Case No.: 23-A116

IN THE SUPREME COURT OF THE UNITED STATES

GRACE, INC, et al.,

Applicants,

v.

CITY OF MIAMI

Respondent.

ON APPLICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (No. 23-12472)

RESPONDENT'S RESPONSE TO EMERGENCY APPLICATION TO VACATE ELEVENTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND FOR AN IMMEDIATE ADMINISTRATE STAY

Victoria Mendez, Esq.
Florida Bar No.: 194931
vmendez@miamigov.com
John A. Greco, Esq.
Florida Bar No.: 991236
jagreco@miamigov.com
Kerri L. McNulty, Esq.
Florida Bar No.: 16171
klmcnultymiamigov.com

Jack R. Reiter, Esq.
Counsel of Record
Florida Bar No.: 0028304
jack.reiter@gray-robinson.com
Andy Bardos, Esq.
Florida Bar No.: 822671
andy.bardos@gray-robinson.com
GrayRobinson, P.A.
333 SE Second Avenue, Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6887

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

I. INTRODUCTION.

With vote by mail starting in approximately two months for an election day on November 7, the District Court's ruling disabled a legislatively-crafted electoral map prepared with public input and ordered the City of Miami to adopt a new map drawn by the Applicants in secret.[1] The Eleventh Circuit Court of Appeals remedied this departure from precedent by staying the District Court's ruling and, thus, eliminating the core harm that this Court sought to avoid in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Now, through an Application that disingenuously accuses the City of misrepresentations, the Applicants are not forthcoming with respect to critical facts necessary to this Court's evaluation of the issues presented. As a threshold matter, the pleadings are still open, the constitutionality of the City-drawn maps has not been decided, and the District Court has entered only a preliminary injunction. Trial on the merits will not occur until 2024. Importantly, no City of Miami district plan has ever been found to be unconstitutional, contrary to the Applicants' claim. *See* Appl. p.1.

In March 2022, the City of Miami enacted a new district map in light of the census that required reapportionment (City of Miami Resolution 22-131, the "Enjoined Plan"). The Application and Applicants' pleadings below argue that this Enjoined Plan gerrymandered districts to concentrate races, but this is inaccurate. On the contrary, far from racially sorting people, the Enjoined Plan maintained

[1] Vote by mail is only two months away. Early voting is two-and-a-half months away. Election day is less than three months away. In recent elections, most of the City's voting has occurred through vote-by-mail or during early voting. *See, e.g.*, Miami-Dade County, Supervisor of Elections, Fall Municipal Elections (Nov. 5, 2021, 3:25:15 PM), https://enr.electionsfl.org/DAD/3110/Summary/.

districts that were in place for 25 years. Applicants ignore the fact that the City of Miami is 70% Hispanic, and it is thus impossible to draw a map without at least three majority Hispanic Districts. The Enjoined Plan actually reduced the racial percentage concentration in the Hispanic-majority and the Black-majority districts, all in compliance with legal precedent.[2] Applicants also do not mention that the so-called Anglo district is a minority white district that elected a Hispanic Commissioner. They obliquely refer to the Voting-Rights-Act-required District 5, that they admitted before the District Court that the City was required to draw, but they do not mention that every iteration of District 5 (including the Applicants' own submission) *reduced* the percentage of Black voting age population until it comprised 50.3% of the District. DE 36 pp.4-5.[3] Thus, the City did not pack minorities; it created the most narrowly tailored Black VRA District possible, and all other districts are Hispanic because the rest of the City is 75% Hispanic. This is not gerrymandering but instead reflects the City's historic ethnic and racial composition.

Notwithstanding this undisputed data, the District Court adopted a Report and Recommendation ("R&R") and preliminarily enjoined the City's March 2022 plan. Critically, the R&R did not find either packing of minorities or ethnicities, or dilution

---

[2] District 4 started with a Hispanic voting age population ("HVAP") of 91.6 % and a Hispanic Citizen voting age population ("HCVAP") of 90.1% (DE 23 ¶ 76), and ended with a HVAP of 89.5 % and a HCVAP of 88.2% (*Id.* ¶ 340). District 3 started with a HVAP of 88.5% and a HCVAP of 86.81% (*Id.*, ¶ 76), and ended with a HVAP of 88.3 % and a HCVAP of 86.9% (*Id.* ¶ 326). District 1 in the enacted redistricting plan has a HVAP of 89.5% and a HCVAP 84.8%. (*Id.* ¶ 289). This too is less than before redistricting, when the percentages were 91% and 86.8%. *See Id.* ¶ 76.

[3] References to the District Court Docket are to "DE__." References to the Eleventh Circuit Court of Appeals docket are to "ECF __."

of any group's influence. It merely found that Applicants had a likelihood of prevailing on their claim that the Enjoined Plan unconstitutionally racially gerrymandered the City to preserve "three Hispanic districts, one Black district, and one Anglo district," and it took issue with certain minor, statistically insignificant changes to the district borders. DE 60 p.16; DE 94 pp.20-21. The R&R focused on commissioners' public discussions of race in a vacuum, failing to consider the City's demographics. Notably, Applicants never presented a plan at that stage or argued the district map could be drawn any differently.

Although the District Court enjoined the City's plan on May 23, 2023, it did not implement an alternative one but instead ordered the City to submit an interim remedial plan. The City repeatedly urged that there would not be enough time to implement a plan before the November 2023 election without implicating the *Purcell* principle,[4] ECF 25 pp.7-10, but the District Court rejected that argument. *Id.*

Following the District Court's preliminary injunction, instead of adopting an interim remedial plan, the City adopted an entirely new plan to address the District Court's concerns and minimize disruption in the districts. That new plan was discussed at a publicly noticed Commission meeting and adopted on June 14, 2023, proceeded through the ten-day veto period and the City's mandatory review processes, and was certified by the Clerk on June 29, 2023 ("New Plan"). DE 77 pp.7-

[4] "[F]ederal district courts ordinarily should not enjoin state election laws in the period close to an election." *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Applicants assert that the City's participation in the Court ordered scheduling process somehow waived the arguments that the timing was unrealistic and would violate *Purcell*. This unconvincing contention would place the City in an impossible position of having to be in contempt of Court to preserve the *Purcell* principle.

8. The plan was filed with the District Court the next day. DE 77. While Applicants claim it is "inexplicable" that the City did not file the New Plan earlier, this ignores the foregoing legislative process, of which they are well aware. Notably, the Applicants urged the Mayor to veto the New Plan during this legislative process. DE 82-10.

But the District Court rejected this New Plan, finding that it failed to correct the prior racial predominance of the Enjoined Plan, and, barely three months before the election (and less than two months before the start of vote-by-mail voting), it ordered the City to adopt a plan unilaterally proposed by the Applicants (the "Mandated Plan") without public input. DE 94 pp. 27, 35-39. The Mandated Plan did not just preserve the alleged racial predominance, it exacerbated it by maintaining three Hispanic districts as supermajorities and maximally packing one of those districts in excess of 95%. DE 82-12 p.16. The Mandated Plan also makes the so-called Anglo District, that recently elected a Hispanic Commissioner, whiter than either the Enjoined Plan or the New Plan. *Compare Id. to* DE 82-12 p.15. And there is no statistically significant difference between the Mandated Plan's version of the VRA-required Black District 5, and the District 5 contained in the City's New Plan.[5] *Id.* In enjoining the New Plan, the District Court also ignored an expert report supporting the narrow tailoring of the New Plan's District 5 because it was finalized

[5] In enjoining the City's New Plan, the District Court reversed the burden of proof, and violated this Court's instruction that the number need not be selected with mathematical precision. *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 580 U.S. 178, 196 (2017).

after the Commission voted for the New Plan.[6] DE 94 pp.38-39. The District Court erroneously found that whether the plan was narrowly tailored was irrelevant. *Id.*

The timing of the District Court's order, alone, supports the Eleventh Circuit's stay under *Purcell*: "[F]ederal district courts ordinarily should not enjoin state election laws in the period close to an election." Furthermore, Applicants' claims of harm ring hollow, and it is unlikely that they will succeed on the merits of the appeal or that this Court will review the Eleventh Circuit's ultimate ruling. Applicants have never alleged—and there have been no findings of—vote dilution. Rather, this case involves allegations of "racial sorting," which, if present in the New Plan, are not "corrected" in the Mandated Plan. Indeed, the Mandated Plan does not change the racial makeup of the districts, only marginally modifies the cores of Districts 2 and 5, and significantly disrupts the cores of the three Hispanic Districts with no apparent remedial effect.[7] The result is a different electoral map to be implemented approximately two months before vote by mail begins for a November 7 election, that wrote one incumbent commissioner out of his district and substituted Applicants' self-made political decisions, which were made in secret, for those of the City's duly elected representatives occurring at a public meeting. The Eleventh Circuit thus

[6] Consultants were tasked with drawing up the districts presented to the Commission, but the districts were not finalized until the June 14, 2023 meeting. DE 77. The final report could not be finished until after the districts were set.

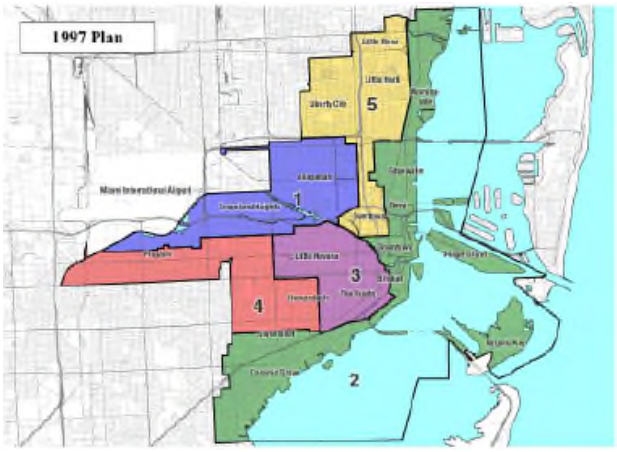
[7] The map imposed by the District Court preserves 96.7% of the core of District 2, a plurality district, and 92.5% of the core of District 5, the Black district. DE 86-2 p.6. And the Eleventh Circuit recognized that "it is not clearcut" that the Mandated Plan "remediates the alleged racial sorting" because "[c]omparing the maps," they "look[] a lot" alike. ECF 25 p.5.

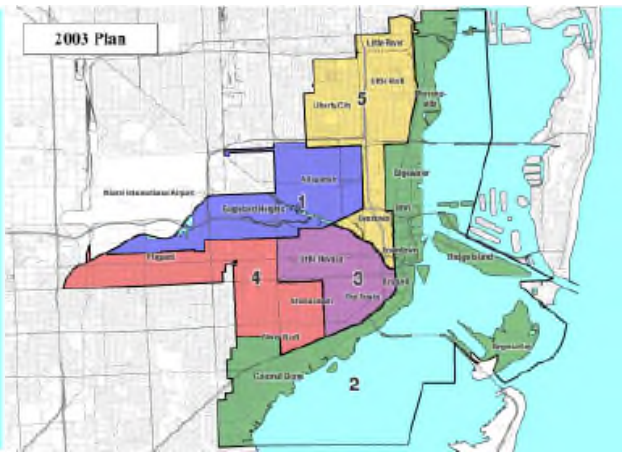
correctly issued a stay of the District Court's preliminary injunction, and Applicants do not—and cannot—meet their high burden for this Court to vacate it at this late stage in the election calendar.

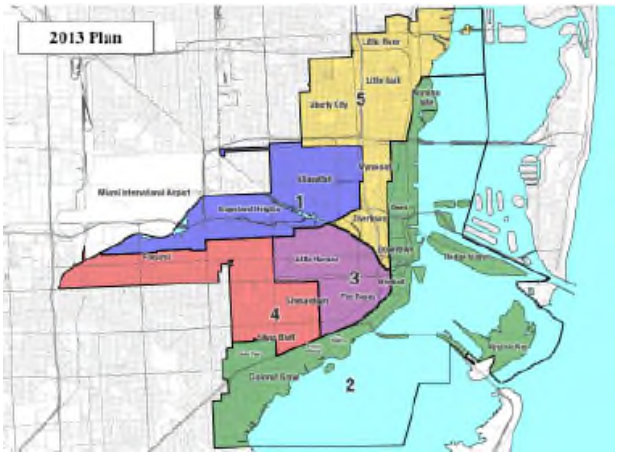
II. STATEMENT OF THE CASE AND PROCEEDINGS BELOW.

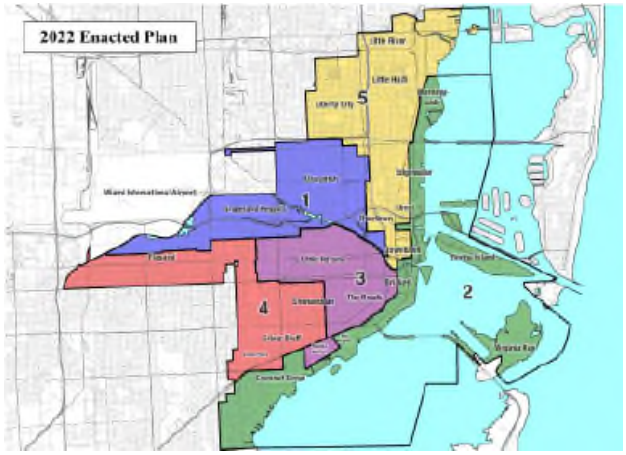
The City implemented single-member districts in 1997. DE 23 ¶¶ 33-39, 59-64. Prior to that, Commissioners were elected at large. In 1996, when no Black Commissioner was elected, a Voting Rights Act lawsuit ensued. DE 24-42; 24-43. Then mayor, now Commissioner Carollo, pushed for single member districts. DE 24-44.[8] These districts have had substantially the same shape and essentially the same racial demographic make-up since first constituted. DE 24-80 to 83. The shapes of the districts are largely dictated by the municipal borders and are not characterized by irregular shapes and appendages like those at issue in *Cooper v. Harris*, 581 U.S. 285, 323 (2017), that Applicants rely on in their Application. *See* Appl. at 27; *cf. Cooper*, 581 U.S. at 323 (depicting challenged Districts 1 and 12 in North Carolina's enacted plan).

[8] Ironically, as discussed below, Applicants have now written his house out of his district.









The United States Census of 2020 (the "2020 Census") revealed that the City's districts no longer had substantial equality of population. DE 23, ¶¶ 72-74. Following the 2020 Census, the ideal district size was 88,448. *Id.*, ¶ 72. District 2, the waterfront district, had grown significantly larger than the other four districts and needed to "shed" population to the other four districts. *Id.*, ¶ 75. On March 24, 2022, the City adopted the Enjoined Plan, which equalized population and preserved

District 5 as a majority Black district under section 2 of the VRA.[9] The Application cites to excerpts of discussions from individual Commissioners during this process.[10]

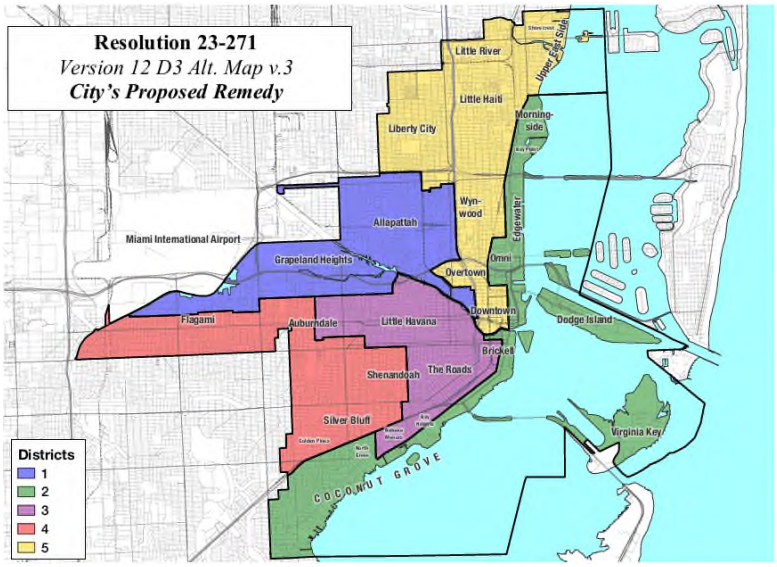
Waiting nine months after passage, Applicants then sued. Their Amended Complaint (DE 23) asserted that all five districts were racially gerrymandered in violation of the Equal Protection Clause. Two months later, on February 10, 2023 (nine months before the scheduled election), Applicants first moved for preliminary injunction. DE 26 & 24. They asked the District Court to expedite ruling because the map had to be submitted to the Miami-Dade County elections department by August 1 for the November 2023 election. DE 26 p.36. The City responded (DE 36), and the Court conducted a hearing on March 29, 2023. The Applicants did not propose an alternative districting plan. On May 3, 2023, the Magistrate entered an R&R, recognizing that the *Purcell* principle may be applicable based on the proximity of the November election but nevertheless recommending a preliminary injunction based upon a finding of racial sorting. DE 52 p.99. The City objected (DE 56), and the Court overruled the objections and approved a preliminary injunction enjoining the City

[9] A representative of both NAACP and Applicants appeared at the February 25, 2022 hearing to ensure that the Black vote would not be diluted in District 5. DE 24-14 p.14. She was assured that the Black vote would not be diluted. *Id.* She thanked the Commission and stated she was looking forward to seeing the numbers. *Id.* Then Applicants sued for not diluting the Black vote in District 5.

[10] Applicants cite snippets of the record out of context. For instance, they quote from the 2022 transcript at which the District 3 Commissioner told the District 4 Commissioner that he can't just get sirloin, he also has to get bone. While he had referred to the Hispanic demographics of the community, the immediate antecedent was not race, but Douglas Road Park, "a very nice park." DE 24-13 p.103:14-18. This area north of US 1 was formerly in District 2, the so-called Anglo District, and was being moved into District 4, a Hispanic District. In Applicants' Plan 4, which was ordered by the District Court (DE 94 p.42), that area is still moved, but into a different Hispanic District, District 3. The Applicants succeeded in moving that area from one supermajority Hispanic district to another. If this constitutes racial sorting, then Applicants are simply asking to be the racial sorters.

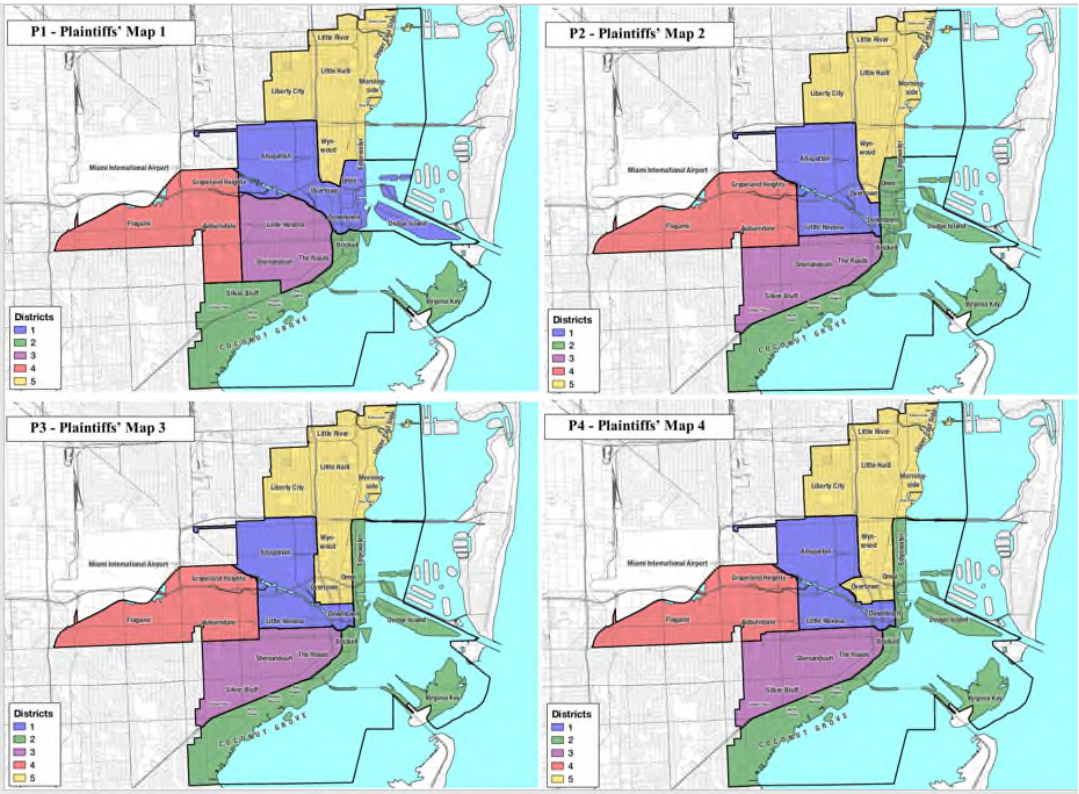
from moving forward with the Enjoined Plan. DE 60. The City was left without an approved district map. The District Court ordered the parties to participate in a scheduling process and ordered the City to enact an interim remedial map. DE 69.

The City initially appealed the preliminary injunction. But on June 14, 2023, before any briefing on appeal, the City passed the New Plan and filed it with the Court. DE 77. This rendered the City's appeal moot because the New Plan was not an interim remedial plan; it replaced the Enjoined Plan. *Id.* This New Plan minimized disruption to the election process and addressed many of the issues raised in the R&R.



Applicants objected to the New Plan on Friday, July 7, 2023, attaching four alternative plans including, for the first time, their proposed Map 4 that, as the

Eleventh Circuit would later observe, looked "a lot like the City's March 2022 redistricting plan the district court enjoined."[11] ECF 25, p.5; DE 83:



Indeed, all five plans have a coastal District 2 that is a plurality district with no racial majority.[12] *Compare* DE 82-24 *to* 82-34–82-37. In fact, Applicants' Maps 2, 3, and 4 have a greater White Voting Aged Population (WVAP) in District 2 than the New Plan. Compare DE 82-12 p.15 to 16. All the plans have a VRA-protected Black

[11] The preliminary injunction did not restrict the City's lawmaking power, and Applicants have not amended their pleadings to assert new claims or allege any infirmities with respect to the New Plan.

[12] "Anglo" district is a misnomer; District 2 has no racial majority. Applicants said they did not "designate" an Anglo access district (DE 82-2 p.6), but they created one in each plan and preserved the Whitest community in Miami, Coconut Grove, inviolate. They claimed not to "pack Hispanics" into three districts, but they did just that. DE 82-12 p.16.

District 5. Applicants previously accused the City of "packing" Black voters into District 5 by looking at Black Citizen Voting Age Population (BCVAP), but Applicants and the City both seem to agree on the size of that District. Applicants' Plan 3's BCVAP was 56.5% and Plan 4's BCVAP is 55.8% compared to the New Plan's 57.4%. *Compare* DE 82-12 p.15 *to* 16. The City's consultant had explained how the districts were drawn and that Applicants were attempting to redraw the City for political purposes, not to address race. DE 82-2 p.8:3-16:13. Applicants packed the most conservative voters in the western part of the City in the Flagami area, making it a 95% Hispanic district, so that District 1 no longer has any part of the Flagami area. Applicants' plans remove the most conservative voters from District 1 by pushing it further East, with the obvious intent of making it a more liberal seat on the Commission. *Id.* 9:9-10:22. The City promptly responded on July 12, 2023 (DE 86).[13] More than two weeks later, on Sunday, July 30, the District Court sustained Applicants' objections and directed the City to file Applicants' Map 4 with the County the following day. DE 94.

The same day that the District Court sustained Applicants' objections, the City appealed the order (ECF 1) and filed an emergency motion to stay (DE 97), that the District Court denied. DE 98. On July 31, 2023—the same day that the district court denied the motion to stay—the City sought a stay from the Eleventh Circuit Court of

[13] The City had to respond to the Friday objection with its multiple expert reports by Wednesday, July 12, and were given ten pages to respond to Applicants' thirty-page submission. DE 69.

Appeals (ECF 2), that was granted following Applicants' Response (ECF 10) and the City's Reply (ECF 12).[14] ECF 25. This application followed.

III. STANDARD OF REVIEW.

Circuit Justices owe "great deference" to an appellate court's decision. *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). For this reason, a Circuit Justice should exercise "the greatest of caution" when evaluating a request to dissolve an appellate court's stay; such a remedy "should be reserved for exceptional circumstances." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers), and only when the appellate court "clearly and 'demonstrably' erred in its application of 'accepted standards.'" *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., joined by Thomas, J., and Alito, J., concurring in denial of application to vacate stay) (quoting *W. Airlines, Inc.*, 480 U.S. at 1305). The Circuit Justice should consider whether "it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). But if "[r]easonable minds can perhaps disagree about whether the Court of Appeals should have granted a stay," then the Applicants

[14] The Eleventh Circuit granted an administrative stay of the District Court's order pending its evaluation of the merits of the City's Motion to Stay. ECF 8.

cannot meet their "heavy burden" to justify this Court's vacating it. *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 134 S. Ct. at 507 (Scalia, J., concurring).

IV. ARGUMENT.

A. The Eleventh Circuit Did Not Clearly and Demonstrably Err.

1. The Eleventh Circuit Correctly Applied *Purcell*.

Applicants misconstrue *Purcell*. As the Eleventh Circuit explained, federal courts should not enjoin state election laws close to an election because of the confusion it creates.

> "That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the [local] interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. "When an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanugh, J., concurring). That's because running an election "is a complicated endeavor." *Id.* "Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election." *Id.* "[V]olunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards." *Id.* "And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting." *Id.*

ECF 25, p.3.

Applicants assert that because the injunction was issued in May, *Purcell* is inapplicable because, they argue, it was "expected" that the District Court would select a map just a few months before the election. *See* Appl. p.16. Essentially, they argue, the disruption was expected, so it is permissible. But that is not the standard. On the contrary, *Purcell* recognizes that:

> "[E]ven seemingly innocuous late-in-the-day judicial alterations to [local] election laws can interfere with administration of an election and cause unanticipated consequences." League of Women Voters [of Fla., Inc. v. Fla. Sec'y of State, 32 F.4th 1363, 1371 (11th Cir. 2022)] (quotation omitted). "If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). "Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The *Purcell* "principle also discourages last minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring)

See ECF 25 p.3-4.

Thus, contrary to Applicants' assertions, the harm contemplated by *Purcell* is not alleviated by the fact that the injunction was entered in May because no map was implemented at that time. This lack of clarity and the District Court's late-stage tinkering is precisely the type of harm that *Purcell* seeks to prevent. Notably, the

injunction itself recognized that the *Purcell* principle might later apply, DE 52 p.99, and Applicants did not object to that finding. Under Applicants' interpretation of *Purcell*, a lower court could disrupt an election at any time—right up to the eve of the election—as long as it issued a preliminary order notifying the electorate and candidates that a potential disruption of an undefined nature might be coming. That is not how *Purcell* is applied. That is how *Purcell* is enervated.

The Eleventh Circuit also correctly found that, contrary to Applicants' argument, the City never "agreed to resolve" the remedial process by August 1, 2023. ECF 25 p.7-8. That date—less than four months before the election—was established by Miami-Dade County's Elections Department, which needed the information no later than then to prepare the upcoming election. DE 24-30.[15] But the City never agreed that the enactment of a map by that date would resolve *Purcell*; on the contrary, and as the Eleventh Circuit observed, the City repeatedly pointed out that the May injunction did not establish a map and that the whole process ran afoul of *Purcell*. ECF 25 pp.8-9; DE 56 pp.19-20; DE 59 pp.5-6.

The District Court nevertheless ordered the parties to a status conference to discuss scheduling. DE 60 p.32. The City did not waive its objection based upon the *Purcell* principle by complying with the court-ordered process while steadfastly maintaining that the District Court's timeline was impracticable. In sum, the *Purcell*

[15] Miami Dade County is not "an agent" of the City of Miami.

issue loomed over the entire process.[16] Applicants do not meet the high burden to justify this Court second-guessing the Eleventh Circuit's conclusion.

2. Disruption Is Not the Status Quo.

Applicants advance a rhetorical point that the District Court's mandatory injunction to implement Applicants' Map 4 maintains the "status quo." The Eleventh Circuit properly rejected this circular fallacy because this would deprive a court of the authority to ever stay an injunction. As the Eleventh Circuit explained:

> "[c]orrecting an erroneous lower court injunction of a [local] election law does not itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct late-breaking lower court injunctions of a [local] election law. That would be absurd and is not the law."

ECF 25 p.10 (quoting *Merrill*, 142 S. Ct. at 882 n.3 (Kavanaugh, J., concurring)); *see also Democratic Nat'l Comm.*, 141 S. Ct. at 31-32 (Kavanaugh, J., concurring).

When the District Court enjoined the use of the Enjoined Plain, it found a likelihood of success but did not mandate an alternative map. The preliminary injunction did not strip the City Commission—a legislative body—of its law-making authority, so the Commission was authorized to, and did, pass a new map. The District Court, through its preliminary injunction, created a vacuum for a new redistricting plan that was filled by the City Commission. The validly passed new map is not remedial in the sense that the Enjoined Plan no longer is at issue and will not be the district map regardless of the outcome of this case. Invoking its remedial authority, the District Court overrode that legislative decision enacting a new plan

[16] In fact, the map ordered by the District Court was not even proposed until July 7, 2023.

and issued a mandatory injunction to conduct an election pursuant to a different map. The stay, therefore, preserves the status quo. Without the stay, allowing the Mandated Plan to go into effect near the eve of the scheduled City-wide election threatens to compromise the integrity and outcome of the entire election.

3. Applicants Are Unlikely to Succeed on the Merits.

Applicants mistakenly accuse the City of Miami, which is comprised of a 70% Hispanic majority and has four Hispanic Commissioners on a five-seat commission, of committing "political apartheid" against its Hispanic citizens.[17] This accusation is baseless and has no ultimate likelihood of success.

As a threshold matter, the contours of Applicants' Mandated Plan are similar to the City's New Plan and thus undermine their argument that the City's New Plan is unconstitutional. Everyone agrees that the VRA requires District 5 to be drawn to allow Black voters to elect the candidate of their choice. Moreover, every plan presented by Applicants included three Hispanic majority districts, but the Mandated Plan packs Hispanics into an over-95%-HVAP district to politically realign the City. Furthermore, in all of Applicants' Plans, the plurality of WVAP is along the coast because that is where that population lives. Stated simply, the New Plan—and all of Applicants' proposed plans—reflect the same demographic realities, not racial sorting, and certainly not political apartheid. The main difference is that Applicants prefer, without any explanation, to disrupt the core of the three adjoining super-majority Hispanic districts, whereas the City Commission prefers to keep the core of

[17] They do not challenge that District 5 was VRA required.

those three districts intact, consistent with traditional redistricting criteria. *See Miller v. Johnson*, 515 U.S. 900, 906 (1995).

The linchpin of Applicants' case is whether the 50.3% BVAP of District 5 was arbitrary or whether it was sufficiently narrowly tailored. If, as the City maintains, it was sufficiently narrowly tailored, then none of the so-called racial gerrymandering around it is unconstitutional.

When the District Court rejected the Enjoined Plan, it did not find that the BVAP was too high, that Black voters were being packed, or that there was any diminution of Black voters' influence in any other District. That was not even alleged. The District Court also recognized that the minority population percentage need not be precise and that the City has no duty to memorialize its analysis or compile a comprehensive record supporting its determination.[18] Nonetheless, it mistakenly overlooked testimony from the City's consultant that he performed the requisite analysis in creating the Enjoined Plan. As a result, the District Court concluded that the Applicants were likely to prevail in showing that there was insufficient evidence to support a finding that the Enjoined Plan's District 5 withstands strict scrutiny. DE 52 pp.82-86.[19]

---

[18] *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 580 U.S. 178, 195-96 (2017)). Otherwise, governments would be "trapped between the competing hazards of liability" under the Voting Rights Act and the Equal Protection Clause. *Id.* at 196.

[19] A bare 50% is not arbitrary. It is mathematically the definition of a majority. In the voting context over 50% wins, under 50% loses. It is also the threshold required to bring a claim under Section 2 of the VRA. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). It is a paradox to conclude that a plaintiff must assert that a minority population is sufficiently large and geographically compact to draw a majority minority district to state a valid claim, but it is constitutionally impermissible to draw that same district in the first instance. While the Commissioners had good reason to be concerned

Furthermore, when the City presented the New Plan to the District Court (DE 77), it attached the opinion of John Alford to support the conclusion that the 50.3% BVAP was narrowly tailored. Notably, the New Plan's BVAP is statistically similar to the BVAP in the Mandated Plan, so if the latter is narrowly tailored, it logically follows that so, too, is the former. Dr. Alford also observed the statistical similarity between Applicants' Plan 3 (56.5% BCVAP) and the New Plan (57.4.% BCVAP).

But the District Court did not examine whether District 5 was, in fact, narrowly tailored, and instead erroneously focused on what the Commission reviewed before implementing the New Plan. The District Court thus mistakenly disregarded Dr. Alford's analysis because it found insufficient proof that Dr. Alford's analysis was presented to the Commission before passing the New Plan.[20] Respectfully, this focus was misplaced. And despite castigating the City, the District Court adopted a plan with very similar percentages. The BVAP in the Mandated Plan is 48.4% and in the New Plan is 50.3%. Similarly, the BCVAP (which the District Court focused on) in the Mandated Plan is 55.8%, and in the New Plan is 57.4%. Ultimately, Applicants cannot succeed on the merits and seem to be merely insisting that the City Commission have yet a third meeting to consider Dr. Alford's analysis to adopt the same plan. The Eleventh Circuit correctly maintained the legislatively adopted New

---

that 50% might not be sufficient for future elections in light of the demographic trends, they set the BVAP at barely over 50% anyway.

[20] How could it be? The Commission relied on the consultants to perform the analysis to present a constitutional plan, which they did and represented it was compliant, but the New Plan was not set until the meeting. In fact, it was redrawn publicly during the meeting. Given the District Court's tight timeframes, it was impossible to settle on a plan, then perform the analysis, then declare a second meeting to present it and vote to adopt it.

Plan. As Dr. Alford pointed out, the remainder of Applicants' case involved swapping population between the three Hispanic districts to claim their plans are "more different" than the Enjoined Plan. Redistricting is not a contest to see who can create the most compact or diverse districts. Applicants are not a competing Commission. As long as the New Plan is not unconstitutional, it cannot be enjoined. Finally, Applicants do not confront the glaring issue that their complaint is moot because the City's enactment of the New Plan superseded the Enjoined Plan—which is the only target of Applicants' complaint. Applicants never filed an amended complaint directed at the New Plan, and they are unlikely to succeed in challenging a plan no longer in effect.

C. This Court is Not Likely to Grant Review.

Applicants assert that this Court "regularly grants review" of redistricting decisions, but they fail to mention the standard under which this Court grants certiorari review, much less show how that standard is likely satisfied. *See* Rule 10 (noting that a petition for writ of certiorari is granted "only for ***compelling*** reasons," such as when "a United States court of appeals has entered a decision ***in conflict with the decision of another*** United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has ***so far departed from the accepted and usual course*** of judicial proceedings, or sanctions ***such a departure by a lower court, as to call for an exercise of this Court's supervisory power***") (emphasis added); *cf. Coleman*, 424 U.S. at 1301 (explaining that the Court may vacate a Circuit Court's stay where, *inter*

alia, the case "could and very likely would be reviewed [in this Court] upon final disposition in the court of appeals"). Applicants present no conflict with any decision of any other court and simply presume that there is an important question to be decided without identifying how the Eleventh Circuit's Order constitutes such a departure from the law that certiorari is not just possible, but ***likely***. This case does not present any such circumstances. In the end, Applicants are simply seeking to shift population within three Hispanic districts. The actual demographics of their Plan 4 are not functionally different from what was enjoined. Miami-Dade is a 69% Hispanic minority-majority County[21] with 34 municipalities.[22] And Miami-Dade is not the only majority-minority county in the nation. If this case constitutes "racial sorting" worthy of the intervention of the United States Supreme Court, then every redistricting decision of other majority-minority municipalities will be subject to this same intrusion.

D. Applicants Will Not Suffer Serious and Irreparable Harm.

Applicants will not suffer serious and irreparable harm if the Eleventh Circuit stay remains in effect because, as set forth above, the New Plan does not racially sort. This is illustrated by the fact that, as the Eleventh Circuit correctly found, the Mandated Plan "looks a lot like" the City's New Plan, and "the racial makeup" in both plans is "close."

[21] https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210.

[22] https://www.miamidade.gov/global/management/municipalities.page.

On the other hand, as the Eleventh Circuit correctly found, the City has an "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws," and vacating the stay at this late stage will result in "significant costs, confusion, and hardships on candidates, voters, and the public." ECF 25 p.6-7. This "Court has recognized that 'practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.'" *Merrill*, 142 S. Ct. at 882 (Kavanaugh, J., concurring) (quoting *Riley v. Kennedy*, 553 U.S. 406, 426 (2008)). So it is here.

CONCLUSION

For these reasons, the City respectfully requests this Court to deny the Application and maintain the Eleventh Circuit's stay.

GRAYROBINSON, P.A.
333 S.E. 2nd Avenue, Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6887

By: /s/ Jack R. Reiter
Counsel of Record
Florida Bar No.: 0028304
Email: Jack.Reiter@gray-robinson.com
Christopher N. Johnson
Florida Bar No.: 69329
Email: Christopher.Johnson@gray-robinson.com
Sydney M. Feldman
Florida Bar No.: 1017798
Email: Sydney.Feldman@gray-robinson.com
Marlene Quintana, B.C.S.
Florida Bar No.: 88358
Email: Marlene.Quintana@gray-robinson.com

GRAYROBINSON, P.A.
Jason L. Unger, Esquire
Florida Bar No.: 991562
Email: Jason.Unger@gray-robinson.com
George T. Levesque
Florida Bar No.: 55551
Email: George.Levesque@gray-robinson.com
Andy Bardos
Florida Bar No.:822671
Email: Andy.Bardos@gray-robinson.com
301 S. Bronough Street
Suite 600
Tallahassee, Florida 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311

CITY OF MIAMI
Victoria Mendez, City Attorney
Florida Bar No. 194931
Email: vmendez@miamigov.com
John A. Greco, Chief Deputy City Attorney
Florida Bar No.: 991236
Email: jagreco@miamigov.com
Kevin R. Jones, Deputy City Attorney
Florida Bar No.: 119067
Email: krjones@miamigov.com
Kerri L. McNulty
Florida Bar No.: 16171
Email: klmcnultymiamigov.com
Litigation & Appeals Division Chief
Florida Bar No. 16171
Office of the City Attorney
444 S.W. 2nd Avenue
Miami, FL 33130
Telephone: (305) 416-1800
Facsimile: (305) 416-1801

Attorneys for Respondent