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

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

Appellants,

v.

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

Appellees.
_____/

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

MOTION FOR LEAVE TO FILE REPLY

Pursuant to Florida Rule of Appellate Procedure 9.300, the Secretary moves for leave to file the attached reply to the response to the Secretary's Emergency Motion to Reinstate Automatic Stay filed by Plaintiffs in in accordance with the Court's Order of May 18, 2022. As grounds for such leave, the Secretary states that the brief reply will assist the Court in resolving the two issues presented in the Court's Order. Furthermore, the attached reply is only 924 words and will not prejudice Plaintiffs.

Dated: May 19, 2022

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

The undersigned certifies that this computer-generated motion complies with the font requirements mandated under Rule 9.045, Fla. R. App. P and contains 83 words.

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

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

I. The Enacted Map Is the Status Quo.

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

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

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

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

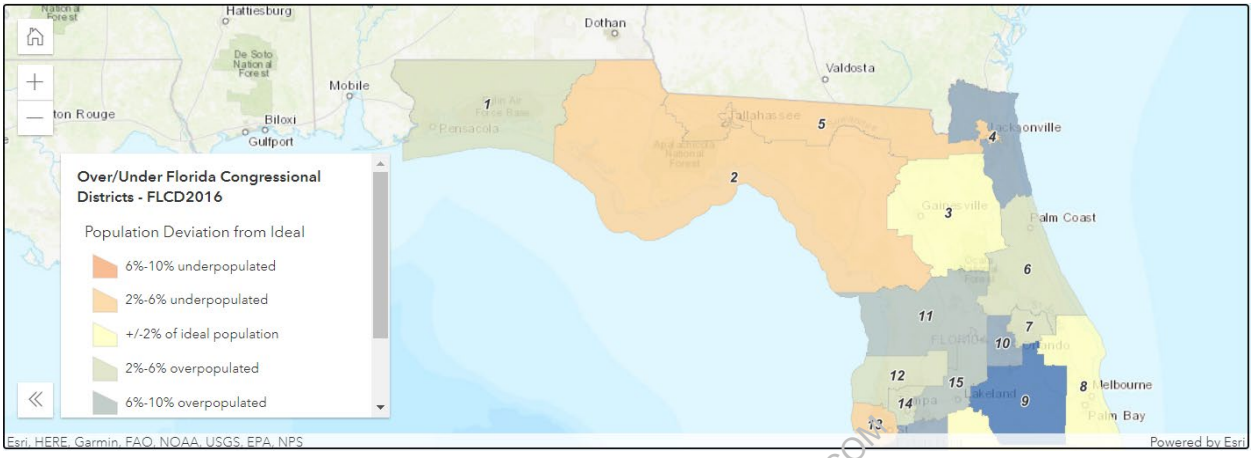
cards based on the Enacted Map. (App. 219-27). For some of these Supervisors of Elections, this work cannot be undone and then redone at this late stage. (App. 219-27, 237). This is the essence of what *status quo* means. Upending the duly enacted map of the people's representatives invites chaos and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

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

Again, Benchmark Congressional District 5 cannot be the status quo because it is now legally invalid. As the following graphic from the Florida Redistricting website[1] demonstrates, due to the decennial census, that district is unconstitutionally malapportioned. *See Wesberry*, 376 U.S. at 7 ("[W]hen qualified voters elect members

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

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



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

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

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

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

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

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

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

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

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

Dated: May 19, 2022

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