SC22-685

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.

On Emergency Petition for a Constitutional Writ
DCA No. 1D22-1470; Cir. No. 2022-CA-0666

RESPONSE TO EMERGENCY PETITION FOR A CONSTITUTIONAL WRIT

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INTRODUCTION & SUMMARY OF ARGUMENT[1]

Petitioners ask this Court to erase a congressional district enacted by the representatives of the people of Florida and to install one designed to guarantee that their preferred candidate always wins. Their chosen instrument for the task is something that the United States Constitution almost invariably forbids—discrimination on the basis of race.

In any other context, such a request would be unthinkable. But citing the non-diminishment standard in Article III, Section 20 of the Florida Constitution, Petitioners claim that the Legislature was constitutionally bound to enact, and the Secretary of State bound to implement, an electoral map that intentionally packs Black voters into a sprawling district in North Florida. Their proposed district stretches 200 miles across the State, nipping and tucking with

[1] The circuit court has dismissed Petitioners' 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 joins 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.

surgical precision on the basis of race.

Florida's Legislature justifiably declined to enact such a district, instead following traditional, race-neutral redistricting principles. There is no basis for upsetting its judgment, much less in this extraordinary posture. The United States Constitution's Equal Protection Clause prohibits State officials from adopting "racial gerrymanders in legislative districting" unless strict scrutiny is satisfied. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). As a result, if applying the non-diminishment standard would make race the "predominant factor" in drawing a congressional district in North Florida, Petitioners must show that such "racial sorting" of voters is narrowly tailored to further a compelling interest. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797–98 (2017). If they cannot, the provision is "without effect" as applied to these facts, *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992); *see also* U.S. Const. art. VI, cl. 2, and the State need not adhere to it.

So it is here. Applying the non-diminishment standard in North Florida would always make race the predominant factor in drawing a district, so Petitioners must satisfy strict scrutiny. And because they

cannot, the provision violates the Equal Protection Clause as applied and is "without effect." *Cipollone*, 505 U.S. at 516.

Petitioners have not established that a racially gerrymandered district in North Florida advances any compelling state interests. Compliance with the non-diminishment standard of Section 20 cannot be one. That provision was modeled on Section 5 of the federal Voting Rights Act, but the Supreme Court has since invalidated Section 5's coverage formula, given the fundamental progress this country has made since that law was first enacted in the Jim Crow era. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 552–55 (2013). There is even less reason to believe that a State has a compelling interest to racially discriminate today in the name of Section 20—an even broader version of Section 5 added to the Florida Constitution in 2010, which unlike Section 5 of the Voting Rights Act was not undergirded by the authority of Congress to enforce the Fifteenth Amendment to the U.S. Constitution. And there is still less reason to believe that compliance with a state-based Section 5 is a compelling interest as applied to North Florida, which was not even subject to Section 5 when the statute was operative.

Petitioners also cannot show that a racial gerrymander in North Florida is narrowly tailored to achieve any compelling interest. They do not even try to rule out less-intrusive, race-neutral means of achieving their stated goals.

Though the racial-gerrymandering issue was the critical issue in the lower-court briefing, Petitioners ignore it in their emergency petition to this Court—a kind of sandbagging that is reason enough to deny them any emergency relief in this extraordinary, expedited posture. Petitioners instead fixate on the First District's decision, which reinstated the automatic stay because the circuit court issued an improper mandatory injunction. But the First District was correct—the circuit court mandated a new status quo when it supplanted the State's electoral map with its own. And Petitioners have not shown that this is the "rare case" justifying such extraordinary affirmative relief before final judgment, particularly given that they make no attempt to address the principal argument dooming their claim on the merits.

For similar reasons, Petitioners' claims are barred by the *Purcell* principle. Recognizing that effective election administration requires

stability and predictability, the *Purcell* principle is a settled rule of equity that prohibits courts from enjoining election laws—except in perhaps the most remarkable circumstances—in the months before an election. Here, the August 23rd primaries are less than three months away, the June 13–17 qualifying period is closer still, and Florida's Division of Elections begins accepting qualifying documents for congressional candidates on May 30. All this leaves precious little time for the Secretary of State and Supervisors of Elections to implement a new congressional map of the circuit court's choosing. *E.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Petitioners also have not shown a clearcut entitlement to relief on the merits. And they have not established that a remedial map could be implemented without significant hardship or cost; to the contrary, they concede that, after today, it is no longer feasible to implement a court-ordered map. *See, e.g.*, Pet. 25; App. 776, 814, 1038, 1043, 1050.

Finally, the equities favor denying the petition. A stay from this Court would preclude the State from enforcing its chosen map, double the strain on its election officials, and frustrate the State's interest in ensuring that its citizens are not unconstitutionally sorted

by race.

BACKGROUND

I. Factual background

A. The Fair Districts Amendment

In 2010, Florida voters amended Florida's Constitution to address standards the State must meet when redrawing congressional districts after a census. Art. III, § 20, Fla. Const. Called the Fair Districts Amendment, the new provision contains two "tiers" of redistricting standards. Tier one explains that the State must not draw districts (1) "with the intent to favor or disfavor a political party or an incumbent," (2) "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process," or (3) "with the intent or result of . . . diminish[ing] [minority groups'] ability to elect representatives of their choice." *Id.* § 20(a). It also requires that districts "consist of contiguous territory." *Id.*

Beneath that tier, tier two contains several core principles of congressional districting. It mandates that districts (1) "be as nearly equal in population as is practicable," (2) "be compact," and (3) "utilize existing political and geographical boundaries" "where

feasible." *Id.* § 20(b).

Finally, though the State need not prioritize one standard over another if they fall within the same tier, *id.* § 20(c), it must prioritize tier-one standards over tier-two standards when "compliance with the standards in [tier two] conflicts with the standards in [tier one]." *Id.* § 20(b). For example, if ensuring that a district does not "diminish" minority voting strength conflicts with the district being "compact" or tracking "existing political and geographical boundaries," the State must choose the map that hits a certain racial target over maps more consistent with those traditional redistricting principles. *See id.*

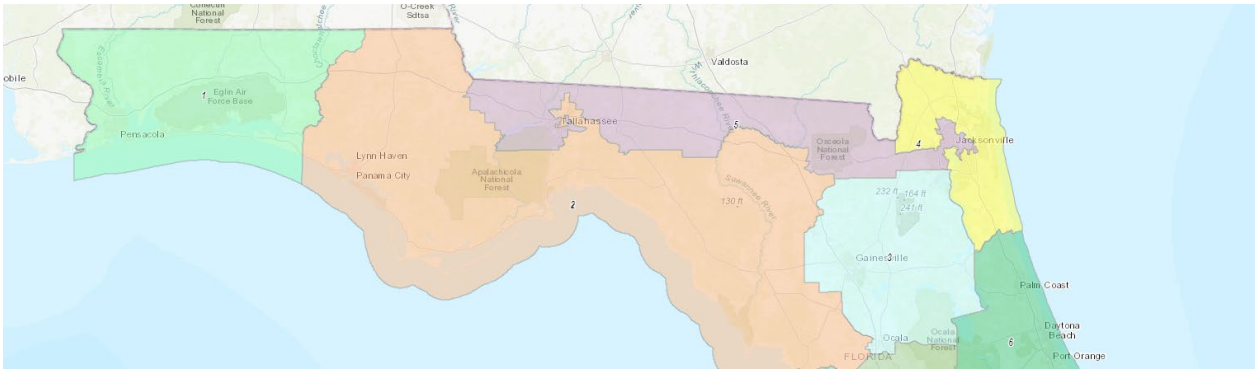
B. Redistricting after the 2010 census

After the Fair Districts Amendment was enacted, the State redrew its congressional districts to track the State's population as reflected in the 2010 census. At first, it drew Congressional District 5 in a north-south configuration, spanning from Jacksonville to Orlando. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 271 (Fla. 2015) (*Apportionment VIII*). This Court, however, struck down that district, holding that it was drawn with impermissible partisan intent. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 403 (Fla. 2015) (*Apportionment VII*).

The Court then considered whether to adopt a proposed east-west version of Congressional District 5 (CD 5) as a remedy. *See id.* at 402–06. Though the Court recognized that CD 5 was not a "model of compactness," it noted that "[o]ther factors account for this phenomenon," like "abiding by" Sections 20's mandate that the State not "diminish [minority groups'] ability to elect representatives of their choice" (the non-diminishment standard). *Id.* at 406. To that end, after considering an array of race-based statistics, the Court determined that CD 5 would not "prevent black voters from electing a candidate of their choice." *Id.* at 404. It then ordered the Legislature to "redra[w]" its map to contain CD 5, calling it "the only alternative option" to the north-south iteration that would comply with the non-diminishment standard. *Id.* at 403. Neither the Court's decision nor the parties' briefs discussed whether that map complied with the Fourteenth Amendment to the U.S. Constitution.

Complying with this Court's decree, the State resubmitted a map containing CD 5, which this Court approved. *Apportionment VIII*, 179 So. 3d at 272.

2015 CD 5 (Purple)



C. Redistricting after the 2020 census

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).

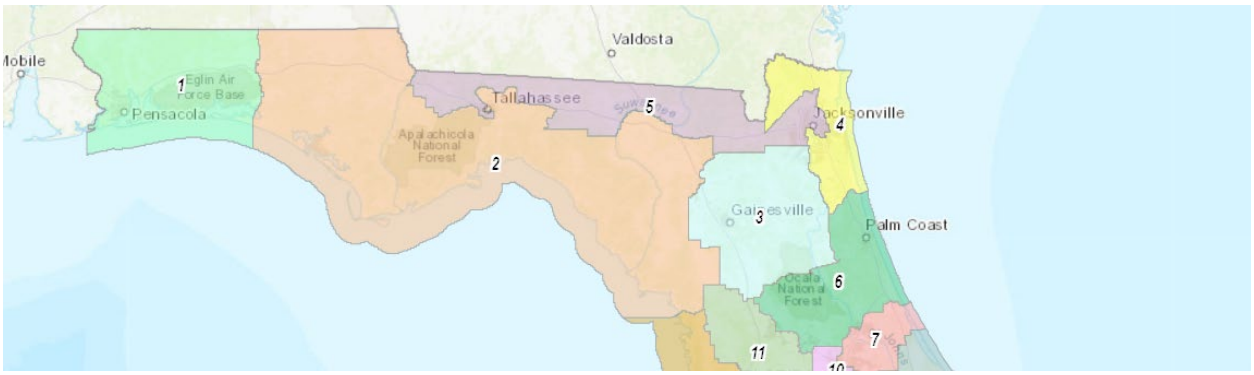
1. Vetoed redistricting bill

The Florida Legislature initially passed a redistricting bill containing a primary and secondary congressional district map.[2] The secondary map, called "Plan 8015," would later become Petitioners' proposed alternative map, which was largely adopted by the circuit

[2] Home, *Fla. Redistricting* (last visited May 27, 2022), https://www.floridaredistricting.gov.

court below. The Legislature introduced Plan 8015 as an alternative that would take effect should a court invalidate the primary map. Plan 8015's CD 5 largely mirrored its predecessor:

Plan 8015 (CD 5 in Purple)[3]



The committee responsible for perpetuating CD 5 in Plan 8015 explained that it did so to "protect[] a black minority seat in north Florida" and to "continu[e] to protect the minority group's ability to elect a candidate of their choice" per Florida's constitutional requirement. App. 906–07 (citing additional legislative statements).[4] And the new CD 5's configuration made this quite clear. The district

[3] Submitted Plans, *Fla. Redistricting* (last visited May 27, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under "Plan Name," type "8015," click "H000C8015," and select "Web Map").

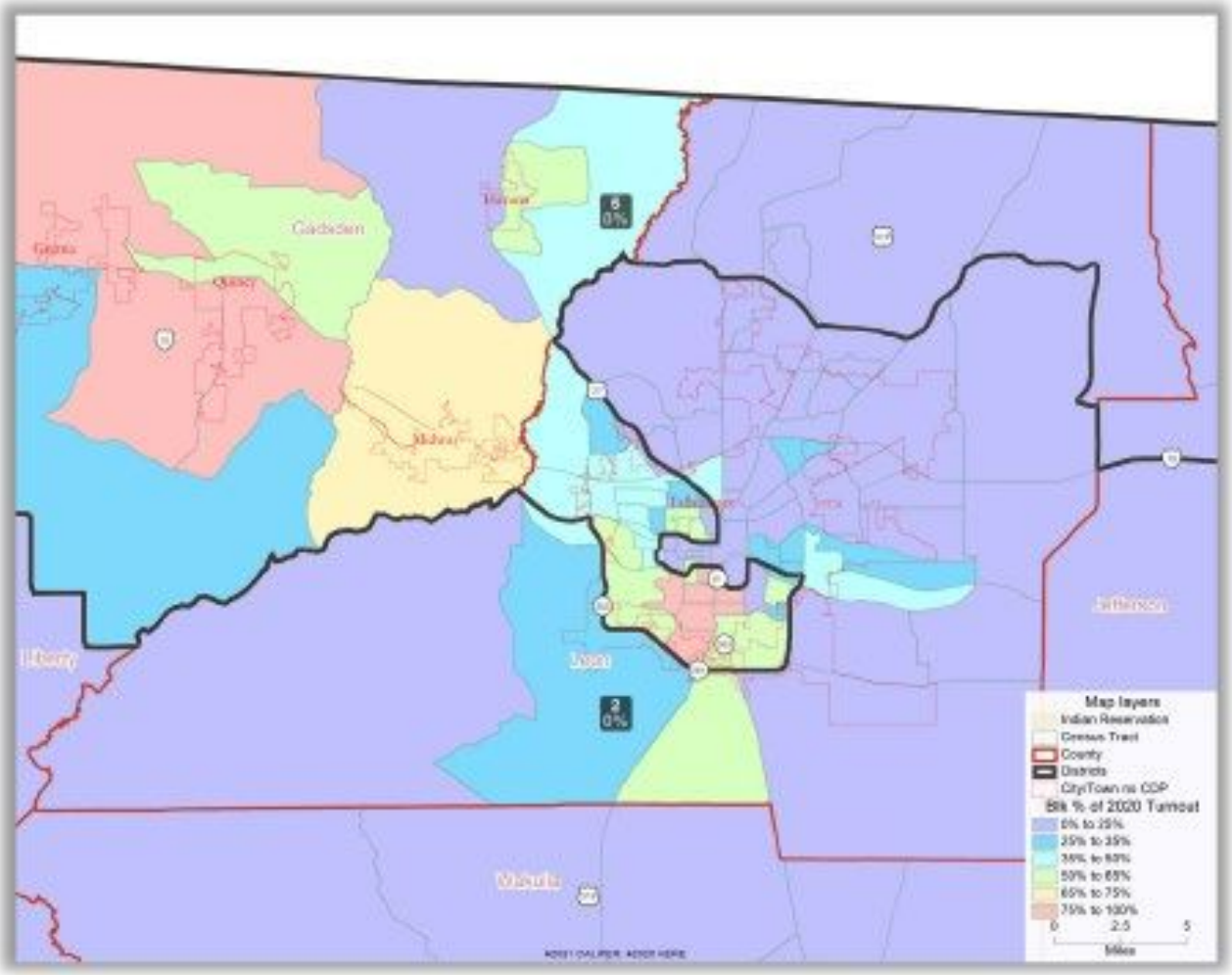
[4] The primary map did not retain the general configuration of CD 5, but it too racially gerrymandered CD 5 in an attempt to protect the ability of Black voters to elect their candidate of choice. *E.g.*, App. 90.

spanned eight counties, split four counties[5], had the lowest compactness score of any district in Plan 8015[6], and was bizarrely drawn to connect dispersed concentrations of Black voters in Duval, Leon, and Gadsden Counties. This close-up map, for example, shows that the district intentionally included Black populations in Leon County (through a hook that captures such areas in red) and

[5] Submitted Plans, *Fla. Redistricting* (last visited May 27, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under "Plan Name," type "8015," click "H000C8015," and select "Assigned District Splits").

[6] *Id.* (under "Plan Name," type "8015," click "H000C8015," and select "District Compactness Report").

intentionally excluded others (App. 921):



Recognizing CD 5 as an unconstitutional racial gerrymander, App. 903–10, Governor DeSantis vetoed the Legislature's initial redistricting bill and convened a special legislative session to enact a new plan.

2. The Enacted Plan

During the special legislative session, the Florida Legislature

passed a new congressional districting bill with the following congressional district map (*see* App. 939):

Plan 109 (the Enacted Plan)

The next day, on April 22, 2022, the Governor signed the bill into law.[7] The Enacted Plan eliminated the racially gerrymandered CD 5 and instead drew the congressional districts in North Florida based on race-neutral, traditional districting criteria. For example, CD 5 of the Enacted Plan is visually and statistically compact, and the border between CD 4 and CD 5 almost perfectly follows the St. Johns River.[8] The districts in North Florida are now more compact and split fewer counties and municipalities than the North Florida

[7] Home, *Fla. Redistricting* (last visited May 27, 2022), https://www.floridaredistricting.gov/.

[8] Submitted Plans, *Fla. Redistricting* (last visited May 27, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under "Plan Name," type "0109," click "P000C0109," and select "Web Map" and "District Compactness Report").

districts in plans containing CD 5. App. 1079–80.

Immediately after the State finalized the Enacted Plan, State Supervisors of Elections began the intricate and time-intensive task of implementing it. *E.g.*, App. 799–806. Supervisors of Elections in Columbia and Duval Counties, for example, began and completed the process of computer mapping the Enacted Plan and matching voters with their voting precincts, and have nearly completed the process of obtaining necessary approvals from their local governments. *See id.* "[E]mployee shortage[s]" also made these endeavors particularly difficult, forcing the Supervisor of Elections in Columbia County to "outsource" some of the work "at a cost of approximately $30,000." App. 800.

II. Procedural history

A. Circuit court proceedings

Once the Governor signed the Enacted Plan into law, Petitioners filed this lawsuit. App. 35–72. They alleged that the Plan violated several provisions of the Florida Constitution. *Id.*

1. Petitioners' motion for a temporary injunction

The next week, Petitioners moved for a temporary injunction. App. 73–103. They argued that the North Florida congressional

districts in the Enacted Plan, which avoided the racially gerrymandered version of CD 5, violated Article III, Section 20's non-diminishment standard by reducing the ability of Black voters in CD 5 to elect their candidate of choice. App. 92–97. Petitioners did not offer any remedial map, beyond identifying several alternatives, including Plan 8015's racially gerrymandered CD 5. But they asked the circuit court to replace the Enacted Plan with a map returning to the racially gerrymandered version of CD 5 for the sake of retaining the concentration of Black voters in North Florida in that district (roughly 45%). *E.g.*, App. 99–100.

Petitioners relied on the so-called "functional analysis" of Dr. Stephen Ansolabehere. App. 655–715.[9] Evaluating CD 5, Dr. Ansolabehere stated that Black voters in North Florida overwhelmingly support Democratic candidates and that under CD 5, they had the ability to elect a Democratic candidate, but under the Enacted Plan they could not. *Id.*

Petitioners also relied on the expert report of Dr. Sharon Austin.

[9] Respondents do not concede that Dr. Ansolabehere's functional analysis was correctly done. But they will press the issue before the trial court if and when the case is decided on the merits after a trial.

App. 716–70. Dr. Austin outlined the alleged history of election-based racial discrimination within the State, noting that, after Reconstruction, Florida did not elect a Black candidate to Congress until 1992. App. 728. She also suggested that CD 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." *See* App. 86–87, 724–27.

Finally, Petitioners submitted affidavits from certain Supervisors of Elections, including the Supervisor for Leon County, who stated that his office could implement revised district lines if imposed by May 27, 2022. App. 774–78.

2. The Secretary's response

The Secretary responded with three arguments: (1) a congressional district map sorting voters by 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 precedent, *see State ex rel. Haft v. Adams*, 238 So. 2d 843 (Fla. 1970), it was too late for the court to impose a new congressional district without significantly

disrupting the election process; and (3) Petitioners failed to establish that they were entitled to a *mandatory* temporary injunction. App. 779–796.

In support, the Secretary produced reports from Dr. Douglas Johnson 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.

Dr. Johnson explained that the Enacted Plan's districts were more compact and divided fewer counties, cities, and towns than any of Petitioners' proposed maps. App. 1079–80. He also explained that CD 5 did not preserve "sharecropper counties," contrary to Petitioners' expert's testimony. App. 916–20.

Supervisor Brown and Mr. Phillips explained that imposing a new congressional district map at this late juncture would cause significant disruptions. App. 798–806. Supervisor Brown put it bluntly: "[It] is not possible" to implement a new map in time for forthcoming elections. App. 800. Implementing a new map would force her to redo weeks-worth of work at an added expense of another

$30,000; to spend $35,000 in printing fees to update voter cards; and to resubmit her precinct maps to the board of county commissioners. App. 800—01.

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 Plan, to ensure quality control to avoid misassigning voters to districts, and to submit precinct changes to the Jacksonville City Council. App. 804–06. Mr. Phillips stated that it would take about six weeks for the council to approve the precinct changes. *Id.* Simply put, "imposing a new map at this late juncture would increase the chances of administrative mistakes, programming errors, and candidate and voter confusion." App. 806.

And Supervisor Earley's affidavit from a related federal case confirmed these views, explaining that "numerous [s]upervisors" had told him, in his capacity as President-Elect of the Florida Supervisors of Elections, that they *cannot* implement any new remedial map at this point. App. 815.

3. Petitioners' reply

In reply, Petitioners proposed two new maps created by Dr.

Ansolabehere. App. 998–1000, 1029–32. The first—Proposed Map A (which was ultimately adopted by the circuit court)—incorporated the vetoed CD 5 from Plan 8015. App. 1030.

Petitioners also submitted new affidavits from a few current and former local election officials. They stated that a new congressional district map could be implemented in their respective counties if the court granted the temporary injunction by May 27, 2022. App. 1038, 1043, 1051.

4. The temporary-injunction hearing

The circuit court held a four-hour hearing on the motion, hearing live testimony only from Dr. Ansolabehere. During his testimony, Dr. Ansolabehere—having never administered an election in Florida—admitted that he could not speak to the ability of supervisors of elections to implement Petitioners' proposed maps. App. 1363–64. He also admitted that he had never testified on behalf of a Republican governor during his redistricting work. App. 1366. And he 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 Voting Tabulation Districts (VTDs), even though his calculation on whether the proposed remedial map

would cause significant disruption was based on an analysis of VTDs. App. 1356–57.

As for 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 CD 6, where portions of the district were separated from other portions. App. 1362–63.

After the parties presented closing arguments, the circuit court issued an oral ruling for Petitioners. App. 1421–39. The court asked Petitioners to draft a proposed order. App. 1439.

5. The adopted order

The court adopted Petitioners' proposed order, making only minor changes and holding that they had satisfied the four temporary-injunction factors.

Substantial likelihood of success. The court first found that the Enacted Plan diminished Black voters' ability to elect a candidate of their choice in North Florida, violating Section 20's non-diminishment standard. App. 15–18.

The court then rejected the Secretary's Equal Protection Clause arguments. U.S. Supreme Court precedent explains 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. But the court, applying the "'presumption of good faith that must be accorded legislative enactments,'" App. 19 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)), determined that race did not predominate in Plan 8015's CD 5 because the Legislature included the district merely "to comply with the Florida Supreme Court's prior rulings regarding CD-5," to "avoid litigation," and to track state legislative districts. App. 19–20. Yet the court simultaneously held that 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 in North Florida. App. 21. In other words, the court determined that race did not predominate in drawing CD 5, but that drawing CD 5 along racial lines was "necessary."

The court also held that CD 5 survives strict scrutiny. It reasoned that compliance with Section 20—which is modeled after Section 5 of the VRA—is itself a compelling interest, as is remedying the effects of past racial discrimination. App. 20–21. It then held that

CD 5 was narrowly tailored to further these goals because there were "good reasons" to think that CD 5 was needed to achieve the court's desired racial balance. App. 21.

Adequate remedy at law and irreparable harm. Next, the court determined that Petitioners lacked an adequate remedy at law and would suffer irreparable harm without a temporary injunction. App. 22–24. The court held that these two elements were met because Petitioners' "fundamental right to vote" was violated. *Id.*

Serving the public interest. Finally, the court concluded that injunctive relief would serve the public interest. App. 24. Again, the court noted that Petitioners' fundamental right to vote was being violated. *Id.* The court also rejected the Secretary's *Purcell* arguments. It first held that *Purcell* was a "creature of the *federal* courts" that "has no bearing on state courts," *id.*, and that the Florida cases the Secretary cited involved periods of time closer to the election, App. 25. It also held that, "[e]ven if *Purcell* did apply to state courts," "there is time to adopt a remedial plan," *id.*, because Proposed Map A "affect[s] just a handful of counties" and "can be implemented quickly and without significant administrative difficulties," App. 26. Last, the

court credited the genuine concerns from Supervisors of Elections that implementing a new map at this juncture would require "hard work" and "expense," but held that "these concerns do not outweigh [Petitioners'] rights." *Id.*

6. Vacatur of the automatic stay

The Secretary filed her notice of appeal to the First District within an hour of the trial court rendering its written order, App. 1109, triggering an automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2). The next morning, Petitioners moved to vacate the automatic stay. App. 1053–60. Concluding that there were "compelling circumstances against maintaining the stay," the circuit court granted that relief. App. 29–32.

B. District court proceedings

Within two days, the Secretary moved in the First District to reinstate the automatic stay. App. 1135–1201. Florida Attorney General Ashley Moody joined the motion. App. 1146. The Legislature and several legislators filed a notice of joinder in the appeal. Supp. App. 4–6.

The First District, citing "the exigency of the circumstances and the need for certainty and continuity as election season approaches,"

temporarily reinstated the automatic stay pending its full resolution of the motion for reinstatement. App. 33. In doing so, it found a "high likelihood" that the circuit court's order erroneously granted a mandatory injunction that upset the status quo and uprooted the State's electoral process on the brink of an election. *Id.* It also noted that its formal disposition of the motion "will be promptly forthcoming." *Id.* And it declined to certify a question of great importance for immediate resolution by this Court. Supp. App. 10.

On May 23, 2022, Petitioners petitioned this Court for a constitutional writ. Four days later, the First District granted the Secretary's motion and reinstated the automatic stay, reasoning that the circuit court improperly mandated a new status quo. Supp. App 23–42. The district court also gave the parties five days to "inform the court" whether additional briefing is needed "before the court disposes of the appeal . . . on the merits." Supp. App. 41.

LEGAL STANDARD

When a governmental entity appeals a trial-court order, that order is automatically stayed. Fla. R. App. P. 9.310(b)(2). "The automatic nature of the stay is grounded in judicial deference to

governmental decisions." *DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145, 150 (Fla. 1st DCA 2020). To vacate that stay, Petitioners must show that "the equities are overwhelmingly tilted against maintaining the stay." *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018). They must therefore establish not only that "the government is [un]likely to succeed on appeal," but also "compelling circumstances" and "irreparable harm." *Fla. Educ. Ass'n*, 325 So. 3d at 151. Petitioners have made none of those showings here.

ARGUMENT

I. Respondents are likely to succeed on appeal.

A. Petitioners face a heavy burden in defending the circuit court's injunction ordering Florida to conduct an election under a racially gerrymandered congressional map rejected by the Legislature.

In defending the circuit court's late-breaking, extraordinary temporary injunction replacing the State's congressional map with their racially gerrymandered one, Petitioners shoulder a heavy burden. As the First District recognized, the circuit court's injunction created a new status quo, rather than preserving an existing one, and so could be issued only if Petitioners demonstrated the clearest

entitlement to relief. And Petitioners' burden is heavier still given the *Purcell* principle, which holds that—except in extraordinary circumstances—a court should not enjoin election laws in the weeks and months nearing an election. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006).

1. The circuit court improperly mandated a new status quo before final hearing on the merits.

The First District concluded that a temporary injunction "has but one purpose"—to "maintain the status quo." Supp. App. 24; *see also Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918, 924 (Fla. 2017) ("As this Court acknowledged long ago, the purpose of a temporary injunction is to preserve the status quo while final injunctive relief is sought."); *Sullivan v. Moreno*, 19 Fla. 200, 215 (Fla. 1882). That term has always been defined to mean the "last actual, peaceable, noncontested condition which preceded the pending controversy." *Bowling v. Nat'l Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931). And here, the First District concluded, the status quo was the 2010 congressional map imposed by this Court in *Apportionment VII*. Supp. App. 34–38.

Yet Petitioners did not seek to return to that map; they sought

instead to impose a newly drawn congressional map of their choosing. The First District thus concluded that the relief Petitioners sought in the circuit court—to *alter* the status quo—fell outside the scope of a permissible temporary injunction. Supp. App. 34.

Petitioners nevertheless assert in this Court that the status quo is "a map under which Black voters in North Florida have the ability to elect their candidate of choice." Pet. 35. But that is just another way of describing the relief Petitioners are seeking in this lawsuit—not a "status quo." The status quo cannot simply be "*a map*" existing in the ether; rather, the status quo—the last "actual . . . condition which preceded the controversy"—refers to a *particular* map, which the First District concluded was the 2010 congressional map that is now almost certainly malapportioned[10] and which Petitioners

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[10] The First District observed that the 2015 map may now be unconstitutionally malapportioned given demographic shifts revealed in the 2020 census, *see Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964), but concluded that that was a question of whether the status quo could lawfully be preserved, rather than what the status quo was. Supp. App. 36–37 (noting the significant population disparities—between 5–24%—that would have resulted from preserving without change the 2010 electoral map).

The Secretary contended before the First District that the "status quo" was the map enacted by the Legislature. Regardless, the point remains that Petitioners sought to mandate a map drawn

therefore did not ask the circuit court to reinstate.

Under the First District's opinion, Petitioners have no likelihood of defending the circuit court's temporary injunction on appeal.

But even if a circuit court could otherwise alter the status quo in this way through a temporary mandatory injunction, "mandatory injunctions" at a minimum are "disfavored" before "final hearing" on the merits. *Spradley v. Old Harmony Baptist Church*, 721 So. 2d 735 (Fla. 1st DCA 1998) (citing *Am. Fire & Cas. Co. v. Rader*, 36 So. 2d 270, 271 (Fla. 1948)). Petitioners at a minimum had to therefore establish that this is the "rare cas[e]" meriting extraordinary temporary relief. *Kline v. State Beverage Dep't of Fla.*, 77 So. 2d 872, 874 (Fla. 1955); *see also Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So. 2d 438, 443 (Fla. 1943) (same); *Bowling*, 135 So. at 544 (noting that a "mandatory injunction will not usually be granted until the final hearing of the case on the merits, unless on a showing of a clear right coupled with a case of urgent necessity or extreme hardship").

They cannot do so. As explained below, Petitioners are wrong on

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by their expert that differs from both the Legislature's enacted map and the prior map this Court imposed in *Apportionment VII*.

the merits, *infra* 40–61; at a minimum have not established a clearcut case, *infra* 35–40; and have not shown that a mandatory injunction can be implemented without substantial cost or hardship, *id.*

2. The equitable presumption against enjoining election laws when an election is close at hand likewise controls here.

The *Purcell* principle applies here and independently defeats Petitioners' entitlement to an injunction.

i. The *Purcell* principle applies.

"[R]unning a statewide election is a complicated endeavor" requiring "a massive coordinated effort." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). It is thus a "bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Milligan*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring in grant of applications for stays). "[I]nterfere[nce] with the election process at [a] late date, even if a clear legal right were shown, [can] result in confusion and injur[y]" to "third persons." *State ex re. Haft v. Adams*, 238 So. 2d 843, 845 (Fla. 1970); *see, e.g.*, *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 2022 WL 1435597 (11th Cir. 2022)

(per curiam) (applying *Purcell* to block another injunction against Florida's election laws).

For that reason, this Court "champions a strong public policy against judicial interference in the democratic process of elections." *Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016); *see also Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992) (same). It therefore will not "restrain the holding of an election" through an equitable remedy like an injunction, except in extraordinary cases. *See City of De Land v. Fearington*, 146 So. 573, 573 (Fla. 1933).

This equitable "principl[e] [is] not novel." *In re Khanoyan*, 637 S.W.3d 762, 765 (Tex. 2022). To the contrary, "[c]ourts at every level" apply a high bar to a request for a late-inning injunction in the election context. *Id.* And the U.S. Supreme Court has fashioned a standard for analyzing such a request. *See Purcell*, 549 U.S. 1. "[K]nown as the *Purcell* principle," the standard acknowledges that federal courts "ordinarily should not enjoin state election laws in the period close to an election," and that the standard for obtaining such an injunction is "heighten[ed]." *Milligan*, 142 S. Ct. at 879, 881 (Kavanaugh, J., concurring in grant of applications for stays). A

plaintiff thus must establish an "extraordinary" case to merit relief. *League of Women Voters*, 2022 WL 1435597, at *3 n.7. And if a lower court "violates th[e] principle" by enjoining an election law without such a showing, "the appellate court should stay the injunction." *Id.* at *3 (simplified).

The circuit court below erroneously ignored the *Purcell* principle, dismissing it as "a creature of the *federal* courts." App. 24. But the *Purcell* principle is a creature of equity, not of the federal courts. It is merely "a sensible refinement of ordinary stay principles for the election context" given "the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays); *League of Women Voters*, 2022 WL 1435597, at *3 (same). Put differently, the principle is shorthand for the caution that *all* courts must exercise in the election context given the risk that a late-in-the-game injunction may cause "confusion and injur[y]" to "third persons." *Adams*, 238 So. 2d at 845.

The circuit court also suggested that the *Purcell* principle does

not apply in state courts because it "was created as a means of restraining federal interference in the administration of state elections." App. 24. But federalism is not the only concept driving *Purcell*. So too is the universal premise that "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). In that vein, it hardly matters whether the disruption is caused by a ruling from a federal or state court; the disruption, in either event, is the harm to be avoided.

And moreover, in Florida, a concept much like federalism comes into play: the separation of powers. Art II, § 3, Fla. Const.; *cf. McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981) (adhering to the separation of powers in the elections context). The "executive and legislative branches of government are the primary managers of our state's elections." *See In re Khanoyan*, 637 S.W.3d at 764. The judiciary's last-minute "involve[ment] in elections . . . always has the potential of leading to a crisis with the other branches of government and raises serious separation-of-powers concerns." *Gore v. Harris*,

772 So. 2d 1243, 1264 (Fla.) (Wells, C.J., dissenting), *rev'd and remanded sub nom. Bush v. Gore*, 531 U.S. 98 (2000). And so, "as the risk of judicial interference with an election rises, so does the duty of the party invoking judicial power" to prove entitlement to an injunction—exactly what the *Purcell* principle describes. *See In re Khanoyan*, 637 S.W.3d at 764.

Perhaps a State may choose to reject the *Purcell* principle and weigh the equitable factors differently. *E.g.*, *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *11 & n.16 (N.Y. Apr. 27, 2022). But Florida is not one of them. Florida law, consistent with most state courts,[11] aligns with *Purcell* and the reasoning that underlies it. *Supra* 29–33.

Purcell thus applies here and forecloses the relief that Petitioners seek. The principle governs when an election is "close at hand," *League of Women Voters*, 2022 WL 1435597, at *3, and this

[11] *E.g.*, *In re Khanoyan*, 637 S.W.3d at 764 n.1 & 765; *Liddy v. Lamone*, 919 A.2d 1276, 1288 (Md. 2007); *Moore v. Lee*, No. M2022-00434-SC-RDO-CV, 2022 WL 1101833, at *6 (Tenn. Apr. 13, 2022); *Chicago Bar Ass'n v. White*, 898 N.E.2d 1101, 1107 (Ill. App. 2008); *Jones v. Sec'y of State*, 239 A.3d 628, 630–31 (Me. 2020); *Singh v. Murphy*, No. A-0323-20T4, 2020 WL 6154223, at *15 (N.J. Super. Ct. App. Div. Oct. 21, 2020).

case meets that standard. *See id.* In a recent redistricting case, for instance, the Supreme Court held that an election was sufficiently "close at hand" when it was still "about four months" away. *Id.* (quoting *Milligan*, 142 S. Ct. at 888 (Kagan, J., dissenting)); *see also Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (stay was warranted under *Purcell* when election was "months away"). Here, the "next statewide election [is] set to begin in *less* than four months"—the August 23rd primary, less than three months from now. *See League of Women Voters*, 2022 WL 1435597, at *3. The candidate qualifying period begins June 13th—less than three weeks away. Florida's Division of Elections will also begin accepting qualifying documents for congressional candidates on Monday, May 30, 2022. § 99.061(8), Fla. Stat.; *see also id.* at (7)(a)2. (specifying that candidate oath submitted during the qualifying period must identify the district number of the office sought). And Petitioners themselves have conceded that May 27 was the deadline for them to obtain relief. *Supra* 19. "Whatever *Purcell*'s outer bounds," then, "this case fits within them." *League of Women Voters*, 2022 WL 1435597, at *3.

ii. Petitioners cannot satisfy the *Purcell* principle.

Petitioners cannot overcome the weighty equitable presumption identified in *Purcell*. To do so, they must "establis[h] at least the following": (1) "the underlying merits are entirely clearcut in [their] favor," and (2) "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays); *see also League of Women Voters*, 2022 WL 1435597, at *4 n.8. If Petitioners fail to meet either prong, equitable relief is unwarranted. *League of Women Voters*, 2022 WL 1435597, at *4 n.8. This is an exceedingly high bar to clear, as shown by the scores of cases in which litigants have come up short.[12]

[12] *See, e.g.*, *RNC v. DNC*, 140 S. Ct. 1205 (2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir.), *application to vacate stay denied*, 140 S. Ct. 2015 (2020); *Thompson v. DeWine*, 959 F.3d 804 (6th Cir.), *application to vacate stay denied*, 2020 WL 3456705 (2020); *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 (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 (6th Cir. 2020); *Common Cause Ind. v. Lawson*, 978 F.3d 1036 (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.), *application to vacate stay denied*, *DNC v. Wis. State Legislature*,

And Petitioners have come up short here. Most obviously, their case is anything but "entirely clearcut." As detailed below, they are wrong on the merits, *infra* 40–61, and "at the very least," it is not resoundingly clear that they are right. *See League of Women Voters*, 2022 WL 1435597, at *6. Moreover, this area of jurisprudence is in flux—the U.S. Supreme Court is currently considering what limits the Equal Protection Clause places on the VRA in congressional redistricting, which may well inform the Clause's impact on Section 20, the State's version of the VRA. *See generally* Merits Br. of Secretary Merrill, *Merrill v. Milligan*, U.S.S.C. No. 21-1086 (probable jurisdiction noted Feb. 7, 2022). Against this backdrop, the "underlying merits of the [trial] court's order in this case are vulnerable." *League of Women Voters*, 2022 WL 1435597, at *4 n.8. So the Court "need not go any further"—Petitioners cannot clear the first prong of the *Purcell* principle. *Id.*

Even if they could, Petitioners have not shown that swapping their chosen map for the State's can be done "without significant cost" or "hardship." *See Milligan*, 142 S. Ct. at 881–82 (Kavanaugh,

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141 S. Ct. 28 (2020); *New Ga. Project v. Raffensperger*, 976 F.3d 1278 (11th Cir. 2020).

J., concurring in grant of applications for stays) (agreeing with stay of injunction when it was infeasible to require Alabama to restart its election preparations given the State's candidate-qualifying deadlines and forthcoming elections). To the contrary, they and their witnesses have long maintained that the latest election officials could implement a court-ordered map is May 27th—today. *E.g.*, Pet. 25; App. 776 (Leon County Supervisor of Elections stating "congressional districts would need to be set by May 27, 2022"); App. 814 (same supervisor reiterating "a new congressional map needs to be in place by May 27, 2022 at the absolute latest"); App. 1038 (election official from Orange County stating that "final boundaries for congressional districts" must be "set not later than May 27, 2022"); App. 1043 (Democratic representative and former election official from Duval County stating that a court would need to set in "place a remedial congressional district plan by May 27, 2022"). The circuit court's order even cites their witnesses and the May 27th date identified by them. App. 26–27.

And Petitioners' view was always unrealistic; the window for implementing a new map closed well before today. Because of time

and resource constraints, several election officials testified that implementing Petitioners' map was "not possible" even weeks ago. App. 800. They also explained that they cannot implement any remedial plan without increasing the odds "of administrative mistakes, programming errors, and candidate and voter confusion." App. 806. The President-Elect of the Florida Supervisors of Elections also echoed this sentiment, testifying in a related federal case that "numerous [s]upervisors" cannot implement a new remedial plan without unduly interfering with election administration, particularly smaller counties that "do not have a wealth of technical resources available." App. 815. And these concerns have only grown given that the Secretary has—consistent with the First District's order reinstating the automatic stay, App. 33—requested that the Supervisors refocus their resources on implementing only the Enacted Plan, Supp. App. 13–14.[13]

[13] Petitioners make much of an email the Secretary sent in the wake of the circuit court's order, claiming that it "suggest[s]" that the "remedial plan is simple enough to implement that [Supervisors] can implement two plans at the same time." Pet. 41. But that email merely "ask[ed]" the Supervisors, "consistent with the trial court's oral pronouncement," to "implement *both* maps" to "the extent that it is possible." App. 1577. It did not opine on whether doing so is indeed possible. And as extensive record evidence reflects, *supra* 38–

The circuit court credited these genuine concerns, recognizing that its temporary injunction would entail "hard work" and "expense." App. 26. It nevertheless dismissed them, concluding that they "do not outweigh [Petitioners'] rights." *Id.* But that logic contradicts every case applying the *Purcell* principle. *Purcell* sets out factors that Petitioners must satisfy to surmount the strong presumption against disrupting election machinery. *See Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). And Petitioners must satisfy "*all*" of them, *League of Women Voters*, 2022 WL 1435597, at *4 n.8; it is legal error to conclude otherwise.

Petitioners have not shown that their proposed remedy could be implemented without significant hardship—indeed, they and their witnesses concede that it is no longer feasible to implement a court-ordered remedy, *supra* 19, 37. So they have not overcome the *Purcell* principle here. That alone suffices to defeat Petitioners' request for a temporary injunction and warrants denying their extraordinary request for a constitutional writ.

39, it is not.

B. The Legislature was not bound to enact a racially gerrymandered district in North Florida.

Petitioners have not come close to demonstrating on the merits that the Legislature was required to enact a racially gerrymandered district in North Florida.

Petitioners theorize that Section 20 required the State to prioritize the maintenance of a racial gerrymander over traditional, race-neutral districting principles. *See* Pet. 44–48. But they make no attempt to square that contention with the Equal Protection Clause of the U.S. Constitution, which forbids the prioritization of race in districting unless doing so satisfies strict scrutiny. *See Bethune-Hill*, 137 S. Ct. at 797. If prioritizing race is unconstitutional, then the non-diminishment standard is "without effect" for purposes of drawing the district, *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992); *see also* U.S. Const. art. VI, cl. 2, and the State need not comply with it.

That is the case here. Prioritizing the non-diminishment standard in North Florida would require race to predominate in districting decisions. And Petitioners have not shown that such "race-based sorting of voters" satisfies strict scrutiny. *Cooper*, 137 S. Ct. at

1464. That dooms Petitioners' challenge, along with the temporary injunction.

1. Race would predominate in the drawing of any congressional district in North Florida that complied with the non-diminishment standard.

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. That 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.

Yet that is precisely what Section 20's tier-based structure commanded here. Under Section 20, the Legislature must prioritize non-diminishment (a tier-one requirement) over traditional redistricting principles, like compactness, population equality, and fidelity to political and geographical boundaries (tier-two requirements). Art. III, § 20(a)–(b), Fla. Const. (providing that the State may not "compl[y] with" the traditional redistricting standards discussed above—along with others unenumerated—if doing so would "conflic[t] with" the mandate that "districts shall not be drawn

with the intent or result of . . . diminish[ing] th[e] ability" of "racial . . . minorities" to "elect representatives of their choice"). As a result, whenever traditional redistricting principles would call for a district that diminishes a minority group's power to elect their candidate of choice, Florida law compels the Legislature to "subordinat[e]" those principles and "choos[e]" a map that hits a specific racial quota. *Bethune-Hill*, 137 S. Ct. at 798.

In other words, the Florida Constitution's directive that the Legislature prioritize maintenance of minority electoral supremacy over typical redistricting principles makes "race for its own sake" the "overriding reason for choosing one map over others." *Id.* at 799. Because the tier-based structure of Section 20 requires the State to prioritize non-diminishment over traditional redistricting principles, race will necessarily predominate.

That is exactly the case in North Florida. Indeed, Petitioners contend that only one district in North Florida could strike their preferred racial composition—CD 5. *E.g.*, App. 85–86. But that district was drawn in large part to comply with Section 20's mandate that the State prioritize race above traditional redistricting principles.

For example, when the Legislature proposed CD 5 in a different, unenacted map, it did so to "protect[] a black minority seat in north Florida" and to "continu[e] to protect the minority group's ability to elect a candidate of their choice." App. 905–07 (citing additional legislative statements).[14] Petitioners' own expert confirmed the overriding racial motive for the district, arguing that the insertion of CD 5 into the remedial plan "restore[d] the ability of Black voters to elect their candidate of choice in North Florida." App. 1000; *see also* App. 998. And even the trial court found that 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." App. 21.

Even without this "direct evidence [of] legislative purpose," "circumstantial evidence of [CD 5's] shape and demographics" shows that the district could be drawn only by "subordinat[ing] traditional race-neutral districting principles" to "racial considerations."

[14] *See also 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.

Bethune-Hill, 137 S. Ct. at 797. After all, none can seriously dispute that application of traditional redistricting principles—like compactness and fidelity to political and geographical boundaries, *see* Art. III, § 20(b), Fla. Const.—would rule out the district in favor of a tighter map like the Enacted Plan. CD 5 sprawls 200 miles, spans eight counties (splitting four in the process[15]), and is "one of the least compact" districts that could possibly be drawn. *See Apportionment VIII*, 179 So. 3d at 272.[16] Its bounds slice surgically through North Florida (curling at one point into the shape of a horseshoe) to capture the Black populations in Gadsden and Leon Counties and in Jacksonville. *See* App. 920–21 (maps showing how the district cuts along racial boundaries). *Cf. Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality op.) (§ 2 cannot justify "bizarrely shaped" or "far from compact" districts); *Shaw v. Hunt*, 517 U.S. 899, 916 (1996) (*Shaw II*) ("No one looking at District 12 could reasonably suggest that the

[15] Submitted Plans, *Fla. Redistricting* (last visited May 27, 2022), https://www.floridaredistricting.gov/pages/submitted-plans (under "Plan Name," type "8015," click "H000C8015," and select "Assigned District Splits").

[16] *Id.* (under "Plan Name," type "8015," click "H000C8015," and select "District Compactness Report") (showing that CD 5 had the lowest compactness score of any district in Plan 8015).

district contains a 'geographically compact' population of any race. Therefore where that district sits, 'there neither has been a wrong nor can be a remedy.'"). And, as Petitioners claim and as the circuit court purported to find, the district "unites" "historic Black communities" that are scattered across North Florida. App. 12, 86. This winding district thus "conflicts with traditional redistricting criteria"—powerful "evidence that race for its own sake, and not other districting principles," is the "dominant and controlling rationale." *Bethune-Hill*, 137 S. Ct. at 798–99.

Petitioners are not the only ones who have tried and failed to draw a district in North Florida that complies with Section 20 without prioritizing race. 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 CD 5 that maintains the precise racial mix Petitioners claim is required by the Florida Constitution without prioritizing race over traditional redistricting principles. The lack of proposed alternatives is what led this Court to bless CD 5 in the first place. *See id.* at 402–06. History repeated itself this redistricting cycle: "[N]early every draft congressional plan that

[the Legislature] debated during" the regular session maintained the general configuration of the district. *See* Pet. 2; *see also* App. 96. An alternative map that achieved the racial composition supposedly required by Section 20 without prioritizing race over neutral redistricting standards simply was not possible when anything more than a "slight" change would violate the race-based non-diminishment standard. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 627 (Fla. 2012) (*Apportionment I*).

To avoid this obvious defect, Petitioners home in on the circuit court's claim that there are now "[r]ace neutral reasons" for maintaining CD 5, "like "preserving the cor[e]" of the district moving forward or "comply[ing] with the Florida Supreme Court's prior rulings regarding" the district. Resp. to Reinstatement Mot. 40–42. But that argument ignores that CD 5 was *itself* blatantly 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").

By perpetuating a map undoubtedly drawn with race at the forefront—and doing so merely to "preserv[e]" or "comply with" that earlier practice of predomination—mapmakers carried forward that racial predomination. *See United States v. Fordice*, 505 U.S. 717, 729 (1992).

Remarkably, Petitioners ignore these arguments in their emergency petition, ignoring outright the critical issue in the case. In other briefing, however, they have responded that this Court originally drew CD 5 not to prioritize race, but instead to address "violations . . . related to partisan intent." Resp. to Reinstatement Mot. 43. That response conflates the *violation* that required a remedy with the *reasons* for choosing a particular map. The reason this Court could consider only this iteration of CD 5, rather than maps more faithful to ordinary redistricting principles, was that Section 20 required the district to be drawn so that "the ability of black voters to elect a candidate of their choice is not diminished." *Apportionment VIII*, 179 So. 3d at 272; *see also Apportionment VII*, 172 So. 3d at 402–06 (though CD 5 is not a "model of compactness . . . [o]ther factors account for this phenomenon, including . . . ensuring that the

apportionment plan does not . . . diminish [minority groups'] ability to elect representatives of their choice" (simplified)). Petitioners recognized as much in their temporary-injunction motion. *See* App. 85 ("The Court ordered the Legislature to redraw CD-5" in its current formation because it was the "'only alternative option'" that ostensibly "complied with the constitutional non-diminishment standard." (quoting *Apportionment VII*, 172 So. 3d at 403)). And they do so again here. Pet. 1 ("In 2015, this Court held that the non-diminishment standard required the creation of [CD 5] to avoid diminishing the voting strength of Black voters in North Florida.").

Petitioners have also claimed that nonracial factors, like the prohibitions on partisan gerrymandering and protecting incumbents or the requirement that districts be contiguous, may also have motivated the creation of their oddly shaped district. Resp. to Reinstatement Mot. 42. The question, however, is whether "race for its own sake [will be] the overriding reason for choosing one map over others." *Bethune-Hill*, 137 S. Ct. at 799. Even if other factors are also considered, here Section 20 required that race be prioritized over other key redistricting principles like compactness, political

boundaries, and geography (along with many other unenumerated redistricting principles). As a result, in North Florida the non-diminishment standard always will be the "overriding reason for" choosing CD 5 over a district more faithful to traditional redistricting standards—like the Enacted Plan.

The law, the facts, and common sense all point in one direction: race predominates in any North Florida district that connects black populations from Jacksonville to Tallahassee solely to achieve a certain racial balance in the district's population. The trial court's finding to the contrary was clear error.

2. Application of Section 20's non-diminishment standard in North Florida does not satisfy strict scrutiny.

The race-based sorting of North Florida voters that the non-diminishment standard purportedly demands is, by its very nature, "odious." *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*Shaw I*); *see also Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in judgment) ("[F]ew devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act."). Whatever the reasons for that race-based sorting, there is no free

pass for Florida or any other State. The map must survive the strict-scrutiny gauntlet. *See Bush*, 517 U.S. at 978 ("Strict scrutiny remains, nonetheless, strict."); *see, e.g.*, *Shaw II*, 517 U.S. at 911 (finding that "creating an additional majority-black district was not required under a correct reading of §5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding §2 liability."); *Miller v. Johnson*, 515 U.S. 900, 922 (1995) ("We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues."). It does not come close.

i. To start, neither the circuit court nor Petitioners have identified a compelling state interest. But at the gate, Petitioners have suggested that this Court reviews only for abuse of "discretion" the circuit court's conclusion that compelling interests justify the racial gerrymander that Section 20 compels in North Florida. *See* Resp. to Reinstatement Mot. 43. That is incorrect. Whether state action satisfies strict scrutiny is a legal question. *State v. J.P.*, 907 So. 2d 1101, 1107 (Fla. 2004). Although the Court reviews the circuit court's decision to vacate a stay for abuse of discretion, it reviews the legal

determinations underlying that decision de novo. *Cf. SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC*, 78 So. 3d 709, 711 (Fla. 1st DCA 2012).

Petitioners have claimed that a racially gerrymandered CD 5 advances three compelling interests: (1) compliance with the non-diminishment standard, (2) remedying the effects of past racial discrimination, and (3) preventing present-day racial discrimination. Resp. to Reinstatement Mot. 43–47. The circuit court accepted the first and second justifications but said nothing of the third. App. 20–21. At any rate, Petitioners have failed to show that these interests are compelling in these circumstances.

1. *Compliance with the non-diminishment standard.* The circuit court held that complying with Section 20's non-diminishment standard is a compelling interest because (1) that standard is "substantive[ly] similar" to Section 5 of the VRA and (2) the U.S. Supreme Court has "assumed" that a State's compliance with the VRA serves a compelling interest. *See* App. 20. For three reasons, that is wrong.

First, the U.S. Supreme Court has never held that compliance

with the VRA is a compelling interest. It has only "assumed" so, often to reject racial gerrymanders for lack of narrow tailoring. *E.g.*, *Cooper*, 137 S. Ct. at 1469.

Second, the theory undergirding the Court's "assumption" about a State's compliance with the VRA does not apply to a State's compliance with its own version of the VRA. Indeed, a straightforward premise underlies the notion that complying with the VRA is a compelling state interest. *See Bush*, 517 U.S. at 990–92 (O'Connor, J., concurring). The VRA is a "presum[ptively] constitutional" exercise of Congress's "authority" to "ensure full protection of the Fourteenth and Fifteenth Amendments," and the "Supremacy Clause obliges the States to comply with" it. *Id.*

Here, however, the State would be engaging in racial discrimination not to comply with a federal law under the Supremacy Clause; it would be attempting to comply with its own state law. Nor is the State the entity entrusted to effectuate the "full protection[s] of the Fourteenth and Fifteenth Amendments"; that "authority" rests with Congress. *See id.* So there is no external justification—like obeying the Supremacy Clause or effectuating the Reconstruction

Amendments—that would make compliance with Section 20 a compelling state interest in and of itself to justify that discrimination.

Petitioners have responded to this critical point with non-sequiturs. They argued below that Section 20, in requiring racial discrimination, advances important policies like preventing other kinds of discrimination, Resp. to Reinstatement Mot. 44–45, and that those policies need not mirror the policies furthered by the VRA, *id.* at 48–49. But those are arguments for why the non-diminishment standard allegedly furthers compelling state interests, not for why complying with the non-diminishment standard is *itself* a compelling state interest. Petitioners are thus left with the circular claim that compliance with state law itself is a compelling interest that justifies racial discrimination. *Id.* at 44. If that were right, the State of Virginia could have cited compliance with its ban on interracial marriage as a compelling state interest in defense of that law. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967).

Third, even if complying with a state analogue of the VRA could constitute a compelling interest, it is not compelling in this instance. Compliance with Section 5's non-retrogression principle—the

inspiration for the non-diminishment standard—is no longer required. *See Shelby Cnty.*, 570 U.S. at 553–57 (invalidating the "coverage formula" dictating to which jurisdictions Section 5 applies). Compliance with Section 5 is thus no longer even a hypothetically compelling interest. *Cf. Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 279 (2015) (reserving whether continued compliance with Section 5 is a compelling interest). And so too with state standards that draw on Section 5's defunct framework.

To top it off, Section 20 is not as "simila[r]" to Section 5 as the circuit court claimed, App. 20—it is far broader. When Section 5 was operative, it covered only select jurisdictions that fell within a rigorous coverage formula designed to identify jurisdictions that had engaged in particularly egregious suppression of minority voting. To curtail such voter suppression, Congress prescribed "extraordinary and unprecedented" medicine, freezing the ability of these jurisdictions to make electoral changes that would "diminish" the power of minorities to elect their candidates of choice. *Shelby Cnty.*, 570 U.S. at 549.

Florida, however, was not one of those jurisdictions.

Apportionment I, 83 So. 3d at 624. Rather, Section 5's "unusual remedies," *Shelby Cnty.*, 570 U.S. at 549, extended to just a handful of Florida counties—Collier, Hardee, Hendry, Hillsborough, and Monroe, none of which are in North Florida, *see Apportionment I*, 83 So. 3d at 624. Yet Section 20 prescribes Section 5's strong medicine to the entire State, etching broad swathes of the State's electoral map in stone on racial grounds. It is therefore far more intrusive than Section 5 ever was and cannot establish a compelling interest, much less in North Florida specifically.

2. *Remedying past racial discrimination*. The circuit court also held that "eradicating the effects of past racial discrimination" constitutes "a compelling state interest for CD-5." App. 21 (quoting *Miller*, 515 U.S. at 920). Petitioners have echoed this claim in other briefing. Resp. to Reinstatement Mot. 45 (citing the interest in "[r]emedying the history of voting-related discrimination in North Florida"). But "an amorphous claim that there has been past discrimination" cannot establish a compelling interest. *E.g.*, *City of Richmond v. J.A. Croson*, 488 U.S. 469, 499 (1989). If that alone sufficed, States could impose race-based policies "that are ageless in

their reach into the past, and timeless in their ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality op.). Rather, Petitioners must provide a "strong basis in evidence for concluding that remedial action is necessary," *Shaw I*, 509 U.S. at 656 (simplified), to address "the *present effects* of past discrimination," *see J.A. Croson*, 488 U.S. at 498 (emphasis added).

Petitioners have not made that showing. Though they chronicle at length the history of racial discrimination in Florida, *see* Resp. to Reinstatement Mot. 45–47, they cite no evidence identifying what negative effects this history has on Black voters today. The closest Petitioners come is noting that, after Reconstruction, a Black candidate was not elected in Florida until 1992. *Id.* at 45. But that was 30 years ago. Without more, it is "sheer speculation" that racial discrimination *today* is needed to rectify the effects of racial discrimination from the past. *See J.A. Croson*, 488 U.S. at 499.[17] And

[17] Petitioners' expert, Dr. Austin, suggested that the State tried to discriminate against Black voters during the 2010 redistricting cycle. *See* App. 733–34. But Dr. Austin cited no support for that accusation, and the circuit court did not even hint at crediting it. App. 20–22. Which makes sense, seeing as this Court struck down the 2012 map for *partisan* gerrymandering, not racial gerrymandering. *Apportionment VII*, 172 So. 3d at 402.

again, North Florida was never subject to the VRA's prophylactic race-based remedies even when those remedies were in place—a good indication that the past discrimination Petitioners discussed was not as severe in this part of the State. *See also Jurisdictions Previously Covered by Section 5*, Dep't of Justice, bit.ly/3Obni3o.

3. *Preventing present-day racial discrimination*. The circuit court did not cite preventing present-day discrimination as a compelling state interest. App. 20–21 (citing only compliance with Section 20 and remedying effects of past racial discrimination). Petitioners, however, have stated that the "nondiminishment provision was adopted to prevent the intentional and effective discrimination against minority voters in the state." Resp. to Reinstatement Mot. 44. But they point to no evidence in the record of any present-day discrimination against Black voters, and the circuit court made no such finding.

ii. Petitioners also cannot establish that a racial gerrymander in North Florida is "narrowly tailored to achieve" a compelling interest. *See Miller*, 515 U.S. at 920.

To begin with, Petitioners have relied on the wrong narrow-

tailoring test—the "good reasons" standard.[18] *See* Resp. to Reinstatement Mot. 50–51 (citing *Cooper*, 137 S. Ct. at 1464). But this deferential standard applies only when compliance with the VRA is the compelling state interest. *See id.*; *see also Bethune-Hill*, 137 S. Ct. at 801; *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).

Here, however, as explained above, *supra* 52–56, compliance with the non-diminishment standard is *not* a compelling state interest. It lacks the supplementary attributes that make compliance with the VRA a potential compelling state interest. *Bush*, 517 U.S. at 990–92 (O'Connor, J., concurring). And the U.S. Supreme Court has never applied such a lax standard to other interests—like, for example, Petitioners' claimed interest in remedying the effects of past racial discrimination or preventing present-day racial discrimination—which would be antithetical to the exacting scrutiny

[18] This standard provides that when a State identifies compliance with the VRA as its compelling interest for drawing a race-based district, the State need not actually prove that the racial gerrymander was needed to comply with the VRA. *Cooper*, 137 S. Ct. at 1464. Instead, it need only "establish that it had 'good reasons' to think that it would transgress the [VRA] if it did *not* draw race-based district lines." *Id.* The test "gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Id.*

it generally applies to state-sponsored racial discrimination.

Stripped of the "good reasons" standard, Petitioners do not come close to satisfying strict scrutiny. *See* Resp. to Reinstatement Mot. 50–53. At the threshold, the district would not be "created . . . to remedy past discrimination," *Miller*, 515 U.S. at 920, or to combat present-day discrimination. The "true interest in designing" the district would instead be to "satisfy [the non-diminishment standard's] demands." *Id.* at 921. The district thus would not be "narrowly tailored to achieve" the eradication of present-day discrimination or the effects of past discrimination. *See id.* at 920.

Nor have Petitioners shown that prioritizing non-diminishment is the least-restrictive means of achieving these discrimination-based interests. *E.g.*, *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (defender of law bore burden to satisfy least-restrictive-means test). Even setting aside that they do not identify what ill effects Black voters presently suffer because of past discrimination or any instances of present-day discrimination, *supra* 56–59, they still do not explain why nothing short of a mandatory racial gerrymander is necessary to curtail those effects. Perhaps a less-intrusive race-based remedy would suffice; or

far more likely, there might be an "alternative, race-neutral" solution to lingering problems. *E.g.*, *J.A. Croson*, 488 U.S. at 471. Petitioners' failure to grapple with these possibilities foils their defense of the non-diminishment standard's application in North Florida.

* * *

In sum, Petitioners have not shown that the circuit court's injunction is likely to be sustained on appeal. And still less have they shown an extraordinary and clearcut entitlement to relief on the merits, as required to justify a temporary mandatory injunction close in time to an election. That is reason enough to deny them relief. *See Fla. Educ. Ass'n*, 325 So. 3d at 151 (party seeking to vacate automatic stay must show that "the government is [un]likely to succeed on appeal").

II. Lifting the automatic stay would harm the State, not Petitioners, and is not justified by any compelling circumstances.

Should the Court reach the equities, it should hold that Petitioners have failed to establish either "irreparable harm" or "compelling circumstances," as they must to justify vacating the automatic stay. *Id.*

For irreparable harm, Petitioners contend that they will be

harmed unless this Court agrees that the automatic stay should be vacated, whereas doing so purportedly would not harm the State. Petitioners have it backwards.

The First District's order does not harm Petitioners. It simply reinstates the Enacted Plan. As explained above, the Enacted Plan is constitutional given that the non-diminishment standard does not control here. *Supra* 40–61. Implementing the Plan thus will not harm Petitioners' constitutional rights.

In contrast, a stay of the First District's order would reimplement the circuit court's remedial map, "irreparabl[y] harm[ing]" the State's interest in "enforc[ing] its duly enacted plans," *Abbott*, 138 S. Ct. at 2324 n.17, and in ensuring that its citizens are not unconstitutionally "sort[ed]" by race, *Cooper*, 137 S. Ct. at 1464.

Dismissing these concerns, Petitioners instead focus on the Supervisors of Elections. Petitioners claim that a stay would have little impact on the Supervisors because the Secretary "instruct[ed]" "county election officials" to implement both the Enacted Plan and the remedial plan after the circuit court's order, proving that these officials can "easily administer" both plans during the State's appeal.

Pet. 42–43. But as explained, the Secretary simply "ask[ed]" the Supervisors, "consistent with the trial court's oral pronouncement," to "implement both maps" to "*the extent* that it is possible." App. 1577 (emphasis added). That request did not suggest that doing so was feasible let alone desirable; it reflected the reality that "numerous [s]upervisors" would have been unable to comply, especially those serving smaller counties that lack a "wealth of technical resources." App. 815.

The evidence bears this out. Election officials in North Florida have made clear that implementing even the remedial map—let alone two maps—is an "[im]possible" task at this point given "employee shortage[s]" and time constraints. App. 800–01. Any attempt to juggle two maps at once would sap the Supervisors of crucial resources, doubling "the chances of administrative mistakes, programming errors, and candidate and voter confusion." App. 806. Worse still, there would be confusion on the part of candidates who must run in the seven affected districts and on the part of voters in those districts. App. 1335. And the harm caused at this point would be all the more severe seeing as the Secretary—in response to the First District's

order reinstating the automatic stay, App. 33—has asked the Supervisors to cease implementing the remedial plan and allocate their limited resources to implementing only the Enacted Plan. Supp. App. 13–14. A stay would therefore substantially harm the State's electoral process.

Finally, Petitioners have not shown that compelling circumstances justify lifting the automatic stay. Consider the purported right they seek to vindicate: the right, on account of race, to call the electoral shots in their district for all time, such that any future district in North Florida must be drawn so that they alone enjoy the constitutional right to elect their preferred candidate. On balance, that view disserves the greater public interest, offends basic democratic precepts, and is unworthy of a temporary injunction.

CONCLUSION

The race-based sorting of voters is an "odious" enterprise. *Shaw I*, 509 U.S. at 643. For that reason, Florida enacted a map that disengages from the "sordid business" of "divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring and dissenting in part). This Court should not force Florida to reengage, especially when doing so threatens to

upend the status quo this close to upcoming elections. The petition for a constitutional writ should be denied.

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I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 11,933 words.

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CERTIFICATE OF SERVICE

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