FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-1470

SECRETARY OF STATE CORD BYRD, *et al.*,

Appellants,

v.

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

Appellees.

On appeal from the Circuit Court for Leon County.
J. Layne Smith, Judge.

May 27, 2022

TANENBAUM, J.

This case is an appeal from a temporary injunction rendered against Florida's secretary of state. We have one pressing matter before us for now: a review of the circuit court's vacatur of a stay of that injunction, put in place by operation of Florida Rule of Appellate Procedure 9.310. To be sure, the case has garnered some public attention. Let us then save the interested reader some trouble by stating what we *do not* address in this opinion.

Because there has been no trial and no final adjudication, this appeal—and, by implication, the secretary's request that we reinstate the stay, addressed below—could not reach whether

recently enacted Senate Bill 2-C ("SB 2-C") comports with Article III, section 20, of the Florida Constitution (the "Fair Districts Amendment," or "FDA"). It would be of no use, then, for the reader to look ahead in this opinion to find any analysis on that question. It is not there. Had the parties wanted this central legal issue addressed as an urgent matter in this court, or by the supreme court on pass-through, they could have (and should have) expedited a trial or final hearing on their four-count declaratory judgment complaint. That would have produced a final order to be accorded a full appellate review, including consideration of the constitutional question.

Procedurally, however, the case was not in this posture when this appeal came in. A docket check reveals that the case *still* has not been set for trial. Indeed, there has been no activity in the circuit court since this appeal and the circuit court's vacatur of the automatic stay. This procedural dilatoriness under the circumstances highlights an extant misunderstanding about the limited role of a temporary injunction. We make clear in this opinion, then, that a temporary injunction is not a vehicle by which to procure a provisional remedy, nor is it a procedural tool by which to fast-track some burning constitutional question for appellate consideration in advance of trial.

Indeed, absent some specific statutory authorization, a circuit court is powerless to grant preliminary or provisional remedies in civil suits. The interlocutory power a circuit court has with respect to the parties before it in these circumstances is only procedural, not substantive. That power comes from Article V, section 5(b) of the Florida Constitution, which allows circuit courts to issue writs in furtherance of the full exercise of their jurisdiction, including the writ of injunction (now usually referred to as a temporary injunction). By whatever name, it has but one purpose: to maintain the status quo. A critical point in this opinion is that this constitutional writ cannot be used to give a party a remedy, even a temporary or provisional one. The function of the writ is solely preservative or preventative—to preserve the subject matter in controversy until a final disposition after a trial.

Even though our immediate task is to consider whether the circuit court erroneously vacated the automatic stay, we cannot do

so while turning a blind eye to the obvious and fatal flaw in the underlying injunction. The temporary injunction before us on appeal does not just return the parties to the condition that existed before the subject matter at the center of the present controversy arose, *i.e.*, before SB 2-C became law. The order does much more. It gives the appellees affirmative relief by requiring the secretary to conduct the 2022 congressional elections under an entirely new, unenacted plan recently proposed by the appellees during the nascent litigation. In the order, the circuit court even acknowledges that it is crafting a remedy for the appellees until there can be a trial. The grant of this provisional remedy, unmoored from an adjudication, was an unauthorized exercise of judicial discretion, making the temporary injunction unlawful on its face.

This abuse of authority by the circuit court, by itself, is enough support for our disposition of the motion to reinstate the stay. Whether there is merit to the constitutional challenge at the center of the appellees' complaint is a question for another day, after a trial in the circuit court. It is not a matter that is pertinent to our analysis in this appeal. We quash the circuit court's vacatur of the stay simply because there is no compelling justification for allowing a patently unlawful temporary injunction to remain in effect. The analysis that follows from here begins and ends with this foundational point.

I.

We cover some background first. The appellees sued pursuant to chapter 86 (Florida's declaratory judgment act) in search of a declaration that SB 2-C, which had just been signed into law, violated the FDA. The focus of the suit is congressional district five ("CD-5"), a majority-minority district previously approved by the supreme court that now sees its boundaries change substantially under SB 2-C. The complaint has four counts. The first count asks for a determination that SB 2-C *results* in the diminishment of Black voters' ability to elect representatives of their choice (a results- or performance-based diminishment claim). The second asks for a determination that SB 2-C has the *intent* to abridge Black voters' opportunity to participate in the political process (an intentional voter dilution claim) and to elect representatives of

their choice (an intentional diminishment claim). The third count addresses alleged intentional favoritism toward the Republican Party of Florida, and the fourth count asserts a non-compactness violation. As supplemental relief for all four counts, the plaintiffs pray for a prohibitory injunction proscribing enforcement of SB 2-C in any congressional election and a mandatory injunction "ordering or adopting a new congressional districting plan that complies with Article III, Section 20 of the Florida Constitution."

The appellees then moved for a temporary injunction that did not just proscribe implementation of SB 2-C (and maintain the status quo) but also "ensure[d] that a necessary *remedy* is timely adopted and a lawful congressional plan is in place in North Florida in time for the 2022 congressional elections." The appellees based their motion entirely on their one claim in count one that SB 2-C had the effect of diminishing the ability of the plaintiffs and other Black voters to elect the representative of their choice.

Rather than schedule an in-person trial (with live witnesses and documents admitted into evidence), the appellees noticed the temporary injunction motion for hearing. The hearing was done by video-conference, and just one witness testified. Exhibits and affidavits went to the court as electronic filings in advance of the hearing. This is all we know about the hearing at this point because the parties have not submitted a transcript from it yet. From what we can glean, though, most of the three-hour hearing was spent on argument by counsel and pronouncements by the circuit court.

The circuit court granted the motion and ordered the secretary "to take all necessary steps to implement the final corrected version of Proposed Map A, as submitted to the Court and to counsel . . . in time for the 2022 congressional elections, while the rest of the case proceeds to a trial on the merits." Underlying the circuit court's decision to grant the relief was its view that SB 2-C violated the plaintiffs' "fundamental constitutional right." On this basis, the circuit court relied on *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017), to reason that it immediately must grant *some* remedy to the appellees in the form of a temporary injunction. At no point did the circuit court consider whether the status quo feasibly could be maintained pending trial.

The injunction automatically was stayed pursuant to Florida Rule of Appellate Procedure 9.310(b)(2) upon the filing of the secretary's notice of appeal of the temporary injunction. The appellees then filed an emergency motion to vacate the automatic stay, which the circuit court granted. The order vacating the stay is now before us for review by motion of the secretary.

II.

A.

As a procedural matter, the circuit court derives its authority to issue a temporary injunction in a civil action from Article V, section 5(b) of the Florida Constitution. That provision gives circuit courts the power to issue "all writs necessary or proper to the complete exercise of their jurisdiction." The power covers what once was commonly known as "a writ of injunction," which a court may issue "to maintain unchanged, as far as practicable, the *status* or condition of the subject-matter of the controversy during the pendency of the suit." *Cohen v. L'Engle*, 5 So. 235, 237, 238–39 (Fla. 1888); *see also Jacksonville Elec. Light Co. v. City of Jacksonville*, 18 So. 677, 679 (Fla. 1895) (observing that the authority to issue a writ of injunction comes from the constitution and is ancillary to exercise of original jurisdiction). The writ of injunction "is an extraordinary, not an ordinary, everyday writ, and it should never be granted lightly, but cautiously and sparingly." *Godwin v. Phifer*, 41 So. 597, 602 (Fla. 1906); *see also Thompson v. Plan. Comm'n of City of Jacksonville*, 464 So. 2d 1231, 1236 (Fla. 1st DCA 1985) (recognizing "that the issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly").

For 140 years or more, the Florida Supreme Court has recognized the limited purpose of a temporary injunction as this: "to preserve the property or rights *in statu quo,* until a satisfactory hearing upon the merits, without expressing and indeed without having the means of forming an opinion as to such rights." *Sullivan v. Moreno*, 19 Fla. 200, 215 (1882); *see also Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, 211 So. 3d 918, 924 (Fla. 2017) ("As this Court acknowledged long ago, the purpose of a temporary injunction is to preserve the status quo while final injunctive relief is sought."); *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So. 2d 750, 754 (Fla. 1st DCA

1994), *approved sub nom. Naegele Outdoor Advert. Co., Inc. v. City of Jacksonville*, 659 So. 2d 1046 (Fla. 1995) ("The purpose of a temporary injunction is to preserve the status quo until a final hearing when full relief may be granted."); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); *cf. Astca Inv. Co. v. Lake County*, 98 So. 824, 824 (Fla. 1922) (issuing a writ of injunction to temporarily prevent destruction of trees to preserve "the essential nature, value, and usefulness of the land" that is the subject matter of the controversy "until the merits of the appeal can be adjudicated"). A circuit court cannot grant one if the "effect would be to change the status." *Bowling v. Nat'l Convoy & Trucking Co.*, 135 So. 541, 544 (Fla. 1931) (quotation and citation omitted).

B.

The constitutional writ of injunction we just discussed functions only to give interim *procedural* relief. That relief is not the same as a *remedy*. A remedy must follow an adjudication on a party's right of action against another. *Cf. Knapp, Stout & Co. Co. v. McCaffrey*, 177 U.S. 638, 644 (1900) (defining a remedy as "the means employed to enforce a right, or redress an injury" (internal quotation and citation omitted)).

A right of action, in turn, is a matter of substantive law, within the prerogative of the Legislature. *See Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975) ("Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions."); *cf. State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969) (defining substantive law that "which creates, defines, or regulates rights, or that part of the law which courts are established to administer," and procedural law "as the legal machinery by which substantive law is made effective"); *In re Fla. Rules of Crim. Proc.*, 272 So. 2d 65, 65 (Fla. 1972) (Adkins, J., concurring) ("Substantive rights are those existing for their own sake and constituting the normal legal order of society, i.e., the rights of life, liberty, property and reputation. Remedial rights

arise for the purpose of protecting or enforcing substantive rights.").

This means that the constitutional authority of a circuit court to preserve the status quo will not support its going further to grant a remedy on a provisional basis. The court must find an independent, substantive source of authority to grant a party a temporary remedy for a claimed right violation. *Cf. St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1980) (explaining that the constitutional provision allowing for writs does not confer additional jurisdiction and "cannot be used as an independent basis of jurisdiction"); *Besoner v. Crawford*, 357 So. 2d 414, 415 (Fla. 1978) (rejecting request for a "constitutional writ" because it sought to use the writ "as an independent basis for jurisdiction" rather than just "to protect existing jurisdiction of the court"); *Williams v. State*, 102 So. 3d 669, 669 (Fla. 1st DCA 2012) (explaining that the "'all writs' provision does not [] constitute a separate source of original or appellate jurisdiction" and such "'constitutional writs' are ancillary in that they are used to preserve the power of the court to fully and effectively decide cases that have been, or will be, presented on independent jurisdictional grounds").

The circuit court also cannot infer a remedy from a statutory right of action. When the Legislature creates a right of action, it may set the procedural parameters that go with the adjudication of that right, including standing and the remedial scope of relief. *See Comptech Int'l, Inc. v. Milam Com. Park, Ltd.*, 753 So. 2d 1219, 1222, 1227 (Fla. 1999) (recognizing the Legislature's authority to create a "statutory remedy," which cannot be abrogated by a "judicially created" rule); *Fla. Wildlife Fed'n v. State Dep't of Env't Regul.*, 390 So. 2d 64, 66–67 (Fla. 1980) (determining that the Legislature was entitled to define the minimum requirements of standing as part of its creation of a new right of action); *Caloosa Prop. Owners Ass'n, Inc. v. Palm Beach Cnty. Bd. of Cnty. Comm'rs*, 429 So. 2d 1260, 1267 (Fla. 1st DCA 1983) (same).

Throughout the Florida Statutes, the Legislature has shown it knows how to establish entitlement to a temporary injunction that would function in a remedial capacity (as opposed to the preservative capacity of a constitutional writ) to follow on the

statutory right of action it has created. *See, e.g.*, § 39.504, Fla. Stat. (authorizing temporary injunction to protect child from abuse); § 60.05, Fla. Stat. (authorizing a temporary injunction in a civil action to abate a nuisance); § 61.16, Fla. Stat. (allowing for temporary equitable relief during the pendency of dissolution litigation); § 61.075(5), Fla. Stat. (allowing for temporary relief regarding equitable distribution); § 381.0012, Fla. Stat. (authorizing Department of Health to seek temporary injunction of restraint in order to enforce public health rules and statutes); § 408.816, Fla. Stat. (authorizing Agency for Healthcare Administration to seek temporary injunction of restraint as an enforcement mechanism); § 741.30, Fla. Stat. (creating "a cause of action for an injunction for protection against domestic violence" and providing for temporary injunction that does more than preserve status quo); § 784.046, Fla. Stat. (doing same for statutorily created causes of action "for an injunction for protection in cases of repeat violence, [] for an injunction for protection in cases of dating violence, and [] for an injunction for protection in cases of sexual violence"); § 784.0485, Fla. Stat. (creating "a cause of action for an injunction for protection against stalking" and authorizing a temporary injunction that does more than maintain status quo); § 825.1035, Fla. Stat. (creating "a cause of action for an injunction for protection against exploitation of a vulnerable adult" and authorizing a temporary injunction to provide a provisional protective remedy); § 896.101, Fla. Stat. (creating a right of action to obtain "temporary injunction to prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such monetary instruments or funds of equivalent value").

We note again that the appellees filed suit under chapter 86, seeking a judicial declaration that the newly enacted SB 2-C violated the FDA. Chapter 86, however, is not among the many examples listed in the preceding paragraph. Indeed, the Legislature clearly eschewed the availability of a provisional remedy in a chapter 86 action, presumably because of the unique nature of a declaratory judgment. The declaratory judgment itself does not operate to remedy an injury suffered by a plaintiff. From its inception, the declaratory judgment "was to serve as an instrument of preventive justice, to render practical help in determining issues, and to adjudicate the rights or status of

parties, without" there first having to be injury suffered. *Sheldon v. Powell*, 128 So. 258, 262 (Fla. 1930) (internal quotations omitted). The nature of a declaratory judgment is distinctive in that it "stands by itself; that is, no executory process follows as of course. In other words, *such a judgment does not involve executory or coercive relief*." *Watson v. Claughton*, 34 So. 2d 243, 245 (Fla. 1948) (internal quotation and citation omitted) (emphasis supplied); *see also id.* (explaining that the only difference between a declaratory judgment and any other judgment is that there is a "coercive element" to the latter).

The Legislature intended chapter 86 to be both "substantive and remedial," with the purpose being "to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations relief." § 86.101, Fla. Stat. The upshot of all this is that under chapter 86, the declaratory judgment *is the final relief* to determine the rights amongst the parties. There could be nothing to remedy beforehand. By statute, then, any relief besides the declaration would be *supplemental to* and follow on the declaratory judgment. *See* § 86.061, Fla. Stat. (providing that supplemental relief may be granted "*based on a declaratory judgment* . . . when necessary or proper," upon application "by motion to the court having jurisdiction to grant relief" (emphasis supplied)). There is no mention in chapter 86 of a temporary injunction being available to provide a provisional remedy based on a preliminary adjudication of rights by the circuit court.

C.

A suit for declaratory judgment—aside from the relief typically sought—is no different than any other civil suit. The complaint and answer frame the issues and the material facts that are in dispute. There is a trial to determine those facts. *See* § 86.071, Fla. Stat. (providing for a civil trial—even by jury—on any material facts in dispute). When necessary, these proceedings can be expedited and advanced on the circuit court's calendar. § 86.111, Fla. Stat. ("The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."). A final judgment then is entered as dictated by the law as applied to the adjudicated facts after the trial. This judgment is

what then triggers the availability of other remedies that the circuit court could craft.

None of this has happened yet, and the parties do not appear to be in a hurry to make it happen. There has been no trial or final evidentiary hearing, no final adjudication of the facts, and no declaratory judgment. The pleadings have not closed, the state parties have not answered, and no one has stepped forward to set the matter for trial. Nevertheless, it seems as if the determination of the temporary injunction motion is being treated as if it *is* the determination on the merits. Yet, it is not. It cannot be. The object of a hearing on a motion for temporary injunction is drastically different than the object of a final evidentiary hearing. *Cf. Camenisch*, 451 U.S. at 395 (explaining that because of the limited purpose of a preliminary injunction ("to preserve the relative positions of the parties until a trial on the merits can be held") and "the haste that is often necessary if those positions are to be preserved," the procedures involved "are less formal" and the evidence "is less complete than in a trial on the merits" (internal quotations and citations omitted)).

A temporary injunction is not an adjudication; it does not decide the merits. *See City of Miami Beach v. State ex rel. Taylor*, 49 So. 2d 538, 538 (Fla. 1950) (approving temporary restraining order because it did not purport to "decide any material points in controversy, but only to preserve the status quo pending the litigation"); *Lieberman v. Marshall*, 236 So. 2d 120, 125 (Fla. 1970) (noting that the "purpose of an injunction is not to take sides"); *Naegele Outdoor Advert. Co.*, 634 So. 2d at 754 (noting that a temporary injunction "does not decide the merits of the case"); *see also Michele Pommier Models, Inc. v. Diel*, 886 So. 2d 993, 995–96 (Fla. 3d DCA 2004) ("The purpose of a temporary or preliminary injunction is not to resolve disputes, but rather to prevent irreparable harm by maintaining status quo until a final hearing can occur when full relief may be given."); *cf. Camenisch*, 451 U.S. at 395 (noting that the findings of fact made by a court granting a preliminary injunction are not binding at the trial on the merits, so "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"), *cited in Naegele Outdoor Advert. Co.*, 634 So. 2d at 754;

cf. Fed. R. Civ. P. 65(a)(2) (permitting a trial court to consolidate a hearing on a temporary injunction with the trial on the merits).

Without a merits determination as part of a final adjudication, chapter 86 provides no authority for the circuit court to grant any affirmative, remedial relief. The only authority the circuit court had at the temporary injunction motion stage of the litigation was to issue a constitutional writ pursuant to Article V, section 5(b). The circuit court, then, was limited to maintaining the status quo, and a temporary injunction that goes beyond that limit, by determining a matter in controversy and granting a remedy, is subject to reversal. *See Naegele Outdoor Advert.*, 634 So. 2d at 754. (quashing temporary injunction because it did not serve "objective of preserving the status quo" and instead effectively "adjudicate[d] material points in controversy").

This is the law. We now turn to explaining how the temporary injunction on review runs counter to it.

III.

A.

An interlocutory injunction goes too far if it effectively "destroy[s] the existing condition of the subject-matter of the suit by permitting the doing of affirmative acts by the plaintiff in advance of the final determination of his right to do them." *Bowling*, 135 So. at 544 (quotation and citation omitted). A temporary mandatory injunction, while rare, can be used, but only to *restore* the status quo. *Cf. id.* ("And where, before the granting of the injunction, the defendant has thus changed the condition of things, the court may not only restrain further action by him, but may also, by preliminary mandatory injunction, compel him to restore the subject-matter of the suit to its former condition. And in so doing the court acts without any regard to the ultimate merits of the controversy." (quotation and citation omitted)).

The circuit court did not spend much time contemplating the proper pre-controversy condition it should be preserving, and the injunction does not even purport to freeze that status quo in place. We should be clear, then, on what that status quo is. It is "the last actual, peaceable, noncontested condition which preceded the

pending controversy." *Id.* (quotation and citation omitted). Recall that the appellees are challenging SB 2-C as being unconstitutional. In any constitutional challenge to a newly enacted law, the status quo will be the condition prior to the subject matter in controversy arising: the circumstances *prior* to the challenged law becoming effective. Contrary to the positions taken by both sides in this appeal, the status quo here plainly is the congressional districting as it existed before SB 2-C went into effect (the "prior plan"). Thus, a temporary injunction, if warranted, could only reinstate the former congressional map. It could never put in place a map that did not exist before the present controversy began.

To put this in the proper context, we go way back to 2012, the last time the Legislature engaged in congressional redistricting. Following the 2010 census, the Legislature adopted chapter 2012-2, Laws of Florida, which amended (among other provisions) section 8.0002 to divide the state into twenty-seven single-member congressional districts and provide for the district boundaries. There was a suit filed shortly thereafter to challenge the conformity of the law with the FDA. *See Romo v. Detzner*, Case No. 2012-CA-412 (Fla. 2d Cir. Ct.). After years of litigation and a failure by the Legislature to enact a remedial plan acceptable to the supreme court, in December 2015, the supreme court approved a remedial plan that was proposed by the plaintiffs and recommended by the circuit court. The supreme court directed the circuit court to enter judgment that adopted the proposed remedial plan for use in the 2016 congressional election and subsequent elections until redistricting occurs after the 2020 census. The remedial plan adopted by the circuit court has been included in the Florida Statutes as section 8.081 alongside the version of section 8.0002 enacted by the Legislature in 2012.

The law now in controversy, SB 2-C, responds to a certification from the clerk of the U.S. House of Representatives that Florida would be apportioned an additional representative in Congress, increasing the number from twenty-seven to twenty-eight. *Cf.* 2 U.S.C. § 2a(b). It rewrites, among other provisions, section 8.0002 (the prior version of which had been declared invalid) to divide the state into twenty-eight congressional districts, and it repeals the prior plan—section 8.081 and other provisions related to the court-

ordered remedial redistricting plan from 2015. The effect of enjoining enforcement of SB 2-C would be to restore the court-ordered remedial plan reflected in section 8.081.

Federal law requires that all congressional districts be drawn as single-member districts. 2 U.S.C. § 2c (requiring states to "establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled," requiring representatives to "be elected only from districts so established," and precluding any district from "elect[ing] more than one Representative"). When redistricting is necessary, section 2c requires both legislatures and courts "to draw single-member districts whenever possible." *Branch v. Smith*, 538 U.S. 254, 269–70 (2003).

Section 2a(c)(2), however, can serve as a "constitutional fallback" to ensure a state still elects its apportioned lot of representatives before redistricting is finalized. *Id.* at 272. Even though SB 2-C accomplished the required single-member redistricting, an injunction that maintained the status quo would put that redistricting on hold. Notwithstanding 2 U.S.C. § 2c, because the prior plan does not account for the twenty-eighth seat apportioned to the state, by operation of federal law, the twenty-eighth seat would be elected at large until redistricting is complete. 2 U.S.C. § 2a(b), (c) (providing for additional representatives to be elected at large and the other representatives to be elected from the districts as prescribed by existing law "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment"); *see Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (affirming judgment determining that, "in the absence of a new districting statute dividing the state into" the newly apportioned number of districts, New York would elect its previously apportioned representatives "in the existing districts as defined by the state law, and the two additional representatives by the state at large").

The secretary argues that the prior plan (from 2015) reflected in section 8.081 could not be the status quo because it is a "nullity." That is not entirely correct. It is true that an election based on pre-existing districts plus a new at-large seat is not permissible under the federal constitution if "(as is usual) the decennial census has

shown a proscribed degree of disparity in the voting population of the established districts." *Branch*, 538 U.S. at 272; *see also id.* at 273 (Scalia, J., for four justices) (noting that section 2a(c)(2) may constitutionally be enforced in the rare "situation in which the decennial census makes no districting change constitutionally necessary"); *cf. Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that "an individual's right to vote for [] legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State"). The infeasibility of returning to the status quo, though, does not mean the prior condition is not the status quo.

When the circuit court considered the motion for temporary injunction, its first task should have been to identify the status quo. In the current litigation, that would be the continued operation of the prior plan reflected in section 8.081 (which would include the version of CD-5 used for the past three elections). The circuit court failed to consider whether it *could* maintain this status quo legally before getting to the well-tread four considerations for *whether* it should maintain the status quo. *Cf. Wilson v. Sandstrom*, 317 So. 2d 732, 736 (Fla. 1975) (concluding "as a general rule, that a temporary mandatory injunction is proper where irreparable harm will otherwise result, the party has a clear legal right thereto, [] such party has no adequate remedy at law," and "the public interest" will be served); *Gainesville Woman Care, LLC*, 210 So. 3d at 1258 (restating "four-part test" for whether to grant a temporary injunction in terms of "a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and [] injunctive relief [serving] the public interest"). In this respect, the circuit court had to take into consideration the potentially significant disparity in population numbers across the prior twenty-seven districts that stems from a 2.7-million-increase in population since the last census.

According to documents in the record before the circuit court, the ideal population for each of twenty-seven congressional districts, based on the 2010 census, was 696,345. That number increased to 769,221 for each of twenty-eight districts based on the 2020 census. The deviations above or below the new ideal number

in the pre-existing twenty-seven districts ranged from more than five percent below the ideal to more than twenty-four percent above. The one threshold question for the circuit court in considering the temporary injunction motion, then—before it got to whether there was a likelihood that SB 2-C was unconstitutional—was whether these population disparities in the pre-SB 2-C districts could be constitutionally justified under the circumstances, or whether the disparities were so great as to violate individual Floridians' right to equal protection and one person, one vote. *See Reynolds*, 377 U.S. at 577 (explaining "that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," although "[m]athematical exactness or precision" is not required); *but cf. Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (explaining that the "equal representation for equal numbers" principle "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown").

Perhaps the disparities could not be justified. The circuit court, however, at no point considered any of this to determine whether maintaining the status quo would be constitutionally permissible. If the court had determined that it was not, though, *then the answer to the request for a temporary injunction had to be a simple denial*. The circuit court instead focused only on whether SB 2-C was unconstitutional and jumped right to ordering the secretary "to take all necessary steps to implement the final corrected version of Proposed Map A, as submitted to the Court and to counsel . . . in time for the 2022 congressional elections, while the rest of the case proceeds to a trial on the merits."

In support of this ostensible temporary injunction, the circuit court "found" definitively that SB 2-C would violate the Fair District Amendment, as alleged in count one, rather than simply conclude that there was a substantial likelihood of ultimate success on the merits of the claim. Still, the unavailability of the status quo during a constitutional challenge and the circuit court's conviction that the challenged law is unconstitutional does not give it the authority to devise some interim remedy in place of the status quo, all in the name of doing *something* immediately. This

abuse of authority lies at the heart of our disposition on the motion for review.

B.

Because it "found a violation of the Florida Constitution and that there is time to remedy the violation," the circuit court concluded it "must consider what *remedy* is appropriate." (emphasis supplied). It found "that a narrow *remedy*—one that addresses only the diminishment discussed in this order—is the most appropriate." (emphasis supplied). It characterized the "*remedial* plan" it was adopting as merely "requir[ing] narrow changes to a plan already passed by the Legislature, *prior to being vetoed*." (emphasis supplied). These references to a conclusive determination of constitutionality and consideration of a remedial plan makes plain that the circuit court did more than just attempt to maintain the status quo.

As we explained already, a temporary injunction cannot be used in a declaratory judgment action as an interim remedial tool. This is so even if the status quo cannot be preserved. The declaratory judgment must come first as a final order. Because this type of judgment by itself does not provide coercive or executory relief, supplemental measures—including injunctions—*then* become available as needed to effectuate the judgment.

Indeed, the temporary injunction we have on review is not written to operate like a constitutional writ of injunction. It does not even attempt to preserve the status quo. The non-final injunction order instead closely resembles an interim adjudication that has the proscribed effect of "awarding execution before trial and judgment." *Kellerman v. Chase & Co.*, 135 So. 127, 128 (Fla. 1931); *cf. Fla. E. Coast Ry. Co. v. Taylor*, 47 So. 345, 345–46 (Fla. 1908) ("It is settled by an overwhelming weight of authority that, except in rare cases, where the right is clear and free from reasonable doubt, a mandatory injunction, commanding the defendant to do some positive act, will not be ordered except upon final hearing, and then only to execute the judgment or decree of the court.").

The temporary injunction essentially is a grant of the ultimate relief sought by the appellees. It necessarily "frustrate[s] the

status quo" rather than preserve it. *Planned Parenthood*, 211 So. 3d at 924. On this obvious basis, the circuit court's order appears to be unlawful.

C.

Before getting to the end of this opinion, we pause briefly to consider a circuit court's previous handling of a congressional redistricting challenge (referenced earlier), which stands in stark contrast to the handling of the present redistricting challenge. *See Romo v. Detzner*, Case No. 2012-CA-412 (Fla. 2d Cir. Ct.).* In July 2014, after an extensive bench trial on the issue, the circuit court rendered a final judgment declaring the Legislature's 2012 congressional redistricting plan to be invalid under the FDA because of congressional districts five and ten. The Legislature went into special session the next month and enacted chapter 2014-255, Laws of Florida, as a remedial redistricting plan.

In August 2014, the circuit court approved the newly enacted plan but ordered that the 2014 election proceed under the original plan reflected in chapter 2012-2, instead of the newly enacted one reflected in chapter 2014-255. The circuit court rejected a proposal to schedule a special election, thereby permitting the 2014 congressional elections to be held under a redistricting plan the court already had declared in a final judgment to be unconstitutional. In July 2015, the supreme court reversed in part the circuit court's judgment approving the legislatively enacted 2014 remedial plan. The court relinquished jurisdiction to the circuit court to consider proposals for a new remedial plan and submit a recommended plan that was consistent with the supreme court's guidance.

From this history, we can make two observations. First, we see that not one, but two congressional elections went forward under a redistricting plan that was challenged as—and later determined to be—violative of the FDA, with the tacit or express approval of the circuit court and supreme court. Second, we note that the circuit court did not impose a remedial plan by court order—and the supreme court did not expect one—until after a full

* We derive this history from the circuit court's case docket.

trial on the merits, after the circuit court rendered final judgment declaring the enacted plan as being unconstitutional, and after the Legislature was given two opportunities to adopt by statute a compliant plan.

The supreme court in fact repeatedly recognized that the Legislature, not the courts, has the prerogative to redraw the lines where the first lines were found wanting. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 413 (Fla. 2015) (requiring the "Legislature to redraw the map, based on the directions set forth by this Court," rather than ordering the circuit court to develop a plan); *id.* at 414 (setting out "guidelines and parameters, which we urge the Legislature to consider in adopting a redrawn map"); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 266 (Fla. 2015) (explaining that judicial redistricting did not occur until after the Legislature failed to act and upon legislative request for that approach); *id.* at 297 (noting that "despite the stringent constitutional standards that operated as a restraint on the legislature, [the court] would defer to legislative decisions on the drawing of districts as long as there was no violation of constitutional requirements" and that limited judicial role in first instance is "simply to "ensur[e] compliance with constitutional requirements to invalidate a redistricting plan only if it ran afoul of such mandates" (internal quotation and citation omitted)).

Rather than proceed by respecting the separation of powers and the historical limits of its authority, the circuit court here improperly fast-tracked the case—in essence, to judgment—and it did so in the context of a constitutional writ of injunction absent a full evidentiary hearing and final adjudication. The circuit court's use of a temporary injunction in this way—to draw up a remedial redistricting plan and force its implementation in the upcoming election without a trial and final adjudication on the merits—was legally unsupported.

IV.

To conclude, we return to our review of the circuit court's order vacating the automatic stay put in place by Florida Rule of Appellate Procedure 9.310(b)(2). The rule setting an automatic stay is there because an injunction against a public official is unlike one against a private person. This is particularly true when

the injunction stops enforcement of a law as passed by the Legislature and signed by the Governor *on an interlocutory basis without a trial*. The automatic stay must remain in place absent circumstances that *are the most compelling*. *See State, Dep't of Env't Prot. v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998); *DeSantis v. Fla. Educ. Ass'n*, 325 So. 3d 145, 150 (Fla. 1st DCA 2020). For our purposes, the automatic stay "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. (quotation and citation omitted). We have the authority to reinstate a stay when, upon our initial review of the case, we determine that the State's appeal has a likelihood of success on the merits. *Cf. id.* at 151; *Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005).

In cases like this, the stay and the temporary injunction on appeal go hand in hand, so naturally we consider them together. The temporary injunction under review is very likely unlawful, as we have explained. We in turn see no practical way to address whether the circuit court erred in vacating the stay without our also being mindful of this readily apparent abuse of discretion. This said, there simply is nothing compelling about a plainly unlawful order that could support leaving it in effect while it remains under appellate review. Given this high likelihood of reversal, we grant the motion for review, quash the vacatur, and reinstate the stay.

The parties shall inform the court within five days of this opinion whether any additional briefing or argument is necessary before the court disposes of the appeal of the non-final order on the merits.

Vacatur QUASHED; stay REINSTATED.

JAY and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Mohammad O. Jazil, Michael Beato, and Gary V. Perko of Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Tallahassee; and Bradley R. McVay and Ashley E. Davis, Florida Department of State, Tallahassee, for Appellant Secretary of State Cord Byrd.

Daniel E. Nordby, George E. Meros, and Tara R. Price of Shutts & Bowen LLP, Tallahassee; and Carlos Rey and Jason Rojas, Florida Senate, Tallahassee, for Florida Senate Appellants.

Andy Bardos of GrayRobinson, P.A., Tallahassee, for Florida House Appellants.

Frederick S. Wermuth and Thomas A. Zehnder of King, Blackwell, Zehnder & Wermuth, P.A., Orlando; and Christina A. Ford of Elias Law Group LLP, Washington D.C., for Appellees.

Henry C. Whitaker, Solicitor General, Tallahassee; Jeffrey Paul DeSousa and Daniel W. Bell, Chief Deputy Solicitors General, Tallahassee; David M. Costello, Assistant Solicitor General, Tallahassee; and Bilal Ahmed Faruqui, Assistant Attorney General, Tallahassee, for Attorney General Ashley Moody.