleaned up). The first imperative (the non-vote-dilution provision) is modeled after section 2 of the Act, and the second imperative (the non-diminishment provision) is modeled after section 5. *Id.* at 619-20. The court found that there was "substantive similarity" between the Florida Constitution and the federal VRA, (App. 411), and because the U.S. Supreme Court has "long assumed" (though never actually decided) that compliance with

the Act serves a compelling state interest, *Cooper*, 137 S. Ct. at 1464, the court reasoned that compliance with the State constitutional provision modeled after section 5 of the Act does as well. (App. 411-12). The trouble with that logic is fourfold.

First, "compliance with federal antidiscrimination laws" will justify a racially discriminatory map only if compliance "was [] reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 916. The U.S. Supreme Court is currently resolving whether the federal VRA can in fact justify racially gerrymandering remedial districts, subverting race-neutral criteria for race-based criteria. *See generally* Merits Br. of Secretary Merrill, *Merrill v. Milligan*, No. 21-1086. To the extent a Florida court believes that this case depends on likening state law to the federal VRA for purposes of concluding that both serve compelling government interests, then that decision must wait for the U.S. Supreme Court's resolution of longstanding confusion about the metes and bounds of the federal VRA as applied in redistricting. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurral) ("*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim."); *id.* at 883

(Roberts, C.J., dissental) (stating Supreme Court is poised to "resolve the wide range of uncertainties arising under *Gingles*.").

Second, although the Supreme Court has "assumed" that compliance with the VRA is a compelling interest, *see Bethune-Hill*, 137 S. Ct. at 801, it has never even hinted that compliance with a race-based provision of a *State constitution* can serve as justification for avoiding the *federal guarantees* of equal protection. And for good reason—the justifications undergirding the Court's "assumption" do not apply to a State replicant of the VRA.

Indeed, the premise that complying with the VRA is a compelling state interest is based on two reasons. *See Bush v. Vera*, 517 U.S. 952, 990–92 (1996) (O'Connor, J., concurring). For one, statutes "are presumed constitutional," and the "Supremacy Clause obliges the States to comply with all constitutional exercises of Congress' power." *Id.* at 991–92. For another, Congress's use of its "authority" to "ensure full protection of the Fourteenth and Fifteenth Amendments" via the VRA is entitled to "respect." *Id.* at 992.

Neither justification transfers to a State constitutional provision that mimics the VRA. The State is not attempting to comply with a federal statute under the Supremacy Clause; it is attempting to

comply with its own State law. And "respect" for a State-sponsored version of the VRA is due less weight because the States are not the entities entrusted to "ensure full protection of the Fourteenth and Fifteenth Amendments"; that "authority" rests with Congress. *See id.* Complying with a congressional act aimed to effectuate the promises of the Reconstruction Amendments is thus quite different from complying with a State's attempt to do the same.

Third, mere compliance with a State's own law cannot serve as a compelling interest for purposes of strict scrutiny. If that were so, States would always be halfway to surviving strict scrutiny in every constitutional challenge to state law. Such a rule would flip the U.S. Supremacy Clause on its head—especially when a federal constitutional provision and a state constitutional provision conflict. When this occurs, the U.S. Constitution prevails. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

Fourth, even assuming that compliance with the Florida Constitution's non-diminishment provision could be a compelling interest to the extent it ensures compliance with §5 of the federal VRA, this compelling interest no longer exists because §5 is not operative now that the U.S. Supreme Court invalidated the VRA's

formula for determining which jurisdictions are subject to §5. *See Shelby Cnty*, 570 U.S. at 553-57. Even before invalidation of the coverage formula, the State of Florida was not subject to §5, nor were any counties in north Florida. *See Apportionment I*, 83 So. 3d at 624 (noting that only five counties were covered by §5—Collier, Hardee, Hendry, Hillsborough, and Monroe). The Circuit Court entirely disregarded this salient fact.

Contrary to the Circuit Court's "substantive similarity" determination, (App. 693), therefore, the Florida Constitution's non-diminishment provision *exceeds* section 5 of the VRA because it requires the drawing of race-based districts that the VRA itself does *not* require. Indeed, no one disputes that Congressional District 5 in the court-ordered map is not required by the VRA.[9] Entirely lacking

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[9] In addition to not being required under section 5, Congressional District 5 is also not required under section 2 of the federal VRA because the demographics of north Florida indisputably cannot trigger federal VRA scrutiny. The Act offers no safe harbor under the circumstances of this case because there is not sufficient black population to transform the challenged district into a majority-minority district, even under Plaintiffs' remedial plan. *See generally Bartlett v. Strickland*, 556 U.S. 1 (2009). Recent U.S. Supreme Court precedent reiterates the point. In *Wisconsin Legislature*, the Court explained that section 2 of the VRA could serve as a compelling interest but only *after* proponents of race-based sorting met all three pre-conditions for section 2's application, one of which is the need to

is any compelling justification for the use of race in drawing a district that is *not* necessary under the VRA. Indeed, the U.S. Supreme Court has never approved a racially gerrymandered district where there were not good reasons to believe that the VRA required such a district.

Likewise, the temporary injunction cannot be sustained based on any compelling state interest in "eradicating the effects of past racial discrimination." *Shaw v. Reno*, 509 U.S. 630, 656 (1993). To even contemplate such an interest, there must be a "strong basis in evidence for concluding that remedial action is necessary." *Id.* at 656 (cleaned up). Generalized allegations of past discrimination or societal discrimination are inadequate. *See Hunt*, 517 U.S. at 909-10. Proponents of race-based sorting—Plaintiffs here—thus must provide a "strong basis in evidence for its conclusion that remedial action [is] necessary" in this historical context and location. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (citations

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form a majority in the district, *and* then established, based on the "totality of circumstances," that "a race-neutral alternative" "would deny equal political opportunity." *Wis. Legis.*, 142 S. Ct. at 1250-51. "Strict scrutiny requires much more" than simply waving VRA as a talisman. *Id.* at 1249.

omitted). This Plaintiffs have not done. Tellingly, the region of the State was never subject to the VRA's prophylactic race-based remedies when those remedies were in place—a good indication that the relief Plaintiffs seek is unnecessary. *See also Jurisdictions Previously Covered by Section 5*, Dep't of Justice, bit.ly/3Obni3o.

3. Even if they could establish that remedying past racial discrimination is a compelling interest here, Plaintiffs have not shown that drawing a district in north Florida that prioritizes non-diminishment would be "narrowly tailored to achieve" it. *See Miller*, 515 U.S. at 920. The district would not be "created . . . to remedy past discrimination"—the "true interest in designing" the district would instead be to "satisfy [the non-diminishment provision's] demands." *Id.* at 920-21. The district thus would not be "narrowly tailored to achieve" the eradication of the effects of past racial discrimination. *See id.* at 920.

And at any rate, Plaintiffs—as defenders of the hypothetical district for these purposes—must show that prioritizing non-diminishment is the least-restrictive means of remedying past racial discrimination in north Florida to satisfy strict scrutiny. *E.g.*, *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (defender of law bore burden to

satisfy least-restrictive-means test). They have far from met that burden. Though they detail Florida's history of racial discrimination in voting rights, they do not explain why nothing short of prioritizing non-diminishment is necessary to curtail the ill effects of such historical discrimination. Their failure to do so proves fatal to any defense of the non-diminishment provision's application in north Florida. *See id.*

The evidence in the record establishes that the race-based boundaries of Congressional District 5 are not narrowly tailored. Dr. Johnson, as well as Robert Popper (the namesake of the Polsby-Popper compactness metric), have already shown at this preliminary stage that the district fares exceedingly poorly with respect to traditional districting criteria. (App. 345-51). The Enacted Plan's districts split fewer counties, cities, towns, and villages and are more compact. (App. 334-37). The Circuit Court's only responses are that Proposed Map A's Congressional District 5 is "necessary to ensure minority voters' continued ability to elect candidates of their choice" (and cites direct legislative testimony); that compactness and traditional districting criteria are only Tier Two requirements under article III, section 20 of the Florida Constitution; and other

congressional districts are less compact. (App. 691-95). For this last proposition, the Circuit Court referenced Texas's 35th Congressional District, which Plaintiffs' own expert had to admit is not anywhere near as sprawling as Florida's, *supra.*

None of these reasons proves narrow tailoring or that Congressional District 5 is constitutional under the U.S. Constitution. The fact that other congressional districts may be less compact does not make Congressional District 5 any more compact. To the extent that the Circuit Court found the comparison with Texas's 35th Congressional District persuasive, Dr. Ansolabehere, during the temporary injunction hearing, demonstrated that the comparison with Texas's 35th Congressional District was misplaced. Texas's 35th Congressional District is a majority-Hispanic district and spans only 80 miles. Indeed, the U.S. Supreme Court acknowledged that the Texas Legislature had good reasons to believe that the district was mandated by section 2 of the VRA. *Abbott v. Perez*, 138 S. Ct. 2305, 2331-32 (2018). Not so here. Congressional District 5, by comparison, is not majority black and spans over 200 miles, and there is no good reason to believe that it is required by the VRA.

B. Without a stay, the Circuit Court's order will interfere with the administration of the 2022 primary and general elections.

Yet, ignoring this commonsense *Purcell* principle, that is exactly what the Circuit Court did here. Given that Plaintiffs lack any clear entitlement to relief, now is not the time for the courts to interfere with the election machinery. "Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurral). For this reason, the U.S. and Florida Supreme Courts have made clear that, except perhaps in the most extraordinary circumstances, trial courts cannot issue injunctions that alter State election laws in the months preceding an election. That is exactly what the Circuit Court did here when it imposed sweeping changes to the State's congressional map from Nassau and St. Johns Counties in the east to Leon and Gadsden Counties in the west and as far south as Marion and Volusia Counties.

That would be extraordinary in any case. It is all the more extraordinary in this case because the U.S. Supreme Court is currently considering what limitations the Equal Protection Clause

places on the use of the federal VRA in the drawing of congressional districts. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of stay). With elections approaching, the U.S. Supreme Court stayed a trial court's injunction of state law to consider that question in *Merrill.* There is no basis for distinguishing the circumstances here, a case regarding whether a redraw of Congressional District 5 is required by state law and not prohibited by the Equal Protection Clause.

Notably, relying on the *Purcell* principle, the U.S. Supreme Court has "'repeatedly'" held that it's improper to enjoin state election laws close to an election. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283-84 & n.2 (11th Cir. 2020). In 2020 alone, all 17 federal district courts that tried to do so met the same fate: either the court of appeals stayed injunctions of state laws erroneously entered by trial courts, or the U.S. Supreme Court did.[10]

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[10] *See, e.g., RNC v. DNC*, 140 S. Ct. 1205 (2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *application to vacate stay denied*, 140 S. Ct. 2015; *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020), *application to vacate stay denied*, 2020 WL 3456705; *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020); *Clarno v. People Not Politicians Ore.*, 141 S. Ct. 206 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020);

Purcell continues to compel the U.S. Supreme Court and other courts to vacate trial court injunctions of duly enacted state redistricting legislation. This term, the U.S. Supreme Court vacated a district court's preliminary injunction of Alabama's congressional map. *See, e.g.*, *Merrill*, 142 S. Ct. at 879. Justice Kavanaugh's opinion concurring in the decision to stay the district court's injunction explained that there was not sufficient time to require the State to re-start its election preparations given Alabama's candidate qualifying deadlines and forthcoming elections looming. *Id.* at 880 (Kavanaugh, J., concurral).

Likewise, just over a week ago, the U.S. Court of Appeals for the Eleventh Circuit applied *Purcell* as one of two independent bases to stay a federal district court's order enjoining Florida from implementing provisions of its election code. The Eleventh Circuit

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Andino v. Middleton, 141 S. Ct. 9 (2020); *A. Philip Randolph Inst. of Ohio v. Larose*, 831 F. App'x 188, 189 (6th Cir. 2020); *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564 (5th Cir. 2020); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220 (5th Cir. 2020); *Priorities USA v. Nessel*, 978 F.3d 976, 978 (6th Cir. 2020); *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020); *Curling v. Sec'y of State of Ga.*, 2020 WL 6301847 (11th Cir. 2020); *DNC v. Bostelmann*, 977 F.3d 639 (7th Cir. 2020), *application to vacate stay denied*, *DNC v. Wis. State Leg.*, 141 S. Ct. 28.

began by asking "[w]hen is an election sufficiently 'close at hand' that the *Purcell* principle applies?" *League of Women Voters of Fla. v. Lee*, Case No. 22-11143, Slip. Op. at 6-7 (11th Cir. May 6, 2022). It noted that the U.S. Supreme Court has relied on *Purcell* to preserve State election laws where elections were as far as "four months away," and then concluded that "[w]hatever *Purcell*'s outer bounds," the State of Florida "fits within them" because "the next statewide election [is] set to begin in less than four months" and the State's election-machinery is already cranking. *Id.* at 7.

These equitable "principles are not novel." *In re Khanoyan*, 637 S.W.3d 762, 765 (Tex. 2022). So state courts have followed suit, invoking *Purcell* to prevent the frustration of election administration. *See, e.g., id.*; *Moore v. Lee*, 2022 Tenn. LEXIS 133, at *15 (Tenn. 2022); *Chi. Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (Ill. App. Ct. 2008); *Liddy v. Lamone*, 919 A.2d 1276, 1287 (Md. 2007).

Florida Supreme Court precedent also follows the *Purcell* principle. The state high court has long recognized that "[t]o interfere with the election process at [a] late date, even if a clear legal right were shown, would result in confusion and injuriously affect the rights of third persons." *Haft*, 238 So. 2d at 845. This potential for

interference provides reason enough to deny pre-election relief. *Id.*; *see also Walker*, 163 So. at 697 (same).

The only rationale the Circuit Court offered for (erroneously) ignoring *Purcell* was that it was a federal court doctrine, not a state court doctrine. That is an error of Florida law. It ignores the many states that have adopted *Purcell*'s reasoning, including the Florida Supreme Court itself. Separately, that is an error of federal law. The reasons underlying *Purcell* apply no less in state court than in federal court—to avoid voter confusion and interference with election administration in the period before election day. The Circuit Court's order interferes just as much with forthcoming elections as would a federal court order doing the same. Testimony from Columbia County and Duval County confirms this fact. Both say that they cannot implement any remedial plan without increasing the odds of error and confusion. (App. 219-27). So too does the President-Elect of the Florida Supervisors of Elections when he recounts that "numerous Supervisors" also cannot implement a new remedial plan without unduly interfering with election administration. (App. 236).

Still the Circuit Court failed to follow a "bedrock tenet of election law," and interfered. *Merrill*, 142 S. Ct. at 880. On that basis alone, reimposition of the automatic stay is warranted.

C. Temporary injunctions prohibit actions to preserve the status quo; they don't mandate action to dismantle the status quo.

Separately, the Circuit Court erred when it *mandated* affirmative action by the State at this preliminary stage of the litigation. "The primary purpose of entering a temporary injunction is to preserve the status quo pending the final outcome of a cause," not to mandate the judicial creation of a new status quo *before* a final adjudication on the merits. *Nazia, Inc. v. Amscot Corp.*, 275 So. 3d 702, 705 (Fla. 5th DCA 2019). Appellate courts caution trial courts "that injunctions which compel or mandate affirmative action by a party are disfavored," *Bull Motors, LLC v. Brown*, 152 So. 3d 32, 35 (Fla. 3d DCA 2014), and remind trial courts that they should be "even more reluctant to issue [mandatory injunctions] than prohibitory ones." *Grant v. GHG014, LLC*, 65 So. 3d 1066, 1067 (Fla. 4th DCA 2010); *see also Kline v. State Beverage Dep't of Fla.*, 77 So. 2d 872, 874 (Fla. 1955) (explaining that it's the "rare case"); *Groff G.M.C.*

Trucks v. Driggers, 101 So. 2d 58, 60 (Fla. 1st DCA 1958) (explaining that such injunctions are "seldom granted").

But the Circuit Court made *this* case the exception. Plaintiffs seek to set aside the congressional map enacted by the Legislature and approved by the Governor and instead restore a racial gerrymander across a wide swath of north Florida. They wish to do so without first putting on any evidence at a trial to show how an alleged race-based gerrymander furthers a compelling state interest through narrowly tailored means sufficient to satisfy the requirements of federal equal protection. This is not that rare case where Plaintiffs have established a clear legal right, "free from reasonable doubt." *Spradley v. Old Harmony Baptist Church*, 721 So. 2d 735, 737 (Fla. 1st DCA 1998). In granting Plaintiffs' mandatory injunction *before* trial, the Circuit Court compelled the State of Florida to now implement some new congressional plan that was never enacted into law. *Id.*; *see also Wilson v. Sandstrom*, 317 So. 2d 732, 736 (Fla. 1975) ("It is a general rule that a mandatory injunction can only be granted on a final hearing." (citations omitted)); *Gulf Power Co. v. Glass*, 355 So. 2d 147, 148 (Fla. 1st DCA 1978) (same).

In sum, the Circuit Court's mandate before a "final hearing" is "like awarding an execution before trial and judgment." *Miami Bridge Co.*, 12 So. 2d at 469 (cleaned up). It was issued in error.

II. PLAINTIFFS DID NOT MAKE THE NECESSARY SHOWING OF COMPELLING CIRCUMSTANCES OR IRREPARABLE HARM.

The only compelling circumstances offered to justify reinstatement of the stay was that "if the 2022 primary and general elections [are] conducted under the Enacted Plan, Plaintiffs' constitutional rights would be violated." (App. 731-32). But Plaintiffs have no right to vote in a racially gerrymandered congressional district that is not otherwise required to comply with the VRA. Indeed, to the contrary, the federal Equal Protection Clause "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper*, 137 S. Ct. at 1463 (quoting *Bethune-Hill*, 137 S. Ct. at 797). If the Circuit Court's temporary injunction is not stayed, then the right of Floridians to not be divvied up by race in their elections will be violated. If anything, therefore, compelling circumstances favor a stay. Regardless, Plaintiffs have failed to show evidence-based

compelling circumstances to warrant the trial court's vacatur of the stay. And they have failed to establish any irreparable harm as well.

CONCLUSION

In the final analysis, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw*, 509 U.S. at 647. While emphasizing on rights under the State Constitution, the Circuit Court seemingly forgot that the U.S. Constitution finds race-based sorting to be "odious." *Wis. Legis.*, 142 S. Ct. at 1248. For the foregoing reasons, the Secretary respectfully requests this Court to reverse the decision of the Circuit Court and reinstate the automatic stay provided under Rule 9.310.

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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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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

[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

[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.

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[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

[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 weeks* 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.

Dated: May 18, 2022

Respectfully submitted,

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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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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.
________________________________/

MOTION FOR LEAVE TO FILE REPLY

Pursuant to Florida Rule of Appellate Procedure 9.300, the Secretary moves for leave to file the attached reply to the response to the Secretary's Emergency Motion to Reinstate Automatic Stay filed by Plaintiffs in in accordance with the Court's Order of May 18, 2022. As grounds for such leave, the Secretary states that the brief reply will assist the Court in resolving the two issues presented in the Court's Order. Furthermore, the attached reply is only 924 words and will not prejudice Plaintiffs.

Dated: May 19, 2022

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The undersigned certifies that this computer-generated motion complies with the font requirements mandated under Rule 9.045, Fla. R. App. P and contains 83 words.

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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,

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

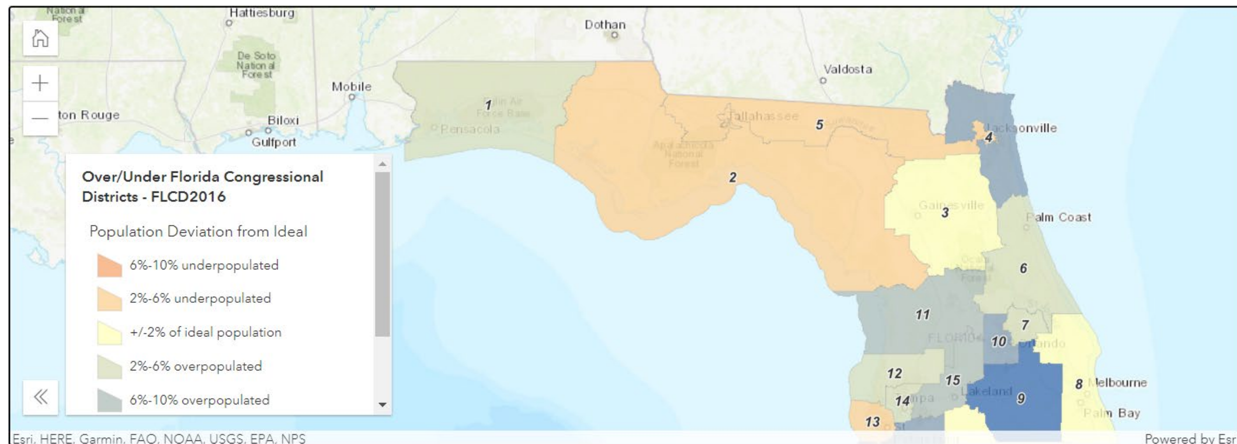
cards based on the Enacted Map. (App. 219-27). For some of these Supervisors of Elections, this work cannot be undone and then redone at this late stage. (App. 219-27, 237). This is the essence of what *status quo* means. Upending the duly enacted map of the people's representatives invites chaos and 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 website[1] 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

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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.

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Black Voters Matter Capacity Building Institute, Inc., et al

vs.

Laurel M. Lee

Hearing Before:

Judge J. Layne Smith

May 11, 2022

Vol 01

PHIPPS REPORTING

Raising the Bar!

IN THE CIRCUIT COURT OF THE 2ND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CASE NO. 2022-CA-000666

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

Plaintiffs,

vs.

LAUREL M. LEE, in her official
capacity as Florida Secretary of
State, et al.,

Defendants.
_______________________________________/

TRANSCRIPT OF HEARING
PROCEEDINGS

RE: Plaintiffs' Motion for Temporary Injunction and
Memorandum of Law

DATE TAKEN: Wednesday, May 11, 2022

TIME: 9:02 a.m. - 12:42 p.m.

PLACE: Remote Via Zoom

BEFORE: J. LAYNE SMITH, Circuit Judge

Stenographically reported remotely via Zoom by:
Lisa Begley, RPR, RMR

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1 Thereupon,
2 the following proceedings began at 9:02 a.m.:
3 THE COURT: As far as I can tell, everyone
4 is connected.
5 Ms. Begley, the court reporter, can you
6 hear?
7 THE STENOGRAPHER: Yes, I can. Thank you,
8 Your Honor.
9 THE COURT: All right, we have enough
10 people and parties involved that it's going to be
11 important, for the court reporter and for the
12 record, for everybody to remember to introduce
13 themselves.
14 And here's Mr. Bardos. I'm connecting him
15 as well. That's the other fun part, if there's
16 somebody that I don't know about that is supposed
17 to be here that hasn't connected.
18 Mr. Bardos, can you hear us?
19 MR. BARDOS: I can, yes, sir.
20 THE COURT: All right, very good. What I
21 was just saying is we have enough people involved,
22 it's important for everybody to introduce
23 themselves, who they are, and who they're
24 speaking, advocating on behalf of for the court
25 reporter's sake.

1 All right, a little -- and here we go. And
2 there's a number of people. We can expect there
3 to be folks adding in. So we'll make sure we
4 don't get out ahead of anybody. That's the
5 attorney general that obviously needs to be here.
6 All right, let me ask everybody else, is
7 there anyone that you know of that should be here,
8 that would want to be here that we need to wait
9 on, or do we think everyone is here and we're
10 ready to go?
11 MR. DEVANEY: Your Honor, John Devaney for
12 the plaintiffs. I believe our team is here and is
13 ready to go.
14 THE COURT: Okay. All right, I see the
15 Senate, the House, the attorney general, the
16 secretary of state, so I think we have everybody
17 that we would -- we would expect. I know we have
18 one witness, I guess, lined up and ready to go.
19 Good morning, everyone. I'm Circuit Judge
20 Layne Smith. I'm the judge on the case. We're
21 here for a temporary injunction hearing in this
22 matter, in Case No. 2022ca666.
23 One matter of housekeeping, I know that the
24 Attorney General's Office had filed a motion and
25 some supporting case law in essence saying that

1 they're not a proper party, that they were
2 supposed to be put on notice that this case is
3 attacking the constitutionality of the enacted
4 statute but that they aren't supposed to be a
5 direct party.
6 I've read the motion. I've read the case
7 law on that. Didn't surprise me. Kind of
8 anticipated that's what they would file on that.
9 Any issue about whether the attorney
10 general is in or out -- in other words, they're on
11 notice, they're here -- but as a party to the
12 case, a defendant to the case?
13 MR. WERMUTH: Your Honor, this is Fritz
14 Wermuth on behalf of the plaintiffs. We're aware
15 of the attorney general's position. I think the
16 fact that they have now clarified on the record
17 that they are not a proper party and that they are
18 not going to be participating in the matter, I
19 think that resolves the issue.
20 THE COURT: I thought -- I thought as much.
21 So the attorney general is certainly on notice.
22 They're required to be on notice, but they're not
23 a party. So if they're not a party, I wouldn't
24 expect them to take a speaking position today, but
25 they're monitoring.

1 Is that fair to say, agreed to by the
2 attorneys general's office.
3 MR. FARUQUI: That's correct, Your Honor.
4 THE COURT: Okay, so with one less
5 defendant, let me tell you where we are on this.
6 I know you all eat and breathe this subject matter
7 on a daily basis, and you're very experienced
8 litigators, very successful litigators; I don't,
9 on this subject matter. And over the last five
10 days, I've juggled my other cases on my docket and
11 read easily 2,000 pages of materials that the
12 parties have provided, statistical reports,
13 tables, new acronyms and terms of art,
14 nomenclature, along with the case law.
15 And the case law could be more
16 straightforward on some of the issues that we
17 have, but as it is, I'm doing the best I can. So
18 I need you all to remember, the attorneys, that
19 you're officers of the court, so don't try to pull
20 one on me if you think you might get away with it,
21 because I'll figure it out sooner or later. Don't
22 do that. It's important that everybody be honest,
23 because we've got a short period of time to do
24 what we need to do today.
25 The other thing is, don't hesitate to

1 explain something to me if -- In all the reading
2 I've done -- I'm a pretty quick study, but in all
3 the reading I've done, if I seem to get something
4 wrong, don't hesitate to call me out on it, to
5 correct me on anything. Be polite about it,
6 please, but there's a lot of material, and I am
7 the only resource.
8 I have a judicial assistant, and she and I
9 are it. So, unlike the appellate courts, I don't
10 have a battery of attorneys that I can turn to and
11 ask to do things. It's me. So make sure that
12 you're being clear in what you're explaining, and
13 it's also important for anybody who's listening in
14 that they understand what we're doing today, what
15 standards apply, what the evidence is, what
16 arguments that everybody is making on their
17 client's behalf because the people will accept a
18 decision better if they think it is a transparent
19 hearing that everybody who had -- everybody who
20 needed to had an opportunity to be heard and that,
21 even on the close calls, everybody involved, the
22 officers of the court and the judge, are doing
23 their best to get it right. And that's what the
24 important thing is. It's not what I would think
25 individually. What does the law require me to do,

1 because that is my charge. That's the oath I
2 took, is to follow the law, not to invent the law.
3 So you all are going to have to help me get
4 to the right answer today, and whoever doesn't
5 like it, and most assuredly somebody's not going
6 to like it -- I start today with the idea that
7 half the population is going to dislike me today,
8 no matter what, or tomorrow, whenever the ruling
9 is. And under the right circumstances, 90 percent
10 of the population can not like me, but I didn't
11 sign up to be popular. I signed up to follow the
12 law, and that's the best of what -- I'm going to
13 do my best on that.
14 So to the extent a party needs to be heard
15 separately, in other words, if there's a multiple
16 defendant that needs to ask questions or needs to
17 be heard, they'll be given that opportunity. If
18 it's as simple as "I'll stand on what's already
19 happened," please state that on the record and
20 we'll go from there.
21 That having all been said, I think what I
22 have read is that both parties intend to have an
23 expert witness with direct and cross-examination.
24 It's possible the defendants will have either one
25 or two expert witnesses.

1 I've done my best to read through the
2 affidavits and all of the materials that have been
3 filed. Now, I got something last night that was
4 78 pages when I was past my saturation point. So
5 what that means is, I got up this morning, had a
6 couple cups of coffee and have tried my best to go
7 through it, but I haven't been able to give it my
8 deliberated best as opposed to I'm under the gun,
9 and that's -- I have done my best.
10 So you all are going to need to walk me
11 through it and make sure that you make your point
12 clearly on the record because, whatever I rule,
13 the next court that gets it is going to need a
14 clear record to know what was advocated and what I
15 decided to the extent it is a determination of
16 fact as opposed to an area of law that they have a
17 de novo review on.
18 So let's start off with the plaintiff.
19 Make your case.
20 MR. WERMUTH: Good morning, Your Honor.
21 This is Fritz Wermuth for the plaintiffs, and I'm
22 accompanied by John Devaney, who's been admitted
23 pro hac vice, and Christina Floyd, and then Joe
24 Posimato, who's been admitted pro hac vice.
25 THE COURT: Let me interrupt you, and I

1 hate to do this. Thank you for that.
2 There was a pro hac vice motion filed
3 yesterday, and I had intended to get it rendered
4 yesterday. It got rendered this morning. So to
5 the extent -- I know that there's another attorney
6 who's a New York Bar member who is a resident of
7 Washington, D.C. If you worry, you have been
8 admitted to the extent you need to talk.
9 MR. WERMUTH: Yes, Your Honor, that's
10 Joseph Posimato, and he's on the Zoom.
11 THE COURT: Thank you.
12 MR. WERMUTH: And then Angie Price, who is
13 my paralegal, will be doing some presentation on
14 the screen.
15 THE COURT: Okay. Very good. All right,
16 Mr. Wermuth, thank you. You can call your first
17 witness, make an opening statement.
18 Have you all decided -- between the parties
19 decided what you all wish to do?
20 MR. DEVANEY: Your Honor, good morning.
21 John Devaney again for the plaintiffs. And I
22 think the parties have agreed that we will provide
23 the Court with oral argument.
24 At some point in the proceeding, and we'd
25 appreciate the Court's guidance on what you think

1 would be most beneficial -- For example, we could
2 start with very brief openings, go right to the
3 witnesses and then have more lengthy closings
4 after the witnesses testify, but we're certainly
5 amenable obviously to whatever the Court prefers.
6 THE COURT: It might help for me to start
7 with a real thumbnail sketch of what I think I
8 understand about that volume of material I've
9 already read to make sure that I'm on the right
10 footing as to the parties' positions.
11 And then I'd like you to give an opening
12 statement regarding, for the plaintiffs, what you
13 intend to prove, how you will prove it, not
14 argument, but basically here's what the evidence
15 is going to show, like an opening statement that
16 you do in front of the jury.
17 The defense, do the same thing as far as
18 what they think the evidence will show. Outline
19 your arguments for me under the law. And then
20 call the first witness with the direct and
21 cross-examination, and we'll go through the
22 witnesses that way.
23 You'll get an opportunity to give an oral
24 summation, and we'll see, I don't know what I'm
25 going to do yet. I shouldn't, should I? I

1 haven't heard the case yet. I mean, I've read a
2 lot of material, but I've got to get a sense of
3 what I'm going to do in a ruling and what I need
4 to be able to do that.
5 So we'll talk later about whether I need
6 any proposed orders or briefings because I know
7 our time is very tight on this. Not of my doing,
8 but it is what it is.
9 So here's where I think we are: The state
10 constitution, Florida's constitution requires the
11 legislature to do apportionment for the State
12 Senate and State House and then send that as a
13 joint recommendation to the Supreme Court.
14 The attorney general files that, and it
15 skips the governor, skips the executive branch and
16 goes from the legislature to the judiciary. Not
17 so with congressional redistricting. If it was
18 the same way, perhaps we wouldn't be here right
19 now because something different might have
20 happened, but we don't know and we don't need to
21 speculate about that.
22 Here, the congressional districting has to
23 be enacted by the House and the Senate -- it was
24 -- and either signed by the governor, vetoed by
25 the governor. If it is vetoed by the governor, it

1 needs to be overridden by two-thirds majority per
2 the constitution.
3 Where we're at is the state legislature,
4 the House and the Senate, enacted reapportionment
5 for Florida and Florida population is growing. So
6 we went from 27 members of the House of
7 Representatives. We got a 28th member as I
8 understand it. So not only did our population
9 grow by over 3 million during the 10 years between
10 the 2010 census and the 2020 census, but we got an
11 allocation of an additional congressperson, and so
12 not only did we have to redistrict for -- to make
13 sure the population was as close to equal in all
14 the factors for apportionment, but we had an
15 additional seat to take care of as well.
16 The governor vetoed a measure that had been
17 enacted by the House and Senate. They did not
18 override the veto. They came back in special
19 session and, as a result of the special session,
20 they enacted new districting that the governor
21 signed.
22 Now, what I don't know, and you all can
23 help me on this quicker than I can figure it out
24 myself -- If I had the luxury of time, I'd figure
25 it out myself -- but how much time did that cost

1 between the Governor vetoing what the legislature
2 had enacted, the special session to where he
3 signed it? I have a date -- I want to say it's
4 April the 22nd -- but a date with where the
5 Governor signed the law at issue in the case.
6 What I don't know is when in time the veto
7 happened. In other words, are we talking four
8 weeks? Are we talking three weeks? Are we
9 talking a month and a half? I know it wasn't a
10 long period of time, but there you go. In other
11 words, so that's -- that's where we're at.
12 The benchmark for Congressional District 5,
13 what had been Congressional District 5 for the
14 prior three elections ran on a east-west basis
15 covering several counties from Gadsden County in
16 the east over to Duval County in the west, and it
17 had been fashioned as a majority-minority African
18 American district.
19 I know the Supreme Court, in cases in the
20 Florida Supreme Court, in cases 2012 through, I
21 guess, 2015 had approved of that as a district to
22 the extent that, at one point in a case, it
23 basically said here's what the district is, now
24 you all figure out apportionment for the remaining
25 districts.

1 It seems to me that a difference between
2 then and now -- and one of the things is a legal
3 matter and we'll see how the facts play out with
4 it -- is to what extent the federal law may have
5 changed somewhat since the Fair Districts
6 amendment was added by the people of Florida
7 overwhelmingly to the state constitution.
8 And so the 15th Amendment to the United
9 States Constitution says that the rights of
10 citizens to vote shall not be denied or abridged
11 by the United States or any state on account of
12 race, color or previous condition of servitude,
13 Section 1; Section 2, that Congress will have the
14 power to enforce this article by an appropriate
15 legislation.
16 Well, in 1965, there was the Voting Rights
17 Act of 1965 enacted, and I think, based on my
18 reading, that that was pursuant -- Congress, what
19 they did at the end of the day is that was -- they
20 were enabled to do that through Section 2 of the
21 15th Amendment to the U.S. Constitution.
22 The 14th Amendment, Section 1, provides for
23 equal protection of the laws. So the U.S., nor
24 any state, can deny any person within its
25 jurisdiction the equal protections of the law.

1 So it seems to me one of the arguments
2 being made is that the Voting Rights Act runs
3 afoul of the 14th Amendment, or that it requires
4 strict scrutiny and narrow tailoring, and to what
5 extent we can prove that in a five-hour injunction
6 hearing, I'm not sure.
7 Is that a fair statement of kind of where
8 we are and the issues that are in play today?
9 MR. DEVANEY: Your Honor, John Devaney
10 again for the plaintiffs. Your Honor's summary, I
11 think, captures a good portion of what's before us
12 and where we are today. I would add a few things.
13 One is, first, in response to Your Honor's
14 question, you asked about when the veto occurred
15 and how much passage of time until the special
16 session at which the map in question was adopted.
17 The veto was on March 29th. The special session
18 was called three weeks later. It was during that
19 special session that the map in question was
20 enacted.
21 And, Your Honor, the piece that I would
22 want to add and very much emphasize is --
23 THE COURT: -- constitution.
24 MR. DEVANEY: I'm sorry?
25 THE COURT: The Fair District amendment to

1 the state constitution.
2 MR. DEVANEY: Exactly, Your Honor. And
3 that law is in effect. Decisions from the Florida
4 Supreme Court interpreting and applying those
5 constitutional amendments are in effect and are
6 binding, of course, on the Court.
7 And the Fair District amendment, as Your
8 Honor knows from the papers, Article 3,
9 Section 20, is very clear in establishing a
10 non-diminishment requirement in Florida law. And
11 there's a process for evaluating non-diminishment
12 that the Supreme Court has established in its
13 decisions, and that is a fairly straightforward
14 process that requires a functional analysis, and
15 that functional analysis focuses on did the
16 district in question -- in this case, of course,
17 what we call Benchmark CD-5 -- permit minorities
18 to elect their preferred candidates. And there
19 are various factors that we'll talk about later,
20 of course, that should be analyzed in that
21 functional analysis.
22 And then the second set in the functional
23 analysis is did the dismantling of CD-5 and the
24 dispersion of 370,000, approximately, black voters
25 into other districts diminish the ability of black

1 voters in northern Florida to elect their
2 preferred candidates. And under the Supreme
3 Court's jurisprudence, that is the analysis. One,
4 did the district perform? Two, with the
5 dismantling of the district, does it no longer
6 perform, and are those 370,000 voters no longer
7 with the -- no longer have the ability to elect
8 their preferred candidates?
9 That is the fairly straightforward analysis
10 under the Florida Constitution and, Your Honor, we
11 would submit and I think Dr. Ansolabehere, who
12 will testify momentarily, will establish that that
13 functional analysis makes it very clear that CD-5,
14 the Benchmark CD-5, the one that was in effect at
15 the beginning of 2015, that was created and
16 adopted by the Supreme Court of this state, did
17 give black voters the opportunity to elect their
18 preferred candidates. In fact, in, I believe, it
19 was three separate elections, black voters in CD-5
20 were able to elect their preferred candidate,
21 Representative Lawson.
22 The plan that has been enacted and is
23 before Your Honor dismantles that district, and so
24 the second part of the analysis is it leads to the
25 inevitable conclusion that that district no longer

1 performs for minority voters, and the voters have
2 been -- the black voters in that district have
3 been dispersed across four different districts,
4 all of which are white majority district, and all
5 of which, established by Dr. Ansolabehere, do not
6 give minorities, in this case black voters, the
7 ability to elect their preferred candidates.
8 And, in a nutshell, that evidence, which is
9 unrefuted -- there's no other functional analysis
10 in the record -- establishes that there is
11 diminishment in violation of the Fair District
12 amendment to the constitution. So, Your Honor, we
13 have a fairly straightforward violation of the
14 Florida Constitution.
15 The last point I'll mention is that the
16 legislature itself, as Your Honor is aware from
17 the history of this redistricting laid forth in
18 our papers, was very concerned about the
19 lawfulness of dismantling CD-5. And every map
20 proposed by the legislature, up until the last
21 minute until the Governor intervened, maintained
22 the east-west configuration of CD-5 or maintained
23 the ability of black voters to elect their
24 preferred candidates.
25 And even when the legislature passed a map

1 that did not give black voters that ability, they
2 proposed an alternative map that did preserve
3 that, recognizing that the constitutionality of
4 what it was proposing was very much in question.
5 And the chair of the House Redistricting Committee
6 himself said on public record that the legislative
7 staff did a functional analysis, and they
8 concluded that CD-5 no longer performs.
9 In other words, they concluded, this is the
10 legislature itself, that there has been
11 diminishment, and that diminishment is in
12 violation of the Florida Constitution.
13 Your Honor, there are obviously other
14 aspects to this proceeding, including responding
15 to some of the defendants' arguments about it's
16 too late to implement a remedy even if there is a
17 constitutional violation. I will reserve those
18 arguments, unless Your Honor would prefer to hear
19 them now, until closing and until we hear from
20 witnesses.
21 What I just outlined for you is at a high
22 level our fundamental case and what we think is a
23 very straightforward record that establishes
24 diminishment in violation of the constitution.
25 THE COURT: All right, Mr. Devaney, in

1 reading the materials you have provided, your
2 summary lockstep with the documents you had filed
3 on it, your briefing, as well as the supporting
4 document.
5 Let's hold off on the argument about delay
6 until after the witnesses have gone.
7 All right, anything else you need to say on
8 behalf of the plaintiffs before the defense gets
9 an opportunity to make an opening?
10 MR. DEVANEY: Your Honor, just one
11 housekeeping matter, and that is ensuring that all
12 that the plaintiffs have submitted with our --
13 both our opening motion and our reply brief is
14 admitted into the record. I just want to ensure
15 that the record contains all those materials.
16 I think -- I'm expecting there's agreement
17 among counsel that everything that the parties
18 have submitted is in the record, but I just want
19 to make sure that's the case.
20 THE COURT: As far as I know, I have
21 received everything that has been filed. Now,
22 unless it is sent to my office, if something is
23 sent to the clerk of court, it can be 12 to
24 48 hours before it populates on a screen I can
25 pull up. But I think everybody has gone out of

1 their way to make sure that they provided either a
2 notebook -- I've got more notebooks than I know
3 what to do with -- three-ring bound filings at a
4 minimum I could print out. So I think everything
5 that I'm aware of at least has been filed.
6 If you all raise something that I'm -- like
7 that's news to me, I'll let you know. And that's
8 true for both sides on that. If either of you had
9 something that -- because we've had to work in a
10 crunch here. So everybody has worked well with
11 each other, in good faith, and I know you all have
12 worked probably for and -- against each other, for
13 each other around the country on different fights,
14 but here we are on this one. So everything, I
15 think, is in, Mr. Devaney.
16 MR. DEVANEY: Thank you, Your Honor.
17 THE COURT: All right. The defense.
18 MR. JAZIL: Good morning, Your Honor.
19 Mohammad Jazil on behalf of the Secretary.
20 I just need to confirm for the record that
21 my friend Mr. Devaney is right. The parties have
22 agreed that all the exhibits attached to the
23 filings should be included in evidence for
24 purposes of this temporary injunction hearing.
25 THE COURT: Very good. Thank you,

1 Mr. Jazil.
2 MR. JAZIL: Thank you, Your Honor.
3 And since most of these materials have been
4 admitted into the record, I'll simply note a few
5 facts for the Court.
6 Your Honor, the record will show and at the
7 conclusion of this hearing you will see that what
8 my friend for the plaintiffs are asking for is for
9 this Court to draw a congressional map that goes
10 200 miles from east to west to connect the black
11 population in Florida's First Coast, Port City,
12 Orange Military Center in Jacksonville with the
13 black population in the Big Bend, a college town
14 with surrounding ag community.
15 Still, in that district, Your Honor, the
16 black population does not form a majority of that
17 congressional district, and that's important, Your
18 Honor, as Your Honor goes through the federal
19 constitutional analysis to see whether or not any
20 such district can comply with the Equal Protection
21 Clause.
22 My friend Mr. Devaney is right that the
23 Court is bound by the Florida Supreme Court's
24 orders and opinions, but the Court is also bound
25 by the U.S. Supreme Court's orders and opinions

1 and complies with the Equal Protection Clause as
2 necessary. Where the Equal Protection Clause and
3 Florida's Fair District amendments conflict, the
4 Equal Protection Clause prevails.
5 And here, Your Honor, to comply with the
6 Equal Protection Clause, any remedial map, any map
7 that stretches from east to west to connect the
8 black populations has to satisfy strict scrutiny,
9 the highest possible level of constitutional
10 scrutiny. You'll see, Your Honor, that that's
11 simply not possible here.
12 Your Honor, in addition, you'll hear
13 evidence about how there might be possible
14 confusion, delays, burdens imposed. That's also
15 important because it goes to our Purcell point, a
16 point that courts shouldn't interject themselves
17 into an election this late in the process.
18 Finally, Your Honor, you'll hear evidence
19 from the plaintiffs showing what they're asking
20 for is a mandatory injunction. They want to
21 mandate the enactment and approval of new maps,
22 mandate. And this is not that rarest of rare case
23 where such a mandate is appropriate.
24 Finally, Your Honor, a cautionary note. As
25 applied to the Benchmark District 5 and any

1 variation that the plaintiffs are asking Your
2 Honor to adopt here, non-diminishment standard
3 runs smack dab into the Equal Protection Clause
4 and renders the non-diminishment provision of the
5 Florida Constitution unconstitutional as applied,
6 and that's an important point.
7 THE COURT: It is, and you faded out just
8 at kind of what I think was going to be the
9 highlight of what you just said on this. So if
10 you'd repeat that sentence for me, please.
11 MR. JAZIL: Yes, Your Honor. My point is
12 simply this: If we adopt any configuration of
13 Congressional District 5 that goes north to south
14 to connect disparate black communities 200 miles
15 apart, what we have then is the non-diminishment
16 provision of the Florida Constitution running
17 smack dab into the Equal Protection Clause of the
18 federal constitution. It renders the Florida
19 Constitution's provision as applied
20 unconstitutional.
21 And it's an east-to-west configuration,
22 Your Honor. I apologize if I said anything
23 otherwise.
24 THE COURT: I gotcha. North-south was --
25 We've all read that with prior skirmishes, not

1 this skirmish. Go ahead.
2 MR. JAZIL: Yes, Your Honor.
3 And, finally, a point about the functional
4 analysis. You have to ask yourself this question:
5 If a baseline map is unconstitutional, what good
6 is a functional analysis? Where am I comparing?
7 How am I measuring diminishment? And we'll
8 explore those concepts a bit as the case proceeds.
9 Thank you, Your Honor.
10 THE COURT: All right, thank you.
11 All right, Mr. Wermuth or Mr. Devaney, call
12 your -- whoever is going to be leading the witness
13 -- not leading -- directing the witness, we'll put
14 it that way, call your witness.
15 MR. DEVANEY: All right, thank you, Your
16 Honor. My colleague, Christina Ford --
17 THE COURT: All right, Ms. Ford.
18 MR. DEVANEY: -- will proceed with direct
19 examination of our witness.
20 THE COURT: Good morning, Ms. Ford.
21 MS. FORD: Good morning, Your Honor.
22 Christina Ford for the plaintiffs.
23 The plaintiffs call Dr. Stephen
24 Ansolabehere as our first witness.
25 THE COURT: Ansolabehere. I'm glad

1 somebody pronounced that for me. I'll do my very
2 best. If I get it wrong, my apologies. I'm not
3 trying to be disrespectful.
4 So, sir, you need to unmute yourself on
5 your end. Let me ask you to raise your right
6 hand.
7 I take it everybody knows this gentleman
8 and knows he is who he's supposed to be. You
9 don't need me to pull out a driver's license or
10 anything; is that correct? I would imagine you
11 all run at each other -- Okay, very good.
12 Sir, do you swear or affirm that the
13 testimony you give in this case will be the truth
14 and nothing but the truth so help you God?
15 THE WITNESS: I do.
16 THE COURT: Very good. You can lower your
17 hand.
18 Ms. Ford, begin when you're ready.
19 MS. FORD: Thank you, Your Honor. Before
20 we begin, I just want to ask if the Court would
21 allow screen sharing so that we can share a couple
22 of demonstrative images --
23 THE COURT: Yes, ma'am.
24 MS. FORD: -- for you and the public?
25 THE COURT: Absolutely. There you go.

1 MS. FORD: Thank you very much.
2 DIRECT EXAMINATION
3 BY MS. FORD:
4 **Q. Good morning, Dr. Ansolabehere. Can you**
5 **please state your full name for the record.**
6 A. My first name is Stephen, with a P H,
7 Daniel Ansolabehere.
8 **Q. And you have been retained as an expert for**
9 **the Black Voters Matter plaintiffs in this case, correct?**
10 A. That's correct.
11 **Q. And you have prepared and submitted two**
12 **expert reports, correct?**
13 A. That's correct.
14 **Q. Dr. Ansolabehere, your C.V. was included**
15 **with your first expert report. Is your C.V. a complete**
16 **and accurate summary of your professional experience?**
17 A. It is.
18 **Q. I have just a few questions for you about**
19 **your background and expertise.**
20 **Can you briefly summarize your educational**
21 **background?**
22 A. I went to the University of Minnesota where
23 I got a BS in economics and a BA in political science.
24 And I went to Harvard University for my Ph.D. in the
25 department of government.

1 **Q. And where are you currently employed?**
2 A. I'm a Professor of Government at Harvard
3 University.
4 **Q. Can you briefly summarize your principal**
5 **areas of research?**
6 A. I study American politics and political
7 science and social science statistics. That is the
8 application of statistical methods to social science
9 problems.
10 I study elections. I run a large survey
11 organization as well, and I'm an election analyst for CBS
12 News.
13 **Q. Do you have experience in the field of**
14 **redistricting?**
15 A. I do.
16 **Q. Can you please briefly describe your**
17 **experience?**
18 A. I've served as an expert in about a dozen
19 cases, including Romo vs. Detzner. I've drawn maps in
20 several of those cases.
21 I worked for the Arizona Independent
22 Redistricting Commission as a consultant in the fall, and
23 for several other cases this cycle.
24 **Q. And just for clarification, Romo v.**
25 **Detzner, that was last cycle's Florida congressional**

1 **redistricting case, correct?**

2 A. Correct.

3 **Q. Thank you. And beyond redistricting cases,**

4 **have you served and been accepted as an expert witness in**

5 **cases generally involving political behavior in**

6 **elections?**

7 A. I have.

8 **Q. Have you ever been rejected as an expert by**

9 **any court?**

10 A. No.

11 **Q. And have courts previously credited and**

12 **relied upon your analysis?**

13 A. They have.

14 MS. FORD: At this time, Your Honor,

15 plaintiffs would offer Dr. Ansolabehere as an

16 expert in the field of political science and

17 election analysis.

18 THE COURT: Go ahead.

19 MS. FORD: Thank you, Your Honor.

20 BY MS. FORD:

21 **Q. Dr. Ansolabehere, before we dive into the**

22 **details of your report, I'd like to start at a high**

23 **level.**

24 **Can you briefly summarize what plaintiffs'**

25 **counsel asked you to evaluate in your first expert**

1 **report?**
2 A. In my first expert report, they asked me to
3 evaluate whether there'd been diminishment of minority
4 voters' ability to elect their preferred candidates
5 through the reconfiguration of CD-5. So it was a
6 comparison of Benchmark CD-5, which was the map that the
7 Florida State Supreme Court had put in place in 2015, to
8 the enacted map.
9 They asked me to do a functional analysis
10 to determine the voting behavior of minority candidates
11 -- minority voters, sorry, and white voters in CD-5 and
12 in the other districts that had been configured around
13 that area in North Florida, and also to see if there'd
14 been any other minority districts created elsewhere in
15 the map to compensate the diminishment around CD-5.
16 **Q. And, broadly, what did you find? What was**
17 **your top-line conclusion?**
18 A. My top-line conclusion was there had been a
19 diminishment of minority voters' ability to elect in
20 North Florida and that there had been no other district
21 created to compensate for that, and that the total number
22 of black Floridians whose -- in CD-5 had been about
23 370,000 and that they would have diminishment in their
24 representation.
25 **Q. And in your opinion, how easy or difficult**

1 **is it to draw a remedial map that fixes this**
2 **diminishment?**
3 A. My judgment is it's fairly easy to draw a
4 map that would fix the diminishment simply by taking 801
5 -- the version of the district that was created in the
6 House plan. The most recent one that I looked at was
7 8015 or the Senate plan, which was 8060. Those are the
8 last four digits on those long numbers describing the
9 plans.
10 Those districts closely mirror the
11 benchmark district, but they made marginal changes in the
12 district to increase the population because the benchmark
13 district was underpopulated by about 20,000 people.
14 **Q. Thank you, Dr. Ansolabehere. We'll come**
15 **back to those potential remedies.**
16 **In preparing for today, in preparing your**
17 **rebuttal report, did you review the reports submitted by**
18 **Dr. Johnson and Dr. Owens?**
19 A. I did.
20 **Q. And do those reports refute the findings in**
21 **your report?**
22 A. No, they don't.
23 **Q. Thank you, Dr. Ansolabehere.**
24 **I'd like to go back to your first report to**
25 **cover some basics, and I'd like to start with the maps**

1 **we'll be discussing today because there have been a lot**
2 **of maps thrown around in this case.**
3 MS. FORD: And here, Angie's going to share
4 a demonstrative.
5 Can everyone see this?
6 THE COURT: Yes, I can.
7 BY MR. FORD:
8 **Q. And, Steve, can you see this as well?**
9 A. Yes.
10 **Q. Sorry. Dr. Ansolabehere.**
11 **So, Dr. Ansolabehere, can you please**
12 **describe at high level what the benchmark map is and what**
13 **CD-5 looked like in the benchmark map?**
14 A. The benchmark map is the map that was put
15 in place by the Florida Supreme Court in 2015, and it
16 runs from Gadsden County in the west along the border,
17 taking the counties between -- in Duval County and takes
18 part of Jacksonville.
19 **Q. And can you describe what voters resided**
20 **there?**
21 A. It's a majority-minority district, and it's
22 a black district.
23 **Q. At the time the Florida Supreme Court**
24 **adopted this map in 2015, was it a majority black**
25 **district?**

1 A. No, it was not.

2 Q. Your report also refers to something called
3 Plan 8015. You also refer to it at times as the House
4 Committee map or the legislature's backup map. Can you
5 explain what these terms mean and what Plan 8015 is?

6 A. Plan 8015 has the number H000C8015. That's
7 the number that's assigned to it when it was submitted
8 through the state's redistricting portal.
9 It's the plan that the House committee had
10 put forward as their remedy if the version that was --
11 that they had passed was judged to be unconstitutional.
12 It follows the Benchmark CD-5 with some small changes.
13 The configuration in Tallahassee is much
14 more -- it's much smoother, not as jagged in its edges,
15 and it takes more of Duval County. It follows the border
16 between Nassau and Duval in the west. And, again it
17 makes the boundary smoother in Jacksonville on the east.

18 Q. And, finally, what is the enacted map?

19 A. The enacted map is the map that was signed
20 into law on April 22nd of this year, and it sets forth
21 four districts covering the area where CD-5 had been in
22 the benchmark and where it's located in Plan 8015.
23 CD-2 takes the western side of the
24 district, including Tallahassee and Leon County and
25 Gadsden County. CD-3 takes the counties from the middle

1 of the district, and the map flips CD-4 and CD-5, so CD-5
2 resides where -- in the enacted map, where CD-4 had taken
3 part of St. Johns and the eastern part of Duval, and CD-4
4 now takes Nassau County, which had been in old CD-4, and
5 the part of CD-5 that was in Plan 8015 and in the
6 benchmark map.
7 Q. And can you please describe how many black
8 voters were affected by this change?
9 A. There were about 367,000 black -- black
10 Floridians in the benchmark map, CD-5.
11 Q. And do those black voters now consist of a
12 minority of each of the new districts, CD-2 through 5, in
13 the enacted map?
14 A. Correct. Blacks are not -- None of these
15 districts, CDs 2,3, 4 or 5 on the enacted map, are
16 majority-minority districts. And in none of them would
17 blacks be able to elect their preferred candidates.
18 Q. Thank you, Dr. Ansolabehere.
19 MS. FORD: And, Angie, we can take this
20 demonstrative down.
21 BY MS. FORD:
22 Q. Dr. Ansolabehere, I'd now like to cover the
23 basics of the concept of diminishment.
24 When you refer to diminishment or
25 non-retrogression, what are you referring to?

1 A. That's the standard by which a district is
2 determined to perform one way or another for minorities,
3 whether it's a black district or Hispanic district. In
4 that district, after analyzing election data, we
5 determined -- or, I determined who is the preferred
6 candidate for the group in question and then whether or
7 not that group has the ability to elect. So that is, do
8 they win a majority of votes in most of the elections in
9 that area. They don't have to win all of the elections.
10 In addition, the demographics, the
11 demographic composition is important. We want to make
12 sure it's not just a white district, let's say a white
13 democratic district, and blacks are a minority and yet
14 they're just electing democrats. So it's really about
15 creating a majority-minority district in demographics, as
16 well as one where they have the ability to elect.
17 And under Florida law from last time, other
18 factors are important, such as the composition of the
19 turnout in the democratic primary and so forth.
20 Q. And all those factors you just talked about
21 is that what goes into a functional analysis?
22 A. That's correct. And diminishment occurs
23 when you have a district where all those factors came
24 together in that area where you're analyzing it -- in
25 this case, the area around CD-5 in North Florida -- and

1 minority voters did have the ability to elect their
2 preferred candidates in the prior version of the map, but
3 in the new version of the map, they would not, either
4 because it's no longer a majority-minority district on
5 demography, or one of those electoral factors is
6 diminished to the point where they can't elect their
7 preferred candidate.
8 Q. So when you conduct a functional analysis,
9 you look more at just the number or the percent of the
10 population that is minority, correct?
11 A. Yes. It's more than just looking at the
12 census numbers.
13 Q. And is that direction you take straight
14 from the Florida Supreme Court?
15 A. Yeah, those were the principles we followed
16 last time in Romo vs. Detzner and League of Women Voters
17 vs. Detzner, and that was the guidance that the Florida
18 Supreme Court gave us as to what factors to look at.
19 Q. So it's possible then that minority voters
20 could constitute below 50 percent of voters in a district
21 and still be protected from diminishment in your
22 understanding?
23 A. That's correct --
24 MR. JAZIL: Objection, leading, Your Honor.
25 Some leeway is --

1 THE COURT: Sustained. Ask the question.
2 But, Mr. Jazil, I'm going to be just the
3 same with you now.
4 BY MS. FORD:
5 **Q. Dr. Ansolabehere, is there any particular**
6 **numerical quota that minority voters might need to hit to**
7 **be protected from diminishment in your estimation?**
8 A. No. Like, the functional analysis and the
9 analysis of whether a district is performing is really
10 tailored to the facts on the ground around that district.
11 It's my understanding of Florida law, this
12 was part of a deliberation last time, and it's in the
13 record and in the decision of the court that this could
14 be less than a majority black district and still be a
15 performing district.
16 THE COURT: Let me ask a question --
17 THE WITNESS: Sure.
18 THE COURT: -- to make sure I've got it
19 right in my reading.
20 Is what you're talking about the difference
21 between a majority-minority district and a
22 crossover district?
23 THE WITNESS: A crossover district is one
24 where blacks couldn't elect their preferred
25 candidate without the votes of whites. That is --

1 THE COURT: All right, and the difference
2 here would be, in Benchmark District 5, if you
3 took the African American voting age population
4 registration, et cetera, and you add it to other
5 minorities, be they Asian, Native Americans,
6 whatever, the combined minority population could
7 outvote the white population?
8 THE WITNESS: Right. So the distinction,
9 if there's a majority-minority district that is a
10 majority of one group, like it's majority Hispanic
11 like you have down in South Florida, or majority
12 black, and then there are coalition districts
13 where the blacks and the Hispanics say, Come
14 together. There are a number of districts like
15 that around the country. And then there is
16 another set of districts which are called
17 crossover districts.
18 There's a little confusion about this in
19 the legal literature because, when this got
20 introduced by -- Rick Pildes introduced this
21 terminology in the '90s. He's a law professor at
22 NYU. I think the terms crossover and coalition
23 were getting used interchangeably back then, so
24 there's a little conflation of --
25 THE COURT: It confused me, which is --

1 which is why I asked, so -- but the bottom line
2 here, I get what you're saying on it. And
3 Mr. Jazil will get his opportunity as well.
4 So, Ms. Ford, please continue. I'm sorry I
5 interrupted.
6 MS. FORD: No, thank you, Your Honor.
7 BY MS. FORD:
8 Q. And, Dr. Ansolabehere, have you performed
9 functional analyses in cases or situations before this
10 one?
11 A. I have.
12 Q. Did you ultimately conduct a functional
13 analysis on the benchmark map and the enacted map?
14 A. I did.
15 Q. Can you please summarize your conclusions
16 as to what you found when you conducted a functional
17 analysis on the benchmark map?
18 A. CD-5 is the performing district for black
19 voters in the benchmark map. It's not in the enacted
20 map, nor is CD-4, CD-2 or CD-3, or any other district in
21 North Florida.
22 Q. And did black voters previously elect a
23 black candidate to Congress from the Benchmark CD-5?
24 A. They did. Al Lawson was elected in 2016,
25 2018 and 2020.

1 **Q. Going back to your fundamental conclusion**
2 **about diminishment, does Dr. Johnson's report refute that**
3 **there has been diminishment?**
4 A. No, it does not.
5 **Q. And does Dr. Owens' report refute that**
6 **there has been diminishment?**
7 A. No, it does not either.
8 **Q. What criticism of your report do you**
9 **understand Dr. Owens to be making?**
10 A. Dr. Owens is providing evidence that black
11 voters prefer white democrats and black democrats and
12 saying that there's not much of a difference between
13 them. My sense of that is that that doesn't go to the
14 question of which kind of candidates or which candidates
15 are preferred by black voters or Hispanic voters or Asian
16 voters, because the question put forward in the
17 constitution in the language is the preferred, the
18 candidates preferred by those voters, has there been a
19 diminishment in the ability of minority voters to elect
20 their preferred candidates. It's not about whether they
21 elect minority candidates. It's not the race of the
22 candidate. It's the preference of the voters that
23 matters.
24 **Q. Thank you, Dr. Ansolabehere. Let's go back**
25 **to your analysis for a moment.**

1 **Did you do a functional analysis of the**
2 **legislature's 8015 plan?**
3 A. I did.
4 **Q. And can you briefly summarize what you**
5 **found?**
6 A. I found that black voters had the ability
7 to elect in 8015's version of CD-5.
8 **Q. And what was your takeaway from that, the**
9 **fact that the legislature was able to make that kind of**
10 **district?**
11 A. So the change from the benchmark map to
12 8015 is that they had to equalize the population of all
13 the districts. And under -- The U.S. Constitution for
14 congressional districts has to be exactly equal, zero
15 population deviations. State legislative districts allow
16 some percentage difference, like, you know, plus or minus
17 5 percent or so. But this is like exact equality.
18 So they had to reconfigure it to get exact
19 equality, and they had to make up for a 20,000 person
20 deficit. Those changes could be -- what 8015 shows is
21 that those changes could have been accomplished and the
22 benchmark map's version of CD-5 maintained as a
23 functioning district for black voters.
24 **Q. Thank you, Dr. Ansolabehere. I'd now like**
25 **to turn to remedies.**

1 **Your initial report describes some of the**
2 **possible remedies to fix this diminishment. Can you**
3 **describe what those remedies were in your first report?**
4 A. In my first report, I was asked whether it
5 was possible to replace districts in North Florida and
6 restore a version of Benchmark CD-5, and the version I
7 chose was to put the version in 8015 in -- a version of
8 CD-5 into 8015 because that had been a version that the
9 House committee on redistricting had created presumably
10 in line with Florida law, or at least their understanding
11 of Florida law, and it had been passed by the committee.
12 And so I took the version in the north part of the map
13 and put it in as closely as possible. That affected
14 seven districts, 2, 3, 4, 5, 6, 7 and 11.
15 **Q. And, Dr. Ansolabehere, just to clarify,**
16 **because this is -- this is a nuance, nuance difference,**
17 **that remedy essentially swapped out the North Florida**
18 **districts from the 8015; is that correct?**
19 A. Correct.
20 **Q. Okay. Did you propose additional different**
21 **remedies in your rebuttal report?**
22 A. In my rebuttal report I proposed two
23 additional remedies to deal with two different questions.
24 One question was, was it -- was whether it was possible
25 to put 8015 in while changing the fewest congressional

1 districts enacted by the legislature and signed by the
2 Governor in the enacted map. And the answer was yes.
3 That's Version B or Proposed Map B. And Proposed Map B
4 puts 8015 in and realizes that the only other districts
5 that you'd need to change would be 2, 3, and 4. You just
6 swap the populations around. And what happens is 4
7 reverts to a very similar version to what it was in the
8 benchmark. Two is very similar to what it was in the
9 benchmark. And CD-3 in that version keeps Marion County
10 exactly as it was in the enacted map, and the only real
11 meaningful change I think is that CD-3 would have to run
12 into St. Johns County to pick up the necessary population
13 to maintain that exact, equal number of 769,221 people.
14 The other version that I proposed in Map A
15 tries to minimize the burdens on counties by trying to
16 follow the state legislative boundaries to the greatest
17 extent possible. So the state legislative district
18 boundaries are important for administrative reasons
19 because when the counties have to draw precincts and
20 format ballots and do the other administrative things,
21 they have to deal not only with this district, not only
22 with the congressional district, but they have to deal
23 with the kind of stacked district and come up with
24 ballots that represent all of those people on a unique
25 ballot. So when you vote, you vote on a ballot that's

1 got a congressional district candidate, a state
2 legislative -- State Senate district candidate, State
3 House district candidate, you know, and then maybe lower
4 level offices as well.
5 And when you stack those offices, when you
6 stack all of those maps up, you create a unique ballot
7 corresponding to that unique set of people that you as a
8 voter are supposed to choose for State House, for State
9 Senate and congressional districts.
10 So by following the state legislative
11 district lines you kind of reduce the number of different
12 ballots that you'd need to create for a county
13 administrator who's running an election. So Plan A
14 follows those state legislative district lines wherever
15 possible. And one of the things I noted as I was
16 studying what the state's House Committee on
17 Redistricting had done in constructing their version of
18 CD-5 was that they followed those legislative district
19 boundaries wherever possible. So I decided to do that in
20 Marion County and St. Johns County.
21 So proposed Map A tries to follow those
22 boundaries as closely as possible in Marion and St. Johns
23 and keeps CD-2 the same as in proposed Map B, and what
24 results is a reduction in the number of crossings of
25 those state legislative district boundaries and also a

1 reduction in the number of split voting tabulation
2 districts.
3 So the other administrative hassle for the
4 counties is that, if we draw districts and we have -- we
5 have to split these precincts to get exactly equal
6 population, it's not possible to do it without splitting.
7 Like, it would be a lucky accident if the precinct just
8 happened to have exactly the right population so you got
9 equality. So you have to split some precincts, and every
10 time you split a precinct, as a mapmaker that draws a --
11 splits a precinct or a state legislature splits a
12 precinct, the county administrator needs to go back and
13 figure out what the new precinct ought to be, because you
14 can't have -- your precincts corresponded to ballot types
15 like I just described and voting places. And you don't
16 want people going to the same precinct having to cast two
17 different ballots for CD-2 and CD-4, say.
18 You want people to be casting one ballot
19 for one congressional district, one state House district
20 and one state Senate district in that precinct. So every
21 time you split a precinct and there's people on both
22 sides of that precinct, the county would to have draw a
23 new precinct. So they're trying to minimize that problem
24 as well for the counties.
25 So by following those -- by minimizing

1 precinct splits -- and the precincts are also sometimes
2 referred to as voting tabulation districts. By
3 minimizing those splits, we got rid of -- we reduced the
4 number of splits, of voting tabulation districts in
5 Marion and St. Johns County relative to the benchmark map
6 and also relative to the enacted map. So there are fewer
7 precinct splits than in the enacted map in proposed Map
8 A.
9 Just a quick aside on what a voting
10 tabulation district is. Starting in the early '70s, the
11 U.S. Census Bureau started a project. It was a voluntary
12 project called the Voting Tabulation District Project.
13 One of the problems with redistricting is
14 if -- the census reports population counts at the lowest
15 geography possible called the block. So it's a census
16 block. And these are like the little tiny building
17 blocks. They typically have about a hundred people in
18 them. But some of them have zero people if it's like a
19 road or some water, and some of them have just a couple,
20 and some of them will have a thousand people. But most
21 of them are around a hundred people. But they -- they
22 correspond to an area of land.
23 And if the states just drew their districts
24 wherever they wanted to, they found that they were
25 crossing these census blocks, and the problem is then

1 you'd have to make a bunch of assumptions about how to
2 put the people, how to apportion the people in the split
3 blocks.
4 So the census started this VTD project to
5 make sure that the states didn't cross blocks, and they
6 created something that was the analog of the precincts,
7 and many -- it's about 45 states now abide by the VTD
8 project where the states and the census, the counties in
9 the census work together and establish these precincts
10 called voting tabulation districts.
11 So when we look at census data for analysis
12 of maps, we get the definition of the precincts from the
13 census, which is called the voting tabulation district.
14 There might be some small changes or variations in those
15 from state to state depending on the degree to which the
16 counties are actually abiding by the agreement to honor
17 the VTDs as the precincts. So we treat the VTDs as the
18 precincts analytically.
19 But that's the -- So the proposed Map A
20 minimizes the number of these split voting tabulation
21 districts, which will minimize the split of precincts.
22 Q. Thank you, Dr. Ansolabehere. I'd like to
23 talk about an example of the state legislative boundaries
24 that you just mentioned and how you achieved this kind of
25 goal that you just spoke about.

1 MS. FORD: Could we please bring up
2 demonstrative 2.
3 BY MS. FORD:
4 **Q. Dr. Ansolabehere, can you please explain**
5 **what this shows?**
6 A. This shows in the top panel the boundary of
7 CD-5 under Congressional Plan 8015 in Jacksonville. It's
8 really zoomed in on the center of Jacksonville, and you
9 can see a bit of the map in the background, the baseline
10 map in the background, the colored parts of two
11 congressional districts. The yellow part is CD-4, and
12 the purple part is CD-5, and you can see the St. Johns
13 River underneath it, as well as some of the highways.
14 The boundary of CD -- between CD-4 and CD-5
15 in the northern part of Jacksonville here follows
16 Interstate 295 on the east, and it actually splits a
17 number of precincts because the voting tabulation
18 districts in that area kind of span the freeway.
19 Below is Plan 8013, which is the State
20 House district plan. That is -- These are the -- This is
21 the plan that was approved and signed, and it's the map
22 of the state lower house's districts in the same area of
23 Jacksonville. HD14 is in yellow, and the purple-ish
24 color is HD13, and the kind of darker brownish color
25 below would be HD12. And you can see that this is the

1 same area. You can -- Underneath, you can make out the
2 St. Johns River going through. And this map follows
3 almost exactly the same boundary for HD14 along
4 Interstate 295.
5 So it was clear what that State House
6 Committee to me, as I studied this map, what the State
7 House Committee was doing was following the boundary of
8 Interstate 295 and making not just a congressional map,
9 but the State House district map.
10 And also the boundary of HD12 on the south
11 of this map on the bottom takes both sides of the river,
12 so it's not treating the river as if it was the normal
13 boundary here. So it's -- it's -- it's making the same
14 cut into the area as the Plan 8015, the congressional
15 district plan is making in configuring the House
16 district, the U.S. House district.
17 Q. So, Dr. Ansolabehere, what is your takeaway
18 from this? What would this mean for a supervisor if they
19 were asked to implement a plan like 8015 in this area?
20 A. So what it would mean is that any -- so
21 just taking first the northern boundaries between CD-4
22 and CD-5, any split precincts up there are going to be
23 precincts that they'd have to deal with anyway. They'd
24 have to draw new precincts because they have to draw new
25 precincts because of the State House district boundary,

1 so there's no additional burden. They're going to have
2 to draw new precincts, and the new precincts are going to
3 have to follow exactly the same boundary. So there's no
4 additional requirement or additional burden placed on
5 that.
6 And, also, because the maps are stacked,
7 because the districts are stacked, there's no additional
8 ballot form that needs to be created or assignment of
9 precincts based on overlapping jurisdiction.
10 Q. Thank you.
11 MS. FORD: Angie, we can take this down.
12 If you could please put up our
13 demonstrative 3 briefly.
14 BY MS. FORD:
15 Q. And, Dr. Ansolabehere, similarly, can you
16 briefly describe what this shows?
17 A. The top panel corresponds to CD-5 in the
18 Leon County area and specifically Tallahassee under Plan
19 8015, and the bottom map is the Plan 8013. That's the
20 State House district, the enacted State House districts
21 again for Tallahassee and Leon County. And we can see
22 the configuration of the district line in the top is
23 purple again is CD-5, and the bottom is CD-2, the browner
24 color is CD-2.
25 The configuration of CD line, the arm that

1 sticks into Tallahassee follows exactly the same arm as
2 House District 8 into Tallahassee. So there's no
3 re-precinct that would be required there. There are some
4 split precincts, but they're exactly the same precincts.
5 And then, in the center of Tallahassee,
6 there's that funny hook, but that hook follows almost
7 exactly the same footprint as the House District 8.
8 Q. So, Dr. Ansolabehere, what's your takeaway
9 for what this would mean for the supervisor in Leon
10 County if he had to implement Plan 8015?
11 A. So Leon County had, under 8015, had about
12 25, I think, spilt precincts, but half of them, 12 or 13
13 of them, I forget the exact number, it's in the report,
14 the rebuttal report, half of them were precincts that
15 were split exactly the same way by the House district.
16 So those are not additional burdens. They're going to
17 have to draw new precincts anyway because they have to
18 comply with the House district maps, the State House
19 district maps.
20 So the additional burden here would be, in
21 terms of new precincts, would be on the order of about
22 six, and the other thing that's going on is there are
23 another six precincts that are split, but the split is
24 zero population. It's just along a road, and there's no
25 -- where the split is, there's no -- there are no people

1 in it. So there's about six additional precincts that
2 would have to be reconfigured by Leon County.
3 And, additionally, the stacking of the
4 ballots, the congressional district and the State House
5 districts means that they don't have to configure -- they
6 don't have to configure a large number of additional
7 ballots, not like these districts are cutting in
8 completely different ways which would create more burdens
9 for the counties.
10 Q. Thank you.
11 MS. FORD: Angie, we can take this down.
12 BY MS. FORD:
13 Q. So, Dr. Ansolabehere, your report puts
14 forward both Plan A and Plan B as proposed remedial
15 options. At this point do you have a recommendation of
16 one of these plans over the other?
17 A. I ran something called the Caltech/MIT
18 Voting Technology Project for about four years, and we
19 worked a lot very closely with county administrators,
20 with our own administrators here in Massachusetts trying
21 to help them configure precincts and implement election
22 administration. So I'm very sympathetic to the
23 difficulties that counties and cities have administering
24 elections. So I would recommend Plan A as a plan that
25 minimizes the burdens to the greatest extent possible.

1 In terms of new precincts that would be
2 required, both the enacted map and any remedy map, if
3 that's the direction the courts choose to go, require new
4 precincts. The enacted map, once you set aside precincts
5 that are going to be required for State House districts
6 or precincts that have no population -- the splits have
7 no population in them, the enacted map is going to
8 require about 12 new precincts across all of the counties
9 affected in North Florida, and Plan A would require about
10 22 new precincts. So it's a net of about 10 additional
11 precincts in terms of burden.
12 Most of that burden -- The burden's going
13 to be unequal. It's going to be less actually than the
14 enacted map in St. Johns and Marion County, and it's
15 going to be more in Leon and Duval County. So it's going
16 to be distributed around, not equally, but it's not going
17 to be more than an additional 10 precincts to be dealt
18 with throughout the state, throughout North Florida.
19 THE COURT: I want to make sure I heard
20 exactly what you said on that, that, if the map
21 that has been enacted and signed by the Governor
22 goes forward, it would cause the creation of 12
23 new precincts. If Map A or Plan A, which you're
24 recommending, went in, it would require 22 new
25 precincts, the lion's share of those being in Leon

1 and Duval County?
2 THE WITNESS: That's correct.
3 BY MS. FORD:
4 Q. And, Dr. Ansolabehere, to put those 10
5 additional precincts in context, how many precincts are
6 there in total across North Florida, across the four
7 congressional districts that we've been discussing?
8 A. So across all those congressional
9 districts, that entire geographic area, there are about
10 650 precincts.
11 Q. Before we move on, I'd like to just ask you
12 about Columbia County specifically. Can you tell us how
13 Columbia County would be affected if you went from the
14 enacted plan to Plan A?
15 A. So 801 -- CD-5 under 8015 in Columbia
16 County cuts across the state along Interstate 10, the
17 county along Interstate 10. And when it cuts across the
18 county in Interstate 10, it splits four precincts. So
19 they have four precinct splits. Three of those four have
20 no population in the split. That is, they're taking --
21 when you go along Interstate 10, there's nobody living on
22 the half of the highway that's split from the precinct.
23 It just happens to be that's where they drew the line.
24 So it's a zero -- So three of those four is
25 a zero population split. So there's one populated voting

1 tabulation district that's split. That is where they
2 split the voting, the precinct, the voting tabulation
3 district, and there are people on both sides of the
4 split, and those people are in different congressional
5 districts.
6 **Q. So just to summarize, Columbia County would**
7 **require only one new precinct; is that correct?**
8 A. Yeah, they'd have to redraw one precinct.
9 **Q. Redraw one new precinct. Thank you.**
10 **I'd like to end by asking you a few**
11 **questions about your rebuttal report. I think you**
12 **already said this, but just to clarify, did you review**
13 **the report of Dr. Douglas Johnson that the defendants**
14 **offered in this case?**
15 A. I did.
16 **Q. Do you dispute that the enacted plan has a**
17 **better compactness score than your proposed plan does?**
18 A. No, I don't.
19 **Q. What was your overall impression of**
20 **Dr. Johnson's report?**
21 A. Dr. Johnson's report focuses on what we
22 referred to as Tier 2 criteria. Compactness, boundaries,
23 municipality splits, not on Tier 1 criteria favoring or
24 disfavoring a party or diminishment of minorities or
25 protection of incumbents.

1 **Q. And do you find that significant?**
2 A. The Florida Constitution in the case -- the
3 Florida Supreme Court in this case in 2015, in Romo vs.
4 Detzner and in the apportionment cases leading up to it,
5 recognize that CD-5 in the benchmark did not have a high
6 level of compactness but that it was necessary for
7 protection of a Tier 1 criterion.
8 So the -- You can't take the Tier 2
9 criteria in isolation. There -- If you're dealing with
10 diminishment and protecting minority voting rights in
11 particular, you might have to reduce the compliance of
12 those criteria. That's not just true here, but also it's
13 true elsewhere, and that's kind of routinely done.
14 There are other districts in the United
15 States, such as Texas' 35, which was heavily litigated
16 under the U.S. Constitution, is less compact than CD-5 in
17 the benchmark map and was allowed to stand because there
18 was a recognition that, to protect Hispanic voting rights
19 in Texas CD-35, it was necessary to have a less compact
20 district. So there's a tradeoff.
21 And when thinking about these Tier 2
22 criteria, you can't take them in the abstract. You have
23 to think of them in the context of other criteria you're
24 trying to balance. So the Johnson report's right that
25 this is a less compact version of what could be drawn in

1 North Florida for the districts, but it takes it out of
2 the context of the other criteria that need to be
3 considered.
4 Q. And can you put CD-5 in context? How does
5 it ultimately compare on compactness when you compare it
6 to other congressional districts across the United
7 States?
8 A. There are a lot of different ways to
9 measure compactness. The two most common used in legal
10 work and in academic scholarship are -- measure the area
11 of dispersion, like do you have a long district, and the
12 metric most commonly used for that was due to a professor
13 named Reock, so it's called the Reock score named after
14 him. And that metric considers the area of the district
15 relative to the smallest circle you can draw around that
16 district, and that ratio runs from 0 to 1 where a high
17 number would be more compact. And this district is --
18 CD-5 has a low Reock, but is not the lowest in the map.
19 CD 35, for example, is about the same, but there were
20 other districts, another, say, half dozen districts in
21 the U.S. used in 2020 that had lower compactness scores
22 on area dispersion.
23 The other metric for compactness that's
24 commonly used is the perimeter dispersion, that is, does
25 the district have big gouges out of it. Does it have

1 inlets. Does it have really irregular-looking sides.
2 And what it does is it measures the perimeter of the
3 district, and then says take the area of the district and
4 now take the area of a circle with the same perimeter or
5 circumference and what's that ratio. And that ratio also
6 runs from 0 to 1. So the most compact version of a
7 district would be a circle. That's not possible in maps
8 because you have to -- like, all the districts have to
9 fit together.
10 A square would have a Polsby-Popper of
11 about .74. This district's measure is more compact in
12 its perimeter than about 65 congressional districts that
13 were used in 2020 across the country, so --
14 THE COURT: Meaning the benchmark?
15 THE WITNESS: Yeah, benchmark. Yeah,
16 benchmark or 8015. They're about the same.
17 THE COURT: Okay.
18 A. Their Reock and Polsby-Popper scores are
19 about .11. So the areas of their districts are about
20 11 percent of the area of the most compact possible
21 configuration, which would be a circle. So there are a
22 number of other districts in the case of the -- that
23 states used this last election to elect their members of
24 Congress in 2020 that were less compact, and Texas 35 is
25 an example of a district that was also heavily litigated

1 on questions of racial gerrymandering under the federal
2 constitution and allowed to stand. So that might be
3 taken as a criterion or a standard.
4 Again, it depends a lot on context because
5 you're dealing with the particular geography of the
6 state, and the geography of the state may not -- and
7 where that district is located within the state may not
8 be highly amenable to creating a lot of compact
9 districts.
10 THE COURT: I hate to interrupt you, but
11 did I glean out of that, you said that across the
12 nation there would have been 65, plus or minus,
13 congressional districts that were less compact
14 under these two metrics.
15 THE WITNESS: Under the perimeter
16 compactness under Polsby-Popper, yes.
17 THE COURT: Okay, Polsby-Popper.
18 THE WITNESS: And a half dozen under Reock.
19 THE COURT: Got it.
20 THE WITNESS: Because CD-5 is a long
21 district. And Reock punishes having a long
22 district.
23 BY MS. FORD:
24 Q. Dr. Ansolabehere, what did you make of
25 Dr. Johnson's invocation of the standard that the Arizona

1 **Redistricting Commission uses to score compactness?**
2 A. Well, I worked for the Arizona Independent
3 Redistricting Commission this fall, and we -- that was
4 the commission that embraced that standard. The standard
5 is not a matter of law. It's just the guideline that
6 they imposed on themselves. It wasn't enacted by
7 legislature or approved by a court, and the next
8 commission can adopt a different standard and the
9 previous commission had a different standard. So it's
10 just a rubric or a guideline.
11 And the geography of the state and the
12 problems in redistricting the state are quite different
13 than the problems -- in the state of Arizona are quite
14 different than those in Florida. Arizona is a square.
15 It's a perfectly -- almost a perfectly square state. It
16 doesn't have a panhandle. It doesn't have a coastline.
17 It doesn't have peninsulas. So it doesn't have any of
18 the geographies that create this problem. And its
19 demography is different because the main population
20 center, the main population is concentrated really
21 densely in the center of the state. So it's not like you
22 have disparate concentrations of population that you need
23 to connect to create a legal district. So it's a much
24 different task in Arizona and a much different context in
25 Arizona to draw districts and in Florida. And even North

1 Florida is going to differ from South Florida in terms of
2 how people are distributed within the state, how
3 districts have to be drawn to accommodate the dispersion
4 of people.
5 Q. Thank you, Dr. Ansolabehere. I have just a
6 few more questions and then I'll be done. I'd like to
7 zoom back out to where we started.
8 In your opinion, after conducting a
9 functional analysis, does the enacted map result in
10 diminishment in black voters' ability to elect their
11 candidate of choice?
12 A. It does result in diminishment --
13 MR. JAZIL: Objection, Your Honor.
14 THE COURT: What's the objection?
15 MR. JAZIL: A, leading; B, it's asking for
16 a legal conclusion that's best left to the Court,
17 not the witness.
18 THE COURT: All right, it's not leading.
19 She's asking if he can do it, and he can say yes
20 or no. I'm going to allow him to testify. He is
21 an expert in this area. You may vigorously
22 cross-examine him.
23 Your expert will be given the same courtesy
24 as far as giving an opinion, which I may or may
25 not accept either expert, we'll see.

1 But overruled. Go ahead.
2 BY MS. FORD:
3 **Q. From your perspective, have the defendants'**
4 **experts put forward anything that refutes your core**
5 **conclusion on that?**
6 A. No.
7 **Q. If this court or another actor were to**
8 **restore black voters' ability to elect and to do so**
9 **within the contours of the existing enacted map without**
10 **making any other changes, how many new precincts would**
11 **need to be drawn in North Florida?**
12 A. There would be an additional or net
13 difference of 10 compared to the enacted map.
14 **Q. Out of how many total precincts in North**
15 **Florida?**
16 A. Out of 650 precincts in North Florida.
17 **Q. And if this court or another court finds**
18 **that it is too late to do anything about this**
19 **diminishment, how many black voters in Florida will have**
20 **lost the ability to elect their candidate of choice?**
21 A. There are 367,000 black Floridians in CD-5
22 that are -- where blacks have the ability to elect their
23 preferred candidates.
24 MS. FORD: Thank you, Dr. Ansolabehere. I
25 have no further questions for you at this time.

1 THE COURT: Very good.
2 Mr. Jazil or whoever on behalf of the
3 defendants, you may cross-examine.
4 MR. JAZIL: Thank you, Your Honor.
5 CROSS EXAMINATION
6 BY MR. JAZIL:
7 Q. Pleased to meet you, Dr. Ansolabehere.
8 A. Nice to meet you.
9 Q. I'd like to start with the VTD.
10 A. Uh-huh.
11 Q. First I want to make sure I understand your
12 testimony. Are you using VTDs as a proxy for precincts
13 in your analysis?
14 A. Florida adheres to the VTD project, and
15 those are the equivalents of the precincts for the
16 purpose of redistricting.
17 Q. Okay, so you're using VTDs and precincts
18 coextensively?
19 A. Yeah, in this analysis, yeah.
20 Q. But we don't know whether the county
21 supervisors are abiding by the VTDs in setting their
22 precincts in Florida, do we?
23 A. Most of them do. I don't know what the
24 boundaries are for all the precincts right now.
25 Q. And you studied this area of the law. So

1 **let me ask you this: There's nothing in the Florida**
2 **Constitution that mandates that supervisors follow VTDs**
3 **when establishing their precincts, is there?**
4 A. Nothing in the constitution that I know of.
5 **Q. There's nothing in the Florida statutes**
6 **saying the supervisor should follow VTDs when setting**
7 **their precincts, is there?**
8 A. I don't know that part of the Florida
9 statutes.
10 **Q. Fair enough. Do you know whether Columbia**
11 **County is following VTDs when setting their precincts?**
12 A. I don't know that.
13 **Q. Do you know whether Duval County is**
14 **following VTDs when setting their precincts?**
15 A. I don't know that.
16 **Q. Do you know whether Leon County is**
17 **following VTDs when setting their precincts?**
18 A. I do not know that.
19 **Q. Is that the same answer for Jackson County**
20 **and St. Johns County and Nassau County?**
21 A. That's correct.
22 **Q. Okay. Now, we talked a bit about**
23 **majority-minority districts. You referred to**
24 **Congressional District 5 as a majority-minority district.**
25 **But black voters do not form a majority of the voting age**

1 **population in the 2015 version of Congressional**
2 **District 5, do they?**
3 A. No, they don't.
4 **Q. And black voters do not form a majority of**
5 **the voting age population in plan 8015 from the**
6 **legislature, do they?**
7 A. That's correct.
8 **Q. Okay. Now, Professor, do you happen to**
9 **have a copy of your initial expert report in this case?**
10 A. I will call it up on my computer if that's
11 okay.
12 **Q. That's fine.**
13 MR. JAZIL: And, Your Honor, if I may share
14 the screen as well?
15 THE COURT: Yes, sir. Go ahead.
16 BY MR. JAZIL:
17 **Q. Doctor, I'd like to point you to page 8 of**
18 **your report.**
19 A. Yes, I see that.
20 **Q. Yes, sir, this is where you discuss your**
21 **ecological regression analysis, and I'll highlight a**
22 **portion of this. Footnote 1 --**
23 MR. JAZIL: Your Honor, I don't know if you
24 can see this or whether I have to make this
25 larger.

1 THE COURT: I can see it, so it's at your
2 discretion about whether to make it larger or not,
3 but I can read it.
4 MR. JAZIL: Yes, sir.
5 BY MR. JAZIL:
6 **Q. Professor, in here, if I understand**
7 **Footnote 1, you're saying that the ecological regression**
8 **estimates for specific non-black minority groups are not**
9 **reliable and have a very high margin of area for the**
10 **congressional districts in this area. Should that say**
11 **margin for error?**
12 A. Margin for error. I'm sorry, that's a
13 typographical error. Sorry.
14 **Q. So if I understand this correctly, you**
15 **don't know whether block voters combined with other**
16 **minority voters in the Congressional District 5 can elect**
17 **candidates, do you?**
18 A. I know that -- So the analysis I performed
19 was black voters, who's their preferred candidate and are
20 their preferred candidates able to win. It's not an
21 analysis of coalitions, but I also analyzed all minority
22 voters and who their preferred candidates were, all
23 minority voters combined.
24 I don't know -- It is not possible to
25 estimate, say, Native American voters or Asian voters in

1 this area because -- using ecological regression because
2 the margin of error is just too big.
3 Q. Yes, sir. So would it be accurate to say
4 black voters could be working with like-minded white
5 voters to elect candidates in Congressional District 5?
6 A. I do know that black voters and all
7 minority voters are sufficient. So if you take all
8 minority voters combined, that's sufficient. So one
9 analysis is all minority voters combined. Another
10 analysis is of black voters. I can do all minority
11 voters combined. I just can't tell you how Native
12 American voters voted with much precision. I can't tell
13 you how Asian American voters voted with much precision.
14 So I can do all minority voters, which is
15 one version of the composition of the district is, and I
16 can do black voters, but I can't give you the numbers for
17 the numbers in between.
18 Q. Understood, Professor. And is it still
19 possible that the black voters are working with white
20 voters, say, in Leon County to elect their preferred
21 candidate?
22 A. I don't know about working with. That's
23 not the term I would use, but there are some whites who
24 vote for democratic candidates along with blacks. But
25 that's not necessary to elect the minority-preferred

1 candidate here.

2 **Q. Understood, Professor. And just to end the**

3 **question on the majority-minority issue, you discussed**

4 **Congressional District 35 in Texas, correct?**

5 A. Correct.

6 **Q. And Congressional District 35 is a district**

7 **where Hispanics make up a majority of the voting age**

8 **population; isn't that right?**

9 A. They did when it was configured. They

10 don't now.

11 **Q. Yes, sir. And that district spans from**

12 **Austin to San Antonio if I have that right, right?**

13 A. Correct.

14 **Q. And that span is 80 miles, not 200 miles,**

15 **right?**

16 A. Yeah.

17 **Q. Now, Professor, I'd like to go to your**

18 **second report.**

19 MR. JAZIL: And I'll pull that up as well,

20 Your Honor, the second rebuttal report from

21 Dr. Ansolabehere.

22 THE COURT: Yeah, I'm tracking you all in

23 the papers you've given me as well, but go ahead

24 and put it on the screen.

25 MR. JAZIL: Your Honor and

1 Dr. Ansolabehere, I'd like to go to map 2.
2 THE COURT: Which exhibit?
3 MR. JAZIL: Your Honor, it's listed as map
4 2 to Dr. Ansolabehere's second report. So it
5 should be in the second binder that my friends for
6 the plaintiffs provided.
7 MS. FORD: I believe that's proposed Map A.
8 MR. JAZIL: Thank you.
9 And, Your Honor, here is the copy of
10 proposed Map A.
11 THE COURT: Got it. Go ahead.
12 BY MR. JAZIL:
13 Q. So, Dr. Ansolabehere, this is your proposed
14 Map A, correct?
15 A. Yep.
16 Q. And you provided this yesterday, the 10th,
17 and you state in your report that you prepared this in
18 response to the state's filings on May the 9th; is that
19 correct, sir?
20 A. Correct.
21 Q. Professor, I'd like to zoom in on
22 Congressional District 5 in proposed Plan A. Do you see
23 that line cutting across the proposed Congressional
24 District 6? Is that a non-contiguity?
25 A. That -- I don't know what that is. That

1 does not -- I can check my file and make sure that that's
2 okay.
3 **Q. Okay.**
4 A. But it could have been something that got
5 screwed up when I uploaded the file. But that should not
6 be there.
7 **Q. Understood. But you put this map together**
8 **in a day, correct?**
9 A. I -- Yes.
10 **Q. Okay.**
11 A. About a day.
12 **Q. It's a lot of work in a day.**
13 **Now, Dr. Ansolabehere, you talked a bit**
14 **about the precincts, but I just want to make sure I**
15 **understand a few things. You're a political scientist by**
16 **training and occupation, correct?**
17 A. Yes.
18 **Q. You've never administered an election in**
19 **the state of Florida, correct?**
20 A. Not in the state of Florida.
21 **Q. You've never set precincts in the state of**
22 **Florida?**
23 A. Nope.
24 **Q. You've never set ballot styles in the state**
25 **of Florida?**

1 A. Nope.

2 **Q. You don't know the impact that the**

3 **nationwide paper shortage is having on the local**

4 **supervisors of elections here, do you?**

5 A. I have not looked into that.

6 **Q. And you can't speak to the impact on the**

7 **ability of local supervisors of elections to send updated**

8 **voter registration cards to all their constituents, do**

9 **you?**

10 A. In the state of Florida, or elsewhere?

11 **Q. In the state of Florida, sir.**

12 A. Because I work with the state of

13 Massachusetts on these issues all the time.

14 **Q. Understood. But the state of Florida?**

15 A. No, I don't work with the state of Florida

16 on these issues.

17 **Q. And, Dr. Ansolabehere, in your first expert**

18 **report, paragraph 68, page 19, you say that incorporating**

19 **the North Florida configurations of either the Senate map**

20 **or the backup map would leave untouched 21 of the**

21 **congressional districts in the enacted map; do you recall**

22 **that?**

23 A. Yes.

24 **Q. So you're saying that seven congressional**

25 **districts would be affected based on a reversion to the**

1 **other maps, correct?**
2 A. In the version put forward in my initial
3 report.
4 **Q. Okay.**
5 A. That would be the -- That would be the --
6 That is where 5 -- CD-5, CD-2, CD-3, CD-4, CD-6, CD-7 and
7 CD-11 would be affected.
8 **Q. And do you happen to know how many counties**
9 **are in those congressional districts?**
10 A. Offhand, I don't.
11 **Q. A dozen, more or less, seem about right to**
12 **you?**
13 A. Across all those congressional districts?
14 **Q. That would be affected when you change the**
15 **lines across those --**
16 A. Oh, yeah, probably in that ballpark.
17 **Q. Thank you. Final set of questions.**
18 **Professor, you've been retained by the**
19 **Perkins Coie firm for this work, or is it the Elias firm?**
20 A. The Elias firm, I believe.
21 **Q. Do you recall how many times you've been**
22 **retained by the Elias firm and the Perkins firm?**
23 A. No, I don't know offhand.
24 **Q. Would it be more than, say, four times?**
25 A. More than four times, yeah.

1 **Q. And are you aware that the Elias firm bills**
2 **itself as the leading firm for democratic candidates, the**
3 **democratic party --**
4 A. I don't know how they bill themselves. I
5 don't follow their promotional stuff.
6 **Q. Understood. Have you ever testified for a**
7 **Republican-led legislature or Republican governor**
8 **(indiscernible) --**
9 THE STENOGRAPHER: I'm sorry, you cut out
10 at the end.
11 BY MR. JAZIL:
12 **Q. Have you ever testified on behalf of a**
13 **Republican governor in all of your redistricting work?**
14 A. None have approached me for redistricting.
15 I've worked for the City of San Antonio. I've worked for
16 the Arizona Independent Redistricting Commission, so...
17 MR. JAZIL: Your Honor, I may be done. May
18 I have just a minute or two to confer with my
19 colleagues?
20 THE COURT: Yes.
21 (Off the record from 10:37 a.m. to 10:38
22 a.m.)
23 MR. JAZIL: Your Honor, I have no further
24 questions. Thank you.
25 THE COURT: Very good. Any redirect?

1 MS. FORD: Just a few short questions, Your
2 Honor.
3 REDIRECT EXAMINATION
4 BY MS. FORD:
5 **Q. Dr. Ansolabehere, the black population in**
6 **CD-5 in the benchmark plan was under 50 percent, correct?**
7 A. Correct.
8 **Q. And that was true at the time the Florida**
9 **Supreme Court created the district?**
10 A. That's correct.
11 **Q. Do black voters and minority voters depend**
12 **on white voters to elect their candidates of choice in**
13 **CD-5?**
14 A. Not in my analysis. Not in my assessment.
15 **Q. In the proposed Map A that you spoke about,**
16 **how many congressional districts would that affect?**
17 A. Proposed Map A would affect CD-2, CD-3,
18 CD-4, CD-5 and CD-6.
19 **Q. So only five congressional districts?**
20 A. That's correct.
21 MS. FORD: Thank you, Your Honor. I have
22 no further questions.
23 THE COURT: All right. May this witness be
24 released?
25 MR. DEVANEY: From the plaintiffs'

1 perspective, yes, Your Honor.
2 THE COURT: All right. Defense?
3 MR. JAZIL: No further questions, Your
4 Honor. Thank you.
5 THE COURT: All right, sir, you're more
6 than welcome to stay if you're interested. If you
7 have other things to do, nice to meet you, go on
8 about your business.
9 THE WITNESS: Thank you for listening and
10 nice to meet you.
11 THE COURT: Thank you.
12 THE WITNESS: Good day, everybody. Thank
13 you.
14 THE COURT: All right, Ms. Ford or
15 Mr. Devaney or Mr. Wermuth, next witness.
16 MR. DEVANEY: Your Honor, Dr. Ansolabehere
17 is our only live witness. We're, of course,
18 relying on the affidavits that have been submitted
19 with our papers, and so that is the end of our
20 live witness presentation. And, Your Honor, I'm
21 assuming that we'll present further oral argument
22 after the defendants' present their witnesses.
23 THE COURT: Correct. I don't need a break
24 personally, but that doesn't mean somebody doesn't
25 need a break.

1 Do we need to break for a few minutes for
2 anybody to use the restroom, use the phone,
3 whatever they would need to do, or are we good to
4 proceed?
5 MR. JAZIL: Your Honor, for planning
6 purposes, we don't plan on calling our two experts
7 at this time, so...
8 THE COURT: Okay. Well, there you go.
9 MR. JAZIL: All for a natural break then.
10 THE COURT: All right, so are we ready --
11 if that's the case, then it may be -- I guess
12 we're to the point where advocates would be
13 advocates and tell me what it is that the
14 affidavit testimony means and how that impacts
15 either the plaintiffs' petition for a temporary
16 injunction or why it is that it should be denied.
17 So any other thing we need to do other than
18 get you all straight into what would be your
19 arguments?
20 MR. DEVANEY: Your Honor, from our
21 perspective, we can address the evidence in our
22 arguments, including the affidavits. So at this
23 juncture, it does feel like we're probably ready
24 to roll into argument. And if that is the case,
25 Your Honor, with your Court's permission, I would

1 ask for a brief recess just to gather some
2 thoughts for the argument based on what we've
3 heard over the last hour and a half or so, if that
4 would be permissible.
5 THE COURT: That's fine. How long do we
6 need to break? Five minutes? Ten minutes?
7 Fifteen minutes? More than five, I would guess.
8 MR. DEVANEY: Would 15 be permissible?
9 THE COURT: It would be. Anybody got any
10 issue with that?
11 MR. JAZIL: No, Your Honor. It seems to me
12 we've got plenty of time, so if my friend
13 Mr. Devaney would like more, that's fine as well.
14 I plan to be brief.
15 THE COURT: Well, here's the important
16 thing: You all can talk amongst yourselves, kind
17 of get your strategy down, but as I've told you
18 all before, I'm going to give you the time you
19 need on this, and I don't want anybody to walk
20 away thinking they couldn't be heard today. So
21 you will have as much time as you need on that.
22 So let's do this: It is 10:42. Let's
23 break until 11, and go from there.
24 MR. JAZIL: Thank you, Your Honor.
25 MR. DEVANEY: Thank you.

1 (Off the record from 10:42 a.m. to
2 11:02 a.m.)
3 THE COURT: Okay, let's continue. All
4 right, so I think where we are is this: The
5 presentation of live witnesses is done. So it's
6 really a matter of giving you an opportunity to
7 argue what's in the affidavits, what's in the
8 exhibits that have been filed to make your case in
9 addition to the one live witness we had.
10 So I guess I'll begin with the plaintiff.
11 It was their burden.
12 MR. DEVANEY: Thank you, Your Honor.
13 Your Honor, the Florida Supreme Court has
14 made it very clear what evidence or analysis is
15 required under the Fair District amendments in
16 determining whether there is unconstitutional
17 diminishment of minority voting rights. And that
18 guidance, that ruling requires what they call
19 comparative analysis, a functional analysis that
20 as we just heard from Dr. Ansolabehere requires
21 first addressing whether Benchmark CD-5 gave black
22 voters the opportunity to elect their preferred
23 candidates.
24 The second step in inquiry is, with the
25 dismantling of CD-5, has there been diminishment

1 in the ability of minority voters to elect their
2 preferred candidates.
3 The record here, Your Honor is
4 uncontroverted. There's only one functional
5 analysis that's been presented and that's from
6 Dr. Ansolabehere. There's nothing in the record
7 to contradict his conclusion that, number one,
8 Benchmark CD-5 is a district where minority voters
9 have the opportunity to elect their preferred
10 candidates. It's a district where the black
11 population is approximately 49 percent. The black
12 voting age population is approximately 45 percent.
13 And as Dr. Ansolabehere established, black voters
14 in combination with other minority voters are able
15 to elect their preferred candidates. That has
16 been demonstrated through the electoral analysis
17 that Dr. Ansolabehere provided, including, Your
18 Honor, the three congressional elections that have
19 taken place since 2015 under that district in
20 which the minority and black-preferred candidate,
21 Representative Lawson, was elected.
22 The second question then becomes, now that
23 CD-5, Benchmark CD-5 has been dismantled, has
24 there been diminishment. And the question there
25 is: Is the dismantling of CD-5 somehow made up

1 for by creation of another minority-performing
2 district in northern Florida? And it's not.
3 We've heard from Dr. Ansolabehere, again
4 completely unrefuted, that the 370,000
5 approximately black voters who were displaced from
6 Benchmark CD-5 have been put into four new
7 districts, 2, 3, 4 and 5, each of which is a
8 majority white district, each of which will not
9 permit minority voters, black voters to elect
10 their preferred candidates. And there is nothing
11 in the record that contradicts that or in any way
12 refutes that. And so that evidence right there,
13 Your Honor, establishes there is diminishment.
14 Your Honor has emphasized throughout this
15 proceeding that it's your intent to follow what
16 the law says. Article 3, Section 20 of the
17 constitution says that the ability to elect -- the
18 minority voters' ability to elect preferred
19 candidates must be protected and cannot be
20 diminished. But it has been diminished. And the
21 Florida Supreme Court in the decision in League of
22 Women Voters v. Detzner establishes the courts
23 have an obligation to invalidate any congressional
24 redistricting plan if it violates the
25 constitution.

1 And, Your Honor, we, of course, submit that
2 this court is required to follow both that
3 language in the constitution and that ruling by
4 the Florida Supreme Court.
5 Your Honor, a few additional points beyond
6 that fundamental framework for our motion. It's
7 that, it's important to emphasize that Article 3,
8 Section 20 prohibits diminishment not just when
9 it's intentional but also when that's the effect
10 of the redistricting. And in this case, Your
11 Honor, it's the effect that we're focusing on.
12 We're not -- We don't have a burden to
13 prove that there is intent to diminish. Our
14 burden here is to show that there was -- in
15 seeking an injunction is to show that there was an
16 effect, and that effect, for the reasons I've
17 described, has been established.
18 THE COURT: All right, the intent part will
19 be argued later on, after a trial. What you're
20 arguing is the or result of denying, in other
21 words, the result.
22 MR. DEVANEY: That's actually correct.
23 That's actually correct, Your Honor.
24 And, Your Honor, I don't want to belabor
25 the point, but I just want to remind the Court

1 about the creation of Benchmark CD-5 and its
2 origins with the Florida Supreme Court back in
3 2015.
4 In that case, the Supreme Court ordered the
5 legislature to draw the CD-5 east-west
6 configuration by holding that that configuration
7 was the, quote, only alternative option that
8 complied with the constitution non-diminishment
9 standard. So we have a ruling here from the
10 highest court in this state establishing that that
11 configuration of CD-5 is necessary to comply with
12 the Florida Constitution.
13 And, Your Honor, as I alluded to earlier at
14 the opening of this proceeding, when the
15 legislature took up its redistricting
16 responsibilities this cycle, it acknowledged
17 repeatedly that it had an obligation to protect
18 CD-5 and not diminish the voting rights of 370,000
19 black voters in that district.
20 In every plan that was put forward by the
21 Senate and the House, the redistricting committees
22 preserved CD-5 in one fashion or another in a way
23 that allowed black candidates to continue to elect
24 their preferred candidates.
25 It was only when the Governor announced

1 that he would veto that the legislature at the
2 last minute reversed course and proposed the
3 current configuration that strips black voters of
4 their ability to elect their preferred candidates.
5 And, Your Honor, we had a discussion about
6 this in response to your question, and I think
7 it's -- it's telling about the timing of this,
8 that the veto took place on March 29th and yet
9 there was a three-week delay until special session
10 took place and a new map was adopted. And what we
11 hear from the defendants, from the Secretary is
12 it's too late; we can't do anything to remedy this
13 even if there is a constitutional violation, as
14 there is.
15 And, Your Honor, it's funny that this
16 timing -- First of all, it's not too late, but to
17 the extent that they argue that, this is a timing
18 circumstance of their own making. These are not
19 naive people. They know that, if they can delay,
20 that a court in the end may be more reluctant to
21 change a map and to remedy a constitutional
22 violation. There's no excuse for the delay that
23 took place in enacting the map that finally was
24 adopted.
25 And, Your Honor, it's interesting, we had a

1 companion case that still exists in Federal
2 District Court in the Northern District of Florida
3 that was filed by some other parties, and in that
4 case, it was filed when there was an impasse.
5 There was no map that existed. And the state's
6 defendants came in and said, it's too early, you
7 can't -- this case isn't ripe, you've got to let
8 the legislature act. And that's the argument they
9 made. And then the day, literally the day that
10 the legislature enacted a map, we filed this case.
11 And now we're being told it's too late. So the
12 constitution cannot be that manipulatable. There
13 has to be a way for constitution rights to be
14 adjudicated. And the possible gamesmanship about
15 timing should not prevent Florida voters from
16 having their constitutional rights protected as we
17 are requesting in this case.
18 Your Honor, I had a lengthy piece in my
19 presentation about Dr. Ansolabehere's diminishment
20 analysis. I am going to probably stay high level
21 on that because you heard in detail from
22 Dr. Ansolabehere, but I'd just make a few
23 fundamental points about why there is
24 diminishment.
25 Black voters in Benchmark CD-5 have been

1 able to consistently elect the candidates of
2 choice since that district was created in 2015.
3 Black voters are the largest racial group of
4 registered voters in the district. The black
5 voters are the largest group of voters in each
6 democratic primary since 2015 and cast a plurality
7 of votes in the 2016 and 2000 (sic) general
8 elections.
9 And black voters vote very cohesively in
10 Congressional District 5, which gives them the
11 ability to elect preferred candidates as shown by
12 the election of Representative Lawson. And, Your
13 Honor, I won't repeat the details of
14 Dr. Ansolabehere's analysis to why there is
15 diminishment only to say, though, that, in the
16 four districts where these 370,000 black voters
17 have been dispersed, here are the black
18 populations in those districts: 23 percent in
19 District 2, 15 percent in District 3, 30 percent
20 in District 4, and 12 percent in District 5. And
21 that compares to, as I said before, 49 point --
22 49 percent population that was in CD-5.
23 THE COURT: 49.1. I read it.
24 MR. DEVANEY: And so what you have, it's
25 classic cracking. It's classic cracking, Your

1 Honor. Let's take that black population. Let's
2 splinter it up into four districts where they
3 don't have any voting power. And that's what
4 we've got. And, you know, literally, Your Honor,
5 of the 370,000 black voters that have been
6 dispersed, not one of them, literally not a single
7 person any longer has the ability to elect his or
8 her preferred candidate. And it's not just
9 Dr. Ansolabehere who reaches that conclusion, it's
10 the legislature, it's their staff that reached
11 that same conclusion in their own functional
12 analysis, which is what makes this case really
13 quite remarkable among redistricting cases.
14 You've got a legislature that concluded
15 there's diminishment, that concluded, based on its
16 own functional analysis, that blacks wouldn't have
17 the ability to elect their candidates, and yet
18 they went ahead and did it anyway.
19 Your Honor, we meet the standards for a
20 temporary injunction very clearly. The first
21 prong, of course, is likelihood of success on the
22 merits. For all the reasons I've described, that
23 I will not drag you through again, we have
24 established a strong likelihood of prevailing on
25 our claim that dismantling of CD-5 violates the

1 Florida Constitution.
2 The second prong is plaintiffs have to
3 demonstrate there is no adequate remedy of law.
4 Here, there is no remedy other than a temporary
5 injunction to protect against the harm the
6 plaintiffs would suffer in the 2022 primary and
7 general election if this unconstitutional
8 districting plan is used.
9 In plaintiffs' lack of adequate remedy of
10 law, whereas here the injuries result from a
11 violation of a constitutional right, we've cited
12 cases in our opening brief at page 16 making that
13 very clear, that when there is a violation of a
14 constitutional right that is irreparable harm.
15 And those constitutional violations are truly
16 quintessential irreparable harm, especially those
17 that implicate, as is the case here, the
18 fundamental right to vote.
19 The next prong, Your Honor, is Florida
20 voters will suffer irreparable harm. I've already
21 touched upon that and, as stated, violation of the
22 constitutional right is irreparable harm. And in
23 that regard, Your Honor, I'll emphasize that, once
24 an election occurs, there's no do-over. You know,
25 the harm is done. And so the only way to protect

1 against that harm is to ensure that a
2 constitutional voting map is put in place before
3 the election actually occurs.
4 The last prong, as Your Honor well knows,
5 is injunctive relief must serve the public
6 interest, and Florida courts have consistently
7 found that injunction to enjoin enforcement of a
8 law that encroaches on a fundamental
9 constitutional right presumptively serves the
10 public interest.
11 And in this case, Your Honor, it's also
12 relevant that the injunction would be limited in
13 geographic scope as it would only affect the
14 districts in northern Florida that
15 Dr. Ansolabehere discussed.
16 And for all those reasons, Your Honor, we
17 satisfy each of the prongs for temporary
18 injunctive relief, but I do want to briefly
19 address some of the arguments that the Secretary
20 made in response to our motion.
21 He relies first on the so-called Purcell
22 principle to argue that it's too late to make any
23 changes, and that argument is essentially, no
24 matter the strength of the constitutional plane
25 here, it's just too late to do anything about it,

1 but, Your Honor --
2 THE COURT: I'm going to give you both an
3 opportunity to talk about Purcell, but what I read
4 Purcell is that the federal government wouldn't
5 intervene and potentially cause disruption. I
6 haven't read those cases to say that the state
7 courts, whether it's a good idea or bad idea, but
8 it's more of a federal principle than applies to
9 states and state court actions.
10 MR. DEVANEY: Your Honor, you just saved
11 two minutes. That's where I was about to go, and
12 I won't go there since you know that.
13 THE COURT: I know the other side might
14 certainly advocate to the contrary and show me
15 that I'm reading that wrong if they think so, but
16 that's -- if I saved you two minutes, good. Go
17 ahead.
18 MR. DEVANEY: And, Your Honor, I know that
19 you didn't get our reply until fairly late in the
20 day yesterday and the valiant effort over your
21 coffee to read it this morning, but there's a case
22 in there that's quite relevant. It's one decided
23 by the New York Court of Appeals, which is that
24 state's highest state court. It came down just
25 two weeks ago.

1 In there, that court said, I'm quoting, the
2 Purcell Principle, quote, does not limit the state
3 judicial authority, whereas here a state court
4 must intervene to remedy violations of the state
5 constitution. So it's to your exact point, Your
6 Honor, that it's a federal doctrine, and as New
7 York just held, it does not prevent intervention
8 at this juncture to prevent a constitutional
9 violation.
10 And, Your Honor, the Secretary cites two
11 cases in an attempt to say that Purcell applies.
12 One is Haft v. Adams, which was decided more than
13 50 years ago, and it sits in opposite, Your Honor.
14 It's -- That case involves, as I understand it, a
15 claim that some candidates for office had failed
16 to pay a fee --
17 THE COURT: I read that case, yeah.
18 MR. DEVANEY: Okay.
19 THE COURT: Well, there was -- it was what
20 was the fee, there was some controversy what the
21 salary was, so what would the filing fee be for
22 candidates of that office.
23 MR. DEVANEY: And that was three weeks
24 before the election. Obviously a very different
25 issue, three weeks before the election, and there,

1 the complaining candidate I think had been lying
2 in wait and sat on that argument and made it for
3 some tactical reasons, and the court rejected
4 that. So very different from any Purcell
5 scenario.
6 And then similarly, Your Honor probably
7 also read Walker v. Best, which is about 90 years
8 old. And there the court refused to require a
9 lieutenant clerk to publish a new amendment to the
10 town charter only 15 days before the election
11 where the town's charter required amendments of
12 that type to be published at least 25 days before.
13 So, again, a very clearly distinguishable
14 situation from what we have here, and not at all
15 within the Purcell principle, even if that
16 principle could apply to state courts, which it
17 does not.
18 Your Honor, the last point I'll make on
19 this Purcell point, and it also goes to the
20 argument it's too late to make any change or
21 implement any remedy, is it is relevant that the
22 Secretary herself just a few weeks ago stated to a
23 federal court in the Northern District of Florida
24 that a new congressional plan could be put in
25 place as late as June 13th, 2022, and still could

1 be implemented.
2 THE COURT: June 13th is the qualifying
3 deadline for congressional candidates.
4 MR. DEVANEY: That is correct.
5 THE COURT: They've got to know which
6 district they're qualifying for, so that's the
7 urgency. Go ahead.
8 MR. DEVANEY: I believe that's correct,
9 Your Honor.
10 The other point I'll make is Florida, with
11 regard to this lateness argument, Florida has
12 close to the latest primary in the country,
13 August 23rd, which is a full roughly three and a
14 half months away, which allows the time for a
15 remedy.
16 And, third, recognizing the need to
17 implement a remedy quickly and efficiently, we
18 very deliberately proposed a narrow remedy. You
19 know, we believe that there are violations of the
20 Florida Constitution in multiple parts of this
21 redistricting map, but we decided to bring this
22 narrow claim, focus on CD-5 and the districts that
23 are affected by the dismantling of CD-5 in part to
24 ensure that we could have a remedy for those
25 370,000 people I've alluded to. And we made it

1 narrow. We made it narrow on purpose because we
2 want to ensure that there is time to implement a
3 remedy to protect those people affected. And so
4 we cast this motion in a way that was designed to
5 ensure there would be time for a remedy, and for
6 the reasons I've stated we're confident that there
7 is.
8 And Dr. Ansolabehere has presented two
9 potential remedies to accomplish this. He
10 described them for you. I won't walk through the
11 details of his testimony because Your Honor heard
12 it. But the effects on surrounding districts to
13 which these 370,000 voters have been dispersed are
14 minimal. And that was by design, again, so that
15 we could have as few changes as possible to allow
16 for a remedy. So it's a remedy that could be
17 implemented quickly. It will affect only a
18 handful of districts. And the Secretary relies on
19 affidavits from a couple of supervisors who state
20 a new map would impose administrative burdens on
21 their office.
22 But, Your Honor, it's important to
23 emphasize that the U.S. Supreme Court in multiple
24 cases, including the Taylor v. Lee case, has found
25 that administrative burdens are not sufficient to

1 justify violating constitutional rights. And the
2 record establishes here that most supervisors who
3 weighed in are confident they can implement the
4 remedy on a timely basis.
5 Supervisor Earley on Leon -- in Leon, his
6 deputy, Christopher Moore, say that the remedy can
7 be implemented as long as a plan is in place by
8 May 27th. The same holds true for the supervisor
9 of elections in Orange County, which has 850,000
10 voters, again, as long as a remedy is in place by
11 the end of this month.
12 And it's interesting, Your Honor, that,
13 while the Secretary relies on an affidavit from
14 the Polk County Supervisor of Elections that was
15 submitted in a different proceeding a month ago,
16 just yesterday that supervisor saw that her
17 declaration had been put into this case, and she
18 issued another declaration or affidavit saying
19 that essentially the Secretary is not actually
20 representing her views and that it would be
21 possible to implement a new plan as long as it's
22 in place by May 27th.
23 THE COURT: What affidavit is that? Do you
24 know?
25 MR. DEVANEY: I am going to have to ask my

1 colleagues to help me with that secretary's last
2 name.
3 THE COURT: Polk County. I can figure it
4 out if it doesn't come --
5 MR. WERMUTH: It's Lori Edwards.
6 THE COURT: Okay.
7 MR. DEVANEY: Thank you. And, Your Honor,
8 the Secretary relies on an affidavit from
9 Supervisor Brown who doubts her ability to
10 implement a remedy in time for the 2022 elections.
11 But the roadblocks she identified are fixable
12 problems, such as having to reschedule a meeting
13 with the Board of County Supervisors. Surely that
14 rescheduling issue shouldn't trump the
15 constitutional violations that we've discussed.
16 THE COURT: Supervisor Brown is Duval
17 County?
18 MR. WERMUTH: Columbia County, Your Honor.
19 THE COURT: Columbia. All right, thank
20 you.
21 MR. DEVANEY: And while Columbia may need
22 to spend some more money, that burden pales in
23 comparison to 370,000 people losing their
24 constitutional rights. And as for Duval, we've
25 submitted an affidavit from Representative Davis

1 who's worked in the Duval Supervisor of Elections
2 Office for 14 years where she is deputy supervisor
3 of elections, and she states that the seasoned
4 staff in Duval knows how to handle changes in
5 restricting maps, including potential precinct
6 splits. It's done routinely. It's been done a
7 lot, and that a remedy can be implemented in this
8 case by the end of May.
9 So, Your Honor, most of the supervisors say
10 that they could handle this. They could implement
11 a new map by the end of the month, as long as it's
12 in place by the end of the month, and those who
13 have doubts about whether they can don't cite any
14 burdens that cannot be overcome.
15 Your Honor, I just have a couple more
16 points to make. I want to briefly address this
17 argument that somehow, if I understand it
18 correctly, that the Fair District amendment and
19 the prohibition against non-diminishment violates
20 the U.S. Constitution because it would require
21 taking into account race in drawing a
22 congressional district.
23 And when the Secretary makes that argument,
24 Your Honor, she is asking you not just to make new
25 Florida law, because that's clearly not what the

1 Florida Constitution or the Florida Supreme Court
2 has held, but she's asking you to create a
3 precedence that no court in the country -- Federal
4 law is very clear that race can be taken into
5 account in the redistricting process.
6 The U.S. Supreme Court in Cooper says there
7 just has to be good reasons to create a district
8 that takes into account race in the crafting of a
9 district. And if you are to take the Secretary's
10 argument to its logical conclusion, you would be
11 violating U.S. Supreme Court, the Florida Supreme
12 Court and, again, creating new law that -- that it
13 would be unprecedented.
14 Your Honor, relatedly it was suggested, I
15 think, in either counsel's opening argument or his
16 cross of Dr. Ansolabehere that there can't be
17 diminishment in CD-5 because the black population
18 isn't in excess of 50 percent, and I think that
19 counsel cited Section 2 of the Voting Rights Act
20 for that proposition.
21 This is not a Section 2 claim, of course.
22 This is a claim under the Florida Constitution.
23 It's undisputed that black voters in coalition
24 with other minority voters are able to elect their
25 preferred candidates. There does not have to be a

1 black voting population in excess of 50 percent
2 for there to be diminishment under the Florida
3 Constitution. I just want to be very clear about
4 that.
5 And, again, with respect to, also, to this
6 claim that somehow the Equal Protection Clause
7 invalidates the Fair District amendments or the
8 application of the Fair District amendments here,
9 there's a very heavy burden that the state bears
10 to show, even if the Court were willing to go
11 there, which, again, would be creating brand new
12 precedence, and so we urge the Court not do that,
13 but even if the Court did that, the state's burden
14 to show that race predominated in the creation of
15 CD-5 and Plan 8015 is a very, very heavy burden,
16 and the case law establishes that, that to show
17 race predominated, one must come forward with very
18 persuasive, robust evidence. There is no such
19 evidence in this record.
20 There are a multitude of reasons why the
21 legislature probably proposed district CD-5 and
22 Plan 8015 preserving the core of the district,
23 keeping constituents together, keeping communities
24 of interest together. And most important, Your
25 Honor, and this is -- you can see this in the

1 legislative record, to comply with the Florida
2 Supreme Court's prior rulings regarding CD-5,
3 that's not a race-related reason.
4 That's a reason that's based in the
5 legislature's obligation to comply with the law.
6 So the state can't meet its burden of showing that
7 race predominated even if the Court were
8 interested in going that far and creating new law.
9 It's also -- It's also very clear from case
10 law that we've cited throughout the country that,
11 even if race predominated, which it didn't, but
12 even if it did, that there's a compelling state
13 interest for drawing a district that took into
14 account race, and that is compliance with the Fair
15 District amendments and the Florida Constitution.
16 Your Honor, the last point that I will
17 address is this argument that we are seeking a
18 mandatory injunction and that those should be
19 sparingly granted. And I want to be very clear in
20 our papers that we made it clear we're seeking a
21 prohibitive injunction, that is to prohibit use of
22 Congressional District 5 -- I'm sorry -- to
23 prohibit use of, yes, the new version of CD-5
24 that's in the enacted map.
25 The Court has multiple options in terms of

1 a remedy. The Court could tell the legislature
2 that it needs to pass a constitutional map by
3 May 27th, and if the Court -- if the legislature
4 fails to do so, at that point the Court could
5 impose one of the two maps that Dr. Ansolabehere
6 has put forward. But the point here is we're
7 seeking a prohibition against the enacted map from
8 being used. We have no objection to the
9 legislature getting another shot at passing a
10 constitutional map. And so I wanted to be very
11 clear about that, that point.
12 And so, Your Honor, in conclusion, there is
13 diminishment. There is a constitutional
14 violation. There's time for a remedy. And we
15 satisfy all the requirements for temporary
16 injunctive relief.
17 And, Your Honor, if I could have one moment
18 to just confer with my colleagues through a couple
19 of texts that I received to make sure that I've
20 not missed anything, I would appreciate that.
21 THE COURT: Sure, go ahead.
22 MR. DEVANEY: Thank you.
23 (Brief interruption.)
24 MR. DEVANEY: Well, Your Honor, unless I'm
25 missing something, I think my colleagues believe

1 I've covered everything. So I think I am done,
2 and I thank you for your time.
3 THE COURT: Thank you, Mr. Devaney.
4 Mr. Jazil.
5 MR. JAZIL: Thank you, Your Honor, and may
6 it please the Court.
7 THE COURT: Yes, sir.
8 MR. JAZIL: Your Honor, I'd like to frame
9 our argument around three points. First, I'd like
10 to talk about and discuss with you the broader
11 constitutional paradigm we're operating under.
12 We have the federal constitution and state
13 constitution. It's important that you know what
14 the rules are for both.
15 Second, Your Honor, I would like to be able
16 to walk through the Purcell argument, which is
17 related to feasibility and timing.
18 THE COURT: Sure.
19 MR. JAZIL: Third, Your Honor, I'd like to
20 talk about the mandatory versus prohibitory
21 injunction issue.
22 THE COURT: Okay.
23 MR. JAZIL: Under the equal protection
24 argument, at the end of the day, Your Honor, in
25 every version of every ask that we have from the

1 plaintiffs, they're asking for an additional
2 drawing from east to west, 200 miles that connects
3 the populations in Duval and the populations in
4 and Leon.
5 If Your Honor takes a look at just the
6 actual populations that would exist in this
7 district, over 80 percent of the population in
8 this configured district would be in Duval and
9 Leon, two counties. So we're drawing a 200-mile
10 district anchored by two counties. The question
11 you have to ask, Your Honor, then is, is this
12 compliant with the federal constitution, because
13 first you have to make sure that things comply
14 with the federal constitution, and then you have
15 to make sure they comply with Florida's Article 3,
16 Section 20 requirement, specifically the
17 non-diminishment provision.
18 Again, Your Honor, where the two conflict,
19 the Equal Protection Clause must prevail. That's
20 why we have a supremacy clause in the federal
21 constitution.
22 So let's talk through the proposed
23 (indiscernible) --
24 THE STENOGRAPHER: I'm sorry, you cut out
25 at the end.

1 MR. JAZIL: Let's talk through the maps.
2 Your Honor, again, under the federal
3 paradigm, if race predominates, strict scrutiny
4 applies. Strict scrutiny is the highest possible
5 level of constitutional scrutiny, and that's for
6 good reason, because race is the reason why we're
7 sorting people, so strict scrutiny applies. And
8 how do you pass strict scrutiny? You show a
9 compelling interest that is narrowly tailored in
10 its application.
11 Let's talk about the race predominating
12 portion, Your Honor. How do we know race
13 predominated? Because the legislature said that
14 they're drawing 8015 based on race. They may have
15 been doing it to comply with the state
16 constitution, but they said that they're drawing
17 it for racial reasons. They're connecting black
18 populations.
19 Again, Your Honor, the map does that.
20 8015, which was the first remedial map and serves
21 as a basis for all the other proposed maps, you
22 have black populations, different parts of the
23 state, and in Leon County, the very top of that
24 connection narrows down to three miles, Your
25 Honor.

1 So race is predominating. We have
2 legislative testimony to that effect. We can see
3 the shape of the district. We can see the
4 population distribution in the district. If you
5 look at the heat maps on the
6 floridaredistricting.gov website, which the Court
7 can take judicial notice of, you'll see we're
8 connecting black populations. That is the goal of
9 any configuration of an east-to-west, 200-mile
10 congressional district.
11 If then, Your Honor, race predominates and
12 strict scrutiny applies, how do you comply? You
13 comply by showing there's some compelling state
14 interest. The United States Supreme Court has
15 assumed, but never actually specifically said,
16 that complying with Section 2 of the Voting Rights
17 Act is a compelling interest. Assumed. Never
18 actually held it specifically.
19 Now, if complying with Section 2 is the
20 assumed compelling interest, how does Section 2
21 get triggered? You have to have a majority black
22 (indiscernible) --
23 THE STENOGRAPHER: I'm sorry, you cut out.
24 (Brief discussion off the record by the
25 stenographer.)

1 THE COURT: It cut out on my end, too. So
2 bring that up anytime you need to, ma'am.
3 Go ahead, sir.
4 MR. JAZIL: Your Honor, if Section 2 is a
5 compelling state interest that we're dealing with,
6 how do you meet Section 2?
7 The Gingles case lays out three
8 preconditions, again underscore on preconditions.
9 The first precondition is you have to have a
10 majority black district, which we do not have
11 here.
12 After you establish the preconditions, you
13 have to look at the totality of circumstances.
14 You have to show how this community was acted upon
15 poorly such that a race-based solution was needed
16 for a race-based problem. What evidence do we
17 have of a race-based problem in North Florida?
18 None, Your Honor.
19 Again, using the Voting Rights Act doesn't
20 analog. The Voting Rights Act created a
21 preclearance list. Florida was on it for five
22 counties, five South Florida counties. No county
23 in North Florida was deemed to have a race-based
24 problem that required the bazooka that used the
25 Voting Rights Act as a race-based solution.

1 So, again, we have a compelling interest,
2 Section 2 or Section 5 of the Voting Rights Act,
3 maybe. That can't possibly be the compelling
4 interest in this instance because we simply don't
5 have the facts to support that as a compelling
6 interest.
7 Then you move down to narrow tailoring,
8 okay. Even if we assume there's some compelling
9 interest, you need the solution narrowly tailored,
10 and the answer there is, no, it is not narrowly
11 tailored.
12 You have Dr. Johnson's testimony as
13 Exhibit 8, Your Honor. You have Mr. Popper's
14 testimony. Mr. Popper is the namesake of the
15 Polsby-Popper, and both of them are telling you
16 that you can't draw a compact district, you can't
17 meet the criteria you would ordinarily need to
18 meet to satisfy narrow tailoring. And that's
19 crucial.
20 Now, where my friends and I disagree is
21 they suggest that complying with the state
22 constitution in and of itself could be a
23 compelling state interest. No court, state or
24 federal, has ever held that complying with a state
25 constitution in a redistricting context serves as

1 a compelling state interest. You would be the
2 first court to hold as much, and you, if you do
3 that, Your Honor, would respectfully be on shaky
4 ground. Complying with the state constitution,
5 where there's no record of awful treatment of
6 African Americans in North Florida, complying with
7 the state constitution where functionally you
8 would be saying that a state could simply point to
9 its constitution and say, look, we're excused from
10 federal requirements, it's a pretty high threshold
11 to me. And we respectfully submit that you don't
12 need to go there.
13 So, under the federal constitution then,
14 Your Honor, which again is supreme, you have to
15 satisfy yourself that there has been a compelling
16 interest put forward. There hasn't. You have to
17 satisfy yourself that there is some narrow
18 tailoring put forward. There hasn't.
19 Now, there's some confusion about who bears
20 the burden in this instance. I would submit to
21 you, Your Honor, that it's the plaintiffs. The
22 plaintiffs are the ones asking for a temporary
23 injunction. The plaintiffs are the ones asking
24 for some extraordinary relief. The plaintiffs are
25 the one asking for the new map, which Your Honor

1 has to satisfy yourself complies with both the
2 federal constitution and the state constitution.
3 Let's talk about the state constitution.
4 If the argument is that the state constitution
5 mandates, because of the state constitution's
6 non-diminishment standard, the 200-mile
7 east-to-west configuration, then the state
8 constitution as applied to this part of the state
9 is unconstitutional. We're trying to avoid that
10 situation.
11 We're noting that the state constitution
12 does not apply, that its non-diminishment standard
13 is not triggered here for a few reasons. Number
14 one --
15 THE COURT: Let me ask you a question,
16 because I'm listening to you, I am, and I'm giving
17 you every opportunity on this.
18 MR. JAZIL: Yes, sir.
19 THE COURT: I'm a trial judge in the Second
20 Judicial Circuit. The State Supreme Court pretty
21 much told the legislature, hands off District 5,
22 Congressional District 5, the benchmark, in an
23 opinion.
24 So are you politely suggesting that I
25 should say they didn't realize it was

1 unconstitutional when they did it, and I'm not
2 smarter than them, but in other words, I ought to
3 find differently and then serve it up to them to
4 see if they agree that they maybe screwed it up
5 the first time, or am I supposed -- am I not bound
6 by what the state Supreme Court has already found
7 on an east-west running district that is largely
8 similar to the ones that the plaintiff is
9 proposing to be put in place by the temporary
10 injunction?
11 MR. JAZIL: No, Your Honor, I'm not
12 specifically asking you to do that. You don't
13 need to get there, because, again, remember,
14 apportionment 7 was the product of many years of
15 litigation after a trial in the Second Circuit.
16 And at the conclusion of that trial, the Florida
17 Supreme Court found that the congressional maps,
18 including the map that was drawn for Congressional
19 District 5 at the time, was tainted with partisan
20 intent and so a remedial map was necessary.
21 As part of that remedial process, the
22 legislature was given a chance to come up with an
23 alternative. It threw up its hands at the
24 conclusion, and the Florida Supreme Court ended up
25 drawing a map.

1 The Florida Supreme Court notes in its
2 opinion as well that this map isn't necessarily
3 compact. The Florida Supreme Court notes that
4 this map that they threw out and are substituting
5 was tainted with partisan intent. Any north-south
6 configuration would have been tainted by partisan
7 intent is a fair reading of that opinion, Your
8 Honor. And so that opinion does not mandate that
9 the legislature forever draw some specific
10 configuration of a map.
11 So you don't need to go there, but I would
12 note, Your Honor, that the law also has moved in
13 the federal context. You've got Cooper vs.
14 Harris. You've got the Wisconsin case from just
15 this year that's emphasizing the need to have
16 race-neutral apportionment plans, and it's
17 emphasizing the need to have an extraordinary
18 amount of evidence to establish a compelling
19 interest that's narrowly tailored. So that is my
20 response there, Your Honor.
21 THE COURT: Got it. Understood. Go ahead.
22 MR. JAZIL: And so, Your Honor, talking
23 about the non-diminishment standard, my friend for
24 the plaintiffs rely on Professor Ansolabehere.
25 There's a fundamental question to ask first.

1 Number one, if you're doing a functional
2 analysis to comply with the non-diminishment
3 standard but the baseline district that you have,
4 the benchmark district has problems, the benchmark
5 district is unconstitutional, how do you deal with
6 that situation? You can't do a functional
7 analysis when the benchmark itself is severely
8 flawed. So let's put that fundamental problem
9 aside and come to another one.
10 If you have a non-diminishment analysis and
11 you're trying to show that black voters are being
12 denied the opportunity to elect a representative
13 of their choice on account of race -- and, Your
14 Honor, that phrase "on account of race" is
15 important because the non-diminishment standard
16 borrows from Section 5 of the Voting Rights Act.
17 Section 5 of the Voting Rights Act talks about how
18 things on account of race cannot discriminate
19 against a minority.
20 The 11th Circuit in the Greater Birmingham
21 case, which we cite in a footnote in our response,
22 Your Honor, looks at the exact same language in a
23 Section 2 context. The 11th Circuit, looking at
24 the language on account of race, says, look, when
25 you're doing an analysis like this to show that

1 someone is being discriminated on because of their
2 race, you need to show more than correlation.
3 And what we have from Professor
4 Ansolabehere is he's saying that race in partisan
5 outcomes are correlated. Black voters tend to
6 vote for democrats. He never disentangles race
7 from partisanship. That's the point that
8 Dr. Owens makes.
9 Dr. Owens takes Table 11 in
10 Dr. Ansolabehere's report and builds on it. He
11 doesn't look at just averages of elections. He
12 looks at individual races and says, hey, look,
13 partisanship is just as good if not a better
14 reason to explain why black people are voting the
15 way they do.
16 Another more concrete way to look at it,
17 Your Honor, is that, look, if Congressman Byron
18 Donalds, who is an African-American republican,
19 were running in a reconfigured Congressional
20 District 5, how would that election turn out.
21 Based on Professor Owens' analysis, he would lose
22 regardless of the fact that he's a black
23 candidate.
24 So what do we know about discrimination on
25 account of race based on Professor Ansolabehere's

1 report? Not much because he's shown correlation,
2 and that's simply not good enough.
3 So, Your Honor, with that, I'd like to move
4 on, unless Your Honor has further questions, to
5 the Purcell argument.
6 THE COURT: I'm good. Go ahead, sir.
7 MR. JAZIL: So, Your Honor, Purcell is a
8 United States Supreme Court case that, as we note
9 in our papers, discusses and relies on common
10 sense principles. Courts should not interfere
11 with elections as elections are upcoming, and the
12 United States Supreme Court talks about how doing
13 so could lead to voter confusion and a
14 disincentive to go out and vote.
15 Now, there are two ways to look at this
16 language, Your Honor. One, it sounds inequity,
17 that, if you're interfering with an election close
18 by, you've got lots of moving parts, a lot of
19 things that need to be done and so you should stay
20 away from that.
21 Another way to look at it, Your Honor, is
22 that it sounds in the 1st and 14th Amendments,
23 because there's a line of U.S. Supreme Court
24 cases, Anderson-Burdick, they stand for the
25 proposition that, if you have voter interference

1 and you create disincentives for people to go out
2 and vote, what you're doing is you're violating
3 the 1st and 14th Amendment rights.
4 So regardless of which way you look at it,
5 this common sense principle is something we ask
6 for you to follow. If it sounds inequity, don't
7 interfere with elections as they're coming up. If
8 it sounds in the 1st and 14th Amendment, don't
9 interfere with elections as they're coming up.
10 The Florida Supreme Court, in the cases
11 from 1970, Adams and Walker, said the same thing.
12 And just because the case is old doesn't mean you
13 shouldn't follow it, and I would point the Court
14 to language from Adams where the court said, The
15 election is scheduled. It would be necessary to
16 print ballots, mail out absentee ballots and make
17 other arrangements for the orderly holding of such
18 a primary election, right? So print ballots, mail
19 out absentee ballots and make other arrangements
20 for the timely holding of elections.
21 That's the same principle that Purcell and
22 its progeny rely on. There's a lot going on as an
23 election is upcoming. So it's best not to get in
24 the middle of that.
25 And here, Your Honor, we've heard from

1 supervisors. We've got Supervisor Brown from
2 Columbia County, Supervisor Hogan through one of
3 his deputies, Mr. Phillips, from Duval County
4 saying just that. Supervisor Brown isn't saying
5 that it would be administratively difficult.
6 She's saying it would be impossible. The
7 supervisor in Duval County comes pretty close to
8 saying the same thing. He says it would impose
9 significant burdens on his office.
10 And, Your Honor, we've got declarations
11 from other supervisors that the plaintiffs have
12 offered. The supervisor in Orange County isn't
13 affected by their proposed remedy because he's too
14 far south. The supervisor of elections in Broward
15 County isn't affected because he's too far south.
16 Polk County has gone from the affidavit that she
17 filed in the federal case where things would be
18 impossible, to a very narrow affidavit in this
19 case where, if you read it closely, says my office
20 can implement things now. I don't know whether or
21 not she would be affected at all if the court were
22 to impose a remedial plan like 8015.
23 But, Your Honor, I would recommend for your
24 consideration Exhibit 2 to our response in
25 opposition which is Supervisor Earley's

1 declaration from the federal case. Paragraph 22,
2 he states, "In my role as a president elect of the
3 supervisor of elections, I have spoken with many
4 of my fellow supervisors in other Florida
5 counties. While my staff and I believe we could
6 complete all the work for Leon County if we have
7 finalized maps by May 27th, I have spoken to
8 numerous supervisors who strongly believe that
9 May 27th would not give them enough time to
10 complete the work for their counties and who
11 believe the deadline for completing that work is
12 early May or even late April."
13 He goes on to talk about how, for some
14 larger counties, the work is more complex. For
15 some smaller counties, they simply don't have the
16 resources to do the work.
17 And, Your Honor, in this case, Supervisor
18 Earley, to his credit, filed a second declaration
19 saying, I can do this by May 27th, my office can
20 do this. There's a third declaration from Leon
21 County in the reply where one of Mr. Earley's
22 deputies says that my office, that Leon County can
23 do this. Again, nothing to rebut what Columbia
24 said, nothing to rebut what Duval County said, and
25 we don't have anything from any of the supervisors

1 in between.
2 Again, it's the plaintiffs' burden to ask
3 for and establish a right to this extraordinary
4 relief. They have not done so because they don't
5 have affidavits from the remaining supervisors who
6 would be affected.
7 Mr. -- Dr. Ansolabehere, pardon me,
8 admitted that there are about 12 or so supervisors
9 who could be affected. How many of those
10 supervisors do we have declarations from? Not
11 many. We've got Leon. We've got Columbia. We've
12 got Duval. You heard from Dr. Ansolabehere that
13 he did an analysis using VTDs as a proxy for
14 precincts, but he doesn't know whether or not the
15 supervisors who are affected are following those.
16 So his discussion about only 22 precincts would be
17 affected, not 12, well, that's, respectfully, a
18 red herring at this point because we don't know
19 how many of these supervisors are following this
20 VTD system. It's not statutorily required, and
21 it's not constitutionally required.
22 Finally, Your Honor, I note that -- one
23 final point about Purcell and the supervisors'
24 concerns. It's been pointed out again that the
25 Court need not follow Purcell, and the Florida

1 Supreme Court cases that are Purcell-like need not
2 be followed because no state courts, it's
3 suggested, follow these. And perhaps I'm
4 extending that a bit by saying no state courts
5 follow it. My friends have said New York doesn't
6 follow it.
7 Your Honor, I would point out that there
8 are other states that do follow Purcell and have
9 done so recently because it is a common sense
10 notion. Those states are Tennessee, Illinois,
11 Maryland and Texas. And, Your Honor, I'm happy to
12 get those cases to you as a supplement if Your
13 Honor would prefer.
14 A final point on timing, Your Honor. My
15 friend suggests that the three weeks it took
16 between the Governor vetoing the legislature's
17 enacted plan and the special session resulting in
18 another plan somehow shows some kind of nefarious
19 attempt to game the system. That's simply not
20 true. There's no evidence for that, number one.
21 Number two, as you've seen from Professor
22 Ansolabehere, it takes time to come up with a good
23 map. Professor Ansolabehere drew a map in a day,
24 did a lot of work in a day, and there was an error
25 on his proposed map. His proposed map has a line

1 going through Congressional District 6, which he
2 said was an error. To me, it looks like a
3 non-contiguity issue. But it's there, and that
4 underscores that map drawing is hard. Working the
5 legislative process and trying to get stakeholders
6 to agree is hard, especially when there's been a
7 veto, and that takes time.
8 The point about the June 13th date that the
9 Secretary noted to the federal court, Your Honor,
10 I was asked that question by Judge Horton on the
11 three-judge panel. Judge Horton said, okay,
12 you're asking for a stay that's limited to the
13 special session, but what is the drop-dead date by
14 which you need a map. At that point, Your Honor,
15 I said the date was June the 13th because, from my
16 client's perspective, that's what made sense.
17 That was the date of qualifying. I did not have
18 the benefit of the supervisors providing their
19 declarations, such as Supervisor Earley, and in
20 the subsequent filing in reply to support our
21 request for a stay during the special session,
22 again which ended April 22nd, we made the point
23 that, look, our request is narrower than what the
24 supervisors are saying they need a map by. And
25 their affidavits themselves had certain other

1 flaws, and that's what that filing says. I'm
2 happy to provide that to Your Honor if you're
3 interested. But we were asked to provide a
4 drop-dead date by the three-judge panel, and we
5 did our best to provide one at the time.
6 Finally, Your Honor, this question about
7 prohibitory versus mandatory injunction. My
8 friends say what they're looking for is a
9 prohibitory injunction. Every case cited in their
10 papers is a case for prohibitory injunction.
11 There's not a single mandatory injunction case.
12 But here's the problem: They're asking the Court
13 to mandate the adoption of a new map. Mandate.
14 Mandatory. I don't know how this fits within the
15 paradigm for prohibitory injunction, and because
16 it doesn't, this is that rarest of rare
17 circumstance instance where they have an
18 extraordinarily high burden to overcome to show
19 that a mandatory injunction is appropriate here.
20 And, Your Honor, we quote from the Florida
21 Supreme Court 1943 on it's consistent. A
22 mandatory injunction is like ordering an execution
23 and holding a trial later, and that's why it's
24 wrong and that's why we shouldn't have it.
25 We haven't had a trial. We haven't

1 introduced the facts. We don't know what is and
2 isn't possible, and you're being asked to rush to
3 a conclusion.
4 So, in summation, Your Honor, just to make
5 this real simple, the plaintiffs are asking you to
6 eat a half-baked cake. I'm telling you it's a
7 half-baked cake and you don't need to eat it. The
8 Columbia and Duval supervisors are saying the same
9 thing. My friends for the plaintiffs are
10 responding by saying the cake is delicious, it's
11 got wonderful frosting, it comes with a cold glass
12 of milk. But at the end of the day, Your Honor,
13 it's still a half-baked cake, you don't need to
14 eat it.
15 Thank you, Your Honor. I have nothing
16 further.
17 THE COURT: Thank you.
18 MR. DEVANEY: Your Honor, would it be
19 possible for me to briefly rebut?
20 THE COURT: You can, but then I'll also
21 give Mr. Jazil an opportunity if he needs to do a
22 rebuttal, too.
23 Go ahead.
24 MR. DEVANEY: Okay, thank you. I won't
25 address the cake, but I'll address a few other

1 things.
2 One is, Your Honor, on the Purcell issue, I
3 just want to point out factually, Mr. Jazil said
4 that, you know, it's hard to draw a map and,
5 therefore, it should be understandable that it
6 took three weeks to schedule the special session
7 and to get a new map drawn, but the point I want
8 to make, a factual point that's very important to
9 this Purcell argument, is that the legislature
10 passed a map, and then it waited three weeks after
11 passage to send it to the Governor for signature.
12 So they weren't -- they weren't drawing a map
13 during those three weeks. They had one, and they
14 sat on it. And that process got delayed by three
15 weeks because of that, and, you know, that plays
16 right into this whole Purcell argument. Hey, it's
17 too late to do anything.
18 Well, I would submit it's too late to do
19 anything because that's kind of what they wanted.
20 They wanted to sit on this. They wanted to delay
21 it so that they could pass an unconstitutional
22 map, and then we'd hear this argument that it's
23 too late to do anything about it.
24 And, relatedly, counsel talks about voter
25 confusion that could result from changes at this

1 point in the process. Your Honor, let me submit
2 that imagine the voter confusion that would result
3 from a finding, which we believe is compelled,
4 that this map is unconstitutional, but we can't do
5 anything about it, we're not going to do anything
6 about it and voters hear that. I mean, how is
7 that going to affect the mindset of a voter on
8 whether to go out and vote?
9 I think the confusion is dramatically
10 greater than the types of administrative confusion
11 that counsel points to as supposedly supporting
12 application of Purcell, but the linchpin or the
13 threshold point, though, is Purcell doesn't apply
14 at all because it's a federal doctrine. But even
15 if it did, I'd make those points that I just did.
16 With respect -- And, also -- I'm sorry, one
17 more point on Purcell. Counsel suggests that
18 other supervisors have not come forward to say
19 that they could implement by the end of the month
20 if the new map were adopted. But we've also not
21 heard from them that they can't. In Purcell, the
22 burden is on the state to prove that Purcell
23 somehow should allow an unconstitutional map to go
24 into effect, and it's the burden on the state to
25 come forth with affidavits from supervisors saying

1 it's too late, we can't do anything.
2 So I don't accept this proposition that it
3 was on us to provide those affidavits. And, in
4 fact, we have provided affidavits, as I've
5 described, from supervisors saying this can be
6 done.
7 Turning next, Your Honor, to the argument
8 that race-based -- or, districting that takes race
9 into account should be declared by you to be in
10 violation of the U.S. Constitution. Counsel
11 suggests that, as part of that analysis, you have
12 to conclude that Section 2 of the Voting Rights
13 Act is not a compelling state interest, and I want
14 to be clear if I haven't been already that our
15 claim for diminishment does not rest in any way on
16 Section 2 of the Voting Rights Act. It rests upon
17 the Fair District amendments to the Florida
18 Constitution, and that provision got -- the
19 non-diminishment of the Florida Constitution is
20 indeed modeled after Section 5 of the Voting
21 Rights Act and, significantly, Section 5 didn't
22 require -- it doesn't require, because Section 5
23 is still in effect, that there be a majority
24 voting block in a district. That's not -- That's
25 not required under Section 5.

1 But the real point I want to make is, this
2 is not a Section 2 claim, and compliance with
3 Section 2 doesn't have to -- is not the compelling
4 state interest if you are ever to go down this
5 rabbit hole of applying equal protection and going
6 as far as the Secretary would like you to do.
7 And then it's surprising to hear the
8 Secretary say that, if you did go down that path,
9 you can conclude that compliance with the Florida
10 Constitution is a compelling state interest. The
11 Supreme Court has on multiple occasions indicated
12 that compliance with the Voting Rights Act is a
13 compelling state interest, and it's -- it's
14 befuddling to suggest that compliance with the
15 Florida Constitution cannot be such compelling
16 state interest.
17 Related also to this argument that we'd ask
18 you to find any consideration of race and
19 districting to be unlawful, counsel suggests that
20 there's no evidence of a, quote, race-based
21 problem to justify non-diminishment. There's
22 nothing in the Fair District amendments that talks
23 about there has to be a race-based problem. All
24 the Fair District amendment says is the ability to
25 elect of minority voters cannot be diminished.

1 There doesn't have -- There's no mention of a
2 race-based problem.
3 And counsel cited the Wisconsin decision
4 from the U.S. Supreme Court that was issued
5 approximately two months ago. I actually was
6 counsel in that case, Your Honor. And that was a
7 Section 2 case. As I said, this is not a
8 Section 2 case. But, significantly, in that case,
9 the U.S. Supreme Court reiterated its longstanding
10 presumption that compliance with the Voting Rights
11 Act is a compelling state interest.
12 And just two other quick points, Your
13 Honor. Counsel talked about Dr. Owens, and the
14 only thing I want to say about Dr. Owens is he
15 never did a functional analysis, just didn't do
16 it. He did analyze how Benchmark CD-5 performs
17 against the new districts, and he's not able to
18 say one way or the other whether there's
19 diminishment. He just didn't to it. And so
20 there's no contradictory evidence in the record in
21 response to Dr. Ansolabehere's analysis.
22 And then last, not once in our papers do we
23 mention mandatory injunction. We say that there
24 should be a mandate to do something. Our request
25 for leave, as I said before, is to prohibit this

1 unconstitutional plan from going into effect and
2 give the legislature a chance to pass a
3 constitutional map, and if it doesn't, at that
4 point a remedy needs to be put in place.
5 And, Your Honor, that is all I have in
6 rebuttal, so thank you.
7 THE COURT: Thank you. All right, anyone
8 on behalf of the House of Representatives or the
9 State Senate wish to be heard.
10 MR. BARDOS: Your Honor, yes. Andy Bardos
11 for the House. Just on one minor point, I'm not
12 weighing in on the other constitutional arguments,
13 but on the issue of available remedies, I heard
14 Mr. Devaney say in his argument that one of the
15 remedies that could be available to the Court is
16 to order the legislature to pass remedial
17 legislation.
18 Of course, we know under the separation of
19 powers that the Court cannot order a legislature
20 to pass legislation, and that's -- for that
21 proposition, I would refer to court Corcoran vs.
22 Geffin, 250 So.3d 779, decided by the First DCA in
23 2018.
24 In restricting cases, what courts will do,
25 if there's time, is give the legislature an

1 opportunity to convene and to pass a remedial map.
2 It doesn't order the legislature to do so because
3 the legislature can't be ordered to perform
4 legislative functions. So that's --
5 THE COURT: I'd prefer the Supreme Court do
6 that rather than a circuit judge if it happens,
7 but go ahead.
8 MR. BARDOS: Thank you, Your Honor. That's
9 the one point I wanted to make.
10 THE COURT: Thank you, sir. Mr. Nordby, on
11 behalf of the Senate, anything need to be heard?
12 MR. NORDBY: No. No, Your Honor, nothing
13 from the Senate.
14 THE COURT: All right, thank you so much.
15 All right, I don't start off with the idea
16 that anybody has played gamesmanship. We have a
17 decennial census, the 2020 census that puts
18 everybody on a short leash as far as the amount of
19 time the legislature has to create districts, fair
20 districts for state races in the House and Senate,
21 as well as congressional districts.
22 The legislature went into session and,
23 somewhere around March the 23rd of this year,
24 enacted a map for congressional districts that
25 ultimately Governor DeSantis vetoed.

1 The state constitution divides out what
2 happens on congressional districting, and it
3 allows the Governor to have the right to veto. So
4 that is the third branch other than the
5 legislature and the courts here, the executive.
6 Governor DeSantis did what he can do on that.
7 The timing of it, how long the legislature
8 held onto it or not, we're talking about a matter
9 of weeks. I realize everybody's on a short leash
10 as far as the time that is available, but the
11 legislature moved through, had an open,
12 transparent effort, from what I have read, to do
13 restricting. It enacted a law. It presented that
14 law to the Governor. The Governor exercised his
15 option to veto the law.
16 The legislature at that juncture could have
17 overridden the veto. It did not. The Governor
18 called the legislature into special session. The
19 result of which was the legislature enacted the
20 current map that we're talking about. The
21 Governor signed that in. We're talking about in
22 essence four weeks, plus or minus a couple of days
23 either way, between the legislature's first
24 version of restricting for Congress and its second
25 version of redistricting for Congress.

1 All right, the parties in this case could
2 not have done anything quicker than they did. I
3 mean, there was an immediate filing of the action
4 in state court. The federal court action, I don't
5 know if Purcell was the reason why Judge Winsor,
6 or whoever it was, Judge Walker or Judge Winsor --
7 I think it was Judge Winsor, but whoever, just
8 tracking, just reading what I read in the
9 newspaper, right. That case got dismissed. The
10 plaintiffs didn't sit on their hands. They moved
11 as quickly as one can imagine in these kinds of
12 cases. They quickly got the complaint filed.
13 There are service of process issues. They
14 had to get service or there had to be an
15 acceptance of service on behalf of the defendants
16 in the case. This Court tried to be as proactive
17 as possible in saying time will be made so that we
18 can have whatever hearing needs to happen, be that
19 a temporary injunction hearing or, if everybody
20 could line things up, a trial. Why? Because this
21 is something that is important to get done on a
22 quick turnaround. It's supposed to be expedited
23 under the rules of procedure, Florida Rule, I
24 think, 6.10(c).
25 The other thing is, coincidently, I had a

1 nice break in my schedule where something that
2 would have chewed up a lot of time resolved. So I
3 made an effort through my judicial assistant in
4 contacting each of you to let you know we have as
5 much time as we need to try this issue this week,
6 the week -- we're doing it now, and we could have
7 gone back into last week if everybody could have
8 lined things up.
9 Now, I realize you all had a lot of work to
10 do and you did a lot of work. You provided me a
11 lot of good information by affidavit. It was good
12 direct and cross-examination today. The lawyering
13 has been superb in this.
14 You've provided me a lot of written
15 advocacy, as well as citations, in a lot of
16 instances actual copies of the cases themselves.
17 So that's been much -- much needed and very
18 helpful. Nobody has drug their feet in a way to
19 cause a got-you game, I think. It's just we had a
20 very short period of time to get this right.
21 Now, the voters of Florida overwhelmingly
22 voted in Article 3, Section 20, Tier 1 standards.
23 Now, they largely track, maybe exactly track if
24 not that largely track the Voters Right Act of
25 1965. So when the United States adopted the 15th

1 Amendment sometime around 19 -- 1869, 1870, one --
2 Section 2 of the Amendment 15 allowed Congress to
3 enact statutes or congressional acts to enforce
4 the amendment, and Congress did in 1965.
5 In this nation, the different states of
6 this nation have been trying to comply with the
7 voters -- not voters registration, but the Voters
8 Rights Act since then. And we've had litigation
9 up and down the board on that. We've gone from
10 certain places that had to be pre-cleared to no
11 longer. So but, during that -- during the
12 interim, the state of Florida, its voters, I think
13 over 62 percent of them voted to add Article 3,
14 Section 20, which says, part of it, is districts
15 shall not be drawn with the intent or result of
16 denying or abridging the equal opportunity of
17 racial or language minorities to participate in
18 the political process or to diminish their ability
19 to elect representatives of their choice.
20 This case has a wrinkle in it that the
21 prior iterations have not had. Before, we had
22 full trials where a circuit judge, like Judge
23 Lewis, Terry Lewis, Judge Reynolds may have had
24 one before, but we had a circuit judge who heard
25 all of the evidence. It wasn't a temporary

1 injunction. There were decisions made, and the
2 legislature was invited to remedy a problem that
3 the trial court and the appellate courts found to
4 exist.
5 They went back into session, and either
6 they remedied it or they couldn't remedy it, and
7 ultimately I think the Supreme Court said, well,
8 here's the answer, or here's a partial answer that
9 you all didn't fix yourselves.
10 Here, we have a very short time frame. The
11 parties, either by choice or practicality
12 probably, did not opt to have a full trial. In
13 other words, no bar is held. Every witness that
14 would come in, live witnesses, judges credibility
15 of witnesses, anything and everything, but I also
16 have not heard from anybody that this process that
17 we have done today has caused one of the sides not
18 to have a fair hearing.
19 In other words, it seems to me that
20 everybody has taken the position that we're making
21 our case, rule on it, and no doubt whoever doesn't
22 like the answer will appeal, and that's their
23 right. That's the way our system works.
24 Here, we already know that the legislature
25 has enacted a statute that the Governor vetoed.

1 So if the Court were to find the existing statute
2 to be unconstitutional, there's at least a map and
3 maybe a backup map that the legislature has
4 already considered.
5 I've read through -- The counsel here that
6 spoke on behalf of the House and here on behalf of
7 the Senate made presentations, their law firms
8 made presentations to both the House and Senate, I
9 believe, and if not, then somebody closely
10 affiliated with them, to lay out what needed to
11 happen to have a transparent determination of
12 redistricting.
13 So here we know what the legislature
14 otherwise did before the veto, which was the
15 Governor's right to veto. So it's not -- A
16 difference this time compared to the other times
17 is potentially we know what the legislature would
18 have done had the Governor signed it already,
19 where we didn't have that information before and
20 they had to go back in to take into consideration
21 the defect that the trial court or the appellate
22 courts afterwards had found leading through to
23 what the legislature had the opportunity to fix
24 itself in, what, 2012, 2015 iterations going back.
25 Those are the reasons courts want to make

1 sure that juries reflect the makeup of society, is
2 people are more confident in their government,
3 they're more trusting of the judicial branch in
4 jury cases if juries aren't all white or all black
5 or all anything. In other words, people have an
6 equal opportunity to participate, and the jury
7 generally is going to look like the community, and
8 people are more accepting of decisions made by
9 juries and rulings made by courts when they feel
10 it's been an open, transparent process, that
11 everybody involved had an equal opportunity to
12 participate, and it reflects the community as a
13 whole, the genius of 6 or 12 regular people
14 listening to a case and deciding a verdict.
15 Congress, in passing the Voters Rights Act,
16 did it in an effort to support the 15th Amendment
17 with the idea there's equal protection rights
18 under the 14th Amendment, and they could have had
19 legislation on that, too. This country has made
20 great effort, particularly in states that had Jim
21 Crow laws, Florida being one of those laws. If
22 you look back, and I know I've read in the record
23 where -- I'm not looking at it right now, but I
24 believe what I read was in 1958 Gadsden County had
25 seven registered African American voters, and the

1 population, the majority of which was African
2 American.
3 So part of the reason the Voters Rights Act
4 of 1965 came into being and Congress enacted it
5 and the federal and the state courts have employed
6 it since then is to try to make sure that people
7 who are minorities had an equal opportunity to
8 participate in the system and that the state did
9 not put its finger on the scale to diminish their
10 ability to elect the representatives of their
11 choice.
12 Now, what does that mean? It doesn't have
13 to mean in a district that is either the majority
14 African American or plurality African American
15 where the additional minorities in that district
16 would provide the minority with a majority of the
17 votes, in other words, more votes than white
18 people, but what it does mean is people typically
19 want for a candidate of their partisan preference
20 but also of their color. I'm not breaking any
21 grounds here in citing federal law to that effect.
22 I think it goes back to Gingles on that.
23 Yeah, Thornburg, T-h-o-r-n-b-u-r-g, vs. Gingles,
24 maybe Gingles -- I assure you, I don't do this on
25 a daily basis -- G-i-n-g-l-e-s, 106 Supreme Court

1 2752, on page 2775. That's a United States
2 Supreme Court case from 1986.
3 Focusing on the Voters -- Voters Rights
4 Act, Section 2(b) states that a violation is
5 established if it can be shown that members of a
6 protected minority group, quote, unquote, have
7 less opportunity than other members to elect
8 representatives of their choice, close quote.
9 The court went on further to say, because
10 minority and majority voters often select members
11 of their own race as their preferred
12 representatives, it will frequently be the case
13 that a black candidate is the choice of blacks,
14 while a white candidate is the choice of whites.
15 All right, in this case, the State Supreme
16 Court, who I answer to, and I also took an oath of
17 office to uphold the federal law, the federal
18 constitution, the state law, the state
19 constitution, my Supreme Court, my State Supreme
20 Court has issued an opinion finding that the
21 Benchmark Congressional District 5 met
22 constitutional muster. This is after the Fair
23 District amendment had been passed.
24 It was a district then that ran basically
25 -- and, Mr. Jazil, I understand 100 percent what

1 you say on this. You're right, it's a 200-mile
2 span running east-west anchored by Duval County
3 and then the African American populations in
4 certain ZIP codes of Leon County and Gadsden
5 County, Florida, but the Florida Supreme Court
6 issued an opinion that that -- failing the -- in
7 other words, it was more important not to diminish
8 minorities' ability to elect their representative
9 choice than it was the compactness of the
10 district, and that gets back to Tier 1 and Tier 2
11 standards.
12 So for those listening that aren't lawyers,
13 Tier 1 standards trump -- no political effort to
14 invoke any past politician's name on that -- but
15 trump the Tier 2 requirements. So the district
16 being compact is less important than districts not
17 being drawn with intent or result of denying or
18 abridging equal opportunity of racial and language
19 minorities to participate in the political process
20 or to diminish their ability to elect
21 representatives of their choice.
22 Here we have the testimony of the one live
23 witness, who I need to look at his name to make
24 sure I get it phonetically right here, which means
25 I need to --

1 MR. DEVANEY: Your Honor, it's
2 Dr. Ansolabehere.
3 THE COURT: Ansolabehere. Thank you very
4 much.
5 He testified that there are other districts
6 throughout the country, depending on which metrics
7 you're using, which are less compact. He pointed
8 out that the defendants' experts -- and I have
9 read their affidavits, I understand what they are
10 saying on that, and I have picked up their focus
11 more on the Tier 2 requirements. I'm not
12 necessarily disagreeing with them on the Tier 1
13 standards.
14 The Benchmark Congressional District 5 had
15 49.1 percent African American voting age
16 population. I think that's the way I read that.
17 You had another little over 4 percent, less than
18 5 percent other minorities. And then the white
19 population was less than 50 percent. So the
20 combined minority vote in and of itself could
21 elect the minority candidate or, perhaps to use
22 the language, the representative of their choice.
23 The legislature's efforts to work with the
24 district to preserve the racial balance to put
25 African Americans in a better position, to not

1 diminish their ability to elect a representative
2 of their choice came up with a number of
3 alternatives that would have kept that district in
4 place. The district that has since been enacted
5 and signed into law by the governor does disperse
6 367,000 African American votes between four
7 different districts. Out of those four different
8 districts, the African American population is
9 nowhere near the plurality or majority, and I
10 think statistically, if you look at the tables
11 that have been included as well, the minority vote
12 is small enough or lowered enough that you would
13 expect it to be harder, substantially harder for
14 minorities to elect a candidate of their choice in
15 those redistrictings.
16 Now, if you're looking it as far as
17 compactness, it's a prettier picture and it's more
18 compact, no doubt about that. I don't attribute
19 bad motives to somebody for that either. I mean,
20 that is -- that's a Tier 2 requirement. There is
21 sense in it other than it doesn't take into
22 consideration the geography.
23 So there are a lot of states, he talked
24 about Arizona being a box or a square, Wyoming,
25 right, a big box, Colorado a big box, expansive

1 area. They don't have panhandles. They don't
2 have coasts. They don't have as many rivers.
3 They don't have the geographical boundaries and
4 constrictions that we have, and yet where was --
5 where were the plantations, if you go back into
6 the slavery leading up to now and the dispersion
7 of African Americans in the communities? Jackson
8 County, across down through Alachua County, they
9 were near the state line of Georgia, and the way
10 the panhandle sticks out and over.
11 So I take the Benchmark District 5 that the
12 Florida Supreme Court authorized and then
13 ultimately mandated in 2015 seriously to look at
14 it that I am not going to upset, in other words,
15 I'm not going to disagree on them with what they
16 did or how they came about it or whether it passed
17 muster because I believe they have made that
18 determination.
19 It is different now. We have a different
20 decennial census. They had a full trial before.
21 We don't have a full trial here. So there are
22 differences.
23 So here's what I'm going to tell you: I'm
24 doing my best, and it's important to me that I get
25 it right and that I fairly heard everybody and am

1 trying to give you a decision that makes sense, so
2 it's intellectually honest, but at the same time
3 is consistent with the Florida law and the federal
4 law.
5 I think that the Florida Constitution, its
6 Article 3, Section 20 standards for Tier 1 and
7 Tier 2 are independent of the Voting Rights Act.
8 It does not mean that a court might not find what
9 was done unconstitutional, equal protection. I'm
10 not going to be that court, though. I don't have
11 in front of me what I think I would need to say
12 this violates the 14th Amendment because I just
13 don't have that on this record, and we have a lot
14 of law between 1965 and now, including even on the
15 Fair District amendments since it was enacted and
16 added to the constitution.
17 The State Supreme Court did put forward
18 some metrics, some things that had to be done, a
19 functional analysis. The plaintiffs' expert
20 witness did conduct a functional analysis. The
21 defense expert witnesses didn't conduct the same
22 functional analysis that the Supreme Court went
23 through, and they have a different argument. I
24 get it. But I do find persuasive the arguments
25 that were made about the diminishment of African

1 American votes in what was Benchmark Congressional
2 District 5 to the other districts that are now
3 spread, and I think that was 2, 3, 4, into 5.
4 We don't know whether all of the
5 supervisors of elections that might be affected
6 use -- Let me get my acronym right here -- the
7 VTDs, the voter tabulation, either districts or
8 precincts -- I think it was districts -- but
9 they're certainly available to use, and what I
10 took out of that is, if you have somewhere in the
11 neighborhood of 10 precincts out of the 650
12 precincts that would be affected if the Court were
13 to impose either Plan 8015 or one of the two plans
14 that the plaintiffs have proposed, it would -- it
15 doesn't look like it would take a lot different,
16 and we're already running on a short time frame
17 that this doesn't make a lot of time difference on
18 anyhow because the earliest this could have
19 happened is the third or fourth week of March,
20 legislature enacts something, the Governor could
21 have signed it. There you go, we wouldn't even be
22 here.
23 Taken the four weeks in between and then
24 the filing of the lawsuit and then getting
25 everybody lined up so that they could participate

1 in this process gets us now to May the 11th. It's
2 important that I get an order out that the state,
3 if it wishes to appeal it, and I expect them to --
4 I mean, this is -- these are important matters and
5 that's their right to appeal it. I want us to get
6 something put together so that they can get to the
7 First District Court of Appeal who may or may not
8 hear the case. They may send it straight to the
9 Supreme Court. I don't know. That would be up to
10 them. That's above my pay grade.
11 What I need to do is get an order in place
12 as quickly as possible that satisfies the
13 requirements of the Florida Rules of Civil
14 Procedure, in other words, laying out the factual
15 reasons for finding the four different elements in
16 citations to the law on that, but what I am doing
17 is I am finding that the enacted map is
18 unconstitutional under the Fair District
19 amendment, Article 3, Section 20, because it
20 diminishes African Americans' abilities to elect
21 the representative of their choice.
22 And I'm not going to order the legislature
23 to go back in session. I don't really think
24 that's up to me on that end.
25 We have two alternatives, which would be

1 Plan 8015 or proposed Plan A. As I understood
2 proposed Plan A, it would affect the least number
3 of counties and I think the least number of
4 precincts. So if I'm put in the pickle of saying
5 if the one map is -- the redistricting map is
6 unconstitutional and substitute something that
7 would have the least effect, it would make the
8 most sense to suggest, I guess is a polite way of
9 putting it, using proposed Map A to have the least
10 impact on everybody else because people have to
11 know -- people have to register to vote and be
12 assigned precincts. Ballots have to be printed.
13 Mail -- Early voting mail has to go out.
14 Now, the qualification date is not until, I
15 believe it's June the 13th. If we can get an
16 order out either today or tomorrow, that way the
17 state can go as quickly as possible to the First
18 District Court of Appeal with the idea that the
19 District Court of Appeal or the State Supreme
20 Court can do what it needs to do. And they've got
21 more resources than me, and they don't necessarily
22 have to agree with what I've done or why I've done
23 it. That's their prerogative on it. They'll
24 follow the law on that. I don't have any doubt on
25 that.

1 But it's important that we get this to the
2 next step so that this can be decided as quickly
3 as possible, so that whatever the answer is
4 finally, ultimately, there is time for the
5 administrators to put into action what needs to be
6 done to make it happen.
7 All right, so, Mr. Devaney, let me ask your
8 side to -- how much time do you need to put
9 together an order -- Now, remember, I've got to
10 sign this. I'm not going to sign this if I don't
11 agree with what it says. I'm not going to sign
12 something that didn't happen. Straight up, as
13 quickly as you can, what would be needed so that
14 the appellate court has what it needs to consider,
15 so we can set the hook there in the event I'm
16 wrong, and the appellate court can straighten it
17 out if it needs to?
18 MR. DEVANEY: Your Honor, we can certainly
19 provide that tomorrow, and we'll do it as early as
20 possible tomorrow.
21 THE COURT: Mr. Jazil, I don't expect you
22 to agree with my ruling. You have argued very
23 well on your behalf, on your clients' behalf on
24 that. If we can get an order out tomorrow, and
25 that's absolutely my goal on it, and it doesn't

1 matter how much coffee I've got to drink to make
2 it happen, all right, so let's get to me as soon
3 as you can.
4 If you investigated me, I don't necessarily
5 sign what people hand me. It needs to be done
6 well, and I need to agree without any overreaching
7 on something, but it needs to lay out what the
8 appellate court needs so that it makes it simpler
9 for them to figure out if I did it right or not.
10 Mr. Jazil, that puts you in a position
11 where you all can load up anything you need to do
12 to be ready tomorrow just as soon as possible to
13 make that appeal.
14 MR. JAZIL: Yes, Your Honor. Point of
15 clarification, though.
16 THE COURT: Yes.
17 MR. JAZIL: You said that you found that
18 the map is unconstitutional. Did you mean that
19 the plaintiffs had a substantial likelihood for
20 success on their argument that it's
21 unconstitutional?
22 THE COURT: I do. And thank you if I'm
23 pushing a little forward here. But, in other
24 words, I'm only commenting on the limited issue
25 before me on the motion for temporary injunction.

1 I'm not arguing or commenting or making a ruling
2 on anything else that's part of the plaintiffs'
3 lawsuit. That will have to be decided after
4 trial. And, yeah, I think in the language of the
5 day, it's most likely to succeed. They don't have
6 an adequate remedy of law otherwise, that it is in
7 the public's best interest for the Court to enter
8 an injunction at this stage, in other words,
9 cracking the elements but giving a reason why that
10 element is supported, not just a conclusory they
11 met the standard.
12 MR. JAZIL: Yes, Your Honor. Second point,
13 and, again, we are not in the business of
14 gamesmanship. So if the appeal is filed, it comes
15 with -- an automatic stay comes with it as well
16 out of the Court's ruling, and the Court has the
17 ability to undo that stay after a subsequent
18 hearing. So would Your Honor let us know, is
19 there --
20 THE COURT: So, and I don't think any one
21 of you is engaging in gamesmanship, and I'm not
22 trying to either on that end. It's not a matter
23 of ego for me.
24 Normally, a stay happens. What's important
25 is that the administrators that need to work

1 through this election are put on notice as soon as
2 possible what they've actually got to do and, if
3 I'm a potential candidate for a race out there,
4 that I can figure out do I want to run in the
5 district I would have or not. If I'm a voter,
6 where am I supposed to register. If I'm a
7 candidate and I'm seeking either -- Think of it
8 this way: If I'm trying to get on the ballot by
9 petition, I've got to know which voters can sign
10 to, you know, get my ballot on -- get my name in
11 the mix.
12 So both sides, if you want to, can brief
13 whether I should enter -- should override the stay
14 or not. Generally, I don't like to override stays
15 from the standpoint that I think there's a
16 presumption that at least -- First of all, I fully
17 expect the appellate court to get this and move as
18 swiftly as they can. They're good people.
19 They're going to be conscientious about doing it.
20 Whether they agree with me or not, they're going
21 to do their job.
22 So I think everybody in the government,
23 regardless of the branch, ought to all be on the
24 same page that we need to get this right as soon
25 as we can. So if I'm a supervisor of elections

1 out there and I'm thinking, well, okay, one guy at
2 least said this needs to be different, that
3 doesn't necessarily mean I'm going to sell out and
4 crunch my numbers and make everything fit that,
5 because we don't know if that will stick.
6 So if you seek to have a stay, my initial
7 response would be okay, all right. So let's get
8 it to the appellate court so it can make the
9 determination it needs to make as soon as possible
10 so that whatever the final answer is gets out to
11 the people that need to put this into place.
12 MR. JAZIL: Understood, Your Honor. Thank
13 you.
14 THE COURT: All right, anything else?
15 MR. JAZIL: No, Your Honor. You said we're
16 going with proposed Map A as a remedy, if I
17 understood that correctly?
18 THE COURT: Yes, I think so because, as I
19 understand it, the functional analysis has been
20 done on it, and it would cause the least amount of
21 disruption but also accounting for the differences
22 in population.
23 Now, to the extent you said, aye, this
24 looks like a smudge, this is wrong on this, I take
25 it that that, that map can be cleaned up so that

1 it doesn't have non-contiguity to it, if that's
2 the right way to say it. But because nobody's
3 suggesting that, if there's an error in a map that
4 was drawn quickly -- And, again, people in good
5 faith here. There was a response by the state on
6 May the 9th. That map that we're talking about
7 was generated and filed by May the 10th. So if
8 somebody looks at it and says, well, this is just
9 wrong, fix it, we can all figure that out and
10 accommodate that.
11 All right, anything else we need to cover?
12 MR. JAZIL: No, Your Honor. Thank you.
13 THE COURT: All right. So here's the
14 thing: Depending on how soon or late you get that
15 to me tomorrow, I want to spend some time looking
16 at it, and my goal is to get it rendered tomorrow
17 so that it can go to the appellate court tomorrow,
18 but if I can't make that schedule, then it will be
19 as soon on Friday as possible. And I think Friday
20 is the 13th, so there's no point in jinxing this
21 the rest of the way by doing it then, too, but if
22 that's the date it is, that's the date it is.
23 MR. DEVANEY: We'll work hard to get that
24 order to you quickly.
25 THE COURT: All right, thank you.

1 MR. FARUQUI: Your Honor, on behalf of the
2 Attorney General, I think this was sort of
3 addressed at the beginning, but for the sake of
4 clarity, if this is indeed the Court's decision,
5 we just want it to be clear on the record that the
6 injunction will not be under and against the
7 Attorney General.
8 THE COURT: No, the Attorney General is on
9 notice that the constitutionality of the statute
10 is contested in this lawsuit, and you have an
11 opportunity to monitor it and you're doing that,
12 so, no, there's no order against the Attorney
13 General.
14 MR. FARUQUI: Thank you, Your Honor.
15 THE COURT: All right, thank you.
16 (Proceedings concluded at 12:42 p.m.)
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1 COURT CERTIFICATE
2
3 STATE OF FLORIDA
4 COUNTY OF PALM BEACH
5
6
7 I, Lisa Begley, RPR, RMR, certify that I
8 was authorized to and did stenographically report
9 the foregoing remote proceedings and that the
10 transcript is a true and complete record of my
11 stenographic notes.
12
13 Dated this 12th day of May, 2022.
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Lisa Begley, RPR, RMR
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Black Voters Matter Capacity Building Institute, Inc., et al

vs.

Laurel M. Lee

Hearing Before:

Judge J. Layne Smith

May 16, 2022

Vol 01

PHIPPS REPORTING

Raising the Bar!

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

CASE NO.: 2022-CA-000666

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

Plaintiffs,

vs.

LAUREL M. LEE, in her official
capacity as Florida Secretary of
State, et al.,

Defendants.
_________________________________/

TRANSCRIPT OF PLAINTIFFS' EMERGENCY MOTION TO VACATE
AUTOMATIC STAY PENDING APPEAL

VOLUME 1 (Pages 1 - 58)

DATE TAKEN: Monday, May 16th, 2022
TIME: 4:32 p.m. - 5:25 p.m.
PLACE: Remote via Zoom
BEFORE: HONORABLE J. LAYNE SMITH, Circuit
Judge

This cause came on to be heard at the time and
place aforesaid, when and where the following
proceedings were stenographically reported by:

Brandy Duxbury, Stenographer

Job No. : 251439

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24

25

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1 Proceedings began at 4:32 p.m.:
2 THE COURT: All right. As far as I
3 can tell, we have 13 participating,
4 including the court reporter, and everyone
5 seems to be connected. So if you have your
6 mute button on, terrific. Since there's so
7 many of us, I would ask that if you're
8 taking a speaking role, introduce who you
9 are, and let us know who you represent.
10 That will make it easier for the court
11 reporter to take it down.
12 My name is Judge Layne, L-a-y-n-e,
13 Smith. We're here today on the Plaintiffs'
14 Emergency Motion to Vacate Automatic Stay
15 Pending Appeal. Here's what I've done
16 since we last saw one another: In addition
17 to rendering the order granting the
18 temporary injunction on May 12th, 2022, I
19 have read the -- everything that has been
20 filed since. I'm aware that the Secretary
21 of State has filed an appeal with the First
22 District Court of Appeals triggering an
23 automatic stay, and I've read the
24 Plaintiffs' Emergency Motion that we're
25 here on today.

1 Today, right around 11:57, right
2 before the noon hour, the Secretary of
3 State filed a response. I think the
4 parties had worked it out whether that
5 response was going to be done by midday,
6 and they met that deadline. That was 249
7 pages. We had a 13-page Memorandum of Law
8 and some exhibits, as well as a transcript
9 from the temporary injunction hearing that
10 happened last week. I've read everything I
11 could read, including the case law, with
12 the exception of rereading the entire
13 transcript of last week. I guess the good
14 news is I was there, so to some extent --
15 and it's pretty fresh in my too. But to
16 the extent I needed to -- I may have to go
17 back and look at something. But I've done
18 everything moving heaven and earth that I
19 could to be prepared for everyone today;
20 that includes taking the lunch hour and
21 rearranging some other hearings I had,
22 putting them off so I could have read the
23 things, including case law, the Appellate
24 rules, everything that goes along with it.
25 So I made every effort I could to roll up

1 my sleeves and to make sure you got me at
2 my best, as well as having reviewed
3 everything.
4 Now, on top of that, the Plaintiffs
5 filed an affidavit from their expert kind
6 of in response or in rebuttal to, I think,
7 Dr. Johnson's affidavit, some of the
8 exhibits that have been part of the 249
9 pages the Secretary of State filed, so I've
10 read that too. That being said, I want to
11 give the Plaintiffs an opportunity to state
12 their case. I certainly want to fully hear
13 from the Secretary of State. I'll ask
14 others who are representing parties, if
15 they wish to be heard, and give them an
16 opportunity to do so.
17 Here's kind of where we're at. I
18 don't have anything else scheduled the rest
19 of the day. I'm going to give you the time
20 that is needed for us to take the time to
21 get everything out that needs to be out.
22 We're not going to retry the hearing from
23 last week, but I want everybody to have a
24 full opportunity to be heard so that we can
25 then get to a point where a decision is

1 made and that helps everybody know what
2 they need to do next. I'm very aware that
3 whatever I do on this matter, I would
4 expect the side that didn't like it most to
5 appeal it. That is your right. That's the
6 system, so it won't hurt my feelings. But
7 I guess the place to start is with the
8 Plaintiffs. It is their motion, Emergency
9 Motion to Vacate the Automatic Stay, so
10 proceed.
11 MR. DEVANEY: Good afternoon, Your
12 Honor. John Devaney speaking on behalf of
13 the Plaintiffs. Your Honor, let me just
14 begin, if I could, by thanking the Court
15 for taking up our motion so expeditiously
16 and adjusting your schedule to accommodate
17 our motion. We do very much appreciate
18 that.
19 Your Honor, this case presents unique
20 circumstances that justify lifting the
21 automatic stay. Vacating the stay is very
22 much in the public interest as it will
23 allow county election supervisors to begin
24 preparing now for the primary elections
25 under a constitutional map. It will ensure

1 at the same time orderly administration of
2 that election. If the Court does not lift
3 the stay, Your Honor, we respectfully ask,
4 as stated in our papers, that at a minimum
5 the Court order the stay automatically
6 expire by May 27th to avoid a situation
7 where the clock runs out while the
8 Secretary's appeal is pending, and we face
9 an argument that at that point it's too
10 late to make any changes to the
11 congressional map. Your Honor will
12 probably recall from last week that some
13 supervisor said that May 27th or
14 thereabouts is sort of the end date for
15 them to begin implementing, which is why we
16 ask for that alternative relief.
17 Your Honor, the Court has the
18 authority to vacate the automatic stay
19 triggered by the Secretary's Appeal if
20 there's a demonstration of compelling
21 circumstances, and as Your Honor is aware,
22 that's in Appellate Rule 9.30(b)(2).
23 Compelling circumstances exist here because
24 allowing the stay to remain in place
25 pending appeal is really the practical

1 equivalent of the reversal of the Court's
2 temporary injunction order, and that's
3 because the Secretary's appeal will very
4 likely last beyond the date by which a
5 remedial plan must be in place for the 2022
6 congressional election. And under Rule
7 9.301(b)(2), the Court may extend a stay,
8 it may impose any unlawful conditions on
9 the stay or vacate the stay. In deciding
10 whether there are compelling circumstances
11 to do any of that, the factors the Court
12 looks at under a precedent are the
13 government's likelihood of success on
14 appeal and the likelihood of irreparable
15 harm if the automatic stay is reinstated.
16 And the Court has broad discretion in
17 making these determinations.
18 Your Honor, as we set forth in our
19 papers, both of these conditions are
20 satisfied for the Court to exercise its
21 discretion to lift the automatic stay. And
22 the concept of an automatic stay is founded
23 in the concept of judicial deference to
24 planning-level governmental decisions. But
25 that deference diminishes, Your Honor,

1 where the illegality of the government's
2 decision has been established and is
3 unlikely to be disturbed on appeal, and
4 that's the case here.
5 First, on likelihood of success, the
6 Court determined in its ordered issued on
7 Friday that the enacted plan is
8 unconstitutional, and that conclusion is
9 based not only on legal conclusions, but on
10 factual determinations that cannot be
11 disturbed absent of showing a clear view of
12 discretion. And Defendants cannot show
13 either that this Court's legal conclusions
14 or its factual determinations were in
15 error, much less that the Court's decision
16 should be reversed.
17 Most important, Your Honor, after a
18 full consideration of the facts of record,
19 the Court correctly determined that the
20 enacted plan, quote, "would diminish the
21 ability of black voters to elect their
22 candidate of choice in North Florida," and
23 also found that the Secretary offered no
24 credible contrary evidence. That's on page
25 10 of the Court's order. The legislature's

1 own functional analysis, as is in the
2 record, proved the same thing, that there
3 is diminishment in Northern Florida under
4 the enacted plan.
5 Now, the Secretary, in opposing our
6 motion, says that she will prevail on
7 appeal because of her claim that diversion
8 of CD 5 from plan 8015 is a race-based
9 district; that is that it was drawn with
10 race as the predominant factor. But she
11 did not show in the proceeding before Your
12 Honor that race predominated in that
13 district. And, in fact, as we established,
14 there is multiple other reasons why that
15 district was drawn, including, most
16 predominantly, compliance with Romo v.
17 Detzner, the Supreme Court precedent and,
18 also, the Fair District Amendment. Plus,
19 as Your Honor found, if race did
20 predominate, even if it did, any use of it
21 was justified by compelling State interest
22 and also that the use of race is narrowly
23 tailored, and that's a finding by Your
24 Honor on pages 11 through 14 of the order.
25 So in sum, Your Honor, the Secretary

1 cannot prevail on appeal. The Secretary
2 can prevail on appeal only if the Supreme
3 Court reverses its own prior precedent,
4 only if it ignores the express requirements
5 of the Fair District Amendments, and only
6 if the Supreme Court doesn't give
7 appropriate deference to this Court's
8 factual findings and the factual record in
9 this case.
10 Accordingly, the first factor,
11 likelihood of success, strongly favors
12 vacating the automatic stay pending the
13 appeal. As to the second factor, that is
14 the factor of irreparable harm, that is
15 also satisfied; that is that irreparable
16 harm will occur if the stay remains in
17 place. And allowing the stay to remain in
18 place poses irreparable harm not just for
19 the Plaintiffs in this case, but for many
20 other Florida voters who would have to vote
21 under an unconstitutional map, a map that
22 this Court has found to be
23 unconstitutional.
24 A remedial plan likely has to be in
25 place within the next few weeks, as

1 mentioned before, to ensure that the 2022
2 congressional election proceeds under a
3 lawful districting plan. The resolution of
4 the Secretary's appeal will likely last
5 longer than that. And if the stay remains
6 in place throughout the pendency of the
7 Appellate proceedings, it may ultimately be
8 infeasible to implement an alternative to
9 the enacted plan for the 2022 election.
10 And the Court has already held that if the
11 2022 primary and general elections are
12 conducted under then enacted plan,
13 Plaintiffs' constitutional rights will be
14 violated. That's an express finding by
15 Your Honor in Friday's order. This
16 constitutional injury, because it is
17 constitutional in nature, constitutes
18 irreparable injury and is sufficient to
19 demonstrate compelling circumstances that
20 justify vacating the automatic stay.
21 So, Your Honor, every day that passes
22 while the stay is in place makes the
23 limitation of the map that Your Honor
24 adopted in your order that much harder for
25 election officials to implement. The Court

1 can ease the burdens of implementing by
2 vacating the stay now and allowing those
3 election officials to get to work on a
4 constitutional -- implementing a
5 constitutional voting plan. And as I said
6 at the start, Your Honor, alternatively, we
7 do ask the Court to at least modify the
8 automatic stay to have it expire by its
9 terms on May 27th -- or by May 27th.
10 And, Your Honor, the last thing I'll
11 address briefly is Dr. Johnson's affidavit.
12 I won't spend a lot of time on it. But the
13 Secretary, as Your Honor noted, presented
14 that affidavit several hours ago,
15 Dr. Ansolabehere reviewed it, and we
16 appreciate Your Honor taking the time to
17 read his response, which was filed less
18 than an hour ago. It's our view that this
19 motion to stay is not an appropriate place
20 to consider this type of new evidence. But
21 if the Court is going to consider
22 Dr. Johnson's affidavit, we, of course, ask
23 you to also consider Dr. Ansolabehere's
24 response.
25 THE COURT: I would not review one

1 without the other, so that's only fair.
2 MR. DEVANEY: Thank you, Your Honor.
3 And there are a few points that
4 Dr. Johnson address that I will briefly
5 respond to. Your Honor will recall that
6 during Dr. Ansolabehere's testimony on
7 Wednesday of last week, it was pointed out
8 that -- I believe it was Wednesday, maybe
9 it was Thursday. I lost track of the days,
10 but --
11 THE COURT: Wednesday.
12 MR. DEVANEY: Thank you. It was
13 pointed out that there was a non-continuous
14 line in an area of the map that was
15 actually Interstate 95. I believe it was
16 in Johns County. And when Dr. Ansolabehere
17 saw that, he admitted, "Oh, yeah, that line
18 should be contiguous." He, on Friday,
19 corrected that, and that involved moving
20 three census blocks on Route 95 to make
21 sure there was continuity, to eliminate
22 that non-continuity. That was really in
23 the nature of a cleanup.
24 Most importantly, Your Honor, that
25 didn't move any people. This is an

1 interstate highway, and there's no effect
2 on which people are in which districts. It
3 just was an administerial change to clean
4 up a non-continuity line, noncontinuous
5 line, that was in the map that
6 Dr. Ansolabehere presented.
7 Dr. Johnson also points to, I believe,
8 it's three census blocks in South Florida
9 that aren't exactly reflective of what's in
10 the enacted map. And the software used to
11 draw -- to formulate some of the districts,
12 when it reached those three census blocks,
13 recognized that they were, again, a
14 highway, a river and an irrigation canal,
15 and it placed census blocks on either side
16 of the highway or either side of the river
17 and the irrigation canal. None of the
18 census blocks involve any people.
19 Dr. Johnson admits that there are no
20 people in any of these census blocks that
21 Dr. Ansolabehere first for I-95 moved and,
22 in this instance, that were placed in South
23 Florida. So there's no population effect
24 whatsoever, and it doesn't change at all
25 the substance of the map.

1 And then last, Dr. Johnson says that
2 it's inaccurate that the map presented by
3 Dr. Ansolabehere and adopted by the Court
4 follows House district lines, and he points
5 to a few examples where it does not follow
6 House district lines, and that's not a
7 surprise, Your Honor.
8 Dr. Ansolabehere is very clear in his
9 testimony, and I'm quoting that this map,
10 quote, "follows the boundaries of the
11 recently enacted Florida State House map,"
12 and this is the key language, "to the
13 greatest extent possible, and by minimizing
14 the number of additional precinct splits."
15 The placement of 8015's version of CD
16 5 into the map means that you can't always
17 follow the Florida State House lines, but
18 Dr. Ansolabehere did it as much as was
19 possible. And by doing so, it's easing the
20 administrative burden on supervisors of
21 election who now will not have to send out
22 multiple ballots, multiple ballot
23 information and in multiple districts.
24 Could it always be done? No, it
25 couldn't. It wasn't feasible to do that;

1 but as I said, he did it wherever possible.
2 So those are the brief responses to
3 Dr. Johnson's affidavit, which
4 Dr. Ansolabehere also addresses in his
5 affidavit.
6 So in sum, Your Honor, the standards
7 for lifting the stay truly do -- these are
8 truly compelling circumstances, and the
9 standards for lifting the stay on
10 likelihood of success and irreparable harm
11 have been met, and we ask Your Honor either
12 lift the stay or modify it so that it
13 expires by May 27th, and I thank you for
14 your consideration and time.
15 THE COURT: Thank you, Mr. Devaney.
16 Mr. Jazil, I imagine you're next, but
17 if not, proceed.
18 MR. JAZIL: Yes, Your Honor. Thank
19 you. Mohammad Jazil on behalf of the
20 Secretary. Your Honor, I'd like to begin
21 by echoing my friend, Mr. Devaney's
22 comments thanking the Court for making the
23 time to review these materials on an
24 expedited basis. We do appreciate that.
25 Your Honor, from there I'd like to

1 begin with a point my friend made about
2 what can and cannot be considered as part
3 of this proceeding. I'd like to point the
4 Court to Department of Environmental
5 Protection vs. Pringle, 707 So.2d 387,
6 inside is 390. This is a First DCA case
7 that talks about how the party seeking to
8 undo the automatic stay bears the burden,
9 and it's an evidentiary burden. They must
10 provide an evidentiary basis that
11 establishes a compelling circumstance
12 sufficient to vacate the stay.
13 Because of that standard, Your Honor,
14 I believe it's appropriate and necessary
15 for both the Plaintiffs to provide evidence
16 and for us to, if necessary, rebut that
17 evidence. Dr. Johnson's materials,
18 Dr. Ansolabehere's materials, for that
19 reason, are appropriate, and the parties
20 have already agreed that hearsay of this
21 type, expert reports, is appropriate as the
22 Court's considering the material on an
23 expedited basis.
24 Second, Your Honor, I'd like to
25 address my friend's arguments on the

1 likelihood for success on the merits. My
2 friend takes an issue with the fact that
3 the Secretary has not established that race
4 predominates. And there, Your Honor,
5 assuming for a moment that in this posture
6 where the Plaintiffs are seeking
7 extraordinary injunctive relief, the
8 secretary has the burden, let's assume that
9 for a minute. I'm not conceding it but,
10 let's assume it. Race does predominate.
11 We have a non-diminished provision in the
12 Florida constitution that specifically says
13 that you have to do certain things based on
14 race.
15 Second, you have specific language
16 from the legislature proceeding, whereas a
17 legislature was considering Map 8015, the
18 one that proposed Map A's version of
19 Congressional District 5's modeled after,
20 the legislation was clear, "We're
21 considering race. We're doing this for
22 racial reasons."
23 And third, Your Honor, if you look at
24 the shape of the district -- this is in
25 Dr. Johnson's report, and it's judicially

1 noticeable off the Florida redistricting
2 website -- that the shape of Congressional
3 District 5 follows the racial demographics
4 in Jacksonville and Tallahassee with
5 surgical precision. Both ends of this
6 congressional district follow racial
7 demographic lines. Those racial
8 demographic lines are almost conterminous
9 with the boundaries of the district.
10 Second, Your Honor, we have another
11 argument on appeal. This is the Purcell
12 argument. This is a simple notion that
13 even seemingly innocuous late-in-the-day
14 judicial changes can affect election
15 administration, and that's why courts
16 should not interfere as elections are
17 upcoming. It causes voter confusion. It
18 creates a disincentive to go to the polls.
19 Your Honor relied on a portion of 7
20 and 8. These are the two decisions from
21 the Florida Supreme Court that adopted the
22 current shape of Congressional District 5.
23 I note, Your Honor, that in both of those
24 cases, the Florida Supreme Court emphasized
25 -- their word, not mine -- emphasized the

1 time sensitive nature of the proceedings.
2 It truncated the time to file motions for
3 clarifications, motions for rehearing, and
4 it truncated the briefing schedule. It did
5 settle when an election was a year out. A
6 year out, the Florida Supreme Court was
7 emphasizing the time sensitive nature of
8 the proceedings. And, Your Honor, again,
9 we have un-rebutted material from Columbia
10 County saying that even as of this date, it
11 is impossible to implement any remedial
12 map; that, too, goes to the Purcell point.
13 Finally, Your Honor, the
14 likelihood-for-success issue is the
15 prohibitory versus mandatory injunction.
16 The Court has now mandated a remedial plan
17 that we believe is inconsistent with the
18 body of law saying that such mandatory
19 injunctions are disfavored. And here, Your
20 Honor, that is especially true because
21 consider what we're doing to establish a
22 congressional map. The author of the
23 adopted map has proofed the map six days
24 after he created it in one day without
25 being subjected to any cross-examination or

1 any examination by any kind by the Court or
2 the legislature. This is the map that the
3 court adopted. "Trust us," the Plaintiffs
4 say is what their argument boils down to.
5 "Trust us," even after Dr. Ansolabehere
6 says in his most recent affidavit, even
7 after he admits in his most recent
8 affidavit that he made changes, that he did
9 change things that are in the map that the
10 Court has now adopted.
11 Regardless of whether these changes
12 are zero population box or not, the changes
13 were made, they affect the boundaries of
14 the congressional districts that have been
15 adopted by the Court. And, again --
16 THE COURT: That's kind of like if a
17 tree falls in a forest and there's nobody
18 there, does it make a noise, right? If it
19 didn't affect any people, how does it make
20 a difference? They can't be corrected by
21 redrawing the line, particularly if it does
22 not impact an actual voter and where that
23 voter would go to vote.
24 MR. JAZIL: Your Honor, but this is
25 still a change that must be reflected in

1 the GIS mapping of the relevant supervisors
2 of elections, right?
3 Because we were told this was not
4 going to affect anything south of Volusia
5 and Marion County. That seems to not be
6 the case. So if you're a supervisor south
7 of Volusia or Marion County, now you have
8 to take the map, you have to reassess
9 whether or not your GIS mapping for this
10 map is accurate. Then you have to
11 reassess, which would be the smart thing to
12 do, whether or not there are any actual
13 other changes that have been made --
14 because we have found at least three -- and
15 so that does affect the actual workload of
16 the supervisors.
17 If you look at Supervisor Earley's
18 affidavits, both in the federal case and in
19 the second one, the case before Your Honor,
20 he lays out all the steps that need to be
21 taken. Supervisor Brown in Columbia County
22 lays out the steps that need to be taken,
23 and Mr. Phillips from Duval lays out the
24 steps that need to be taken. Now, we know
25 there have been certain changes made, so

1 it's incumbent on every election supervisor
2 to ensure they are complying with proposed
3 Map A, which is now the remedial map.
4 And, Your Honor, so at the end of the
5 day, my friend talked about the purposes
6 for an emergency stay and why it exists.
7 He noted one of the reasons, which is to
8 give deference to government decisions. He
9 says you don't need to give government
10 decisions deference where those decisions
11 are unconstitutional. Fair enough. Let's
12 put that rationale to the side.
13 There is also a second rationale in
14 those cases, and that second rationale is
15 the public be protected against judicial
16 decisions that might turn out to be
17 incorrect; a judicial mandate, in this
18 instance a map, which might amount to one
19 that has a few errors or many errors. We
20 can't be sure yet because, again, this map
21 did not go through the crucible of
22 legislative testing and testing at a trial.
23 So, Your Honor, for that reason and
24 all the others, we respectfully request
25 that the automatic stay remain in place as

1 the appeal proceeds. There's no reason to
2 doubt that the appeal will not proceed
3 expeditiously, as the Court pointed out in
4 the comments in the temporary injunction
5 hearing. Indeed, my friends have already
6 moved to have the Florida Supreme Court
7 consider the matter. My friends remain
8 free to file a motion to expedite the
9 proceedings at the First DCA, and the First
10 DCA has a history, as Your Honor mentioned
11 at the temporary injunction hearing, to
12 consider these matters on an expedited
13 basis.
14 So for all those reasons and the
15 reasons laid out in the papers, we ask that
16 the Court deny the motion.
17 THE COURT: Thank you, sir.
18 Let me ask, in no particular order.
19 Mr. Nordby, I think you represent the
20 upper chain or the Senate, so is there
21 anything that the Senate or any of the
22 senators, be it the president of the Senate
23 or the senator, I think Rodrigues on behalf
24 the District Committee, wish to be heard?
25 MR. NORDBY: Judge, we've been making

1 efforts to try and streamline these
2 expedited proceedings. We don't have
3 anything else to add today. Thank you very
4 much, though.
5 THE COURT: All right. Thank you.
6 Yes, sir.
7 Mr. Bardos, same thing on behalf the
8 State House of Representatives, the Speaker
9 of the House and Representative Meek on
10 behalf the Redistricting Committee?
11 MR. BARDOS: Thank you, Your Honor.
12 We have nothing to add at this time.
13 THE COURT: Okay. Okay. You know,
14 when you're a judge, you get a random draw
15 of cases. And so I didn't sign up for the
16 case, but I did sign up for the job. So it
17 is my responsibility, and I embrace that
18 responsibility. It doesn't mean cases are
19 easy, though.
20 This is an instance where the State --
21 first of all, let's start globally, right?
22 The United States Constitution -- I think
23 Article 1, Section 4 -- leaves to the State
24 Legislatures to determine the time, manner
25 and place for elections of U.S. Senate and

1 House Representatives. U.S. Senate came
2 later with an amendment, but the idea is
3 the Federal Constitution tells the State
4 Legislatures to comes up with whatever plan
5 that state wishes to implement to have
6 districting for members of the House of --
7 the United States House of Representatives.
8 The people of the State of Florida,
9 overwhelming, added Article 3, Section 20
10 to the State Constitution by vote in 2010,
11 and we've had the litigation for several
12 election cycles since then. The point
13 being, that the legislature, that branch of
14 government, our policy makers, have the
15 sole responsibility of determining
16 legislative districts for Congress. But
17 constitutions are constraints upon power,
18 so the people established some criteria
19 that the State Legislature must follow in
20 establishing fair districts.
21 Case law, that I am bound to follow
22 from the State's Supreme Court, mandates
23 that it is the judiciary's responsibility
24 to make sure, when challenged, that the
25 legislature has followed the criteria set

1 forth in Article 3, Section 20. So kind of
2 whether I want it or not, here it is; I've
3 got it.
4 Now, critical to that, there's no
5 mention of the third branch of government,
6 the Executive Branch. So how we find
7 ourself here today is the State Legislature
8 enacted a congressional redistricting plan
9 to accommodate the 28th and an additional
10 plus one congressional district, and to
11 make sure that the boundaries met all the
12 requirements including reallocating
13 populations to try to even out so that you
14 don't have any districts that have way more
15 or way less population; in other words, one
16 man, one boat principle.
17 They did that. The State Constitution
18 does not send that straight from the
19 legislature to the Supreme Court for
20 approval. Instead, this is a situation
21 where the governor of the state can
22 exercise his right to veto the legislation,
23 and that is what he did. That is
24 absolutely the executive right. Governor
25 DeSantis and Governor DeSantis alone can

1 decide to do that; he did, and that this
2 Court and everyone involved should respect.
3 Now, as a result of that veto, you
4 have a timeframe -- and if I'm off a day,
5 excuse me. But you have in March, sometime
6 around the 24th of March, where the
7 legislature enacts a plan that ultimately
8 gets vetoed; several weeks later, it's sent
9 to the governor who vetoes it. The
10 governor calls the legislature into a
11 special session. They come, they enact a
12 map that we're here on today, and quick
13 turn, like a day later, the governor signs
14 that enacted map; that becomes the law.
15 The same day, I believe it was April
16 the 22nd of this year, that the governor
17 signed the enacted plan, the Plaintiffs
18 filed this lawsuit. So we have a 2020
19 decennial census. The legislature goes
20 through a number of steps, both chambers,
21 to make sure that we have an open
22 transparent process for following Article
23 3, Section 20 of the State Constitution.
24 They go through that process, they pass a
25 statute, it gets vetoed, they come back in

1 a special session, pass another statute,
2 the governor signs this version, Plaintiffs
3 immediately, that same day, files suit. So
4 everybody is moving at a pretty good clip
5 here. The thing that causes us the problem
6 with timing is these things have to be
7 done, and there's not a lot of time in
8 between spots, right? The decennial census
9 happens. The legislature goes through its
10 process. Once you have a veto come back in
11 special session, you have this new enacted
12 map signed, I mean, minutes later, the
13 Plaintiffs are filing suit, so nobody drug
14 their feet. This is as fast as it could be
15 done.
16 Now, the part about the judiciary
17 being responsible for making sure that the
18 legislature has done what it was supposed
19 to on that -- and that is not something
20 that I or any other judge that I'm aware of
21 wants to do. We prefer the legislature do
22 what it does, and -- but so sometimes
23 you've got to make a call.
24 In this case, the Secretary of State
25 has basically led the defense. That's her

1 -- I mean, it's her counsel and her right
2 to do that. But the legislature, so far as
3 I know, have not defended the map that
4 Governor DeSantis signed. They haven't
5 offered any exhibits into evidence. They
6 didn't put on any witnesses. As far as I
7 can tell, as late as of the last hour, the
8 only appeal of the Court's temporary
9 injunction was by the Secretary of State's
10 Office, not the Senate, not the House, not
11 the president of the Senate, not the
12 Speaker of the House, not either
13 chairpersons of the Redistrict Committees
14 in either chamber. Well, they don't have
15 to appeal it. But my point is this, the
16 judiciary is supposed to make sure,
17 according to the Supreme Court, that the
18 Fair District Amendment is followed.
19 The Secretary of State has a very
20 important function, and her role is kind of
21 from the 30,000-foot level of making sure
22 that an election is administered well, that
23 the law is followed, and that the various
24 supervisors of elections are doing what
25 they're supposed to do in making reports

1 and doing audits and everything that has to
2 follow through in an election.
3 The supervisors of election are the
4 people who own the ground. They're at the
5 ground level. They're the ones that help
6 people register to vote, assign them to
7 different precincts, work with people who
8 are trying to, by petition, qualify to run
9 for any of the offices, whatever those
10 would be. They're the ones that have to
11 figure out how to mail out absentee
12 ballots, to make sure that people that are
13 in the Military who are oversees fighting
14 for our free nation, you know, the
15 maintenance of our way of life, that they
16 get their ballots on a timely business.
17 So they have a mountain of work to do.
18 They are all dedicated people. So in
19 talking about -- there are Plaintiffs that
20 are regular citizens saying, "I want to
21 vote, and here's why it's important to me."
22 There are associations and groups of
23 citizens. But everybody involved in
24 government, be it in the legislature, the
25 courts, the Executive Branch, Secretary of

1 the State, the governor, the supervisors of
2 election, all these people are public
3 servants. And almost to the person, these
4 are people that roll up their sleeves and
5 are dedicated to doing a good job for the
6 people of the State of Florida.
7 So here's where I am on this: I'm
8 kind of the guy who's damned if he does and
9 damned if he doesn't, but I still got to
10 make a decision. I've paid very careful
11 attention to the evidence, to the legal
12 arguments and the case law before rendering
13 a decision to grant the temporary
14 injunction, that includes the arguments
15 that the Secretary of the State made.
16 The United States Supreme Court is
17 aware that Florida has a Fair District
18 Amendment. And as a matter of fact, the
19 United States Supreme Court in case law
20 has, in essence, given us a good job as far
21 as something that other states could
22 emulate and, in fact, recognize that other
23 states have followed our lead in putting
24 something like that in these other state's
25 constitutions.

1 The State Supreme Court, closer to
2 heart, down the street from me, our State
3 Supreme Court has -- is aware of the Equal
4 Protection Clause of the 14th Amendment, is
5 aware of the Voting Right Act of 1965 and
6 the state and federal case law and all
7 those points is aware of the 15th Amendment
8 and enabling legislation to enforce the
9 15th Amendment, including the Voting Rights
10 Act -- the State Supreme Court, in either
11 2015 or 2016, adopted a district that looks
12 very much like the one the Court said it
13 was going to impose through the temporary
14 injunction -- aware of all of these
15 constitutional concepts and arguments, even
16 if it wasn't made directly there.
17 So is it possible that a court could
18 say, you know, "Here's an argument, we're
19 now going to address," and change its mind?
20 It could. I've looked at it from the
21 standpoint as someone who took an oath that
22 I solemnly follow to follow the law, follow
23 the U.S. Constitution, the State
24 Constitution, and the case law on it from
25 courts superior to me, and that would be

1 every court out there practically, right?
2 And I'm a former county judge, so maybe not
3 that one, but God, I love my county judges,
4 so there you go.
5 Under these circumstances, this is
6 redistricting. So what did we start with?
7 We started with benchmark Congressional
8 District 5 that the State Supreme Court in
9 essence said, "Here's the way it's going to
10 be, leave it alone," at least in the round
11 -- in the round of litigation. We've had
12 three election cycles since where the
13 voters have, by substantial majority, voted
14 Congressman Lawson. We have a State
15 Supreme Court Justice named Al Lawson, and
16 in this case it's Congressman Al Lawson,
17 different people. But Congressman Lawson
18 was elected in benchmark Congressional
19 District 5 in the last three races.
20 We start with what we're
21 redistricting, and if I look at the State
22 Supreme Court and what I'm supposed to
23 follow -- and what I tried to do through
24 the prior order and in ways on what I'm
25 doing today -- the Florida Supreme Court,

1 they don't give me an easy name on this
2 one, In re S.J.RES., I think, 7 -- 1176.
3 That's an 83 So.3d. -- and I don't have the
4 page that decision starts on. If memory
5 serves me correct -- which is a bad way to
6 go -- 597, maybe. But the bottom line is
7 the language I'm quoting is on page 625 of
8 the So.3d. report.
9 Accordingly -- quote, unquote,
10 "Accordingly, the legislature cannot
11 eliminate majority-minority districts or
12 weaken other historically performing
13 minority districts where doing so would
14 actually diminish a minority group's
15 ability to elect its preferred candidates."
16 That is on page 625 of that opinion.
17 The testimony that the Court accepted
18 -- and this came from Dr. Ansolabehere's
19 testimony -- was taking 367 African
20 American voters from benchmark
21 Congressional District 5 and distributing
22 throughout 4 new districts, basically put
23 African Americans in a position where they
24 had a very low chance of having the
25 prevailing candidate. And I'm not looking

1 at the chart right now, but you go down to
2 the teens, rather than -- you know,
3 49.1 percent, you go down to, you know,
4 something like -- I'm looking at
5 16 percent, 22 percent. The highest of the
6 four districts might have been around
7 30 percent. But if I'm reading the State's
8 Supreme Court on this, that can't be done
9 because it says so in black and white from
10 the State's Supreme Court, which I am
11 obliged to follow.
12 And if the trial judge won't follow
13 the law or do his or her very best to
14 follow the law, then God help us, right?
15 So it may be that a higher court than me
16 thinks differently, and it doesn't mean I'm
17 -- you know, they're going to do their job,
18 and I'm confident they'll do their job.
19 And if I'm wrong, I'll be humble about it.
20 This is not an ego trip. But I'm trying to
21 follow what my State Supreme Court has
22 said, and that factored into the decision
23 last week; it factors into the decision
24 this week.
25 This is a remedial step to fix some of

1 the things that happened under the old Jim
2 Crow Laws, to give Africans Americans an
3 opportunity to elect. And it doesn't have
4 to be African Americans. We have Hispanic
5 districts in South Florida. There can be
6 other places that have districts with
7 different minorities. But in this case,
8 the old south where you had slavery, where
9 you had plantations, where you had a number
10 of African Americans there but were not
11 able to register to vote, persuasively --
12 persuaded not to register to vote in some
13 instances, the Voting Rights Act of 1965
14 was passed in the Johnson Administration to
15 remedy that problem, and it did in large
16 part. And the voters of the State of
17 Florida adopted, basically, the exact same
18 language modeled on the Voting Rights Act
19 of 1965 into our State Constitution.
20 So here's where I'm at: I have
21 already found that the Plaintiffs have
22 satisfied what is necessary for the Court
23 to grant them a temporary injunction. I
24 think the people would have a real problem
25 with their government if rather than this

1 being decided by courts on the merits, the
2 clock ran out. And I'm not suggesting
3 anybody is trying to run any clock out. I
4 know that everybody is on a very short
5 timeframe, but I think the people expect
6 more of us and better than that. And
7 knowing the heart of a public servant, I
8 know that the supervisors of election and
9 other people involved -- Secretary of
10 State's Office, absolutely, courts --
11 people are going to do what's necessary,
12 that includes evening time, weekend time,
13 lunch time; if we get a little less sleep,
14 that's okay because it's crunch time now,
15 and this involves fundamental
16 constitutional rights.
17 And I'm not suggesting anybody has
18 done anything on tort whatsoever, don't
19 make that mistake. But if the ultimate
20 answer is every time we have a decennial
21 census, a party -- be it the Republicans or
22 the Democrats or the Whig party somehow if
23 they go back into control somewhere -- all
24 they got to do is say, "Well, I'm going to
25 have an infirm constitutional redistricting

1 and nobody can do anything about it until
2 at least, you know, after one election
3 cycle." So in other words, "I can gain the
4 system and get" -- and I'm not saying at
5 all -- I have no reason whatsoever to think
6 that happened at all here. But if the
7 answer is nobody can ever do anything about
8 the first election following a decennial
9 census, even if it turns out later on
10 something's unconstitutional, that isn't a
11 very good message to the people. And you
12 can't delay or speed up a decennial census,
13 so we've got to do what we can to get this
14 right.
15 Now, I know a little bit about
16 elections because I've spent a very
17 enjoyable time serving on my Leon County
18 Canvassing Board for the 2018 election, and
19 that was the one that had the three
20 laser-thin votes, and I think of Governor
21 Scott and Senator Nelson; very close race.
22 The Governors' race, DeSantis and Gillum,
23 very close race, and then the agriculture
24 race. That evening it looked like the
25 fellow who lost was going to win, and yet

1 Ms. Fried wound up beating him, so -- and
2 we even had some close races that had
3 recounts and other things locally in
4 elections. But the bottom line is, I got a
5 little walk around sense about what a
6 secretary -- I mean, a supervisor of
7 election and their staff can and cannot do.
8 So here's what makes sense to me: Not
9 that anybody's got to listen to me on it,
10 but they're fully capable of doing more
11 than one thing at once. They can say,
12 "Well, you know, suppose this judge's
13 temporary injunction carries the day. How
14 do we go about handling that?" And they
15 can do some planning. "Well, at the same
16 time, that fellow's order may not stand."
17 So they're already doing work based upon
18 the enacted map. It's not beyond the pale
19 to say, "And suppose Judge Smith's order
20 sticks, how would you go about doing that?
21 What steps would you need to take?" Back
22 to the damned if I do, damned if I don't
23 part.
24 I'd rather the Appellate Court decide
25 this, but they're not the one who has the

1 motion in front of them right now; I do. I
2 am concerned that if the normal course of
3 things plays out, we could get to a point
4 where the Plaintiffs had no remedy, even if
5 it winds up being that they should have
6 gotten one. An election that happens can't
7 be undone.
8 And so I'm going to air -- I'm going
9 to air -- I'm not trying to be a populist
10 here, but I'm going to air with the idea
11 that I want the Plaintiffs and the people
12 who would vote to be in a position where
13 they vote in a district which I believe
14 abides by the State Constitution. And if
15 I'm wrong about that, I'm sorry. I'm doing
16 the very best I can, and I'm not trying to
17 get it wrong. I'm doing my dead level best
18 to weigh this and be fair to everybody
19 involved.
20 So, I guess, in conclusion, it's --
21 while I very much appreciate the Secretary
22 of State and the Executive Branch pressing
23 this point, it's not the legislature.
24 She's not the legislature. The legislature
25 is a party, but they've been silent to date

1 on the position. I don't know what the
2 Appellate Court will read in or out of
3 that, but I do note that. I was paying
4 attention to it. It falls on me to make
5 sure that the legislature has done what it
6 was supposed to.
7 Representative Meek, when asked, said
8 that the objectives on this, or the
9 objective criteria, would not perform for
10 African American voters. So you look at
11 that as an admission by someone who is a
12 party in the case against the interest of
13 the very map, the enacted plan. I take
14 that seriously, and the State Supreme Court
15 previously took it seriously, and you could
16 look at what individual legislatures, be it
17 the Senate or the House or Committee
18 members, said or did.
19 The State Supreme Court has talked in
20 opinions about the functional analysis and
21 objective criteria using those functional
22 analysis statistics. The Plaintiffs put
23 forward functional analysis, and they had
24 an expert that walked the Court through
25 what their findings were, and right now

1 that's the only game in town as far as
2 functional analysis. And my reading of the
3 State Supreme Court requirements is that is
4 something I can rely on and have relied on,
5 particularly with not a functional analysis
6 same thing in response from the other side,
7 so it wasn't even a matter of -- you know,
8 I got one guy telling two plus two equals
9 four, and the other guy telling me two plus
10 two equals five, and here's what I think,
11 here's my finding, it's, A -- you know,
12 testimony with respect to the functional
13 analysis versus no other functional
14 analysis.
15 That being said, I am going to grant
16 the motion to vacate the automatic stay,
17 fully aware that I may be reversed; and if
18 I am, I will be humble about it. Again,
19 I'm not trying to -- I'm just in a position
20 that I got to call it as I see it. I think
21 -- I don't think the Secretary of State
22 will prevail. She may be right, and I may
23 be wrong. But do I do think irreparable
24 harm will happen to the Plaintiffs and
25 other voters in Florida, and that they will

1 lack any remedy whatsoever if the Appellate
2 process strings out long enough. And I am
3 mindful and am hopeful that the good men
4 and woman who work for the supervisors of
5 elections and supervisors of elections
6 themselves will game plan for both
7 contingencies, because good Lord, the
8 Appellate Court may come up with a third
9 alternative. I don't know.
10 That being said, I certainly
11 understand the Secretary of State, if they
12 -- I would imagine they will promptly ask
13 that the First District Court of Appeal to
14 convince or tell me on remand I'm wrong,
15 okay. That's your option on that end.
16 That won't hurt my feelings. That is the
17 system that we have. So do what you need
18 to do on that end. And, as I say, whether
19 I'm affirmed or reversed, I've done my job
20 with the cleanest conscience I can have,
21 and now it's up to the Appellate Court to
22 do their jobs, and I am fully confident and
23 have faith in my colleagues above my paid
24 grade, both at the DCA and the Supreme
25 Court. But I do think it is best for the

1 State of Florida and the people for this to
2 be decided -- in other words, a decision
3 issued in time to do something different,
4 if that's called for, rather than, you
5 know, three meals down and the clock runs
6 out, and there you go.
7 Anything else we need to cover today?
8 MR. JAZIL: Your Honor, if I may. May
9 I ask that the vacatur not take effect
10 until May 27th as the Plaintiffs point out
11 in their motion?
12 THE COURT: You know, you can -- and I
13 actually was weighing that pretty heavily
14 as I was listing and thinking, from the --
15 so here's my point back. And I didn't say
16 it before, but now that you bring it up,
17 the other thing is the Secretary of State's
18 position has been, "Man, time is short."
19 So if you don't have time to do anything
20 now, we started out with that, I would be
21 willing to do that, unless somebody is
22 going to come in and say May 27th is even
23 too late. So I don't want it to be a
24 sucker, got you game. And I'm not
25 suggesting anybody is trying to sucker me.

1 But if everybody is confident that May 27th
2 is at least a drop-dead date, or maybe the
3 earliest drop-dead date, then I would be
4 willing to do that because that way if the
5 Appellate Court did something, maybe they
6 could get me off the hook, right? If the
7 Appellate Court did something in the
8 interim, perhaps you don't need an order
9 from me at all. They would have taken care
10 of it, which I would much prefer them to
11 make the call than put them in a position
12 where they have to review what I just did.
13 Mr. Devaney, is that satisfactory to
14 you if the Court basically lifts or vacates
15 the stay no later than May 27th or on May
16 27th?
17 MR. DEVANEY: No, Your Honor, that is
18 not our preference. We made that for an
19 alternative request for relief.
20 THE COURT: You did. I had to ask,
21 though.
22 MR. DEVANEY: Sure. I totally
23 understand. A couple of concerns. One is
24 there is no doubt that even if the Court
25 were to select May 27th as a date by which

1 the stay be lifted, in their papers before
2 the DCA or the Florida Supreme Court, the
3 Secretary will be arguing it's too late to
4 do anything. I would bet my house on it.
5 THE COURT: All right. So -- I hear
6 you. So here's what I'm going to do -- in
7 it for the penny, I guess I meant for the
8 pound, and hopefully not a pound.
9 Yes, sir?
10 MR. JAZIL: Your Honor, one other
11 point, and I do not mean to hoodwink you.
12 We're going to be up front with you.
13 THE COURT: You're a good reputable
14 man and a good attorney. You're not
15 hoodwinking me at all, go ahead.
16 MR. JAZIL: Yes, Your Honor. So we do
17 make the point in our papers, and I've made
18 the point that for at least Columbia
19 County, the drop-dead date has passed.
20 That said, Your Honor, we do plan to
21 get a motion to reinstate the Court's -- to
22 reinstate the stay on file with the First
23 DCA tomorrow.
24 THE COURT: Yeah.
25 MR. JAZIL: If the Court undoes the

1 stay today, it creates a gap between our
2 filing and whenever we get our papers on
3 file and the Court addresses the issue. So
4 perhaps there's a middle ground of where
5 there isn't a gap in the record, and the
6 supervisors aren't going back and forth
7 with days in effect --
8 THE COURT: So let me just say, I did
9 not find it persuasive that the supervisors
10 of election in Columbia County couldn't
11 accommodate this, right? I mean, so it is
12 what it is. I'm not suggesting bad faith
13 or anything else.
14 I got some -- wow, I just had
15 something that told me my computer will
16 shut down unless I tell it to try later. I
17 think I'll hit try later, so that's a state
18 government computer. Totally made me lose
19 my train of thought.
20 MR. DEVANEY: Your Honor, may I jump
21 in while you're recapturing your train of
22 thought?
23 THE COURT: Yes, sir.
24 MR. DEVANEY: I just want to go back
25 to Your Honor's point that election

1 officials can do more than one thing at a
2 time, and I don't mean to minimize the job
3 that administration of elections have.
4 They have very serious challenging jobs.
5 But we're talking about a very short time
6 here where, if necessary, people can begin
7 doing what's necessary to lay the
8 foundation for either plan.
9 THE COURT: Yes, sir. Let me
10 interrupt you just a second.
11 Mr. Jazil, tell me what you were
12 talking about a gander. Here's what I'd
13 like to do: I'd like to -- I don't want to
14 make anybody do unnecessary work or incur
15 unnecessary expense. At the same time, I
16 don't want to get hoisted on my own petard
17 by somebody coming in later and saying,
18 "Well, I could have done it on the 25th,
19 but you didn't tell me to do it until the
20 27th," right? And that made a difference
21 to them.
22 So fully understanding that you're
23 going to pursue your right to ask the
24 District Court of Appeal to undo what I'm
25 telling you I'm about to do, tell me your

1 argument on the gap.
2 MR. JAZIL: Your Honor, my point is
3 this: If Your Honor crafts the vacatur
4 order such that it allows for the
5 possibility of the Secretary filing a
6 Motion to Reinstate tomorrow, and then says
7 the automatic stay will be vacated after
8 the First DCA addresses the Secretary's
9 Motion for Reinstatement, which will be
10 filed on May the 17th for, pick 72 hours,
11 whatever the appropriate window you believe
12 is for the First DCA to rule on that.
13 I think that would be beneficial from
14 an election administration perspective for
15 these reasons: Absent that allowance, what
16 will happen at the end of today's hearing
17 is we will send an e-mail to all the
18 supervisors of the elections saying, "The
19 stay has been lifted, begin implementing
20 proposed mapping." If the First DCA comes
21 back and reinstates the enacted map, we'll
22 send another e-mail saying, "Go ahead,
23 start enacting the map that the legislature
24 passed." And based on past experience,
25 that e-mail correspondence back and forth

1 with the supervisors does cause confusion.
2 So if we have an allowance for 72
3 hours, I think it gives the First DCA an
4 opportunity to at least provide some kind
5 of guidance on the reinstatement motion,
6 and it would avoid that intermediary step.
7 That's what I would suggest from just -- at
8 least from an administration perspective,
9 Your Honor.
10 MR. DEVANEY: Your Honor, may I
11 respond?
12 THE COURT: Yes, sir.
13 MR. DEVANEY: Your Honor, we've
14 already had several days pass since Your
15 Honor's order. Your Honor had offered to
16 graciously hear this on Friday. The State
17 was not available, so here we are late in
18 the day on Monday. We don't know when the
19 First DCA is going to rule on a Motion to
20 Reinstate the Stay, and so we're looking at
21 an uncertain amount of time.
22 And, in effect, Counsel is asking for
23 a stay be granted and left in place for
24 some period of time that none of us here
25 can predict how long that would be. And at

1 the same time, we're hearing, "It's too
2 late to do anything. We got to get
3 started." And it's really -- it's a
4 contradictory argument, Your Honor, and
5 election officials should begin now
6 preparing for implementation of the
7 constitutional map. It turns out -- that's
8 my point.
9 THE COURT: All right. So I'm going
10 to grant the motion. And I hate to put my
11 colleagues at the DCA in a position where
12 they're going to have to move on it, but --
13 so it is what it is.
14 So, Mr. Jazil, if I caused somebody
15 unnecessary aggravation as it turns out,
16 I'm sorry about that, but I can only do the
17 best I can. So you made the motion -- or
18 you asked me on that, and it's running
19 through my brain matter. I have considered
20 it.
21 Here's what I need to do: I need to
22 get an order out. So I wanted to hear from
23 everybody before I wrote the order,
24 obviously, because I needed to think
25 through what I was doing and make sure I

1 understood all the arguments and give you
2 an opportunity to be heard. I intend --
3 (The Court conferred with the clerk.)
4 THE COURT: Okay. I'm just going to
5 have to do a little evening work. I am
6 going to try to put together an order and
7 get it rendered today. I don't know if
8 today means 11:59, if that's as quick as I
9 can get it done, or, you know, in 45
10 minutes. I have an idea of a framework,
11 and I'm not going to try to make it -- you
12 know, I'm not going to reinvent the wheel
13 or write the Magna Carta, if all I got to
14 do is lay out what we need to -- because we
15 do have a court reporter, and I think
16 there's enough -- the issues are important
17 enough that if somebody needs a transcript,
18 they'll run it over there, and the DCA can
19 read for itself what we've just done on
20 that. So I'll try and make it as short as
21 possible on that end, but that way we get
22 it done.
23 And then that way, Mr. Jazil, you and
24 your client can -- you'll have something --
25 if you can get it filed today, good for

1 you, or maybe first thing in the morning,
2 just depending. But I'll get you something
3 rendered. Dan will get it out to everybody
4 through the e-Service portal.
5 I do appreciate the hard work that
6 everybody did on this, and the very
7 professional work that was done on this.
8 That being said, I better get to work on
9 this. So thank you all. We'll sign off,
10 and I'll get an order rendered this week.
11 MR. DEVANEY: Thank you, Your Honor.
12 THE COURT: Thank you.
13 MR. JAZIL: Your Honor, just one more
14 point.
15 THE COURT: Yes?
16 MR. JAZIL: This is Secretary Lee's
17 last court hearing as Secretary of State,
18 so I just wanted to note that and note that
19 it's been an honor and privilege
20 representing her for three years, so...
21 THE COURT: Well, very good, and I was
22 aware of it today. She had announced it
23 would be her last day on that, so
24 absolutely. And I'm sincere when I say she
25 and other people in government are public

1 servants. They have the heart of a public
2 servant, so I'm grateful for her services
3 today.
4 MR. JAZIL: Thank you, Your Honor.
5 THE COURT: Thank you .
6 (Proceedings were concluded at 5:25
7 p.m.)
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1 COURT CERTIFICATE

2

3

4 STATE OF FLORIDA

5 COUNTY OF LEON

6

7 I, Brandy Duxbury, Stenographer,

8 certify that I was authorized to and did

9 stenographically report the foregoing

10 remote proceedings, and that the transcript

11 is a true and complete record of my

12 stenographic notes.

13

14 Dated this 17th day of May, 2022.

15 ______________________________

16 Brandy Duxbury, Stenographer

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Sent:	Tuesday, May 17, 2022 10:33 PM
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Cc:	Davis, Ashley E.; Matthews, Maria I.; Marconnet, Amber; O'Brien, Colleen E.; Labasky, Ron - FSASE Legal Counsel
Subject:	RE: Please read -- 3rd Update on state redistricting case (U.S. congressional map)
Attachments:	2022.05.12 - Order Granting Motion for Temporary Injunction.pdf; FL_PlanA.csv

Dear Supervisors,

Yesterday evening, in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)), the trial court issued an order vacating the automatic stay referenced in my previous e-mail (see below).

The Secretary intends to soon file an Emergency Motion at the First District Court of Appeal asking the appellate court to reinstate the stay. We expect that the First District Court of Appeal will take up the issue quickly and we will continue to promptly update you with any rulings or developments.

In the meantime, the trial court's May 12, 2022, Order Granting Motion for Temporary Injunction is now in effect. For your convenience, I have included as an attachment to this e-mail a copy of the trial court's order. Additionally, and pursuant to the trial court's order, I have included as an attachment to this e-mail the final corrected version of an excel file necessary for you to replicate Plaintiffs' "Proposed Map A" which is currently the operative map for the upcoming 2022 elections. Please note that neither the Department of State nor the Florida Legislature created this file; this is the product of Plaintiffs' expert alone.

As you proceed with implementation, please do make sure to remember that if the First District Court of Appeal grants the Secretary's emergency motion to reinstate the stay, the state's legislatively enacted map (SB 2-C) would once again become the operative map for the upcoming 2022 elections. 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. At a minimum, as you undertake implementation on "Proposed Map A," you should make sure to preserve any and all work that has already been done towards implementing SB 2-C.

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Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the sender or the Department of State. Parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before relying upon the information provided.

In addition, Florida has a very broad public records law. Written communications to or from state officials regarding state business constitute public records. Public records are available to the public and media upon request, unless the information is subject to a specific statutory exemption. Therefore, any information that you send to this address, including your contact information, may be subject to public disclosure.

From: McVay, Brad R.
Sent: Thursday, May 12, 2022 8:23 PM
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Subject: RE: Please read -- 2nd Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

As forecasted in the below communication from this morning, the trial court in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)) entered this afternoon a written Order Granting Motion for Temporary Injunction. The Secretary's Notice of Appeal immediately "stayed" the trial court's ruling pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), causing SB 2-C (the state's current, enacted congressional map) to remain in effect for the upcoming 2022 elections absent further direction from the courts. Therefore, you should continue implementing SB 2-C, the map the Florida Legislature enacted and the Governor approved on April 22, 2022.

The Secretary's Notice of Appeal is attached herein and includes the Order Granting Motion for Temporary Injunction.

We will continue to promptly update you with any additional developments.

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Subject: Please read -- Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

Yesterday afternoon, in the state court redistricting case (*Black Voters Matter et al v. Lee*, *et al* /2022CA000666, 2nd Jud. Cir.), the trial court held a hearing on Plaintiffs' motion for a temporary injunction and *orally* ruled that they have a likelihood of success on the merits of their claim that SB 2-C (the state's current, enacted congressional map) violates the non-diminishment standard of Article III, Section 20 of the Florida Constitution in portions of North Florida. The trial court indicated that it will soon issue an order in *writing* temporarily enjoining SB 2-C and ordering a different map be put in place – i.e., Plaintiffs' "Proposed Map A." The Secretary intends to appeal the decision to the First District Court of Appeal immediately, but cannot do so until the written order is issued.

The Secretary's appeal will immediately "stay" the trial court's ruling pursuant to the Florida Rules of Appellate Procedure, causing SB 2-C to remain in effect for the upcoming 2022 elections absent further direction from the courts.

We will continue to provide updates and guidance as information becomes available.

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Florida Department of State
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Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the sender or the Department of State. Parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before relying upon the information provided.

In addition, Florida has a very broad public records law. Written communications to or from state officials regarding state business constitute public records. Public records are available to the public and media upon request, unless the information is subject to a specific statutory exemption. Therefore, any information that you send to this address, including your contact information, may be subject to public disclosure.