Filing # 191674345 E-Filed 02/09/2024 04:00:12 PM

IN THE SUPREME COURT OF FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *et al.*, *Petitioners*, v. CORD BYRD, in his official capacity as Florida Secretary of State, *et al.*, *Respondents*.	Case No. SC23-1671

RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO EXPEDITE

Petitioners seek to compel the parties to litigate this case at breakneck pace—from briefing to argument in just over 60 days. But this Court has already denied that request. During the jurisdictional-briefing phase, Petitioners urged this Court to "decide this appeal no later than March 2024," Pet.Juris.Br.13, and the parties provided the Court—at the Clerk of Court's invitation—all the relevant electoral deadlines on which Petitioners now ground their motion. Fully informed of when it would need to rule to affect the 2024 elections, the Court set this case on the ordinary briefing track. That decision has provided much-needed certainty for state and county election

officials before the 2024 elections, and Petitioners have offered no persuasive reason why this Court should reconsider its prior ruling. For these and the reasons below, the Court should deny expedition and allow this complicated redistricting case to proceed in the ordinary course.

1. To begin with, expediting proceedings would be fruitless because there is no reasonable likelihood that the Court will issue its ruling in time to affect the 2024 elections. "[R]unning a statewide election" requires "a massive coordinated effort," *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay), and state and county election officials need certainty well before Election Day. For that reason, the parties sought a "schedule that w[ould] permit resolution . . . by December 31, 2023," leaving the State time to enact a remedial map, if necessary, before the end of the "2024 regular legislative session." Mot.App.3.

This Court's ruling, however, will not come before session ends on March 8, 2024. On Petitioners' schedule, the answer briefs will not even be filed by then. Mot.3. Nor is a decision likely to come even before the qualifying period for primary-election candidates. Pre-

qualifying begins on April 8—just a few days after Petitioners' proposed oral-argument date.[1] The candidate qualifying period begins at noon on April 22—a mere three weeks after this Court's April oral-argument sitting. And the deadline for candidates for Congress to submit petitions to qualify by the petition method for the primary-election ballot is March 25—a week before the proposed oral-argument date. *See* § 99.095(3), Fla. Stat.

That is not enough time to resolve this important and complex redistricting dispute. At issue are hotly contested and novel questions, like whether Florida's non-diminishment standard requires the State to preserve non-compact districts that group together far-flung black populations, and whether applying the non-diminishment standard to these facts would violate the Fourteenth Amendment's Equal Protection Clause. Those pressing questions prompted the First District to take the rare step of granting initial hearing en banc, resulting in five opinions spanning 78 pages. Resolving those questions accurately at the Supreme Court level is critical, as this Court's decision could affect not just this case, but

[1] https://files.floridados.gov/media/706905/2023-calendar-2024-highlights.pdf.

the State's approach to redistricting in future cycles. The few weeks between the April oral-argument sitting and the April 26 qualifying deadline is not enough time to give this case the careful consideration it deserves and, if necessary, for the Legislature to convene and enact new congressional districts. For issues as weighty as these, it is better to measure twice and cut once.

Petitioners respond that this Court can "adjust" the statutorily established April qualifying deadline because "in redistricting years, the State's candidate qualifying deadline is typically held in June." Mot.4. But Petitioners do not even mention the impact that an eleventh-hour postponement of the qualifying period, and potential reconfiguration of congressional districts, would have on the ability of election officials to execute their long-settled plans for the administration of smooth and orderly federal, state, county, and municipal elections in August and November. And because of the grave risks associated with disorder and confusion in the administration of a highly complex election process, as Respondents explained two years ago during the constitutional-writ proceedings before this Court, *see* Resp. to Emergency Pet. for Const. Writ at 29–39, *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, 340 So. 3d

475 (Fla. 2022), it is a settled rule of equity that courts "should not enjoin state election laws in the period close to an election," *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)); *see also Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016); *Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992).

That principle governs, at a minimum, when an election is "about four months" away. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (quotation omitted); *see also Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020). And after April, the August 20 primary will be less than four months away. Given that even the earliest plausible ruling would come perilously close to the 2024 qualifying period, it is improbable that the Court would apply its ruling to upend the 2024 elections, even if the qualifying deadline could be extended.[2]

[2] Petitioners' passing suggestion that this Court could simply "adjust" the statutory qualifying deadline (Mot.4) falls far short of a request that this Court preemptively enjoin enforcement of the candidate qualifying deadline before merits briefing has even begun and is devoid of any reference to legal authority supporting that relief at this stage of the Court's review.

2. Expediting proceedings would also subvert the certainty provided by both the First District's decision and this Court's scheduling order. It is a "bedrock tenet of election law" that "[w]hen an election is close at hand, the rules of the road must be clear and settled." *Milligan*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring in grant of applications for stays). Though Petitioners may disagree with the current state of affairs, the district court provided clarity for state and county election officials when it affirmed the State's electoral map, and this Court solidified that clarity when it set this case on the ordinary briefing track. Expediting proceedings now would only thrust the State's 2024 electoral process back into doubt, "result[ing] in confusion" for state and county election officials and risking "injur[y]" to the voters they serve. *See State ex rel. Haft v. Adams*, 238 So. 2d 843, 845 (Fla. 1970).

3. Petitioners offer no reason for this Court to alter its current schedule. Their sole justification is that without expedition, "Floridians will again vote under a redistricting plan of questionable legality." Mot.4. But the en banc First District held by an 8-2 margin that there was nothing questionable about the Enacted Plan's legality. Nor is it unusual for two election cycles to pass before

redistricting litigation concludes. Last cycle's redistricting litigation extended to the end of 2015—almost five years after the 2010 census. *See League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258 (Fla. 2015). That another cycle might pass is not grounds to rush this Court's decision-making process, particularly given the density and magnitude of the issues presented and, if Petitioners prevail, the necessity of extensive post-opinion proceedings, including convening the Legislature, before any change to the existing congressional districts could even be effected.

4. Finally, Petitioners have forfeited any "right . . . to expedited consideration" by slow-walking proceedings in this Court. *See Morland v. Sprecher*, 443 U.S. 709, 710 (1979). Petitioners took the full 10 days to file their jurisdictional brief (Respondents, by contrast, took half the allotted time). *See* Fla. R. App. P. 9.120(d). They also plan to file their initial brief on February 13—a leisurely 74 days after the First District's decision—even though they could have "significantly self-expedite[d] the case by filing [their] brief[]" as early as the Court's order granting review. *Medeva Pharma Suisse A.G. v. Par Pharm., Inc.*, 430 F. App'x 878, 880 (Fed. Cir. 2011); *see* Fla. R. App. P. 9.120(g). And Petitioners' delay has extended to even this

motion. They waited more than a week to seek expedition. *See* Mot.5 (filed 8 days after this Court accepted review). And they asked this Court to give them three days for a reply, while urging it to allow Respondents just one day to respond. *Id.* Petitioners' conduct belies their claim that time is of the essence.

CONCLUSION

This Court decided to handle this case in the ordinary course, despite full knowledge of the nature of this redistricting case and the approaching election deadlines. Because expediting proceedings now would only uproot the certainty that the en banc First District's decision and this Court's prior schedule has provided, and because Petitioners have offered nothing persuasive to support reconsideration of that schedule, the motion should be denied.

Dated: February 9, 2024

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Daniel E. Nordby
DANIEL E. NORDBY (FBN14588)
GEORGE N. MEROS, JR. (FBN263321)
TARA R. PRICE (FBN98073)

Shutts & Bowen LLP
215 S Monroe St., Ste. 804
Tallahassee, FL 32301
Telephone: 850-241-1725
dnordby@shutts.com

CARLOS REY (FBN11648)
KYLE GRAY (FBN1039497)

Florida Senate
404 S Monroe St.
Tallahassee, FL 32399

Counsel for the Florida Senate

/s/ Andy Bardos
ANDY BARDOS (FBN822671)

GrayRobinson, P.A.
301 S Bronough St., Ste. 600
Tallahassee, FL 32301
Telephone: 850-577-9090
andy.bardos@gray-robinson.com
vanessa.reichel@gray-robinson.com

Counsel for the Florida House of Representatives

/s/ Henry C. Whitaker
HENRY C. WHITAKER (FBN1031175)
Solicitor General
DANIEL WILLIAM BELL (FBN1008587)
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitors General
DAVID M. COSTELLO (FBN1004952)
Deputy Solicitor General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3300
henry.whitaker@myfloridalegal.com

MOHAMMAD O. JAZIL (FBN72556)
GARY V. PERKO (FBN855898)
ED WENGER (FBN85568)
MICHAEL BEATO (FBN1017715)

Holtzman Vogel Baran Torchinsky & Josefiak
119 S. Monroe St. Ste. 500
Tallahassee, FL 32301

BRADLEY R. MCVAY (FBN79034)
JOSEPH S. VAN DE BOGART (FBN84764)
ASHLEY DAVIS (FBN48032)

Florida Department of State
500 S. Bronough St.
Tallahassee, FL 32399

Counsel for Secretary Byrd

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to counsel for all parties of record on this **9th** day of February 2024.

/s/ Henry C. Whitaker
Solicitor General