

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

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

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as
Florida Secretary of State, et al.,

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' EMERGENCY MOTION TO VACATE
AUTOMATIC STAY PENDING APPEAL

Plaintiffs, pursuant to Rule 9.310(b)(2) of Florida Rules of Appellate Procedure, respectfully request that the Court, on an emergency basis, vacate the stay of the Order Granting Plaintiffs' Temporary Injunction, and as grounds therefore state:

INTRODUCTION

This Court must vacate the automatic stay triggered by the Secretary's appeal of its Temporary Injunction Order blocking implementation of the Enacted Plan. While the Secretary's notice of appeal "shall automatically operate as a stay pending review," this Court has authority to vacate the stay under compelling circumstances. Fla. R. App. P. 9.310(b)(2). Here, compelling circumstances exist because an automatic stay pending appeal is tantamount to a reversal of the Temporary Injunction Order: The Secretary's appeal will almost certainly last beyond the date by which a remedial plan must be in place for the 2022 congressional election.

Recognizing that Plaintiffs' access to relief was on the clock, this Court ensured the speedy resolution of Plaintiffs' motion for relief in advance of the 2022 election. It made itself immediately available for a hearing on Plaintiffs' motion for temporary injunctive relief, and after

careful consideration of live and written testimony and hundreds of pages of briefing, found that the Enacted Plan diminishes the ability of Black Floridians in North Florida to elect candidates of their choice in violation of the Florida Constitution. To avoid the irreparable harm that would follow from allowing the election to go forward under the Enacted Plan, the Court ordered the state to adopt Plaintiffs' Proposed Plan A.

The Secretary's appeal, and the stay it automatically triggers, may effectively overturn the Court's considered effort to ensure Plaintiffs' access to relief by preventing the Secretary and Supervisors of Elections from beginning preparations to implement the remedial plan. But the Secretary cannot demonstrate she has a likelihood of success on appeal—indeed, her position is contrary to binding Florida Supreme Court precedent. On the other side of the scale, *per se* irreparable harm will occur if the automatic stay is allowed to remain in place indefinitely. Vacatur of the automatic stay is, therefore, not only a reasonable application of this Court's discretion, but necessary to remedy the constitutional violations that the Court adjudged. For the same notions of justice and equity that drove the Court to temporarily enjoin implementation of the Enacted Plan and to order implementation of Plan A, the Court should now vacate the automatic stay.

LEGAL STANDARD

Under Florida Rule of Appellate Procedure 9.310(b)(2), “[t]he timely filing of a notice shall automatically operate as a stay pending review . . . when the state, [or] any public officer in an official capacity. . . seeks review.” *Id.* § 9.310(b)(2). Nevertheless, the maintenance of that stay is not a given: Rule 9.310(b)(2) provides that “[o]n motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.” *Id.* A court may vacate an automatic stay under this provision when it finds that “compelling circumstances” exist. *Fla. Dep’t of Health v. People United for Med. Marijuana*, 250 So. 3d 825, 828 (Fla. 1st DCA 2018).

In making that determination, the Court considers (1) the government’s likelihood of success on appeal, and (2) the likelihood of irreparable harm if the automatic stay is reinstated. *City of Sarasota v. AFSCME Council ’79*, 563 So. 2d 830, 830 (Fla. 1st DCA 1990); *see also Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005) (same). At bottom, the Court should vacate the automatic stay where “the equities are overwhelmingly tilted against maintaining the stay.” *Id.* at 828 (quoting *Tampa Sports Auth. v. Johnson*, 914 So. 2d 1076 (Fla. 2d DCA 2005)). The Court enjoys “broad discretion” in making these determinations. *See City of Sarasota*, 563 So. 2d at 830.

DISCUSSION

Compelling circumstances justify vacatur of the automatic stay in this case. *First*, the Secretary does not have a likelihood of success on appeal. Indeed, “the automatic stay rule is founded in judicial deference to planning-level governmental decisions.” *Tampa Sports Auth.*, 914 So. 2d at 1083. But that deference “diminishes” where the illegality of the government’s decision has been established and is unlikely to be disturbed on appeal. Such is the case here. This Court’s determination that the Enacted Plan is unconstitutional 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). Defendants have not, and cannot, demonstrate that they are likely to demonstrate that either the Court’s legal or factual findings were in error, much less that the Court’s decision should be reversed.

After careful consideration of a voluminous record, this Court correctly determined that the Enacted Plan “would diminish the ability of Black voters to elect their candidate of choice in North Florida” in violation of the Florida Constitution, and the Secretary “*offer[ed] no credible contrary evidence.*” Order at 10 (emphasis added). The Legislature’s own analysis proved as much,

and the Secretary's experts "neither performed a functional analysis nor contested [plaintiffs' expert's] findings." *Id.* Moreover, the Secretary cannot show that application of the Florida Constitution's non-diminishment standard violates the Fourteenth Amendment of the U.S. Constitution because she failed to show that race was the predominant factor in the drawing of 8015's CD-5. And this Court further found that even if racial considerations did predominate, they were narrowly tailored to advance compelling government interests. *Id.* at 11-14. The Court based its findings on binding Florida Supreme Court precedent. As a result, the Secretary cannot win on appeal unless the Florida Supreme Court is willing to reverse its own precedent from just a few years ago. *See In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 625 (Fla. 2012) (finding 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"). The first factor, thus, overwhelmingly favors vacatur of the automatic stay pending appeal.

Second, allowing the automatic stay to remain in place would almost certainly result in irreparable harm to Plaintiffs and countless other Florida voters, who may be forced—simply as a result of the delay following from the stay—to vote under an unconstitutional map, which operates to diminish the political power of Black voters in North Florida in particular. A remedial plan likely must be in place within the next few weeks to ensure that the 2022 congressional election proceeds under a lawful districting plan. Order at 18. But the resolution of the Secretary's appeal will probably last well beyond that date. The Secretary filed a notice of appeal in the First District Court of Appeal but has not moved to expedite those proceedings. And even if she did, this appeal will also likely involve additional review by the Florida Supreme Court. If the automatic stay remains in force throughout the pendency of these appellate proceedings, it may be infeasible to

implement an alternative to the Enacted Plan for the 2022 election—and this Court has already held that “if the 2022 primary and general elections [are] conducted under the Enacted Plan, Plaintiffs’ constitutional rights would be violated.” Order at 15-16. Such a constitutional injury is sufficient to demonstrate “compelling circumstances” to justify vacating an automatic stay. *See Tampa Sports Auth.*, 914 So. 2d at 1084 (compelling circumstances justify vacatur where movant “would suffer definite, irreparable, and irreparable harm to his important constitutional interests” if “the stay were to remain in force during [the] appeal”).

The equities clearly favor vacatur for the additional reason that allowing county elections officials to implement the remedial map immediately will ease administrative burdens. Just yesterday, after news of this Court’s order, Robert Phillips of the Duval County Supervisors of Elections’ Office confirmed that Duval County could implement this Court’s order, thanking the court for its speed, and noting, “The fact they ruled so quickly makes it easier.”¹ But every day that passes while the stay is in place makes that implementation harder. This Court can ease any additional burdens of implementation by vacating the stay now.

While the Court should vacate the automatic stay now, it should at minimum issue an order stating that the Court will vacate the automatic stay on May 27, 2022—the date by which several Supervisors have stated a plan would need to be in place to give them sufficient time to implement it— if a higher court has yet to resolve the State’s appeal by that date. Fla. R. App. P. 9.310(b)(2) (authorizing the Court to “impose any lawful conditions” on an automatic stay). This course would ensure that Florida’s election administrators will have sufficient time to implement Proposed Plan A and to ensure relief will be available to Plaintiffs and Florida voters.

¹ Andrew Pantazi, *Judge Strikes Down Congressional Map for Reducing Black Voting Power*, WJCT News (May 11, 2022, 3:09 PM), available at <https://news.wjct.org/first-coast/2022-05-11/judge-strikes-down-congressional-map-for-reducing-black-voting-power>.

WHEREFORE, Plaintiffs request that the Court vacate the automatic stay pending appeal pursuant to Rule 9.310(b)(2).

Dated: May 13, 2022

/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

+*Admitted Pro hac vice*

Respectfully submitted,

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*
Harleen K. Gambhir*
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
hgambhir@elias.law

Counsel for Plaintiffs

+*Admitted Pro hac vice*

**Pro hac vice application forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 13, 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.

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

Counsel for Plaintiffs

SERVICE LIST

Daniel E. Nordby
Shutts & Bowen LLP
215 S. Monroe Street
Suite 804
Tallahassee, FL 32301
ndordby@shutts.com

Counsel for Defendants
Florida Senate, Ray Rodrigues, and Wilton Simpson

Ashley Davis
Bradley R. McVay
Florida Department of State
R.A. Gray Building, Suite 100
500 South Bronough Street
Tallahassee, FL 32399
ashley.davis@dos.myflorida.com
brad.mcvay@dos.myflorida.com

Counsel for Defendant
Laurel M. Lee, as Florida Secretary of State

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

Mohammed O. Jazil
Michael Beato
Gary V. Perko
Holtzman Vogel Baran Torchinsky
& Josefiak, PLLC
119 S. Monroe Street
Suite 500
Tallahassee, FL 32301
mjazil@holtzmanvogel.com
mbeato@holtzmanvogel.com
gperko@holtzmanvogel.com

Counsel for Defendant
Laurel M. Lee, as Florida Secretary of State

Bilal A. Faruqui
Office of the Attorney General
State Programs Bureau
PL-01 The Capitol
Tallahassee, FL 32399

bilal.farqui@myfloridalegal.com

*Counsel for Defendant
Ashley Moody, as Florida Attorney General*