

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.

Case No: 2022 CA 0666

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

Defendants.

**DEFENDANT SECRETARY OF STATE LAUREL LEE'S
RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION TO VACATE THE AUTOMATIC STAY**

The Court should deny Plaintiffs' motion to vacate. Case after case makes clear that vacatur of the automatic stay granted to public officers by Florida Rule of Appellate Procedure 9.310(b)(2) is the exception—not the norm. *See, e.g., DeSantis v. Scott*, No. 1D21-2685 (Fla. 1st DCA Oct. 27, 2021) (reinstating the automatic stay vacated by the Second Judicial Circuit); *DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145 (Fla. 1st DCA 2020) (same); *Fla. Dep't of Health v. People United for Med. Marijuana*, 250 So. 3d 825 (Fla. 1st DCA 2018) (same). To obtain such relief, Plaintiffs must “establish an evidentiary basis” of “the most compelling circumstances” to vacate the stay. *Dep't of Env't'l Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998). This they can't do, especially when the rushed remedial map the Court *mandated* at the temporary injunction hearing has changed since its approval—*after* the opportunity to cross-examine the map drawer had passed. *See Exhibit 12* (Second Expert Declaration of Dr. Johnson).

I. STANDARD

“[A] trial court may vacate an automatic stay only ‘under the most compelling circumstances.’” *Fla. Educ. Ass'n*, 325 So. 3d at 150 (quoting *People United for Med. Marijuana*, 250 So. 3d at 828). As the

party seeking to vacate the automatic stay, Plaintiffs have the burden of demonstrating that (1) the equities overwhelmingly tilt against maintaining the automatic stay, (2) they are likely to prevail on the merits of the appeal, and (3) they'll suffer irreparable harm if the automatic stay is maintained. *Dep't of Agric. & Consumer Servs. v. Henry & Rilla White Found., Inc.*, 317 So. 3d 1168 (Fla. 1st DCA 2020) (citing *People United for Med. Marijuana*, 250 So. 3d at 828). Placing the evidentiary burden on Plaintiffs makes sense because the primary “purpose of the automatic stay provision” “is to accord judicial deference to governmental decisions.” *Scott*, No. 1D21-2685, order at 2. The stay “also seeks to protect the public against ‘any adverse consequences realized from proceeding under an erroneous judgment.’” *Fla. Educ. Ass'n*, 325 So. 3d at 150 (citation omitted).¹

II. ARGUMENT

Plaintiffs fail to satisfy all three elements necessary for vacatur of the automatic stay. Compelling circumstances do not exist to vacate the stay, and Plaintiffs’ motion should be denied.

A. The Equities Weigh in Favor of Maintaining the Automatic Stay.

The equities tilt decidedly in favor of maintaining the stay. Three reasons predominate. *First*, during the temporary injunction hearing, this Court stated the following:

Generally, I don’t like to override stays from the standpoint that I think there’s a presumption that at least – First of all, I fully expect the appellate court to get this and move as swiftly as they can. They’re good people. They’re going to be conscientious about doing it. Whether they agree with me or not, they’re going to do their job.

So I think everybody in the government, regardless of the branch, ought to all be on the same page that we need to get this right as soon as we can. So if I’m a supervisor of elections out there and I’m thinking, well, okay, one guy at least said this needs to be different, that doesn’t necessarily mean I’m going to sell out and crunch my numbers and make everything fit that, because we don’t know if that will stick.

So if you seek to have a stay, my initial response would be okay, all right. So let’s get it to the appellate court so it can make the determination it needs to make as soon as

¹ This Court emphasized the latter point at the hearing held on Plaintiffs’ Motion for Temporary Injunction. See **Exhibit 13** at 152:14 – 153:11.

possible so that whatever the final answer is gets out to the people that need to put this into place.

Exhibit 13 at 152:14 – 153:11. Put differently, this Court stated that it favors maintaining automatic stays, and that maintaining the automatic stay would be warranted in this case because the appellate process will be “swift[.]” *Id.* The Secretary agrees, and to that end filed her Notice of Appeal on Thursday approximately one hour after the Court issued its Order Granting Motion for Temporary Injunction. Moreover, Plaintiffs sought pass-through jurisdiction to the Florida Supreme Court on Friday. **Exhibit 14.** Given the deliberate speed of the appeal, the stay should be maintained.

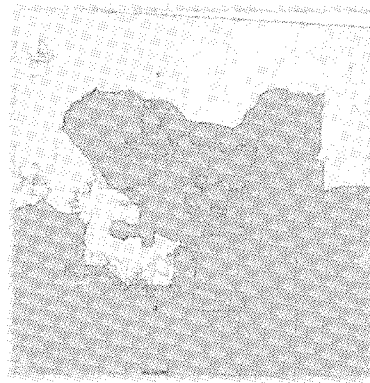
Second, and more importantly, Floridians are entitled to have confidence that their congressional map is generally free of errors. The parties and this Court knew that Proposed Map A, as originally provided to the Court and the parties, though *without* the underlying data files, contained flaws. Dr. Ansolabehere admitted as much during the temporary injunction hearing. **Exhibit 13** at 73:3-6 (Dr. Ansolabehere testifying about an error in congressional district 6 in Proposed Map A as originally submitted, noting “it could have been something that got screwed up when I uploaded the file. But that should not be there”).

The Defense called Dr. Ansolabehere’s error a non-contiguity, but Plaintiffs said that it wasn’t so in footnote 2 of their proposed order to the Court and well beyond the direct-cross-re-direct strictures of the hearing itself. But, as Dr. Johnson notes in his second expert declaration, there was a non-contiguity in congressional district 6 based on his review of the PDF provided by Plaintiffs that showed the original Map A. **Exhibit 12 ¶¶** 11-14. There was also a non-contiguity in congressional district 3. *Id.*

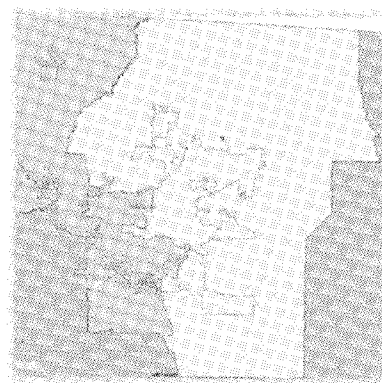
While Plaintiffs corrected both non-contiguities in the amended version of Map A later submitted to the Court, there are still more concerns with the remedial map created by Plaintiffs’

expert in only a day. **Exhibit 13** at 73:7-12. Consider the following based on the Secretary’s quick review of the material provided to her:

- Dr. Ansolabehere failed to disclose that his amended Map A made three changes from the Enacted Map that affected congressional districts 3, 9, 12, 18, 26, and 28. **Exhibit 12** ¶¶ 15-17.
- Dr. Ansolabehere claimed that congressional district 5 in Map A “divides Leon County along similar lines to the division of Leon County in the State House Districts and under the Benchmark Map.” Reply Ex. 13 ¶¶ 29, 31. But Dr. Johnson calls this claim “false.” **Exhibit 12** ¶ 27. As Dr. Johnson explains, “the State House district that comes into southern Tallahassee is not the same State House district that comes across the northern part of Leon County,” and “the State House district that comes into southern Tallahassee has significantly different boundaries.” *Id.* “A simple visual glance shows the significant geographic differences between the two maps:”



Amended Map A



Enacted State House Map

Id.

- Dr. Ansolabehere claimed that congressional district 5 “takes the entirety of the western side of Duval County. Its northeastern boundary in Jacksonville follows Interstate 295, which is similar to the boundary followed by the State Senate District

5 and State House District 14.” Reply Ex. 13 ¶¶ 30-31. But Dr. Johnson calls this claim “at best misleading” because “[o]ther than both maps following the northern city border of Jacksonville, Amended Map A and the Enacted State House Map are completely different”:

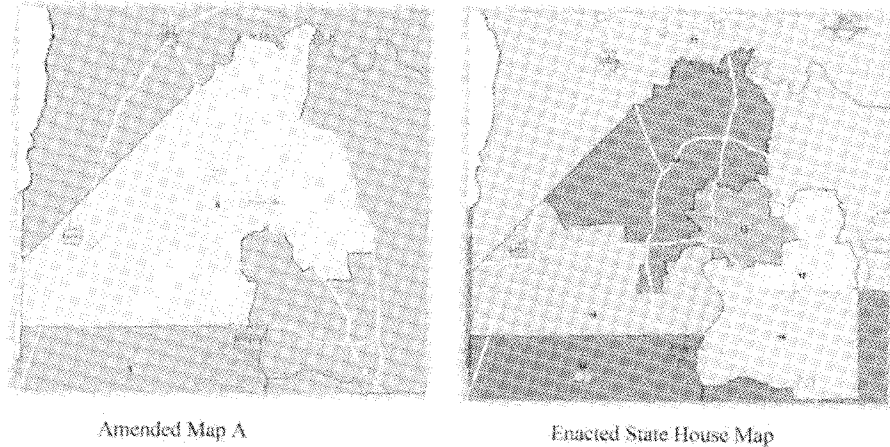
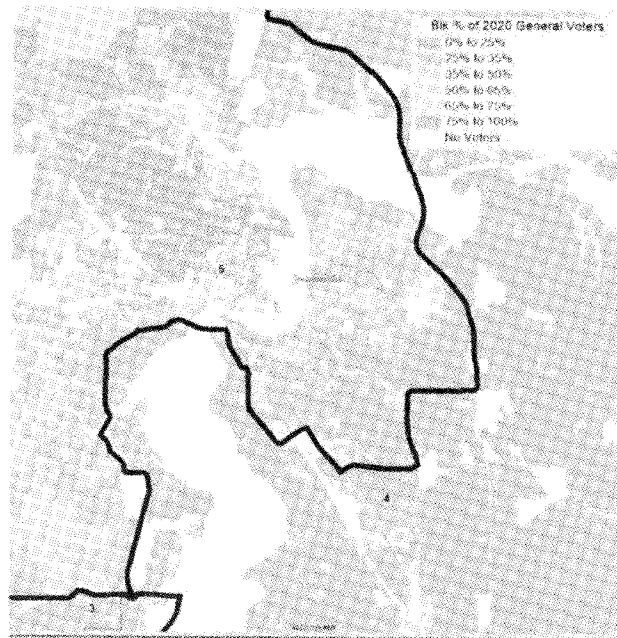


Exhibit 12 ¶ 29. Dr. Johnson further states “plaintiff followed racial data fairly precisely in drawing the boundary between CD4 and CD5 along the St. Johns River and I-95 corridor,” which again underscores the Secretary’s concerns that race predominates in any iteration of congressional district 5 that stretches 200 miles from east to west:



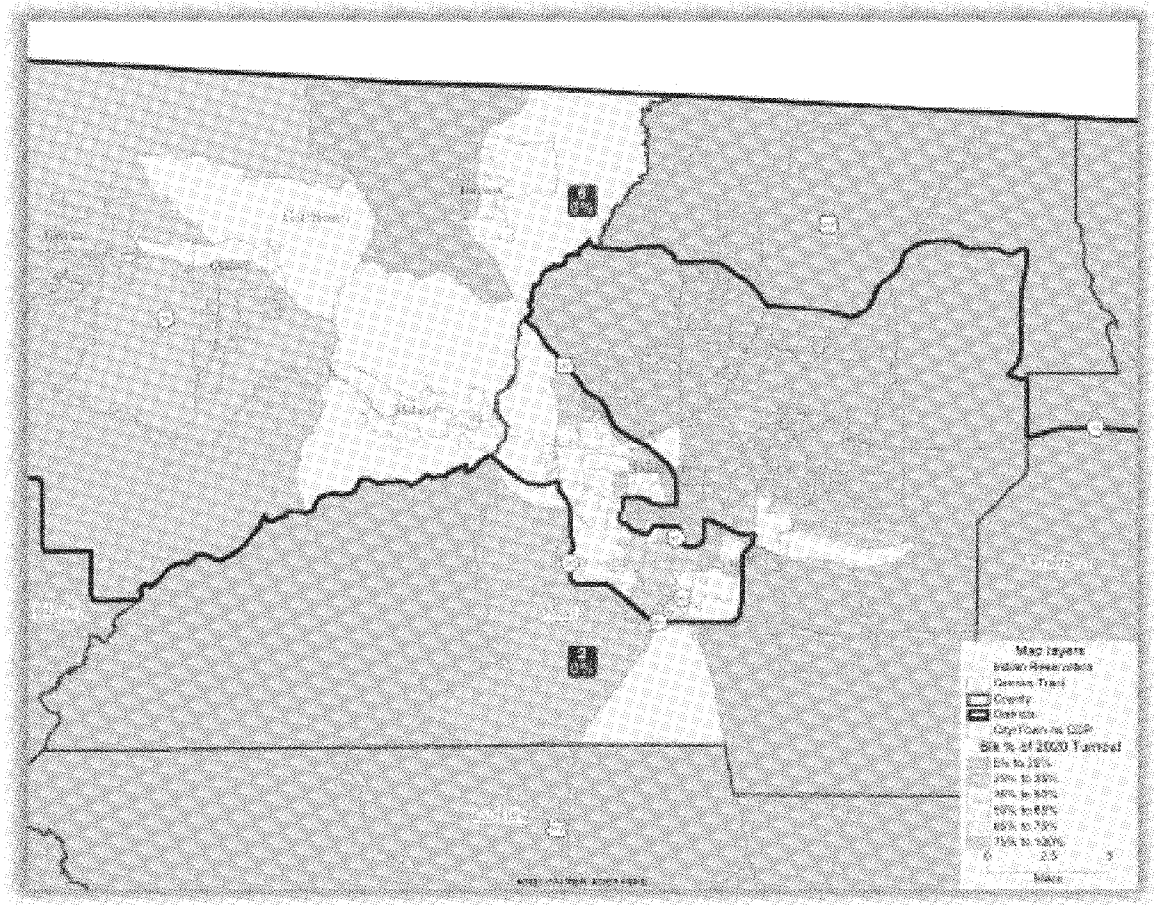
Id. ¶ 30.

- Reviewing the boundaries of congressional district 5 in Map A also reveals that Dr. Ansolabehere followed the racial composition of Leon County with surgical precision, with a very precise hook separating the Black and White populations in Tallahassee:

Id. ¶ 28.

- Congressional districts 2 through 5 in the Enacted Map continue to be more compact than those same districts in Map A. *Id.* ¶¶ 20-22.
- Map A also splits 8 counties in north Florida. *Id.* ¶ 18. Excluding Duval County, which must be split because of its population, that’s “75% more” splits than the Enacted Plan. *Id.* And Plaintiffs still fail to provide affidavits from all the affected supervisors saying that they can implement this new map at this late date.

If Plaintiffs' maps went through the usual legislative process and were subject to public comment, these issues could have been appropriately scrutinized. But that didn't happen here. Plaintiffs created the map in a day, giving the State hours to prepare for cross-examination of the map drawer, and then "fixed" errors in the map while shielding it from further scrutiny.



Requiring Florida to now hold its congressional elections pursuant to a new, hastily crafted map will necessarily "result in voter confusion and consequent incentive to remain away from the polls." See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). This is precisely why courts should not rush to change election rules before an election. See *Resp. in Opp. to Pl. Mot. for Temp. Inj.* at 7-10 (citing *Purcell* and the Florida *Purcell*-like cases); see also *In re Khanoyan*, 637 S.W.3d 762, 765 (Tex. 2022); *Moore*

v. Lee, 2022 Tenn. LEXIS 133, at *15 (Tenn. 2022); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (Ill. App. Ct. 2008); *Liddy v. Lamone*, 919 A.2d 1276, 1287 (Md. 2007).

Third, supervisors of elections, as well as congressional candidates and their campaigns, have been relying upon the enacted congressional district map for three weeks. The supervisors have been updating voter information data, procuring materials to print and ship ballots, and obtaining legislative approval for their new precinct lines. Because of the enacted map, congressional candidates know where they are going to run, and their campaigns know which voters' doors to knock.

The Secretary provided the affidavits of Duval County Supervisor of Elections Chief Election Officer Robert Phillips and Columbia County Supervisor of Elections Tomi Brown. *See* Resp. in Opp. to Pl. Temp. Inj. Mot. Exs. 1 & 2. They have expressed deep concern about the imposition of a new map at this late juncture. *Id.* Indeed, Supervisor Brown's statement that it "is not possible" to impose a new map in her county is un rebutted. *Id.* Ex. 1 ¶ 6. Supervisor Brown's and Officer Phillips's affidavits state unequivocally that imposing a new map would lead to prohibitive costs, increase chances of error, and voter confusion. *Id.* Ex. 1 & 2. Plaintiffs failed to produce any affidavits from the supervisors of elections from Gadsden, Jefferson, Madison, Hamilton, Baker, or Nassau Counties—the counties predominately affected by Proposed Map A—that suggest otherwise. And Plaintiffs attempt to undercut Duval County's concerns based on a quote from a newspaper story taken out of context, where the Duval official never said that "Duval County could implement this Court's Order." Mot. to Vacate at 5. Plaintiffs' spin on hearsay within hearsay stands in stark contrast to Mr. Phillips's second affidavit where he states that Plaintiffs take his comments "out of context," that he "stand[s] by [his] first affidavit in this case," and that "[i]mplementing any map other than the enacted map remains exceedingly difficult and increases the chances for error and voter confusion and decreases voter confidence." **Exhibit 15 ¶ 7.**

The State has already informed the supervisors that this Court’s decision will be (and now has been) appealed, which triggers an automatic stay. **Exhibit 16.** As such, supervisors must continue to use the current, enacted congressional map (SB 2C) pending the appellate process. *Id.*

It makes little, if any, sense to force north Florida counties to stop midstream and redo their efforts with a new map, only to have the temporary injunction reversed by either a three-judge First District Court of Appeal panel, an *en banc* First District Court of Appeal panel, or the Florida Supreme Court. This Court echoed the same point at the preliminary injunction hearing. *See Exhibit 13* at 152:14 – 153:11. Efficient election administration, as well as confidence in the electoral process, would be severely undermined by this start-stop-start approach.

B. Plaintiffs Are Not Likely to Prevail on the Merits of the Appeal.

It is far from certain that Plaintiffs will prevail on appeal. After all, “statutes,” including statutes that set congressional districts, “are presumed constitutional, and the challenging party has the burden to establish the statute’s invalidity beyond a reasonable doubt.” *People United for Med. Marijuana*, 250 So. 3d at 828 (quoting *Jackson v. State*, 191 So. 3d 423, 426 (Fla. 2016)).

Plaintiffs’ non-diminishment claim is not likely to prevail—especially considering the Secretary’s Equal Protection Clause argument, according to which Plaintiffs have failed to show that the race-based district they ask this Court to impose satisfies strict scrutiny, the U.S. Supreme Court’s most rigorous standard of review. *See Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017); *see also Wis. Leg. v. Wis. Elections Comm’n*, 142 S. Ct. 1245, 1249 (2022) (rejecting a court ordered map containing an additional black majority legislative district that was selected by the state Supreme Court without adequate justification).

In a recent opinion, the Florida Supreme Court, when applying the non-diminishment standard to state legislative maps, took no position on the Equal Protection Clause concerns that the Governor raised in an advisory opinion request:

Governor Ron DeSantis recently sought an advisory opinion from this Court, in part seeking our views on the meaning and application of the non-diminishment standard in article III, section 21(a). For the reasons we explained in *Advisory Opinion to the Governor re Whether Article III Section 20(a) of the Florida Constitution Requires the Retention of a District in Northern Florida*, 333 So. 3d 1106 (Fla. 2022), we declined to issue the advisory opinion. Our decision today should not be taken as expressing any views on the questions raised in the Governor’s request.

In re Sen. J. Res. Of Legis. Apportionment 100, 334 So. 3d 1282, 1289 n.7 (Fla. 2022). At best, then, the law remains unsettled. It also bears emphasis that during the last redistricting cycle, when the Florida Supreme Court approved benchmark congressional district 5, the court was not presented with, and took no position on, whether application of the non-diminishment provision to that district violated the Equal Protection Clause. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 402 (Fla. 2015) (*Apportionment VII*); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 272 (Fla. 2015) (*Apportionment VIII*).

This Court also failed to adequately address the Secretary’s *Purvell* and mandatory injunction arguments. **Exhibit 13** at 131:14 – 149:6. Given relevant Florida Supreme Court precedent, as well as the weight of federal and other state precedent, there is a strong possibility that either the First District or the Florida Supreme Court will embrace those arguments to vacate the temporary injunction. *See, e.g., State ex rel. Haft v. Adams*, 238 So. 2d 843, 845 (Fla. 1970) (providing the *Purvell*-like reasoning that judicial “interfere[nce]” with the “orderly holding of” elections “would result in confusion and injuriously affect the rights of third persons”); *Wilson v. Sandstrom*, 317 So. 2d 732, 736 (Fla. 1975) (“It is a general rule that a mandatory injunction can only be properly granted on a final hearing.”).

C. Plaintiffs Will Not Suffer Irreparable Harm.

Plaintiffs also failed to establish that they will suffer irreparable harm if the stay is maintained. As the Secretary will demonstrate on appeal, Plaintiffs do not have a fundamental constitutional right to reside in a racially gerrymandered congressional district that violates the Equal Protection Clause

of the Fourteenth Amendment to the U.S. Constitution. *See* U.S. Const. amend. XIV, § 1; *Cooper*, 137 S. Ct. at 1455. As a result, maintaining the automatic stay will not harm Plaintiffs.

III. CONCLUSION

For the foregoing reasons, the Secretary asks that this Court deny Plaintiffs' motion.

Dated: May 16, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal, on May 16, 2022.

/s/ Mohammad O. Jazil
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DEFENDANT SECRETARY OF STATE LAUREL LEE'S EXHIBIT LIST

<u>Exhibit No.</u>	<u>Description</u>
12	Declaration of Dr. Douglas Johnson
13	Transcript of May 11, 2022, Hearing before Circuit Judge J. Layne Smith
14	Appellees' Suggestion for Certification, filed with the Court May 13, 2022
15	Second Affidavit of Robert Phillips
16	Email from Brad McVay, General Counsel, to Florida Supervisors of Elections

EXHIBIT 12

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DECLARATION OF DR. DOUGLAS JOHNSON

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. My qualifications are stated in my original report. The following is true of my own personal knowledge and I otherwise believe it to be true.
2. I was asked to review the amended "Map A" map of Congressional Districts provided by the plaintiffs.

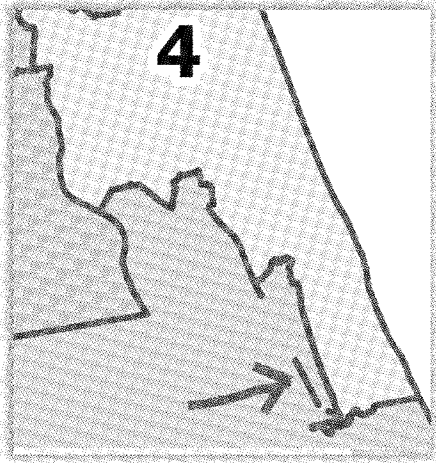
OPINIONS

3. Despite plaintiff's sworn statement, it appears clear that two non-contiguous parts of the original "Map A" shown in the Reply Brief PDF map were changed to make them contiguous in the amended "Map A" provided as a census block assignment file.
4. Despite plaintiff's statement that Districts 7 through 28 are unchanged from the enacted map (P000C0109) in fact there are three small changes, one of which includes a change in the border between CD12 and CD3.

5. Congressional Districts 2 through 5 in the Amended Map A split just as many cities and counties as Districts 2 through 5 in what I termed "plaintiff's map" (H000C8015) in my original report.
6. Congressional Districts 2 through 5 in the Amended Map A are significantly less compact than even what was "plaintiff's map" (H000C8015) in my original report.
7. Amended Map A has never been reviewed or discussed by the Legislature and there has been no opportunity for public comment on it.
8. Amended Map A links distant pockets of distant and unrelated concentrations of Black/African-American population in the same manner as the plaintiff's previously preferred map. (Discussed and mapped in my original report.)
9. Amended Map A divides Leon County and the City of Tallahassee along lines explained predominately by race.
10. Amended Map A divides Jacksonville along boundary lines explained predominately by race.

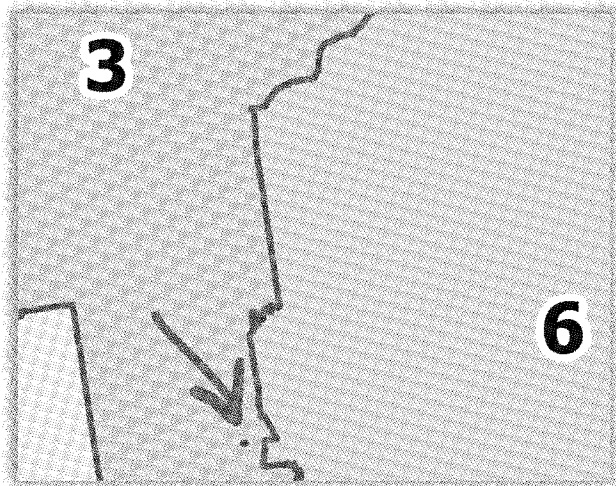
AMENDED MAP A CHANGES FROM ORIGINAL MAP A

11. Despite plaintiff's sworn statement to the contrary, the PDF map of Original Map A (provided in plaintiff's Reply Brief) clearly contained a non-contiguous area within CD6, which is clearly seen with any PDF viewer that allows a viewer to zoom in on the map (I added the red arrow to highlight the non-contiguous area):



12. Using my Maptitude redistricting software, I was able to identify the "gap" between that area and the rest of CD4 as Census Block 121090212091009. In the PDF map this Census Block is clearly assigned to CD6 while the one or two Census Blocks north of it are assigned as non-contiguous pieces of another district (likely CD4, but that cannot be confirmed in the PDF map).

13. In the PDF map of Original Map A, CD3 also contains a non-contiguous piece of another CD (again I added the red arrow to highlight the non-contiguous area):



14. This is clearly a non-contiguous area in the PDF map provided of the original Map A, but was changed to make it contiguous in the census block assignment file provided for Amended Map A.

UNDISCLOSED DIFFERENCES FROM ENACTED MAP DISTRICTS 7-28

15. Census Block 120830010031087 was moved from D12 in the Enacted Map to D3 in Amended Map A. This is a zero-population river block that is entirely in the Withlacoochee River, and that river is the border of D12 and D3. The Enacted map used the east bank of the river as the border, and Map A uses the center of the river.

16. Census Block 120860141001018 was moved from Enacted Map district 28 to district 26 in Amended Map A. This is a zero-population census block that includes only the middle lanes of Hwy 836 on the north edge of Tamiami in Miami-Dade County.

17. Census Block 121050157024030 was moved from Enacted Map district 9 to district 18 in Map A. This is a zero-population census block along the border of what appears to be a creek or irrigation canal on the Polk County / Osceola County border.

COUNTY SPLITS ANALYSIS

18. Districts 2 through 5 of Amended Map A contain eight county splits, the same number as plaintiff's previously preferred map (H000C8015). Duval County's population exceeds the population of a Congressional District and thus the County must be split. Excluding Duval County, Amended Map A and plaintiff's previously preferred map both split 7 counties – 75% more than the four counties split in the Enacted Map.

CITY, TOWN AND VILLAGE SPLITS ANALYSIS

19. Districts 2 through 5 of Amended Map A contain the same divisions of Jacksonville and Tallahassee included in plaintiff's previously preferred map. The split of Jacksonville is required due to its size. Where the Enacted Map splits no city, town, or village that is small enough to fit within one Congressional District, Amended Map A divides one (Tallahassee).

COMPACTNESS ANALYSIS

20. Districts 2 through 5 of the enacted Congressional District map are significantly more compact than the same districts in Amended Map A, which is significantly less compact than even plaintiff's previously preferred map Districts 2 through 5.

21. At 0.46, the average Polsby-Popper compactness score for the enacted map's districts 2, 3, 4 and 5 is more than double the average of Amended Map A (0.20) [plaintiff's previously preferred map averaged 0.27].

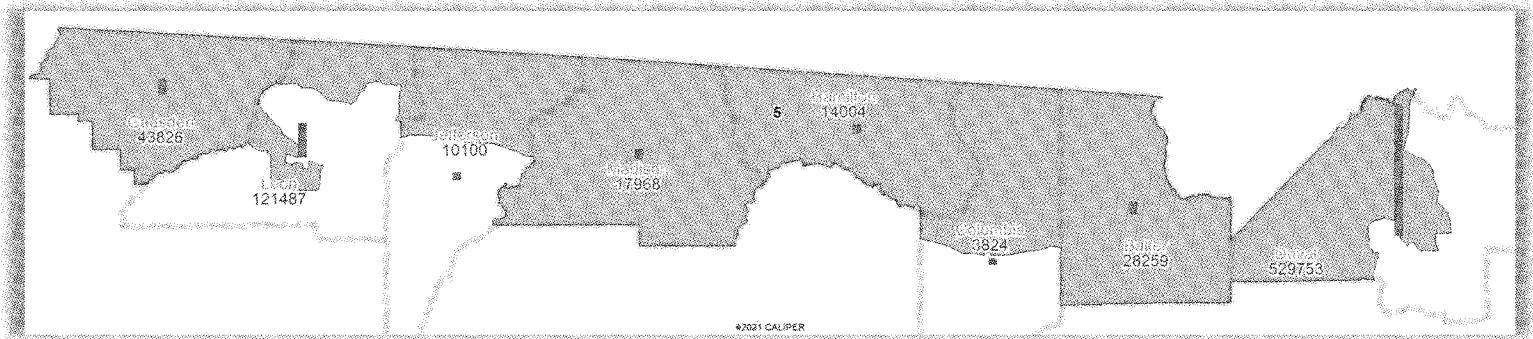
22. In Amended Map A, CD3's Polsby-Popper score drops to 0.31. It was 0.50 in the Enacted Map and from 0.54 in plaintiff's previously preferred map. This low 0.31 score is the highest of all the four focus districts (2 through 5) in Amended Map A, but remains less-compact than even the **least** compact district (among these 4 districts) in the Enacted Map (CD4 at 0.32).

Districts 2 - 5		Polsby-Popper Compactness		
District	Adopted	2016	Plaintiff	Amended Map A
2	0.48	0.21	0.25	0.25
3	0.50	0.53	0.54	0.31
4	0.32	0.17	0.18	0.14
5	0.53	0.10	0.11	0.11
Average	0.46	0.25	0.27	0.20

LINKING DISTANT POCKETS OF POPULATION

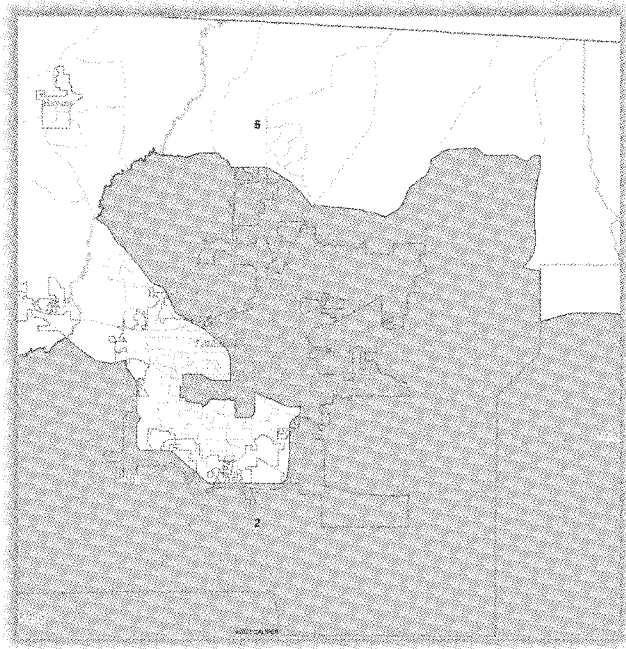
23. Amended Map A provides a tenuous and sparsely populated 116-mile link between Gadsden / Leon counties in the west and Duval County in the east. Amended Map A links the two distant regions using a string of sparsely populated counties – and splitting two of those five those counties to further depopulate the "bridge."
24. Of the 769,221 people in Amended Map A Congressional District 5, 529,753 (68.9%) reside in Duval County while 165,313 (21.5%) reside at the far west end in Leon or Gadsden Counties. Combined, over 90 percent of the District population reside at the extreme ends of the 204-mile-long district.
25. At just 74,155, the total population in the five "bridge" counties are less than ten percent of the District population. The "bridge" geography does not even encompass the Interstate 10 corridor, as Jefferson County and Columbia County are both split right along the freeway (excluding the southern side of the freeway corridor from the District), and CD5 completely excludes the Suwannee County section of the Interstate 10 corridor:

Amended Map A Population by County:

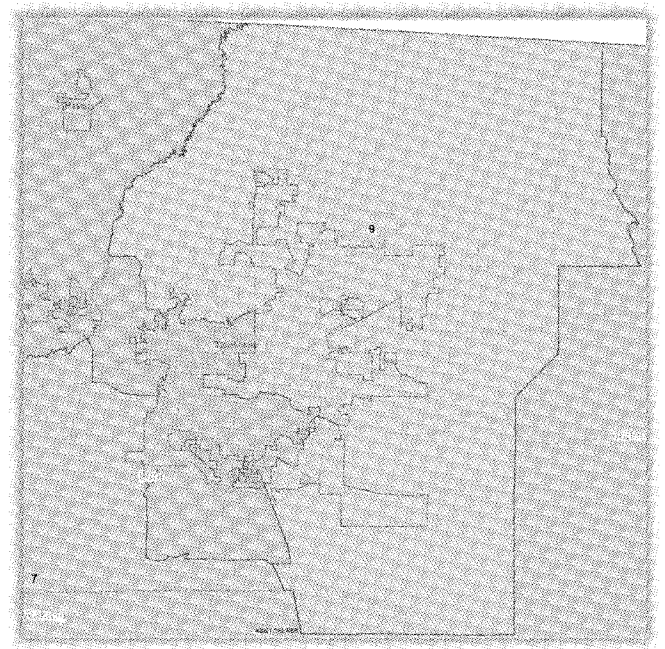


LEON COUNTY / TALLAHASSEE SPLIT

26. Amended Map A divides Leon County and Tallahassee along the exact same lines as plaintiff's previously preferred map, with the same problems I discussed in my original report.
27. Plaintiff's claim that Amended Map A follows the same lines as the adopted State House map is false. In fact, the State House district that comes into southern Tallahassee is not the same State House district that comes across the northern part of Leon County. In addition, the State House district that comes into southern Tallahassee has significantly different boundaries than those in Amended Map A. A simple visual glance shows the significant geographic and population differences between the two maps:

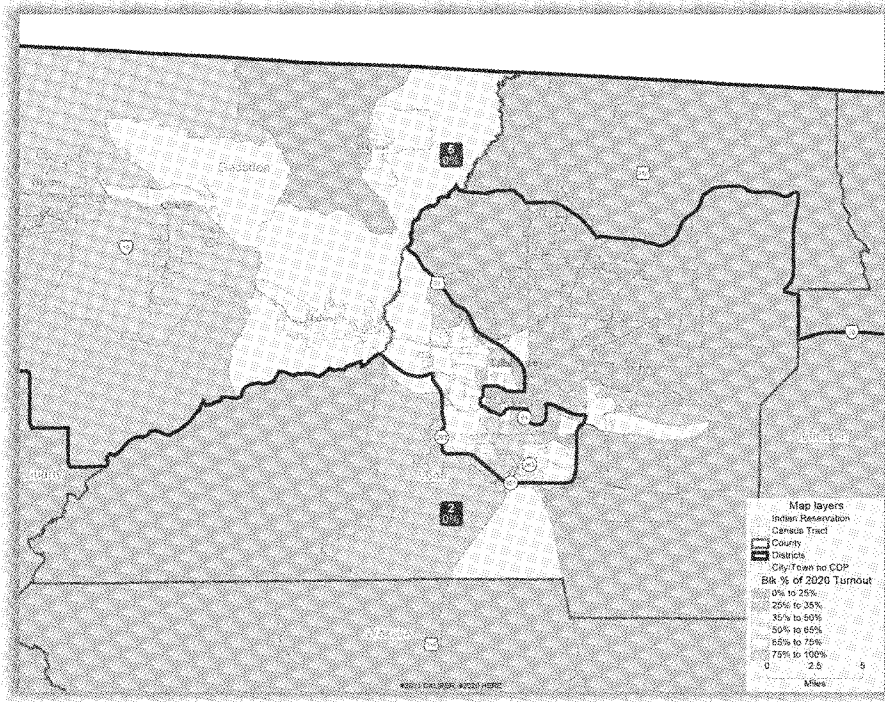


Amended Map A



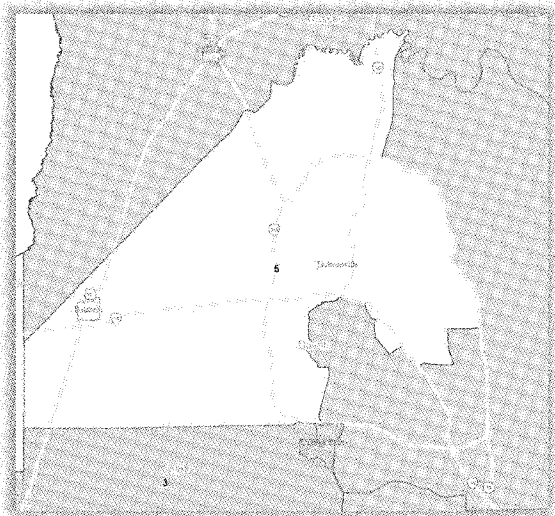
Enacted State House Map

28. Amended Map A maintains the same Leon County-to-Gadsden County-to-Leon County configuration of CD5, picking up only the most-heavily-Black Census Tracts inside Tallahassee, as I discussed in my original report:

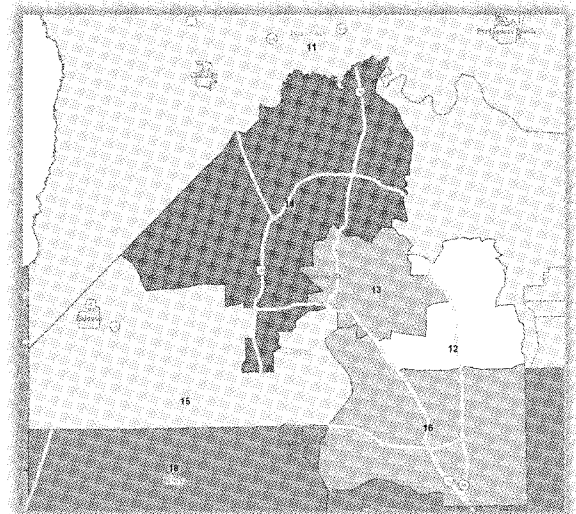


DUVALL COUNTY / JACKSONVILLE SPLIT

29. Plaintiff's claim that Amended Map A follows the same highways through Jacksonville as the enacted State House map is at best misleading. Other than both maps following the northern city border of Jacksonville, Amended Map A and the Enacted State House Map are completely different:

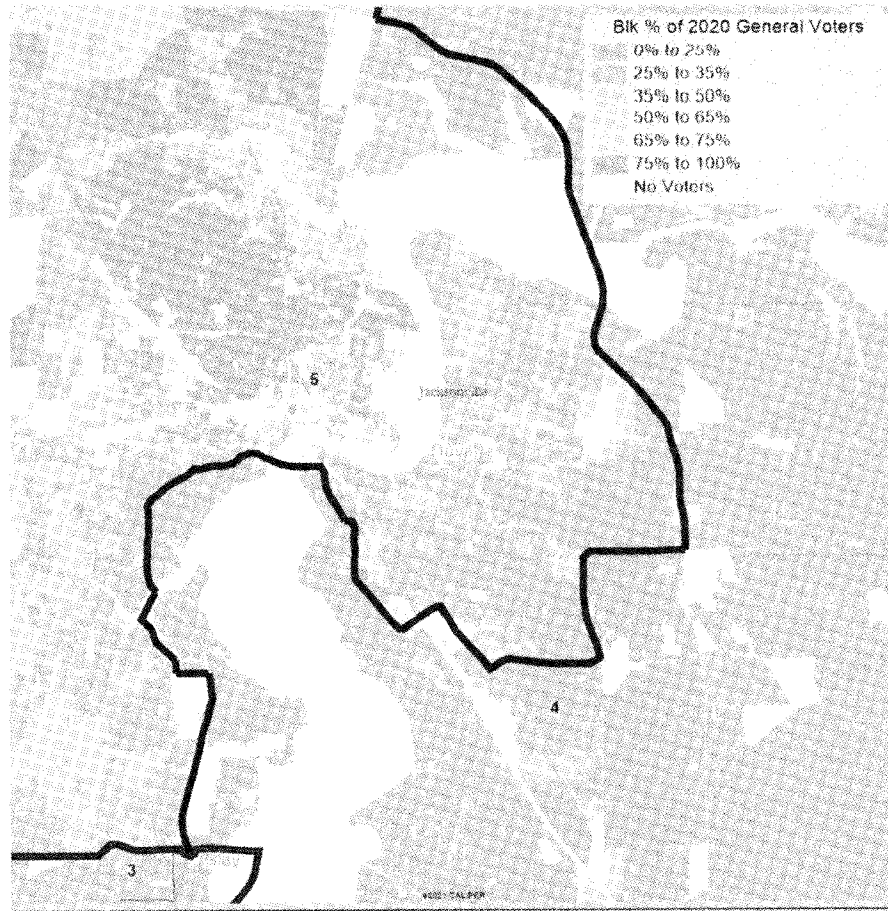


Amended Map A



Enacted State House Map

30. Clearly plaintiff's claim to have followed State House district lines is false. The data show the plaintiff followed racial data fairly precisely in drawing the boundary between CD4 and CD5 along the St Johns River and the I-95 corridor:



This the 13th day of May, 2022.

By: 
Dr. Douglas Johnson

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

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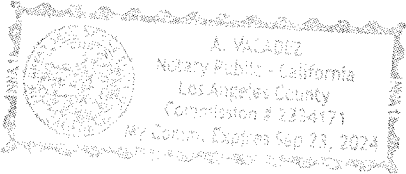
State of California)
County of Los Angeles)

On 05-13-2022 before me, A. Valadez, Notary Public
Date Here Insert Name and Title of the Officer
personally appeared Dr. Douglas Johnson
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature A. Valadez
Signature of Notary Public

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EXHIBIT 13

Black Voters Matter Capacity Building Institute, Inc., et al

vs.

Laurel M. Lee

Hearing Before:

Judge J. Layne Smith

May 11, 2022

Vol 01

PHIPPS REPORTING

Raising the Bar!

Judge J. Layne Smith
May 11, 2022

IN THE CIRCUIT COURT OF THE 2ND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CASE NO. 2022-CA-000666

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

Plaintiffs,

vs.

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

Defendants.

TRANSCRIPT OF HEARING
PROCEEDINGS

RE: Plaintiffs' Motion for Temporary Injunction and
Memorandum of Law

DATE TAKEN: Wednesday, May 11, 2022

TIME: 9:02 a.m. - 12:42 p.m.

PLACE: Remote Via Zoom

BEFORE: J. LAYNE SMITH, Circuit Judge

Stenographically reported remotely via Zoom by:
Lisa Begley, RPR, RMR

248604

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1 Thereupon,
2 the following proceedings began at 9:02 a.m.:

3 THE COURT: As far as I can tell, everyone
4 is connected.

5 Ms. Begley, the court reporter, can you
6 hear?

7 THE STENOGRAPHER: Yes, I can. Thank you,
8 Your Honor.

9 THE COURT: All right, we have enough
10 people and parties involved that it's going to be
11 important, for the court reporter and for the
12 record, for everybody to remember to introduce
13 themselves.

14 And here's Mr. Bardos. I'm connecting him
15 as well. That's the other fun part, if there's
16 somebody that I don't know about that is supposed
17 to be here that hasn't connected.

18 Mr. Bardos, can you hear us?

19 MR. BARDOS: I can, yes, sir.

20 THE COURT: All right, very good. What I
21 was just saying is we have enough people involved,
22 it's important for everybody to introduce
23 themselves, who they are, and who they're
24 speaking, advocating on behalf of for the court
25 reporter's sake.

1 All right, a little -- and here we go. And
2 there's a number of people. We can expect there
3 to be folks adding in. So we'll make sure we
4 don't get out ahead of anybody. That's the
5 attorney general that obviously needs to be here.

6 All right, let me ask everybody else, is
7 there anyone that you know of that should be here,
8 that would want to be here that we need to wait
9 on, or do we think everyone is here and we're
10 ready to go?

11 MR. DEVANEY: Your Honor, John Devaney for
12 the plaintiffs. I believe our team is here and is
13 ready to go.

14 THE COURT: Okay. All right, I see the
15 Senate, the House, the attorney general, the
16 secretary of state, so I think we have everybody
17 that we would -- we would expect. I know we have
18 one witness, I guess, lined up and ready to go.

19 Good morning, everyone. I'm Circuit Judge
20 Layne Smith. I'm the judge on the case. We're
21 here for a temporary injunction hearing in this
22 matter, in Case No. 2022ca666.

23 One matter of housekeeping, I know that the
24 Attorney General's Office had filed a motion and
25 some supporting case law in essence saying that

1 they're not a proper party, that they were
2 supposed to be put on notice that this case is
3 attacking the constitutionality of the enacted
4 statute but that they aren't supposed to be a
5 direct party.

6 I've read the motion. I've read the case
7 law on that. Didn't surprise me. Kind of
8 anticipated that's what they would file on that.

9 Any issue about whether the attorney
10 general is in or out -- in other words, they're on
11 notice, they're here -- but as a party to the
12 case, a defendant to the case?

13 MR. WERMUTH: Your Honor, this is Fritz
14 Wermuth on behalf of the plaintiffs. We're aware
15 of the attorney general's position. I think the
16 fact that they have now clarified on the record
17 that they are not a proper party and that they are
18 not going to be participating in the matter, I
19 think that resolves the issue.

20 THE COURT: I thought -- I thought as much.
21 So the attorney general is certainly on notice.
22 They're required to be on notice, but they're not
23 a party. So if they're not a party, I wouldn't
24 expect them to take a speaking position today, but
25 they're monitoring.

1 Is that fair to say, agreed to by the
2 attorneys general's office.

3 MR. FARUQUI: That's correct, Your Honor.

4 THE COURT: Okay, so with one less
5 defendant, let me tell you where we are on this.
6 I know you all eat and breathe this subject matter
7 on a daily basis, and you're very experienced
8 litigators, very successful litigators; I don't,
9 on this subject matter. And over the last five
10 days, I've juggled my other cases on my docket and
11 read easily 2,000 pages of materials that the
12 parties have provided, statistical reports,
13 tables, new acronyms and terms of art,
14 nomenclature, along with the case law.

15 And the case law could be more
16 straightforward on some of the issues that we
17 have, but as it is, I'm doing the best I can. So
18 I need you all to remember, the attorneys, that
19 you're officers of the court, so don't try to pull
20 one on me if you think you might get away with it,
21 because I'll figure it out sooner or later. Don't
22 do that. It's important that everybody be honest,
23 because we've got a short period of time to do
24 what we need to do today.

25 The other thing is, don't hesitate to

1 explain something to me if -- In all the reading
2 I've done -- I'm a pretty quick study, but in all
3 the reading I've done, if I seem to get something
4 wrong, don't hesitate to call me out on it, to
5 correct me on anything. Be polite about it,
6 please, but there's a lot of material, and I am
7 the only resource.

8 I have a judicial assistant, and she and I
9 are it. So, unlike the appellate courts, I don't
10 have a battery of attorneys that I can turn to and
11 ask to do things. It's me. So make sure that
12 you're being clear in what you're explaining, and
13 it's also important for anybody who's listening in
14 that they understand what we're doing today, what
15 standards apply, what the evidence is, what
16 arguments that everybody is making on their
17 client's behalf because the people will accept a
18 decision better if they think it is a transparent
19 hearing that everybody who had -- everybody who
20 needed to had an opportunity to be heard and that,
21 even on the close calls, everybody involved, the
22 officers of the court and the judge, are doing
23 their best to get it right. And that's what the
24 important thing is. It's not what I would think
25 individually. What does the law require me to do,

1 because that is my charge. That's the oath I
2 took, is to follow the law, not to invent the law.

3 So you all are going to have to help me get
4 to the right answer today, and whoever doesn't
5 like it, and most assuredly somebody's not going
6 to like it -- I start today with the idea that
7 half the population is going to dislike me today,
8 no matter what, or tomorrow, whenever the ruling
9 is. And under the right circumstances, 90 percent
10 of the population can not like me, but I didn't
11 sign up to be popular. I signed up to follow the
12 law, and that's the best of what -- I'm going to
13 do my best on that.

14 So to the extent a party needs to be heard
15 separately, in other words, if there's a multiple
16 defendant that needs to ask questions or needs to
17 be heard, they'll be given that opportunity. If
18 it's as simple as "I'll stand on what's already
19 happened," please state that on the record and
20 we'll go from there.

21 That having all been said, I think what I
22 have read is that both parties intend to have an
23 expert witness with direct and cross-examination.
24 It's possible the defendants will have either one
25 or two expert witnesses.

1 I've done my best to read through the
2 affidavits and all of the materials that have been
3 filed. Now, I got something last night that was
4 78 pages when I was past my saturation point. So
5 what that means is, I got up this morning, had a
6 couple cups of coffee and have tried my best to go
7 through it, but I haven't been able to give it my
8 deliberated best as opposed to I'm under the gun,
9 and that's -- I have done my best.

10 So you all are going to need to walk me
11 through it and make sure that you make your point
12 clearly on the record because, whatever I rule,
13 the next court that gets it is going to need a
14 clear record to know what was advocated and what I
15 decided to the extent it is a determination of
16 fact as opposed to an area of law that they have a
17 de novo review on.

18 So let's start off with the plaintiff.
19 Make your case.

20 MR. WERMUTH: Good morning, Your Honor.
21 This is Fritz Wermuth for the plaintiffs, and I'm
22 accompanied by John Devaney, who's been admitted
23 pro hac vice, and Christina Floyd, and then Joe
24 Posimato, who's been admitted pro hac vice.

25 THE COURT: Let me interrupt you, and I

1 hate to do this. Thank you for that.

2 There was a pro hac vice motion filed
3 yesterday, and I had intended to get it rendered
4 yesterday. It got rendered this morning. So to
5 the extent -- I know that there's another attorney
6 who's a New York Bar member who is a resident of
7 Washington, D.C. If you worry, you have been
8 admitted to the extent you need to talk.

9 MR. WERMUTH: Yes, Your Honor, that's
10 Joseph Posimato, and he's on the Zoom.

11 THE COURT: Thank you.

12 MR. WERMUTH: And then Angie Price, who is
13 my paralegal, will be doing some presentation on
14 the screen.

15 THE COURT: Okay. Very good. All right,
16 Mr. Wermuth, thank you. You can call your first
17 witness, make an opening statement.

18 Have you all decided -- between the parties
19 decided what you all wish to do?

20 MR. DEVANEY: Your Honor, good morning.
21 John Devaney again for the plaintiffs. And I
22 think the parties have agreed that we will provide
23 the Court with oral argument.

24 At some point in the proceeding, and we'd
25 appreciate the Court's guidance on what you think

1 would be most beneficial -- For example, we could
2 start with very brief openings, go right to the
3 witnesses and then have more lengthy closings
4 after the witnesses testify, but we're certainly
5 amenable obviously to whatever the Court prefers.

6 THE COURT: It might help for me to start
7 with a real thumbnail sketch of what I think I
8 understand about that volume of material I've
9 already read to make sure that I'm on the right
10 footing as to the parties' positions.

11 And then I'd like you to give an opening
12 statement regarding, for the plaintiffs, what you
13 intend to prove, how you will prove it, not
14 argument, but basically here's what the evidence
15 is going to show, like an opening statement that
16 you do in front of the jury.

17 The defense, do the same thing as far as
18 what they think the evidence will show. Outline
19 your arguments for me under the law. And then
20 call the first witness with the direct and
21 cross-examination, and we'll go through the
22 witnesses that way.

23 You'll get an opportunity to give an oral
24 summation, and we'll see, I don't know what I'm
25 going to do yet. I shouldn't, should I? I

1 haven't heard the case yet. I mean, I've read a
2 lot of material, but I've got to get a sense of
3 what I'm going to do in a ruling and what I need
4 to be able to do that.

5 So we'll talk later about whether I need
6 any proposed orders or briefings because I know
7 our time is very tight on this. Not of my doing,
8 but it is what it is.

9 So here's where I think we are: The state
10 constitution, Florida's constitution requires the
11 legislature to do apportionment for the State
12 Senate and State House and then send that as a
13 joint recommendation to the Supreme Court.

14 The attorney general files that, and it
15 skips the governor, skips the executive branch and
16 goes from the legislature to the judiciary. Not
17 so with congressional redistricting. If it was
18 the same way, perhaps we wouldn't be here right
19 now because something different might have
20 happened, but we don't know and we don't need to
21 speculate about that.

22 Here, the congressional districting has to
23 be enacted by the House and the Senate -- it was
24 -- and either signed by the governor, vetoed by
25 the governor. If it is vetoed by the governor, it

1 needs to be overridden by two-thirds majority per
2 the constitution.

3 Where we're at is the state legislature,
4 the House and the Senate, enacted reapportionment
5 for Florida and Florida population is growing. So
6 we went from 27 members of the House of
7 Representatives. We got a 28th member as I
8 understand it. So not only did our population
9 grow by over 3 million during the 10 years between
10 the 2010 census and the 2020 census, but we got an
11 allocation of an additional congressperson, and so
12 not only did we have to redistrict for -- to make
13 sure the population was as close to equal in all
14 the factors for apportionment, but we had an
15 additional seat to take care of as well.

16 The governor vetoed a measure that had been
17 enacted by the House and Senate. They did not
18 override the veto. They came back in special
19 session and, as a result of the special session,
20 they enacted new districting that the governor
21 signed.

22 Now, what I don't know, and you all can
23 help me on this quicker than I can figure it out
24 myself -- If I had the luxury of time, I'd figure
25 it out myself -- but how much time did that cost

1 between the Governor vetoing what the legislature
2 had enacted, the special session to where he
3 signed it? I have a date -- I want to say it's
4 April the 22nd -- but a date with where the
5 Governor signed the law at issue in the case.
6 What I don't know is when in time the veto
7 happened. In other words, are we talking four
8 weeks? Are we talking three weeks? Are we
9 talking a month and a half? I know it wasn't a
10 long period of time, but there you go. In other
11 words, so that's -- that's where we're at.

12 The benchmark for Congressional District 5,
13 what had been Congressional District 5 for the
14 prior three elections ran on a east-west basis
15 covering several counties from Gadsden County in
16 the east over to Duval County in the west, and it
17 had been fashioned as a majority-minority African
18 American district.

19 I know the Supreme Court, in cases in the
20 Florida Supreme Court, in cases 2012 through, I
21 guess, 2015 had approved of that as a district to
22 the extent that, at one point in a case, it
23 basically said here's what the district is, now
24 you all figure out apportionment for the remaining
25 districts.

1 It seems to me that a difference between
2 then and now -- and one of the things is a legal
3 matter and we'll see how the facts play out with
4 it -- is to what extent the federal law may have
5 changed somewhat since the Fair Districts
6 amendment was added by the people of Florida
7 overwhelmingly to the state constitution.

8 And so the 15th Amendment to the United
9 States Constitution says that the rights of
10 citizens to vote shall not be denied or abridged
11 by the United States or any state on account of
12 race, color or previous condition of servitude,
13 Section 1; Section 2, that Congress will have the
14 power to enforce this article by an appropriate
15 legislation.

16 Well, in 1965, there was the Voting Rights
17 Act of 1965 enacted, and I think, based on my
18 reading, that that was pursuant -- Congress, what
19 they did at the end of the day is that was -- they
20 were enabled to do that through Section 2 of the
21 15th Amendment to the U.S. Constitution.

22 The 14th Amendment, Section 1, provides for
23 equal protection of the laws. So the U.S., nor
24 any state, can deny any person within its
25 jurisdiction the equal protections of the law.

1 So it seems to me one of the arguments
2 being made is that the Voting Rights Act runs
3 afoul of the 14th Amendment, or that it requires
4 strict scrutiny and narrow tailoring, and to what
5 extent we can prove that in a five-hour injunction
6 hearing, I'm not sure.

7 Is that a fair statement of kind of where
8 we are and the issues that are in play today?

9 MR. DEVANEY: Your Honor, John Devaney
10 again for the plaintiffs. Your Honor's summary, I
11 think, captures a good portion of what's before us
12 and where we are today. I would add a few things.

13 One is, first, in response to Your Honor's
14 question, you asked about when the veto occurred
15 and how much passage of time until the special
16 session at which the map in question was adopted.
17 The veto was on March 29th. The special session
18 was called three weeks later. It was during that
19 special session that the map in question was
20 enacted.

21 And, Your Honor, the piece that I would
22 want to add and very much emphasize is --

23 THE COURT: -- constitution.

24 MR. DEVANEY: I'm sorry?

25 THE COURT: The Fair District amendment to

1 the state constitution.

2 MR. DEVANEY: Exactly, Your Honor. And
3 that law is in effect. Decisions from the Florida
4 Supreme Court interpreting and applying those
5 constitutional amendments are in effect and are
6 binding, of course, on the Court.

7 And the Fair District amendment, as Your
8 Honor knows from the papers, Article 3,
9 Section 20, is very clear in establishing a
10 non-diminishment requirement in Florida law. And
11 there's a process for evaluating non-diminishment
12 that the Supreme Court has established in its
13 decisions, and that is a fairly straightforward
14 process that requires a functional analysis, and
15 that functional analysis focuses on did the
16 district in question -- in this case, of course,
17 what we call Benchmark CD-5 -- permit minorities
18 to elect their preferred candidates. And there
19 are various factors that we'll talk about later,
20 of course, that should be analyzed in that
21 functional analysis.

22 And then the second set in the functional
23 analysis is did the dismantling of CD-5 and the
24 dispersion of 370,000, approximately, black voters
25 into other districts diminish the ability of black

1 voters in northern Florida to elect their
2 preferred candidates. And under the Supreme
3 Court's jurisprudence, that is the analysis. One,
4 did the district perform? Two, with the
5 dismantling of the district, does it no longer
6 perform, and are those 370,000 voters no longer
7 with the -- no longer have the ability to elect
8 their preferred candidates?

9 That is the fairly straightforward analysis
10 under the Florida Constitution and, Your Honor, we
11 would submit and I think Dr. Ansolabehere, who
12 will testify momentarily, will establish that that
13 functional analysis makes it very clear that CD-5,
14 the Benchmark CD-5, the one that was in effect at
15 the beginning of 2015, that was created and
16 adopted by the Supreme Court of this state, did
17 give black voters the opportunity to elect their
18 preferred candidates. In fact, in, I believe, it
19 was three separate elections, black voters in CD-5
20 were able to elect their preferred candidate,
21 Representative Lawson.

22 The plan that has been enacted and is
23 before Your Honor dismantles that district, and so
24 the second part of the analysis is it leads to the
25 inevitable conclusion that that district no longer

1 performs for minority voters, and the voters have
2 been -- the black voters in that district have
3 been dispersed across four different districts,
4 all of which are white majority district, and all
5 of which, established by Dr. Ansolabehere, do not
6 give minorities, in this case black voters, the
7 ability to elect their preferred candidates.

8 And, in a nutshell, that evidence, which is
9 unrefuted -- there's no other functional analysis
10 in the record -- establishes that there is
11 diminishment in violation of the Fair District
12 amendment to the constitution. So, Your Honor, we
13 have a fairly straightforward violation of the
14 Florida Constitution.

15 The last point I'll mention is that the
16 legislature itself, as Your Honor is aware from
17 the history of this redistricting laid forth in
18 our papers, was very concerned about the
19 lawfulness of dismantling CD-5. And every map
20 proposed by the legislature, up until the last
21 minute until the Governor intervened, maintained
22 the east-west configuration of CD-5 or maintained
23 the ability of black voters to elect their
24 preferred candidates.

25 And even when the legislature passed a map

1 that did not give black voters that ability, they
2 proposed an alternative map that did preserve
3 that, recognizing that the constitutionality of
4 what it was proposing was very much in question.
5 And the chair of the House Redistricting Committee
6 himself said on public record that the legislative
7 staff did a functional analysis, and they
8 concluded that CD-5 no longer performs.

9 In other words, they concluded, this is the
10 legislature itself, that there has been
11 diminishment, and that diminishment is in
12 violation of the Florida Constitution.

13 Your Honor, there are obviously other
14 aspects to this proceeding, including responding
15 to some of the defendants' arguments about it's
16 too late to implement a remedy even if there is a
17 constitutional violation. I will reserve those
18 arguments, unless Your Honor would prefer to hear
19 them now, until closing and until we hear from
20 witnesses.

21 What I just outlined for you is at a high
22 level our fundamental case and what we think is a
23 very straightforward record that establishes
24 diminishment in violation of the constitution.

25 THE COURT: All right, Mr. Devaney, in

1 reading the materials you have provided, your
2 summary lockstep with the documents you had filed
3 on it, your briefing, as well as the supporting
4 document.

5 Let's hold off on the argument about delay
6 until after the witnesses have gone.

7 All right, anything else you need to say on
8 behalf of the plaintiffs before the defense gets
9 an opportunity to make an opening?

10 MR. DEVANEY: Your Honor, just one
11 housekeeping matter, and that is ensuring that all
12 that the plaintiffs have submitted with our --
13 both our opening motion and our reply brief is
14 admitted into the record. I just want to ensure
15 that the record contains all those materials.

16 I think -- I'm expecting there's agreement
17 among counsel that everything that the parties
18 have submitted is in the record, but I just want
19 to make sure that's the case.

20 THE COURT: As far as I know, I have
21 received everything that has been filed. Now,
22 unless it is sent to my office, if something is
23 sent to the clerk of court, it can be 12 to
24 48 hours before it populates on a screen I can
25 pull up. But I think everybody has gone out of

1 their way to make sure that they provided either a
2 notebook -- I've got more notebooks than I know
3 what to do with -- three-ring bound filings at a
4 minimum I could print out. So I think everything
5 that I'm aware of at least has been filed.

6 If you all raise something that I'm -- like
7 that's news to me, I'll let you know. And that's
8 true for both sides on that. If either of you had
9 something that -- because we've had to work in a
10 crunch here. So everybody has worked well with
11 each other, in good faith, and I know you all have
12 worked probably for and -- against each other, for
13 each other around the country on different fights,
14 but here we are on this one. So everything, I
15 think, is in, Mr. Devaney.

16 MR. DEVANEY: Thank you, Your Honor.

17 THE COURT: All right. The defense.

18 MR. JAZIL: Good morning, Your Honor.

19 Mohammad Jazil on behalf of the Secretary.

20 I just need to confirm for the record that
21 my friend Mr. Devaney is right. The parties have
22 agreed that all the exhibits attached to the
23 filings should be included in evidence for
24 purposes of this temporary injunction hearing.

25 THE COURT: Very good. Thank you,

1 Mr. Jazil.

2 MR. JAZIL: Thank you, Your Honor.

3 And since most of these materials have been
4 admitted into the record, I'll simply note a few
5 facts for the Court.

6 Your Honor, the record will show and at the
7 conclusion of this hearing you will see that what
8 my friend for the plaintiffs are asking for is for
9 this Court to draw a congressional map that goes
10 200 miles from east to west to connect the black
11 population in Florida's First Coast, Port City,
12 Orange Military Center in Jacksonville with the
13 black population in the Big Bend, a college town
14 with surrounding ag community.

15 Still, in that district, Your Honor, the
16 black population does not form a majority of that
17 congressional district, and that's important, Your
18 Honor, as Your Honor goes through the federal
19 constitutional analysis to see whether or not any
20 such district can comply with the Equal Protection
21 Clause.

22 My friend Mr. Devaney is right that the
23 Court is bound by the Florida Supreme Court's
24 orders and opinions, but the Court is also bound
25 by the U.S. Supreme Court's orders and opinions

1 and complies with the Equal Protection Clause as
2 necessary. Where the Equal Protection Clause and
3 Florida's Fair District amendments conflict, the
4 Equal Protection Clause prevails.

5 And here, Your Honor, to comply with the
6 Equal Protection Clause, any remedial map, any map
7 that stretches from east to west to connect the
8 black populations has to satisfy strict scrutiny,
9 the highest possible level of constitutional
10 scrutiny. You'll see, Your Honor, that that's
11 simply not possible here.

12 Your Honor, in addition, you'll hear
13 evidence about how there might be possible
14 confusion, delays, burdens imposed. That's also
15 important because it goes to our Purcell point, a
16 point that courts shouldn't interject themselves
17 into an election this late in the process.

18 Finally, Your Honor, you'll hear evidence
19 from the plaintiffs showing what they're asking
20 for is a mandatory injunction. They want to
21 mandate the enactment and approval of new maps,
22 mandate. And this is not that rarest of rare case
23 where such a mandate is appropriate.

24 Finally, Your Honor, a cautionary note. As
25 applied to the Benchmark District 5 and any

1 variation that the plaintiffs are asking Your
2 Honor to adopt here, non-diminishment standard
3 runs smack dab into the Equal Protection Clause
4 and renders the non-diminishment provision of the
5 Florida Constitution unconstitutional as applied,
6 and that's an important point.

7 THE COURT: It is, and you faded out just
8 at kind of what I think was going to be the
9 highlight of what you just said on this. So if
10 you'd repeat that sentence for me, please.

11 MR. JAZIL: Yes, Your Honor. My point is
12 simply this: If we adopt any configuration of
13 Congressional District 5 that goes north to south
14 to connect disparate black communities 200 miles
15 apart, what we have then is the non-diminishment
16 provision of the Florida Constitution running
17 smack dab into the Equal Protection Clause of the
18 federal constitution. It renders the Florida
19 Constitution's provision as applied
20 unconstitutional.

21 And it's an east-to-west configuration,
22 Your Honor. I apologize if I said anything
23 otherwise.

24 THE COURT: I gotcha. North-south was --
25 We've all read that with prior skirmishes, not

1 this skirmish. Go ahead.

2 MR. JAZIL: Yes, Your Honor.

3 And, finally, a point about the functional
4 analysis. You have to ask yourself this question:
5 If a baseline map is unconstitutional, what good
6 is a functional analysis? Where am I comparing?
7 How am I measuring diminishment? And we'll
8 explore those concepts a bit as the case proceeds.

9 Thank you, Your Honor.

10 THE COURT: All right, thank you.

11 All right, Mr. Wermuth or Mr. Devaney, call
12 your -- whoever is going to be leading the witness
13 -- not leading -- directing the witness, we'll put
14 it that way, call your witness.

15 MR. DEVANEY: All right, thank you, Your
16 Honor. My colleague, Christina Ford --

17 THE COURT: All right, Ms. Ford.

18 MR. DEVANEY: -- will proceed with direct
19 examination of our witness.

20 THE COURT: Good morning, Ms. Ford.

21 MS. FORD: Good morning, Your Honor.

22 Christina Ford for the plaintiffs.

23 The plaintiffs call Dr. Stephen
24 Ansolabehere as our first witness.

25 THE COURT: Ansolabehere. I'm glad

1 somebody pronounced that for me. I'll do my very
2 best. If I get it wrong, my apologies. I'm not
3 trying to be disrespectful.

4 So, sir, you need to unmute yourself on
5 your end. Let me ask you to raise your right
6 hand.

7 I take it everybody knows this gentleman
8 and knows he is who he's supposed to be. You
9 don't need me to pull out a driver's license or
10 anything; is that correct? I would imagine you
11 all run at each other -- Okay, very good.

12 Sir, do you swear or affirm that the
13 testimony you give in this case will be the truth
14 and nothing but the truth so help you God?

15 THE WITNESS: I do.

16 THE COURT: Very good. You can lower your
17 hand.

18 Ms. Ford, begin when you're ready.

19 MS. FORD: Thank you, Your Honor. Before
20 we begin, I just want to ask if the Court would
21 allow screen sharing so that we can share a couple
22 of demonstrative images --

23 THE COURT: Yes, ma'am.

24 MS. FORD: -- for you and the public?

25 THE COURT: Absolutely. There you go.

1 MS. FORD: Thank you very much.

2 DIRECT EXAMINATION

3 BY MS. FORD:

4 Q. Good morning, Dr. Ansolabehere. Can you
5 please state your full name for the record.

6 A. My first name is Stephen, with a P H,
7 Daniel Ansolabehere.

8 Q. And you have been retained as an expert for
9 the Black Voters Matter plaintiffs in this case, correct?

10 A. That's correct.

11 Q. And you have prepared and submitted two
12 expert reports, correct?

13 A. That's correct.

14 Q. Dr. Ansolabehere, your C.V. was included
15 with your first expert report. Is your C.V. a complete
16 and accurate summary of your professional experience?

17 A. It is.

18 Q. I have just a few questions for you about
19 your background and expertise.

20 Can you briefly summarize your educational
21 background?

22 A. I went to the University of Minnesota where
23 I got a BS in economics and a BA in political science.
24 And I went to Harvard University for my Ph.D. in the
25 department of government.

1 Q. And where are you currently employed?

2 A. I'm a Professor of Government at Harvard
3 University.

4 Q. Can you briefly summarize your principal
5 areas of research?

6 A. I study American politics and political
7 science and social science statistics. That is the
8 application of statistical methods to social science
9 problems.

10 I study elections. I run a large survey
11 organization as well, and I'm an election analyst for CBS
12 News.

13 Q. Do you have experience in the field of
14 redistricting?

15 A. I do.

16 Q. Can you please briefly describe your
17 experience?

18 A. I've served as an expert in about a dozen
19 cases, including Romo vs. Detzner. I've drawn maps in
20 several of those cases.

21 I worked for the Arizona Independent
22 Redistricting Commission as a consultant in the fall, and
23 for several other cases this cycle.

24 Q. And just for clarification, Romo v.
25 Detzner, that was last cycle's Florida congressional

1 redistricting case, correct?

2 A. Correct.

3 Q. Thank you. And beyond redistricting cases,
4 have you served and been accepted as an expert witness in
5 cases generally involving political behavior in
6 elections?

7 A. I have.

8 Q. Have you ever been rejected as an expert by
9 any court?

10 A. No.

11 Q. And have courts previously credited and
12 relied upon your analysis?

13 A. They have.

14 MS. FORD: At this time, Your Honor,
15 plaintiffs would offer Dr. Ansolabehere as an
16 expert in the field of political science and
17 election analysis.

18 THE COURT: Go ahead.

19 MS. FORD: Thank you, Your Honor.

20 BY MS. FORD:

21 Q. Dr. Ansolabehere, before we dive into the
22 details of your report, I'd like to start at a high
23 level.

24 Can you briefly summarize what plaintiffs'
25 counsel asked you to evaluate in your first expert

1 **report?**

2 A. In my first expert report, they asked me to
3 evaluate whether there'd been diminishment of minority
4 voters' ability to elect their preferred candidates
5 through the reconfiguration of CD-5. So it was a
6 comparison of Benchmark CD-5, which was the map that the
7 Florida State Supreme Court had put in place in 2015, to
8 the enacted map.

9 They asked me to do a functional analysis
10 to determine the voting behavior of minority candidates
11 -- minority voters, sorry, and white voters in CD-5 and
12 in the other districts that had been configured around
13 that area in North Florida, and also to see if there'd
14 been any other minority districts created elsewhere in
15 the map to compensate the diminishment around CD-5.

16 **Q. And, broadly, what did you find? What was**
17 **your top-line conclusion?**

18 A. My top-line conclusion was there had been a
19 diminishment of minority voters' ability to elect in
20 North Florida and that there had been no other district
21 created to compensate for that, and that the total number
22 of black Floridians whose -- in CD-5 had been about
23 370,000 and that they would have diminishment in their
24 representation.

25 **Q. And in your opinion, how easy or difficult**

1 is it to draw a remedial map that fixes this
2 diminishment?

3 A. My judgment is it's fairly easy to draw a
4 map that would fix the diminishment simply by taking 801
5 -- the version of the district that was created in the
6 House plan. The most recent one that I looked at was
7 8015 or the Senate plan, which was 8060. Those are the
8 last four digits on those long numbers describing the
9 plans.

10 Those districts closely mirror the
11 benchmark district, but they made marginal changes in the
12 district to increase the population because the benchmark
13 district was underpopulated by about 20,000 people.

14 Q. Thank you, Dr. Ansolabehere. We'll come
15 back to those potential remedies.

16 In preparing for today, in preparing your
17 rebuttal report, did you review the reports submitted by
18 Dr. Johnson and Dr. Owens?

19 A. I did.

20 Q. And do those reports refute the findings in
21 your report?

22 A. No, they don't.

23 Q. Thank you, Dr. Ansolabehere.

24 I'd like to go back to your first report to
25 cover some basics, and I'd like to start with the maps

1 we'll be discussing today because there have been a lot
2 of maps thrown around in this case.

3 MS. FORD: And here, Angie's going to share
4 a demonstrative.

5 Can everyone see this?

6 THE COURT: Yes, I can.

7 BY MR. FORD:

8 Q. And, Steve, can you see this as well?

9 A. Yes.

10 Q. Sorry. Dr. Ansolabehere.

11 So, Dr. Ansolabehere, can you please
12 describe at high level what the benchmark map is and what
13 CD-5 looked like in the benchmark map?

14 A. The benchmark map is the map that was put
15 in place by the Florida Supreme Court in 2015, and it
16 runs from Gadsden County in the west along the border,
17 taking the counties between -- in Duval County and takes
18 part of Jacksonville.

19 Q. And can you describe what voters resided
20 there?

21 A. It's a majority-minority district, and it's
22 a black district.

23 Q. At the time the Florida Supreme Court
24 adopted this map in 2015, was it a majority black
25 district?

1 A. No, it was not.

2 Q. Your report also refers to something called
3 Plan 8015. You also refer to it at times as the House
4 Committee map or the legislature's backup map. Can you
5 explain what these terms mean and what Plan 8015 is?

6 A. Plan 8015 has the number H000C8015. That's
7 the number that's assigned to it when it was submitted
8 through the state's redistricting portal.

9 It's the plan that the House committee had
10 put forward as their remedy if the version that was --
11 that they had passed was judged to be unconstitutional.
12 It follows the Benchmark CD-5 with some small changes.

13 The configuration in Tallahassee is much
14 more -- it's much smoother, not as jagged in its edges,
15 and it takes more of Duval County. It follows the border
16 between Nassau and Duval in the west. And, again it
17 makes the boundary smoother in Jacksonville on the east.

18 Q. And, finally, what is the enacted map?

19 A. The enacted map is the map that was signed
20 into law on April 22nd of this year, and it sets forth
21 four districts covering the area where CD-5 had been in
22 the benchmark and where it's located in Plan 8015.

23 CD-2 takes the western side of the
24 district, including Tallahassee and Leon County and
25 Gadsden County. CD-3 takes the counties from the middle

1 of the district, and the map flips CD-4 and CD-5, so CD-5
2 resides where -- in the enacted map, where CD-4 had taken
3 part of St. Johns and the eastern part of Duval, and CD-4
4 now takes Nassau County, which had been in old CD-4, and
5 the part of CD-5 that was in Plan 8015 and in the
6 benchmark map.

7 Q. And can you please describe how many black
8 voters were affected by this change?

9 A. There were about 367,000 black -- black
10 Floridians in the benchmark map, CD-5.

11 Q. And do those black voters now consist of a
12 minority of each of the new districts, CD-2 through 5, in
13 the enacted map?

14 A. Correct. Blacks are not -- None of these
15 districts, CDs 2,3, 4 or 5 on the enacted map, are
16 majority-minority districts. And in none of them would
17 blacks be able to elect their preferred candidates.

18 Q. Thank you, Dr. Ansolabehere.

19 MS. FORD: And, Angie, we can take this
20 demonstrative down.

21 BY MS. FORD:

22 Q. Dr. Ansolabehere, I'd now like to cover the
23 basics of the concept of diminishment.

24 When you refer to diminishment or
25 non-retrogression, what are you referring to?

1 A. That's the standard by which a district is
2 determined to perform one way or another for minorities,
3 whether it's a black district or Hispanic district. In
4 that district, after analyzing election data, we
5 determined -- or, I determined who is the preferred
6 candidate for the group in question and then whether or
7 not that group has the ability to elect. So that is, do
8 they win a majority of votes in most of the elections in
9 that area. They don't have to win all of the elections.

10 In addition, the demographics, the
11 demographic composition is important. We want to make
12 sure it's not just a white district, let's say a white
13 democratic district, and blacks are a minority and yet
14 they're just electing democrats. So it's really about
15 creating a majority-minority district in demographics, as
16 well as one where they have the ability to elect.

17 And under Florida law from last time, other
18 factors are important, such as the composition of the
19 turnout in the democratic primary and so forth.

20 **Q. And all those factors you just talked about**
21 **is that what goes into a functional analysis?**

22 A. That's correct. And diminishment occurs
23 when you have a district where all those factors came
24 together in that area where you're analyzing it -- in
25 this case, the area around CD-5 in North Florida -- and

1 minority voters did have the ability to elect their
2 preferred candidates in the prior version of the map, but
3 in the new version of the map, they would not, either
4 because it's no longer a majority-minority district on
5 demography, or one of those electoral factors is
6 diminished to the point where they can't elect their
7 preferred candidate.

8 Q. So when you conduct a functional analysis,
9 you look more at just the number or the percent of the
10 population that is minority, correct?

11 A. Yes. It's more than just looking at the
12 census numbers.

13 Q. And is that direction you take straight
14 from the Florida Supreme Court?

15 A. Yeah, those were the principles we followed
16 last time in Romo vs. Detzner and League of Women Voters
17 vs. Detzner, and that was the guidance that the Florida
18 Supreme Court gave us as to what factors to look at.

19 Q. So it's possible then that minority voters
20 could constitute below 50 percent of voters in a district
21 and still be protected from diminishment in your
22 understanding?

23 A. That's correct --

24 MR. JAZIL: Objection, leading, Your Honor.

25 Some leeway is --

1 THE COURT: Sustained. Ask the question.

2 But, Mr. Jazil, I'm going to be just the
3 same with you now.

4 BY MS. FORD:

5 Q. Dr. Ansolabehere, is there any particular
6 numerical quota that minority voters might need to hit to
7 be protected from diminishment in your estimation?

8 A. No. Like, the functional analysis and the
9 analysis of whether a district is performing is really
10 tailored to the facts on the ground around that district.

11 It's my understanding of Florida law, this
12 was part of a deliberation last time, and it's in the
13 record and in the decision of the court that this could
14 be less than a majority black district and still be a
15 performing district.

16 THE COURT: Let me ask a question --

17 THE WITNESS: Sure.

18 THE COURT: -- to make sure I've got it
19 right in my reading.

20 Is what you're talking about the difference
21 between a majority-minority district and a
22 crossover district?

23 THE WITNESS: A crossover district is one
24 where blacks couldn't elect their preferred
25 candidate without the votes of whites. That is --

1 THE COURT: All right, and the difference
2 here would be, in Benchmark District 5, if you
3 took the African American voting age population
4 registration, et cetera, and you add it to other
5 minorities, be they Asian, Native Americans,
6 whatever, the combined minority population could
7 outvote the white population?

8 THE WITNESS: Right. So the distinction,
9 if there's a majority-minority district that is a
10 majority of one group, like it's majority Hispanic
11 like you have down in South Florida, or majority
12 black, and then there are coalition districts
13 where the blacks and the Hispanics say, Come
14 together. There are a number of districts like
15 that around the country. And then there is
16 another set of districts which are called
17 crossover districts.

18 There's a little confusion about this in
19 the legal literature because, when this got
20 introduced by -- Rick Pildes introduced this
21 terminology in the '90s. He's a law professor at
22 NYU. I think the terms crossover and coalition
23 were getting used interchangeably back then, so
24 there's a little conflation of --

25 THE COURT: It confused me, which is --

1 which is why I asked, so -- but the bottom line
2 here, I get what you're saying on it. And
3 Mr. Jazil will get his opportunity as well.

4 So, Ms. Ford, please continue. I'm sorry I
5 interrupted.

6 MS. FORD: No, thank you, Your Honor.

7 BY MS. FORD:

8 Q. And, Dr. Ansolabehere, have you performed
9 functional analyses in cases or situations before this
10 one?

11 A. I have.

12 Q. Did you ultimately conduct a functional
13 analysis on the benchmark map and the enacted map?

14 A. I did.

15 Q. Can you please summarize your conclusions
16 as to what you found when you conducted a functional
17 analysis on the benchmark map?

18 A. CD-5 is the performing district for black
19 voters in the benchmark map. It's not in the enacted
20 map, nor is CD-4, CD-2 or CD-3, or any other district in
21 North Florida.

22 Q. And did black voters previously elect a
23 black candidate to Congress from the Benchmark CD-5?

24 A. They did. Al Lawson was elected in 2016,
25 2018 and 2020.

1 Q. Going back to your fundamental conclusion
2 about diminishment, does Dr. Johnson's report refute that
3 there has been diminishment?

4 A. No, it does not.

5 Q. And does Dr. Owens' report refute that
6 there has been diminishment?

7 A. No, it does not either.

8 Q. What criticism of your report do you
9 understand Dr. Owens to be making?

10 A. Dr. Owens is providing evidence that black
11 voters prefer white democrats and black democrats and
12 saying that there's not much of a difference between
13 them. My sense of that is that that doesn't go to the
14 question of which kind of candidates or which candidates
15 are preferred by black voters or Hispanic voters or Asian
16 voters, because the question put forward in the
17 constitution in the language is the preferred, the
18 candidates preferred by those voters, has there been a
19 diminishment in the ability of minority voters to elect
20 their preferred candidates. It's not about whether they
21 elect minority candidates. It's not the race of the
22 candidate. It's the preference of the voters that
23 matters.

24 Q. Thank you, Dr. Ansolabehere. Let's go back
25 to your analysis for a moment.

1 Did you do a functional analysis of the
2 legislature's 8015 plan?

3 A. I did.

4 Q. And can you briefly summarize what you
5 found?

6 A. I found that black voters had the ability
7 to elect in 8015's version of CD-5.

8 Q. And what was your takeaway from that, the
9 fact that the legislature was able to make that kind of
10 district?

11 A. So the change from the benchmark map to
12 8015 is that they had to equalize the population of all
13 the districts. And under -- The U.S. Constitution for
14 congressional districts has to be exactly equal, zero
15 population deviations. State legislative districts allow
16 some percentage difference, like, you know, plus or minus
17 5 percent or so. But this is like exact equality.

18 So they had to reconfigure it to get exact
19 equality, and they had to make up for a 20,000 person
20 deficit. Those changes could be -- what 8015 shows is
21 that those changes could have been accomplished and the
22 benchmark map's version of CD-5 maintained as a
23 functioning district for black voters.

24 Q. Thank you, Dr. Ansolabehere. I'd now like
25 to turn to remedies.

1 Your initial report describes some of the
2 possible remedies to fix this diminishment. Can you
3 describe what those remedies were in your first report?

4 A. In my first report, I was asked whether it
5 was possible to replace districts in North Florida and
6 restore a version of Benchmark CD-5, and the version I
7 chose was to put the version in 8015 in -- a version of
8 CD-5 into 8015 because that had been a version that the
9 House committee on redistricting had created presumably
10 in line with Florida law, or at least their understanding
11 of Florida law, and it had been passed by the committee.
12 And so I took the version in the north part of the map
13 and put it in as closely as possible. That affected
14 seven districts, 2, 3, 4, 5, 6, 7 and 11.

15 Q. And, Dr. Ansolabehere, just to clarify,
16 because this is -- this is a nuance, nuance difference,
17 that remedy essentially swapped out the North Florida
18 districts from the 8015; is that correct?

19 A. Correct.

20 Q. Okay. Did you propose additional different
21 remedies in your rebuttal report?

22 A. In my rebuttal report I proposed two
23 additional remedies to deal with two different questions.
24 One question was, was it -- was whether it was possible
25 to put 8015 in while changing the fewest congressional

1 districts enacted by the legislature and signed by the
2 Governor in the enacted map. And the answer was yes.
3 That's Version B or Proposed Map B. And Proposed Map B
4 puts 8015 in and realizes that the only other districts
5 that you'd need to change would be 2, 3, and 4. You just
6 swap the populations around. And what happens is 4
7 reverts to a very similar version to what it was in the
8 benchmark. Two is very similar to what it was in the
9 benchmark. And CD-3 in that version keeps Marion County
10 exactly as it was in the enacted map, and the only real
11 meaningful change I think is that CD-3 would have to run
12 into St. Johns County to pick up the necessary population
13 to maintain that exact, equal number of 769,221 people.

14 The other version that I proposed in Map A
15 tries to minimize the burdens on counties by trying to
16 follow the state legislative boundaries to the greatest
17 extent possible. So the state legislative district
18 boundaries are important for administrative reasons
19 because when the counties have to draw precincts and
20 format ballots and do the other administrative things,
21 they have to deal not only with this district, not only
22 with the congressional district, but they have to deal
23 with the kind of stacked district and come up with
24 ballots that represent all of those people on a unique
25 ballot. So when you vote, you vote on a ballot that's

1 got a congressional district candidate, a state
2 legislative -- State Senate district candidate, State
3 House district candidate, you know, and then maybe lower
4 level offices as well.

5 And when you stack those offices, when you
6 stack all of those maps up, you create a unique ballot
7 corresponding to that unique set of people that you as a
8 voter are supposed to choose for State House, for State
9 Senate and congressional districts.

10 So by following the state legislative
11 district lines you kind of reduce the number of different
12 ballots that you'd need to create for a county
13 administrator who's running an election. So Plan A
14 follows those state legislative district lines wherever
15 possible. And one of the things I noted as I was
16 studying what the state's House Committee on
17 Redistricting had done in constructing their version of
18 CD-5 was that they followed those legislative district
19 boundaries wherever possible. So I decided to do that in
20 Marion County and St. Johns County.

21 So proposed Map A tries to follow those
22 boundaries as closely as possible in Marion and St. Johns
23 and keeps CD-2 the same as in proposed Map B, and what
24 results is a reduction in the number of crossings of
25 those state legislative district boundaries and also a

1 reduction in the number of split voting tabulation
2 districts.

3 So the other administrative hassle for the
4 counties is that, if we draw districts and we have -- we
5 have to split these precincts to get exactly equal
6 population, it's not possible to do it without splitting.
7 Like, it would be a lucky accident if the precinct just
8 happened to have exactly the right population so you got
9 equality. So you have to split some precincts, and every
10 time you split a precinct, as a mapmaker that draws a --
11 splits a precinct or a state legislature splits a
12 precinct, the county administrator needs to go back and
13 figure out what the new precinct ought to be, because you
14 can't have -- your precincts corresponded to ballot types
15 like I just described and voting places. And you don't
16 want people going to the same precinct having to cast two
17 different ballots for CD-2 and CD-4, say.

18 You want people to be casting one ballot
19 for one congressional district, one state House district
20 and one state Senate district in that precinct. So every
21 time you split a precinct and there's people on both
22 sides of that precinct, the county would to have draw a
23 new precinct. So they're trying to minimize that problem
24 as well for the counties.

25 So by following those -- by minimizing

1 precinct splits -- and the precincts are also sometimes
2 referred to as voting tabulation districts. By
3 minimizing those splits, we got rid of -- we reduced the
4 number of splits, of voting tabulation districts in
5 Marion and St. Johns County relative to the benchmark map
6 and also relative to the enacted map. So there are fewer
7 precinct splits than in the enacted map in proposed Map
8 A.

9 Just a quick aside on what a voting
10 tabulation district is. Starting in the early '70s, the
11 U.S. Census Bureau started a project. It was a voluntary
12 project called the Voting Tabulation District Project.

13 One of the problems with redistricting is
14 if -- the census reports population counts at the lowest
15 geography possible called the block. So it's a census
16 block. And these are like the little tiny building
17 blocks. They typically have about a hundred people in
18 them. But some of them have zero people if it's like a
19 road or some water, and some of them have just a couple,
20 and some of them will have a thousand people. But most
21 of them are around a hundred people. But they -- they
22 correspond to an area of land.

23 And if the states just drew their districts
24 wherever they wanted to, they found that they were
25 crossing these census blocks, and the problem is then

1 you'd have to make a bunch of assumptions about how to
2 put the people, how to apportion the people in the split
3 blocks.

4 So the census started this VTD project to
5 make sure that the states didn't cross blocks, and they
6 created something that was the analog of the precincts,
7 and many -- it's about 45 states now abide by the VTD
8 project where the states and the census, the counties in
9 the census work together and establish these precincts
10 called voting tabulation districts.

11 So when we look at census data for analysis
12 of maps, we get the definition of the precincts from the
13 census, which is called the voting tabulation district.
14 There might be some small changes or variations in those
15 from state to state depending on the degree to which the
16 counties are actually abiding by the agreement to honor
17 the VTDs as the precincts. So we treat the VTDs as the
18 precincts analytically.

19 But that's the -- So the proposed Map A
20 minimizes the number of these split voting tabulation
21 districts, which will minimize the split of precincts.

22 Q. Thank you, Dr. Ansolabehere. I'd like to
23 talk about an example of the state legislative boundaries
24 that you just mentioned and how you achieved this kind of
25 goal that you just spoke about.

1 MS. FORD: Could we please bring up
2 demonstrative 2.

3 BY MS. FORD:

4 Q. Dr. Ansolabehere, can you please explain
5 what this shows?

6 A. This shows in the top panel the boundary of
7 CD-5 under Congressional Plan 8015 in Jacksonville. It's
8 really zoomed in on the center of Jacksonville, and you
9 can see a bit of the map in the background, the baseline
10 map in the background, the colored parts of two
11 congressional districts. The yellow part is CD-4, and
12 the purple part is CD-5, and you can see the St. Johns
13 River underneath it, as well as some of the highways.

14 The boundary of CD -- between CD-4 and CD-5
15 in the northern part of Jacksonville here follows
16 Interstate 295 on the east, and it actually splits a
17 number of precincts because the voting tabulation
18 districts in that area kind of span the freeway.

19 Below is Plan 8013, which is the State
20 House district plan. That is -- These are the -- This is
21 the plan that was approved and signed, and it's the map
22 of the state lower house's districts in the same area of
23 Jacksonville. HD14 is in yellow, and the purple-ish
24 color is HD13, and the kind of darker brownish color
25 below would be HD12. And you can see that this is the

1 same area. You can -- Underneath, you can make out the
2 St. Johns River going through. And this map follows
3 almost exactly the same boundary for HD14 along
4 Interstate 295.

5 So it was clear what that State House
6 Committee to me, as I studied this map, what the State
7 House Committee was doing was following the boundary of
8 Interstate 295 and making not just a congressional map,
9 but the State House district map.

10 And also the boundary of HD12 on the south
11 of this map on the bottom takes both sides of the river,
12 so it's not treating the river as if it was the normal
13 boundary here. So it's -- it's -- it's making the same
14 cut into the area as the Plan 8015, the congressional
15 district plan is making in configuring the House
16 district, the U.S. House district.

17 Q. So, Dr. Ansolabehere, what is your takeaway
18 from this? What would this mean for a supervisor if they
19 were asked to implement a plan like 8015 in this area?

20 A. So what it would mean is that any -- so
21 just taking first the northern boundaries between CD-4
22 and CD-5, any split precincts up there are going to be
23 precincts that they'd have to deal with anyway. They'd
24 have to draw new precincts because they have to draw new
25 precincts because of the State House district boundary,

1 so there's no additional burden. They're going to have
2 to draw new precincts, and the new precincts are going to
3 have to follow exactly the same boundary. So there's no
4 additional requirement or additional burden placed on
5 that.

6 And, also, because the maps are stacked,
7 because the districts are stacked, there's no additional
8 ballot form that needs to be created or assignment of
9 precincts based on overlapping jurisdiction.

10 **Q. Thank you.**

11 MS. FORD: Angie, we can take this down.

12 If you could please put up our
13 demonstrative 3 briefly.

14 BY MS. FORD:

15 **Q. And, Dr. Ansolabehere, similarly, can you**
16 **briefly describe what this shows?**

17 A. The top panel corresponds to CD-5 in the
18 Leon County area and specifically Tallahassee under Plan
19 8015, and the bottom map is the Plan 8013. That's the
20 State House district, the enacted State House districts
21 again for Tallahassee and Leon County. And we can see
22 the configuration of the district line in the top is
23 purple again is CD-5, and the bottom is CD-2, the browner
24 color is CD-2.

25 The configuration of CD line, the arm that

1 sticks into Tallahassee follows exactly the same arm as
2 House District 8 into Tallahassee. So there's no
3 re-precinct that would be required there. There are some
4 split precincts, but they're exactly the same precincts.

5 And then, in the center of Tallahassee,
6 there's that funny hook, but that hook follows almost
7 exactly the same footprint as the House District 8.

8 Q. So, Dr. Ansolabehere, what's your takeaway
9 for what this would mean for the supervisor in Leon
10 County if he had to implement Plan 8015?

11 A. So Leon County had, under 8015, had about
12 25, I think, split precincts, but half of them, 12 or 13
13 of them, I forget the exact number, it's in the report,
14 the rebuttal report, half of them were precincts that
15 were split exactly the same way by the House district.
16 So those are not additional burdens. They're going to
17 have to draw new precincts anyway because they have to
18 comply with the House district maps, the State House
19 district maps.

20 So the additional burden here would be, in
21 terms of new precincts, would be on the order of about
22 six, and the other thing that's going on is there are
23 another six precincts that are split, but the split is
24 zero population. It's just along a road, and there's no
25 -- where the split is, there's no -- there are no people

1 in it. So there's about six additional precincts that
2 would have to be reconfigured by Leon County.

3 And, additionally, the stacking of the
4 ballots, the congressional district and the State House
5 districts means that they don't have to configure -- they
6 don't have to configure a large number of additional
7 ballots, not like these districts are cutting in
8 completely different ways which would create more burdens
9 for the counties.

10 Q. Thank you.

11 MS. FORD: Angie, we can take this down.

12 BY MS. FORD:

13 Q. So, Dr. Ansolabehere, your report puts
14 forward both Plan A and Plan B as proposed remedial
15 options. At this point do you have a recommendation of
16 one of these plans over the other?

17 A. I ran something called the Caltech/MIT
18 Voting Technology Project for about four years, and we
19 worked a lot very closely with county administrators,
20 with our own administrators here in Massachusetts trying
21 to help them configure precincts and implement election
22 administration. So I'm very sympathetic to the
23 difficulties that counties and cities have administering
24 elections. So I would recommend Plan A as a plan that
25 minimizes the burdens to the greatest extent possible.

1 In terms of new precincts that would be
2 required, both the enacted map and any remedy map, if
3 that's the direction the courts choose to go, require new
4 precincts. The enacted map, once you set aside precincts
5 that are going to be required for State House districts
6 or precincts that have no population -- the splits have
7 no population in them, the enacted map is going to
8 require about 12 new precincts across all of the counties
9 affected in North Florida, and Plan A would require about
10 22 new precincts. So it's a net of about 10 additional
11 precincts in terms of burden.

12 Most of that burden -- The burden's going
13 to be unequal. It's going to be less actually than the
14 enacted map in St. Johns and Marion County, and it's
15 going to be more in Leon and Duval County. So it's going
16 to be distributed around, not equally, but it's not going
17 to be more than an additional 10 precincts to be dealt
18 with throughout the state, throughout North Florida.

19 THE COURT: I want to make sure I heard
20 exactly what you said on that, that, if the map
21 that has been enacted and signed by the Governor
22 goes forward, it would cause the creation of 12
23 new precincts. If Map A or Plan A, which you're
24 recommending, went in, it would require 22 new
25 precincts, the lion's share of those being in Leon

1 and Duval County?

2 THE WITNESS: That's correct.

3 BY MS. FORD:

4 Q. And, Dr. Ansolabehere, to put those 10
5 additional precincts in context, how many precincts are
6 there in total across North Florida, across the four
7 congressional districts that we've been discussing?

8 A. So across all those congressional
9 districts, that entire geographic area, there are about
10 650 precincts.

11 Q. Before we move on, I'd like to just ask you
12 about Columbia County specifically. Can you tell us how
13 Columbia County would be affected if you went from the
14 enacted plan to Plan A?

15 A. So 801 -- CD-5 under 8015 in Columbia
16 County cuts across the state along Interstate 10, the
17 county along Interstate 10. And when it cuts across the
18 county in Interstate 10, it splits four precincts. So
19 they have four precinct splits. Three of those four have
20 no population in the split. That is, they're taking --
21 when you go along Interstate 10, there's nobody living on
22 the half of the highway that's split from the precinct.
23 It just happens to be that's where they drew the line.

24 So it's a zero -- So three of those four is
25 a zero population split. So there's one populated voting

1 tabulation district that's split. That is where they
2 split the voting, the precinct, the voting tabulation
3 district, and there are people on both sides of the
4 split, and those people are in different congressional
5 districts.

6 Q. So just to summarize, Columbia County would
7 require only one new precinct; is that correct?

8 A. Yeah, they'd have to redraw one precinct.

9 Q. Redraw one new precinct. Thank you.

10 I'd like to end by asking you a few
11 questions about your rebuttal report. I think you
12 already said this, but just to clarify, did you review
13 the report of Dr. Douglas Johnson that the defendants
14 offered in this case?

15 A. I did.

16 Q. Do you dispute that the enacted plan has a
17 better compactness score than your proposed plan does?

18 A. No, I don't.

19 Q. What was your overall impression of
20 Dr. Johnson's report?

21 A. Dr. Johnson's report focuses on what we
22 referred to as Tier 2 criteria. Compactness, boundaries,
23 municipality splits, not on Tier 1 criteria favoring or
24 disfavoring a party or diminishment of minorities or
25 protection of incumbents.

1 Q. And do you find that significant?

2 A. The Florida Constitution in the case -- the
3 Florida Supreme Court in this case in 2015, in Romo vs.
4 Detzner and in the apportionment cases leading up to it,
5 recognize that CD-5 in the benchmark did not have a high
6 level of compactness but that it was necessary for
7 protection of a Tier 1 criterion.

8 So the -- You can't take the Tier 2
9 criteria in isolation. There -- If you're dealing with
10 diminishment and protecting minority voting rights in
11 particular, you might have to reduce the compliance of
12 those criteria. That's not just true here, but also it's
13 true elsewhere, and that's kind of routinely done.

14 There are other districts in the United
15 States, such as Texas' 35, which was heavily litigated
16 under the U.S. Constitution, is less compact than CD-5 in
17 the benchmark map and was allowed to stand because there
18 was a recognition that, to protect Hispanic voting rights
19 in Texas CD-35, it was necessary to have a less compact
20 district. So there's a tradeoff.

21 And when thinking about these Tier 2
22 criteria, you can't take them in the abstract. You have
23 to think of them in the context of other criteria you're
24 trying to balance. So the Johnson report's right that
25 this is a less compact version of what could be drawn in

1 North Florida for the districts, but it takes it out of
2 the context of the other criteria that need to be
3 considered.

4 Q. And can you put CD-5 in context? How does
5 it ultimately compare on compactness when you compare it
6 to other congressional districts across the United
7 States?

8 A. There are a lot of different ways to
9 measure compactness. The two most common used in legal
10 work and in academic scholarship are -- measure the area
11 of dispersion, like do you have a long district, and the
12 metric most commonly used for that was due to a professor
13 named Reock, so it's called the Reock score named after
14 him. And that metric considers the area of the district
15 relative to the smallest circle you can draw around that
16 district, and that ratio runs from 0 to 1 where a high
17 number would be more compact. And this district is --
18 CD-5 has a low Reock, but is not the lowest in the map.
19 CD 35, for example, is about the same, but there were
20 other districts, another, say, half dozen districts in
21 the U.S. used in 2020 that had lower compactness scores
22 on area dispersion.

23 The other metric for compactness that's
24 commonly used is the perimeter dispersion, that is, does
25 the district have big gouges out of it. Does it have

1 inlets. Does it have really irregular-looking sides.
2 And what it does is it measures the perimeter of the
3 district, and then says take the area of the district and
4 now take the area of a circle with the same perimeter or
5 circumference and what's that ratio. And that ratio also
6 runs from 0 to 1. So the most compact version of a
7 district would be a circle. That's not possible in maps
8 because you have to -- like, all the districts have to
9 fit together.

10 A square would have a Polsby-Popper of
11 about .74. This district's measure is more compact in
12 its perimeter than about 65 congressional districts that
13 were used in 2020 across the country, so --

14 THE COURT: Meaning the benchmark?

15 THE WITNESS: Yeah, benchmark. Yeah,
16 benchmark or 8015. They're about the same.

17 THE COURT: Okay.

18 A. Their Reock and Polsby-Popper scores are
19 about .11. So the areas of their districts are about
20 11 percent of the area of the most compact possible
21 configuration, which would be a circle. So there are a
22 number of other districts in the case of the -- that
23 states used this last election to elect their members of
24 Congress in 2020 that were less compact, and Texas 35 is
25 an example of a district that was also heavily litigated

1 on questions of racial gerrymandering under the federal
2 constitution and allowed to stand. So that might be
3 taken as a criterion or a standard.

4 Again, it depends a lot on context because
5 you're dealing with the particular geography of the
6 state, and the geography of the state may not -- and
7 where that district is located within the state may not
8 be highly amenable to creating a lot of compact
9 districts.

10 THE COURT: I hate to interrupt you, but
11 did I glean out of that, you said that across the
12 nation there would have been 65, plus or minus,
13 congressional districts that were less compact
14 under these two metrics.

15 THE WITNESS: Under the perimeter
16 compactness under Polsby-Popper, yes.

17 THE COURT: Okay, Polsby-Popper.

18 THE WITNESS: And a half dozen under Reock.

19 THE COURT: Got it.

20 THE WITNESS: Because CD-5 is a long
21 district. And Reock punishes having a long
22 district.

23 BY MS. FORD:

24 Q. Dr. Ansolabehere, what did you make of
25 Dr. Johnson's invocation of the standard that the Arizona

1 **Redistricting Commission uses to score compactness?**

2 A. Well, I worked for the Arizona Independent
3 Redistricting Commission this fall, and we -- that was
4 the commission that embraced that standard. The standard
5 is not a matter of law. It's just the guideline that
6 they imposed on themselves. It wasn't enacted by
7 legislature or approved by a court, and the next
8 commission can adopt a different standard and the
9 previous commission had a different standard. So it's
10 just a rubric or a guideline.

11 And the geography of the state and the
12 problems in redistricting the state are quite different
13 than the problems -- in the state of Arizona are quite
14 different than those in Florida. Arizona is a square.
15 It's a perfectly -- almost a perfectly square state. It
16 doesn't have a panhandle. It doesn't have a coastline.
17 It doesn't have peninsulas. So it doesn't have any of
18 the geographies that create this problem. And its
19 demography is different because the main population
20 center, the main population is concentrated really
21 densely in the center of the state. So it's not like you
22 have disparate concentrations of population that you need
23 to connect to create a legal district. So it's a much
24 different task in Arizona and a much different context in
25 Arizona to draw districts and in Florida. And even North

1 Florida is going to differ from South Florida in terms of
2 how people are distributed within the state, how
3 districts have to be drawn to accommodate the dispersion
4 of people.

5 Q. Thank you, Dr. Ansolabehere. I have just a
6 few more questions and then I'll be done. I'd like to
7 zoom back out to where we started.

8 In your opinion, after conducting a
9 functional analysis, does the enacted map result in
10 diminishment in black voters' ability to elect their
11 candidate of choice?

12 A. It does result in diminishment --

13 MR. JAZIL: Objection, Your Honor.

14 THE COURT: What's the objection?

15 MR. JAZIL: A, leading; B, it's asking for
16 a legal conclusion that's best left to the Court,
17 not the witness.

18 THE COURT: All right, it's not leading.
19 She's asking if he can do it, and he can say yes
20 or no. I'm going to allow him to testify. He is
21 an expert in this area. You may vigorously
22 cross-examine him.

23 Your expert will be given the same courtesy
24 as far as giving an opinion, which I may or may
25 not accept either expert, we'll see.

1 But overruled. Go ahead.

2 BY MS. FORD:

3 Q. From your perspective, have the defendants'
4 experts put forward anything that refutes your core
5 conclusion on that?

6 A. No.

7 Q. If this court or another actor were to
8 restore black voters' ability to elect and to do so
9 within the contours of the existing enacted map without
10 making any other changes, how many new precincts would
11 need to be drawn in North Florida?

12 A. There would be an additional or net
13 difference of 10 compared to the enacted map.

14 Q. Out of how many total precincts in North
15 Florida?

16 A. Out of 650 precincts in North Florida.

17 Q. And if this court or another court finds
18 that it is too late to do anything about this
19 diminishment, how many black voters in Florida will have
20 lost the ability to elect their candidate of choice?

21 A. There are 367,000 black Floridians in CD-5
22 that are -- where blacks have the ability to elect their
23 preferred candidates.

24 MS. FORD: Thank you, Dr. Ansolabehere. I
25 have no further questions for you at this time.

1 THE COURT: Very good.

2 Mr. Jazil or whoever on behalf of the
3 defendants, you may cross-examine.

4 MR. JAZIL: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. JAZIL:

7 Q. Pleased to meet you, Dr. Ansolabehere.

8 A. Nice to meet you.

9 Q. I'd like to start with the VTD.

10 A. Uh-huh.

11 Q. First I want to make sure I understand your
12 testimony. Are you using VTDs as a proxy for precincts
13 in your analysis?

14 A. Florida adheres to the VTD project, and
15 those are the equivalents of the precincts for the
16 purpose of redistricting.

17 Q. Okay, so you're using VTDs and precincts
18 coextensively?

19 A. Yeah, in this analysis, yeah.

20 Q. But we don't know whether the county
21 supervisors are abiding by the VTDs in setting their
22 precincts in Florida, do we?

23 A. Most of them do. I don't know what the
24 boundaries are for all the precincts right now.

25 Q. And you studied this area of the law. So

1 let me ask you this: There's nothing in the Florida
2 Constitution that mandates that supervisors follow VTDs
3 when establishing their precincts, is there?

4 A. Nothing in the constitution that I know of.

5 Q. There's nothing in the Florida statutes
6 saying the supervisor should follow VTDs when setting
7 their precincts, is there?

8 A. I don't know that part of the Florida
9 statutes.

10 Q. Fair enough. Do you know whether Columbia
11 County is following VTDs when setting their precincts?

12 A. I don't know that.

13 Q. Do you know whether Duval County is
14 following VTDs when setting their precincts?

15 A. I don't know that.

16 Q. Do you know whether Leon County is
17 following VTDs when setting their precincts?

18 A. I do not know that.

19 Q. Is that the same answer for Jackson County
20 and St. Johns County and Nassau County?

21 A. That's correct.

22 Q. Okay. Now, we talked a bit about
23 majority-minority districts. You referred to
24 Congressional District 5 as a majority-minority district.
25 But black voters do not form a majority of the voting age

1 population in the 2015 version of Congressional
2 District 5, do they?

3 A. No, they don't.

4 Q. And black voters do not form a majority of
5 the voting age population in plan 8015 from the
6 legislature, do they?

7 A. That's correct.

8 Q. Okay. Now, Professor, do you happen to
9 have a copy of your initial expert report in this case?

10 A. I will call it up on my computer if that's
11 okay.

12 Q. That's fine.

13 MR. JAZIL: And, Your Honor, if I may share
14 the screen as well?

15 THE COURT: Yes, sir. Go ahead.

16 BY MR. JAZIL:

17 Q. Doctor, I'd like to point you to page 8 of
18 your report.

19 A. Yes, I see that.

20 Q. Yes, sir, this is where you discuss your
21 ecological regression analysis, and I'll highlight a
22 portion of this. Footnote 1 --

23 MR. JAZIL: Your Honor, I don't know if you
24 can see this or whether I have to make this
25 larger.

1 THE COURT: I can see it, so it's at your
2 discretion about whether to make it larger or not,
3 but I can read it.

4 MR. JAZIL: Yes, sir.

5 BY MR. JAZIL:

6 Q. Professor, in here, if I understand
7 Footnote 1, you're saying that the ecological regression
8 estimates for specific non-black minority groups are not
9 reliable and have a very high margin of area for the
10 congressional districts in this area. Should that say
11 margin for error?

12 A. Margin for error. I'm sorry, that's a
13 typographical error. Sorry.

14 Q. So if I understand this correctly, you
15 don't know whether block voters combined with other
16 minority voters in the Congressional District 5 can elect
17 candidates, do you?

18 A. I know that -- So the analysis I performed
19 was black voters, who's their preferred candidate and are
20 their preferred candidates able to win. It's not an
21 analysis of coalitions, but I also analyzed all minority
22 voters and who their preferred candidates were, all
23 minority voters combined.

24 I don't know -- It is not possible to
25 estimate, say, Native American voters or Asian voters in

1 this area because -- using ecological regression because
2 the margin of error is just too big.

3 Q. Yes, sir. So would it be accurate to say
4 black voters could be working with like-minded white
5 voters to elect candidates in Congressional District 5?

6 A. I do know that black voters and all
7 minority voters are sufficient. So if you take all
8 minority voters combined, that's sufficient. So one
9 analysis is all minority voters combined. Another
10 analysis is of black voters. I can do all minority
11 voters combined. I just can't tell you how Native
12 American voters voted with much precision. I can't tell
13 you how Asian American voters voted with much precision.

14 So I can do all minority voters, which is
15 one version of the composition of the district is, and I
16 can do black voters, but I can't give you the numbers for
17 the numbers in between.

18 Q. Understood, Professor. And is it still
19 possible that the black voters are working with white
20 voters, say, in Leon County to elect their preferred
21 candidate?

22 A. I don't know about working with. That's
23 not the term I would use, but there are some whites who
24 vote for democratic candidates along with blacks. But
25 that's not necessary to elect the minority-preferred

1 candidate here.

2 Q. Understood, Professor. And just to end the
3 question on the majority-minority issue, you discussed
4 Congressional District 35 in Texas, correct?

5 A. Correct.

6 Q. And Congressional District 35 is a district
7 where Hispanics make up a majority of the voting age
8 population; isn't that right?

9 A. They did when it was configured. They
10 don't now.

11 Q. Yes, sir. And that district spans from
12 Austin to San Antonio if I have that right, right?

13 A. Correct.

14 Q. And that span is 80 miles, not 200 miles,
15 right?

16 A. Yeah.

17 Q. Now, Professor, I'd like to go to your
18 second report.

19 MR. JAZIL: And I'll pull that up as well,
20 Your Honor, the second rebuttal report from
21 Dr. Ansolabehere.

22 THE COURT: Yeah, I'm tracking you all in
23 the papers you've given me as well, but go ahead
24 and put it on the screen.

25 MR. JAZIL: Your Honor and

1 Dr. Ansolabehere, I'd like to go to map 2.

2 THE COURT: Which exhibit?

3 MR. JAZIL: Your Honor, it's listed as map
4 2 to Dr. Ansolabehere's second report. So it
5 should be in the second binder that my friends for
6 the plaintiffs provided.

7 MS. FORD: I believe that's proposed Map A.

8 MR. JAZIL: Thank you.

9 And, Your Honor, here is the copy of
10 proposed Map A.

11 THE COURT: Got it. Go ahead.

12 BY MR. JAZIL:

13 Q. So, Dr. Ansolabehere, this is your proposed
14 Map A, correct?

15 A. Yep.

16 Q. And you provided this yesterday, the 10th,
17 and you state in your report that you prepared this in
18 response to the state's filings on May the 9th; is that
19 correct, sir?

20 A. Correct.

21 Q. Professor, I'd like to zoom in on
22 Congressional District 5 in proposed Plan A. Do you see
23 that line cutting across the proposed Congressional
24 District 6? Is that a non-contiguity?

25 A. That -- I don't know what that is. That

1 does not -- I can check my file and make sure that that's
2 okay.

3 Q. Okay.

4 A. But it could have been something that got
5 screwed up when I uploaded the file. But that should not
6 be there.

7 Q. Understood. But you put this map together
8 in a day, correct?

9 A. I -- Yes.

10 Q. Okay.

11 A. About a day.

12 Q. It's a lot of work in a day.

13 Now, Dr. Ansolabehere, you talked a bit
14 about the precincts, but I just want to make sure I
15 understand a few things. You're a political scientist by
16 training and occupation, correct?

17 A. Yes.

18 Q. You've never administered an election in
19 the state of Florida, correct?

20 A. Not in the state of Florida.

21 Q. You've never set precincts in the state of
22 Florida?

23 A. Nope.

24 Q. You've never set ballot styles in the state
25 of Florida?

1 A. Nope.

2 Q. You don't know the impact that the
3 nationwide paper shortage is having on the local
4 supervisors of elections here, do you?

5 A. I have not looked into that.

6 Q. And you can't speak to the impact on the
7 ability of local supervisors of elections to send updated
8 voter registration cards to all their constituents, do
9 you?

10 A. In the state of Florida, or elsewhere?

11 Q. In the state of Florida, sir.

12 A. Because I work with the state of
13 Massachusetts on these issues all the time.

14 Q. Understood. But the state of Florida?

15 A. No, I don't work with the state of Florida
16 on these issues.

17 Q. And, Dr. Ansolabehere, in your first expert
18 report, paragraph 68, page 19, you say that incorporating
19 the North Florida configurations of either the Senate map
20 or the backup map would leave untouched 21 of the
21 congressional districts in the enacted map; do you recall
22 that?

23 A. Yes.

24 Q. So you're saying that seven congressional
25 districts would be affected based on a reversion to the

1 other maps, correct?

2 A. In the version put forward in my initial
3 report.

4 Q. Okay.

5 A. That would be the -- That would be the --
6 That is where 5 -- CD-5, CD-2, CD-3, CD-4, CD-6, CD-7 and
7 CD-11 would be affected.

8 Q. And do you happen to know how many counties
9 are in those congressional districts?

10 A. Offhand, I don't.

11 Q. A dozen, more or less, seem about right to
12 you?

13 A. Across all those congressional districts?

14 Q. That would be affected when you change the
15 lines across those --

16 A. Oh, yeah, probably in that ballpark.

17 Q. Thank you. Final set of questions.

18 Professor, you've been retained by the
19 Perkins Coie firm for this work, or is it the Elias firm?

20 A. The Elias firm, I believe.

21 Q. Do you recall how many times you've been
22 retained by the Elias firm and the Perkins firm?

23 A. No, I don't know offhand.

24 Q. Would it be more than, say, four times?

25 A. More than four times, yeah.

1 Q. And are you aware that the Elias firm bills
2 itself as the leading firm for democratic candidates, the
3 democratic party --

4 A. I don't know how they bill themselves. I
5 don't follow their promotional stuff.

6 Q. Understood. Have you ever testified for a
7 Republican-led legislature or Republican governor
8 (indiscernible) --

9 THE STENOGRAPHER: I'm sorry, you cut out
10 at the end.

11 BY MR. JAZIL:

12 Q. Have you ever testified on behalf of a
13 Republican governor in all of your redistricting work?

14 A. None have approached me for redistricting.
15 I've worked for the City of San Antonio. I've worked for
16 the Arizona Independent Redistricting Commission, so...

17 MR. JAZIL: Your Honor, I may be done. May
18 I have just a minute or two to confer with my
19 colleagues?

20 THE COURT: Yes.

21 (Off the record from 10:37 a.m. to 10:38
22 a.m.)

23 MR. JAZIL: Your Honor, I have no further
24 questions. Thank you.

25 THE COURT: Very good. Any redirect?

1 MS. FORD: Just a few short questions, Your
2 Honor.

3 REDIRECT EXAMINATION

4 BY MS. FORD:

5 Q. Dr. Ansolabehere, the black population in
6 CD-5 in the benchmark plan was under 50 percent, correct?

7 A. Correct.

8 Q. And that was true at the time the Florida
9 Supreme Court created the district?

10 A. That's correct.

11 Q. Do black voters and minority voters depend
12 on white voters to elect their candidates of choice in
13 CD-5?

14 A. Not in my analysis. Not in my assessment.

15 Q. In the proposed Map A that you spoke about,
16 how many congressional districts would that affect?

17 A. Proposed Map A would affect CD-2, CD-3,
18 CD-4, CD-5 and CD-6.

19 Q. So only five congressional districts?

20 A. That's correct.

21 MS. FORD: Thank you, Your Honor. I have
22 no further questions.

23 THE COURT: All right. May this witness be
24 released?

25 MR. DEVANEY: From the plaintiffs'

1 perspective, yes, Your Honor.

2 THE COURT: All right. Defense?

3 MR. JAZIL: No further questions, Your
4 Honor. Thank you.

5 THE COURT: All right, sir, you're more
6 than welcome to stay if you're interested. If you
7 have other things to do, nice to meet you, go on
8 about your business.

9 THE WITNESS: Thank you for listening and
10 nice to meet you.

11 THE COURT: Thank you.

12 THE WITNESS: Good day, everybody. Thank
13 you.

14 THE COURT: All right, Ms. Ford or
15 Mr. Devaney or Mr. Wermuth, next witness.

16 MR. DEVANEY: Your Honor, Dr. Ansolabehere
17 is our only live witness. We're, of course,
18 relying on the affidavits that have been submitted
19 with our papers, and so that is the end of our
20 live witness presentation. And, Your Honor, I'm
21 assuming that we'll present further oral argument
22 after the defendants' present their witnesses.

23 THE COURT: Correct. I don't need a break
24 personally, but that doesn't mean somebody doesn't
25 need a break.

1 Do we need to break for a few minutes for
2 anybody to use the restroom, use the phone,
3 whatever they would need to do, or are we good to
4 proceed?

5 MR. JAZIL: Your Honor, for planning
6 purposes, we don't plan on calling our two experts
7 at this time, so...

8 THE COURT: Okay. Well, there you go.

9 MR. JAZIL: All for a natural break then.

10 THE COURT: All right, so are we ready --
11 if that's the case, then it may be -- I guess
12 we're to the point where advocates would be
13 advocates and tell me what it is that the
14 affidavit testimony means and how that impacts
15 either the plaintiffs' petition for a temporary
16 injunction or why it is that it should be denied.

17 So any other thing we need to do other than
18 get you all straight into what would be your
19 arguments?

20 MR. DEVANEY: Your Honor, from our
21 perspective, we can address the evidence in our
22 arguments, including the affidavits. So at this
23 juncture, it does feel like we're probably ready
24 to roll into argument. And if that is the case,
25 Your Honor, with your Court's permission, I would

1 ask for a brief recess just to gather some
2 thoughts for the argument based on what we've
3 heard over the last hour and a half or so, if that
4 would be permissible.

5 THE COURT: That's fine. How long do we
6 need to break? Five minutes? Ten minutes?
7 Fifteen minutes? More than five, I would guess.

8 MR. DEVANEY: Would 15 be permissible?

9 THE COURT: It would be. Anybody got any
10 issue with that?

11 MR. JAZIL: No, Your Honor. It seems to me
12 we've got plenty of time, so if my friend
13 Mr. Devaney would like more, that's fine as well.
14 I plan to be brief.

15 THE COURT: Well, here's the important
16 thing: You all can talk amongst yourselves, kind
17 of get your strategy down, but as I've told you
18 all before, I'm going to give you the time you
19 need on this, and I don't want anybody to walk
20 away thinking they couldn't be heard today. So
21 you will have as much time as you need on that.

22 So let's do this: It is 10:42. Let's
23 break until 11, and go from there.

24 MR. JAZIL: Thank you, Your Honor.

25 MR. DEVANEY: Thank you.

1 (Off the record from 10:42 a.m. to
2 11:02 a.m.)

3 THE COURT: Okay, let's continue. All
4 right, so I think where we are is this: The
5 presentation of live witnesses is done. So it's
6 really a matter of giving you an opportunity to
7 argue what's in the affidavits, what's in the
8 exhibits that have been filed to make your case in
9 addition to the one live witness we had.

10 So I guess I'll begin with the plaintiff.
11 It was their burden.

12 MR. DEVANEY: Thank you, Your Honor.

13 Your Honor, the Florida Supreme Court has
14 made it very clear what evidence or analysis is
15 required under the Fair District amendments in
16 determining whether there is unconstitutional
17 diminishment of minority voting rights. And that
18 guidance, that ruling requires what they call
19 comparative analysis, a functional analysis that
20 as we just heard from Dr. Ansolabehere requires
21 first addressing whether Benchmark CD-5 gave black
22 voters the opportunity to elect their preferred
23 candidates.

24 The second step in inquiry is, with the
25 dismantling of CD-5, has there been diminishment

1 in the ability of minority voters to elect their
2 preferred candidates.

3 The record here, Your Honor is
4 uncontroverted. There's only one functional
5 analysis that's been presented and that's from
6 Dr. Ansolabehere. There's nothing in the record
7 to contradict his conclusion that, number one,
8 Benchmark CD-5 is a district where minority voters
9 have the opportunity to elect their preferred
10 candidates. It's a district where the black
11 population is approximately 49 percent. The black
12 voting age population is approximately 45 percent.
13 And as Dr. Ansolabehere established, black voters
14 in combination with other minority voters are able
15 to elect their preferred candidates. That has
16 been demonstrated through the electoral analysis
17 that Dr. Ansolabehere provided, including, Your
18 Honor, the three congressional elections that have
19 taken place since 2015 under that district in
20 which the minority and black-preferred candidate,
21 Representative Lawson, was elected.

22 The second question then becomes, now that
23 CD-5, Benchmark CD-5 has been dismantled, has
24 there been diminishment. And the question there
25 is: Is the dismantling of CD-5 somehow made up

1 for by creation of another minority-performing
2 district in northern Florida? And it's not.
3 We've heard from Dr. Ansolabehere, again
4 completely unrefuted, that the 370,000
5 approximately black voters who were displaced from
6 Benchmark CD-5 have been put into four new
7 districts, 2, 3, 4 and 5, each of which is a
8 majority white district, each of which will not
9 permit minority voters, black voters to elect
10 their preferred candidates. And there is nothing
11 in the record that contradicts that or in any way
12 refutes that. And so that evidence right there,
13 Your Honor, establishes there is diminishment.

14 Your Honor has emphasized throughout this
15 proceeding that it's your intent to follow what
16 the law says. Article 3, Section 20 of the
17 constitution says that the ability to elect -- the
18 minority voters' ability to elect preferred
19 candidates must be protected and cannot be
20 diminished. But it has been diminished. And the
21 Florida Supreme Court in the decision in League of
22 Women Voters v. Detzner establishes the courts
23 have an obligation to invalidate any congressional
24 redistricting plan if it violates the
25 constitution.

1 And, Your Honor, we, of course, submit that
2 this court is required to follow both that
3 language in the constitution and that ruling by
4 the Florida Supreme Court.

5 Your Honor, a few additional points beyond
6 that fundamental framework for our motion. It's
7 that, it's important to emphasize that Article 3,
8 Section 20 prohibits diminishment not just when
9 it's intentional but also when that's the effect
10 of the redistricting. And in this case, Your
11 Honor, it's the effect that we're focusing on.

12 We're not -- We don't have a burden to
13 prove that there is intent to diminish. Our
14 burden here is to show that there was -- in
15 seeking an injunction is to show that there was an
16 effect, and that effect, for the reasons I've
17 described, has been established.

18 THE COURT: All right, the intent part will
19 be argued later on, after a trial. What you're
20 arguing is the or result of denying, in other
21 words, the result.

22 MR. DEVANEY: That's actually correct.
23 That's actually correct, Your Honor.

24 And, Your Honor, I don't want to belabor
25 the point, but I just want to remind the Court

1 about the creation of Benchmark CD-5 and its
2 origins with the Florida Supreme Court back in
3 2015.

4 In that case, the Supreme Court ordered the
5 legislature to draw the CD-5 east-west
6 configuration by holding that that configuration
7 was the, quote, only alternative option that
8 complied with the constitution non-diminishment
9 standard. So we have a ruling here from the
10 highest court in this state establishing that that
11 configuration of CD-5 is necessary to comply with
12 the Florida Constitution.

13 And, Your Honor, as I alluded to earlier at
14 the opening of this proceeding, when the
15 legislature took up its redistricting
16 responsibilities this cycle, it acknowledged
17 repeatedly that it had an obligation to protect
18 CD-5 and not diminish the voting rights of 370,000
19 black voters in that district.

20 In every plan that was put forward by the
21 Senate and the House, the redistricting committees
22 preserved CD-5 in one fashion or another in a way
23 that allowed black candidates to continue to elect
24 their preferred candidates.

25 It was only when the Governor announced

1 that he would veto that the legislature at the
2 last minute reversed course and proposed the
3 current configuration that strips black voters of
4 their ability to elect their preferred candidates.

5 And, Your Honor, we had a discussion about
6 this in response to your question, and I think
7 it's -- it's telling about the timing of this,
8 that the veto took place on March 29th and yet
9 there was a three-week delay until special session
10 took place and a new map was adopted. And what we
11 hear from the defendants, from the Secretary is
12 it's too late; we can't do anything to remedy this
13 even if there is a constitutional violation, as
14 there is.

15 And, Your Honor, it's funny that this
16 timing -- First of all, it's not too late, but to
17 the extent that they argue that, this is a timing
18 circumstance of their own making. These are not
19 naive people. They know that, if they can delay,
20 that a court in the end may be more reluctant to
21 change a map and to remedy a constitutional
22 violation. There's no excuse for the delay that
23 took place in enacting the map that finally was
24 adopted.

25 And, Your Honor, it's interesting, we had a

1 companion case that still exists in Federal
2 District Court in the Northern District of Florida
3 that was filed by some other parties, and in that
4 case, it was filed when there was an impasse.
5 There was no map that existed. And the state's
6 defendants came in and said, it's too early, you
7 can't -- this case isn't ripe, you've got to let
8 the legislature act. And that's the argument they
9 made. And then the day, literally the day that
10 the legislature enacted a map, we filed this case.
11 And now we're being told it's too late. So the
12 constitution cannot be that manipulatable. There
13 has to be a way for constitution rights to be
14 adjudicated. And the possible gamesmanship about
15 timing should not prevent Florida voters from
16 having their constitutional rights protected as we
17 are requesting in this case.

18 Your Honor, I had a lengthy piece in my
19 presentation about Dr. Ansolabehere's diminishment
20 analysis. I am going to probably stay high level
21 on that because you heard in detail from
22 Dr. Ansolabehere, but I'd just make a few
23 fundamental points about why there is
24 diminishment.

25 Black voters in Benchmark CD-5 have been

1 able to consistently elect the candidates of
2 choice since that district was created in 2015.
3 Black voters are the largest racial group of
4 registered voters in the district. The black
5 voters are the largest group of voters in each
6 democratic primary since 2015 and cast a plurality
7 of votes in the 2016 and 2000 (sic) general
8 elections.

9 And black voters vote very cohesively in
10 Congressional District 5, which gives them the
11 ability to elect preferred candidates as shown by
12 the election of Representative Lawson. And, Your
13 Honor, I won't repeat the details of
14 Dr. Ansolabehere's analysis to why there is
15 diminishment only to say, though, that, in the
16 four districts where these 370,000 black voters
17 have been dispersed, here are the black
18 populations in those districts: 23 percent in
19 District 2, 15 percent in District 3, 30 percent
20 in District 4, and 12 percent in District 5. And
21 that compares to, as I said before, 49 point --
22 49 percent population that was in CD-5.

23 THE COURT: 49.1. I read it.

24 MR. DEVANEY: And so what you have, it's
25 classic cracking. It's classic cracking, Your

1 Honor. Let's take that black population. Let's
2 splinter it up into four districts where they
3 don't have any voting power. And that's what
4 we've got. And, you know, literally, Your Honor,
5 of the 370,000 black voters that have been
6 dispersed, not one of them, literally not a single
7 person any longer has the ability to elect his or
8 her preferred candidate. And it's not just
9 Dr. Ansolabehere who reaches that conclusion, it's
10 the legislature, it's their staff that reached
11 that same conclusion in their own functional
12 analysis, which is what makes this case really
13 quite remarkable among redistricting cases.

14 You've got a legislature that concluded
15 there's diminishment, that concluded, based on its
16 own functional analysis, that blacks wouldn't have
17 the ability to elect their candidates, and yet
18 they went ahead and did it anyway.

19 Your Honor, we meet the standards for a
20 temporary injunction very clearly. The first
21 prong, of course, is likelihood of success on the
22 merits. For all the reasons I've described, that
23 I will not drag you through again, we have
24 established a strong likelihood of prevailing on
25 our claim that dismantling of CD-5 violates the

1 Florida Constitution.

2 The second prong is plaintiffs have to
3 demonstrate there is no adequate remedy of law.
4 Here, there is no remedy other than a temporary
5 injunction to protect against the harm the
6 plaintiffs would suffer in the 2022 primary and
7 general election if this unconstitutional
8 districting plan is used.

9 In plaintiffs' lack of adequate remedy of
10 law, whereas here the injuries result from a
11 violation of a constitutional right, we've cited
12 cases in our opening brief at page 16 making that
13 very clear, that when there is a violation of a
14 constitutional right that is irreparable harm.
15 And those constitutional violations are truly
16 quintessential irreparable harm, especially those
17 that implicate, as is the case here, the
18 fundamental right to vote.

19 The next prong, Your Honor, is Florida
20 voters will suffer irreparable harm. I've already
21 touched upon that and, as stated, violation of the
22 constitutional right is irreparable harm. And in
23 that regard, Your Honor, I'll emphasize that, once
24 an election occurs, there's no do-over. You know,
25 the harm is done. And so the only way to protect

1 against that harm is to ensure that a
2 constitutional voting map is put in place before
3 the election actually occurs.

4 The last prong, as Your Honor well knows,
5 is injunctive relief must serve the public
6 interest, and Florida courts have consistently
7 found that injunction to enjoin enforcement of a
8 law that encroaches on a fundamental
9 constitutional right presumptively serves the
10 public interest.

11 And in this case, Your Honor, it's also
12 relevant that the injunction would be limited in
13 geographic scope as it would only affect the
14 districts in northern Florida that
15 Dr. Ansolabehere discussed.

16 And for all those reasons, Your Honor, we
17 satisfy each of the prongs for temporary
18 injunctive relief, but I do want to briefly
19 address some of the arguments that the Secretary
20 made in response to our motion.

21 He relies first on the so-called Purcell
22 principle to argue that it's too late to make any
23 changes, and that argument is essentially, no
24 matter the strength of the constitutional plane
25 here, it's just too late to do anything about it,

1 but, Your Honor --

2 THE COURT: I'm going to give you both an
3 opportunity to talk about Purcell, but what I read
4 Purcell is that the federal government wouldn't
5 intervene and potentially cause disruption. I
6 haven't read those cases to say that the state
7 courts, whether it's a good idea or bad idea, but
8 it's more of a federal principle than applies to
9 states and state court actions.

10 MR. DEVANEY: Your Honor, you just saved
11 two minutes. That's where I was about to go, and
12 I won't go there since you know that.

13 THE COURT: I know the other side might
14 certainly advocate to the contrary and show me
15 that I'm reading that wrong if they think so, but
16 that's -- if I saved you two minutes, good. Go
17 ahead.

18 MR. DEVANEY: And, Your Honor, I know that
19 you didn't get our reply until fairly late in the
20 day yesterday and the valiant effort over your
21 coffee to read it this morning, but there's a case
22 in there that's quite relevant. It's one decided
23 by the New York Court of Appeals, which is that
24 state's highest state court. It came down just
25 two weeks ago.

1 In there, that court said, I'm quoting, the
2 Purcell Principle, quote, does not limit the state
3 judicial authority, whereas here a state court
4 must intervene to remedy violations of the state
5 constitution. So it's to your exact point, Your
6 Honor, that it's a federal doctrine, and as New
7 York just held, it does not prevent intervention
8 at this juncture to prevent a constitutional
9 violation.

10 And, Your Honor, the Secretary cites two
11 cases in an attempt to say that Purcell applies.
12 One is Haft v. Adams, which was decided more than
13 50 years ago, and it sits in opposite, Your Honor.
14 It's -- That case involves, as I understand it, a
15 claim that some candidates for office had failed
16 to pay a fee --

17 THE COURT: I read that case, yeah.

18 MR. DEVANEY: Okay.

19 THE COURT: Well, there was -- it was what
20 was the fee, there was some controversy what the
21 salary was, so what would the filing fee be for
22 candidates of that office.

23 MR. DEVANEY: And that was three weeks
24 before the election. Obviously a very different
25 issue, three weeks before the election, and there,

1 the complaining candidate I think had been lying
2 in wait and sat on that argument and made it for
3 some tactical reasons, and the court rejected
4 that. So very different from any Purcell
5 scenario.

6 And then similarly, Your Honor probably
7 also read Walker v. Best, which is about 90 years
8 old. And there the court refused to require a
9 lieutenant clerk to publish a new amendment to the
10 town charter only 15 days before the election
11 where the town's charter required amendments of
12 that type to be published at least 25 days before.

13 So, again, a very clearly distinguishable
14 situation from what we have here, and not at all
15 within the Purcell principle, even if that
16 principle could apply to state courts, which it
17 does not.

18 Your Honor, the last point I'll make on
19 this Purcell point, and it also goes to the
20 argument it's too late to make any change or
21 implement any remedy, is it is relevant that the
22 Secretary herself just a few weeks ago stated to a
23 federal court in the Northern District of Florida
24 that a new congressional plan could be put in
25 place as late as June 13th, 2022, and still could

1 be implemented.

2 THE COURT: June 13th is the qualifying
3 deadline for congressional candidates.

4 MR. DEVANEY: That is correct.

5 THE COURT: They've got to know which
6 district they're qualifying for, so that's the
7 urgency. Go ahead.

8 MR. DEVANEY: I believe that's correct,
9 Your Honor.

10 The other point I'll make is Florida, with
11 regard to this lateness argument, Florida has
12 close to the latest primary in the country,
13 August 23rd, which is a full roughly three and a
14 half months away, which allows the time for a
15 remedy.

16 And, third, recognizing the need to
17 implement a remedy quickly and efficiently, we
18 very deliberately proposed a narrow remedy. You
19 know, we believe that there are violations of the
20 Florida Constitution in multiple parts of this
21 redistricting map, but we decided to bring this
22 narrow claim, focus on CD-5 and the districts that
23 are affected by the dismantling of CD-5 in part to
24 ensure that we could have a remedy for those
25 370,000 people I've alluded to. And we made it

1 narrow. We made it narrow on purpose because we
2 want to ensure that there is time to implement a
3 remedy to protect those people affected. And so
4 we cast this motion in a way that was designed to
5 ensure there would be time for a remedy, and for
6 the reasons I've stated we're confident that there
7 is.

8 And Dr. Ansolabehere has presented two
9 potential remedies to accomplish this. He
10 described them for you. I won't walk through the
11 details of his testimony because Your Honor heard
12 it. But the effects on surrounding districts to
13 which these 370,000 voters have been dispersed are
14 minimal. And that was by design, again, so that
15 we could have as few changes as possible to allow
16 for a remedy. So it's a remedy that could be
17 implemented quickly. It will affect only a
18 handful of districts. And the Secretary relies on
19 affidavits from a couple of supervisors who state
20 a new map would impose administrative burdens on
21 their office.

22 But, Your Honor, it's important to
23 emphasize that the U.S. Supreme Court in multiple
24 cases, including the Taylor v. Lee case, has found
25 that administrative burdens are not sufficient to

1 justify violating constitutional rights. And the
2 record establishes here that most supervisors who
3 weighed in are confident they can implement the
4 remedy on a timely basis.

5 Supervisor Earley on Leon -- in Leon, his
6 deputy, Christopher Moore, say that the remedy can
7 be implemented as long as a plan is in place by
8 May 27th. The same holds true for the supervisor
9 of elections in Orange County, which has 850,000
10 voters, again, as long as a remedy is in place by
11 the end of this month.

12 And it's interesting, Your Honor, that,
13 while the Secretary relies on an affidavit from
14 the Polk County Supervisor of Elections that was
15 submitted in a different proceeding a month ago,
16 just yesterday that supervisor saw that her
17 declaration had been put into this case, and she
18 issued another declaration or affidavit saying
19 that essentially the Secretary is not actually
20 representing her views and that it would be
21 possible to implement a new plan as long as it's
22 in place by May 27th.

23 THE COURT: What affidavit is that? Do you
24 know?

25 MR. DEVANEY: I am going to have to ask my

1 colleagues to help me with that secretary's last
2 name.

3 THE COURT: Polk County. I can figure it
4 out if it doesn't come --

5 MR. WERMUTH: It's Lori Edwards.

6 THE COURT: Okay.

7 MR. DEVANEY: Thank you. And, Your Honor,
8 the Secretary relies on an affidavit from
9 Supervisor Brown who doubts her ability to
10 implement a remedy in time for the 2022 elections.
11 But the roadblocks she identified are fixable
12 problems, such as having to reschedule a meeting
13 with the Board of County Supervisors. Surely that
14 rescheduling issue shouldn't trump the
15 constitutional violations that we've discussed.

16 THE COURT: Supervisor Brown is Duval
17 County?

18 MR. WERMUTH: Columbia County, Your Honor.

19 THE COURT: Columbia. All right, thank
20 you.

21 MR. DEVANEY: And while Columbia may need
22 to spend some more money, that burden pales in
23 comparison to 370,000 people losing their
24 constitutional rights. And as for Duval, we've
25 submitted an affidavit from Representative Davis

1 who's worked in the Duval Supervisor of Elections
2 Office for 14 years where she is deputy supervisor
3 of elections, and she states that the seasoned
4 staff in Duval knows how to handle changes in
5 restricting maps, including potential precinct
6 splits. It's done routinely. It's been done a
7 lot, and that a remedy can be implemented in this
8 case by the end of May.

9 So, Your Honor, most of the supervisors say
10 that they could handle this. They could implement
11 a new map by the end of the month, as long as it's
12 in place by the end of the month, and those who
13 have doubts about whether they can don't cite any
14 burdens that cannot be overcome.

15 Your Honor, I just have a couple more
16 points to make. I want to briefly address this
17 argument that somehow, if I understand it
18 correctly, that the Fair District amendment and
19 the prohibition against non-diminishment violates
20 the U.S. Constitution because it would require
21 taking into account race in drawing a
22 congressional district.

23 And when the Secretary makes that argument,
24 Your Honor, she is asking you not just to make new
25 Florida law, because that's clearly not what the

1 Florida Constitution or the Florida Supreme Court
2 has held, but she's asking you to create a
3 precedence that no court in the country -- Federal
4 law is very clear that race can be taken into
5 account in the redistricting process.

6 The U.S. Supreme Court in Cooper says there
7 just has to be good reasons to create a district
8 that takes into account race in the crafting of a
9 district. And if you are to take the Secretary's
10 argument to its logical conclusion, you would be
11 violating U.S. Supreme Court, the Florida Supreme
12 Court and, again, creating new law that -- that it
13 would be unprecedented.

14 Your Honor, relatedly it was suggested, I
15 think, in either counsel's opening argument or his
16 cross of Dr. Ansolabehere that there can't be
17 diminishment in CD-5 because the black population
18 isn't in excess of 50 percent, and I think that
19 counsel cited Section 2 of the Voting Rights Act
20 for that proposition.

21 This is not a Section 2 claim, of course.
22 This is a claim under the Florida Constitution.
23 It's undisputed that black voters in coalition
24 with other minority voters are able to elect their
25 preferred candidates. There does not have to be a

1 black voting population in excess of 50 percent
2 for there to be diminishment under the Florida
3 Constitution. I just want to be very clear about
4 that.

5 And, again, with respect to, also, to this
6 claim that somehow the Equal Protection Clause
7 invalidates the Fair District amendments or the
8 application of the Fair District amendments here,
9 there's a very heavy burden that the state bears
10 to show, even if the Court were willing to go
11 there, which, again, would be creating brand new
12 precedence, and so we urge the Court not do that,
13 but even if the Court did that, the state's burden
14 to show that race predominated in the creation of
15 CD-5 and Plan 8015 is a very, very heavy burden,
16 and the case law establishes that, that to show
17 race predominated, one must come forward with very
18 persuasive, robust evidence. There is no such
19 evidence in this record.

20 There are a multitude of reasons why the
21 legislature probably proposed district CD-5 and
22 Plan 8015 preserving the core of the district,
23 keeping constituents together, keeping communities
24 of interest together. And most important, Your
25 Honor, and this is -- you can see this in the

1 legislative record, to comply with the Florida
2 Supreme Court's prior rulings regarding CD-5,
3 that's not a race-related reason.

4 That's a reason that's based in the
5 legislature's obligation to comply with the law.
6 So the state can't meet its burden of showing that
7 race predominated even if the Court were
8 interested in going that far and creating new law.

9 It's also -- It's also very clear from case
10 law that we've cited throughout the country that,
11 even if race predominated, which it didn't, but
12 even if it did, that there's a compelling state
13 interest for drawing a district that took into
14 account race, and that is compliance with the Fair
15 District amendments and the Florida Constitution.

16 Your Honor, the last point that I will
17 address is this argument that we are seeking a
18 mandatory injunction and that those should be
19 sparingly granted. And I want to be very clear in
20 our papers that we made it clear we're seeking a
21 prohibitive injunction, that is to prohibit use of
22 Congressional District 5 -- I'm sorry -- to
23 prohibit use of, yes, the new version of CD-5
24 that's in the enacted map.

25 The Court has multiple options in terms of

1 a remedy. The Court could tell the legislature
2 that it needs to pass a constitutional map by
3 May 27th, and if the Court -- if the legislature
4 fails to do so, at that point the Court could
5 impose one of the two maps that Dr. Ansolabehere
6 has put forward. But the point here is we're
7 seeking a prohibition against the enacted map from
8 being used. We have no objection to the
9 legislature getting another shot at passing a
10 constitutional map. And so I wanted to be very
11 clear about that, that point.

12 And so, Your Honor, in conclusion, there is
13 diminishment. There is a constitutional
14 violation. There's time for a remedy. And we
15 satisfy all the requirements for temporary
16 injunctive relief.

17 And, Your Honor, if I could have one moment
18 to just confer with my colleagues through a couple
19 of texts that I received to make sure that I've
20 not missed anything, I would appreciate that.

21 THE COURT: Sure, go ahead.

22 MR. DEVANEY: Thank you.

23 (Brief interruption.)

24 MR. DEVANEY: Well, Your Honor, unless I'm
25 missing something, I think my colleagues believe

1 I've covered everything. So I think I am done,
2 and I thank you for your time.

3 THE COURT: Thank you, Mr. Devaney.
4 Mr. Jazil.

5 MR. JAZIL: Thank you, Your Honor, and may
6 it please the Court.

7 THE COURT: Yes, sir.

8 MR. JAZIL: Your Honor, I'd like to frame
9 our argument around three points. First, I'd like
10 to talk about and discuss with you the broader
11 constitutional paradigm we're operating under.

12 We have the federal constitution and state
13 constitution. It's important that you know what
14 the rules are for both.

15 Second, Your Honor, I would like to be able
16 to walk through the Purcell argument, which is
17 related to feasibility and timing.

18 THE COURT: Sure.

19 MR. JAZIL: Third, Your Honor, I'd like to
20 talk about the mandatory versus prohibitory
21 injunction issue.

22 THE COURT: Okay.

23 MR. JAZIL: Under the equal protection
24 argument, at the end of the day, Your Honor, in
25 every version of every ask that we have from the

1 plaintiffs, they're asking for an additional
2 drawing from east to west, 200 miles that connects
3 the populations in Duval and the populations in
4 and Leon.

5 If Your Honor takes a look at just the
6 actual populations that would exist in this
7 district, over 80 percent of the population in
8 this configured district would be in Duval and
9 Leon, two counties. So we're drawing a 200-mile
10 district anchored by two counties. The question
11 you have to ask, Your Honor, then is, is this
12 compliant with the federal constitution, because
13 first you have to make sure that things comply
14 with the federal constitution, and then you have
15 to make sure they comply with Florida's Article 3,
16 Section 20 requirement, specifically the
17 non-diminishment provision.

18 Again, Your Honor, where the two conflict,
19 the Equal Protection Clause must prevail. That's
20 why we have a supremacy clause in the federal
21 constitution.

22 So let's talk through the proposed
23 (indiscernible) --

24 THE STENOGRAPHER: I'm sorry, you cut out
25 at the end.

1 MR. JAZIL: Let's talk through the maps.

2 Your Honor, again, under the federal
3 paradigm, if race predominates, strict scrutiny
4 applies. Strict scrutiny is the highest possible
5 level of constitutional scrutiny, and that's for
6 good reason, because race is the reason why we're
7 sorting people, so strict scrutiny applies. And
8 how do you pass strict scrutiny? You show a
9 compelling interest that is narrowly tailored in
10 its application.

11 Let's talk about the race predominating
12 portion, Your Honor. How do we know race
13 predominated? Because the legislature said that
14 they're drawing 8015 based on race. They may have
15 been doing it to comply with the state
16 constitution, but they said that they're drawing
17 it for racial reasons. They're connecting black
18 populations.

19 Again, Your Honor, the map does that.
20 8015, which was the first remedial map and serves
21 as a basis for all the other proposed maps, you
22 have black populations, different parts of the
23 state, and in Leon County, the very top of that
24 connection narrows down to three miles, Your
25 Honor.

1 So race is predominating. We have
2 legislative testimony to that effect. We can see
3 the shape of the district. We can see the
4 population distribution in the district. If you
5 look at the heat maps on the
6 floridaredistricting.gov website, which the Court
7 can take judicial notice of, you'll see we're
8 connecting black populations. That is the goal of
9 any configuration of an east-to-west, 200-mile
10 congressional district.

11 If then, Your Honor, race predominates and
12 strict scrutiny applies, how do you comply? You
13 comply by showing there's some compelling state
14 interest. The United States Supreme Court has
15 assumed, but never actually specifically said,
16 that complying with Section 2 of the Voting Rights
17 Act is a compelling interest. Assumed. Never
18 actually held it specifically.

19 Now, if complying with Section 2 is the
20 assumed compelling interest, how does Section 2
21 get triggered? You have to have a majority black
22 (indiscernible) --

23 THE STENOGRAPHER: I'm sorry, you cut out.
24 (Brief discussion off the record by the
25 stenographer.)

1 THE COURT: It cut out on my end, too. So
2 bring that up anytime you need to, ma'am.

3 Go ahead, sir.

4 MR. JAZIL: Your Honor, if Section 2 is a
5 compelling state interest that we're dealing with,
6 how do you meet Section 2?

7 The Gingles case lays out three
8 preconditions, again underscore on preconditions.
9 The first precondition is you have to have a
10 majority black district, which we do not have
11 here.

12 After you establish the preconditions, you
13 have to look at the totality of circumstances.
14 You have to show how this community was acted upon
15 poorly such that a race-based solution was needed
16 for a race-based problem. What evidence do we
17 have of a race-based problem in North Florida?
18 None, Your Honor.

19 Again, using the Voting Rights Act doesn't
20 analog. The Voting Rights Act created a
21 preclearance list. Florida was on it for five
22 counties, five South Florida counties. No county
23 in North Florida was deemed to have a race-based
24 problem that required the bazooka that used the
25 Voting Rights Act as a race-based solution.

1 So, again, we have a compelling interest,
2 Section 2 or Section 5 of the Voting Rights Act,
3 maybe. That can't possibly be the compelling
4 interest in this instance because we simply don't
5 have the facts to support that as a compelling
6 interest.

7 Then you move down to narrow tailoring,
8 okay. Even if we assume there's some compelling
9 interest, you need the solution narrowly tailored,
10 and the answer there is, no, it is not narrowly
11 tailored.

12 You have Dr. Johnson's testimony as
13 Exhibit 8, Your Honor. You have Mr. Popper's
14 testimony. Mr. Popper is the namesake of the
15 Polsby-Popper, and both of them are telling you
16 that you can't draw a compact district, you can't
17 meet the criteria you would ordinarily need to
18 meet to satisfy narrow tailoring. And that's
19 crucial.

20 Now, where my friends and I disagree is
21 they suggest that complying with the state
22 constitution in and of itself could be a
23 compelling state interest. No court, state or
24 federal, has ever held that complying with a state
25 constitution in a redistricting context serves as

1 a compelling state interest. You would be the
2 first court to hold as much, and you, if you do
3 that, Your Honor, would respectfully be on shaky
4 ground. Complying with the state constitution,
5 where there's no record of awful treatment of
6 African Americans in North Florida, complying with
7 the state constitution where functionally you
8 would be saying that a state could simply point to
9 its constitution and say, look, we're excused from
10 federal requirements, it's a pretty high threshold
11 to me. And we respectfully submit that you don't
12 need to go there.

13 So, under the federal constitution then,
14 Your Honor, which again is supreme, you have to
15 satisfy yourself that there has been a compelling
16 interest put forward. There hasn't. You have to
17 satisfy yourself that there is some narrow
18 tailoring put forward. There hasn't.

19 Now, there's some confusion about who bears
20 the burden in this instance. I would submit to
21 you, Your Honor, that it's the plaintiffs. The
22 plaintiffs are the ones asking for a temporary
23 injunction. The plaintiffs are the ones asking
24 for some extraordinary relief. The plaintiffs are
25 the one asking for the new map, which Your Honor

1 has to satisfy yourself complies with both the
2 federal constitution and the state constitution.

3 Let's talk about the state constitution.

4 If the argument is that the state constitution
5 mandates, because of the state constitution's
6 non-diminishment standard, the 200-mile
7 east-to-west configuration, then the state
8 constitution as applied to this part of the state
9 is unconstitutional. We're trying to avoid that
10 situation.

11 We're noting that the state constitution
12 does not apply, that its non-diminishment standard
13 is not triggered here for a few reasons. Number
14 one --

15 THE COURT: Let me ask you a question,
16 because I'm listening to you, I am, and I'm giving
17 you every opportunity on this.

18 MR. JAZIL: Yes, sir.

19 THE COURT: I'm a trial judge in the Second
20 Judicial Circuit. The State Supreme Court pretty
21 much told the legislature, hands off District 5,
22 Congressional District 5, the benchmark, in an
23 opinion.

24 So are you politely suggesting that I
25 should say they didn't realize it was

1 unconstitutional when they did it, and I'm not
2 smarter than them, but in other words, I ought to
3 find differently and then serve it up to them to
4 see if they agree that they maybe screwed it up
5 the first time, or am I supposed -- am I not bound
6 by what the state Supreme Court has already found
7 on an east-west running district that is largely
8 similar to the ones that the plaintiff is
9 proposing to be put in place by the temporary
10 injunction?

11 MR. JAZIL: No, Your Honor, I'm not
12 specifically asking you to do that. You don't
13 need to get there, because, again, remember,
14 apportionment 7 was the product of many years of
15 litigation after a trial in the Second Circuit.
16 And at the conclusion of that trial, the Florida
17 Supreme Court found that the congressional maps,
18 including the map that was drawn for Congressional
19 District 5 at the time, was tainted with partisan
20 intent and so a remedial map was necessary.

21 As part of that remedial process, the
22 legislature was given a chance to come up with an
23 alternative. It threw up its hands at the
24 conclusion, and the Florida Supreme Court ended up
25 drawing a map.

1 The Florida Supreme Court notes in its
2 opinion as well that this map isn't necessarily
3 compact. The Florida Supreme Court notes that
4 this map that they threw out and are substituting
5 was tainted with partisan intent. Any north-south
6 configuration would have been tainted by partisan
7 intent is a fair reading of that opinion, Your
8 Honor. And so that opinion does not mandate that
9 the legislature forever draw some specific
10 configuration of a map.

11 So you don't need to go there, but I would
12 note, Your Honor, that the law also has moved in
13 the federal context. You've got Cooper vs.
14 Harris. You've got the Wisconsin case from just
15 this year that's emphasizing the need to have
16 race-neutral apportionment plans, and it's
17 emphasizing the need to have an extraordinary
18 amount of evidence to establish a compelling
19 interest that's narrowly tailored. So that is my
20 response there, Your Honor.

21 THE COURT: Got it. Understood. Go ahead.

22 MR. JAZIL: And so, Your Honor, talking
23 about the non-diminishment standard, my friend for
24 the plaintiffs rely on Professor Ansolabehere.
25 There's a fundamental question to ask first.

1 Number one, if you're doing a functional
2 analysis to comply with the non-diminishment
3 standard but the baseline district that you have,
4 the benchmark district has problems, the benchmark
5 district is unconstitutional, how do you deal with
6 that situation? You can't do a functional
7 analysis when the benchmark itself is severely
8 flawed. So let's put that fundamental problem
9 aside and come to another one.

10 If you have a non-diminishment analysis and
11 you're trying to show that black voters are being
12 denied the opportunity to elect a representative
13 of their choice on account of race -- and, Your
14 Honor, that phrase "on account of race" is
15 important because the non-diminishment standard
16 borrows from Section 5 of the Voting Rights Act.
17 Section 5 of the Voting Rights Act talks about how
18 things on account of race cannot discriminate
19 against a minority.

20 The 11th Circuit in the Greater Birmingham
21 case, which we cite in a footnote in our response,
22 Your Honor, looks at the exact same language in a
23 Section 2 context. The 11th Circuit, looking at
24 the language on account of race, says, look, when
25 you're doing an analysis like this to show that

1 someone is being discriminated on because of their
2 race, you need to show more than correlation.

3 And what we have from Professor
4 Ansolabehere is he's saying that race in partisan
5 outcomes are correlated. Black voters tend to
6 vote for democrats. He never disentangles race
7 from partisanship. That's the point that
8 Dr. Owens makes.

9 Dr. Owens takes Table 11 in
10 Dr. Ansolabehere's report and builds on it. He
11 doesn't look at just averages of elections. He
12 looks at individual races and says, hey, look,
13 partisanship is just as good if not a better
14 reason to explain why black people are voting the
15 way they do.

16 Another more concrete way to look at it,
17 Your Honor, is that, look, if Congressman Byron
18 Donalds, who is an African-American republican,
19 were running in a reconfigured Congressional
20 District 5, how would that election turn out.
21 Based on Professor Owens' analysis, he would lose
22 regardless of the fact that he's a black
23 candidate.

24 So what do we know about discrimination on
25 account of race based on Professor Ansolabehere's

1 report? Not much because he's shown correlation,
2 and that's simply not good enough.

3 So, Your Honor, with that, I'd like to move
4 on, unless Your Honor has further questions, to
5 the Purcell argument.

6 THE COURT: I'm good. Go ahead, sir.

7 MR. JAZIL: So, Your Honor, Purcell is a
8 United States Supreme Court case that, as we note
9 in our papers, discusses and relies on common
10 sense principles. Courts should not interfere
11 with elections as elections are upcoming, and the
12 United States Supreme Court talks about how doing
13 so could lead to voter confusion and a
14 disincentive to go out and vote.

15 Now, there are two ways to look at this
16 language, Your Honor. One, it sounds inequity,
17 that, if you're interfering with an election close
18 by, you've got lots of moving parts, a lot of
19 things that need to be done and so you should stay
20 away from that.

21 Another way to look at it, Your Honor, is
22 that it sounds in the 1st and 14th Amendments,
23 because there's a line of U.S. Supreme Court
24 cases, Anderson-Burdick, they stand for the
25 proposition that, if you have voter interference

1 and you create disincentives for people to go out
2 and vote, what you're doing is you're violating
3 the 1st and 14th Amendment rights.

4 So regardless of which way you look at it,
5 this common sense principle is something we ask
6 for you to follow. If it sounds inequity, don't
7 interfere with elections as they're coming up. If
8 it sounds in the 1st and 14th Amendment, don't
9 interfere with elections as they're coming up.

10 The Florida Supreme Court, in the cases
11 from 1970, Adams and Walker, said the same thing.
12 And just because the case is old doesn't mean you
13 shouldn't follow it, and I would point the Court
14 to language from Adams where the court said, The
15 election is scheduled. It would be necessary to
16 print ballots, mail out absentee ballots and make
17 other arrangements for the orderly holding of such
18 a primary election, right? So print ballots, mail
19 out absentee ballots and make other arrangements
20 for the timely holding of elections.

21 That's the same principle that Purcell and
22 its progeny rely on. There's a lot going on as an
23 election is upcoming. So it's best not to get in
24 the middle of that.

25 And here, Your Honor, we've heard from

1 supervisors. We've got Supervisor Brown from
2 Columbia County, Supervisor Hogan through one of
3 his deputies, Mr. Phillips, from Duval County
4 saying just that. Supervisor Brown isn't saying
5 that it would be administratively difficult.
6 She's saying it would be impossible. The
7 supervisor in Duval County comes pretty close to
8 saying the same thing. He says it would impose
9 significant burdens on his office.

10 And, Your Honor, we've got declarations
11 from other supervisors that the plaintiffs have
12 offered. The supervisor in Orange County isn't
13 affected by their proposed remedy because he's too
14 far south. The supervisor of elections in Broward
15 County isn't affected because he's too far south.
16 Polk County has gone from the affidavit that she
17 filed in the federal case where things would be
18 impossible, to a very narrow affidavit in this
19 case where, if you read it closely, says my office
20 can implement things now. I don't know whether or
21 not she would be affected at all if the court were
22 to impose a remedial plan like 8015.

23 But, Your Honor, I would recommend for your
24 consideration Exhibit 2 to our response in
25 opposition which is Supervisor Earley's

1 declaration from the federal case. Paragraph 22,
2 he states, "In my role as a president elect of the
3 supervisor of elections, I have spoken with many
4 of my fellow supervisors in other Florida
5 counties. While my staff and I believe we could
6 complete all the work for Leon County if we have
7 finalized maps by May 27th, I have spoken to
8 numerous supervisors who strongly believe that
9 May 27th would not give them enough time to
10 complete the work for their counties and who
11 believe the deadline for completing that work is
12 early May or even late April."

13 He goes on to talk about how, for some
14 larger counties, the work is more complex. For
15 some smaller counties, they simply don't have the
16 resources to do the work.

17 And, Your Honor, in this case, Supervisor
18 Earley, to his credit, filed a second declaration
19 saying, I can do this by May 27th, my office can
20 do this. There's a third declaration from Leon
21 County in the reply where one of Mr. Earley's
22 deputies says that my office, that Leon County can
23 do this. Again, nothing to rebut what Columbia
24 said, nothing to rebut what Duval County said, and
25 we don't have anything from any of the supervisors

1 in between.

2 Again, it's the plaintiffs' burden to ask
3 for and establish a right to this extraordinary
4 relief. They have not done so because they don't
5 have affidavits from the remaining supervisors who
6 would be affected.

7 Mr. -- Dr. Ansolabehere, pardon me,
8 admitted that there are about 12 or so supervisors
9 who could be affected. How many of those
10 supervisors do we have declarations from? Not
11 many. We've got Leon. We've got Columbia. We've
12 got Duval. You heard from Dr. Ansolabehere that
13 he did an analysis using VTDs as a proxy for
14 precincts, but he doesn't know whether or not the
15 supervisors who are affected are following those.
16 So his discussion about only 22 precincts would be
17 affected, not 12, well, that's, respectfully, a
18 red herring at this point because we don't know
19 how many of these supervisors are following this
20 VTD system. It's not statutorily required, and
21 it's not constitutionally required.

22 Finally, Your Honor, I note that -- one
23 final point about Purcell and the supervisors'
24 concerns. It's been pointed out again that the
25 Court need not follow Purcell, and the Florida

1 Supreme Court cases that are Purcell-like need not
2 be followed because no state courts, it's
3 suggested, follow these. And perhaps I'm
4 extending that a bit by saying no state courts
5 follow it. My friends have said New York doesn't
6 follow it.

7 Your Honor, I would point out that there
8 are other states that do follow Purcell and have
9 done so recently because it is a common sense
10 notion. Those states are Tennessee, Illinois,
11 Maryland and Texas. And, Your Honor, I'm happy to
12 get those cases to you as a supplement if Your
13 Honor would prefer.

14 A final point on timing, Your Honor. My
15 friend suggests that the three weeks it took
16 between the Governor vetoing the legislature's
17 enacted plan and the special session resulting in
18 another plan somehow shows some kind of nefarious
19 attempt to game the system. That's simply not
20 true. There's no evidence for that, number one.

21 Number two, as you've seen from Professor
22 Ansolabehere, it takes time to come up with a good
23 map. Professor Ansolabehere drew a map in a day,
24 did a lot of work in a day, and there was an error
25 on his proposed map. His proposed map has a line

1 going through Congressional District 6, which he
2 said was an error. To me, it looks like a
3 non-contiguity issue. But it's there, and that
4 underscores that map drawing is hard. Working the
5 legislative process and trying to get stakeholders
6 to agree is hard, especially when there's been a
7 veto, and that takes time.

8 The point about the June 13th date that the
9 Secretary noted to the federal court, Your Honor,
10 I was asked that question by Judge Horton on the
11 three-judge panel. Judge Horton said, okay,
12 you're asking for a stay that's limited to the
13 special session, but what is the drop-dead date by
14 which you need a map. At that point, Your Honor,
15 I said the date was June the 13th because, from my
16 client's perspective, that's what made sense.
17 That was the date of qualifying. I did not have
18 the benefit of the supervisors providing their
19 declarations, such as Supervisor Earley, and in
20 the subsequent filing in reply to support our
21 request for a stay during the special session,
22 again which ended April 22nd, we made the point
23 that, look, our request is narrower than what the
24 supervisors are saying they need a map by. And
25 their affidavits themselves had certain other

1 flaws, and that's what that filing says. I'm
2 happy to provide that to Your Honor if you're
3 interested. But we were asked to provide a
4 drop-dead date by the three-judge panel, and we
5 did our best to provide one at the time.

6 Finally, Your Honor, this question about
7 prohibitory versus mandatory injunction. My
8 friends say what they're looking for is a
9 prohibitory injunction. Every case cited in their
10 papers is a case for prohibitory injunction.
11 There's not a single mandatory injunction case.
12 But here's the problem: They're asking the Court
13 to mandate the adoption of a new map. Mandate.
14 Mandatory. I don't know how this fits within the
15 paradigm for prohibitory injunction, and because
16 it doesn't, this is that rarest of rare
17 circumstance instance where they have an
18 extraordinarily high burden to overcome to show
19 that a mandatory injunction is appropriate here.

20 And, Your Honor, we quote from the Florida
21 Supreme Court 1943 on it's consistent. A
22 mandatory injunction is like ordering an execution
23 and holding a trial later, and that's why it's
24 wrong and that's why we shouldn't have it.

25 We haven't had a trial. We haven't

1 introduced the facts. We don't know what is and
2 isn't possible, and you're being asked to rush to
3 a conclusion.

4 So, in summation, Your Honor, just to make
5 this real simple, the plaintiffs are asking you to
6 eat a half-baked cake. I'm telling you it's a
7 half-baked cake and you don't need to eat it. The
8 Columbia and Duval supervisors are saying the same
9 thing. My friends for the plaintiffs are
10 responding by saying the cake is delicious, it's
11 got wonderful frosting, it comes with a cold glass
12 of milk. But at the end of the day, Your Honor,
13 it's still a half-baked cake, you don't need to
14 eat it.

15 Thank you, Your Honor. I have nothing
16 further.

17 THE COURT: Thank you.

18 MR. DEVANEY: Your Honor, would it be
19 possible for me to briefly rebut?

20 THE COURT: You can, but then I'll also
21 give Mr. Jazil an opportunity if he needs to do a
22 rebuttal, too.

23 Go ahead.

24 MR. DEVANEY: Okay, thank you. I won't
25 address the cake, but I'll address a few other

1 things.

2 One is, Your Honor, on the Purcell issue, I
3 just want to point out factually, Mr. Jazil said
4 that, you know, it's hard to draw a map and,
5 therefore, it should be understandable that it
6 took three weeks to schedule the special session
7 and to get a new map drawn, but the point I want
8 to make, a factual point that's very important to
9 this Purcell argument, is that the legislature
10 passed a map, and then it waited three weeks after
11 passage to send it to the Governor for signature.
12 So they weren't -- they weren't drawing a map
13 during those three weeks. They had one, and they
14 sat on it. And that process got delayed by three
15 weeks because of that, and, you know, that plays
16 right into this whole Purcell argument. Hey, it's
17 too late to do anything.

18 Well, I would submit it's too late to do
19 anything because that's kind of what they wanted.
20 They wanted to sit on this. They wanted to delay
21 it so that they could pass an unconstitutional
22 map, and then we'd hear this argument that it's
23 too late to do anything about it.

24 And, relatedly, counsel talks about voter
25 confusion that could result from changes at this

1 point in the process. Your Honor, let me submit
2 that imagine the voter confusion that would result
3 from a finding, which we believe is compelled,
4 that this map is unconstitutional, but we can't do
5 anything about it, we're not going to do anything
6 about it and voters hear that. I mean, how is
7 that going to affect the mindset of a voter on
8 whether to go out and vote?

9 I think the confusion is dramatically
10 greater than the types of administrative confusion
11 that counsel points to as supposedly supporting
12 application of Purcell, but the linchpin or the
13 threshold point, though, is Purcell doesn't apply
14 at all because it's a federal doctrine. But even
15 if it did, I'd make those points that I just did.

16 With respect -- And, also -- I'm sorry, one
17 more point on Purcell. Counsel suggests that
18 other supervisors have not come forward to say
19 that they could implement by the end of the month
20 if the new map were adopted. But we've also not
21 heard from them that they can't. In Purcell, the
22 burden is on the state to prove that Purcell
23 somehow should allow an unconstitutional map to go
24 into effect, and it's the burden on the state to
25 come forth with affidavits from supervisors saying

1 it's too late, we can't do anything.

2 So I don't accept this proposition that it
3 was on us to provide those affidavits. And, in
4 fact, we have provided affidavits, as I've
5 described, from supervisors saying this can be
6 done.

7 Turning next, Your Honor, to the argument
8 that race-based -- or, districting that takes race
9 into account should be declared by you to be in
10 violation of the U.S. Constitution. Counsel
11 suggests that, as part of that analysis, you have
12 to conclude that Section 2 of the Voting Rights
13 Act is not a compelling state interest, and I want
14 to be clear if I haven't been already that our
15 claim for diminishment does not rest in any way on
16 Section 2 of the Voting Rights Act. It rests upon
17 the Fair District amendments to the Florida
18 Constitution, and that provision got -- the
19 non-diminishment of the Florida Constitution is
20 indeed modeled after Section 5 of the Voting
21 Rights Act and, significantly, Section 5 didn't
22 require -- it doesn't require, because Section 5
23 is still in effect, that there be a majority
24 voting block in a district. That's not -- That's
25 not required under Section 5.

1 But the real point I want to make is, this
2 is not a Section 2 claim, and compliance with
3 Section 2 doesn't have to -- is not the compelling
4 state interest if you are ever to go down this
5 rabbit hole of applying equal protection and going
6 as far as the Secretary would like you to do.

7 And then it's surprising to hear the
8 Secretary say that, if you did go down that path,
9 you can conclude that compliance with the Florida
10 Constitution is a compelling state interest. The
11 Supreme Court has on multiple occasions indicated
12 that compliance with the Voting Rights Act is a
13 compelling state interest, and it's -- it's
14 befuddling to suggest that compliance with the
15 Florida Constitution cannot be such compelling
16 state interest.

17 Related also to this argument that we'd ask
18 you to find any consideration of race and
19 districting to be unlawful, counsel suggests that
20 there's no evidence of a, quote, race-based
21 problem to justify non-diminishment. There's
22 nothing in the Fair District amendments that talks
23 about there has to be a race-based problem. All
24 the Fair District amendment says is the ability to
25 elect of minority voters cannot be diminished.

1 There doesn't have -- There's no mention of a
2 race-based problem.

3 And counsel cited the Wisconsin decision
4 from the U.S. Supreme Court that was issued
5 approximately two months ago. I actually was
6 counsel in that case, Your Honor. And that was a
7 Section 2 case. As I said, this is not a
8 Section 2 case. But, significantly, in that case,
9 the U.S. Supreme Court reiterated its longstanding
10 presumption that compliance with the Voting Rights
11 Act is a compelling state interest.

12 And just two other quick points, Your
13 Honor. Counsel talked about Dr. Owens, and the
14 only thing I want to say about Dr. Owens is he
15 never did a functional analysis, just didn't do
16 it. He did analyze how Benchmark CD-5 performs
17 against the new districts, and he's not able to
18 say one way or the other whether there's
19 diminishment. He just didn't do it. And so
20 there's no contradictory evidence in the record in
21 response to Dr. Ansolabehere's analysis.

22 And then last, not once in our papers do we
23 mention mandatory injunction. We say that there
24 should be a mandate to do something. Our request
25 for leave, as I said before, is to prohibit this

1 unconstitutional plan from going into effect and
2 give the legislature a chance to pass a
3 constitutional map, and if it doesn't, at that
4 point a remedy needs to be put in place.

5 And, Your Honor, that is all I have in
6 rebuttal, so thank you.

7 THE COURT: Thank you. All right, anyone
8 on behalf of the House of Representatives or the
9 State Senate wish to be heard.

10 MR. BARDOS: Your Honor, yes. Andy Bardos
11 for the House. Just on one minor point, I'm not
12 weighing in on the other constitutional arguments,
13 but on the issue of available remedies, I heard
14 Mr. Devaney say in his argument that one of the
15 remedies that could be available to the Court is
16 to order the legislature to pass remedial
17 legislation.

18 Of course, we know under the separation of
19 powers that the Court cannot order a legislature
20 to pass legislation, and that's -- for that
21 proposition, I would refer to court Corcoran vs.
22 Geffin, 250 So.3d 779, decided by the First DCA in
23 2018.

24 In restricting cases, what courts will do,
25 if there's time, is give the legislature an

1 opportunity to convene and to pass a remedial map.
2 It doesn't order the legislature to do so because
3 the legislature can't be ordered to perform
4 legislative functions. So that's --

5 THE COURT: I'd prefer the Supreme Court do
6 that rather than a circuit judge if it happens,
7 but go ahead.

8 MR. BARDOS: Thank you, Your Honor. That's
9 the one point I wanted to make.

10 THE COURT: Thank you, sir. Mr. Nordby, on
11 behalf of the Senate, anything need to be heard?

12 MR. NORDBY: No. No, Your Honor, nothing
13 from the Senate.

14 THE COURT: All right, thank you so much.

15 All right, I don't start off with the idea
16 that anybody has played gamesmanship. We have a
17 decennial census, the 2020 census that puts
18 everybody on a short leash as far as the amount of
19 time the legislature has to create districts, fair
20 districts for state races in the House and Senate,
21 as well as congressional districts.

22 The legislature went into session and,
23 somewhere around March the 23rd of this year,
24 enacted a map for congressional districts that
25 ultimately Governor DeSantis vetoed.

1 The state constitution divides out what
2 happens on congressional districting, and it
3 allows the Governor to have the right to veto. So
4 that is the third branch other than the
5 legislature and the courts here, the executive.
6 Governor DeSantis did what he can do on that.

7 The timing of it, how long the legislature
8 held onto it or not, we're talking about a matter
9 of weeks. I realize everybody's on a short leash
10 as far as the time that is available, but the
11 legislature moved through, had an open,
12 transparent effort, from what I have read, to do
13 restricting. It enacted a law. It presented that
14 law to the Governor. The Governor exercised his
15 option to veto the law.

16 The legislature at that juncture could have
17 overridden the veto. It did not. The Governor
18 called the legislature into special session. The
19 result of which was the legislature enacted the
20 current map that we're talking about. The
21 Governor signed that in. We're talking about in
22 essence four weeks, plus or minus a couple of days
23 either way, between the legislature's first
24 version of restricting for Congress and its second
25 version of redistricting for Congress.

1 All right, the parties in this case could
2 not have done anything quicker than they did. I
3 mean, there was an immediate filing of the action
4 in state court. The federal court action, I don't
5 know if Purcell was the reason why Judge Winsor,
6 or whoever it was, Judge Walker or Judge Winsor --
7 I think it was Judge Winsor, but whoever, just
8 tracking, just reading what I read in the
9 newspaper, right. That case got dismissed. The
10 plaintiffs didn't sit on their hands. They moved
11 as quickly as one can imagine in these kinds of
12 cases. They quickly got the complaint filed.

13 There are service of process issues. They
14 had to get service or there had to be an
15 acceptance of service on behalf of the defendants
16 in the case. This Court tried to be as proactive
17 as possible in saying time will be made so that we
18 can have whatever hearing needs to happen, be that
19 a temporary injunction hearing or, if everybody
20 could line things up, a trial. Why? Because this
21 is something that is important to get done on a
22 quick turnaround. It's supposed to be expedited
23 under the rules of procedure, Florida Rule, I
24 think, 6.10(c).

25 The other thing is, coincidentally, I had a

1 nice break in my schedule where something that
2 would have chewed up a lot of time resolved. So I
3 made an effort through my judicial assistant in
4 contacting each of you to let you know we have as
5 much time as we need to try this issue this week,
6 the week -- we're doing it now, and we could have
7 gone back into last week if everybody could have
8 lined things up.

9 Now, I realize you all had a lot of work to
10 do and you did a lot of work. You provided me a
11 lot of good information by affidavit. It was good
12 direct and cross-examination today. The lawyering
13 has been superb in this.

14 You've provided me a lot of written
15 advocacy, as well as citations, in a lot of
16 instances actual copies of the cases themselves.
17 So that's been much -- much needed and very
18 helpful. Nobody has drug their feet in a way to
19 cause a got-you game, I think. It's just we had a
20 very short period of time to get this right.

21 Now, the voters of Florida overwhelmingly
22 voted in Article 3, Section 20, Tier 1 standards.
23 Now, they largely track, maybe exactly track if
24 not that largely track the Voters Right Act of
25 1965. So when the United States adopted the 15th

1 Amendment sometime around 19 -- 1869, 1870, one --
2 Section 2 of the Amendment 15 allowed Congress to
3 enact statutes or congressional acts to enforce
4 the amendment, and Congress did in 1965.

5 In this nation, the different states of
6 this nation have been trying to comply with the
7 voters -- not voters registration, but the Voters
8 Rights Act since then. And we've had litigation
9 up and down the board on that. We've gone from
10 certain places that had to be pre-cleared to no
11 longer. So but, during that -- during the
12 interim, the state of Florida, its voters, I think
13 over 62 percent of them voted to add Article 3,
14 Section 20, which says, part of it, is districts
15 shall not be drawn with the intent or result of
16 denying or abridging the equal opportunity of
17 racial or language minorities to participate in
18 the political process or to diminish their ability
19 to elect representatives of their choice.

20 This case has a wrinkle in it that the
21 prior iterations have not had. Before, we had
22 full trials where a circuit judge, like Judge
23 Lewis, Terry Lewis, Judge Reynolds may have had
24 one before, but we had a circuit judge who heard
25 all of the evidence. It wasn't a temporary

1 injunction. There were decisions made, and the
2 legislature was invited to remedy a problem that
3 the trial court and the appellate courts found to
4 exist.

5 They went back into session, and either
6 they remedied it or they couldn't remedy it, and
7 ultimately I think the Supreme Court said, well,
8 here's the answer, or here's a partial answer that
9 you all didn't fix yourselves.

10 Here, we have a very short time frame. The
11 parties, either by choice or practicality
12 probably, did not opt to have a full trial. In
13 other words, no bar is held. Every witness that
14 would come in, live witnesses, judges credibility
15 of witnesses, anything and everything, but I also
16 have not heard from anybody that this process that
17 we have done today has caused one of the sides not
18 to have a fair hearing.

19 In other words, it seems to me that
20 everybody has taken the position that we're making
21 our case, rule on it, and no doubt whoever doesn't
22 like the answer will appeal, and that's their
23 right. That's the way our system works.

24 Here, we already know that the legislature
25 has enacted a statute that the Governor vetoed.

1 So if the Court were to find the existing statute
2 to be unconstitutional, there's at least a map and
3 maybe a backup map that the legislature has
4 already considered.

5 I've read through -- The counsel here that
6 spoke on behalf of the House and here on behalf of
7 the Senate made presentations, their law firms
8 made presentations to both the House and Senate, I
9 believe, and if not, then somebody closely
10 affiliated with them, to lay out what needed to
11 happen to have a transparent determination of
12 redistricting.

13 So here we know what the legislature
14 otherwise did before the veto, which was the
15 Governor's right to veto. So it's not -- A
16 difference this time compared to the other times
17 is potentially we know what the legislature would
18 have done had the Governor signed it already,
19 where we didn't have that information before and
20 they had to go back in to take into consideration
21 the defect that the trial court or the appellate
22 courts afterwards had found leading through to
23 what the legislature had the opportunity to fix
24 itself in, what, 2012, 2015 iterations going back.

25 Those are the reasons courts want to make

1 sure that juries reflect the makeup of society, is
2 people are more confident in their government,
3 they're more trusting of the judicial branch in
4 jury cases if juries aren't all white or all black
5 or all anything. In other words, people have an
6 equal opportunity to participate, and the jury
7 generally is going to look like the community, and
8 people are more accepting of decisions made by
9 juries and rulings made by courts when they feel
10 it's been an open, transparent process, that
11 everybody involved had an equal opportunity to
12 participate, and it reflects the community as a
13 whole, the genius of 6 or 12 regular people
14 listening to a case and deciding a verdict.

15 Congress, in passing the Voters Rights Act,
16 did it in an effort to support the 15th Amendment
17 with the idea there's equal protection rights
18 under the 14th Amendment, and they could have had
19 legislation on that, too. This country has made
20 great effort, particularly in states that had Jim
21 Crow laws, Florida being one of those laws. If
22 you look back, and I know I've read in the record
23 where -- I'm not looking at it right now, but I
24 believe what I read was in 1958 Gadsden County had
25 seven registered African American voters, and the

1 population, the majority of which was African
2 American.

3 So part of the reason the Voters Rights Act
4 of 1965 came into being and Congress enacted it
5 and the federal and the state courts have employed
6 it since then is to try to make sure that people
7 who are minorities had an equal opportunity to
8 participate in the system and that the state did
9 not put its finger on the scale to diminish their
10 ability to elect the representatives of their
11 choice.

12 Now, what does that mean? It doesn't have
13 to mean in a district that is either the majority
14 African American or plurality African American
15 where the additional minorities in that district
16 would provide the minority with a majority of the
17 votes, in other words, more votes than white
18 people, but what it does mean is people typically
19 want for a candidate of their partisan preference
20 but also of their color. I'm not breaking any
21 grounds here in citing federal law to that effect.

22 I think it goes back to Gingles on that.
23 Yeah, Thornburg, T-h-o-r-n-b-u-r-g, vs. Gingles,
24 maybe Gingles -- I assure you, I don't do this on
25 a daily basis -- G-i-n-g-l-e-s, 106 Supreme Court

1 2752, on page 2775. That's a United States
2 Supreme Court case from 1986.

3 Focusing on the Voters -- Voters Rights
4 Act, Section 2(b) states that a violation is
5 established if it can be shown that members of a
6 protected minority group, quote, unquote, have
7 less opportunity than other members to elect
8 representatives of their choice, close quote.

9 The court went on further to say, because
10 minority and majority voters often select members
11 of their own race as their preferred
12 representatives, it will frequently be the case
13 that a black candidate is the choice of blacks,
14 while a white candidate is the choice of whites.

15 All right, in this case, the State Supreme
16 Court, who I answer to, and I also took an oath of
17 office to uphold the federal law, the federal
18 constitution, the state law, the state
19 constitution, my Supreme Court, my State Supreme
20 Court has issued an opinion finding that the
21 Benchmark Congressional District 5 met
22 constitutional muster. This is after the Fair
23 District amendment had been passed.

24 It was a district then that ran basically
25 -- and, Mr. Jazil, I understand 100 percent what

1 you say on this. You're right, it's a 200-mile
2 span running east-west anchored by Duval County
3 and then the African American populations in
4 certain ZIP codes of Leon County and Gadsden
5 County, Florida, but the Florida Supreme Court
6 issued an opinion that that -- failing the -- in
7 other words, it was more important not to diminish
8 minorities' ability to elect their representative
9 choice than it was the compactness of the
10 district, and that gets back to Tier 1 and Tier 2
11 standards.

12 So for those listening that aren't lawyers,
13 Tier 1 standards trump -- no political effort to
14 invoke any past politician's name on that -- but
15 trump the Tier 2 requirements. So the district
16 being compact is less important than districts not
17 being drawn with intent or result of denying or
18 abridging equal opportunity of racial and language
19 minorities to participate in the political process
20 or to diminish their ability to elect
21 representatives of their choice.

22 Here we have the testimony of the one live
23 witness, who I need to look at his name to make
24 sure I get it phonetically right here, which means
25 I need to --

1 MR. DEVANEY: Your Honor, it's
2 Dr. Ansolabehere.

3 THE COURT: Ansolabehere. Thank you very
4 much.

5 He testified that there are other districts
6 throughout the country, depending on which metrics
7 you're using, which are less compact. He pointed
8 out that the defendants' experts -- and I have
9 read their affidavits, I understand what they are
10 saying on that, and I have picked up their focus
11 more on the Tier 2 requirements. I'm not
12 necessarily disagreeing with them on the Tier 1
13 standards.

14 The Benchmark Congressional District 5 had
15 49.1 percent African American voting age
16 population. I think that's the way I read that.
17 You had another little over 4 percent, less than
18 5 percent other minorities. And then the white
19 population was less than 50 percent. So the
20 combined minority vote in and of itself could
21 elect the minority candidate or, perhaps to use
22 the language, the representative of their choice.

23 The legislature's efforts to work with the
24 district to preserve the racial balance to put
25 African Americans in a better position, to not

1 diminish their ability to elect a representative
2 of their choice came up with a number of
3 alternatives that would have kept that district in
4 place. The district that has since been enacted
5 and signed into law by the governor does disperse
6 367,000 African American votes between four
7 different districts. Out of those four different
8 districts, the African American population is
9 nowhere near the plurality or majority, and I
10 think statistically, if you look at the tables
11 that have been included as well, the minority vote
12 is small enough or lowered enough that you would
13 expect it to be harder, substantially harder for
14 minorities to elect a candidate of their choice in
15 those redistrictings.

16 Now, if you're looking it as far as
17 compactness, it's a prettier picture and it's more
18 compact, no doubt about that. I don't attribute
19 bad motives to somebody for that either. I mean,
20 that is -- that's a Tier 2 requirement. There is
21 sense in it other than it doesn't take into
22 consideration the geography.

23 So there are a lot of states, he talked
24 about Arizona being a box or a square, Wyoming,
25 right, a big box, Colorado a big box, expansive

1 area. They don't have panhandles. They don't
2 have coasts. They don't have as many rivers.
3 They don't have the geographical boundaries and
4 constrictions that we have, and yet where was --
5 where were the plantations, if you go back into
6 the slavery leading up to now and the dispersion
7 of African Americans in the communities? Jackson
8 County, across down through Alachua County, they
9 were near the state line of Georgia, and the way
10 the panhandle sticks out and over.

11 So I take the Benchmark District 5 that the
12 Florida Supreme Court authorized and then
13 ultimately mandated in 2015 seriously to look at
14 it that I am not going to upset, in other words,
15 I'm not going to disagree on them with what they
16 did or how they came about it or whether it passed
17 muster because I believe they have made that
18 determination.

19 It is different now. We have a different
20 decennial census. They had a full trial before.
21 We don't have a full trial here. So there are
22 differences.

23 So here's what I'm going to tell you: I'm
24 doing my best, and it's important to me that I get
25 it right and that I fairly heard everybody and am

1 trying to give you a decision that makes sense, so
2 it's intellectually honest, but at the same time
3 is consistent with the Florida law and the federal
4 law.

5 I think that the Florida Constitution, its
6 Article 3, Section 20 standards for Tier 1 and
7 Tier 2 are independent of the Voting Rights Act.
8 It does not mean that a court might not find what
9 was done unconstitutional, equal protection. I'm
10 not going to be that court, though. I don't have
11 in front of me what I think I would need to say
12 this violates the 14th Amendment because I just
13 don't have that on this record, and we have a lot
14 of law between 1965 and now, including even on the
15 Fair District amendments since it was enacted and
16 added to the constitution.

17 The State Supreme Court did put forward
18 some metrics, some things that had to be done, a
19 functional analysis. The plaintiffs' expert
20 witness did conduct a functional analysis. The
21 defense expert witnesses didn't conduct the same
22 functional analysis that the Supreme Court went
23 through, and they have a different argument. I
24 get it. But I do find persuasive the arguments
25 that were made about the diminishment of African

1 American votes in what was Benchmark Congressional
2 District 5 to the other districts that are now
3 spread, and I think that was 2, 3, 4, into 5.

4 We don't know whether all of the
5 supervisors of elections that might be affected
6 use -- Let me get my acronym right here -- the
7 VTDs, the voter tabulation, either districts or
8 precincts -- I think it was districts -- but
9 they're certainly available to use, and what I
10 took out of that is, if you have somewhere in the
11 neighborhood of 10 precincts out of the 650
12 precincts that would be affected if the Court were
13 to impose either Plan 8015 or one of the two plans
14 that the plaintiffs have proposed, it would -- it
15 doesn't look like it would take a lot different,
16 and we're already running on a short time frame
17 that this doesn't make a lot of time difference on
18 anyhow because the earliest this could have
19 happened is the third or fourth week of March,
20 legislature enacts something, the Governor could
21 have signed it. There you go, we wouldn't even be
22 here.

23 Taken the four weeks in between and then
24 the filing of the lawsuit and then getting
25 everybody lined up so that they could participate

1 in this process gets us now to May the 11th. It's
2 important that I get an order out that the state,
3 if it wishes to appeal it, and I expect them to --
4 I mean, this is -- these are important matters and
5 that's their right to appeal it. I want us to get
6 something put together so that they can get to the
7 First District Court of Appeal who may or may not
8 hear the case. They may send it straight to the
9 Supreme Court. I don't know. That would be up to
10 them. That's above my pay grade.

11 What I need to do is get an order in place
12 as quickly as possible that satisfies the
13 requirements of the Florida Rules of Civil
14 Procedure, in other words, laying out the factual
15 reasons for finding the four different elements in
16 citations to the law on that, but what I am doing
17 is I am finding that the enacted map is
18 unconstitutional under the Fair District
19 amendment, Article 3, Section 20, because it
20 diminishes African Americans' abilities to elect
21 the representative of their choice.

22 And I'm not going to order the legislature
23 to go back in session. I don't really think
24 that's up to me on that end.

25 We have two alternatives, which would be

1 Plan 8015 or proposed Plan A. As I understood
2 proposed Plan A, it would affect the least number
3 of counties and I think the least number of
4 precincts. So if I'm put in the pickle of saying
5 if the one map is -- the redistricting map is
6 unconstitutional and substitute something that
7 would have the least effect, it would make the
8 most sense to suggest, I guess is a polite way of
9 putting it, using proposed Map A to have the least
10 impact on everybody else because people have to
11 know -- people have to register to vote and be
12 assigned precincts. Ballots have to be printed.
13 Mail -- Early voting mail has to go out.

14 Now, the qualification date is not until, I
15 believe it's June the 13th. If we can get an
16 order out either today or tomorrow, that way the
17 state can go as quickly as possible to the First
18 District Court of Appeal with the idea that the
19 District Court of Appeal or the State Supreme
20 Court can do what it needs to do. And they've got
21 more resources than me, and they don't necessarily
22 have to agree with what I've done or why I've done
23 it. That's their prerogative on it. They'll
24 follow the law on that. I don't have any doubt on
25 that.

1 But it's important that we get this to the
2 next step so that this can be decided as quickly
3 as possible, so that whatever the answer is
4 finally, ultimately, there is time for the
5 administrators to put into action what needs to be
6 done to make it happen.

7 All right, so, Mr. Devaney, let me ask your
8 side to -- how much time do you need to put
9 together an order -- Now, remember, I've got to
10 sign this. I'm not going to sign this if I don't
11 agree with what it says. I'm not going to sign
12 something that didn't happen. Straight up, as
13 quickly as you can, what would be needed so that
14 the appellate court has what it needs to consider,
15 so we can set the hook there in the event I'm
16 wrong, and the appellate court can straighten it
17 out if it needs to?

18 MR. DEVANEY: Your Honor, we can certainly
19 provide that tomorrow, and we'll do it as early as
20 possible tomorrow.

21 THE COURT: Mr. Jazil, I don't expect you
22 to agree with my ruling. You have argued very
23 well on your behalf, on your clients' behalf on
24 that. If we can get an order out tomorrow, and
25 that's absolutely my goal on it, and it doesn't

1 matter how much coffee I've got to drink to make
2 it happen, all right, so let's get to me as soon
3 as you can.

4 If you investigated me, I don't necessarily
5 sign what people hand me. It needs to be done
6 well, and I need to agree without any overreaching
7 on something, but it needs to lay out what the
8 appellate court needs so that it makes it simpler
9 for them to figure out if I did it right or not.

10 Mr. Jazil, that puts you in a position
11 where you all can load up anything you need to do
12 to be ready tomorrow just as soon as possible to
13 make that appeal.

14 MR. JAZIL: Yes, Your Honor. Point of
15 clarification, though.

16 THE COURT: Yes.

17 MR. JAZIL: You said that you found that
18 the map is unconstitutional. Did you mean that
19 the plaintiffs had a substantial likelihood for
20 success on their argument that it's
21 unconstitutional?

22 THE COURT: I do. And thank you if I'm
23 pushing a little forward here. But, in other
24 words, I'm only commenting on the limited issue
25 before me on the motion for temporary injunction.

1 I'm not arguing or commenting or making a ruling
2 on anything else that's part of the plaintiffs'
3 lawsuit. That will have to be decided after
4 trial. And, yeah, I think in the language of the
5 day, it's most likely to succeed. They don't have
6 an adequate remedy of law otherwise, that it is in
7 the public's best interest for the Court to enter
8 an injunction at this stage, in other words,
9 cracking the elements but giving a reason why that
10 element is supported, not just a conclusory they
11 met the standard.

12 MR. JAZIL: Yes, Your Honor. Second point,
13 and, again, we are not in the business of
14 gamesmanship. So if the appeal is filed, it comes
15 with -- an automatic stay comes with it as well
16 out of the Court's ruling, and the Court has the
17 ability to undo that stay after a subsequent
18 hearing. So would Your Honor let us know, is
19 there --

20 THE COURT: So, and I don't think any one
21 of you is engaging in gamesmanship, and I'm not
22 trying to either on that end. It's not a matter
23 of ego for me.

24 Normally, a stay happens. What's important
25 is that the administrators that need to work

1 through this election are put on notice as soon as
2 possible what they've actually got to do and, if
3 I'm a potential candidate for a race out there,
4 that I can figure out do I want to run in the
5 district I would have or not. If I'm a voter,
6 where am I supposed to register. If I'm a
7 candidate and I'm seeking either -- Think of it
8 this way: If I'm trying to get on the ballot by
9 petition, I've got to know which voters can sign
10 to, you know, get my ballot on -- get my name in
11 the mix.

12 So both sides, if you want to, can brief
13 whether I should enter -- should override the stay
14 or not. Generally, I don't like to override stays
15 from the standpoint that I think there's a
16 presumption that at least -- First of all, I fully
17 expect the appellate court to get this and move as
18 swiftly as they can. They're good people.
19 They're going to be conscientious about doing it.
20 Whether they agree with me or not, they're going
21 to do their job.

22 So I think everybody in the government,
23 regardless of the branch, ought to all be on the
24 same page that we need to get this right as soon
25 as we can. So if I'm a supervisor of elections

1 out there and I'm thinking, well, okay, one guy at
2 least said this needs to be different, that
3 doesn't necessarily mean I'm going to sell out and
4 crunch my numbers and make everything fit that,
5 because we don't know if that will stick.

6 So if you seek to have a stay, my initial
7 response would be okay, all right. So let's get
8 it to the appellate court so it can make the
9 determination it needs to make as soon as possible
10 so that whatever the final answer is gets out to
11 the people that need to put this into place.

12 MR. JAZIL: Understood, Your Honor. Thank
13 you.

14 THE COURT: All right, anything else?

15 MR. JAZIL: No, Your Honor. You said we're
16 going with proposed Map A as a remedy, if I
17 understood that correctly?

18 THE COURT: Yes, I think so because, as I
19 understand it, the functional analysis has been
20 done on it, and it would cause the least amount of
21 disruption but also accounting for the differences
22 in population.

23 Now, to the extent you said, aye, this
24 looks like a smudge, this is wrong on this, I take
25 it that that, that map can be cleaned up so that

1 it doesn't have non-contiguity to it, if that's
2 the right way to say it. But because nobody's
3 suggesting that, if there's an error in a map that
4 was drawn quickly -- And, again, people in good
5 faith here. There was a response by the state on
6 May the 9th. That map that we're talking about
7 was generated and filed by May the 10th. So if
8 somebody looks at it and says, well, this is just
9 wrong, fix it, we can all figure that out and
10 accommodate that.

11 All right, anything else we need to cover?

12 MR. JAZIL: No, Your Honor. Thank you.

13 THE COURT: All right. So here's the
14 thing: Depending on how soon or late you get that
15 to me tomorrow, I want to spend some time looking
16 at it, and my goal is to get it rendered tomorrow
17 so that it can go to the appellate court tomorrow,
18 but if I can't make that schedule, then it will be
19 as soon on Friday as possible. And I think Friday
20 is the 13th, so there's no point in jinxing this
21 the rest of the way by doing it then, too, but if
22 that's the date it is, that's the date it is.

23 MR. DEVANEY: We'll work hard to get that
24 order to you quickly.

25 THE COURT: All right, thank you.

1 MR. FARUQUI: Your Honor, on behalf of the
2 Attorney General, I think this was sort of
3 addressed at the beginning, but for the sake of
4 clarity, if this is indeed the Court's decision,
5 we just want it to be clear on the record that the
6 injunction will not be under and against the
7 Attorney General.

8 THE COURT: No, the Attorney General is on
9 notice that the constitutionality of the statute
10 is contested in this lawsuit, and you have an
11 opportunity to monitor it and you're doing that,
12 so, no, there's no order against the Attorney
13 General.

14 MR. FARUQUI: Thank you, Your Honor.

15 THE COURT: All right, thank you.

16 (Proceedings concluded at 12:42 p.m.)

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COURT CERTIFICATE

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, Lisa Begley, RPR, RMR, certify that I was authorized to and did stenographically report the foregoing remote proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 12th day of May, 2022.



Lisa Begley, RPR, RMR

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EXHIBIT 14

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

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

Appellants,

v.

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

Appellees.

Case No.: 1D22-1470
L.T. No.: 2022-ca-000666

APPELLEES' SUGGESTION FOR CERTIFICATION

Appellees 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 Hershoin, Anaydia Connolly, Brandon P. Nelson, Katie Yarrows, Cynthia Lippert, Kisha Linebaugh, Beatriz Alonso, Gonzalo Alfredo Pedroso, and Ileana Caban, respectfully suggest that the order under review by this Court should be certified for immediate review by the Florida Supreme Court and state:

1. Florida Rule of Appellate Procedure 9.125(a) authorizes this Court to certify that a judgment requires immediate resolution by the Supreme Court because

the issues are of great public importance. This is the procedure required to invoke the Florida Supreme Court's constitutional authority to review such decisions pursuant to Article V, Section 3(b)(5) of the Florida Constitution.

2. As the district court determined, "this case is one of fundamental public importance." Order at 1. The Secretary seeks to overturn the district court's order finding that Florida's 2022 congressional plan (the "Enacted Plan") violates Article III, Section 20 of the Florida Constitution by diminishing the ability of Black voters in North Florida to elect candidates of their choice and ordering the state to implement a remedial plan. In so ordering, the district court recognized that "time is of the essence" in a case like this one; for Florida voters to obtain relief in advance of the 2022 elections, Florida's election apparatus needs to begin implementing such a new plan within just few weeks.

3. The Secretary's appeal thus concerns the administration of the state's elections and the fundamental right to vote, issues the Florida Supreme Court has made clear are of exceeding public importance. Addressing precisely this issue last redistricting cycle, the Florida Supreme Court granted an extraordinary writ staying this Court's prior ruling on a challenge to a districting plan because of "the importance and statewide significance of" the issues at stake and noted that this Court could certify its decision in that appeal for Supreme Court review in part due to "the statewide importance of [the] litigation." *League of Women Voters of Fla. v.*

Data Targeting, Inc., 140 So. 3d 510, 511, 514 (Fla. 2014). Appreciation for the public interest at stake in districting litigation pervaded the Court’s decisions throughout the cycle. *See, e.g., League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 (Fla. 2015) (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, 614 (Fla. 2012) (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) (“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). As the Court explained, “the right to elect representatives—and the process by which we do so—is the very bedrock of our democracy.” *In re S. J. Res. of Legis. Apportionment*, 83 So. 3d at 599-600.

4. The Court’s respect for the right to vote has carried forward. Just a few months ago, the Florida Supreme Court acknowledged the public importance of the issues at stake in this case when presented with Governor DeSantis’s request for an advisory opinion, inviting that Court to find CD-5 unconstitutional. The Court recognized “the importance of the issues presented by the Governor,” but declined his invitation, noting the (then) lack of a factual record necessary to the Court’s

considered adjudication of such weighty issues.¹ *See Advisory Op. to Gov.*, 333 So. 3d 1106, 1108 (Fla. 2022).

5. This Court too has determined that cases concerning the state’s districting are of such great public importance and urgency that certification was warranted not only of an appeal addressing the merits of a challenge to the constitutionality of a districting plan, *League of Women Voters v. Detzner*, 178 So. 3d 6, 6-8 (Fla. 1st DCA 2014), but also one concerning a third-party discovery dispute concerning privilege and trade secret rights arising out of that claim, *Non-Parties v. League of Women Voters of Fla.*, 2014 WL 2770013, at *1 (Fla. 1st DCA June 19, 2014) (en banc). And this Court granted pass-through certification when those plaintiffs still had roughly two years to obtain relief before the next election. *League of Women Voters*, 178 So. 3d at 7 (granting pass through to ensure sufficient time for the Supreme Court to grant relief despite “plaintiffs[’] acknowledge[ment] that the 2016 election is approximately two years away”).

6. This appeal comes with yet more urgency. As the district court found, while there is still time to implement a remedial plan in time for the 2022 congressional elections, that window will likely close within a few weeks, *see Order*

¹ This case now has the factual record that the Florida Supreme Court desired, including specifically the required “functional analysis” needed to determine whether there has been diminishment in minority voters’ ability to elect their candidates of choice. *See Advisory Op. to Gov.*, 333 So. 3d at 1108; *see also Order* at 7-10.

at 16-19, leaving Plaintiffs to suffer irreparable harm without chance for relief, *see id.* at 15; *see also League of Women Voters*, 178 So. 3d at 8 (“The decision to certify [an] appeal must not be made in isolation but rather in light of all of the facts and circumstances of the case.”).

7. This appeal, therefore, cannot wait for briefing, argument, and judgment in this Court, even under an expedited schedule. No matter how quickly this Court moves, the time the parties would spend briefing the issues at stake and the Court would spend weighing their competing arguments, would severely subtract from the time available for the Supreme Court to receive the same briefing and complete the same analysis in order to provide final word on the constitutionality of the Enacted Plan. As this Court explained in certifying related questions last cycle, “[t]o 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.” *Id.* at 8. Similarly, this appeal requires immediate certification to the Supreme Court if Plaintiffs are to be granted relief in time for the 2022 elections.

WHEREFORE, the Plaintiffs respectfully request the Court certify the trial court’s order for immediate resolution by the Florida Supreme Court.

Rule 9.125(e)(3) Certificate

The undersigned attorneys express a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the Supreme Court and is both of great public importance and will have a great effect on the administration of justice throughout the state.

Dated: May 13, 2022

Respectfully submitted,

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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

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EXHIBIT 15

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

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

Case No: 2022 CA 0666

Plaintiffs,

v.

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

Defendants.

SECOND AFFIDAVIT OF ROBERT PHILLIPS

STATE OF FLORIDA
COUNTY OF DUVAL

BEFORE ME, the undersigned authority, this day personally appeared Robert Phillips, who, being by me first duly sworn, deposes and says, under penalty of perjury:

1. I am over the age of eighteen (18) and am otherwise competent to make the statements in this affidavit.
2. I have personal knowledge of the matters contained herein.
3. I am the Chief Elections Officer for the Duval County Supervisor of Elections. I began working in the office in 1991. As Chief Elections Officer, I am responsible for legislative services, budget preparation, procurement, calendar, and other election-related duties. My many duties include the implementation of all reapportionment plans in Duval County.
4. The Duval County Supervisor of Elections office administers elections in Duval County. Election administration includes the timely and accurate assignment of voters to the races in which they can cast ballots; the creation of voting precincts; the preparation of ballots specific

to groups of voters who may vote in particular races; the printing of those ballots; and the timely mailing of those ballots to voters consistent with state and federal law. Accurate information concerning delineating this information is also provided to voters on voter information cards.

5. I have reviewed the Plaintiffs' motion to vacate the automatic stay in this case, including footnote one, which references my prior testimony in this case and a newspaper quote attributed to me.

6. While the newspaper quote attributed to me is accurate, the Plaintiffs' use of it takes the quote out of context.

7. I stand by my first affidavit in this case. Implementing any map other than the enacted map remains exceedingly difficult and increases the chances for error and voter confusion and decreases voter confidence.

THE AFFIANT SAYS NOTHING FURTHER.

By: 

Robert Phillips

STATE OF FLORIDA
COUNTY OF DUVAL

The foregoing document was sworn to and subscribed before me this 16th day of May, 2022, by Robert Phillips, who is personally known to me or produced _____ as identification.

personally appeared

LANA G. SELF
Notary Public, State of Florida
My Comm. Expires 08/09/2025
Commission No. HH162692



NOTARY PUBLIC
My Commission Expires: _____

EXHIBIT 16

From: McVay, Brad R.
To: Adkins, Janet; Andersen, Mark; Anderson, Chris; Anderson, Shirley; Arnold, Melissa; Arrington, Mary Jane; Baird, Maureen "Mo"; Ballard, Seth; Barton, Kim; Beasley, Bobby; Bennett, Michael; Brown, Tomi; Cannon, Starlet; Chambless, Chris H.; Chason, Sharon; Convers, Grant; Corley, Brian; Cowles, Bill; Davis, Vicki; Dehn, Dan; Doyle, Tommy; Driggers, Heath; Dunaway, Carol; Earley, Mark; Edwards, Jennifer J.; Edwards, Lori; Farnam, Aletris; Griffin, Joyce; Hale, Bryce; Hanlon, John; Hart, Travis; Hays, Alan; Hogan, Mike; Hoots, Brenda; Hutto, Laura; Jones, Tammy; Keen, Bill; Kinsey, Jennifer; Knight, Shirley; Latimer, Craig; Lenhart, Kaiti; Lewis, Lisa; Link, Wendy; Lux, Paul; Marconnet, Amber; Marcus, Julie; Matthews, Maria I.; McNeill, Justin "Tyler"; Meadows, Therisa; Milton, Christopher; Morgan, Joe; Negley, Mark; Oakes, Vicky; Osborne, Deborah; Overturf, Charles; Riley, Heather; Rudd, Carol F.; Sanchez, Connie; Scott, Joe; Scott, Lori; Sevfang, Amanda; Smith, Diane; Southerland, Dana; Stafford, David H.; Stamoulis, Paul; Swan, Leslie; Treppiedi, Vincenza; Turner, Ron; Villane, Tappie Ann; Walker, Gertrude; White, Christina; Wilcox, Wesley; Adkins, Janet; AdminManateeCounty; Anderson, Shirley; Armstrong, Linda; Arnold, Melissa; Baird, Maureen "Mo"; Ballard, Seth; Barksdale, Matt; Barton, Kim; BayCountySOE; Bennett, Michael; Bobanic, Tim; Bridges, Christina; Brittain, Paula; Brown, Tomi; Burger, Joanne; Cannon, Starlet; Carter, Leslie; Chason, Sharon; ClayCountySOE; CollierCountySOE; Convers, Grant; Corley, Brian; Dehn, Dan; Delesdernier, Carl; Dickerson, Katrina; Doyle, Tommy; Driggers, Heath; Dunaway, Carol; DuvalCountySOE; Earley, Mark; Farnam, Aletris; Figueroa, Annette; Fryman, Melinda; GadsdenCountySOE; Gibson, Stephanie; Greene, Celina; Hankemeyer, Kim; Hart, Travis; Hays, Alan; HighlandsCountySOE; HillsboroughCountySOE; Hogan, Mike; Hoots, Brenda; Hutto, Laura; Jackson, Brayden; JacksonCountySOE; James, Thomas; Jones, Tammy; Keen, Bill; Kinsey, Jennifer; Lenhart, Kaiti; LeSuer, Timothy; Lewis, Lisa; LibertyCountySOE; Long, Sarah; Lux, Paul; Mahan, Kemie; Marcus, Julie; MarionCountySOE; Marisa Crispell; MartinCountySOE; Mayo, Wendy; McGirr, Louise; McNeill, Justin "Tyler"; Meadows, Therisa; Merrick, Jason; MiamiDadeCountySOE; Miller, Scott; Milton, Christopher; Molina, Imaltzin; MonroeCountySOE; Moore, Christopher; Moreno, Luis; Morgan, Joe; Morley, Tiffany M.; Mosca, Alex; NassauCountySOE; Negley, Mark; Norris, Tina; Nunez, Jorge; Oneal, Casandra; OrangeCountySOE; Osborne, Deborah; OsceolaCountySOE; Overturf, Charles; PalmBeachCountySOE; Pearson, Maria; PinellasCountySOE; PolkCountyElections; Ponce, Jose; Reeves, Barbara; Riley, Heather; Rodriguez, Robert; Rorabaugh, Robin; Rudd, Carol F.; Sacerio, Ed; Sanchez, Connie; SarasotaCountySOE; Savary, Evelyn; Sawczyn, Jamie; Scott, Joe; Scott, Lori; SeminoleCountySOE; Sevfang, Amanda; Smith, Diane; Southerland, Dana; Stafford, Katelyn; Stamoulis, Paul; Steven, Scarselli; StJohnsCountySOE; Swan, Leslie; Teaman, Jason; Thompson, Holly; Treppiedi, Vincenza; Trutie, Suzy; Ivson, Chase; Villane, Tappie Ann; WakullaCountySOE; Walker, Gertrude; Wilkinson, Lori; Earley, Mark; Overturf, Charles; JeffersonCountySOE
Cc: Davis, Ashley E.; Matthews, Maria I.; Marconnet, Amber; O'Brien, Colleen E.
Subject: RE: Please read -- 2nd Update on state redistricting case (U.S. congressional map)
Attachments: Notice Of Appeal To DCA.pdf

Dear Supervisors,

As forecasted in the below communication from this morning, the trial court in the state court redistricting case (*Black Voters Matter, et al. v. Lee, et al.*, No. 2022-CA-000666 (Fla. 2nd Cir. Ct.)) entered this afternoon a written Order Granting Motion for Temporary Injunction. The Secretary's Notice of Appeal immediately "stayed" the trial court's ruling pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), causing SB 2-C (the state's current, enacted congressional map) to remain in effect for the upcoming 2022 elections absent further direction from the courts. Therefore, you should continue implementing SB 2-C, the map the Florida Legislature enacted and the Governor approved on April 22, 2022.

The Secretary's Notice of Appeal is attached herein and includes the Order Granting Motion for Temporary Injunction.

We will continue to promptly update you with any additional developments.

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From: McVay, Brad R.

Sent: Thursday, May 12, 2022 10:46 AM

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Subject: Please read -- Update on state redistricting case (U.S. congressional map)

Dear Supervisors,

Yesterday afternoon, in the state court redistricting case (*Black Voters Matter et al v. Lee, et al* /2022CA000666, 2nd Jud. Cir.), the trial court held a hearing on Plaintiffs' motion for a temporary injunction and *orally* ruled that they have a likelihood of success on the merits of their claim that SB 2-C (the state's current, enacted congressional map) violates the non-diminishment standard of Article III, Section 20 of the Florida Constitution in portions of North Florida. The trial court indicated that it will soon issue an order in *writing* temporarily enjoining SB 2-C and ordering a different map be put in place – i.e., Plaintiffs' "Proposed Map A." The Secretary intends to appeal the decision to the First District Court of Appeal immediately, but cannot do so until the written order is issued.

The Secretary's appeal will immediately "stay" the trial court's ruling pursuant to the Florida Rules of Appellate Procedure, causing SB 2-C to remain in effect for the upcoming 2022 elections absent further direction from the courts.

We will continue to provide updates and guidance as information becomes available.

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Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the sender or the Department of State. Parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before relying upon the information provided.

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