**IN THE SUPREME COURT OF FLORIDA**

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| BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al.,<br><br>Petitioners,<br><br>v.<br><br>CORD BYRD, in his official capacity as Florida Secretary of State, et al.,<br><br>Respondents. | Case No.: SC22-685<br>L.T. No.: 1D22-1470<br>2022-ca-000666 |

# PETITIONERS' REPLY BRIEF IN SUPPORT OF EMERGENCY PETITION FOR CONSTITUTIONAL WRIT

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## INTRODUCTION

Petitioners ask this Court to stay the First District's order reinstating the automatic stay of the trial court's order temporarily enjoining the use of the DeSantis Plan and ordering implementation of the Remedial Plan. Behind this complicated syntax is a simple reality: The First District's decision would permit the DeSantis Plan to take effect despite the trial court's finding that that plan is *facially unconstitutional* and the First District's finding that the DeSantis Plan upended the status quo. But the First District's order was erroneous as matter of law; temporary mandatory relief is available to plaintiffs who have demonstrated a violation of their legal rights and irreparable harm—two things the First District does not dispute—and federal law authorizes state courts to adopt remedial plans in these circumstances. Petitioners thus urge this Court to take up this Petition now, stay the First District's order, and vindicate "this Court's duty, given to it by the citizens of Florida, to enforce adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid." *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 607 (Fla. 2012).

## ARGUMENT

### I. The First District's stay was based on the erroneous view that the trial court had no option but to leave an unconstitutional redistricting plan in place.

Just today, the First District explained its decision to reinstate the automatic stay of the trial court's order temporarily enjoining the use of the DeSantis Plan and ordering implementation of the Remedial Plan. Notably, that result was based not on the constitutionality of the DeSantis Plan, Supp. App 23-24, nor on the Secretary's misconception that the DeSantis Plan was the status quo for the purposes of a temporary injunction, Supp. App. 34 (explaining "the status quo here plainly is the congressional districting as it existed before SB 2-C went into effect"). Instead, the First District's order reinstating the stay was based on plain errors of both state and federal law.

First, the First District erred in holding that Florida law does not allow litigants to obtain affirmative relief through a temporary injunction. That is just not true: Florida law permits plaintiffs to seek temporary *mandatory* injunctive relief "where irreparable harm will otherwise result, the party has a clear legal right thereto, and such party has no adequate remedy at law." *Wilson v. Sandstrom*, 317 So.

732, 736 (Fla. 1975). Temporary mandatory injunctive relief is especially necessary where delaying "the remedy would necessarily involve a denial of the right." *Kellerman v. Chase & Co.*, 135 So. 127, 128 (Fla. 1931). The First District did not evaluate whether these elements were met here. This threshold error alone warrants a stay of the First District's order.

In fact, all of the elements of a temporary mandatory injunction were satisfied here. The trial court's decision to enjoin the DeSantis Plan and order the adoption of the Remedial Plan was premised on unrebutted findings that (1) the DeSantis Plan diminishes Black electoral power in North Florida in violation of the Fair Districts Amendment's non-diminishment provision, (2) Petitioners lack an alternative remedy at law, and (3) delaying implementation of a remedial plan would effectively nullify Petitioners' constitutional right to a lawful congressional plan for the 2022 elections. App (Vol. I) 15-28. If such relief should be granted anywhere, it should be granted here. Indeed, this Court has affirmed temporary mandatory injunctions where far less important rights were at stake. *See, e.g.*, *Kellerman*, 135 So. at 128 (affirming temporary mandatory injunctive relief to enforce tomato contract because "it is a matter of common

knowledge that the tomato crop is . . . perishable"); *Wilson*, 317 So. 3d at 737 (affirming same relief to protect "the public interest or rights" in dog racing and State's revenue therefrom).

Second, the First District erred as a matter of federal law in concluding that the trial court had no choice but to let an unconstitutional redistricting plan take effect. As the U.S. Supreme Court has explained, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Growe v. Emison*, 507 U.S. 25, 33-34 (1993) (citation omitted); *see also Branch v. Smith*, 538 U.S. 254, 270, 272 (2003) (finding that federal law expressly authorizes "action by state and federal courts" to "remedy[] a failure" by state legislature "to redistrict constitutionally"). Such appropriate action includes "adopt[ing] a constitutional plan 'within ample time . . . to be utilized in the [upcoming] election.'" *Growe*, 507 U.S. at 34 (citing *Scott v. Germano,* 381 U.S. 407 (1965)). In ordering the Remedial Plan, the trial court thus acted pursuant to both its injunctive powers under Florida law *and* its recognized authority

under federal law to ensure that Florida has a valid congressional plan in time for the 2022 elections.

Accordingly, the First District was wrong to assert that, when faced with two facially unconstitutional plans, the trial court's only option was to throw its hands up and allow one to take effect. Rather, the trial court appropriately exercised its authority and discretion under Florida and federal law to order implementation of a map that remedied both the unconstitutional malapportionment in the prior congressional plan *and* the unconstitutional diminishment in the DeSantis Plan—thus returning Florida to the status quo as closely as possible. As this Court has explained, "a temporary injunction is an equitably remedy" and "a court of equity is a court of conscience; it should not be shackled by rigid rules of procedure and thereby preclude justice being administered according to good conscience." *Planned Parenthood of Greater Orlando, Inc. v. MMB Properties*, 211 So. 3d 918, 925 (Fla. 2017) (quotations omitted).

Indeed, had the trial court *only* enjoined the DeSantis Plan without providing a temporary remedy, it not only would have left the state without a valid map, it would have risked ceding control of the congressional plan to the federal courts. *See Growe*, 507 U.S. at 34

(permitting federal courts to intervene where "state branches . . . fail timely to perform" their duty to validly redistrict). Neither Florida nor federal law required such a result. The trial court appropriately spared all parties from another round of litigation in crafting relief at the same time it enjoined the DeSantis Plan. Indeed, it would have been an abdication of the trial court's responsibility to do otherwise.[1]

## II. This Court must issue a writ to preserve the status quo and its ability to exercise jurisdiction in this case.

Pursuant to its All Writs authority, this Court must stay the First District's order to preserve the status quo or else lose the ability to exercise its jurisdiction over this exceedingly important case.

The Florida Constitution authorizes this Court to issue "all writs necessary to the complete exercise of its jurisdiction," Fla. Const. art. V, § 3(b)(7), both in cases currently pending before it and those that will likely "invoke" its jurisdiction "in the future," *Roberts v. Brown*,

[1] If, however, this Court agrees with the First District that the trial court's remedy was unlawful, this Court should allow only that part of the First District's stay to remain in place. The trial court independently found the DeSantis Plan unconstitutional and temporarily enjoined its use. Because the First District takes no issue with the trial court's conclusion on this front, there is no basis to stay the trial court's injunction of the DeSantis Plan, leaving it to the parties and state or federal courts to impose a remedial plan in a separate proceeding.

43 So. 3d 673, 677 (Fla. 2010). Contained in that authority is the Court's power to stay orders from intermediate appellate courts that so alter the status quo that they threaten the Court's jurisdiction. *See 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).

There is no question that the First District's order warrants exercise of this Court's All Writs authority. Both the trial court and the First District agreed that the DeSantis Plan altered the status quo, under which Black voters in North Florida had the opportunity to elect their preferred candidates. The First District's order not only allows that plan to take effect for the 2022 elections, it precludes this Court from holding otherwise. Under the trial court's order, the Secretary instructed elections administrators to be prepared to implement *both* the DeSantis and Remedial Plans. App. (Vol. VII) 1576-77. Accordingly, the trial court's order protected this Court's ultimate jurisdiction by ensuring that election administrators can feasibly implement the Remedial Plan for the 2022 elections should this Court agree with the trial court on the merits, just as they are prepared to implement the DeSantis Plan if this Court disagrees.

The First District's order upsets the status quo and does so on clearly erroneous grounds. *See supra* Section I. Because we are now approaching the end of May, the First District's reinstatement of the stay will effectively eliminate this Court's ability to provide Petitioners relief in time for the 2022 elections. To protect its jurisdiction over this exceedingly important case during the appellate process, the Court must preserve the status quo by exercising its All Writs authority to stay the First District's order and reinstate the trial court's temporary injunction pending this Court's final review. *See Data Targeting, Inc.*, 140 So. 3d at 514 (staying First District order pursuant to All Writs authority).

## III. Petitioners are likely to succeed on the merits, as the DeSantis Plan is invalid under this Court's clear precedent.

At bottom, the Secretary asks this Court to find that *the Court itself* violated the U.S. Constitution when it imposed the Benchmark Plan last cycle, and then violated it again this cycle when it approved the state's legislative maps. S*ee League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015) ("*LWV II*") (ordering imposition of Benchmark CD-5); *In re S. J. Res. of Legis. Apportionment 100*, 334 So. 3d 1282 (Fla. 2022) (approving 30 House districts and 10 Senate

districts drawn to comply with non-diminishment provision). But of course, the Court did no such thing.

The Secretary does not seriously dispute that the DeSantis Plan violates the Florida Constitution's non-diminishment standard. *See* Response at 15 n.9. Even if there were a credible dispute on this point, the trial court's determination that the DeSantis Plan violated the non-diminishment standard was based not only on legal conclusions, but on factual determinations that cannot be disturbed absent a showing of clear abuse of discretion. *See Gold Coast Chem. Corp. v. Goldberg*, 668 So. 2d 326, 327 (Fla. 4th DCA 1996).

Instead of thoughtfully engaging with the trial court's findings, the Secretary glosses over them, contending that adopting a district closely based on the Benchmark Map's CD-5—such as Plan 8015's CD-5—is unquestionably a racial gerrymander. *See* Response at 40-61. But a districting plan violates the Fourteenth Amendment only if "(1) race is the 'dominant and controlling' or 'predominant' consideration in deciding to 'place a significant number of voters within or without a particular district,' and (2) the use of race is not 'narrowly tailored to serve a compelling state interest.'" *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 160-61 (2015) (citations

omitted). A trial court's "assessment of a districting plan . . . warrants significant deference on appeal." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

Here, the trial court found that the Secretary did "not establish[] that race was the predominant factor," but was rather just "one of several factors, in the drawing of 8015's CD-5." App. (Vol. I) 19. As the trial court explained, "the Legislature drew 8015 to comply with the Florida Supreme Court's prior rulings regarding CD-5," *id.* (citing *LWV II*, 179 So. 3d at 272), and as the U.S. Supreme Court has held, a desire to avoid litigation is a sufficient race-neutral reason to adopt a plan. *See Abbott v. Perez*, 138 S. Ct. 2305, 2327 (2018). Moreover, by altering only those lines of Benchmark CD-5 necessary to account for population changes, Plan 8015's CD-5 is independently motivated by the "legitimate state objective" of "preserving the cores of prior districts." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 764 (2012) ("The desire to minimize population shifts between districts is clearly a valid, neutral state policy."). There is thus no basis to conclude that the trial court abused its discretion in determining race did not predominate in Plan 8015's CD-5, and this Court must defer to the

trial court's factual finding on that score. *See Cooper*, 137 S. Ct. at 1465 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).[2]

But even if this Court found an abuse of discretion on that basis, the trial court found the Legislature's configuration of Plan 8015's CD-5 was narrowly tailored to advance compelling state interests. App. (Vol. I) 20-22. The non-diminishment provision "aims at safeguarding the voting strength of minority groups against . . . retrogression." *In re S. J. Res.*, 83 So. 3d at 620; *see also id.* at 619. The trial court thus was well within its discretion in concluding that "compliance with the Fair Districts Amendment's non-diminishment provision" and "addressing the history of voting-related racial discrimination and . . . lack of representation in North Florida" constitute compelling state interests. App. (Vol. I) 20-21. As the U.S. Supreme Court has long presumed with respect to compliance with the Voting Rights Act's mirror provision, such considerations constitute a compelling state interest. *See, e.g.*, *Wis. Legis. v. Wis.*

[2] The Secretary claims the tiered structure of the Fair Districts Amendment proves that race predominated in the Legislature's drawing of Plan 8015, *see* Response at 41-49, but the Amendment lists multiple factors within each tier, *see* Fla. Const. art. III, § 20(a), and explicitly provides that no factor necessarily prevails over another within a tier, *see id.* § 20(c).

*Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) ("We have assumed that complying with the VRA is a compelling interest."); *Abbott*, 138 S. Ct. at 2315; *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017). While the Secretary suggests compliance with the non-diminishment provision cannot be a compelling state interest after *Shelby County v. Holder*, 570 U.S. 529 (2013), this Court did not question the continuing application of that provision post-*Shelby County* in 2015 when it adopted the Benchmark CD-5. Nor should it; Florida's non-diminishment provision raises no similar sovereignty concerns. It is Florida's prerogative to impose restrictions on its own redistricting processes, period.

Finally, the trial court correctly found that "Plan 8015's CD-5 is narrowly tailored to address the[] compelling interests" of preventing future diminishment of minority voters' ability to elect their candidates of choice in North Florida and remedying historical voting-related discrimination in North Florida. App. (Vol. I) 21. The Legislature "had good reasons to believe" that Plan 8015's configuration of CD-5 "was necessary . . . to avoid diminishing the ability of black voters to elect their preferred candidates." *Bethune-Hill*, 137 S. Ct. at 791; *see also* App. (Vol. I) 21 (citing "detailed

testimony" from legislative record demonstrating "that [Plan] 8015's configuration of CD-5 is necessary to" comply with non-diminishment provision). This "strong showing of a pre-enactment analysis with justifiable conclusions" demonstrates narrow tailoring to a compelling state interest. *Wis. Legis.*, 142 S. Ct. at 1249 (citing *Abbott*, 138 S. Ct. at 2325). Moreover, the trial court also made the factual finding that Plan 8015's CD-5 was narrowly tailored because it fell within a reasonable range of compactness. Indeed, the district is more compact than other congressional districts in the United States from the last redistricting cycle that withstood federal racial gerrymandering claims, as well as more compact than 65 other congressional districts nationwide. App. (Vol. I) 22.

## IV. This Court has adequate time and authority to prevent irremediable harm to Florida voters.

The petition is now ripe for the Court's *immediate* decision staying the First District's order. Should this Court find that it needs more time to consider the issues, however, timing poses no barrier to the relief Petitioners seek.

While Florida's Supervisors indicated that they needed to begin implementing a plan by the end of May to meet other election

deadlines, that assertion assumed a June 17 candidate filing deadline. *See* Fla. Stat. § 99.061(1). But that date is hardly set in stone. To the contrary, it is entirely within *this Court's authority* to adjust election deadlines to ensure that Floridians are not forced to vote under an unconstitutional plan. Indeed, that is precisely what other state courts have done in this election cycle to give both the court and election administrators time to implement remedial plans. *See, e.g.*, *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *12 (N.Y. Apr. 27, 2022) (New York's highest court ordering new election schedule even after candidate filing period had passed to "allow[] time for the adoption of new constitutional maps"); *Harper v. Hall*, 380 N.C. 317, 330 (2022) (North Carolina Supreme Court suspending candidate filing deadlines until it could adjudicate merits of plaintiffs' claim that congressional plan violated state constitution); *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106, at *1-2 (Pa. Feb. 23, 2022) (Pennsylvania Supreme Court modifying pre-election deadlines to ensure lawful congressional plan was in place for 2022 elections). Here, too, this Court may issue an order that, for example, briefly extends the state's filing deadline and correspondingly shortens the period during which the Secretary must certify the final list of

candidates to supervisors of elections to offset that delay. *See* Fla. Stat. § 99.061(6).

This Court's hands are not tied by the election calendar; it is squarely within its authority to fashion a schedule that will protect Black voters from irremediable harm. There is no basis to penalize Florida voters based on the election calendar, particularly where Petitioners have moved for relief as fast as possible. They filed their complaint the same day the DeSantis Plan was enacted and sought a temporary injunction two business days later. While the First District criticized Plaintiffs for not seeking final relief on the merits, at the trial court's first scheduling hearing, the Secretary's counsel *agreed* that a temporary injunction was the proper course. App. (Vol. VIII) 1597. Petitioners then filed this petition one business day after the First District stayed the trial court's temporary injunction. And Petitioners file this reply brief mere hours after the Secretary responded. It would violate notions of fair play and substantial justice to find that "as fast as possible" was not fast enough.

**WHEREFORE**, Petitioners request that the Court stay the First District's order to preserve the status quo until this Court adjudicates the merits of Plaintiffs' temporary injunction motion.

Dated: May 27, 2022

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify under Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B) that this opposition brief is computer generated in 14-point Bookman Old Style and has a word count of 3,162.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 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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