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.

EMERGENCY MOTION TO REINSTATE AUTOMATIC STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

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.

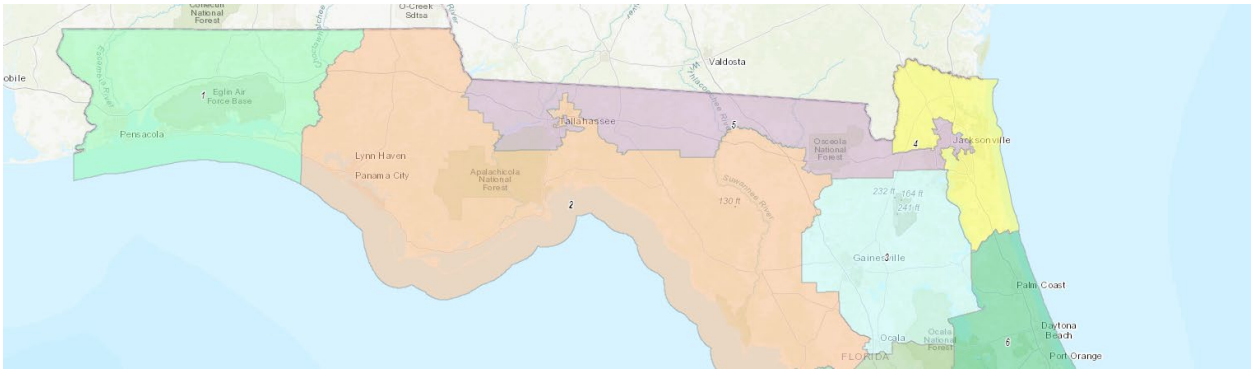
STATEMENT OF THE CASE & FACTS

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)



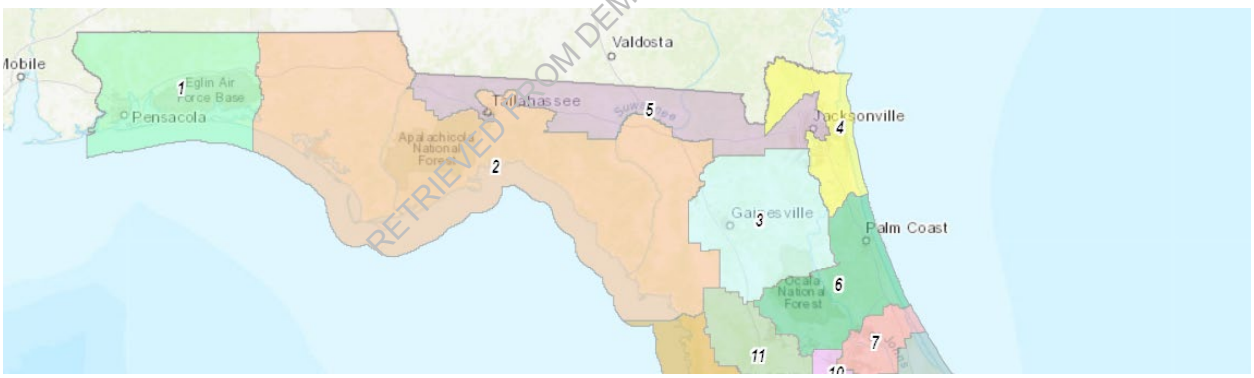
In redrawing the district, however, the court paid paramount attention to its racial composition. In fact, the court rejected arguments that the east-west configuration, as opposed to the north-south configuration, "would prevent black voters from electing a candidate of their choice." *Apportionment 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]

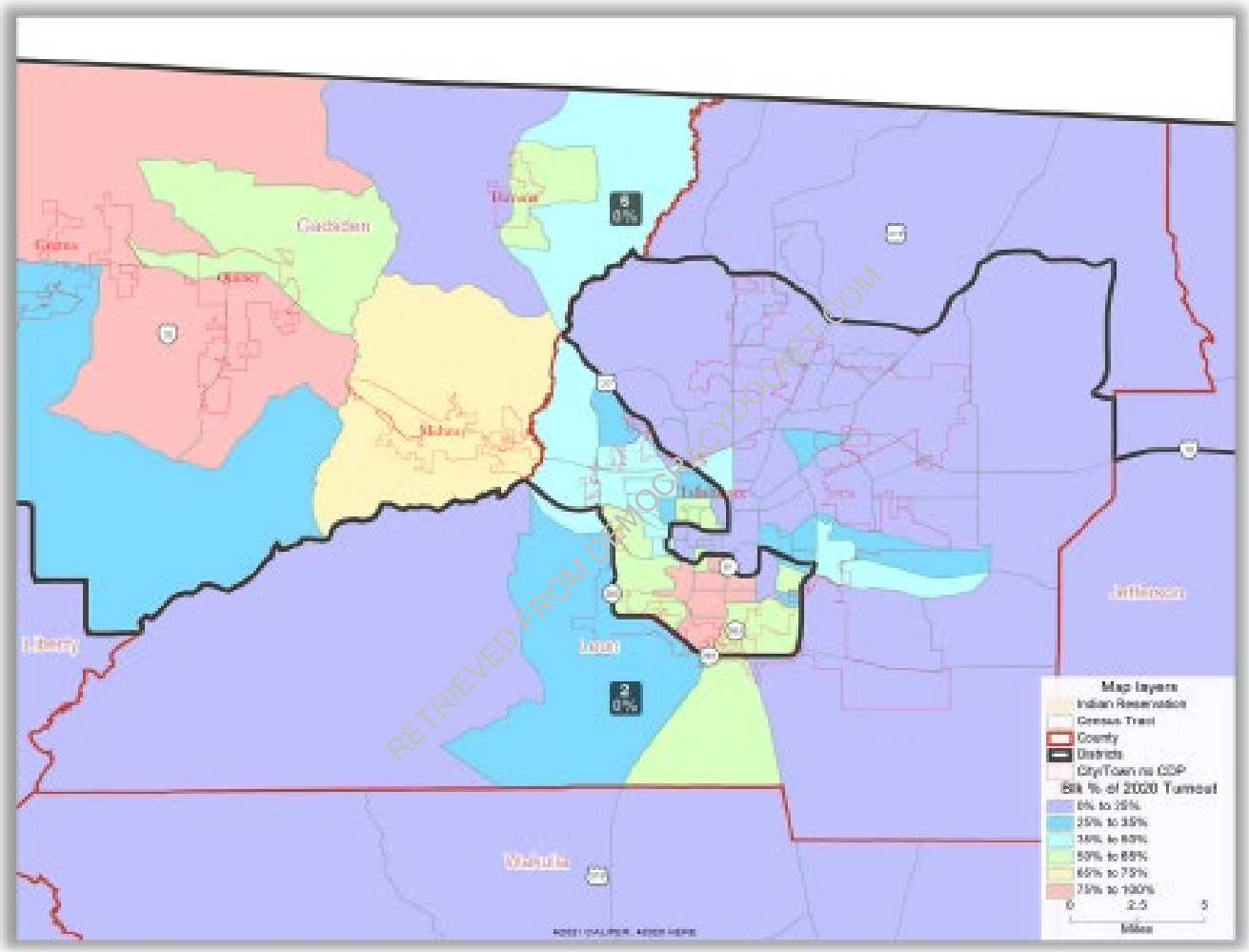
The only way to draw the district was for race to predominate over race-neutral districting criteria. The resulting proposed district split four counties[4]; had the lowest compactness score of any district in Plan 8015[5]; and as the figure below shows, was bizarrely drawn to

[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,

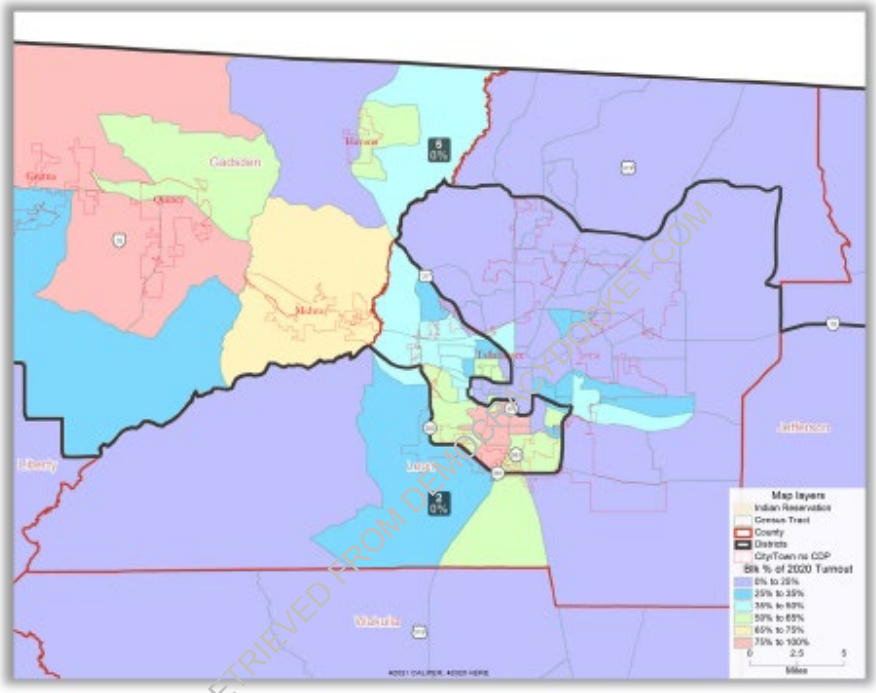
with respect to Plaintiff's remedial plan, Dr. Ansolabehere argued that it "restore[d] the ability of Black voters to elect their candidate of choice in North Florida." (App. 422). Even the Circuit Court found that the "legislative record includes detailed testimony that 8015's configuration of [Congressional 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

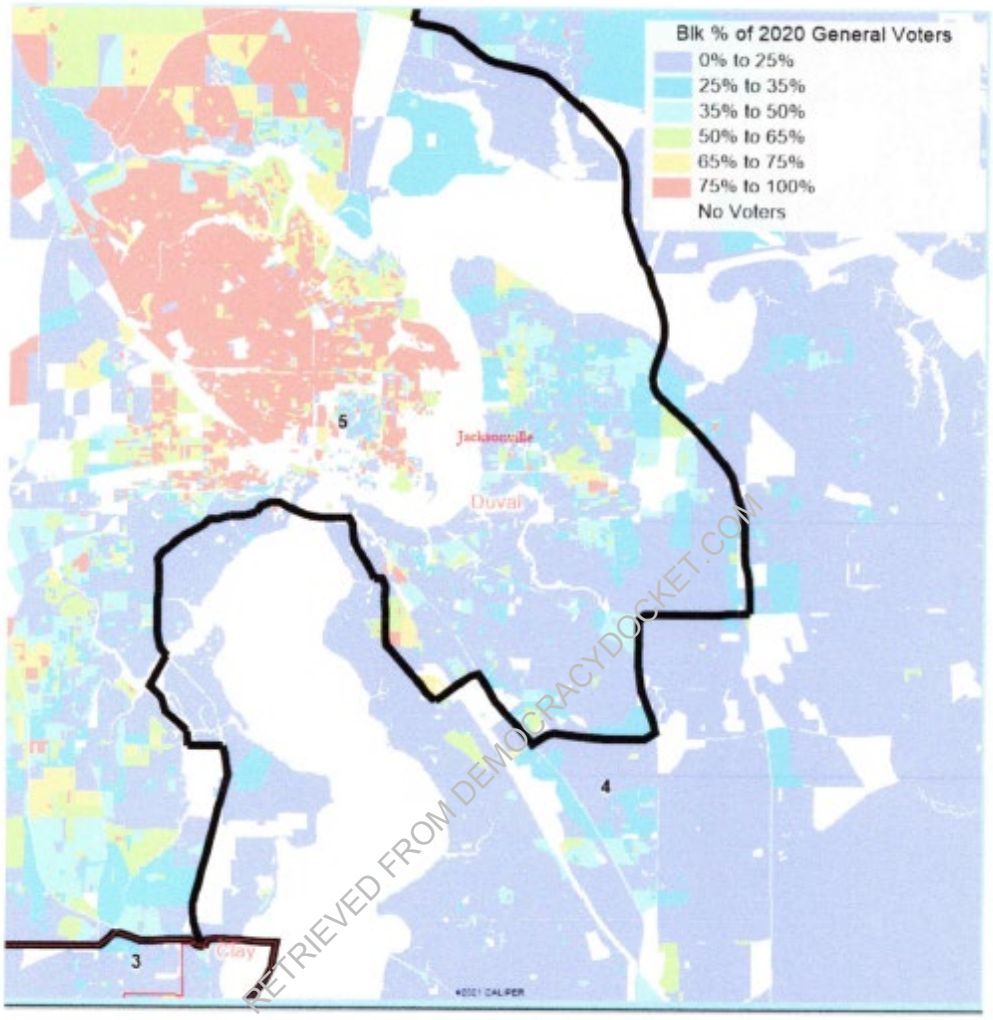
of any district in Plan 8015.[8] Moreover, as Dr. Johnson makes clear in his second expert report, Congressional District 5 in Proposed Map A was surgically drawn with exact precision to follow the racial composition of Leon County:



"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

[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

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]

[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.

Dated: May 18, 2022

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CERTIFICATION OF COMPLIANCE

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

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