Filing # 148446537 E-Filed 04/26/2022 07:34:22 PM

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., EQUAL GROUND EDUCATION FUND, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., LEAGUE OF WOMEN VOTERS OF FLORIDA EDUCATION FUND, INC., FLORIDA RISING TOGETHER, PASTOR REGINALD GUNDY, SYLVIA YOUNG, PHYLLIS WILEY, ANDREA HERSHORIN, ANAYDIA CONNOLLY, BRANDON P. NELSON, KATIE YARROWS, CYNTHIA LIPPERT, KISHA LINEBAUGH, BEATRIZ ALONSO, GONZALO ALFREDO PEDROSO, and ILEANA CABAN,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Florida Secretary of State, ASHLEY MOODY, in her official capacity as Florida Attorney General, the FLORIDA SENATE, the FLORIDA HOUSE OF REPRESENTATIVES, WILTON SIMPSON, in his official capacity as the President of the Florida Senate, CHRIS SPROWLS, in his official capacity as the Speaker of the Florida House of Representatives, RAY RODRIGUES, in his official capacity as Chair of the Senate Committee on Reapportionment, and TOM LEEK, in his official capacity as Chair of the Chair of the House Redistricting Committee,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

It is settled law that the Florida Constitution prohibits the Legislature from enacting a congressional redistricting plan that diminishes the ability of racial minorities to elect representatives of their choice. *See* Art. III, § 20(a), Fla. Const. This "non-diminishment standard" requires courts to determine whether minority voting strength has diminished under the new plan when compared to the old plan. And the Florida Supreme Court has made clear that courts have an obligation to invalidate congressional redistricting plans when they violate the Florida Constitution. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015).

Controlling precedent requires the issuance of temporary injunctive relief against the congressional plan drawn and signed into law by Governor Ron DeSantis on April 22, 2022 (the "DeSantis Plan"). In 2015, the Florida Supreme 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.*, 172 So. 3d at 403. That district—Congressional District ("CD-") 5—has enabled Black voters to elect their candidate of choice in every election since it was adopted. And the Legislature, mindful of the Florida Supreme Court's earlier ruling in *League of Women Voters of Florida*, chose to retain it in every draft congressional plan that it debated during the 2021–2022 redistricting process—including the plan that Governor DeSantis vetoed late last month before calling a special session to ensure the passage of his own plan.

The DeSantis Plan completely dismantles CD-5, and there is no serious dispute that it violates the non-diminishment standard in doing so. Rather than preserve a North Florida district where Black voters would retain their ability to elect their congressional candidates of choice, the DeSantis Plan cracks Black voters among four new districts in which they have no realistic chance to elect their candidate of choice. Legislative leaders freely acknowledged during the special

session that the dissolution of CD-5 violates the non-diminishment standard. Governor DeSantis did not dispute this. Instead, he derided CD-5 as an unconstitutional "racial gerrymander" and claimed that the Florida Supreme Court erred in ordering its adoption. But Governor DeSantis has no authority to overrule Supreme Court precedent, which binds this Court and makes clear that CD-5 is a lawful district, the elimination of which inarguably violates the non-diminishment standard.

Plaintiffs seek temporary relief enjoining Defendants from administering the 2022 primary or general election for Congress under the DeSantis Plan. Plaintiffs have no adequate remedy at law for such a clear violation of their constitutional rights, and it is well settled that infringement of voting rights safeguarded by the constitution—even for just one election—causes irreparable injury. Injunctive relief in this case would serve the public interest and is feasible under the current election timeline. While Plaintiffs have challenged the DeSantis Plan in its entirety, this motion seeks temporary relief solely on the ground that the elimination of CD-5 violates the Florida Constitution's non-diminishment standard. Any injunction would therefore be limited to a handful of districts in North Florida and thus would not impact election preparations throughout most of the state. As Florida's Supervisors of Elections attest, such a narrow injunction is easily workable ahead of Florida's primary on August 23, 2022, one of the latest in the country.

The Florida Supreme Court has made clear that "[i]t is 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). By dismantling a congressional district that enabled Black voters to elect their candidates of choice under the previous plan, the

DeSantis Plan inarguably violates the Florida Constitution, and it is now *this* Court's responsibility to enjoin its use in the upcoming elections.

BACKGROUND

I. The Florida Supreme Court ordered the creation of the prior CD-5 to comply with the Fair Districts Amendment.

On November 2, 2010, Floridians voted by an overwhelming margin of 62.9% to 37.1% to enact the Fair Districts Amendment to the Florida Constitution.[1] Ex. 1-A[2]. The Amendment established new standards to constrain the Legislature's once-in-a decade exercise of its congressional reapportionment power, which are enumerated within two "tiers" in Article III, Section 20 of the Florida Constitution. Among the "Tier I" standards is a 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*." Art. III, § 20(a), Fla. Const (emphasis added). The inclusion of this italicized phrase—known as the "non-diminishment standard"—in Tier I "mean[s] that the voters placed this constitutional imperative as a top priority to which the Legislature must conform during the redistricting process." *In re S. J. Res.*, 83 So. 3d at 615, 677.

The Florida Supreme Court first enforced the non-diminishment standard in *League of Women Voters of Florida v. Detzner* ("*LWV I*"), 172 So. 3d at 363 (Fla. 2015). There, the plaintiffs challenged Florida's 2012 congressional plan as a violation of the Fair Districts Amendment's prohibition on partisan gerrymandering. While the plaintiffs alleged that numerous districts in the 2012 plan were the product of intentional partisan bias, the "focal point of the challenge" was CD-

[1] Florida voters adopted a virtually identical constitutional amendment—by a similarly lopsided margin—to reform Florida's legislative apportionment. Ex. 1-A; *see also* Art. III, § 21, Fla. Const. Unless otherwise noted, "Fair Districts Amendment" refers to the congressional amendment only.
[2] Due to the volume of the exhibits to be filed in support of this Motion and Memorandum, Notices of Filing attaching Exhibits 1-12 will be filed contemporaneously herewith.

5—a district described by the Florida Supreme Court as "visually not compact" and "bizarrely shaped" as it "[wound] from Jacksonville to Orlando, narrowing at one point to the width of a highway":

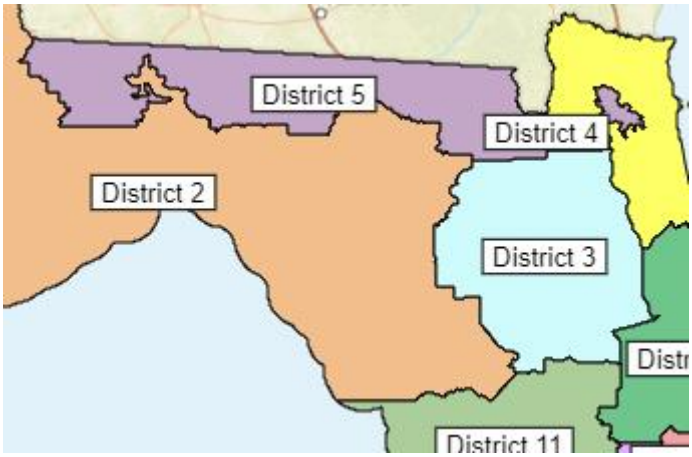
Id. at 402 (quotation omitted).

The *LWV I* plaintiffs alleged that this configuration of CD-5 "overpack[ed] Democratic-leaning black voters into the district . . . thereby diluting the influence of Democratic minorities in surrounding districts." *Id.* at 402–04. But the State contended that drawing CD-5 in this manner was necessary to comply with the non-diminishment standard, noting that Black voters in the Jacksonville area had a reasonable opportunity to elect candidates of their choice under the prior redistricting plan. *See id.* at 402 (citing *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1300–01 (N.D. Fla. 2002) (per curiam) (three-judge court)). The Court confirmed that the Florida Constitution required the Legislature to avoid diminishment of Black voters' ability to elect their candidate of choice, but disagreed that the North-South configuration was necessary to do so, noting that legislative staffers initially drew CD-5 in an East-West configuration spanning from Jacksonville to Leon and Gadsden Counties that resulted in a more compact district and similarly preserved the ability of Black voters to elect candidates of their choice. *Id.* at 403. The Court ordered the Legislature to redraw CD-5 in this East-West manner, concluding that this configuration was the "only alternative option" that complied with the constitutional non-diminishment standard. *Id.*

That configuration of CD-5—"Benchmark CD-5"—has been in place for the last three election cycles.

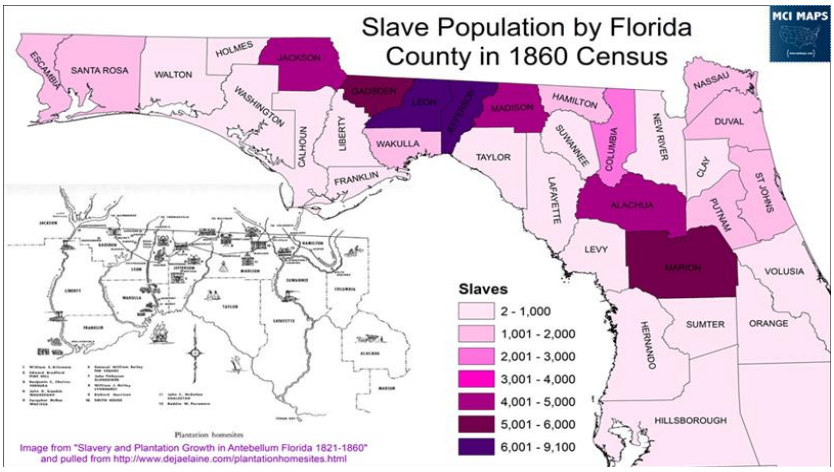
II. Benchmark CD-5 unites North Florida's historic Black communities.

Benchmark CD-5 extends from Jacksonville to Tallahassee and includes all of Baker, Gadsden, Hamilton, and Madison Counties, as well as portions of Columbia, Duval, Jefferson, and Leon Counties:



League of Women Voters of Fla. v. Detzner, 179 So. 3d 258, 271–72 (Fla. 2015). While both Tallahassee and Jacksonville have substantial Black populations, Black voters also make up a substantial portion of the lower-density counties that make up the rest of Benchmark CD-5. Gadsden County, for instance, is 55% Black, and Jefferson, Madison, and Hamilton Counties are all more than 30% Black. Ex. 1-Y.

Benchmark CD-5 unites historic Black communities in North Florida that pre-date the Civil War and arose from the slave and sharecropping communities that worked the state's abundant cotton and tobacco plantations, as shown below:



Ex. 3 at 8, Fig. 1. For much of the state's history, Black voters in these communities—and, indeed, in the state more broadly—have been unable to participate equally in the electoral process. As in many other southern states, Black voters in Florida had early electoral victories in the wake of Reconstruction: In 1870, for example, the state elected its first Black member of Congress, Josiah Walls. *Id.* at 9. But immediately after, the State commenced a centuries-long policy of disenfranchisement that erased these gains and made it impossible for Black voters to even register to vote. *Id.* at 9–11. These policies had their desired effect: Between 1876 and 1992, Florida did not elect a single Black candidate to Congress. *Id.* at 10.

The state's discriminatory voting practices and laws hit the Black residents of North Florida particularly hard. The federal Civil Rights Commission reported that of the 10,930 Black adults living in Gadsden County in 1958, only *seven* were registered to vote. *Id.* at 11. Political discrimination and oppression were felt in every county with a large Black population in North Florida. "According to a second U.S. Civil Rights Commission report, Black voters were confronted with threats, violence, and harassment when attempting to register. These tactics included cross burning, fire bombings, and threatening phone calls." *Id.* at 12.

Black voters in Florida found relief only after the passage of federal civil rights legislation. The enactment of the Voting Rights Act of 1965 sharply increased voter-registration rates in the

state's Black communities. *Id.* at 12. It also provided Black Floridians a means of challenging discriminatory redistricting schemes. *Id.* at 13–17. Through decades of litigation, Black Floridians fought against districting plans that fractured the state's Black populations, particularly in North Florida, to great effect. *Id*. In 1992, after Black and other minority voters successfully argued that the Voting Rights Act requires the creation of majority-Black and Black-opportunity districts, Florida finally elected its first Black representatives to Congress since Reconstruction. As history shows, without these hard-won districts, Black voters would be unable to elect their candidates of choice. *Id*.

III. After the Legislature indicated that it would protect CD-5 from diminishment, Governor DeSantis vetoed its plans and forced a special session.

After release of the 2020 census data, the Florida Senate and House of Representatives 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." Ex. 1-B; *see also* Ex. 1-C. To that end, the redistricting committees in both chambers provided their members with extensive presentations on the legal principles and standards that govern the process.

In those presentations and throughout the redistricting process, the Legislature emphasized the Florida Constitution's non-diminishment standard. Each chamber instructed its members that this 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.*, Ex. 1-D at 42 (recognizing that Florida Constitution incorporates federal retrogression standards); Ex. 1-E at 15 (same). And they explained that while the U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), "means the preclearance process established by the Voting Rights

Act is no longer in effect," that decision "does not affect the validity of the diminishment standard in the Florida Constitution." Ex. 1-F.

Among the districts that both chambers determined were protected from retrogression 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.*, Ex. 1-G at 3–4 (reporting that proposed Senate 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"); Ex. 1-H at 54–57, 62–65, 70–73, 78–81 (performing functional analyses of CD-5 for proposed Senate plans). Indeed, until the very last moment, every single congressional plan proposed by the House and Senate redistricting committees maintained the general configuration of CD-5 as it was drawn by the Florida Supreme Court and preserved Black voters' ability to elect their candidates of choice in North Florida. *See, e.g.*, Exs. 1-G, 1-I, 1-J, 1-K, 1-L.

Governor DeSantis, by contrast, aggressively lobbied for a plan that would dismantle Benchmark CD-5. He made it plain in public speeches that he would reject any proposal that maintained CD-5's configuration, *see* Ex. 1-M; invited the Florida Supreme Court to find CD-5 unconstitutional, which the Court declined to do, *see Advisory Op. to Governor*, No. SC22-139, 2022 WL 405381, at *1 (Fla. Feb. 10, 2022); and called on the assistance of a proxy to convince the House that its proposal for CD-5 was unlawful, *see* Ex. 1-N. Despite this pressure, and until just days before passing its first congressional plan, the Legislature remained steadfastly determined to protect CD-5 as required under the Fair Districts Amendment. *See* Ex. 1-O ("The Legislature refused to go along with the governor's demands during the two-month session, when leaders in both the House and Senate relied on a state constitutional requirement and preserved

Florida's minority-heavy districts[.]"). Indeed, in a rare moment of bipartisan unity, Democratic and Republican members of the House combined forces to challenge the position offered by Governor DeSantis's proxy. *See* Ex. 1-P.

The Senate ultimately passed, on a bipartisan basis, a congressional redistricting plan that retained the East-West configuration of Benchmark CD-5 that Governor DeSantis opposed. Ex. 1-Q. Thereafter, the Legislature attempted to appease Governor DeSantis by passing a redistricting plan on March 4, 2022, that significantly modified CD-5—but, the Legislature maintained, would avoid diminishing Black voters' ability to elect candidates of their choice in the district. Recognizing the plan's vulnerability under the non-diminishment standard, however, the legislation included an *alternative* plan—Plan 8015, or the "Backup Map"—that was intended to take effect if courts found that the primary plan diminished Black voting power in violation of the Florida Constitution. Ex. 1-Q. The Backup Map retained the East-West configuration of CD-5 approved in *LVW I*. The Legislature's attempt at prophylaxis reflected its position that Governor DeSantis's view of CD-5 was unconstitutional.

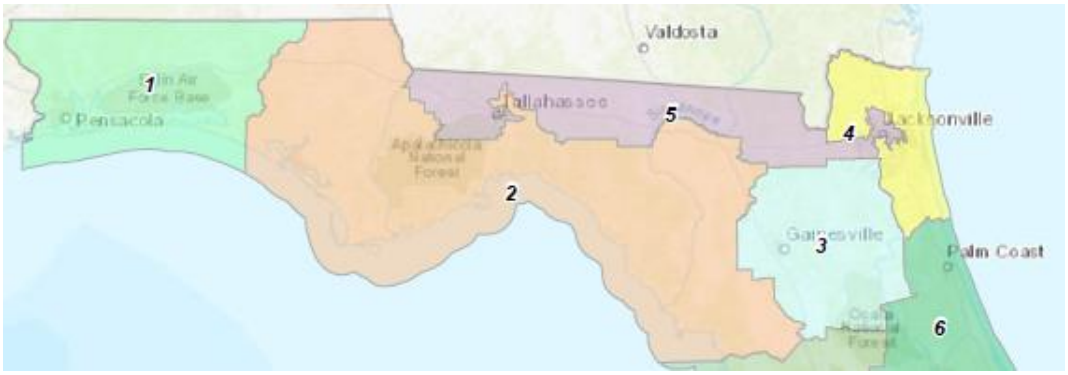
On the eve of those plans' passage, however, Governor DeSantis upended the redistricting process by again threatening to veto the plan's configuration of CD-5 and declaring it "dead on arrival":

Ex. 1-R. Ultimately, true to his word, Governor DeSantis vetoed the Legislature's plan on March 29, 2022, and called a special legislative session. Exs. 1-S, 1-T. In advance of the special session, House Speaker Chris Sprowls and Senate President Wilton Simpson informed lawmakers that

legislative staff would not draw new plans, and that the Legislature would instead take up Governor DeSantis's preferred congressional plan. Ex. 1-U. The intent of the special session, they explained, was "to provide the Governor's Office opportunities to present [a plan] before House and Senate redistricting committees." *Id.*

Governor DeSantis released his congressional plan on April 13, 2022, which eliminated any district resembling Benchmark CD-5, as shown below:

The Benchmark Plan (Attachment to Ex. 2):



The DeSantis Plan (Attachment to Ex. 2):

Throughout the special session, legislative leaders all but acknowledged that the DeSantis Plan resulted in the diminishment of Black voters' ability to elect their candidates of choice. Indeed, when asked on the House floor whether the configuration of CD-4 or 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."

Ex. 1-V. The Legislature nevertheless passed the DeSantis Plan on April 21, 2022, and Governor DeSantis signed it into law the next day. Ex. 1-W.

Plaintiffs include several Black Florida voters who resided in Benchmark CD-5 under the previous congressional plan and now reside in the new CD-2 or CD-4, where they cannot elect their candidates of choice to Congress. *See* Exs. 4–6 (affidavits of voter plaintiffs Gundy, Wiley, and Young). Plaintiffs also include several organizations, including Black Voters Matter, the League of Women Voters of Florida, Equal Ground, and Florida Rising Together, all of which are harmed by the DeSantis Plan. *See* Exs. 7–10 (affidavits of organizational plaintiffs).

LEGAL STANDARD

To obtain a temporary injunction, a movant must demonstrate: "[1] a substantial likelihood of success on the merits; [2] lack of an adequate remedy at law; [3] irreparable harm absent the entry of an injunction; and [4] that injunctive relief will serve the public interest." *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017) (quoting *Reform Party of Fla. v. Black*, 885 So. 2d 303, 305 (Fla. 2004) (per curiam)).

ARGUMENT

I. Plaintiffs are substantially likely to prove that the DeSantis Plan violates the non-diminishment standard of Article III, Section 20.

The DeSantis Plan openly violates the commands of the Florida Constitution because it results in the diminishment of Black voters' ability to elect their candidates of choice.[3] Article III, Section 20(a) prohibits "diminish[ment]" of the ability of racial or language minorities "to elect representatives of their choice." The Florida Supreme Court has labeled this provision the "non-

[3] While Plaintiffs further allege that the DeSantis Plan *intended* to diminish Black electoral power, *see generally* Compl., Plaintiffs seek a temporary injunction only on the basis that the DeSantis Plan *results* in diminishment in North Florida in violation of Article III, Section 20(a) of the Florida Constitution. Plaintiffs reserve their right to make additional arguments about other ways in which the plan is unconstitutional and invalid, and seek appropriate relief, as this matter moves forward.

diminishment standard." *Advisory Op.*, 2022 WL 405381, at *1. This standard prohibits congressional districting plans that have "the purpose of or *will have the effect* of diminishing the ability of any citizens on account of race or color to elect their preferred candidates of choice." *In re S. J. Res.*, 83 So. 3d at 620 (cleaned up) (emphasis added). 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.

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. This inquiry requires "consideration not only of the minority population in the districts, or even the minority voting-age population in those districts, but of political data and how a minority population group has voted in the past." *Id.* Similarly, a court's review of minority voting power "will involve the review of the following statistical data: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; and (4) election results history." *Id.* at 627.

The DeSantis Plan unmistakably violates the non-diminishment standard. Benchmark CD-5 was a Black-performing district that tied together historic Black communities in North Florida and enabled Black voters in those communities to elect their candidates of choice in every election following its 2015 enactment. The DeSantis Plan dissolves that configuration of CD-5 and cracks

Black voters into four new districts with white majorities that consistently vote *against* Black-preferred candidates—rendering Black voters in North Florida unable to elect their candidates of choice in any of the new districts.

A. Benchmark CD-5 gave North Florida's historic Black communities the ability to elect their preferred congressional candidates.

Benchmark CD-5 was a Black-performing district, and inarguably so. The East-West configuration of Benchmark CD-5 traced the boundaries of historic Black communities in North Florida that predate the Civil War. Ex. 3 at 7-9. Those communities were home to a significant number of the slaves and sharecroppers who worked Florida's cotton and tobacco fields, the descendants of whom "account for a sizeable portion of the Black population" that the DeSantis Plan now disperses into overwhelmingly white districts. *Id*. While these communities have existed for more than a century and half, 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.* at 9–17. These efforts were enormously successful. For example, the federal Civil Rights Commission reported in 1958 that only *seven* of Gadsden County's 10,930 Black adults were registered to vote. *Id.* at 11.

Benchmark CD-5 gave these voters a voice in Congress. Dr. Stephen Ansolabehere shows 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 "account[] for 49.1 percent of the total population and 77.7 percent of the minority population in this district." Ex. 2 ¶¶ 32–34. 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. *See id.* ¶¶ 35–36. Given the extraordinary political cohesion of Black voters in Benchmark CD-5, *id.* ¶ 37, Dr. Ansolabehere concludes 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.* ¶¶ 38–40.

B. The DeSantis Plan diminishes the ability of Black voters in North Florida to elect their preferred candidates by dissolving CD-5.

Black voters in North Florida 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: CDs-2 through 5. Ex. 2 ¶ 42. The resulting Black populations of those districts are now 22.7%, 15.3%, 30.8%, and 12.1%, respectively. *Id.*, tbl. 2. White voters, meanwhile, 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. *Id.* ¶¶ 45–47. 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." *Id.* ¶ 4. The white majorities in these districts cohesively support candidates opposed by Black voters. In the new CD-4, for example, "82% of White voters chose Republican candidates, while only 18% chose Democratic candidates, *i.e.*, the candidates preferred by 89% of Black voters (and 83% of all minority voters)." *Id.* ¶ 48. 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 Dr. Ansolabehere. *Id.* ¶ 49; *see also* ¶ 20 (listing those elections). 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.* ¶ 51.

Legislative leaders conducted their own functional analysis of the DeSantis Plan that corroborates 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. Ex. 1-V. Indeed, at no point during the special session did legislative leaders assert that the DeSantis Plan complies with the non-diminishment standard.

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 In re S. J. Res.*, 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.

C. The Legislature could have preserved Benchmark CD-5.

The redistricting process that ensued in the Legislature following the release of 2020 census data makes clear that it is possible to preserve Benchmark CD-5 and avoid diminishment of Black voters' ability to elect their candidates of choice. *Every* draft congressional plan proposed and debated by the Legislature, until the very last one, maintained the general configuration of Benchmark CD-5. *See* Exs. 1-G, 1-I, 1-J, 1-K, 1-L. Legislative staff conducted a functional analysis of each plan, confirming that Black voters in the proposed CD-5s remained capable of electing candidates of their choice. *See* Exs. 1-G, 1-H.

The existence of these alternative maps as prepared by the Legislature demonstrates that the dissolution of Benchmark CD-5 was unnecessary to equalize population or otherwise comply

with Florida law. Two legislative maps from this cycle provide telling examples: Plan 8060, initially passed by the Senate, and Plan 8016, the Backup Map that the full Legislature passed in the event their first map was invalidated as unlawful under the Fair Districts Amendment. Ex. 2 ¶¶ 13–14. Both maps made minor changes to Benchmark CD-5 and would have resulted in a district with a majority-minority voting-age population in which Black voters would have been able to elect their candidates of choice. Ex. 2 ¶¶ 52–67.

II. Plaintiffs have no adequate remedy at law.

No other remedy exists under Florida law to remedy the harm Plaintiffs will suffer if the 2022 primary and general elections proceed under an unconstitutional districting plan. Plaintiffs lack an adequate remedy at law where, as here, their injuries result from a violation of a fundamental constitutional right. *See, e.g.*, *Gainesville Woman Care*, 210 So. 3d at 1263–64 ("In light of finding that the [challenged law] is likely unconstitutional, there is no adequate legal remedy at law for the improper enforcement of the [law]."); *see also League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018) (granting temporary injunction in voting-related case because injury could not "be undone through monetary remedies" (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987))); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1282 (N.D. Fla. 2018) (same).[4] Harms caused by constitutional violations are quintessentially irreparable, especially those that strike the fundamental right to vote. *See, e.g.*, *League of Women Voters of Fla.*, 314 F. Supp. 3d at 1224; *Madera*, 325 F. Supp. 3d at 1282.

[4] In weighing whether an injury cannot be remedied at law and thus constitutes irreparable harm, the Florida Supreme Court has relied on precedent from federal courts. *See, e.g.*, *Gainesville Woman Care*, 210 So. 3d at 1263–64 (noting that U.S. Supreme Court and lower federal courts "have presumed irreparable harm when certain fundamental rights are violated").

III. Plaintiffs and other Florida voters will suffer irreparable harm absent a temporary injunction.

Plaintiffs are likely to suffer irreparable harm absent temporary injunctive relief. Plaintiffs have a constitutional right guaranteed to them by Article III, Section 20 to vote in congressional districts free of diminishment of minority electoral ability. If the 2022 primary and general elections were conducted under the unlawful DeSantis Plan, Plaintiffs' constitutional rights would be irreparably injured. Florida "law recognizes that a continuing constitutional violation, in and of itself, constitutes irreparable harm." *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"); *see also Gainesville Woman Care*, 210 So. 3d at 1263–64 (finding that law that violated constitution would lead to irreparable harm absent injunctive relief). Indeed, "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *see also, e.g.*, *Larios v. Cox*, 305 F. Supp. 2d 1335, 1343–44 (N.D. Ga.) (per curiam) (three-judge court) (holding that stay of court's order finding state legislative plans unconstitutional would result in "irreparable harm to the plaintiffs, and to all voters in Georgia who have had their votes unconstitutionally debased," and that court had "a responsibility to ensure that future elections will not be conducted under unconstitutional plans"), *aff'd*, 542 U.S. 947 (2004). That is because "once the election occurs, there can be no do-over and no redress" for voters whose rights were violated. *League of Women Voters of N.C.*, 769 F.3d at 247. Because Plaintiffs' injury results from a constitutional violation, they will suffer irreparable harm absent injunctive relief.

IV. Injunctive relief will serve the public interest.

The public interest requires this Court to issue an injunction preventing the use of the DeSantis Plan in the 2022 congressional elections. As Florida courts have consistently found, "enjoining the enforcement of a law that encroaches on a fundamental constitutional right presumptively 'would serve the public interest.'" *Green v. Alachua Cnty.*, 323 So. 3d 246, 254 (Fla. 1st DCA 2021) (quoting *Gainesville Woman Care*, 210 So. 3d at 1264); *see also Gainesville Woman Care*, 210 So. 3d at 1264 (finding that it "would be specious to require . . . that the trial court make additional factual findings" to determine that enjoining unconstitutional law would be in public interest). This Court should enjoin the DeSantis Plan to ensure that this year's congressional elections occur under a lawful congressional plan.

Several factors make temporary injunctive relief particularly feasible here. First, an injunction would have limited geographic scope, as it would affect only a handful of congressional districts in North Florida. *See* Ex. 2 ¶ 68 ("Incorporating the North Florida configurations of either the Senate Map or the Backup Map would leave untouched 21 of the congressional districts in the Enacted Map."). In *LWV I*, the Florida Supreme Court ordered the Legislature to redraw only certain congressional districts found unconstitutional, explaining that "requiring the entire map to be redrawn is not the remedy commensurate with the constitutional violations found in [that] case." 172 So. 3d at 413; *see also Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 877–78 (E.D. Va. 2019) (three-judge court) ("In choosing a remedial plan, we endeavor to minimize the number of districts affected by our revisions, recognizing that districts immediately adjacent to the invalidated districts may be subject to significant changes."); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 564 (E.D. Va. 2016) (three-judge court) (adopting remedy that "minimizes the disruptive impact of the remedial plan" by "not alter[ing] any districts outside of the [challenged] District and those abutting it"). Similarly, it is possible here to swap the DeSantis Plan's CD-5 for

a configuration that retains Black voters' ability to elect their candidates of choice without changing any districts south of Marion and Volusia Counties. Ex. 2 ¶ 68. For that reason, a remedial map would require no effort from most of Florida's supervisors of elections. *See, e.g.*, Ex. 11 (Broward Supervisor Scott confirming that changing DeSantis Plan's CD-5 to Plan 8015's CD-5 would "impose no burden on my office," but that his office "will diligently implement *any* plan adopted by the Court if it allows [] voters to elect their preferred candidates under a plan consistent with the United States and Florida Constitutions" (emphasis added)).

Second, both this Court and the Legislature will be aided by the significant work already accomplished by the Legislature when it crafted various configurations that maintained CD-5 prior to Governor DeSantis's intervention. *See LWV I*, 172 So. 3d at 413, 417 (requiring Legislature to adopt East-West configuration of District 5 already drawn by legislative staffers). Indeed, the Senate already passed a congressional plan that maintains the voting strength of CD-5's Black voters, as did the full Legislature when it passed Plan 8015—the Backup Map. Ex. 2 ¶¶ 52–67. Either of these maps would require little to no change outside of North Florida. *See id.* ¶ 68.

Third, Florida's election calendar provides more than enough time to impose injunctive relief ahead of the 2022 primary election. While many other states have primaries that begin this month, Florida's primary is not until *August 23*, making it one of the latest in the country. *See* Ex. 1-X; Ex. 11 (Broward Supervisor Scott noting that Florida's primary is "among the latest" and not for another 17 weeks). This case is therefore unlike instances in which federal courts have declined to uphold "orders affecting elections" in the *month* preceding an election. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam) (decision rendered in October preceding November general election); *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kavanaugh, J., concurring) (decision rendered in February preceding absentee voting that purportedly commenced in March). Indeed, the Secretary

of State (the "Secretary") represented in federal court proceedings that a congressional plan could be put in place as late as June 13, 2022. *See* Defendant Secretary of State Laurel Lee's Reply in Support of Her Motion to Stay at 6, *Common Cause Fla. v. Lee*, No. 4:22-cv-109-AW/MAF (N.D. Fla. Apr. 8, 2022), ECF No. 73. By the Secretary's own estimation, this Court has seven weeks to order the adoption of a lawful congressional plan.

Florida's Supervisors agree that relief before the 2022 elections is feasible in this case. As Leon Supervisor of Elections Mark Earley has explained, his office can implement a remedial plan if he receives notice of the new plan by May 27, 2022—a month away from now. *See* Ex. 12 ¶ 13. As Supervisor Earley notes, "while it may impose slightly more work for my office to implement a revised congressional plan should Florida state courts order one, my office will be glad to do so if it means that my voters can elect their congressional candidates under a plan consistent with the Florida Constitution." *Id.* ¶ 15.

Ultimately, granting temporary relief in this matter is not only practicable—it is imperative. A new, lawful congressional plan can be readily implemented in North Florida before the 2022 election machinery goes into motion. And as a matter of sound public policy—of basic principle—this Court should work swiftly to ensure that flagrant violations of the Florida Constitution are not tolerated. As Florida Supervisors agree, failing to remedy such violations can lead to a decrease in confidence in the outcome of elections. *Id.* ¶ 14. The public interest is best served when elected representatives are forced to follow the law as written and, in turn, the will of the electorate. Nothing less can or should be countenanced by this Court.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court temporarily enjoin implementation of the DeSantis Plan. Plaintiffs further request that the Court expedite its consideration of this motion, including the scheduling of any hearings, to ensure that a necessary

remedy is timely adopted and a lawful congressional plan is in place in North Florida in time for the 2022 congressional elections. As noted in their motion, Plaintiffs also request that the Court require no more than a nominal bond, because the relief sought is against the state and to remedy a congressional plan that fails to comply with the Florida Constitution.

Respectfully submitted,

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111
Thomas A. Zehnder
Florida Bar No. 0063274
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, Florida 32802
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com

John M. Devaney*
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
jdevaney@perkinscoie.com

Abha Khanna*
Jonathan P. Hawley*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 656-0177
Facsimile: (206) 656-0180
akhanna@elias.law
jhawley@elias.law

Christina A. Ford
Florida Bar No. 1011634
Joseph N. Posimato*
Graham W. White*
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
cford@elias.law
jposimato@elias.law
gwhite@elias.law

Counsel for Plaintiffs

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 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. I further certify that I have caused to be served, via Process Server, the foregoing on Defendants who have not yet made an appearance in this case.

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111

Counsel for Plaintiffs

SERVICE LIST

Andy Bardos, Esq.
GrayRobinson, P.A.
P.O. Box 11189
Tallahassee, FL 32302
andy.bardos@gray-robinson.com

Counsel for Defendants
Chris Sprowls and Thomas J. Leek