IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al., Petitioners, v. CORD BYRD, in his official capacity as Florida Secretary of State, et al., Respondents.	Case No.: SC22-_____ L.T. No.: 1D22-1470 2022-ca-000666

EMERGENCY PETITION FOR CONSTITUTIONAL WRIT

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PRELIMINARY STATEMENT

This Court must immediately issue an emergency writ to preserve its ability to exercise jurisdiction in this congressional redistricting case ahead of the 2022 midterm elections.

The Florida Constitution prohibits the Legislature from enacting redistricting plans that diminish the ability of racial minorities to elect representatives of their choice. *See* Art. III, §§ 20(a), 21(a). Floridians voted by an overwhelming margin of 63% to 37% to enshrine this "non-diminishment standard" in the Florida Constitution more than a decade ago. And this Court has since enforced it repeatedly in congressional and legislative redistricting cases alike.

In 2015, this Court held that the non-diminishment standard required the creation of a congressional district that spans from Duval to Leon and Gadsden Counties to avoid diminishing the voting strength of Black voters in North Florida. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015) ("*LWV I*"). That district—Congressional District 5 ("CD-5")—united North Florida's historic Black populations that pre-date the Civil War and has maintained their ability to elect their candidate of choice in every

election since it was adopted. The Legislature chose to retain that district in nearly every draft congressional plan that it debated during the 2021-2022 redistricting process. But Governor Ron DeSantis, after vetoing the Legislature's plan, drew and compelled the passage of his own congressional map (the "DeSantis Plan") that eliminates CD-5 entirely.

This case presents the narrow question of whether the dismantling of CD-5 in the DeSantis Plan violates the non-diminishment requirement of the Florida Constitution. There is no serious dispute that it does. The DeSantis Plan needlessly cracks Black voters among four new districts where they have no realistic chance of electing their congressional candidate of choice. Legislative leaders freely acknowledged that the dissolution of CD-5 violates the non-diminishment standard. Governor DeSantis did not dispute this, arguing instead that application of the non-diminishment standard violates the U.S. Constitution—a position that, should it prevail, threatens not only CD-5 but dozens of state house and senate districts that this Court approved on facial review under state and federal law just a few months ago. *See In re S. J. Res. Of Legis.*

Apportionment 100, 334 So. 3d 1282 (Fla. 2022) ("*Apportionment 2022*").

The trial court issued a temporary injunction ordering Florida to administer its 2022 congressional election under a remedial districting plan (the "Remedial Plan"). The Remedial Plan keeps the DeSantis Plan intact except for a handful of districts in North Florida, which revert to a configuration passed by the Legislature that preserves CD-5. But given the fast-approaching administrative deadlines for the August primary election, the trial court allowed Florida's supervisors of elections to plan to implement *both* the DeSantis Plan and the Remedial Plan to ensure that Florida's congressional election can proceed under whichever plan emerges from the appellate process.

The First District Court of Appeal, on its own motion, stayed the trial court's injunction. That decision means that the supervisors are now *only* preparing to implement the DeSantis Plan, needlessly jeopardizing Florida's ability to implement a remedy and prevent irreparable harm to its voters in the event this Court upholds the trial court's temporary injunction. For the reasons set forth below, this

Court must issue a writ now to preserve its ability to exercise jurisdiction and fashion relief.

BASIS FOR INVOKING THIS COURT'S JURISDICTION

This case presents issues of exceeding public importance, implicates provisions of both the Florida and Federal Constitutions, and will evade this Court's jurisdiction if that jurisdiction is not invoked now. This Court therefore must stay the First District's order under its all writs authority to preserve the status quo.

Article V, Section 3(b)(7) of the Florida Constitution authorizes this Court to issue "all writs necessary to the complete exercise of its jurisdiction." This authority protects the Court's jurisdiction that has already been invoked, as well as its "jurisdiction that likely will be invoked in the future." *Roberts v. Brown*, 43 So. 3d 673, 677 (Fla. 2010); *see also Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982) (noting that because "jurisdiction of the issue of apportionment will vest in this Court with certainty in this year we have the jurisdiction conferred by article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction" of the Court) (citing *Couse v. Canal Auth.*, 209 So. 2d 865 (Fla. 1968)). Accordingly, the all writs provision may be "used to

obtain a stay or injunction to preserve the status quo of a proceeding" that is or will be pending in this Court. *See, e.g.*, Philip J. Padovano, *Florida Appellate Practice* § 3:18 at 92 (2013 ed.); *see also League of Women Voters of Fla. v. Data Targeting, Inc.*, 140 So. 3d 510, 514 (Fla. 2014) (granting all writs petition and staying First District's order in reapportionment appeal).

Petitioners are guaranteed to invoke this Court's jurisdiction. Just days ago, the First District issued a preliminary ruling reversing the trial court's order lifting an automatic stay of its temporary injunctive order. The First District erred. By preliminarily vacating the trial court's order, the First District mistook the DeSantis Plan for the status quo, even though it has not been used in a single election. Is so doing, the First District ignored the clear facts demonstrating that the DeSantis Plan diminishes the electoral power of Black voters in North Florida in violation of the Florida Constitution, and elided over the overwhelming equities in favor of lifting the stay, including that the state's election administrators were sensibly preparing to implement *both* the DeSantis Plan and the Remedial Plan pending this Court's final review. A stay of the trial court's temporary injunction jeopardizes Petitioners' access to relief

in time for the 2022 elections. Petitioners will appeal the First District's order when it becomes final and properly invoke this Court's jurisdiction.

This case implicates the scope of the Fair Districts Amendment to the Florida Constitution and its interplay with the Federal Constitution, triggering at least three bases for this Court's jurisdiction. *See* Fla. Const., Art. V § 3(b)(3) (extending Court's jurisdiction to decisions construing "a provision of the state or federal constitution," "declar[ing] valid a state statute," or "expressly affect[ing] a class of constitutional or state officers"). And it concerns the constitutionality of the state's districting plan, a matter this Court has repeatedly considered of exceeding public importance. *See, e.g.*, *LWV I*, 172 So. 3d at 370 (describing Fair Districts Amendment as "designed to restore the core principle of republican government") (internal quotation marks omitted); *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 599-600 (Fla. 2012) ("*Apportionment I*") ("[T]he right to elect representatives—and the process by which we do so—is the very bedrock of our democracy."); *id.* at 614 (describing Court's "important responsibility to ensure that the joint resolution of apportionment comports with both the United

States and Florida Constitutions"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) ("*LWV II*") ("This Court has an obligation to provide certainty to candidates and voters regarding the legality of the state's congressional districts.") (internal quotation marks omitted).

Neither the equities nor this Court's jurisdiction can await the appeal of the First District's stay or its eventual ruling on the trial court's temporary injunction. Under the status quo of the trial court's order, the Secretary appropriately instructed elections administrators to prepare to implement *both* the DeSantis and Remedial Plans. App. (Vol. VII) 1576-77 (emphasis in original). That made good sense: Lifting the stay and permitting the state's election officials to prepare both plans now will ease the state's implementation of the final plan while this exceedingly important case is resolved through the appellate process.

But the First District's order disrupts that sensible approach by staying implementation of the Remedial Plan. As the trial court found, a remedial plan must likely be implemented within the next few weeks to ensure that the 2022 congressional elections proceed as scheduled and under a lawful districting plan. App. (Vol. I) 26. The

First District's order will make that deadline almost impossible to meet. The appellate process, including the briefing, argument, and judicial judgment they entail, threatens to run out the time available to the State's election administrators to effect Petitioners' relief, no matter how quickly this Court acts when Petitioners inevitably invoke its jurisdiction. *See League of Women Voters of Fla. v. Detzner*, 178 So. 3d 6, 8 (Fla. 1st DCA 2014) ("To allow the appellate process to take its full course through the completion of review by this court followed by possible en banc review, could potentially put the supreme court in the position of having to delay the remedy.").

Accordingly, to protect this Court's jurisdiction and authority to order relief in this case in time for the 2022 elections, it must preserve the status quo by exercising its all writs authority to stay the First District's order pending this Court's final review. *See Data Targeting, Inc.*, 140 So. 3d at 514 (staying First District order pursuant to all writs authority); *State ex rel. Chiles v. Pub. Emps. Rels. Comm'n*, 630 So. 2d 1093, 1095 (Fla. 1994) (indicating that the all writs provision is used to guard against threats to the potential exercise of the Court's jurisdiction); *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968) (exercising all writs jurisdiction to halt destruction of election records

even though court was uncertain it had jurisdiction, because destruction would render issue moot); *Monroe Educ. Ass'n v. Clerk, Dist. Ct. of Appeal, Third Dist.*, 299 So. 2d 1, 3 (Fla. 1974) (noting that all writs jurisdiction is important because "certain cases present extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved that require expedition").

FACTS ON WHICH PETITIONERS RELY

I. The Fair Districts Amendment protects minority voters from implementation of redistricting plans that diminish their ability to elect their candidates of choice.

A decade ago, Floridians voted by an overwhelming margin of 62.9% to 37.1% to enact the Fair Districts Amendment to the Florida Constitution. App. (Vol. I) 46. The Amendment explicitly constrains the Legislature's once-in-a-decade exercise of its reapportionment power, as enumerated within two "tiers" in Article III, Sections 20 and 21 of the Florida Constitution.[1] Among the "Tier I" standards is a

[1] The Fair Districts Amendment provides "identical standards for congressional redistricting" under Article III, Section 20 and state legislative redistricting under Article III, Section 21. *Apportionment I*, 83 So. 3d at 598 n.1. This Court has indicated that the same substantive standards apply to each section. *See LWV I*, 172 So. 3d at 373-74 (applying standards articulated in state legislative redistricting case to congressional redistricting case).

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

This "non-diminishment provision" prohibits the Legislature from "eliminat[ing] majority-minority districts or weaken[ing] other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Apportionment I*, 83 So. 3d at 625. To evaluate a non-diminishment claim, courts must determine whether minority voting strength has diminished under the new plan when compared to the old plan. *Id.* at 624-25.

During this *current* redistricting cycle, both legislative chambers took efforts to ensure that the State House and Senate plans complied with the non-diminishment standard. In its brief asking this Court to approve the newly enacted State House Plan, the Florida House verified that it satisfied the non-diminishment provision by conducting functional analyses to protect against diminishment in

30 minority-performing districts. House Br. at 15.[2] The House explained that it "protected *all* performing districts from diminishment, even if minorities did not comprise a majority of the voting-age population." *Id.* The Florida Senate also conducted functional analyses to protect five districts from diminishment that performed for Black voters and five that performed for Hispanic voters. Senate Br. at 20, 34-36.[3]

This Court considered these submissions and unanimously held the newly enacted Florida State House and Senate plans were facially valid. *See Apportionment 2022*, 334 So. 3d at 1282. In so doing, the Court reiterated the Tier I non-diminishment provision, *id.* at 1286, approvingly cited the Legislature's functional analyses, *id.* at 1289, and agreed with "the Legislature's representation that the 2022 plans do not diminish minority voters' ability to elect representatives of their choice." *Id.* at 1290. Nowhere in that opinion

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

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

did this Court question the continuing application of the non-diminishment standard.

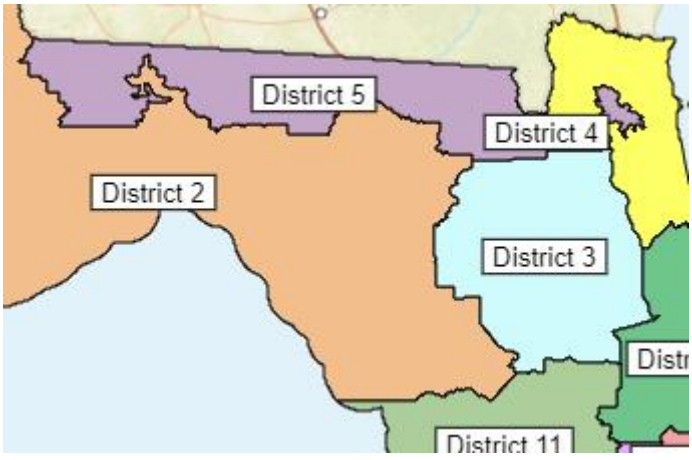
II. Black voters in North Florida have had the ability to elect their congressional candidate of choice since at least 2015.

CD-5 was created and adopted by this Court in 2015 after it invalidated the Legislature's 2012 congressional redistricting plan under the Fair Districts Amendment on the basis that partisan intent tainted the entire redistricting process. *See LWV I*, 172 So. 3d at 392-93.

The Court found that Black voters in North Florida had, at least to some degree, had the opportunity to elect their representatives of choice since 1992. *See id.* at 404 (explaining that "the predecessor of District 5 . . . performed for the black candidate of choice in every election from 1992 through 2000" and then in "every election from 2000 through the present"). The Court provided specific remedial guidance regarding numerous districts, including CD-5. The Court rejected the argument that an East-West configuration would cause CD-5 "to become significantly less compact." *Id.* at 405–06. It acknowledged that an East-West configuration would result in a "longer" district "with a correspondingly greater perimeter and area,"

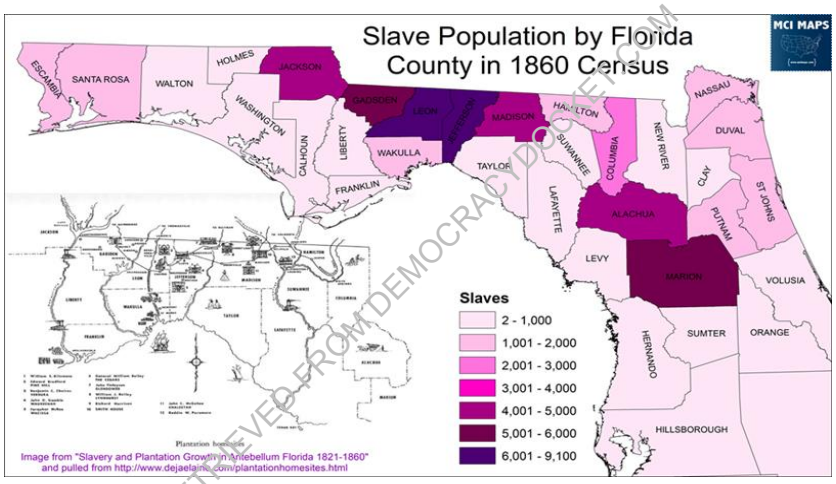
but explained that "length is just one factor to consider in evaluating compactness" alongside others, such as Florida's existing geography. *Id.* at 406.

The congressional plan that resulted from this litigation, referred to here as the "Benchmark Plan," contained the East-West configuration of CD-5 and was in place during the 2016, 2018, and 2020 congressional elections. At the time of its adoption, CD-5 had a Black voting age population of 45.12%. *Id.* at 404. As of the 2020 Census, the Benchmark Plan's version of CD-5 had a total Black population of 49.1%, a Black voting age population of 45.2%, and a minority voting age population of 59.8%. App. (Vol. VI) 669, 679. Benchmark CD-5 extended from Jacksonville to Tallahassee and included all of Baker, Gadsden, Hamilton, and Madison Counties, as well as portions of Columbia, Duval, Jefferson, and Leon Counties:



LWV II, 179 So. 3d at 271-72.

While both Tallahassee and Jacksonville have substantial Black populations, Black voters also constituted a substantial portion of the lower-density counties that made up the rest of Benchmark CD-5. App. (Vol. VI) 650-54. Indeed, Benchmark CD-5 unites historic Black communities in North Florida that pre-date the Civil War and arose from the slave and sharecropping communities of the era:



App. (Vol. VI) 726.

As Petitioners' expert demonstrated below, as the trial court found, and as the Secretary does not dispute in this litigation, Benchmark CD-5 was unquestionably a district that allowed Black voters to elect their candidate of choice. Under Benchmark CD-5, voters elected Black Congressman Al Lawson in 2016, 2018, and 2020. App. (Vol. VI) 671.

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

After release of the 2020 Census data, the Florida Senate and House commenced the redistricting process by holding initial hearings in September 2021. From the beginning, both chambers stressed that the Legislature's redistricting effort would be guided by established law. Representative Tom Leek, Chair of the House Redistricting Committee, "promise[d]" his members that the House would "do this right" and "within the law." App. (Vol. I) 105. And both the Senate and the House instructed its members that the Florida Constitution's non-diminishment standard prohibits the Legislature from enacting a congressional plan that diminishes a minority group's existing ability to elect their candidate of choice. *See, e.g.*, App. (Vol. I) 151 (recognizing that the Florida Constitution parallels federal retrogression standards); App. (Vol. I) 197 (same). And they explained that while the U.S. Supreme Court's decision in *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013), "means the preclearance process established by Section 5 of the VRA was no longer in effect," that decision "does not affect the validity of the statewide

diminishment standard in the Florida Constitution." App. (Vol. VI) 543.

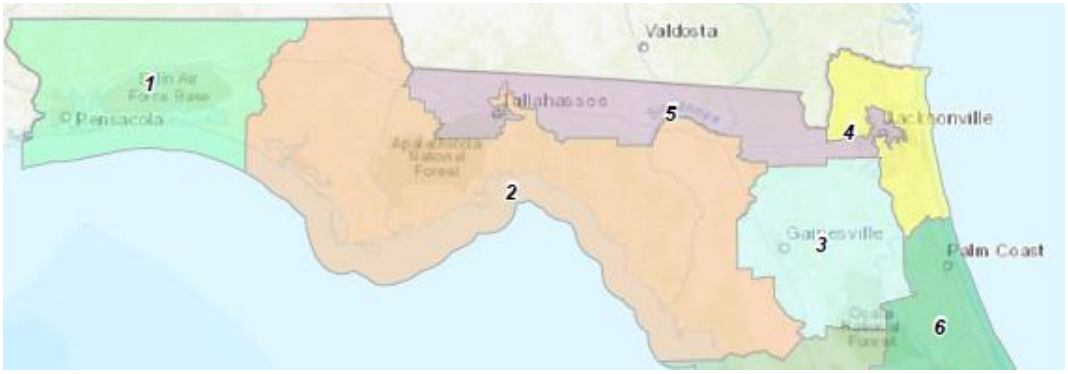
Among the many districts that both chambers determined were protected from diminishment was CD-5. To that end, the Legislature performed a functional analysis on each of its proposed plans to ensure that Black voters in CD-5 maintained the ability to elect their candidates of choice. *See, e.g.*, (Vol. V) App. 378-79 (reporting that proposed congressional plans "[d]o not retrogress and maintain the ability . . . for racial and language minorities to participate in the political process and elect candidates of their choice"); App. (Vol. II) 264-67, (Vol. III) 273-76, 281-84 (performing functional analyses of CD-5 for proposed congressional plans). Nearly every congressional plan proposed by the House and Senate redistricting committees maintained the general East-West configuration of CD-5 approved by this Court and preserved Black voters' ability to elect their candidates of choice in North Florida. *See, e.g.*, App. (Vol. III) 306, (Vol. V) 379, 382, (Vol. VI) 537.

On March 4, 2022, the Legislature passed a redistricting plan that significantly modified CD-5, though the Legislature maintained that its plan would avoid diminishing Black voters' ability to elect

candidates of their choice in the district. Recognizing the plan's vulnerability under the non-diminishment provision, however, the legislation included an alternative plan—H000C8015, the "Backup Map" or "Plan 8015"—that was intended to take effect if courts found that the primary plan diminished Black voting power in violation of the Florida Constitution. App. (Vol. VI) 486–504. The Backup Map retained the East-West configuration of CD-5 approved in *LWV I*.

Governor DeSantis vetoed the Legislature's plan on March 29 and called a special legislative session. App. (Vol. VI) 635-37, 643-46. The Governor released his own congressional plan on April 13 that eliminated any district resembling either the Benchmark Plan's or any of the Legislature's proposed configurations of CD-5:

<u>The Benchmark Plan</u> (App. (Vol. VI) 696):



The DeSantis Plan (*id.* at 697):

When asked on the House floor whether the configuration of CD-5 in the DeSantis Plan would continue to perform for Black candidates of choice, Representative Leek responded that it would not: "[O]ur [House] staff did a functional analysis and confirm[ed] it does not perform." App. (Vol. VI) 564. The Legislature nevertheless passed the DeSantis Plan on April 21, 2022, and Governor DeSantis signed it into law the next day. App. (Vol. VI) 639-41.

The DeSantis Plan splits Benchmark CD-5 into four new districts: new CD-2, CD-3, CD-4, and CD-5. The DeSantis Plan disperses over 360,000 Black voters from the Benchmark CD-5 into each of these new districts. App. (Vol. VI) 669, 674. Black voters now make up only 22.7%, 15.3%, 30.8%, and 12.1% of the voters in those districts, respectively. *Id.* at 681. In none of those districts do Black

voters have the ability to elect their preferred congressional candidates. *Id.* at 673-74.

IV. Petitioners filed suit the same day the DeSantis Plan was signed into law.

On April 22, the same day that Governor DeSantis signed his plan into law, Petitioners filed suit, alleging the plan violated the Florida Constitution. App. (Vol. I) 35. Petitioners include Black Voters Matter, the League of Women Voters of Florida, Equal Ground Education Fund, and Florida Rising Together, along with many individual Florida voters, some of whom reside in Benchmark CD-5. *Id.* at 39-44. Petitioners' complaint alleged multiple violations of the Florida Constitution, including that the DeSantis Plan (1) was intended to favor the Republican Party, (2) was intended to diminish Black voting strength, and (3) resulted in diminishment of Black voting strength, all of which are violations of the Tier I standards in Article III, Section 20 of the Florida Constitution. *Id.* at 66-69. Petitioners also alleged multiple Tier II violations in the DeSantis Plan. *Id.* at 69-71. Petitioners named the Secretary of State, the Attorney General, the Florida House, the Florida Senate, and several

individual members of the Florida House and Senate Redistricting Committees as Defendants. *Id.* at 45-46.[4]

V. Petitioners' temporary injunction motion was supported by extensive evidence.

While Petitioners' claims against the DeSantis Plan were brought statewide and under multiple provisions of the Florida Constitution, their request for immediate relief was exceedingly narrow, both substantively and geographically. Petitioners sought a temporary injunction against the DeSantis Plan exclusively on the basis that it results in diminishment of Black voters' ability to elect their candidate of choice in North Florida, in violation of Article III, Section 20(a) of the Florida Constitution. App. (Vol. I) 78. In their request for temporary injunctive relief, Petitioners asked the trial court to enjoin the Secretary of State from administering the 2022 primary and general elections under a plan that diminished Black voters' ability to elect their candidate of choice in North Florida. *Id.* at 101-02. Petitioners also asked the trial court to expedite

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

proceedings to allow for relief on this limited claim in time for the 2022 congressional elections. *Id.*

Petitioners' motion was supported by extensive evidence, including an expert report from Dr. Stephen Ansolabehere of Harvard University, who has deep experience in redistricting and in advising courts and commissions on redistricting plans. App. (Vol. VI) 674. In his first report, Dr. Ansolabehere conducted a functional analysis precisely as instructed by this Court in *Apportionment I*, 83 So. 3d at 620. Under the non-diminishment standard, "the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Id.* at 625. The non-diminishment standard accordingly calls for a comparative analysis: "The existing plan of a covered jurisdiction serves as the 'benchmark' against which the 'effect' of voting changes is measured." *Id.* at 624. And whether a minority group's voting power has been diminished is determined by a "functional analysis" of "whether a district is likely to perform for minority candidates of choice." *Id.* at 625.

Using this framework, Dr. Ansolabehere demonstrated that Black voters in North Florida were able to elect their candidate of choice ever since the Benchmark Plan was adopted in 2015. Dr. Ansolabehere found Black voters were the largest racial group of registered voters in Benchmark CD-5 and "account[ed] for 49.1 percent of the total population and 77.7 percent of the minority population in this district." App. (Vol. VI) 669. Black voters were also the largest group of voters in each Democratic primary election since 2015 and cast a plurality of votes in the 2016 and 2018 general elections. *Id.* at 669-70. Given the extraordinary political cohesion of Black voters in Benchmark CD-5, *id.* at 670, Dr. Ansolabehere concluded that Black voters had the ability to elect their preferred candidates in that district—and, indeed, elected Black Democrat Al Lawson to Congress in 2016, 2018, and 2020. *Id.* at 671. None of this evidence was contested below.

Dr. Ansolabehere conducted the same functional analysis of the DeSantis Plan and found that it would diminish Black voters' ability to elect their candidate of choice. He found that the DeSantis Plan divides the area and populations that comprise Benchmark CD-5 across newly enacted CD-2, CD-3, CD-4, and CD-5. *Id.* at 671. White

voters comprise a supermajority of the voting age population and a majority of registered voters in all four of these new districts. *Id.* at 672. Among the precincts included in the new district configurations, white voters cast the majority of votes in the 2016, 2018, and 2020 primary and general elections. *Id.* In all four of these districts, white voters cohesively voted for the candidates opposed to Black-preferred candidates. *Id.* at 672-73. In all four of these districts, white-preferred candidates won the majority of votes cast in all eight of the general elections examined. *Id.* at 673. Accordingly, Dr. Ansolabehere found that under the DeSantis Plan Black voters would no longer be able to elect their candidate of choice in North Florida. *Id.* at 674. Again, none of this evidence was contested in the trial court or before the First District.

Petitioners also demonstrated that legislative leaders, conducting their own functional analysis of the DeSantis Plan, corroborated Dr. Ansolabehere's conclusions. According to House Redistricting Chair Leek, legislative staff "did a functional analysis and confirm[ed] [that the new configuration of districts in North Florida] does not perform" for Black voters. App. (Vol. VI) 564. Indeed, at no point during the special session did legislative leaders assert

that the DeSantis Plan complied with the non-diminishment provision.

Petitioners' motion was also supported by an expert report from Dr. Sharon Austin, a political scientist and historian from the University of Florida, who traced the history of the Black Floridians residing in the Benchmark CD-5 back to the state's long-history of slavery and racial discrimination. As Dr. Austin explained, many counties, cities, and towns that comprised Benchmark CD-5 were built around the cotton and tobacco trades of the state's past that relied on slavery and sharecropping during the 1800s and into the early decades of the 1900s. App. (Vol. VI) 721. Many of the Black Floridians in this part of North Florida, including many of the approximately 360,000 who have been moved out of CD-5 under the DeSantis Plan, are direct descendants of those who were forced to work on the cotton and tobacco plantations in this area. *Id.* And Black Floridians in North Florida, like Black voters throughout the state, have long had to confront discriminatory voting practices and schemes that eliminated their ability to elect representatives to Congress. *Id.*

Petitioners' motion was also supported by five current and former senior officials of supervisors of elections offices across the state who affirmed that their offices could implement a different congressional plan in time for the 2022 elections if the trial court found the DeSantis Plan to be unconstitutional. Leon County Supervisor of Elections Mark Earley, one of the Supervisors who would be most affected by redrawing CD-5, as well as his Deputy, Christopher Moore, both stated that their office could implement any remedial plan received by May 27, 2022. App. (Vol. VI) 774-78, 1048-52. Counsel for the Supervisor of Elections of Orange County, who is responsible for a county with over 850,000 voters, swore to the same, App. (Vol. VII) 1035-39. And the Polk County Supervisor of Elections Lori Edwards similarly testified by affidavit that her office could implement a remedial plan imposed by May 27. App. (Vol. VII) 1044-47. Petitioners also submitted an affidavit by Representative Tracie Davis, former Deputy Supervisor of Elections for Duval County and 14-year veteran of the Duval County Supervisor's Office, who explained that the Duval Supervisor's Office is capable of managing districting schemes, is practiced in handling precinct splits in congressional plans, and should be able to implement a different

remedial plan in time for the primary election as long as it is received by the end of May. App. (Vol. VII) 1040-43.

Finally, in his rebuttal report Petitioners' expert Dr. Ansolabehere prepared potential remedial plans in order to demonstrate it would be possible to keep a district that preserved Black voters' ability to elect their candidates of choice in North Florida while making very few changes to the DeSantis Plan. Indeed, Dr. Ansolabehere showed that the constitutional violation at issue could be remedied simply by inserting the Legislature's version of CD-5 from the Backup Map into the DeSantis Plan. *See* App. (Vol. VII) 1007-08. This approach would adjust only five CDs from the DeSantis Plan: CD-2, 3, 4, 5, and 6. *Id.* at 1000. Dr. Ansolabehere also attempted to match the congressional lines with the new legislatively enacted State House districts in North Florida wherever possible, thus reducing the number of new precincts that would be required under such a map. *See id.* at 1007.

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

Upon Petitioners' motion for a temporary injunction, Judge J. Layne Smith swiftly scheduled a hearing, taking care to read over

"2,000 pages of materials" from the parties, including multiple expert reports, sworn affidavits, and pleadings. App. (Vol. I) 9; App. (Vol. VII) 1298. At the temporary injunction hearing, the trial court heard extensive live testimony from Petitioners' expert Dr. Ansolabehere. *Id.* at 1319-1355. Dr. Ansolabehere explained his functional analysis of the Benchmark and DeSantis Plans, how the DeSantis Plan diminishes Black voters' ability to elect their candidate of choice in North Florida, and how such diminishment could be remedied by inserting into the DeSantis Plan the version of CD-5 that the Legislature had originally passed in its "Backup Map." *Id.*

Even though the trial court explained to the parties that it would "give [them] the time [they] need [to present their evidence]," and that no one should "walk away thinking they couldn't be heard today," App. (Vol. VII) 1370, the Secretary declined to call any witnesses, including the Secretary's own two experts, *id.* at 1369. Neither the Attorney General, nor the House, nor the Senate, nor any of the individual legislators filed any papers, offered any witnesses, or even spoke in defense of the DeSantis Plan.

VII. The trial court granted Petitioners' motion and ordered the state to use a plan that preserved Black voters' ability to elect their candidate of choice in North Florida.

After considering the evidence, the trial court concluded that Petitioners had "demonstrated the [DeSantis] Plan will result in diminishment of Black voters' ability to elect their candidate of choice." App. (Vol. I) 15. Upon review of Dr. Ansolabehere's functional analysis and live testimony, the trial court found his conclusions credible, *id.* at 16, and "buttressed by analysis from the Florida Legislature's redistricting staff, which conducted its own functional analysis and found that Black voters would not have the ability to elect their preferred candidates to Congress under the [DeSantis] Map in this area," *id.* at 18. Importantly, the trial court found that the Secretary "offer[ed] no credible contrary evidence; her experts neither performed a functional analysis nor contested Dr. Ansolabehere's findings." *Id.*

Next, the trial court held that the Secretary failed to establish that the non-diminishment standard violates the Equal Protection Clause of the United States Constitution. *Id.* at 19. Specifically, the trial court found that race did not predominate in the Legislature's configuration of CD-5 in Plan 8015 because the legislative record indicated the Legislature's proposal was guided by several race-neutral factors. *Id.*

The trial court also found that, "[e]ven if the Secretary could show that racial considerations predominated in the drawing of Plan 8015's CD-5, the record indicates that the Legislature's configuration of CD-5 is narrowly tailored to advance compelling state interests." *Id.* at 20. The trial court concluded that "compliance with the Fair Districts Amendment's non-diminishment provision is a compelling state interest," as was addressing "voting-related racial discrimination and a lack of representation in North Florida." *Id.* at 20-21. And it found that Plan 8015's CD-5 was narrowly tailored to address those compelling state interests. The trial court explained that "the Legislature, which conducted a functional analysis on their redistricting plans, 'had good reasons to believe that' Plan 8015's configuration of CD-5 'was necessary . . . to avoid diminishing the ability of black voters to elect their preferred candidates,'" *Id.* at 21 (quoting *Bethune-Hill v. Va. State Bd. of Elections,* 137 S. Ct. 788, 791 (2017)), and that CD-5 was reasonably compact.

The trial court found that "absent injunctive relief, no other remedy exists under Florida law to remedy the harm Petitioners will suffer if the 2022 primary and general elections proceed under an unconstitutional districting plan," App. (Vol. I) 22, and determined

that granting Petitioners' motion would serve the public interest. *Id.* at 24. It further rejected the Secretary's argument that it was too late to grant Petitioners relief, finding the Secretary's legal authorities inapposite and noting "Florida's primary, one of the latest in the nation, is set for August 23, nearly four months away." *Id.* at 25. The trial court also found that a plan that preserved Black voters' ability to elect their candidate of choice in North Florida would be practicable for Florida's supervisors to implement, as it would "affect just a handful of counties and can be implemented quickly and without significant administrative difficulties." *Id.* at 26. Indeed, the Remedial Plan was drawn with the specific goal of reducing burdens on election administrators "by following the boundaries of the recently enacted Florida State House map to the greatest extent possible and by minimizing the number of additional precinct splits." *Id.* at 27. As the trial court concluded, "[t]he remedial plan the Court adopts requires narrow changes to a plan already passed by the Legislature, prior to being vetoed. It is not in the public's interest to deny the Petitioners' relief." *Id.*

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

The Secretary subsequently filed a Notice of Appeal, triggering an automatic stay under Florida Rule of Appellate Procedure 9.310(b)(2). Petitioners filed an emergency motion to vacate the automatic stay the following day. App. (Vol. VII) 1053. While the trial court was available to hear Petitioners' motion that same day, the Secretary requested three additional days to file an opposition and prepare for the hearing, which the trial court granted.

The trial court ultimately granted Petitioners' motion to vacate the stay following a hearing on May 16, 2022. The court explained that keeping the automatic stay in place would ensure that "Petitioners and other voters in Florida . . . will lack any remedy whatsoever if the Appellate process strings out long enough." App. (Vol. VII) 1541-42. But vacatur of the automatic stay would allow employees of "the supervisors of elections and supervisors themselves [to] game plan for both contingencies," ensuring that Florida could administer whichever plan emerges from this appeal. *Id.* at 1542. Pursuant to the court's instruction, on May 17, the Secretary instructed Florida's supervisors of elections "to the extent that it is possible, to proceed on two fronts and plan to implement both maps." App. (Vol. VII) 1577. Florida's supervisors then began

preparing to implement both the remedial plan and the DeSantis Plan. As St. Johns' Supervisor Vicky Oakes explained, implementation of the remedial plan fairly straightforward: "Fortunately for us, even under the remedial plan, it happens to follow a lot of our new district lines in terms of precincts."[5] Similarly, "Duval [County was] still preparing new precincts for approval by the Jacksonville City Council, and chief elections officer Robert Phillips said that the office was preparing for either map."[6]

IX. The First District Court of Appeal issued a preliminary order reinstating the stay.

The Secretary appealed the trial court's vacatur of the automatic stay on May 18. App. (Vol. VII) 1135. The Secretary did not contest that the DeSantis Plan violates the non-diminishment provision of Article III, Section 20(a). *Id.* at 1135-1201. Instead, the Secretary's motion focused largely on the novel argument that application of the non-diminishment provision in North Florida

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

[6] *Id.*

violates the Fourteenth Amendment of the U.S. Constitution. *Id.* at 1171-89. Petitioners filed a response on May 19. App. (Vol. VII) 1202.

The next day, May 20, the First District issued a preliminary order reinstating the stay of the trial court's temporary injunction "pending the court's disposition of the [Secretary's] motion for review of the trial court's vacatur of the automatic stay." App. (Vol. I) 33. The Court had "determined there is a high likelihood that the temporary injunction is unlawful" because awarding a preliminary remedy "frustrated the status quo, rather than preserved it." *Id.* (citation omitted). Petitioners now file this emergency petition on the next business day.

NATURE OF THE RELIEF SOUGHT

Petitioners seek an emergency writ staying the First District's May 20 order so as to retain the status quo in which supervisors of elections prepare to implement both the Remedial and DeSantis Plans in advance of the 2022 primary elections. A stay of the First

District's decision is necessary to preserve this Court's ability to adjudicate the parties' appeals in time for the 2022 elections.[7]

Indeed, the status quo—as directed by the trial court's temporary injunction and the Secretary's subsequent instructions to supervisors of elections—is the most administratively sensible approach to adjudicating these exceedingly important questions. Under the status quo, if this Court ultimately grants Petitioners relief, the supervisors of elections in the affected counties will have had sufficient time to implement the Remedial Plan, as described below. At the same time, if the Court ultimately denies Petitioners relief, no harm will have been done as supervisors of election will be readily able to implement the DeSantis Plan.

ARGUMENT

A party with a right to seek review in this Court is generally entitled to a stay preserving the status quo pending review upon a showing of a likelihood of success on the merits and irremediable

[7] Should this Court conclude that the First District's May 20 preliminary ruling is sufficient to trigger its jurisdiction, Appellees urge the Court to immediately accept review, treat this petition as the Appellees' initial brief, grant the emergency interim relief requested herein, and ultimately vacate the First District's decision.

harm by the denial of a stay. *See, e.g.*, *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1039 (Fla. 1980). Petitioners easily satisfy both factors.

I. Petitioners are likely to prevail in reversing the First District Court of Appeal's preliminary order.

The First District erred by preliminarily finding that the trial court abused its discretion in granting Petitioners a temporary injunction. Indeed, Petitioners are highly likely to succeed on the merits of their claim.

A. The First District erred in holding that the temporary injunction altered the status quo.

The First District stayed the trial court's injunction order because it purportedly "frustrated the status quo, rather than preserved it." App. (Vol. I) 33 (quoting *Planned Parenthood of Greater Orlando, Inc. v. MMB Properties*, 211 So. 3d 918, 925 (Fla. 2017)). Not so. The status quo in this case—the "last actual, peaceable, noncontested condition which preceded the pending controversy"—is a map under which Black voters in North Florida have the ability to elect their candidate of choice. *Bowling v. Nat'l Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931). In every general election since 2016, Florida voters have voted under a congressional plan,

implemented and approved by this Court, in which Black voters were able to elect their candidate of choice in CD-5. App. (Vol. VI) 671. For six years, that plan has remained the uncontested status quo of the state.

This Court not only established that status quo in 2015, *see LWV I*, 172 So. 3d at 416, it declined the Governor's invitation to alter that settled precedent earlier this year. *Advisory Op. to Gov.*, 333 So. 3d 1106, 1108 (Fla. Feb. 10, 2022). And in developing new congressional plans this cycle, both the Senate and the House strove to preserve that status quo by retaining the configuration of North Florida that had been ordered by this Court and peaceably existed for over half a decade. *See supra* pp. 14-16.

The Governor's intervention upended that effort. Rejecting the bipartisan commitment to retaining the electoral power of Black voters in North Florida consistent with constitutional requirements, the Governor unilaterally concluded that the Fair Districts Amendment was unconstitutional, drew his own map, and forced it through the Legislature under a legal theory that even supporters of his plan admitted was a novel one. *See* App. (Vol. VI) 559-60, 563-64. It is the DeSantis Plan, not the trial court's order, that disrupted

the "last actual, peaceable, noncontested condition which preceded the pending controversy," *Bowling*, 135 So. at 544.

Indeed, if the mere passage of a law worked to create a new status quo, as the First District seems to suggest, Florida's courts would be barred from temporarily enjoining any legislative enactment no matter its constitutionality. Unsurprisingly, this Court's precedent has rejected that absurd result. *See, e.g.*, *City of Miami Beach v. Clevelander Ocean, L.P.*, No. 3D21-1345, 2022 WL 610218 (Fla. 3d DCA 2022) (affirming temporary injunction defining status quo as landowners' rights as they existed *before* new legislation repealing those rights was passed); *accord Lieberman v. Marshall*, 236 So. 2d 120, 124-26 (Fla. 1970) (affirming a temporary injunction that had been issued to restore the peace at a university "after the [student] occupation and rally already had begun" and explaining "the status quo sought to be preserved was . . . the last, peaceable, uncontested condition preceding such confrontation and occupation" (citing *Bowling*, 135 So. at 544)). As this Court explained in *Bowling*:

> [T]he status quo which will be preserved by preliminary injunction is meant the last actual, peaceable, noncontested condition which preceded the pending controversy, and *equity will not permit a wrongdoer to shelter himself behind a suddenly and secretly changed*

> *status, although he succeeded in making the change before the hand of the chancellor has actually reached him.*

135 So. at 544 (emphasis added).

In suddenly dismantling CD-5, the DeSantis Plan upset the status quo—along with the settled expectations of voters and legislators alike. The trial court's temporary injunction, by contrast, preserves the last peaceable condition—a congressional plan where Black voters in North Florida can elect their candidate of choice. The First District thus erred in determining that the temporary injunction altered rather than preserved the status quo.

B. The First District erred in holding that the need for certainty and continuity warrants a stay.

The First District erred in holding that reinstating the stay would promote certainty and continuity. The state's election administrators were *already* preparing to implement the DeSantis Plan and the Remedial Plan before the First District issued its order, notwithstanding the trial court's temporary injunction. And after the trial court vacated the automatic stay, the Secretary asked the state's election administrators to "proceed on two fronts and plan to implement both" plans. App. (Vol. VII) 1577 (emphasis in original). That makes good sense: Allowing the state's election officials to

prepare both plans now eases the state's implementation of the final plan while this exceedingly important case is resolved through the appellate process. Reinstating the stay, as the First District did, therefore disrupts rather than facilitates the sensible administration of the state's elections. Neither the law, nor the equities, nor the facts support that decision.

First, no doctrine or record evidence supports a finding that it is too late to order Petitioners' relief for the 2022 elections. In prior briefing the Secretary has cited the *Purcell* principle, but as the trial court explained, "*Purcell* is a creature of the *federal* courts, where it was created as a means of restraining federal interference in the administration of state elections on the eve of an election, as demonstrated by all of the federal precedent the Secretary cites in support of the principle. It has no bearing on state courts." App. (Vol. I) 24. New York's highest state court recently concurred, explaining that *Purcell* "does not limit state judicial authority where, as here, a state court must intervene to remedy violations of the State Constitution." *Harkenrider v. Hochul*, 2022 NY Slip Op. 02833, at 28 n.16 (N.Y. Apr. 27, 2022).

Nor have Florida courts developed a *Purcell*-like principle; neither of the cases the Secretary has previously cited for that proposition applies here. In *State ex rel. Haft v. Adams*, 238 So. 2d 843 (Fla. 1970), the Florida Supreme Court declined to grant a writ of mandamus to prohibit the Secretary from placing certain candidates' names on the ballot, *just three weeks* before the primary election, where a candidate, who was seeking to force others off the ballot, had discovered an alleged error weeks earlier and waited to file his suit to "belatedly take advantage" of the situation so that no other candidate could have gained access to the ballot by the time his suit was heard. *See* 238 So. 2d at 845. Under those specific circumstances, the Court denied relief; it did not set a bright-line rule that injunctions near elections are disfavored. And in *State ex rel. Walker v. Best,* 163 So. 696, 697 (Fla. 1935), the Florida Supreme Court refused to order a town clerk to publish a new amendment to the town charter *15 days* before the election, based not on a *Purcell*-like standard, but on the town's charter, which required such amendments to be published not less than 25 days before.

Second, even if *Purcell* did apply, we are not days or weeks from an election. Florida's primary, on August 23, is one of the latest in

the nation. App. (Vol. I) 25. "This is therefore not the typical eve-of-election case in which judicial relief may disrupt an election, and instead more resembles the many other cases in which state courts have enjoined redistricting plans in the months before an election." *Id.*; *see also Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (invalidating plan on February 14, 2022, about three months before North Carolina's May 17 primary elections); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (invalidating plan on February 7, 2018, about three months prior to Pennsylvania's May 15 primary elections; plan ordered on February 23); *Wis. Legis. v. Wisc. Elections Comm'n*, 142 S. Ct. 1245 (2022) (remanding to state supreme court on March 23 for further proceedings to select a redistricting plan, ahead of August 9 primary elections).

Moreover, the Remedial Plan "affect[s] just a handful of counties" and therefore will have "minimal impacts on the [DeSantis] Plan" and "can be implemented quickly and without significant administrative difficulties." App. (Vol. VI) 698-99. As the Secretary's email to the state's election administrators suggests, the Remedial Plan is simple enough to implement that their offices can prepare to implement two plans at the same time.

The record bears this out. Petitioners submitted affidavits from five current and former senior officials of supervisors of elections offices across the state who show their offices *can* implement a remedial plan in time for the 2022 elections. *See* Affidavit of Mark Earley, Leon County Supervisor of Elections, App. (Vol. VI) 774-78 (office can implement any remedial plan received by May 27, 2022); Affidavit of Christopher Moore, Deputy Leon County Supervisor of Elections, App. (Vol. VII) 1048-52 (same); Affidavit of Nicholas Shannin, Counsel for the Supervisor of Elections of Orange County, App. (Vol. VII) 1035-39 (same); Affidavit of Lori Edwards, Polk County Supervisor of Elections, App. (Vol. VII) 817-24 (same); Affidavit of Representative Tracie Davis, App. (Vol. VII) 1040-1043 (testified as 14-year veteran of the Duval County Supervisor's office that the office is well practiced in managing complicated districting schemes and should be capable of implementing a remedial plan if received by the end of May).

In response, the Secretary provided three affidavits—only two from county election administrator offices—that stand for the proposition that implementation of the Remedial Plan would create administrative inconvenience. But the Secretary's own instructions

to county election officials bely that proposition, as they make clear that officials can easily administer both plans simultaneously. Plan. App. (Vol. VII) 1577. For another, the burdens those affidavits identify, such as rescheduling meetings and expending additional funds, show not impossibility but mere inconvenience, and inconvenience is insufficient to overcome Petitioners' overwhelming interest in obtaining relief for their constitutional injuries. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (finding that "administrative convenience" is not a sufficient reason to uphold unconstitutional law). As the trial court found, while "its order may cause inconvenience, hard work, and expense" those minor issues "do not outweigh Petitioners' rights." App. (Vol. I) 25; *see also* App. (Vol. VII) 1546 (trial court "did not find it persuasive" that certain counties purportedly "couldn't accommodate" preparing to implement both plans).

Accordingly, rather than avoid confusion, the First District's order creates it. Under the status quo, the state's election officials were preparing implementation of both the Remedial and DeSantis plans while Petitioners' exceedingly important claim for injunctive

relief is fully adjudicated. The First District's order upends that approach.

C. The First District did not dispute the trial court's finding that Petitioners are likely to succeed in showing that the DeSantis Plan is unconstitutional.

The trial court correctly found that the DeSantis Plan violates the Florida Constitution—a finding that was disputed by neither the Secretary nor the First District in the appellate proceedings that followed. Indeed, the Secretary did not dispute at *any* point in his 53-page brief before the First District that the DeSantis Plan violated the Florida Constitution's non-diminishment standard.

It is easy to see why. It is this Court's settled law that "the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates." *Apportionment I*, 83 So. 3d at 625. The protection of racial and language minorities is a Tier I standard, "meaning that the voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process." *Id.* at 615. And this Court held during the last redistricting cycle that the

non-diminishment standard required the "East-West" configuration of CD-5. *See LWV I*, 172 So. 3d at 406.

The DeSantis Plan unmistakably violates the non-diminishment standard. Benchmark CD-5 was a Black-performing district that "united Black communities in North Florida that pre-date the Civil War and arose from the slave and sharecropping communities that worked the state's cotton and tobacco plantations." App. (Vol. I) 12. While these communities have existed for more than a century and half, the trial court correctly found that their residents were unable to elect candidates of their choice until the modern era due to deliberate efforts by the State to disenfranchise Black voters. *Id.*

Benchmark CD-5 afforded these voters a voice in Congress. The trial court found that Black voters in Benchmark CD-5 have been able to consistently elect their candidates of choice since the district was created in 2015. Black voters are the largest racial group of registered voters in the district and accounted for 49.1 percent of the total population and 77.7 percent of the minority population in the district. *Id.* at 17. Black voters were also the largest group of voters in each Democratic primary election since 2015 and cast a plurality

of votes in the 2016 and 2018 general elections. *Id.* Given the extraordinary political cohesion of Black voters in Benchmark CD-5, the trial court concluded that Black voters had the ability to elect their preferred candidates in that district—and, indeed, elected Black Democrat Al Lawson to Congress in 2016, 2018, and 2020. *Id.*

Black voters in North Florida thus inarguably had the ability to elect candidates of their choice in Benchmark CD-5, but the DeSantis Plan diminishes that ability by carving up the district and cracking its Black population among four new districts (CD-2, CD-3, CD-4, and CD-5), none of which provide Black voters an opportunity to elect their preferred candidates. *Id.* at 17-18. White voters comprise a majority of the registered voters and population in each of these districts and would have cast the majority of votes in 2016, 2018, and 2020 in both the general and Democratic primary elections. App. *Id.* at 17-18. Black voters are so strategically diluted across these districts that of the 367,467 Black Floridians in Benchmark CD-5, "not one of these individuals will reside in a district in which they have the ability to elect their candidates of choice." App. (Vol. VI) 660. And in all four of the new North Florida congressional districts, white-preferred candidates won in all eight of the statewide general

elections examined by Petitioners' expert Dr. Ansolabehere. *Id.* at 673. The upshot of this data is clear: The DeSantis Plan "disperses the Black voters that previously resided in Benchmark CD-5 among majority-white districts where the white residents vote cohesively for candidates that are not supported by Black voters. Accordingly, under the [DeSantis Plan], Black voters will no longer be able to elect their candidate of choice in North Florida." *Id.* at 674.

Legislative leaders conducted their own functional analysis of the DeSantis Plan that corroborates the conclusions of Petitioners' expert. According to House Redistricting Chair Leek, legislative staff "did a functional analysis and confirm[ed] [that the new configuration of districts in North Florida] does not perform" for Black voters. App. (Vol. I) 18. Indeed, at no point during the special session, before the trial court, or before the First District did legislative leaders assert that the DeSantis Plan complies with the non-diminishment standard. And, as the trial court found, the Secretary "offer[ed] no credible contrary evidence: her experts neither performed a functional analysis nor contested Dr. Ansolabehere's findings." *Id.*

In sum, Dr. Ansolabehere evaluated the statistical data required to conduct a functional analysis, including statistics on the voting-

age populations, voter registration and turnout data, and election results. *See Apportionment I*, 83 So. 3d at 615. These data show that the DeSantis Plan cracks Black voters in Benchmark CD-5 into four new districts in which they have no opportunity to elect candidates of their choice to Congress, which is precisely the sort of diminishment in voting power that the Florida Constitution prohibits.

II. Denying Petitioners' application for a stay of the First District's order will cause Petitioners irreparable harm, while granting it will not prejudice Respondent.

Permitting the First District's preliminary order to stand will cause Petitioners irreparable harm. As the trial court concluded in its "broad discretion," *City of Sarasota v. AFSCME Council '79*, 563 So. 2d 830, 830 (Fla. 1st DCA 1990), "[a]llowing the automatic stay to remain in place would almost certainly result in irreparable harm to Plaintiffs and Florida voters," because "[m]aintaining the stay and failing to quickly determine this case on the merits, will force Plaintiffs and many North Florida voters to cast their votes according to an unconstitutional congressional district map." App. (Vol. I) 31; *see also Bd. of Cnty. Comm'rs v. Home Builders Ass'n of W. Fla., Inc.*, 325 So. 3d 981, 985 (Fla. 1st DCA 2021) (upholding trial court's determination "that irreparable harm was presumed based on the

existence of a constitutional violation"); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1263–64 (Fla. 2017) (finding that law that violated constitution would lead to irreparable harm absent injunctive relief); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury.").[8]

A remedial plan must likely be implemented within the next few weeks to ensure that the 2022 congressional elections proceed on time under a lawful districting plan. But resolution of the Parties' multiple appeals will make that deadline almost impossible to meet. *See League of Women Voters v. Detzner*, 178 So. 3d at 8 ("To allow the appellate process to take its full course through the completion of review by this court followed by possible en banc review, could potentially put the supreme court in the position of having to delay the remedy."). Consequently, if Petitioners are to obtain relief, election administrators must continue preparing the Remedial Plan *now* to ensure their ability to effectuate any relief granted by this

[8] In weighing whether an injury cannot be remedied at law and thus constitutes irreparable harm, this Court has relied on precedent from federal courts. *See, e.g.*, *Gainesville Woman Care*, 210 So. 3d at 1263–64.

Court. The First District's preliminary order reinstating the stay makes that impossible.

Nor would staying the First District's order prejudice the Secretary. The Secretary does not dispute that Petitioners will suffer irreparable harm if forced to vote under an unconstitutional plan.[9] And under the status quo before the First District's order, the Secretary requested that election administrators prepare *both* the DeSantis and the Remedial Plans, preserving the state's ability to effectuate whatever order this Court issues. Consequently, the only decision respectful of the equities and this Court's jurisdiction requires a return to the status quo by staying the First District's preliminary order.

WHEREFORE, Petitioners request that the Court stay the First District's order to preserve the status quo until this Court can fully adjudicate the case.

[9] Before the First District, the Secretary simply argued the unremarkable point that the Plaintiffs will not suffer irreparable harm if they lose on the merits. App. (Vol. VII) 1197.

Dated: May 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2022 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

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