No. 23A116

IN THE SUPREME COURT OF THE UNITED STATES

GRACE, INC., ET AL.,

Applicants,

v.

CITY OF MIAMI,

Respondent.

Application from the United States Court of Appeals for the Eleventh Circuit (No. 23-12472)

REPLY IN SUPPORT OF 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 ADMINISTRATIVE STAY

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INTRODUCTION

The City's Response to the Emergency Application does two things: (1) it concedes that the 2022 Plan will under no circumstance be used in the upcoming November election; and (2) it completely ignores Applicants' point that *Purcell* is not applicable because the choice is not between an old map and a new map but between *two new maps*. Amicus's handwringing about deadlines is thus entirely irrelevant. The only deadline that matters for present purposes is the August 1 deadline set by the election administrator—Miami-Dade County—and the district court met that deadline to provide a constitutional interim remedial map. County officials are making preparations to ensure they are able to implement the Court's Plan if this Court grants the Application and vacates the stay. *See* Joey Flechas, *Legal Fight Over Miami's City Voting Map Has Reached U.S. Supreme Court. Now What?*, MIAMI HERALD (Aug. 11, 2023) ("Department officials say they are ready to work with whichever map the Supreme Court chooses."). All relevant considerations favor vacating the stay and implementing the Court's Plan.

Again, the choice is between two competing maps—one (the City's) an unconstitutional racial gerrymander, the other one (the Court's Plan) a valid map that unwinds the City's racial sorting—each submitted two weeks ago. The City's map harms Miamians by allocating seats to "balance" racial groups for a predetermined ethnic makeup of the Miami City Commission. This Court should grant the Application to remediate that irreparable harm.

ARGUMENT

The City's Response again dissembles and distracts. Applicants briefly respond to several points.

I. The City Does Not Meaningfully Address *Purcell*.

Rather than addressing whether factual realities implicate *Purcell*, the City pretends them out of existence. First, the City can disclaim acquiescence to a court schedule all it likes, Response at 13–16, but that does not change the fact that Miami-Dade County)—the entity with which it contracts to conduct the upcoming City election—provided a deadline for implementing a map that the district court in fact met. For this reason, too, the Amicus falls flat with its fretting about upcoming deadlines—and concomitant assertions about "[t]he City's election administration machinery" without any basis in the record. Amicus at 6.[1]

This relates to the second way in which both the City and Amicus wholly distort *Purcell* here. There is no old-map status quo to go back to, so concern about relative burdens on election administrators make little sense. Of the two maps on the table, both are new, and only one is not an unconstitutional racial gerrymander.

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[1] The only deadline Amicus points to that has actually passed—the August 11 deadline for candidates who choose to qualify by petition method to submit their petitions—is already eased by Florida law that relaxes the petitioning requirements in redistricting years. Fla. Stat. §§ 99.095(2)(d), 100.3605(1). In any event, candidates who miss the petition deadline can qualify by paying the $100 fee until qualifying ends on September 23. *Candidate Qualifying*, City of Miami, https://www.miamigov.com/My-Government/Elections/Candidate-Qualifying. Candidates for whom the fee would be an undue burden can have the fee waived. *Id.* Candidates qualifying by either petition method or fee must also pay a $582 state assessment. *Id.*

For all its numerous incantations of *Purcell*, the City's Response to this Court cites *not a single harm* that would befall the City if this Court allowed the district court's plan to go into effect. All the City can muster is a bare assertion—with no record citation, much less any reasoning or argument—that "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." Response at 17. That's it.[2]

That leaves us with the County. Because the City chose not to appeal the preliminary injunction, the remedial process ensued.[3] Now the remedial process is complete, and the Court's Plan has been ordered. There is nothing left to do except instruct Miami-Dade County to prepare the map for the November election. County

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[2] Potential harm to the City's Commissioners (as distinct from the City itself) are not relevant to the *Purcell* analysis, either.

[3] Strikingly, the City asserts that the Magistrate Judge's Report and Recommendation "recogniz[ed] that the *Purcell* principle may be applicable based on the proximity of the November election." Response at 8 (citing R&R at 99). The cited page actually states:

> The second harm—that there is insufficient time to adopt a remedial map—is implied and not directly argued or substantiated by the City. The harm, which is implied in passing, relates to the *Purcell* principle, which the City does not here raise or invoke. The next election is six months away; the City has not identified and this Court is not aware of any case where the Eleventh Circuit or the Supreme Court has applied *Purcell* under similar circumstances.

App. 100a. Besides seriously misstating the Magistrate Judge's assertions and highlighting its own failure to raise *Purcell*, the City's contentions further underscore two points: (1) the City abandoned its appeal of the order adopting the R&R; and (2) the City continues to throw up red herrings to distract from the fact that its own new map causes just as much burden (in fact more burden, by splitting more precincts, *see* Application at 19–20) as the Court's Plan.

officials are waiting for this Court to rule and will implement the Court's Plan if this Court grants the Application. *See* Joey Flechas, *Legal Fight Over Miami's City Voting Map Has Reached U.S. Supreme Court. Now What?*, MIAMI HERALD (Aug. 11, 2023) ("Department officials say they are ready to work with whichever map the Supreme Court chooses."). The County is facing the election head-on. *Purcell* does not support the court of appeals' decision to issue the stay.[4]

II. The City's Actions Reinforce That Applicants Are Highly Likely to Succeed on the Merits.

On the merits, the City seeks to distract this Court with factual disputes that the district court resolved and the Eleventh Circuit did not reverse. Applicants will thus not reply on the merits except to make a few discrete points.

First, the City admits that its remedial map sought "to address the District Court's concerns and *minimize disruption in the districts*." Response at 3 (emphasis added). The district court saw through the ruse: the City's remedial map recreated the explicit racial gerrymander of the 2022 Plan and kept more than 94% of Miamians in the same district. App. 142a–150a, 162a; Application at 23–24. The City cannot "immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan." *Allen v. Milligan*, 143

[4] Amicus goes even further than the City, stretching *Purcell* to a new level. In its view, "the election began almost a year ago," Amicus at 8, and the mere formulation of a campaign strategy based on the 2022 Plan is evidently dispositive under *Purcell*. This not only transmogrifies *Purcell* into something no court has found it to be—*i.e.*, no-map-changes-after-any-campaign-strategizing-or-fundraising—but it also again seeks to confuse this Court into forgetting the fact that everyone in this litigation acknowledges that *under no circumstance will the 2022 Plan be the map governing the upcoming November election*. We are talking instead about a choice between two new maps.

S. Ct. 1487, 1505 (2023). That is why the district court analyzed (and ultimately rejected) the City's remedial map and ordered the Court's Plan instead.

Second, the City and Amicus seek to rewrite the remedial process in redistricting cases by allowing any legislative body to "moot" the dispute by pretending it is "adopt[ing] an entirely new plan" and seeking to treat it differently than a proposed remedial plan. *See* Response at 3, 16, 20; Amicus at 14–15. This approach undermines the authority of a district court to enforce its own orders and flies in the face of well-settled law that requires the district court to fashion a remedial decree "in the light of well-known principles of equity," *North Carolina v. Covington*, 581 U.S. 486, 488 (2017) (citation omitted), and carry out "its own duty to cure illegally gerrymandered districts," *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). If the legislature fails to enact "a constitutionally acceptable" remedial plan, then "the responsibility falls on the District Court" to reconfigure the unconstitutional districts. *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Abrams v. Johnson*, 521 U.S. 74, 86 (1997) (holding that a remedial districting plan cannot be sustained if it "would validate the very maneuvers that were a major cause of the unconstitutional districting").[5]

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[5] Amicus would have constituents who are subjected to racial gerrymandering be forced to play an unending game of whack-a-mole, amending their complaints over and over again, and moving for preliminary injunctions over and over again, on the grounds that each new map represented "an entirely different map that *superseded* and *replaced* the map that is the subject of this litigation." Amicus at 14. On that theory of jurisdiction, a municipality could evade injunctive relief in perpetuity merely by continuing to amend to make slight changes to a map each time, claiming that *this* time made the difference and that the plaintiffs needed to amend yet once more. That is not the law.

Third, the panel majority below and the City gloss over the very real differences between the two maps. The City argues that "the contours of Applicants' Mandated Plan are similar to the City's New Plan." Response at 17. To the contrary, the Court's Plan reunites neighborhoods across Miami that have been divided for decades in service of the City's goal to achieve racial balancing. The Court's Plan unwinds all the specific, race-based problems in the enjoined map,[6] and the district court found it better comported with traditional redistricting principles, whereas the City's Remedial Plan deviated from traditional principles in ways that pointed to racial predominance—including in *new* ways that further enhanced racial separation *beyond* what the 2022 Plan achieved. App. 164a–175a, 177a–185a, 197a–198a. To the extent the Court's Plan looks similar in some way to the Remedial Plan, that is because the district court also accommodated the City's race-neutral policy

[6] These included (1) separating a white-majority part of the Coconut Grove neighborhood that one commissioner compared to "bone" in the "Anglo district" from an adjacent part "where the Hispanic voters live" and where "there's ethnic diversity" into a "Hispanic district"; (2) retaining in a "Hispanic district," and excluding from the "Black district," an irregular appendage "described by the Commissioners as an 'attractive' area that was 'mainly Hispanic or Anglo,'" App. 37a, 42a, 75a; (3) retaining in the "Anglo district," and excluding from the "Black district," a neighborhood described by the "Black district" commissioner as a "white affluent" area she did not want in her district (App. 173a, 210a; Doc. 77 at 34); (4) balancing the Hispanic population among three districts by splitting the Flagami, Shenandoah, Silver Bluff, and Little Havana neighborhoods; (5) dividing the neighborhoods of Allapattah, Omni, Downtown, and Brickell along racial lines, replicating the Commission's strategy of drawing the 2022 Plan to "find adjacent areas with similar demographics," and (6) deviating from major boundaries like interstates and major roads in favor of local streets in all these areas and others, to surgically separate residents along racial lines and facilitate the "balancing" of the Hispanic population among the three "Hispanic districts." Doc. 83 at 12–14, 16–21, 23–25.

preferences. *See* App. 197a–198a.[7]

For these reasons, the City's Remedial Plan fails to correct the constitutional violations while the Court's Plan does. The City is not likely to succeed on the merits of its appeal. To the contrary, Applicants have shown that the merits are entirely clearcut in *their* favor—because the district-court order concerning the Remedial Plan properly resolves the limited remedial issue facing the district court as a result of the City's explicit racial sorting.

III. The City Ignores How Residents of Miami Would Be Irreparably Harmed Absent Vacatur.

The City fails to refute, or even seriously address, the irreparable harm that Miamians will suffer because the court of appeals approved the imposition of a blatantly unconstitutional map. The Response merely argues that Applicants will lose on the merits, and that there will be significant costs to implement a map. Response at 21–22. Both arguments miss the mark. The map imposed as a result of the stay intentionally divides Miami residents by race, assigning residents to districts to match the "faces" of their representative, in an overt system of racial balancing. *See, e.g.*, App. 20a, 36a, 68a, 72a, 142a, 159a. Any election held under such a map will irreparably harm Applicants, and all Miamians, while the cost of implementing either of the two new competing maps will be the same. The County is simply waiting for this Court to tell it which map to use.

[7] The City attempts to cast the Court's Plan as "drawn by the Applicants in secret." Response at 1. That is untrue. Applicants held two open forums in June where the public commented and contributed to the map-making process. By contrast, the City held only one public meeting to finalize their remedial map.

This Court can immediately alleviate the irreparable harm of the stay by granting vacatur. That will put the constitutional remedial map ordered by the district court in place for the November 2023 elections. The case will then proceed to trial on the merits scheduled in January 2024, with plenty of time to create a permanent map for the remainder of the decennial census period before the next municipal election cycle in 2025.

IV. The City's Refusal to Follow the Constitution Will Put the Merits Before This Court.

The City argues that "Applicants present no conflict with any decisions of any other court." Response at 21. That is because the district court followed well-settled racial gerrymandering precedents. *E.g.*, *Cooper v. Harris*, 581 U.S. 285 (2017); *Shaw v. Reno*, 509 U.S. 603 (1993). The court of appeals erroneously stayed the Court's Plan based on a misapplication of *Purcell*. If the court of appeals had reversed the district court's decision on the preliminary injunction or the remedial process, such a ruling likely would conflict with well-established law and would merit this Court's review.

This Court has never approved the use of race in drawing lines merely to achieve "balance" or address generalized diversity concerns. "Outright racial balancing is patently unconstitutional." *Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2272 (2023) (cleaned up). But that is the result chosen by the court of appeals and is what the City asks this Court to leave in place. If this Court were to deny the Application, that would impose an intentional racial gerrymander and disrupt a process that followed well-settled law.

CONCLUSION

This Court should vacate the stay entered by the Eleventh Circuit.

Respectfully submitted this 15th day of August, 2023,

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