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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:22-cv-24066-KMM

GRACE, INC., *et al.*,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

REPORT AND RECOMMENDATIONS

THIS CAUSE is before the Court upon Plaintiffs' Expedited Motion for Preliminary Injunction, filed on February 10, 2023.[1] (ECF No. 26).[2] Defendant City of Miami (the "City") filed a response in opposition (ECF No. 36), to which Plaintiffs filed a reply (ECF No. 39). The matter was referred to the undersigned by the Honorable K. Michael Moore, United States District Court Judge, pursuant to 28 U.S.C. § 636 and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida, to take all necessary and proper action as required by law and/or to issue a report and recommendations regarding the Expedited Motion. (ECF No. 27). Accordingly,

[1] Plaintiffs are organizational plaintiffs Grove Rights and Community Equity, Inc. ("GRACE"), Engage Miami, Inc. ("Engage Miami"), South Dade Branch of the NAACP ("South Dade NAACP"), and Miami-Dade Branch of the NAACP ("Miami-Dade NAACP"), and individual plaintiffs Clarice Cooper, Jared Johnson, Steven Miro, Alexandra Contreras, and Yanelis Valdes. (ECF No. 23). In accordance with Local Rule 7.1(d)(2) of the Local Rules of the Southern District of Florida, Plaintiffs request expedited consideration and a final ruling on their request for a preliminary injunction, by **May 23, 2023**, to permit sufficient time for the City to enact an interim remedial map in the event the District Court enters a preliminary injunction against the City. (ECF No. 26 at 36) (citing S.D. Fla. L.R. 7.1(d)(2)). The request for expedited relief is appropriate. As set forth in the recommendations section of this Report and Recommendations, and upon the consent of the Parties at the March 29, 2023 Evidentiary and Preliminary Injunction Hearing, the undersigned has shortened the time in which the Parties may file objections.

[2] All citations to page numbers for documents filed in the Court's electronic case filing system refer to the pagination assigned to a document by the Court's electronic case filing system (*i.e.*, the page number of the PDF).

I convened an Evidentiary and Preliminary Injunction Hearing on the Expedited Motion on March 29, 2023. (ECF No. 48). Having considered the Expedited Motion, Response, Reply, the evidence and argument advanced at the March 29, 2023 hearing, the record as a whole, and being otherwise fully advised, the undersigned respectfully **RECOMMENDS** that the Expedited Motion (ECF No. 26) be **GRANTED**.

I. BACKGROUND

This is an action alleging racial gerrymandering in the redistricting of the five commission districts for the Commission of the City of Miami (the "Commission") in Miami, Florida, following the 2020 United States Census ("2020 Census").

As background context for the discussion that follows, the Commission is a five-member governing body for the City, whose members are elected from single-member, numbered districts. On March 24, 2022, the Commission passed Resolution 22-131 (the "Enacted Plan"), which provides the new jurisdictional boundaries for the five Commission districts—Districts 1 through 5 (together, the "Commission Districts"). (ECF No. 24-1). For visual reference, a map of the Commission Districts adopted in the March 24, 2022 Enacted Plan is provided on the following page.

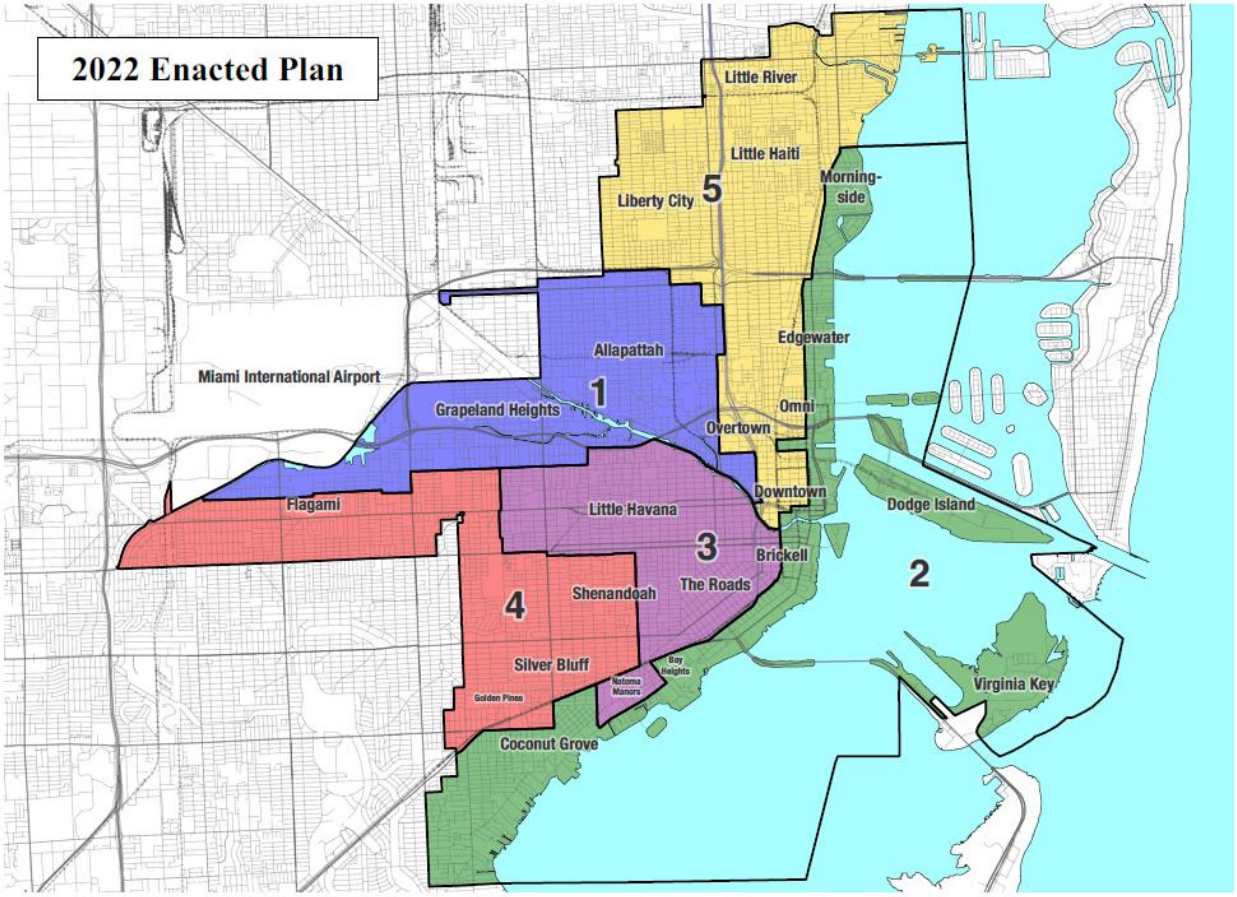


Figure 1. Map of City Commission Districts in Enacted Plan. (Reproduced as depicted in ECF No. 24-83).

Plaintiffs commenced this action in this Court on December 15, 2022, invoking the Court's federal question jurisdiction under 28 U.S.C. § 1331. (ECF No. 1). The operative complaint asserts one claim for relief, arising under the Fourteenth Amendment's Equal Protection Clause. *See* (ECF No. 23 at ¶¶ 358–365) ("Am. Compl."). Plaintiffs allege in their First Amended Complaint that race was the predominant factor in the redrawing of each of the five Commission Districts adopted by the City in the Enacted Plan following the 2020 Census. Plaintiffs aver that, because the City is not able to establish that the City's use of race in drawing the Commission Districts was narrowly tailored to a compelling governmental interest, the five Commission Districts constitute unconstitutional racial gerrymanders, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs seek the following relief: (i) a declaration that the five Commission Districts drawn and adopted in the most recent redistricting process are unconstitutional racial gerrymanders in violation of the Fourteenth Amendment; (ii) a preliminary and later a permanent injunction enjoining the City and its officers and agents from calling, conducting, supervising, or certifying any elections under the Enacted Plan; and (iii) an order requiring the City to hold special elections should adequate relief not be available prior to the next regularly scheduled election.[3]

Now, in their Expedited Motion for Preliminary Injunction (ECF No. 26), Plaintiffs move to preliminarily enjoin the City, and its officers and agents, from calling, conducting, supervising, or certifying any elections under the Enacted Plan, beginning with the general elections scheduled for November 2023, until the entry of final judgment in this case.

As set forth in greater detail below, the record before the Court contains substantial evidence that the Commission Districts are racial gerrymanders in violation of the Fourteenth Amendment. It is without meaningful dispute that race predominated the City's drawing of District 5, ostensibly in effort to comply with the Voting Rights Act of 1965. Race was the predominant factor the Commission considered in the redrawing of each of the five Commission Districts. The Commissioners expressly prioritized preserving the cores of the existing districts to preserve the Commission's composition of three Hispanic commissioners, one Black commissioner, and one white or "Anglo" commissioner. Based on this and other evidence, the Court finds that Plaintiffs are substantially likely to succeed in establishing that the City designed the Enacted Plan to preserve the Hispanic super-majorities in Districts 1, 3, and 4, and to preserve District 2 as an "Anglo access" district. The City does not argue that the Commission's use of race in this way to draw those districts was narrowly tailored to any compelling governmental

[3] Plaintiffs also request an award of nominal damages in the amount of $100.00 for each Plaintiff, and an award of attorney's fees and costs incurred in connection with this action.

interest. Moreover, Plaintiffs are substantially likely to succeed in establishing that the Commission's consideration of race in the drawing of District 5 was not narrowly tailored to comply with the Voting Rights Act, because the record in this case does not reflect that the City had an evidentiary basis for the selection of a Black Voting Age Population quota of 50% for that district. Because the Court also finds that Plaintiffs will be irreparably harmed absent a preliminary injunction, and because the balance of the equities weighs in favor of the entry of a preliminary injunction, the undersigned recommends to the District Court that the City be preliminarily enjoined from conducting any elections under the 2022 Enacted Plan.

A summary of the briefing on the Expedited Motion follows.

A. Plaintiffs' Expedited Motion

Plaintiffs first argue in their Expedited Motion that they have standing[4] to assert the cause of action here raised because the individual plaintiffs reside in the challenged districts and because the organizational Plaintiffs have members residing in each of the challenged districts.

Second, Plaintiffs argue that there is a substantial likelihood that they will succeed on the merits of their racial gerrymandering claim, because the direct and circumstantial evidence in the legislative record shows that race predominated in the City's redrawing of the five Commission Districts, and the City's consideration of race in that process does not withstand strict scrutiny.

As direct evidence that race predominated in the City's 2022 redistricting process, Plaintiffs cite to the Commissioners' explicit statements at transcribed, public meetings of the Commission that the Commissioners' objective in the most recent redistricting process was to preserve the existence of three Hispanic seats, one Black seat, and one "Anglo" seat on the Commission. Specifically, Plaintiffs point to: (i) the Commission's creation of an "Anglo-Access

[4] The City has moved to dismiss the Amended Complaint on the basis that Plaintiffs lack standing. That Motion remains pending (ECF No. 34).

District" as District 2; (ii) the imposition of an arbitrary minimum Black Voting Age Population ("BVAP") quota of 50% in District 5 for compliance with Section 2 of the Voting Rights Act of 1965 ("VRA");[5] (iii) the packing and treatment as fungible of Hispanic residents into Districts 1, 3, and 4; and (iv) the subordination to race of traditional redistricting criteria (*e.g.*, neighborhoods, compactness, and manmade and natural boundaries).

As circumstantial evidence that race predominated in the City's 2022 redistricting process, Plaintiffs cite to the racial demographics and shapes of the geographic areas that were moved among the districts as between the City's 2013 redistricting plan and the 2022 Enacted Plan, and the rejected alternative map configurations considered leading up to the adoption of the Enacted Plan.

According to Plaintiffs, the predominance of race in the City's redistricting process does not withstand strict scrutiny. In this regard, Plaintiffs argue that the City did not have a strong basis in evidence for the maintenance of District 2 as an "Anglo access district"; for maximizing the population of Hispanic residents in Districts 1, 3, and 4; or for selecting a BVAP floor of 50% for District 5.

Third, Plaintiffs argue that they will suffer irreparable harm absent a preliminary injunction because the harm to their fundamental right to vote cannot be undone with monetary remedies. And fourth, Plaintiffs assert that the balance of the equities weighs in their favor, and that injunctive relief is in the public's interest.

B. The City's Response

In its Response, the City reiterates the argument advanced in its Motion to Dismiss that Plaintiffs lack standing to bring this action, seemingly on the ground that the First Amended

[5] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (as codified in Title 52 of the United States Code).

Complaint is a shotgun pleading that does not specify whether any particular Plaintiff resides in any of the geographic areas or parcels moved between Commission Districts as part of the redistricting adopted in the Enacted Plan.

On the merits, the City argues that Plaintiffs are not substantially likely to succeed. The City asserts that the geographic shape and racial demographic make-up of the five Commission Districts have remained largely the same since single-member districts were instituted in the City in the late 1990s. According to the City, the districts were not improper when they were instituted, and Plaintiffs' citation to the legislative record from 2022 does not establish racial motive now. Rather, the City argues that Plaintiffs cannot establish "packing" because the specific geographic areas that were moved to create the Commission Districts did not result in the movement of a significant number of voters into or out of a particular district. Moreover, the City asserts that Plaintiffs have not established that any racial or ethnic group has had its influence reduced anywhere as a result of the Enacted Plan.

As to District 5, the City argues that Plaintiffs concede compliance with the VRA required the preservation of a majority BVAP of 50% in that district. *See* (ECF No. 36 at 16). According to the City, the City is not required to prove that it determined the minimum BVAP required for VRA compliance in District 5 and that the City then drew the borders for that district with mathematical precision. Moreover, the City asserts that Plaintiffs' First Amended Complaint focused on the splitting of a historically Black community within the Coconut Grove neighborhood (identified as the West Grove) that was largely kept together in the Enacted Plan within District 2. In this regard, the City asserts that the Commission Districts adopted in the Enacted Plan are facially compact.

As to Districts 1, 3, and 4, the City argues that it was not unconstitutional to deliberately

place Hispanic residents into these districts to preserve the Black majority in District 5. Moreover, the City argues that Districts 1, 3, and 4, which all have Hispanic Voting Age Populations ("HVAP") of more than 80%, cannot have been "packed" because the borders for those districts, which are generally contiguous, cannot have packed one another.

Regarding the fourth factor for the entry of a preliminary injunction, the City argues that the entry of a preliminary injunction would disserve the public interest by lowering the Black Citizen Voting Age Population ("BCVAP") in District 5 without increasing the influence of Black residents elsewhere.

And last, the City argues that Plaintiffs unduly delayed filing the instant Expedited Motion, which is "either a year too late or 25 years too late." (ECF No. 36 at 22). The City asserts that the Expedited Motion is 25 years too late because Plaintiffs complain of redistricting decisions made in the late 1990s, and that the Expedited Motion is a year too late because the redistricting process culminating in the Enacted Plan was completed in March 2022 but Plaintiffs waited until February 2023 to seek a preliminary injunction. The City notes the upcoming November 2023 general election is looming, and asserts Plaintiffs have not demonstrated diligence.

C. Plaintiffs' Reply

In their Reply, Plaintiffs argue that bright-line rules for standing in racial gerrymandering cases support that they have standing to bring this case.

On the merits, Plaintiffs reply that the City's arguments about packing and electoral influence in its Response are responsive to vote dilution claims under the VRA, but because Plaintiffs have not raised such a claim, the City's arguments are unresponsive to the racial gerrymander claim asserted here under the Fourteenth Amendment. Rather, Plaintiffs argue that the City's "core preservation" redistricting priority cannot immunize the perpetuation of racial

gerrymanders. Moreover, Plaintiffs argue that the City's focus on the individual parcels and geographic areas moved between districts is misplaced, as the determination whether race predominated focuses on a challenged district as a whole and not the particular portions moved in isolation. With these arguments in mind, Plaintiffs reiterate that each of the five Commission Districts was drawn with race as the predominant factor.

As to District 5, Plaintiffs in essence argue that the Parties agree race predominated in the drawing of that district. To that end, Plaintiffs reply that the City conflates a BVAP numerical majority with the ability of Black voters to elect preferred candidates of their choice—that is, that the City arbitrarily selected a BVAP floor of 50% for District 5 and thus the City's consideration of race is not narrowly tailored. Plaintiffs reiterate that the City did not perform a functional analysis of the electoral behavior within District 5 and that the record lacks evidence that a pre-enactment analysis was completed. Plaintiffs emphasize that they do not concede that District 5 required a BVAP of 50% in District 5 to comply with the VRA, given the City's redistricting consultant advised that lower BVAPs for District 5 were Section 2 compliant.

As to Districts 1, 2, 3, and 4, Plaintiffs note that the City denies that race was the predominant factor in the drawing of those districts, but that the City fails to argue the consideration of race was narrowly tailored to any compelling governmental interest. In this regard, Plaintiffs contend that the City fails to rebut the direct and circumstantial evidence that race predominated in the drawing of those districts. Plaintiffs reiterate that the City fails to rebut that the primary factor in the design of Districts 1, 3, and 4 was to maximize the population of Hispanic residents in those districts.

Last, Plaintiffs argue in their Reply that they were diligent in bringing the instant action. Plaintiffs note the record in this case is large, parts of which required time to compile through

public records requests; the harms Plaintiffs suffer will not be realized until an election takes place under the Enacted Plan; there is sufficient time for the City to design and enact a remedial plan before an August 1, 2023 deadline set by the Miami-Dade County Supervisor of Elections; the harm complained of here is a new harm resulting from the 2022 Enacted Plan and not historic maps; and at least one of the individual Plaintiffs, for example, was born after the institution of single-member Commission Districts in the late 1990s. And, Plaintiffs assert that the *Purcell* principle,[6] militating against the entry of a preliminary injunction on the eve of an election, does not apply in this case.

II. FACTUAL BACKGROUND

Plaintiffs attached 93 exhibits in support of their Motion. *See* (ECF No. 24). All 93 exhibits were admitted without objection into evidence at the March 29, 2023 Evidentiary and Preliminary Injunction Hearing. Included among these exhibits, Plaintiffs have filed the reports of two experts. At the hearing, the Court also heard the testimony of the City's redistricting consultant, Miguel De Grandy, Esq. ("De Grandy"). And the City offered into evidence 12 exhibits, which were admitted without objection.

A review of the Commissioners' statements at six sessions of the Commission over five months, the presentations, reports, letters and memoranda in evidence, and the opinions of Plaintiffs' experts follows.

A. Redistricting Process

The City began the most recent redistricting process, culminating in the 2022 Enacted Plan, at the end of 2021 following the release of the 2020 Census results. The Commission convened six times to discuss redistricting. *See* (ECF Nos. 24-11 through 24-18).

[6] *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The Commission first met on November 18, 2021, where it was announced that the City had hired De Grandy and Stephen M. Cody ("Cody") to serve as redistricting consultants.[7] (ECF No. 24-11, "Tr. Nov. 18", at 2).

Prior to the November 18, 2021 Commission session, De Grandy and Cody submitted to the City an initial report and legal primer (the "Initial Report"). (ECF No. 50-11, "Init. Rpt."). The Initial Report explained that the City's population had grown by 42,752, or 10.7%, to 442,241 and that this growth was not uniform across the City's five existing commission districts. (Init. Rpt. at 3). As examples, the Initial Report identified that the City's most populous district—District 2 along the coast—had grown to a population of 116,742, which was 28,364 persons above the ideal population of 88,448, whereas District 3 had 79,309 residents and was 9,069 persons below the ideal population. (Init. Rpt. at 3). Thus, to bring the City's commission districts to within substantially equal populations of one another, the Initial Report explained that the City would have to redistrict. (Init. Rpt. at 3).

The Initial Report identified potential redistricting criteria the City could consider, suggested a process and timeline, and provided a summary of the legal requirements in redistricting. (Init. Rpt. at 3–6, 9–15). The Initial Report advised the City that the Commission would need to determine which redistricting criteria it would prioritize. (Init. Rpt. at 4).

The Initial Report provided the City with a racial breakdown of the five Commission Districts after the 2020 Census, based on the borders of the districts prior to redistricting; the Court reproduces that racial breakdown below:

[7] De Grandy served on the 1997 panel that drew the City's single-member commissioner districts. De Grandy noted that he also had previously been hired as a redistricting consultant for the City during the 2000 and 2010 redistricting cycles. (Tr. Nov. 18 at 2).

District	Hispanic Pop.	Non Hisp. Black Pop	Non Hisp. White Pop
1	90.0%	10.0%	4.0%
2	52.0%	8.0%	34.0%
3	88.0%	6.0%	8.0%
4	90.0%	3.0%	7.0%
5	41.0%	54.0%	7.0%
Overall	70%	16.3%	11.9%

Table 1. Racial Breakdown of District Populations Prior to the Adoption of the Enacted Plan, Following the 2020 Census. (Reproduced as reported in Init. Rpt. at 7).[8]

At the first Commission session on redistricting on November 18, 2021, De Grandy gave a presentation titled "Redistricting the City of Miami," (ECF No. 24-3), that contained information previously submitted to the Commission in the Initial Report. (Tr. Nov. 18 at 2:14–16). De Grandy informed the Commission that analysis of the *Gingles*[9] preconditions for the City's Black population required race to be factored into the redistricting process under the VRA as one of several factors to be conscious of in drafting a redistricting plan. (Tr. Nov. 18 at 6:12–7:6).

Commissioner Alex Díaz de la Portilla and De Grandy engaged in an exchange regarding the permissibility of redistricting to "protect an African American district." (Tr. Nov. 18 at 11:21–23). De Grandy responded that he had to "be clear because the record is very important" "[f]or any future actions." (Tr. Nov. 18 at 12:3–5). Commissioner Díaz de la Portilla responded that he was trying to ask his question "the right way." (Tr. Nov. 18 at 12:6–7). De Grandy informed Commissioner Díaz de la Portilla that "White, non-Hispanic, is not a protected class under the Voting Rights Act"; Commissioner Díaz de la Portilla confirmed his understanding that the 2022 redistricting process could result in the elimination of the "Anglo" seat: "[Y]ou in

[8] Population totals exceed 100% because, as De Grandy noted in his Initial Report, some residents self-reported as being two or more races in the 2020 Census. *See* (Init. Rpt. at 7).

[9] *Thornburg v. Gingles*, 478 U.S. 30 (1986). De Grandy summarized the *Gingles* preconditions: "First the majority group, minority group, excuse me, must be large enough and compact to comprise a majority in a single member district. Second, minority voters must be politically cohesive. And that means they generally coalesce around the same candidates or issues in elections. And third, the majority must usually vote as a bloc to thwart the election of the minority-preferred candidate." (Tr. Nov. 18 at 6:12–16).

essence, could be eliminating what we call here in Miami, in practical terms, an Anglo, right, the term that we use here, seat, potentially." (Tr. Nov. 18 at 12:10–14).

Commissioner Díaz de la Portilla noted that his use of the word "protect" in reference to District 5 was making De Grandy "very nervous." (Tr. Nov. 18 at 14:23–15:1). Commissioner Christine King attempted to clarify for Commissioner Díaz de la Portilla that what she thought he was trying to say was "that you have to, you're going to attempt to try to maintain the core of the existing district." (Tr. Nov. 18 at 15:2–3).

Commissioner Manolo Reyes agreed that maintaining the cores of the existing districts should be prioritized. (Tr. Nov. 18 at 15:14–16). He urged that the redistricting process should protect the core of District 5 and also protect District 2 as a white district, noting that the cores of the existing districts were designed so that every ethnic group in the City would be "protected" or represented on the Commission:

> Commissioner Reyes: And I want you to take that into consideration and in my case I will strongly request that the districts, you see, would be, remain as they are as possible. You see? Remain as the core of the district, remain as intact as possible. Take that into consideration. That's very important to me. And also at the same time, you see, as Commissioner King said, we have to protect the core of District 5, and as much as we can also, the core of District 2, although there is not a white district anymore, but we will, and I'm going to be very clear on it. This district, I remember the first time that it was, this was drawn, you were mayor, right? You were mayor —
>
> Commissioner Carollo: Well —
>
> Commissioner Reyes: And it was done, excuse me Commissioner, it was drawn in a way that every single ethnic group would be represented. And that's why this is the odd shape that we have now, you see, for every single district, and it was drawn, what was the name, this guy that drew them, [inaudible], was the one that presented this plan, and I was here, and I didn't agree with it.
>
> Commissioner Carollo: No. No.
>
> Commissioner Reyes: Yes. Yes. Yes.
>
> Commissioner Carollo: That was the first one, there was then, I don't know.
>
> Commissioner Reyes: Well when he presented this plan, I was very upset about it because it divide[d] Flagami the way it was, but that's out of this question.
>
> Commissioner Carollo: This plan came after. The one you have today was not the original one.

> Commissioner Reyes: No, no, I'm saying that this plan, it was changed to this plan after 10 years, but the original was different. But it was drawn in a way that every single ethnic group was protected. You see?

(Tr. Nov. 18 at 15:22–16:22) (annotation in original). De Grandy immediately explained that there were race neutral criteria that had been considered in that prior redistricting cycle. (Tr. Nov. 18 at 16:23–17:2).

Commissioner Joe Carollo and De Grandy also discussed as a priority identifying politically cohesive minority voters. De Grandy restated the direction as keeping neighborhoods and communities together that vote in a cohesive manner:

> Commissioner Carollo: . . . This is important . . . Minority voters must be politically cohesive. Okay?
> Mr. De Grandy: Yes sir.
> Commissioner Carollo: Okay and this to me is one of the most important aspects of what we need to give him instructions on. And I think we all understand why that is important. Minority voters must be politically cohesive. I will make a motion that this will be part of what you use to put the districts together, also. The minority voters must be politically cohesive.
> Mr. De Grandy: In other words, what you're saying is over and above the Voting Rights Act analysis, you want me to look at how different neighborhoods and communities vote, and if they vote in a cohesive manner, try to keep them together.
> Commissioner Carollo: Correct.

(Tr. Nov. 18 at 19:16–20:4).

De Grandy informed the Commission that not all of its redistricting priorities could be realized, for example stating as to compactness that he "can't do it on [the] core[s] of [the] existing districts[.]" (Tr. Nov. 18 at 21:4–5). De Grandy also spoke of the redistricting "wall that separates D[istrict] 2 and D[istrict] 5," in the northeast of the City, based on concerns of compliance with the VRA. (Tr. Nov. 18 at 23:9). Commissioner Díaz de la Portilla proposed moving residents from the southern part of "the white seats, for lack of a better term" (*i.e.*, District 2) into District 3 or District 4. (Tr. Nov. 18 at 23:16–18). He asked if De Grandy could "take some of those

communities that are white communities and incorporate them into some of the Hispanic seats, for lack of a better term, again, right, without diluting Hispanic minority power in those districts[.]" (Tr. Nov. 18 at 23:19–22). Commissioner Díaz de la Portilla cited as an example the area of Douglas Park as a politically cohesive community in District 2 that "probably doesn't belong there" that could be moved out of District 2 on the grounds that it has more commonalities with District 4 than it does with Coconut Grove in District 2. (Tr. Nov. 18 at 24:1–5, 14–19).

Commissioner Carollo explained his reason for the City switching to single-member commissioner districts:

> Commissioner Carollo: Let me go a little bit real quick into the history of this and Commissioner King was a lot younger than some of us so she won't remember as well as a bunch over here or Mr. Díaz de la Portilla. When we went to districts, we went to districts when I was mayor. We had no African American representation [o]n the commission. So, instead of waiting for more years to go on like that so there could be a solid case made in the court, I decided that I was gonna put in my political capital and make districts to assure that there would be an African American sitting in this commission and there would be an Anglo. We've got half of one now but we're still good. And I wanted to make sure that there were three Hispanic districts because that's the way that our population was and basically it still is. It passed. I knew that there were a lot of negative points from going to districts but there were even greater negativities if we didn't do that. That's why I pushed it and it passed.

(Tr. Nov. 18 at 28:2–12).

The Commission also discussed whether keeping traditional neighborhoods together or splitting them between districts would be a redistricting priority. Commissioners King, Reyes, and Díaz de la Portilla agreed that neighborhoods should be kept together when feasible. (Tr. Nov. 18 at 33:9–11). Commissioner Carollo noted "breaks in [his] district" that already existed. (Tr. Nov. 18 at 33:12–13). Commissioner Díaz de la Portilla suggested that it would be permissible to break up neighborhoods like Flagami among multiple districts because "the core constituency will elect the same kind of representative," noting that neighborhoods like Overtown and Liberty City

should not be moved. (Tr. Nov. 18 at 33:14–17). Commissioner Carollo urged that the Commission would "have to also be careful" because "[t]here is a distinction between ethnicity within a neighborhood," prompting Commissioner Díaz de la Portilla to state:

> Commissioner Díaz de la Portilla: Well, look, people in the Roads don't vote the same way as people in Allapattah. Even though they may be Cuban American or Hispanic, they don't vote the same way, right? Some of them are, I think you used the term once so I'm not gonna use it, but uppity. Some of them are uppity something. Do you remember that term?
>
> Commissioner Carollo: Yes.
>
> Mr. De Grandy: I think I referenced that in a legislative debate, yes, many years ago.
>
> Commissioner Díaz de la Portilla: Yes, uppity something, that one, and some are those kinda people and then they're different so even within racial groups or ethnic groups, there are differences, economic difference, they vote differently.
>
> Mr. De Grandy: Of Course.

(Tr. Nov. 18 at 33:22–34:10).

The Commissioners and De Grandy discussed the ranking of the redistricting priorities to give De Grandy flexibility in designing a proposed map. The rankings were: (1) target substantial equality of population; (2) maintain the cores of the existing districts; (3) consider political cohesion; and (4) keep traditional neighborhoods together, where feasible. (Tr. Nov. 18 at 35–36). These priorities were set forth in the November 18, 2021 Resolution 21-485 as: (a) Comply with the United States Constitution and the Voting Rights Act; (b) Maintain the core of existing districts to avoid voter confusion; (c) Factor in voter cohesion; (d) Achieve substantial equality of population as opposed to mathematical equality; and (e) Maintain communities of interest and neighborhoods where feasible. (ECF No. 50-1).

The Commission had a follow-up session with De Grandy on December 9, 2021. (ECF No. 24-12, "Tr. Dec. 9"). De Grandy began the discussion by reiterating the criteria he understood he was instructed to apply: "one, achieve substantial equality as opposed to mathematical equality. Maintain the core of districts, wherever feasible. Look at voter cohesion and preserve traditional

neighborhoods and communities of interest together, also when feasible." (Tr. Dec. 9 at 2:4–7). Yet the discussion promptly featured race as a priority second only to achieving substantial numerical equality. Commissioner Carollo noted that Commissioner Díaz de la Portilla's district (District 1) would

> need to acquire seven, eight thousand more people. The only logical way that you get more is by going toward Wynwood, I believe. That's mainly a Hispanic area. That's because if you go some of the other ways, you start getting districts that get broken up. You got some other areas along the river.
>
> On your side of the river, across from mine, that I think are also areas you could go and are attractive. Those are non-African American areas, mainly Hispanic or Anglo basically, that are in District 5. District 5 is going to have to acquire some additional areas also. What I suggest, strongly, is that you meet with Mr. De Grandy so you can go over it with him.

(Tr. Dec. 9 at 3:11–18).

Due to the borders of the City, Commissioner Díaz de la Portilla stated that District 1 would have to extend to the south toward Districts 3 and 4, and that "to maintain the integrity of each district, we sort of could figure out how these three districts, right, 1, 3, and 4 could be kept whole, for a lack of a better term, without going into District 2 and other areas like that." (Tr. Dec. 9 at 6:13–15). Accordingly, Commissioner Díaz de la Portilla asked De Grandy if Coconut Grove could be split among districts based on where Hispanic votes live:

> Commissioner Díaz de la Portilla: The question, the legal question to you, is there a problem with this. Coconut Grove is also — like Coral Gables is a different city but there's ethnic diversity in Coconut Grove too. Is there a problem with splitting Coconut Grove as an entity? Based on where the Hispanic voters live? Let's say Bay Heights, areas like that, verses other areas. Is there an issue with that?
>
> Mr. De Grandy: Let me rephrase your question. Instead of problem if the question is, is there a legal impediment
>
> Commissioner Díaz de la Portilla: That's what I meant.
>
> Mr. De Grandy: There is no legal impediment to breaking up any community of interest. It's up to you to provide that policy.

(Tr. Dec. 9 at 7:14–23).

De Grandy again explained, as he did in November 2021, that a redistricting "wall" existed between Districts 2 and 5 in the northeastern part of the City, thus to honor the priority of preserving the cores of the existing districts, District 2 would have to shed population in the southwest of the City where it abutted Districts 3 and 4. (Tr. Dec. 9 at 9:4–7). Commissioner Díaz de la Portilla again expressed concern that doing so would dilute the "ethnic integrity" of those districts:

> Commissioner Díaz De La Portilla: How do you not dilute, then, District 3 and District 4? Can you survive, can you keep the — again I'll call it the ethnic integrity, let's call it that for the lack of a better legal term. I'm not talking about legalities, 'cause you're the lawyer, that's why you do what you do — the ethnic integrity of Districts 3 and 4, how far south can you go? And are there enough precincts around or contiguous to District 3 and 4 that allows you to add to them, 'cause they don't need that many people. Add to them without compromising the ethnic integrity of those Districts, 3 and 4.

(Tr. Dec. 9 at 10:4–10). De Grandy responded that, given the Hispanic populations of Districts 3 and 4—approximately 88% and 90%, respectively—neither the "integrity" of those districts nor the ability of that community to elect candidates of choice would be compromised. (Tr. Dec. 9 at 10:11–17). After stating that he did not "have any interest in getting any part of [Coconut] Grove," (Tr. Dec. 9 at 13:3–5), Commissioner Díaz de la Portilla expressed that shifting voters out of District 2 into the surrounding districts should be done so as to minimize any changes to the "ethnic integrity" and "racial integrity" of those surrounding districts, adding:

> Commissioner Díaz De La Portilla: . . . My thinking is you sort of work with that way of thinking of how we're gonna get there. We have to take away from District 2, no matter what. Figure out a way to just give everybody a little bit, and we can because [looking at Commissioner Russell] you're not a protected category, by the way. District 2 is not — white, Anglos are not protected. So if the district happens to go Hispanic, it goes Hispanic. Right?

(Tr. Dec. 9 at 13:19–14:1) (annotation in original).

Commissioner Carollo also expressed his concern that changing one or two of the Hispanic

seats on the Commission would upset the balance and harmony of the City:

> Commissioner Carollo: The purest of the Hispanic districts is District 4, much more than [looking at Commissioner Díaz de la Portilla] yours or mine. And I say that because while we have to go by law in making districts, based on how many people live in them, once we break down on how many of those people are voters, that make[s] a big difference. So they are not as pure in the percentage of the Hispanics that vote in these three districts. Particularly in my district and secondary in Commissioner Díaz de la Portilla's district. And we have to also look at that. Because otherwise, the concept that I championed and brought up for the change with districts, so that we could keep a balance and harmony of this city, it's gonna be changed. *And where the biggest danger lies in it being changed — and it's not in keeping an Anglo seat or a Black seat — will be in changing one or two of the Hispanic seats*.

(Tr. Dec. 9 at 14:5–14) (emphasis added) (annotation in original). Commissioner Carollo reiterated that his "main interest in my district and your district Commissioner Díaz de la Portilla and Mr. Reyes' district is that I'm sure that we're going to keep the balance of the Hispanic population where we're going to be getting Hispanics elected there." *See* (Tr. Dec. 9 at 22:21–23:7). Commissioner Díaz de la Portilla responded, "Of course." (Tr. Dec. 9 at 23:8). Citing to his concern that tremendous migration from other parts of "the country, South Florida, the state, a lot from up north, New York, Chicago, [and] out west," was driving racial demographic changes in the City, Commissioner Carollo stated:

> This is what I feel that I have an obligation to protect. Not just [District 5]. District 4, and District 1. The other districts, like I said, no matter how we carve them, they're going to have the representation that we intended those districts to have for some time to come.

(Tr. Dec. 9 at 24:8–10).

The Commissioners instructed De Grandy to consider the contiguity of districts. (Tr. Dec. 9 at 17). However, De Grandy informed the Commission that he would be unable to effectuate the Commission's desire to draw compact districts in light of its desire to maintain the cores of the existing districts. (Tr. Dec. 9 at 17:20–18:23). De Grandy informed the Commission that the

districts were not compact and three of the Commissioners agreed. *See* (Tr. Dec. 9 at 18:7–8; 29:10–19). De Grandy also responded in the affirmative to Commissioner Díaz de la Portilla's question whether it was a "foregone conclusion" that "[i]f you want to have an African American district and you want to have an Anglo district it's almost impossible. To emphasize compactness." (Tr. Dec. 9 at 28:22–29:2).

The Commissioners also discussed with De Grandy whether he should consider man-made or natural boundaries. Commissioner Carollo and Commissioner Díaz de la Portilla discussed the need for a district to extend south over U.S. Highway 1 or extend to reach the Douglas Park neighborhood, which was a "[v]ery Hispanic area" that "should have always been part of District 4, but it wasn't." (Tr. Dec. 9 at 19:22–20:2). Commissioner Díaz De La Portilla asked if District 4 could be extended south to increase its population by acquiring Douglas Park without crossing U.S. Highway 1 into Coconut Grove. (Tr. Dec. 9 at 21:3–5).

Commissioner Carollo raised the issues of undercounted populations in his, Commissioner King's, and Commissioner Díaz de la Portilla's districts. Commissioner Carollo concluded that discussion noting that, "[i]n Commissioner Russell's district, no matter how you cut it, you're gonna have an Anglo elected to a district," to which Commissioner Russell responded, "[o]r even a Japanese American."[10] (Tr. Dec. 9 at 23:19–21).

The Commissioners discussed with De Grandy the option of a plan that would retain the cores of their districts as much as possible while minimizing disruption. Commissioner Russell noted that breaking up the Coconut Grove neighborhood would be disruptive, and that U.S. Highway 1 is a "pretty hard boundary." (Tr. Dec. 9 at 26). He noted that there were many places for District 2 to shed population consistent with population growth (*e.g.*, Brickell and/or Douglas

[10] Commissioner Ken Russell is of Japanese heritage.

Park) and man-made barriers that would avoid breaking up the Coconut Grove neighborhood. (Tr. Dec. 9 at 26–27).

On February 7, 2022, the Commission convened a special meeting for the presentation of the preliminary redistricting plan and to take public comment. (ECF No. 24-13) ("Tr. Feb. 7"). At the February 7, 2022 special meeting, De Grandy presented the preliminary plan to the Commission and members of the public in attendance. De Grandy summarized the racial demographics of the districts in the February 7 preliminary plan as follows: (1) District 1 would have a Hispanic population of 87.38% and HVAP of 88.7%; (2) District 2 would "remain[] a swing district, with 37.2% white, non-Hispanic population, 8% Black population, and roughly 48% Hispanic population," (Tr. Feb. 7 at 7:10–12); (3) District 3 would have a Hispanic population of 87.4% and HVAP of 88.4%; (4) District 4 would have a Hispanic population of 86.7% and HVAP of 88%; and (5) District 5 would have a Black population of 51.7% and a BVAP of 49.8%. (Tr. Feb. 7 at 7–8). De Grandy explained that the February 7 preliminary plan would underpopulate District 5 based on expectations that it would experience significant development activity and population growth over the next decade. (Tr. Feb. 7 at 8).

De Grandy summarized particular areas moved as part of the proposed preliminary map and explained that the preliminary plan would largely retain the cores of the existing districts. A visual representation of the February 7, 2022 preliminary map proposal is reproduced below from De Grandy's contemporaneous presentation:

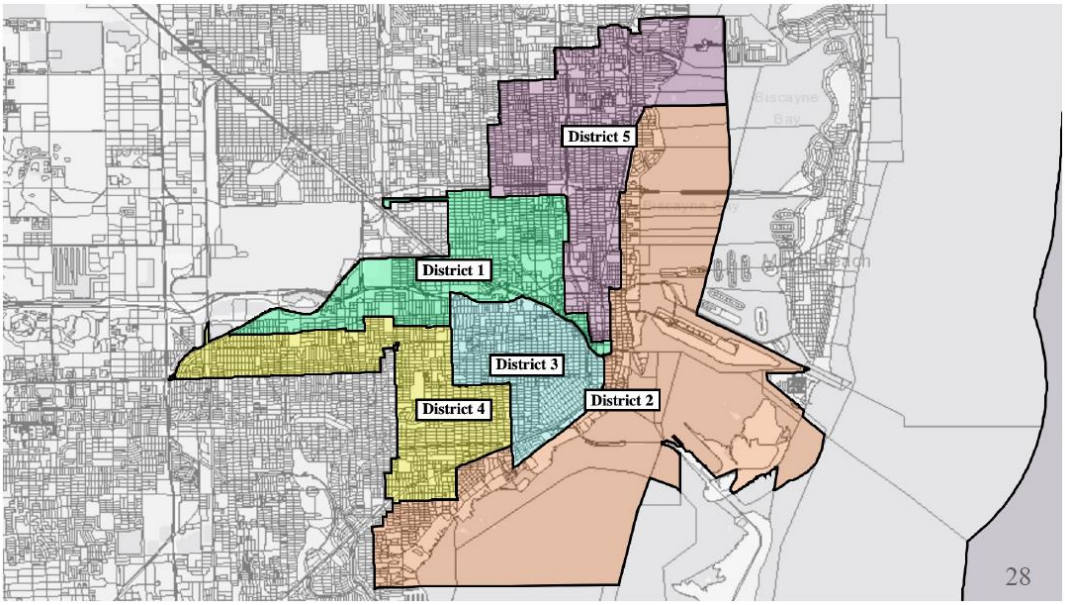


Figure 2. February 7, 2022 Preliminary Map Proposal (Reproduced as depicted in ECF No. 24-4 at 40).

Members of the public expressed opposition to the proposed map, particularly with respect to the odd shape of the proposed District 2 and the breaking up of the Coconut Grove neighborhood by moving the historically Black West Grove into District 4.[11] (ECF No. 24-13) (Tr. Feb. 7 at 12–14, 16–17, 19–26, 28–33, 38–39). One person expressed concern that the Black population in the proposed District 5 was too low. (Tr. Feb. 7 at 27–28). The public suggested looking at the map with fresh eyes, rather than maintaining the cores, or increasing the number of commissioners from five to seven, a consideration Commissioner Russell had also raised during the December 9 Commission meeting.

De Grandy clarified that the triangle area described as the West Grove that he proposed moving from District 2 to District 4 had an approximately 48% Hispanic population and 10% Black population. *See* (Tr. Feb. 7 at 42). He also explained that the southern portion of District 5 near Downtown Miami along the Miami River that he proposed moving from District 5 to

[11] A statement from Plaintiff South Dade NAACP expressing concern about moving the West Grove out of District 2 was read into the record at the February 7, 2022 session. (Tr. Feb. 7 at 24–25).

District 1 was a predominantly Hispanic area that would be moved to rebalance District 5's population to preserve District 5 as a district in which Black voters can elect preferred candidates, upon moving portions of District 2 into District 5. *See* (Tr. Feb. 7 at 42:21–43:3).

Commissioner Díaz de la Portilla asked De Grandy whether the Commission was required to preserve District 2 as a white district:

> Commissioner Díaz de la Portilla: . . . Mr. De Grandy, is there any legal requirement or legal principle that we have in coastal district?
>
> Mr. De Grandy: No, there is no requirement but once you told me to maintain the core and configuration of the existing districts, I kept that coastal district as a coastal district, but there is no legal requirement. I mean I could start from scratch and create a new plan if you want, which is we discussed and this commission said no, maintain the core of existing districts to minimize voter confusion and disruption.
>
> Commissioner Díaz de la Portilla: This commission could change that vote, right, and reverse that and say we don't need a coastal district? There's no legal protection having a white, for lack of a better term, district, correct?
>
> Mr. De Grandy: No, there is no legal protection to having a coastal district.

(Tr. Feb. 7 at 45:6–16).

Commissioner Carollo again provided background on the City's adoption of single-member commissioner districts, explaining that, at a point in the past when he was the mayor, the City had city-wide commissioners. *See* (Tr. Feb. 7 at 50). Commissioner Carollo explained that the City's sole Black commissioner had lost an election such that there was no Black representative on the Commission; Commissioner Carollo also noted that the Commission's sole "Anglo" commissioner would likely have been the last white commissioner elected given population trends in the City. *See* (Tr. Feb. 7 at 50–51). Commissioner Carollo represented that, accordingly, the core of District 2 had been an intentional racial gerrymander to ensure the election of an "Anglo" commissioner:

> While the districts have good but they also have a lot of bad that come along with them. There's a lot of baggage to districts. Also, I thought that it far outweighed it having districts but having equal representation within the

> commission and to assure that we would always have a balance of what our population in the district and that there would always be an African American commissioner and an Anglo commissioner because if we would've citywide elections, the trend was very different.
>
> I believe that trend will show even today if we have citywide elections and the way that the original districts were made, this [is] why we've had a whole coastal one. It was made that way. *It was gerrymandered but it was a legal gerrymander so that you would have an Anglo elected commissioner*.

(Tr. Feb. 7 at 51:10–15) (emphasis added).

After providing examples of neighborhoods that are split across Districts 1, 3, and 4, Commissioner Carollo again explained that the goal of redistricting was to ensure, consistent with the decision to adopt single-member commissioner districts, that there would be three Hispanic commissioners, one Black commissioner, and one Anglo commissioner elected to the Commission:

> So, I'm bringing this so you could have a historical impact that this body is just not trying to cut up communities for the heck of it. We've had to do this in the past so that we could meet first of all the types of people that this was an impediment to elect. We needed to make sure and we need to make sure that there's gonna be an African American elected [a]nd up in this Commission. We need to make sure there's an Anglo American elected and up in this Commission that in the rest of the districts that are majority Hispanic, that they stayed that way so that the 67% of the population, 68, of the City of Miami, the Hispanic, will have three representatives in the Commission.

(Tr. Feb.7 at 52:18–53:2).

Commissioner Carollo explained that the need to preserve District 5 as a district in which Black voters could elect preferred candidates, and the amount of development in the coastal areas in District 2, limited the Commission's ability to shift population without affecting "why [the City] went into districts." (Tr. Feb. 7 at 53:9). Commissioner Carollo further explained that a small portion of Coconut Grove would have to be moved "in order to give balance, first of all protect the integrity of what was done in 2000 and making sure that we keep [an] African American district, that we keep an Anglo American district, but that we also keep that same balance and

having a balance in the Hispanic districts." (Tr. Feb. 7 at 54:5–15). He noted that other neighborhoods were split among districts; he stated that if neighborhoods could not be separated, "[t]hen the outcome of that would be that guys like— that look like us, with last names like us, in the near future might not be elected necessarily from the districts that we represent." (Tr. Feb. 7 at 54:15–17).

Commissioner Reyes affirmed Commissioner Carollo's recounting that the City created single-member districts because, based on population trends, the election of city-wide commissioners would have resulted in an all-Hispanic Commission. He asked if De Grandy's proposed plan was "the best" De Grandy could do to protect the Black and Anglo seats on the Commission:

> That's why they were formed. That's the odd shape that they have now. It was to make sure and let's call a spade a spade. To make sure that an African American was gonna be elected and that an Anglo as they were called before, was gonna be elected. That was brought to the people and the people voted.
>
> Every year, I mean every ten years, in order to protect those two seats, which I think that it is just to that everybody has representation. There have to be changes. . . . But I wanna ask Commissioner [*sic*] De Grandy. I want you to be very honest because we gave you your marching order[s]. The most important question that we have is this the best you can do to protect the African American seat? I'm gonna be blunt and the Anglo seat, but more important, the African American seat?

(Tr. Feb. 7 at 67:19–68:9). De Grandy responded that the shifting of population into and out of District 5 required rebalancing the population of District 1. Commissioner Reyes and De Grandy discussed alternate borders for the extension of District 4 southward into Coconut Grove in District 2 to minimize disruption. *See* (Tr. Feb. 7 at 68–70). De Grandy explained the rippling effects of border changes, to which Commissioner Reyes stated the goal of representation included that, "The Anglos and the African Americans, they're gonna have somebody sitting here who's gonna look like them. I'm committed." (Tr. Feb. 7 at 71:16–17).

Commissioner Carollo expressed a similar commitment in addition to concern that the

redistricting process would dilute the Hispanic populations of Districts 1 and 3 such that the Commission would risk "ending up with two districts of Hispanics" instead of three:

> Commissioner Carollo: . . . What I am trying to do is, number one: As I stated, were my goals from day 1 in the year 2000. When I put all my political whereabouts to get a referendum passed for districts, so that we could have African American representation first and foremost. Then into the future be able to have guaranteed Anglo representation, and to have three districts that were Hispanic. These are my intentions here today. I have no doubt that the way that we'll break in District 5 is gonna be an African American representation. Anyway we cut District 2 the same would happen, because when you look at the voting population, they'll be very high, they'll be able to accomplish that.
>
> My concern now is just the opposite of back in 2000. My concern is that if we dilute some of these districts, or one district or another. In particular District 3 and possibly District 1, because District 4 is the most Hispanic by far of any of these three districts. That we're risking into the future, ending up with two districts of Hispanics. So we might have a population that is very plus-majority Hispanic, but because the voting power is not there, you end up differently. This is why I'm going this way. And let's begin in the Grove so that we can finish that and then I'll jump into the rest of the districts.

(Tr. Feb. 7 at 100:13–101:4).

Accordingly, the Commissioners discussed the Douglas Park area, which Commissioner Carollo noted was a "huge Hispanic area on the other side of US [Highway] 1" from the western portions of Coconut Grove. (Tr. Feb. 7 at 103:11–12). Commissioner Carollo and Commissioner Reyes discussed the redistricting of that area. Comparing Hispanic voters to the sirloin of a steak and non-Hispanic voters to the bone in a steak, Commissioner Carollo stated, "[t]here has to be a balance into the future. So that District 3 — which I can't run again so it's not me — and District 1, can keep the same type of last names, faces that they have, and that we don't end up with diluting artificially, Hispanic population in the City of Miami." (Tr. Feb. 7 at 103:18–21). Commissioner Carollo explained that that "whole area here which is a very rich area of voters that own their own homes, like the rest of Commissioner Reyes's district. Hispanic. . . . But he's only going to get a

slice, sliver, here in this part of the Grove, of areas that are not as Hispanic like the rest of his district." (Tr. Feb. 7 at 104:4–7).

Commissioner Carollo discussed the balancing of Hispanic voters among Districts 1, 3, and 4, explaining that moving the Douglas Park area to Commissioner Reyes's district would result in that district gaining territory in "prime Hispanic area" while "diluting the Hispanic vote" overall. (Tr. Feb. 7 at 105:2–3); *see* (Tr. Feb. 7 at 105–106); *see also* (Tr. Feb. 7 at 106:19–21) ("Commissioner Reyes' District is still gonna be highly, highly Hispanic. That there is not gonna be any problem for him or any other Hispanic after him to get elected there."). Commissioner Carollo stated, "What I care is that in the future, there is sufficient Hispanic votes [in Districts 1, 3, and 4] to elect a Hispanic. And a Hispanic that is not going to be a lap dog for anybody." (Tr. Feb. 7 at 105:22–23). He expressed concern for placing "sufficient Hispanic voters in [District 1], because the one district that is in most danger into the future of losing a Hispanic representative is District 3[.]" (Tr. Feb. 7 at 106:13–14).

And, also at the February 7, 2022 Commission meeting, Commissioner Russell asked whether population growth in District 2 could be offset by shifting the particular areas within District 2 that experienced the most population growth, and explained District 2's role as the financial generator for the City. He asked that the Commission avoid disrupting neighborhoods within District 2, particularly Coconut Grove, as much as possible, noting the diversity within District 2 and in that neighborhood. He rejected the characterization of himself as the "white commissioner" and opined that the "common denominator of District 2 is diversity." *See* (Tr. Feb. 7 at 64:1–4). Thus, he proposed an alternate map configuration. *See* (Tr. Feb. 7 at 62–66).

On February 25, 2022, the Commission convened again to discuss redistricting. De Grandy presented the revised February 25, 2022 plan based on the direction he received from the

Commission at the February 7, 2022 meeting. According to De Grandy, the February 25, 2022 revised plan would reduce the number of residents moved to District 4 from Coconut Grove in District 2, retain the Bay Heights neighborhood in District 2, retain the Miami Riverside Center (MRC) area in District 5, and slightly increase the BVAP proportion of District 5. De Grandy also noted that the February 25, 2022 plan would result in greater population deviation across districts. *See* (ECF No. 24-14, "Tr. Feb. 25 AM", at 5–6). *See generally* (ECF No. 24-7) (accompanying slide-show presentation). De Grandy's presentation again identified District 2 as a "swing district" on racial grounds, and otherwise focused on the racial demographic breakdown of each of the districts and the changes made under the revised February 25, 2022 plan. De Grandy explained:

> Okay, next slide, District 1 is at a -.41 deviation, which is 340 residents below the ideal. It has an 88% Hispanic population with 89.5% Hispanic voting age population, it clearly complies with the Voting Rights Act. District 2, next slide, now has a +5.46 deviation, which is 4,832 residents above the ideal. District 2 remains a swing district with 37% white non-Hispanic population, approximately 7.5% Black population, and roughly 48.7% Hispanic population. Voting age percentages are almost the same as the total population percentages. D[istrict] 3 is slightly underpopulated at a -0.92 or 810 people under the ideal population. District 3 has an 87.25% Hispanic population and approximately 88.3% Hispanic voting age population, and consistent with the Voting Rights Act, the Hispanic community has an equal opportunity to elect the candidate of its choice. District 4 is now slightly underpopulated with a -2% deviation or 1,774 residents below the ideal. 88.2% of the population is Hispanic, with 89.5% Hispanic voting age population. As I said before, the drop in population compared to our preliminary plan was a direct result of reducing the number of Grove residents that we had moved from D[istrict] 2 to D[istrict] 4. The district also complies with the requirements of the Voting Rights Act.
>
> Now finally, we underpopulated D[istrict] 5 by roughly 2.14 under the ideal, this allowed us to slightly increase the Black voting percentage. The proposed district is now approximately 52.2% Black, with approximately 50.3% Black voting age population. Our analysis of voting patterns indicates that, consistent with the requirements of the VRA, the Black community does have an equal opportunity to elect the candidate of its choice.

(Tr. Feb. 25 AM at 6:1–19). Despite referencing analyses of voting patterns, no such analyses have been described or made part of the record of the instant case.

De Grandy explained the decision to change the border between District 1 and District 5 near Downtown Miami near the Miami Riverside Center on racial grounds:

> The next slide shows the movement we made in the south part of D[istrict] 1, taking population from D[istrict] 5. Now the preliminary plan had this movement going even further southeast. But however, in order to keep the MRC in D[istrict] 5, we had to reduce this movement with a new boundary at the I-95 expressway. Again, we felt this movement was needed because Hispanics in this area constitute roughly 70% of the population. Thus, they have greater voter cohesion, which is one of the factors you asked us to consider with D[istrict] 1 residents.

(Tr. Feb. 25 AM at 7:3–8). Moreover, because of the racial demographics in District 2 where the Brickell neighborhood is located, De Grandy did not feel it was appropriate to extend District 3 into Brickell; he instead proposed moving population from District 4 into District 3 in the Little Havana area identified as Areas 14 and 15 to maintain the racial demographics of the districts, *see* (ECF No. 24-7 at 23):

> The next slide is of the proposed District 3. As the most underpopulated district, D[istrict] 3 also needed to increase in population. It was not feasible to cross the river to the north, so our options were to move east, west or south. We did not feel it was appropriate to move east because of dissimilar demographics. And the next slide now shows the movements we made, taking population from D[istrict] 4 into D[istrict] 3. It spans from NW 7th Street to the north to SW 8th Street to the south, and from 27th to 32nd Avenue. Again, this was done to balance population, and in that regard we tried to find adjacent areas with similar demographics in order to maintain voter cohesion, one of your standards, while rebalancing population.

(Tr. Feb. 25 AM at 7:20–8:4). Summarizing the February 25, 2022 revised plan, De Grandy said:

> Every district maintains the core configuration and the vast majority of its existing population. We restored the MRC to D[istrict] 5. We increased D[istrict] 5's Black voting age population above 50%. Wherever possible, we tried to move population based on similar demographics and voting patterns in order to maintain voter cohesion. We stayed well below the 10% threshold. Finally, there was a directive to maintain communities of interest and traditional neighborhoods when feasible. However, as you know, many of the city's traditional neighborhoods were already split in the current plan. Moreover, because the current configurations and the directives to maintain the core of existing districts as well as a need to balance population, the directive to maintain communities of interest and traditional neighborhoods could not be substantially achieved. And with that, I'm happy to answer any questions you may have.

(Tr. Feb. 25 AM at 9:15–10:2). As in the previous presentations, the statistics highlighted in the February 25, 2022 presentation for the Commission, apart from the population totals, focused on the racial breakdown of each district: the total white, Black, and Hispanic populations, and the BVAP, HVAP, and WVAP for each district. *See generally* (ECF No. 24-7).

The Commission took public comment. A representative from Plaintiffs South Dade NAACP and Miami-Dade NAACP read a statement into the record, expressing concerns that splitting the West Grove between Districts 2 and 4 would dilute the voting power of Black voters within District 2. (Tr. Feb. 25 AM at 14). Other members of the public commented on the record advocating against splitting the Coconut Grove neighborhood between districts, including Plaintiff Cooper and a representative from Plaintiff GRACE, (Tr. Feb. 25 AM at 16, 41).

A representative from the ACLU of Florida, which is Plaintiffs' counsel in this case, also spoke at the February 25, 2022 morning session to summarize concerns detailed in a letter to the Commission that had been emailed to the City earlier that day. Specifically, Plaintiffs' counsel raised concerns regarding the arbitrary BVAP floor of 50% selected for District 5, overconcentrating Black voters in District 5, discrepancies in the population figures that De Grandy had presented (*e.g.*, population totals that did not add up to the 2020 Census count for the City and the inclusion in the population totals of precincts from outside the City's borders), and the splitting of Coconut Grove. (Tr. Feb. 25 AM at 34:4–23). These concerns were argued in further detail in Plaintiffs' counsel's letter, which explained that Black voters make up a substantially higher share of registered voters and actual voters in District 5 than the 2020 Census figures indicate. (ECF No. 24-28, "Feb. 25 ACLU Ltr.", at 2–3). These same concerns were reiterated in the ACLU of Florida's second letter, dated March 31, 2022, addressed to the Mayor of the City, Francis X. Suarez. *See generally* (ECF No. 24-29, "Mar. 31 ACLU Ltr.").

In the afternoon session of the Commission on February 25, 2022, De Grandy responded to comments made by the representative from the ACLU of Florida: "What they're basically saying is I put too many Black folks into District 5." (ECF No. 24-15, "Tr. Feb. 25 PM", at 2:7–8). De Grandy further stated that he was not

> looking at creating a plan that will perform for the Black community just in the next election, I'm trying to create a plan that performs for the community for a decade. And I know that this community is subject to some degree of gentrification. And so, to me, the most important thing is to put, you know, the district in a position that complies with the Voting Rights Act.

(Tr. Feb. 25 PM at 2:10–14). De Grandy explained that he was not proposing a plan that would "pack" or "crack" the Black vote in District 5.

In response to a member of the public's comment that Commissioner Carollo had been involved in the creation of single-member commission districts in the City, Commissioner Carollo again explained that the City switched to single-member commissioner districts with the goal of creating three Hispanic seats, one Black seat, and one Anglo seat. In that explanation, Commissioner Carollo explained the City had intentionally split up predominantly Hispanic neighborhoods among Districts 1, 3, and 4 to permit the City to intentionally racially gerrymander District 2 to be a white district and to establish District 5 as a predominantly Black district. Commissioner Carollo stated that preserving that framework drove the City's redistricting process in 2022:

> But let me be as clear as I can. When I did that, I was mayor of the city. We had had an election that someone that looked like her [pointing to Commissioner King] was no longer here. You had four Hispanic commissioners and you had my dear friend J.L. Plummer, that Coconut Grove uh – after serving so many years decided that they don't want him when we went to districts. So Plummer was the only non-Hispanic in the commission and if we would've had another election, and Plummer would not have ran, you probably would have had five Hispanics on the commission. Just like now, if it would be a citywide vote, you would have five Hispanics up here. So I put my neck on the line and I said, no, I'm not going to wait for a couple more elections and not have an African American in this

> commission, because that's what it would've required. Just because you don't have a representation from a certain minority group automatically you don't get to go to court and you get that. You have to show that it's a pattern, not necessarily that the guy that they voted out is someone that people didn't want, and you can't do that in one election. So I went out knowing the pluses and frankly, all the negatives the districts bring and ask[ed] for the residents of Miami to vote for districts and for the mayor to be an executive mayor like it is today, and I was the first executive mayor of the city of Miami. And that's how the district came. *We, yes, gerrymandered District 2, so that someone that would be of an Anglo background, not Hispanic, would be elected*. And that's why District 2 crossed into – across the highway, and a big chunk of a Hispanic district was put into District 2 because we had to balance the population within the five districts. In order to accommodate that and to make sure that there were enough African Americans in District 5 to elect an African American from District 5, *we gerrymandered and broke up numerous neighborhoods into the other three – in the other three districts, and particularly District 3 and District 4*. And that's how we came about today. And we've had since then a couple of more revisions, I think Mr. De Grandy has been the guy who's been doing it all these years so, I mean, we haven't gone and try to pick anybody else to put something different or hoodwink people. We kept the same guy that we've had, so throughout the different revisions since then, uh we've had to cut into other areas. Originally District 2 went all the way to the end of the city of Miami past Biscayne Boulevard to 86th Street. That had to be changed in the prior revision because of the growth that came, other areas had to be changed and this is why we have the dilemma that we are discussing today.

(Tr. Feb. 25 AM at 60:17–61:22) (annotation in original) (emphasis added).

Commissioner Carollo repeated his understanding that the City had purposefully divided traditional neighborhoods in other districts to create District 2 as a racial gerrymander from which a white commissioner could be elected:

> Commissioner Carollo: Look, what I'm most amazed at is that when we created districts from the get-go, and then the redistricting that has been done each decade, every 10 years, we have purposely divided neighborhoods in the other districts to try to keep District 2 into a district that a non-Hispanic would be elected. And that's why Coconut Grove was kept together. In fact, from the beginning, a big chunk across US 1 was given to Coconut Grove because there would not have been enough population to balance it out otherwise in District 2. Nobody objected to that at the time, nobody objected to numerous neighborhoods in the city of Miami in having been divided.
>
> Like someone sen[t] me recently on Silver Bluff some some information and the history of it which was interesting, this is from an old newspaper article I believe is a short history of Silver Bluff platted in 1941 incorporated in 1920 — excuse me platted in 1911 and incorporated in 1921 the town of Silver Bluff. Was independent

> for a short period of time, it was one of several municipalities that was annexed by the city of Miami in 1925. Nestled between Miami's original southern boundary and the town of Coconut Grove. Silver Bluff is named for the bluff located along the eastern edge of the quarter that appears silver when touched by morning light. And Silver Bluff is one of those communities that was split in half to be able to create a District 2 that would elect someone like Mr. Russell —
>
> Commissioner Ken Russell: Japanese American.
>
> Commissioner Carollo: I didn't hear — well you didn't quite mention the Oriental part when you were running, only the yo-yo at the time.[12] But I'll leave it at that. It was the — after you got elected that I guess it was more convenient, the — but Silver Bluff, Shenandoah, Little Havana, I mean Little Havana has really been kept major, Little Havana goes to 37th Avenue, so from 27th to 37th Avenue, huge area of Little Havana was cut up. You got Flagami that not originally, but then when growth came in, Flagami was then cut in the second round I think after districts were originally created. Down the middle. You got other neighborhoods within District 4, others within District 1. Some in District 5. So the arguments that I've heard here today just don't hold any water. As this city grows in population, we have to make adjustments and the adjustments have to be made in — in the best way to try to keep all five of these districts in proportion to our population *for the reasons that we went into districts*.

(Tr. Feb. 25 PM at 4:6–5:10) (emphasis added).

Commissioner Reyes expressed similar concerns as Commissioner Carollo regarding the preservation of a racial framework of the Commission. He asked De Grandy whether Districts 5 and 2 could perform as Black and Anglo districts, respectively, under De Grandy's proposed February 25 plan. De Grandy confirmed that the probability was high that District 2 would perform as an "Anglo" district despite the plurality of Hispanic residents in that district:

> Commissioner Reyes: . . . My commitment is that everyone be represented. According to your — all the movement that you have done of population and the way that will the, the, Afro American district and the so-called Anglo district will stand time. I mean the next ten years, for the next ten years, given the movement of population that we are going to experience, we — there stand the test of time and we will be able, or the probability of electing an Afro American and an Anglo are that you will — are confident that it is very probable that we, because nothing is sure but death and taxes, but it is very probable that we will — we will continue to have a mixed commission, which is my — my main concern.
>
> Mr. De Grandy: To answer your question commissioner, we have done our level best to ensure that District 5 performs for the African American community and that they will continue throughout the decade to have the ability to elect the

[12] It is the Court's understanding that this is a reference to Commissioner Russell's background in yo-yo'ing.

> candidate of their choice. As to District 2, as I said in my report, District 2 is a competitive district, it actually has a greater percentage of Hispanics than of single-race white individuals, as was self-identified by, in the census. It is my belief that that 48+% will continue to grow. So, it's gonna be very competitive —
> Commissioner Reyes: It's competitive but is there still the probability is high?
> Mr. De Grandy: Yes.

(Tr. Feb. 25 PM at 19:13–20:12).

Commissioner Reyes asked De Grandy to confirm that his proposed plan prioritized preserving the existing District seats:

> Commissioner Reyes: Okay, and I heard people, no gerrymandering! Yes, we are gerrymandering to preserve those seats. And that's it. And if you want to take us to court for it, —
> Mr. De Grandy: That that actually wouldn't be called gerrymandering —
> Commissioner Reyes: But that's what —
> Mr. De Grandy: That's a tradition —
> Commissioner Reyes: Just what — just what some of the —
> Mr. De Grandy: Yeah.
> Commissioner Reyes: Some —
> Mr. De Grandy: But that is a traditional redistricting principle.
> Commissioner Reyes: Okay.

(Tr. Feb. 25 PM at 22:14–23).

The map proposed at the February 25, 2022 session of the Commission was approved as the draft redistricting or "base" plan, to be discussed with community stakeholders and considered at a meeting on redistricting on March 11, 2022 for a final vote. (Tr. Feb. 25 PM at 42); *see also* (ECF No. 50-7).

On March 11, 2022, the Commission met to consider community stakeholder feedback on the February 25, 2022 draft map. (ECF No. 24-16) ("Tr. Mar. 11 AM"). The meeting began with a statement by Commissioner Carollo challenging Commissioner Russell's residency in his District and thus qualification to partake in the redistricting vote; Commissioner Carollo was apparently responding to some public criticism regarding his own residency within District 3 and

concluded his remarks by reporting that he would abstain from the vote to prevent anyone later blaming him in any future court case over the redistricting.[13]

When the discussion finally turned to the redistricting plan, Commissioner Reyes again noted the overarching goal of the redistricting plan was to preserve the racial composition of the Commission with three Hispanic commissioners, one Black commissioner, and one white commissioner:

> The only race that we're gonna bring to this equation, I'm gonna tell you what it is. We have to keep diversity on this dais and that's why we have districts. And we have to say and do everything that is needed to make sure that there is diversity in this dais. If not, if we are not gonna do whatever it takes to have diversity in this dais, let's do away with the districts then and then everybody will be — we will have five Hispanics right here since we are 70% of the population. And in order to avoid that, the districts were created. And I will always — my main concern and I have said it and I repeat it — my main concern is to save that seat that now is occupied by Ms. King. And I will vote for any plan that will save that seat. Is that clear? So let's get race out of this.

(Tr. Mar. 11 AM at 44:2–10); *see also* (ECF No. 24-17, "Tr. Mar. 11 PM," at 8:8–21) (Commissioner Díaz de la Portilla).

De Grandy also presented on a revised plan that Commissioner Russell had asked him to look into that would keep Coconut Grove together, *see* (ECF No. 24-9) (accompanying slide-show presentation); De Grandy noted that that plan would still provide for a Black district and three Hispanic districts and comply with the VRA, (Tr. Mar. 11 AM at 52:12–16).

There was substantial public comment about keeping Coconut Grove together, including comments from Plaintiff Cooper and representatives from Plaintiffs Engage Miami and South Dade NAACP. The Commissioners also continued their discussion with De Grandy about compiling alternate maps, to include (i) the transfer of an unpopulated area back to District 5 containing a venue known as The Wharf Miami, (ii) what has been described as Commissioner

[13] Carollo did participate in the vote when it was ultimately conducted, not at this hearing.

Russell's plan, and (iii) a separate request from Commissioner Reyes. A final vote was deferred to March 24, 2022.

On March 24, 2022, the Commission again convened at a special session to discuss redistricting. (ECF No. 24-18, "Tr. Mar. 24"); *see also* (ECF No. 24-10) (De Grandy's contemporaneous presentation). De Grandy summarized the effect on racial demographics within the Commission Districts under the Commissioners' proposed plans, which included a proposal to retain the "Flagler on the River" development within District 5; Commissioner Russell's initial proposal to retain Natoma Manors and the West Grove south of U.S. Highway 1 within District 2 while transferring western Brickell to District 3, *see* (ECF No. 24-10 at 6) (visual representation); Commissioner Russell's revised proposed plan to retain the West Grove and Natoma Manors in District 2 and reduce the number of residents moved into District 3 by moving a smaller portion of western Brickell into that district, *see* (ECF No. 24-10 at 7) (visual representation); and Commissioner Reyes' revised plan to restore The Wharf to District 5, and restore the West Grove to District 2 while moving a strip of land from District 2 to District 3 from Natoma Manors north through Bay Heights and up to Simpson Park near Brickell, *see* (ECF No. 24-10 at 9). As to each of the proposed changes, De Grandy reported the racial demographics of the particular areas.

De Grandy represented that he and Cody believed that all of the alternative map configurations complied with the U.S. Constitution and the Voting Rights Act based on their analyses, but nonetheless recommended that additional changes be made to ensure that the BVAP in District 5 would be above 50%. (Tr. Mar. 24 at 8:5–9).

Public comment again focused on not splitting Coconut Grove between districts. In response to a public comment that the other commissioners should give deference to District 2's commissioner in the redistricting process because District 2 would be the most affected,

Commissioner Carollo suggested that the City should consider going back to city-wide commissioners, adding: "maybe that's what we need to do. Put a referendum, a charter amendment, that we go back and run citywide, like I did and won many, many times. So that everyone gets represented, we wouldn't have to worry about districts anymore. Now, if it happens, then you end up with five Hispanics, then don't cry." (Tr. Mar. 24 at 13:4–7).

Commissioner Carollo also asked a member of the public who had been part of the 1997 committee with De Grandy that designed the City's five single-member commissioner districts upon switching from city-wide districts if she remembered why the Little Havana, Shenandoah, Silver Bluff, and Flagami neighborhoods had been divided. (Tr. Mar. 24 at 37). She answered that the City switched to single-member commission districts in response to a federal lawsuit. (Tr. Mar. 24 at 37–38). Commissioner Carollo explained that in 1997, Coconut Grove was kept together in District 2 because:

> We could not have separated Coconut Grove and kept one Anglo district. In fact, what we had to do was what we're discussing today. To give Coconut Grove enough of a population, even though we were going from one end of the water all the way to the end of the city in the northeast, we had to cross across US 1 to give District 2, the Anglo district, more of a population to balance those populations. And this is why you and the committee recommended that Little Havana had to be broken up, Shenandoah, Silver Bluff, Flagami, and I could go on and on. And that's the only point that I'm trying to make.

(Tr. Mar. 24 at 38:9–15). Commissioner Carollo reiterated at the March 24, 2022 session that the districts in the 2022 redistricting process would have to be drawn so that Districts 1, 3, and 4 would be Hispanic districts, District 2 would be an Anglo access district, and District 5 would be a Black district:

> The only reason [District 5] doesn't take the rest [of Downtown Miami] is we need to keep a sliver on Biscayne Boulevard so that the northeast, the part of the northeast that's left, can be connected with Downtown and Coconut Grove, and Brickell etcetera. The reason we're having to do this is because the growth we've had – and we have to keep one district that is going to have a majority of African Americans.

> We're gonna have to keep one district that you can get an Anglo, whether they're an Anglo that's Japanese or an Anglo that's Russian, Ukrainian, Italian, Polish, English, French, they can get elected. And City of Miami still has a population that is at least 70%, maybe more, I don't know, maybe De Grandy can clarify that, that's Hispanic. And we have to keep three districts that are going to be majority-Hispanic. But since Hispanic comes in all types, colors, creeds, races, religions, not all think alike, not all act alike, we're trying – and based on the federal guidelines – are trying to keep those Hispanic-majority districts within those guidelines of people that are closer to each other so that three Hispanics could be elected in those districts too. And this is why we're going through that process.

(Tr. Mar. 24 at 56:12–57:1).

Commissioner Reyes reiterated these points and expressed that the purpose of the redistricting process in 2022 was to ensure that there would be a likelihood that an Anglo commissioner and a Black commissioner would be elected to the Commission to ensure diversity. (Tr. Mar. 24 at 38:23–39:20).

Commissioner Russell urged his colleagues to adopt his revised plan that would retain U.S. Highway 1 as the border between Districts 2, 3, and 4 north of Coconut Grove. (Tr. Mar. 24 at 65). He asserted that population equalization among the districts and the preservation of a Black resident numerical majority in District 5 required population to be shifted from District 2 to District 3. (Tr. Mar. 24 at 65). Commissioner Russell informed the other commissioners that his revised proposed plan would move areas in west Brickell racially similar into District 3 to the extent needed to equalize population. (Tr. Mar. 24 at 69).

Commissioner Carollo asserted that Commissioner Russell's plan would put at risk the ability of a Hispanic commissioner to be elected in District 3:

> it would put District 3 into the future in possible jeopardy – and Commissioner Russell knows that too – in bringing in a transplant from another part of the country, and because they speak a little Spanish and they smile all the time, they feel they can sneak in. Or they give a chance to another transplant that tried this time to run against me and crashed. And this district now is gonna be skewed where it's not gonna be clear on the kind of person that could get elected from it.

(Tr. Mar. 24 at 66:13–18). He explained that he did not want "to change the District 3 voting patterns, the types of people that are there with different people. I don't want to do that to District 4, nor to District 1. Just like I want to be able to leave District 2 where it could still elect a guy like you, if they want to. In District 5, that will be a majority-African American district." (Tr. Mar. 24 at 68:14–17).

Commissioner Díaz de la Portilla agreed that Commissioner Russell's revised proposed plan would, "in 2026 or '27, . . . disintegrate that Hispanic district, District 3." (Tr. Mar. 24 at 70:16–17). He stated that he had thought about demographic changes into the future and that he had "looked at my district will remain the same, whoever replaces me. That Commissioner Reyes' district will remain a Hispanic American seat. But Commissioner Carollo's district, whoever replaces him, it's jeopardized to having an Hispanic American commissioner. And that's wrong. There's no one here, me and you Commissioner Russell, that can argue this Commission should be majority non-Hispanic. The same way that we fought for you [looking at Commissioner King] Madam Chair, to be there, same way we fought for you [looking at Commissioner Russell] to be there, you have to fight for the majority of the city." (Tr. Mar. 24 at 70:22–71:6) (annotations in original). Commissioner Díaz de la Portilla urged that by incorporating western portions of Brickell into District 3 the Commission would be "shifting the balance of power in a Hispanic district to the east, you're jeopardizing its future." (Tr. Mar. 24 at 71:15); *see also* (Tr. Mar. 24 at 72:2). He expressed concern for the "future of this Commission, the future of this city" in that respect. (Tr. Mar. 24 at 71:18).

De Grandy explained that he did not move District 3 east into Brickell because doing so would result in "approximately forty-some percent Hispanic, going into a district that's approximately 88% Hispanic." (Tr. Mar. 24 at 75:12–13). He summarized, "Now, in any of the

plans is District 3 still a majority Hispanic district? The answer is yes. Is it stronger Hispanic district under the base plan, absolutely." (Tr. Mar. 24 at 75:20–21). De Grandy agreed with Commissioner Díaz de la Portilla that, for District 3, "the best move will be to go south and not to go east, because there are more people in Bay Heights that are more similar . . . than to the people that live at Brickell and East Little Havana," despite west Brickell being approximately evenly split racially among Hispanic and Anglo residents. (Tr. Mar. 24 at 78:14–18).

The Commission voted 3-to-2 to adopt the base plan while moving the unpopulated The Wharf into District 5. (Tr. Mar. 24 at 89–90).

Under the Enacted Plan, the racial demographics of the Commission Districts are as follows:

District	Black VAP	White VAP	Hispanic VAP
1	11.0%	3.5%	89.5%
2	7.2%	37.4%	48.6%
3	5.4%	7.7%	88.3%
4	3.1%	7.6%	89.5%
5	50.3%	10.5%	40.6%

Table 2. Demographics of the Commission Districts Under the Enacted Plan, by Voting Age Population. (Reproduced as reported in Abbott Rpt. at 5–6, ECF No. 24-31).[14]

For comparison, the racial demographics of the Commission Districts under the 2013 plan borders prior to the 2022 redistricting are as follows:

District	Black VAP	White VAP	Hispanic VAP
1	10.1 %	3.0%	91.0%
2	7.7%	34.5%	51.9%
3	5.6 %	7.4%	88.5%
4	2.9%	6.0%	91.6%
5	52.9%	7.8%	41.6%

Table 3. Demographics of the Commission Districts Under the 2013 Plan Borders, by Voting Age Population. (Reproduced as reported in Abbott Rpt. at 4, ECF No. 24-31)

[14] *See*, *supra* note 8, which states that the City's consultant's Initial Report explained that population percentages may exceed 100% because residents reported as being two or more races on the 2020 Census.

Specific geographic areas moved among the Commission Districts in the 2022 Enacted Plan are visually represented in the map below, which the Court has reproduced from the report of Plaintiffs' expert, Carolyn B. Abbott, Ph.D.

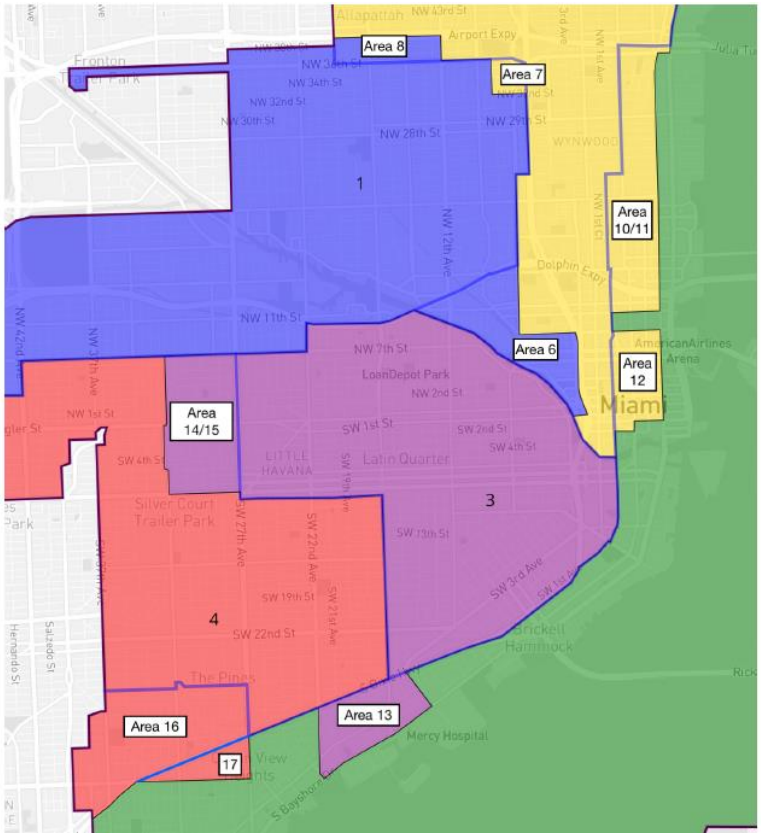


Figure 3. Areas Moved Between 2013 Plan and 2022 Enacted Plan. (Reproduced as depicted in Abbott Rpt. at 8).

Areas 10 and 11 above, which include the Midtown Miami development and the western portions of the Edgewater and Omni neighborhoods, and Area 12, which contains portions of Downtown Miami west of Biscayne Boulevard (including courthouses for the United States Court of Appeals for the Eleventh Circuit, this Court, and the Federal Detention Center in Miami ("FDC-Miami")), were moved from District 2 to District 5.

Area 13, which encompasses the Natoma Manors area, was moved from District 2 north into District 3.

Area 16, which encompasses Douglas Park, and Area 17, which contains portions of the West Grove, were moved from District 2 north into District 4.

Areas 14 and 15 in Little Havana were moved from District 4 to District 3.

Area 6, containing portions of Overtown and Spring Garden, along the Miami River was moved from District 5 to District 1.

And Areas 7 and 8 in Allapattah were exchanged between Districts 1 and 5, with Area 8 moved from District 5 south into District 1, and Area 7 moved east from District 1 into District 5.

De Grandy Memo to Mayor Suarez. As noted above, in response to the 2022 Enacted Plan, the ACLU of Florida submitted a second letter to the City, dated March 31, 2022 expressing concerns with the Enacted Plan. (ECF No. 24-29) (Mar. 31 ACLU Ltr.). The ACLU of Florida's second letter reiterated its earlier concern that the Commission had "adopted an arbitrary numerical demographic target for District 5" by selecting "a quota of 50% Black voting-age population (BVAP)" for that district. (Mar. 31 ACLU Ltr. at 2). The letter asserted that the adoption of that target was an "express racial target, divorced from such a functional analysis to determine what is necessary to achieve compliance with the Voting Rights Act," that overconcentrated Black voters in that district beyond what was required for Section 2 compliance because it neglected Black voters' voting patterns, voter turnout, and voter registration rates. (Mar. 31 ACLU Ltr. at 2–3). The second letter concluded that Black voters can "maintain an ability to elect candidates of their choice even if the BVAP were to drop below 50%." (Mar. 31 ACLU Ltr. at 3). The Mayor was urged to veto the Enacted Plan. (Mar. 31 ACLU Ltr. at 4).

The Mayor asked De Grandy to submit a Memorandum in response to the ACLU of Florida's second letter. *See* (ECF No. 50-12, "De Grandy Mem."). In his Memorandum, De Grandy asserted that District 5 is relatively compact as drafted. He also noted that the BVAP in

District 5 had decreased from 52.9% prior to redistricting, to 50.3% under the Enacted Plan. (De Grandy Mem. at 4). De Grandy's Memorandum asserted that Black voter registration rates and election turnout was factored into the analyses he and Cody had conducted. (De Grandy Mem. at 4). De Grandy asserted that the ACLU of Florida's second letter "ignores the fact that this plan is a plan for the next decade, not simply a snapshot in time" in light of development, growth, and gentrification in the City. (De Grandy Mem. at 5). De Grandy's Memorandum asserted that the ACLU of Florida's letter ignores that there are three majority-Hispanic districts, noted that Hispanic residents are also a protected class under the VRA, and warned that the ACLU of Florida's stance on "packing" could result in four majority Hispanic districts (as opposed to the current plurality in District 2), "and potentially a fifth district with roughly equal black and Hispanic population." (De Grandy Mem. at 5).

B. Expert Reports

Plaintiffs also submitted reports from two experts who concluded that the geographic areas moved between districts in the Enacted Plan were moved because of race and that there is some evidence of racially polarized voting in the City, respectively. The City in its Response challenges only the relevance of the inferences to be drawn from the findings in the two reports. The City has advanced no rebuttal expert of its own, apart from the testimony of its redistricting consultant, De Grandy, discussed in further detail below.

1. Carolyn B. Abbott, Ph.D.

Plaintiffs' first expert is Carolyn B. Abbott, Ph.D., an Assistant Professor in the Department of Political Science at Baruch College, City University of New York, in New York, New York. (ECF No. 24-31) ("Abbott. Rpt."). Her research and teaching focuses on American politics and public policy with emphasis on the state and local levels of government. (Abbott Rpt.

at 2). In her report, Abbott used data on voting-age populations ("VAP"), citizen voting-age populations ("CVAP"), and voting patterns within City electoral precincts to determine whether and to what extent race explains the shapes of the Commission Districts in the Enacted Plan. (Abbott. Rpt. at 1). Based on her analysis, Abbott concluded that the particular geographic areas moved between the districts in the Enacted Plan were moved on the basis of race, and that other geographic areas could have been moved without segregating the Commission Districts by race. (Abbott Rpt. at 2).

Abbott looked at VAPs by race at the block-level based on data from the 2020 Census, which was then aggregated to the precinct and "split-precinct" levels. (Abbott Rpt. at 3). She also looked at CVAPs by race, obtained from the 2019 American Community Survey 5-Year Estimates. (Abbott Rpt. at 3). According to Abbott, the City's 2013 commission map exhibited clear patterns of racial segregation, and the City needed to shift population out of District 2 after the 2020 Census. (Abbott Rpt. at 3–5). Abbott observed that "there was no statistical difference between VAP by race before and after redistricting at the district level," but that there were "significant patterns of change at a more granular level." (Abbott Rpt. at 5). The Court summarizes Abbott's findings with respect to each Commission District. A map identifying the specific areas noted in Abbott's report is reproduced above as Figure 3, *supra*.

Abbott observed that District 1 is a majority Hispanic district that only needed to gain minimal population as part of the 2022 redistricting process, but ended up growing relative to the other districts nonetheless. (Abbott Rpt. at 6). According to Abbott, the transfer of population between District 5 and District 1 was entirely motivated by race—the areas moved from District 5 to District 1 (Areas 6 & 8) had higher HVAP and lower BVAP proportions than the areas surrounding them that remained in District 5, whereas the area moved from District 1 to District 5

(Area 7) had a higher BVAP and a lower HVAP proportion than the areas surrounding it that remained in District 1.[15] (Abbott Rpt. at 6–7).

According to Abbott, areas moved out of District 2 were largely moved for racial reasons, as well. Areas moved from District 2 to District 5 (*e.g.*, Areas 10 and 11) had higher BVAP and HVAP proportions than the areas that remained in District 2. An area moved from District 2 to District 4 (the West Grove portion encompassed in Area 17) "differed markedly from the racial composition of the receiving District 4." (Abbott Rpt. at 9). Abbott also concluded that an area moved from District 2 to District 3 (Area 13), was notable because it resulted in District 3 being less compact; however, Abbott concluded that this area was not moved for racial reasons. (Abbott Rpt. at 10–12). Nonetheless, Abbott opined that other areas (Areas 14 and 15 in Little Havana) were moved from District 4 to District 3 to offset the lower proportion of Hispanic voters gained upon moving Area 13 (Natoma) from District 2 into District 3. (Abbott Rpt. at 11–12).

Abbott opined that explanations other than race do not account for the areas moved in the 2022 Enacted Plan. According to Abbott, partisan gerrymandering does not explain the geographic areas moved because the Commission elections are nonpartisan. Maintaining the partisanship of the district cores also did not explain the particular moves because the precincts moved did not resemble the receiving districts, based on voting patterns in the 2018 Florida gubernatorial election. That is, Abbott observed that the areas moved were either much more or much less likely to vote for the 2018 Republican Party gubernatorial candidate than the districts into which they were moved.

[15] These observations also were made when the precincts and "split-precincts" comprising the moved areas were analyzed: Abbott observed that the portions of the precincts split during the redistricting that remained in their prior district looked different in terms of VAPs from the other portions of those precincts that were moved. (Abbott Rpt. at 6–7).

Abbott also observed that the 2022 Enacted Plan is visually less compact than the 2013 plan, and thus maintaining compactness does not explain the moves.

Abbott also reviewed the alternative proposed maps that were not adopted which "tended to shore up existing racial compositions within individual Commission districts, particularly those of Districts 1, 2, and 5." (Abbott Rpt. at 16–21). Abbott nonetheless concluded that the Commission's 2022 Enacted Plan was "designed around racial and ethnic considerations." (Abbott Rpt. at 21). Abbott found "no evidence that any factors other than race and ethnicity affected the drawing of district lines" apart from a small portion of District 2 that was moved into District 3. (Abbott Rpt. at 21–22).

2. Bryant J. Moy, Ph.D.

Also before the Court is the expert report of Bryant J. Moy, Ph.D. (ECF No. 24-32) ("Moy Rpt."). Moy holds a Ph.D. in Political Science and currently serves as a Visiting Assistant Professor in the Department of Politics and as a Data Science Faculty Fellow in the Center for Data Sciences at New York University in New York, New York. (Moy Rpt. at 2). Moy's area of expertise relates to local government, race and ethnic politics, and the use of advanced statistical models to understand political phenomena. (Moy Rpt. at 2).

As part of his analysis, Moy examined twenty elections from between 2017 and 2021 to determine whether and to what extent racially polarized voting exists in the City.[16] (Moy Rpt. at 1). Moy summarized his conclusions as follows: (i) racially polarized voting existed in ten of those twenty elections; (ii) two of six municipal elections examined showed signs of racially polarized voting with the Latino-preferred candidate prevailing over the Anglo-preferred

[16] As the Supreme Court has explained, "[f]or purposes of § 2 [of the Voting Rights Act], the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates." *Gingles*, 478 U.S. at 62.

candidate; (iii) eight of fourteen federal, state, or county elections showed signs of racially polarized voting with Latino-preferred candidate prevailing over Black or Anglo-preferred candidates in five of the eight RPV elections; (iv) Latino-preferred candidates prevailed in a majority of the RPV elections, followed by Black-preferred candidates, and then Anglo-preferred candidates; and (v) there was overlap in the Black and Anglo-preferred candidates (six of ten of the RPV elections), but minimal overlap in the Black and Latino-preferred candidates (one of ten RPV elections). (Moy Rpt. at 2).

Moy estimated the proportion of Black, Anglo, and Hispanic registered voters required for their preferred candidate to prevail in the ten elections for which he found evidence of racially polarized voting. (Moy Rpt. at 42). He found that in elections where there was racially polarized voting, the Black preferred candidate would prevail when Black registered voters made up shares of as low as 5% of the registered voting population, to as high as approximately 49% of the registered voting population when racially polarized voting was more pronounced. *See generally* (Moy Rpt.). In none of the elections Moy examined in which he found racially polarized voting did he conclude that Black registered voters would need to make up more than 50% of the registered voter population for the Black preferred candidate to prevail.

C. Testimony of the City's Redistricting Consultant, Miguel De Grandy

At the March 29, 2023 Evidentiary and Preliminary Injunction Hearing, the City tendered as a witness its redistricting consultant for the 2022 redistricting cycle, Miguel De Grandy, Esq. De Grandy testified that he is an attorney who is a member of The Florida Bar and the Bar of this Court, whose practice focuses on legislative redistricting, among other areas.

On direct examination, De Grandy testified that the City Commission provided ranked criteria to direct the redistricting of the Commission Districts. These included complying with the

United States Constitution and the Voting Rights Act, maintaining the cores of the districts, voter cohesion, and maintaining traditional neighborhoods if feasible. The order of the criteria provided mattered, De Grandy testified, because some of the Commission's redistricting criteria were mutually exclusive of one another.

De Grandy noted his view that the Hispanic community in the City of Miami is not monolithic, as the new Commissioner elected in District 2, who is Hispanic, would likely not be elected in the more conservative Districts 1, 3, or 4, which have large Cuban-American populations. Regarding the Commissioners' continued reference to District 2 as an "Anglo" district, De Grandy testified that District 2 is, in actuality, majority Hispanic and is not an Anglo district.

De Grandy also testified to the Commission's priority of maintaining a BVAP majority of over 50% in District 5. De Grandy testified that, with each redistricting cycle, the Black population majority in District 5 has decreased. According to De Grandy, District 5 is undergoing gentrification, and thus the desire to preserve a BVAP majority in District 5 was determined in light of this population trend.

When asked why the Black Registered Voting Age Population percentage for District 5 is higher than the BCVAP, De Grandy explained that District 5 was redrawn to contain FDC-Miami.

De Grandy was asked about specific geographic areas that were moved as part of the redistricting plan adopted in the Enacted Plan.[17] The geographical triangle identified as Area 17 (the portion of the West Grove), De Grandy testified, was moved from District 2 to District 4 for population rebalancing. Area 6 along the Miami River near Overtown was described as a "natural"

[17] A visual depiction of the specific areas that were the subject of De Grandy's testimony are located in the March 24, 2022 Redistricting the City of Miami Commission presentation by De Grandy and Stephen Cody. *See* (ECF No. 24-10 at 4).

move from District 5 to District 1 because District 1 already included portions of the Miami River. And, according to De Grandy, Areas 14 and 15 were moved from District 4 to District 3 in Little Havana because Commissioner Carollo desired to have influence in those areas.

De Grandy testified that the geographic areas moved into District 5 were more cohesive with District 5. According to De Grandy, the eastern portions of the City of Miami located along the water constituted a community of interest that is more affluent and, in De Grandy's words, the population residing there is more concerned with "first world issues" and social justice, whereas the population of District 5 is more concerned with potholes and having parks in their neighborhoods. An area described as the "condo canyon" remained in District 2 whereas the blocks directly north and south were moved to District 5 out of concerns that this condo canyon would dilute the Black voting power in District 5. *See* Figure 3, *supra* (providing a visual representation of the "condo canyon" which is located between Areas 10/11 and Area 12).

Overall, De Grandy testified that, in his opinion, the alternative configurations and maps proposed by the individual Commissioners were all constitutionally compliant. However, he noted that none of those plans received majority support.

On cross-examination, De Grandy was asked whether he raised the possibility with the Commission of redrawing the electoral map from scratch/anew. Because the Commission ranked higher in preference the criterion of maintaining the cores of the existing districts, the criterion of maintaining neighborhoods together could not be achieved; De Grandy testified that that criterion had not been honored in prior redistricting processes. Rather, De Grandy testified that, once he had received instructions to maintain the cores of the existing districts, compact districts could not be drawn given the shape of the geographic borders of the City.

Regarding the BVAP for District 5, De Grandy testified on cross-examination to his belief

that compliance with the Voting Rights Act required a BVAP of more than 50% in District 5, irrespective of the Commission's expressed objective to that effect.

De Grandy testified on cross-examination that based on an analysis conducted by his co-consultant Cody, the *Gingles* preconditions were met for the Black and Hispanic populations in the City. When asked if the *Gingles* pre-conditions were met for the white population in the City, De Grandy responded that that population was not a protected class under the Equal Protection Clause.

De Grandy was also asked on cross-examination about gentrification and the potential impact of gentrification in District 5. He testified that no studies had been conducted to assess the potential impact of gentrification in that district, and that his assessment of the effects of gentrification were based on (i) his personal experience having grown up in the City, (ii) his general awareness of construction and land use permitting activity in the City, and (iii) his understanding of general demographic trends in the City. However, De Grandy testified that no models or studies were conducted to assess the extent to which the Black population in the City would decrease over the next 10 years. De Grandy testified that his concerns about gentrification were communicated to the individual Commissioners in separate meetings with them, but that those communications are shieled by the attorney-client privilege.

De Grandy further testified on cross-examination about the decision to move FDC-Miami, which is located in Area 12, from District 2 to District 5. According to De Grandy, Area 12 including FDC-Miami was moved at the request of the Commissioners to preserve a 50% BVAP in District 5.

III. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 65(a), the Court may enter a preliminary injunction

to preserve the status quo "until the merits of the controversy can be fully and fairly adjudicated." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990) (quoting *Am. Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 483 F.2d 1, 4 (5th Cir. 1973). To prevail on a motion for a preliminary injunction, a plaintiff must establish: "(1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). "Failure to show any of the four factors is fatal" to the preliminary injunction inquiry. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009) ("*ACLU of Fla.*").

The Eleventh Circuit has recognized that the first factor—a substantial likelihood of success on the merits—is "generally the most important" of the four factors. *Gonzalez v. Governor of Georgia*, 978 F.3d 1266, 1271 n.12 (11th Cir. 2020) (quoting *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005)). Moreover, "[t]he third and fourth factors 'merge' when, as here, the government is the opposing party." *Gonzalez*, 978 F.3d at 1271 (cleaned up) (quoting *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020)).

But courts must be mindful that "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *Keister v. Bell*, 879 F.3d 1282, 1287 (11th Cir. 2018) (quoting *ACLU of Fla.*, 557 F.3d at 1198). This is especially so where a plaintiff seeks a preliminary injunction over a legislative enactment, in which case a preliminary injunction must be entered "reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution

and by the other strict legal and equitable principles that restrain courts."[18] *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am.*, 896 F.2d at 1285.

IV. DISCUSSION

The Court's analysis broadly proceeds in four parts. First, the Court addresses the City's argument that Plaintiffs lack standing to bring their racial gerrymandering claim. Second, finding that Plaintiffs establish they have standing, the Court finds that Plaintiffs have met their burden that they are substantially likely to succeed in establishing that the drawing of Districts 1, 2, 3, 4, and 5 violates the Fourteenth Amendment's Equal Protection Clause. Third, the Court finds Plaintiffs are irreparably harmed absent the entry of a preliminary injunction. And fourth, the Court finds that the balance of the equities weighs in favor of the entry of a preliminary injunction. Accordingly, the undersigned recommends that a preliminary injunction issue.

A. Standing

For purposes of this Motion, the City raises standing only to argue that Plaintiffs are unable to establish irreparable harm, the second showing they must make to seek preliminary relief. But, because standing implicates the Court's subject matter jurisdiction, and therefore its power over this case, the Court must first assure itself of its jurisdiction before proceeding to the merits of Plaintiffs' Motion. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case."). Accordingly, the Court first takes up the City's argument, summarized above, that Plaintiffs lack standing to bring this action.[19]

[18] This is because, in such contexts, preliminary injunctions "interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am.*, 896 F.2d at 1285

[19] The Court's evaluation of Plaintiffs' standing is made for the limited purpose of providing this Report and Recommendations to the District Court.

In its Response, the City poses a string of seemingly rhetorical questions challenging Plaintiffs' standing to bring this action. Specifically, the City asserts that Plaintiffs lack standing because the First Amended Complaint fails to comply with procedural pleading requirements, on the grounds that it is a "shotgun pleading" under Eleventh Circuit jurisprudence. According to the City, the First Amended Complaint is a shotgun pleading because it alleges a single claim for the racial gerrymandering of all five Commission Districts, without specifying which district each individual Plaintiff resides in. Because, the City argues, the First Amended Complaint does not allege whether any individual Plaintiff resides in the particular parcels moved in the redistricting process, Plaintiffs fail to establish that their injuries are reparable, and thus treat themselves as "fungible." (ECF No. 36 at 21).

Article III of the United States Constitution vests the judicial power in the federal courts and limits that power to "Cases" and "Controversies." U.S. Const. art. III, §§ 1–2; *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016). A challenge to a plaintiff's standing to assert a claim presents a challenge to the Court's power to entertain the suit, as standing is one of the components of a justiciable case or controversy required for the Court to possess subject matter jurisdiction. *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cnty., Fla.*, 879 F.3d 1274, 1281 (11th Cir. 2018). To establish standing, the burden is on a plaintiff to show that that plaintiff: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

As relevant here, in actions alleging racial gerrymandering brought under the Fourteenth Amendment's Equal Protection Clause, it is well-established that "[w]here a plaintiff resides in a

racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (citing *Ne. Fla. Chapter, Associated Gen. Contractors of Am.*, 508 U.S. 656). However, a plaintiff only has standing to challenge as racially gerrymandered the district in which that plaintiff resides. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (citing *Hays*, 515 U.S. at 744–45) ("[A] plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that his own district has been so gerrymandered.").

Moreover, it is well-established that an association "has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc.*, 528 U.S. at 181 (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)); *see also Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268–71 (2015) ("*ALBC*") (reversing district court's *sua sponte* finding that state-wide political caucus lacked standing in racial gerrymandering case where common-sense supported an inference that the state-wide political caucus had members in every district based on the testimony of its representative that it had members in every county and the organization's representations regarding the purpose of its founding).

The City's challenge to Plaintiffs' standing on the ground that the First Amended Complaint is a shotgun pleading is a matter of procedural compliance implicating the rules for pleading under Federal Rules of Civil Procedure 8(a) and 10(b). This procedural pleading concern is distinct from the more substantive constitutional concern of Plaintiffs' standing to bring this

case, which goes to subject matter jurisdiction and the heart of the Court's power to hear this dispute under Article III of the United States Constitution. Indeed, whether the First Amended Complaint is a shotgun pleading relates to whether that pleading gives adequate notice to the City of Plaintiffs' claim, not whether Plaintiffs have Article III standing. *See Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1323 (11th Cir. 2015) ("The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests."). In any event, the Court need not resolve whether the First Amended Complaint is a shotgun pleading to determine that Plaintiffs have standing to bring their claim, because Plaintiffs' standing is supported by the record.

Here, Plaintiffs expressly pled in the First Amended Complaint that the organizational plaintiffs each have members residing in multiple of the five Commission Districts. Plaintiff GRACE has members residing in Districts 2 and 4, Plaintiff Engage Miami has members residing in all five Commission Districts; Plaintiff South Dade NAACP has members residing in Districts 2, 3, and 4; and Plaintiff Miami-Dade NAACP has members residing in all five districts. (Am. Compl. ¶ 23). Moreover, the First Amended Complaint alleges that Plaintiff Cooper resides in District 2, Plaintiff Johnson resides in District 3, Plaintiff Miro resides in District 3, Plaintiff Contreras resides in District 4, and Plaintiff Valdes resides in District 5. (Am. Compl. ¶¶ 25–29). These averments all are supported by Plaintiffs' declarations: representatives from the organizational Plaintiffs each have submitted declarations attesting that their organizations have members residing in the five Commission Districts.[20] These declarations also attest to the

[20] *See* (ECF No. 24-33 at ¶ 4) (attesting that GRACE has members living in Districts 2 and 4); (ECF No. 24-34 at ¶ 4) (attesting that Engage Miami has members living in each of the five districts); (ECF No. 24-35 at ¶ 5) (attesting that South Dade NAACP has members living in Districts 2, 3, and 4); (ECF No. 24-36 at ¶ 5) (attesting that Miami-Dade NAACP has members living in Districts 1, 2, 3, and 5).

organizational Plaintiffs' missions, local natures, and focuses. *See ALBC*, 575 U.S. at 270–71. The individual Plaintiffs have likewise submitted signed declarations supporting their averments that they reside in the challenged districts.[21] No evidence has been advanced to the contrary.

Well-established authority does not, as the City argues, require that a plaintiff reside in the particular or specific parcels or geographic areas that were moved between districts as part of the Enacted Plan. As explained in further detail below, the focus of a racial gerrymandering claim is the challenged *district*. *See ALBC*, 575 U.S. at 262. Thus, Plaintiffs need not reside in the particular parcels and geographic areas moved among the Commission Districts as part of the Enacted Plan to establish standing to bring their claim in this case.

Accordingly, the Court will not recommend a finding that Plaintiffs lack standing, and thus the Court turns to the four factors Plaintiffs must establish to obtain a preliminary injunction.

B. Substantial Likelihood of Success on the Merits

At the outset and to frame the analysis that follows, the Court begins by noting that the sole claim raised in the First Amended Complaint asserts that *all* of the five Commission Districts are unconstitutional racial gerrymanders, in violation the Fourteenth Amendment's Equal Protection Clause. (Am. Compl. ¶¶ 358–364). Plaintiffs do not here assert any statutory claim arising under the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (as codified in Title 52 of the United States Code).

As described in further detail below, the Court must determine whether race was the predominant factor that the City considered in drawing the borders of each of the five Commission Districts. The determination must be made as to each Commission District, district-by-district,

[21] *See* (ECF No. 24-37 at ¶ 1) (Plaintiff Cooper – District 2); (ECF No. 24-38 at ¶ 1) (Plaintiff Johnson – District 3); (ECF No. 24-39 at ¶ 1) (Plaintiff Miro – District 3); (ECF No. 24-40 at ¶ 1) (Plaintiff Contreras – District 4); (ECF No. 24-41 at ¶ 1) (Plaintiff Valdes – District 5).

and not as to the Enacted Plan as a whole. *ALBC*, 575 U.S. at 262 ("A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district."). Finding that race was the predominant factor the Commission considered in drawing each of the five Commission Districts, the burden shifts to the City to show that the City's use of race in designing the districts withstands strict scrutiny. However, the City did not argue or present evidence that the consideration of race in the design of Districts 1, 2, 3, and 4 withstands strict scrutiny. The Court accordingly finds that the City has not met its burden and thus Plaintiffs are likely to prevail on showing that the City's consideration of race in drawing the borders of Districts 1, 2, 3, and 4 violates the Fourteenth Amendment's Equal Protection Clause. And because the City's consideration of race in drawing the borders of District 5 was not narrowly tailored to comply with the VRA, the Court finds that the consideration of race in the design of District 5 does not withstand strict scrutiny.

The Court takes a moment to recognize the unusual circumstance this case presents. As the Commissioners' explicit statements during the 2022 redistricting process reveal, their primary concern in this redistricting process was to ensure the preservation of a Commission to which three Hispanic, one Black, and one Anglo commissioner could be elected. The goal was expressed in laudable terms: the City of Miami is an ethnically and racially diverse majority-minority city. Indeed, approximately 70% of its residents are Hispanic, 16% are Black non-Hispanic, and 12% are white non-Hispanic. (Init. Rpt. at 7). Thus, the Commissioners' expressed intent was to draw the borders of the Commission Districts to facilitate the election of commissioners who reflect that diversity—maximizing the Hispanic populations in Districts 1, 3, and 4; preserving the core of District 2 so that an Anglo commissioner had a high probability of being elected; and drawing District 5 as a district in which Black voters had an opportunity to elect preferred candidates. But

in that regard, race and ethnicity came close to being the *only* factors that the Commissioners considered during the six public redistricting sessions over 5 months. The law generally does not permit race to predominate in the drawing of districts unless there is a compelling reason to do so. And to that end the City misapprehended that, because it was required consider race in drawing District 5, it therefore could consider race in drawing the other four districts. The City does not argue in defense against Plaintiffs' Motion that any compelling reason existed for race to predominate in the drawing those other four Commission Districts. And as to the fifth—District 5—there is no evidence in the record before this Court of the kinds of analyses required to guide the City's consideration of race in drawing the borders of that district.

The Court turns to the law governing Plaintiffs' claim.

1. Legal Framework

"The Equal Protection Clause prohibits a State, without sufficient justification, from 'separat[ing] its citizens into different voting districts on the basis of race.'"[22] *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). As the United States Supreme Court has reiterated, "districting maps that sort voters on the basis of race 'are by their very nature odious.'" *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993)). This is because, "[w]hen the [government] assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"

[22] It is well-established that political subdivisions of a state, including the City in the instant action, must comply with the Fourteenth Amendment. *See Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 480 (1968) ("Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment."); *see also Jacksonville Branch of NAACP v. City of Jacksonville*, --- F. Supp. 3d ---, No. 3:22-CV-493-MMH-LLL, 2022 WL 7089087, at *5 n.9 (M.D. Fla. Oct. 12, 2022), *appeal dismissed*, No. 22-13544-HH, 2023 WL 2966338 (11th Cir. Jan. 12, 2023) ("*Jacksonville I*").

Miller, 515 U.S. at 911–12 (quoting *Shaw*, 509 U.S. at 647). Indeed, the Supreme Court has described "[t]he harms that flow from racial sorting [to] 'include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group.'" *Bethune-Hill*, 580 U.S. at 187 (quoting *ALBC*, 575 U.S. at 263).

Courts engage in a two-step analysis when a voter sues government officials for "drawing such race-based lines[.]" *Cooper v. Harris*, 581 U.S. 285, 291–92 (2017). "First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id.* at 291 (quoting *Miller*, 515 U.S. at 916). Second, "if racial considerations predominated over others," the burden shifts to the state to establish that "the design of the district . . . withstand[s] strict scrutiny." *Id.* at 292 (citing *Bethune-Hill*, 580 U.S. at 193). That is, "[t]he burden thus shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Id.* While the Court's application of law is reviewed *de novo*, "the court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error." *Id.* at 293.

In this case, Plaintiffs allege in their First Amended Complaint that race was the predominant factor considered in the drawing of all of the five Commission Districts. "Racial gerrymandering claims proceed 'district-by-district.'" *Bethune-Hill*, 580 U.S. at 191 (quoting *ALBC*, 575 U.S. at 262). That Plaintiffs in essence bring a "whole map challenge," as the City argued at the March 29, 2023 hearing, does not preclude the instant action. No Supreme Court precedent the Court is aware of forbids Plaintiffs from challenging all five of the Commission Districts in this action. Rather, Supreme Court precedent appears to contemplate that possibility,

so long as Plaintiffs comply with the standing and evidentiary requirements that their challenges be brought with respect to the districts within which they reside and on a district-by-district basis. *See ALBC*, 575 U.S. at 263 (emphasis in original) (internal citations omitted) ("Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district. And voters might make the claim that *every* individual district in a State suffers from racial gerrymandering. But this latter claim is not the claim that the District Court, when using the phrase "as a whole," considered here."). Plaintiffs may, and do, in essence challenge the map as a whole by challenging each Commission District, district-by-district. *See id.* The Court thus turns to the first step of the analysis—whether race predominated.

2. Whether Race Predominated

The Court finds that Plaintiffs are substantially likely to prevail in establishing that race was the predominant factor considered in the drawing of each of the five Commission Districts.

At the outset, the Court finds that race was the predominant factor considered in the design of District 5. Neither side disputes that District 5 was designed to preserve a BVAP of more than 50%. Indeed, throughout the City's Response, the City argues that Section 2 of the VRA required the City to draw the borders of District 5 such that it has a BVAP of more than 50%—the City argues that Plaintiffs have conceded this point. Moreover, at the March 29, 2023 hearing, the City agreed that the design of District 5 must withstand strict scrutiny—inherent in that agreement is the recognition that race was the predominant factor considered in the drawing of District 5. Thus, the Court finds that race was the predominant factor in the design of District 5. *See ALBC*, 575 U.S. at 267 (explaining that "expressly adopt[ing] and appl[ying] a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines").

Accordingly, the following analysis focuses on whether Plaintiffs are substantially likely to establish that race was the predominant factor considered in the drawing of Districts 1, 2, 3, and 4. The Court makes such a finding. *See Miller*, 515 U.S. at 911–12 (quoting *Shaw*, 509 U.S. at 647) ("When the [government] assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"). The principles governing that determination are as follows.

a. Applicable Law

Plaintiffs, through direct evidence of legislative intent and/or circumstantial evidence of a challenged district's shape and demographics, bear the burden of "demonstrating that the [City] 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.'" *Cooper*, 581 U.S. at 291. "The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill*, 580 U.S. at 189–90. The City's efforts to create districts of approximately equal population are not considered when conducting a racial predominance analysis. *See ALBC*, 575 U.S. at 272 (stating that that factor "is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met").

As noted above, the burden lies with Plaintiffs at this step, not the City. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 945 (N.D. Ala. 2022). That burden has been described as demanding. *See, e.g.*, *Cooper*, 581 U.S. at 319 (citing *Easley v. Cromartie*, 532 U.S. 234, 241 (2001)). Indeed, the Supreme Court has emphasized that federal courts must "exercise extraordinary caution in

adjudicating claims that a State has drawn district lines on the basis of race." *Bethune-Hill*, 580 U.S. at 187 (internal quotation marks omitted) (quoting *Miller*, 515 U.S. at 916). "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915.

"Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a . . . legislature must be presumed." *Id.* (internal citations omitted). As the Supreme Court has explained, "redistricting differs from other kinds of [governmental] decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of . . . a variety of other demographic factors." *Bethune-Hill*, 580 U.S. at 187 (alteration and emphasis in original) (quoting *Shaw*, 509 U.S. at 646). Despite the awareness, racial considerations must nonetheless not be the motivating factor in the redistricting process. *Miller*, 515 U.S. at 916 ("The distinction between being aware of racial considerations and being motivated by them may be difficult to make.").

To determine legislative intent, courts look to the relevant evidentiary factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488 (1997) ("In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance."). The evidentiary factors, as recently summarized by the Eleventh Circuit, with supplementation, are:

> (1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators. And, because these factors are not exhaustive, the list has been supplemented: (6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives.

Greater Birmingham Ministries v. Sec'y of State for State of Ala., 992 F.3d 1299, 1321–22 (11th Cir. 2021).

As the Supreme Court has explained, the "ultimate question remains whether a discriminatory intent has been proved in a given case." *Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018). Thus, any evidence of past discrimination in the form of "historical background" is but one factor that is considered and does not change the presumption of legislative good faith. *See id.* at 2324. Moreover, "*Arlington Heights*'s 'historical background' factor should be 'focus[ed] . . . on the specific sequence of events leading up to the challenged decision' rather than 'providing an unlimited lookback to past discrimination.'" *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (alterations in original) (quoting *Greater Birmingham Ministries*, 992 F.3d at 1325).

Nonetheless, "[r]ace may predominate even when a reapportionment plan respects traditional principles . . . if '[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill*, 580 U.S. at 189 (alterations in original) (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996)). Evidence of a bizarre shape or a conflict or inconsistency between an enacted plan and traditional redistricting principles may be "persuasive circumstantial evidence" that tends to show that race predominated in the design of a district. *Id.* at 189–90. The Supreme Court has explained that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering." *Id.* at 190. However, "such evidence loses much of its value when the [government] asserts partisanship as a defense, because a bizarre shape . . . can arise from a 'political motivation' as well as a racial one." *Cooper*, 581 U.S. at 308. Where such a defense is raised, the Court must "must make 'a sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to

disentangle race from politics and prove that the former drove a district's lines." *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999)).

b. Analysis

The evidence before the Court supports a finding that Plaintiffs are substantially likely to succeed in establishing that race predominated in drawing the borders of Districts 1, 2, 3, and 4. The Court need not look much beyond what a majority of the Commissioners expressly stated on the record at public meetings regarding their understanding of historical redistricting cycles and their goal for the 2022 redistricting process resulting in the Enacted Plan. Indeed, on multiple occasions, a majority of the Commissioners expressed that their main concern for the redistricting process was to ensure that there would be three Hispanic commissioners, one Black commissioner, and one Anglo commissioner on the Commission, consistent with past redistricting cycles and the reason the City switched from city-wide commissioners to single-member commissioner districts. Those Commissioners reiterated that priority to the retained consultant tasked with proposing the redistricted map, as recounted above. And he acknowledged that he took instruction from the majority of Commissioners.[23] The resulting shapes of each of the individual Commission Districts adopted in the Enacted Plan and the racial demographic data before the Court for the Commission Districts reflects that the City achieved that goal by ensuring that the HVAPs in Districts 1, 3 and 4 were as high as possible, and through the preservation of the core of District 2. The Court nonetheless considers all the relevant *Arlington Heights* factors and begins with the presumption that the City acted in good faith in the most recent redistricting cycle.

Historical Background, Contemporaneous Statements of Key Commissioners, and Sequence of Events Leading to the Passage of the Enacted Plan. The Court begins with

[23] *See* (ECF No. 24-11) (Tr. Nov. 18 at 17:9–15).

statements by the Commissioners made during the 2022 redistricting process. Given the intertwined nature of the historical background and the statements of key commissioners, the Court assesses these factors together. In this case, a majority of the Commissioners unambiguously expressed on the record, at six legislative sessions held over the course of approximately 5 months, their understanding of the City's switch from city-wide commissioners to single-member commission districts, their understanding of how that switch factored into prior redistricting cycles, and their intention for how that switch would factor into the 2022 redistricting process culminating in the Enacted Plan.

The Court is mindful that its assessment of the *Arlington Heights* historical background factor should be focused on the specific sequence of events that led up to the Enacted Plan rather than an unlimited lookback to past discrimination. *See League of Women Voters of Fla.*, 32 F.4th at 1373. In this respect, the record contains evidence of contemporaneous news coverage regarding the City's 1997 switch to single-member districts, as well as news coverage, legislative documents, and consultant reports from the 2013 redistricting process. *See* (ECF Nos. 24-42 through 24-79).

But the Court need not delve into that historical evidence in this case because the Court need not draw inferences from that historical evidence. *Cf. Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *41 (citing *Abbott*, 138 S. Ct. at 2327) ("[T]he Court considers the 2011 historical evidence only to the extent it gives rise to inferences regarding the intent of the City Council in 2022."). This is because a majority of the Commissioners during the 2022 redistricting process expressly discussed their own understanding of the historical context that informed their decision-making. That is, a majority of the Commissioners were abundantly clear on the record in *this* 2022 redistricting process that the City had switched from city-wide commissioners to single-member commissioner districts in the past to ensure there would be three Hispanic Commissioners, one

Black Commissioner, and one Anglo Commissioner. *See, e.g.*, (Tr. Nov. 18 at 15:22–16:22); (Tr. Nov. 18 at 28:2–29:3); (Tr. Dec. 9 at 14:5–14); (Tr. Dec. 9 at 24:8–10); (Tr. Feb. 7 at 50–51); (Tr. Feb. 7 at 54:5–15); (Tr. Feb. 7 at 67:19–68:9); (Tr. Mar. 11 PM at 8:8–21); (Tr. Mar. 24 at 56:12–57:1); (Tr. Mar. 24 at 38:23–39:20).

The Commissioners' statements speak for themselves and are recounted at great length above. *See* Section II.A, *supra*. The City asserts that the Commissioners' discussion of race was in reference to the political cohesiveness of minority groups. It was not so limited, as the passages above reveal. There was indeed some discussion of voter cohesion, including guidance to the consultant to consider evidence of voter cohesion. However there is a dearth of evidence that voter cohesion was in fact analyzed or considered in the Commissioners' approval or revisions to the consultant's proposed plans.

The City also asserts that "[t]he test for racial gerrymandering is not merely whether race was discussed, but whether it actually resulted in a racial gerrymander of a significant number of voters." (ECF No. 36 at 17) (emphasis omitted). The evidence reveals not only that race was discussed but that the Commissioners themselves characterized the district map as a product of gerrymandering. Indeed, Commissioner Carollo expressly stated on the record that District 2 under the prior plans had been intentionally gerrymandered to be an Anglo district. (Tr. Feb. 7 at 51:10–15) ("It was gerrymandered but it was a legal gerrymander so that you would have an Anglo elected commissioner."). At another session, Commissioner Carollo explained that, not only was District 2 historically gerrymandered, but also the Commission had "gerrymandered and broke[n] up numerous neighborhoods into the other three – in the other three districts, and particularly District 3 and District 4." (Tr. Feb. 25 AM at 60:17–61:22); *see also* (Tr. Feb. 25 PM at 22:14–23).

The record in this case for the 2022 redistricting process contains substantial evidence that a majority of the Commissioners believed the cores of the existing districts had been intentionally designed with race as the predominant factor considered in that design, such that the composition of the Commission would be three Hispanic Commissioners, one Black Commissioner, and one Anglo Commissioner.

Nonetheless, and putting aside achieving substantially equal populations which is part of the redistricting background, *see ALBC*, 575 U.S. at 272, the Commissioners ranked preserving the cores of the existing districts as their top redistricting priority. (Tr. Nov. 18 at 35–36). This supports a finding that their intent was, as expressed, to preserve previously-drawn race-based lines of the Commission Districts in the 2022 redistricting process.

Indeed, the Commissioners were clear that they intended to honor in the 2022 redistricting process the overarching plan created in the late 1990s—that there would be three Hispanic districts, one Black district, and one Anglo district. *See, e.g.*, (Tr. Dec. 9 at 22:21–23:7) (Carollo); (Tr. Dec. 9 at 24:8–10) (Carollo); (Tr. Feb.7 at 52:18–53:2) (Carollo); (Tr. Feb. 7 at 71:16–17) (Reyes); (Tr. Mar. 24 at 38:23–39:20) (Reyes); (Tr. Feb. 7 at 67:19–68:9) (Reyes).

Commissioner Díaz de la Portilla repeatedly spoke of maintaining the ethnic integrity and avoiding the dilution of the majority-Hispanic districts—Districts 1, 3, and 4. *See, e.g.*, (Tr. Dec. 9 at 6:13–15) ("[T]o maintain the integrity of each district, we sort of could figure out how these three districts, right, 1, 3, and 4 could be kept whole, for a lack of a better term, without going into District 2 and other areas like that."); *see also* (Tr. Dec. 9 at 7:2–3); (Tr. Dec. 9 at 10:4–10); (Tr. Dec. 9 at 13:8–14:1). Again, after describing the relative "purities" of Districts 1, 3, and 4, Commissioner Carollo noted the danger to the balance and harmony of the City of changing one or two "of the Hispanic seats." (Tr. Dec. 9 at 14:5–14). He also expressly stated that it was his

"main interest in my district and your district Commissioner Díaz de la Portilla and Mr. Reyes' district is that I'm sure that we're going to keep the balance of the Hispanic population where we're going to be getting Hispanics elected there." (Tr. Dec. 9 at 22:21–23:7). Indeed, and for example, Commissioner Russell's revised plan, which would have extended District 3 east into parts of Brickell and not south into Coconut Grove, was rejected because it purportedly put at risk the ability of a Hispanic commissioner to be elected in District 3. *See* (Tr. Mar. 24 at 66:13–18) (Carollo); (Tr. Mar. 24 at 70:16–17, 71:15) (Díaz de la Portilla). De Grandy agreed that District 3 was a "stronger Hispanic district" under the base plan and not under Commissioner Russell's revised plan. (Tr. Mar. 24 at 75:20–21).

Moreover, while the record reflects that Commissioners Reyes and Carollo were cognizant of the need to shift residents out of District 2 into neighboring districts, they were also expressly concerned with ensuring that District 2 would remain a competitive district that an Anglo would have a high probability of winning. *See* (Tr. Feb. 25 PM at 19:13–20:12) (Reyes); (Tr. Mar. 24 at 38:23–39:20) (Reyes); (Tr. Mar. 24 at 68:14–17) (Carollo). Commissioner Reyes told De Grandy the "most important question" the Commission had was whether the racial breakdown for both Districts 2 and 5 "was the best [De Grandy] can do to protect the African American seat? I'm gonna be blunt and the Anglo seat, but more important, the African American seat?" (Tr. Feb. 7 at 67:19–68:9). Commissioner Reyes also committed to making sure that Anglos would have someone sitting on the Commission who looked like them. (Tr. Feb. 7 at 71:16–17). This was despite De Grandy informing the Commission at the first session in November 2021 that white voters are not a protected class under the VRA. (Tr. Nov. 18 at 12:3–5).

This understanding of the historical background, and the explicit intention to draw the borders of Districts 1, 2, 3, and 4 to preserve the "ethnic integrity" of Districts 1, 3, and 4 and

preserve District 2 as a district where an Anglo could be elected, all was repeated on the record on multiple occasions across six sessions of the Commission over a period of 5 months, from November 2021 through March 2022. And in deference to the Commissioners' repeated emphasis on retaining the cores of the existing districts as much as possible, De Grandy's presentations of the preliminary plans focused on the racial breakdown of the proposed districts. (Tr. Feb. 7 at 8); (Tr. Feb. 25 AM at 6:1–19). As set forth below with respect to the "impact of the challenged law" factor, the 2022 Enacted Plan largely did preserve the racial breakdown of the prior districts, with three majority HVAP districts, one majority BVAP district, and one district with approximately 37% WVAP.

The Commissioners also unambiguously expressed that neighborhoods would be split to preserve the racial balance of the Commission. As noted above, Commissioner Carollo expressly stated at the February 7, 2022 Commission session that, if neighborhoods could not be separated, "[t]hen the outcome of that would be that guys like— that look like us, with last names like us, in the near future might not be elected necessarily from the districts that we represent." (Tr. Feb. 7 at 54:15–17). Commissioner Díaz de la Portilla and Commissioner Reyes echoed that traditional Hispanic neighborhoods had been broken up to preserve the racial balance of the Commission. *See, e.g.*, (Tr. Mar. 24 at 79:17–20) (Díaz de la Portilla); (Tr. Mar. 24 at 38:23–39:20) (Reyes). In this respect, the Commission disregarded its redistricting priority of keeping traditional neighborhoods together whenever feasible—the evidence before the Court is that this traditional redistricting criterion was set aside to preserve the racial composition of the Commission. *See Bethune-Hill*, 580 U.S. at 190–91 ("In general, legislatures that engage in impermissible race-based redistricting will find it necessary to depart from traditional principles in order to do so.").

Indeed, Commissioner Carollo urged his colleagues that compromise and the splitting up of traditional neighborhoods would be required to carry forward the overarching goal of preserving the racial composition of the Commission Districts and of the Commission.

The intention of preserving Districts 1, 3, and 4 as majority-Hispanic districts and District 2 as a district in which an Anglo could be elected was expressed by a majority of the Commissioners. The Court does not here impute the expressed intentions of one influential councilmember to a 19-member council as a whole. *Cf. Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-13544, 2022 WL 16754389, at *4 (11th Cir. Nov. 7, 2022) ("*Jacksonville II*") (finding that the district court did not afford too much weight to the statements of one councilmember who "was a key figure in the nineteen-member Council," the appellants' expert supported that conclusion, and "numerous direct quotes . . . suggested race was a primary motivating factor for that councilmember").

In its Response, the City denies that the Commissioners' references to political cohesion throughout the redistricting cycle were not, as Plaintiffs allege, code for race but rather evidence of the City's prioritization of political cohesion. (ECF No. 36 at 16). The City argues that such partisan gerrymandering is not justiciable. (*Id.*). Indeed, the Court must take care when there are claims of partisan as opposed to racial gerrymandering. But there is an absence of evidence that the Commissioners actually considered political cohesion when discussing race—there is instead an abundance of evidence in the record that "cohesion" was used as a proxy for race, despite De Grandy's efforts to rephrase the Commissioners' comments. And in any event, Abbott opined that partisan gerrymandering did not explain the designs of the Commission Districts. *See* (Abbott Rpt. at 12–13). No rebuttal expert evidence has been adduced to the contrary.

The Commissioners were clear on the record that the priority of preserving the cores of the existing district, the preservation of the ethnic integrity of Districts 1, 3, and 4 as majority-Hispanic districts, the preservation of District 2 as a district where an Anglo could be elected, and the splitting up of neighborhoods, all was in furtherance of the wider goal of preserving three Hispanic seats, one Black seat, and one Anglo seat on the Commission. As the Court noted above, ensuring diversity of representation is undoubtedly a laudable goal. But where a government opts to preserve district cores to maintain the race-based lines created in previous redistricting cycles, "[t]he Supreme Court has been equally clear that this is not a legitimate objective." *Jacksonville II*, 2022 WL 16754389, at *3 (citing *See North Carolina v. Covington*, 138 S. Ct. 2548, 2551 (2018) (per curiam)) (denying emergency motion to stay on appeal preliminary injunction entered against the City of Jacksonville, on the ground that the City of Jacksonville was not likely to succeed on the merits of their appeal of the district court's preliminary injunction). Indeed, the evidence before the Court is that the Commissioners here "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria[.]" *ALBC*, 575 U.S. at 267.

Accordingly, the Court finds that these three *Arlington Heights* factors weigh strongly in favor of finding that racial considerations predominated in the City's drawing of Districts 1, 2, 3, and 4.

Impact of the Challenged Law. The shapes of the borders, the racial makeup of the Commission Districts, and the splitting up of neighborhoods, all support a finding that race predominated in the City's design of Districts 1, 2, 3, and 4 and that these districts were drawn in furtherance of the Commission's express goal to preserve the composition of the Commission as having three Hispanic seats, one Black seat, and one Anglo or Anglo-access seat.

"In the context of redistricting, the Court judges the impact of the law by examining the [c]hallenged [d]istricts' shapes and demographics." *Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *37.

Shape and Racial Demographics of District 2. The Court begins its analysis of this factor with District 2 because of its connection to District 5. Starting with the shapes of the districts, the Court finds that District 2 is not compact. A visual inspection of the map of District 2 under the Enacted Plan reveals that it is a relatively thin strip confined to the coast, extending from the northeast in the Morningside area, south through Edgewater, the eastern portion of Downtown and the eastern portion of Brickell, and continuing southwest along the water through Coconut Grove to the southern border of the City. *See* Figure 1, *supra*. As discussed above, neighborhoods were split in the design of District 2: Edgewater and Downtown Miami have been split between Districts 2 and 5. According to Plaintiffs' expert, Abbott, the portions of Edgewater moved from District 2 to District 5, identified as Areas 10 and 11, had lower a lower WVAP proportion and greater BVAP and HVAP proportions than the areas around them that remained in District 2. (ECF No. 24-31) (Abbott Rpt. at 8–9).

A "condo canyon" south of Interstate I-395 and the MacArthur Causeway between Downtown Miami and the Omni area, bounded by Northwest 1st Avenue, Northwest 8th Street, and Northwest 10th Street, bulges into District 5—De Grandy testified on cross-examination that this "condo canyon" was kept in District 2 whereas all the areas around it were moved into District 5 out of concerns that moving the "condo canyon" would dilute the Black vote in District 5. Notably, De Grandy testified at the March 29, 2023 hearing that the border between District 2 and District 5 was redrawn so that District 2 lost and District 5 now includes parcels home to FDC-

Miami, the federal temporary detention center across the street from this Court. But only a few blocks north of FDC-Miami is the "condo canyon" that was retained in District 2.

Indeed, the City does not rebut that District 2 was designed and later preserved, as discussed in further detail above, as an Anglo district or district where an Anglo could be elected, apart from arguing that District 2 necessarily was racially gerrymandered to preserve the Black majority in District 5 that has shrunk with each redistricting cycle. As set forth in Table 2, *supra*, District 2 has the highest WVAP proportion of all the Commission Districts, at 37.4%. (Abbott Rpt. at 5–6). This represents an increase: prior to the 2022 redistricting under the borders in place from the 2013 plan, the WVAP in District 2 was 34.5%. *See* Table 3, *supra*; *see also* (Abbott Rpt. at 4). District 2's HVAP and BVAP proportions are 48.6% and 7.2%, respectively, under the 2022 Enacted Plan. Under the 2013 plan borders prior to the 2022 redistricting process, the HVAP in District 2 was 51.9%.

Accordingly, based on the evidence in the record, this factor weighs in favor of finding that race predominated in the design of District 2.

Shapes and Racial Demographics of Districts 1, 3, and 4. As to Districts 1, 3, and 4, the Court does not find upon visual inspection of those districts that Districts 1, 3, and 4 are facially non-compact. *See* Figure 1, *supra*. Plaintiffs have not adduced quantitative evidence assessing the compactness of the Commission Districts. Nonetheless, the Court notes some irregular features in the shapes of those districts. The Court finds that the particular lines drawn in designing these districts and the resulting racial demographics weigh slightly in favor of a finding that race predominated in the designs of Districts 1, 3, and 4.

Indeed, the City's redistricting consultant, De Grandy, agreed generally on cross-examination that once he had received instructions to maintain the cores of the existing

districts, compact districts could not be drawn given the shape of the geographic borders of the City. As noted above, De Grandy responded in the affirmative to Commissioner Díaz de la Portilla's question that it was a "foregone conclusion" that "[i]f you want to have an African American district and you want to have an Anglo district it's almost impossible. To emphasize compactness." (Tr. Dec. 9 at 28:22–29:2). And the Commissioners themselves at the Commission's December 9, 2021 session recognized that the districts under the 2013 plan were not compact. (Tr. Dec. 9 at 18:7–8). In the Enacted Plan, the cores of all the Commission Districts were preserved and, visually, the cores of Districts 1, 2, 3, and 4 in the Enacted Plan do not facially differ from the cores adopted part of the 2013 plan. This observation was also made by Plaintiff's expert, Abbott, who concluded that compactness did not explain the shapes of the districts in the Enacted Plan. *See* (ECF No. 24-31) (Abbott Rpt. at 15–16).

As to District 1, the shape of District 1 follows a staircase-like stepping pattern in its northeastern corner in Allapattah, denoted as Areas 7 and 8 in Abbott's report. *See* Figure 3, *supra*. As Abbott noted, and as was summarized above, the drawing of the borders of District 1 with respect to Areas 7 and 8 was race-driven. *See* (Abbott Rpt. at 6–7). District 1 also has an appendage extending toward Downtown Miami along the Miami River (Area 6 in Abbott's report): this area previously in District 5 was described by the Commissioners as an "attractive" area that was "mainly Hispanic or Anglo." (Tr. Dec. 9 at 3:11–18). Abbott concluded that the portion of a precinct that was moved from District 5 to District 1 in Area 6 had a higher HVAP proportion and lower BVAP proportion than the portion of that precinct that remained in District 5. (Abbott Rpt. at 6–7). The demographics of District 1 under the Enacted Plan are: BVAP of 11.0%; WVAP of 3.5% and HVAP of 89.5%. (Abbott Rpt. at 5–6).

District 3 has an irregular appendage in its southern portion that extends across U.S.

Highway 1 to the Natoma Manors area identified as Area 13 in Abbott's Report. This irregular appendage juts into District 2. While Abbott concluded that this area was not moved for racial reasons, Abbott did conclude, as noted above, that *other* areas (Areas 14 and 15) were moved from District 4 into District 3 to offset the lower proportion of Hispanic voters gained upon moving Area 13 (which has a HVAP of 37.6%) into District 3. (Abbott Rpt. at 11–12). Indeed, the racial demographics of District 3 under the Enacted Plan are: BVAP of 5.4%; WVAP of 7.7% and HVAP of 88.3%. (Abbott Rpt. at 5–6).

District 4, likewise, has racial demographic breakdowns similar to Districts 1 and 3 under the Enacted Plan: BVAP of 3.1 %; WVAP of 7.6% and HVAP of 89.5%. (Abbott Rpt. at 5–6).

Notably, the HVAP percentages of Districts 1, 3, and 4 remained largely the same both pre- and post-redistricting, with only slight percentage decreases. *Compare* Table 2, *supra*, *with* Table 3, *supra*.

Division of Traditional Neighborhoods. Moreover, the Court notes that traditional neighborhoods are divided among Districts 1, 2, 3, and 4 under the Enacted Plan.

The Enacted Plan divides traditional neighborhoods just as prior plans had. Among other neighborhoods, the Enacted Plan divides: Edgewater and Downtown Miami between Districts 2 and 5; Coconut Grove between Districts 2 and 4; Brickell between Districts 2 and 3; Silver Bluff and Shenandoah between Districts 3 and 4; Flagami between Districts 1 and 4; Allapattah between Districts 1 and 5; and Little Havana among Districts 1, 3, and 4. Indeed, Commissioner Díaz de la Portilla explained that Hispanic communities in the City had been divided by redistricting for decades, stated that "Coconut Grove doesn't have a monopoly on being a community," and therefore justified that Coconut Grove could also be split for the greater good of preserving the racial and ethnic composition of the Commission. (Tr. Feb. 7 at 60:6–18).

The City's Response. In its Response, the City argues that the shapes of the Commission Districts are all facially compact because they do not resemble the convoluted district shapes that were at issue in *Cooper v. Harris*, 581 U.S. 285 (2017). *See* (ECF No. 36 at 11). The City defends the shape of the border between District 2 and District 5 (*i.e.*, the redistricting "wall" De Grandy referred to in the November 18, 2021 and December 9, 2021 Commission sessions) on the ground that compliance with Section 2 of the VRA did not make it unconstitutional for the City to gerrymander District 5. (*Id.*). The City asserts that the only irregular aspect of the Enacted Plan is the area identified as Area 13 discussed above. And according to the City, the border between Districts 1 and 4, which has been largely unchanged for 20 years, could not have been drawn for racial reasons because Districts 1 and 4 have similar demographics. The City argues that the particular geographical movements in this case were contiguous and had minimal racial effect, and therefore the Enacted Plan did not affect a significant number of voters.

Again, the City's argument addresses only the changes made in redistricting and fails to consider the District as a whole. The Supreme Court has made clear that the Court must look to the *districts* that are challenged, not in isolation to the particular lines drawn. *See Bethune-Hill*, 580 U.S. at 191–92 ("Courts evaluating racial predominance therefore should not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district.").

Assuming at this stage of the proceedings that the City in good faith was motivated by politics, not race, in making those minor changes, the Court is nonetheless required to look beyond those changes to determine the predominant motive for the design of the district as a whole. *See Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *39.

Accordingly, the Court finds that this factor supports a finding that it was substantially

likely that race predominated in the designs of Districts 1, 2, 3, and 4.

Procedural and Substantive Departures. Plaintiffs have neither argued nor adduced evidence that the City failed to comply with procedures for redistricting set forth in relevant provisions of Florida law or the City's municipal code, and the record does not suggest any such failure. The Commission held six sessions regarding redistricting on the public record. And the Commission heard comments from the public.

Accordingly, the Court finds that this factor does not weighs in favor of a finding that racial considerations predominated in the designs of Districts 1, 2, 3, and 4.

Availability of Less Discriminatory Alternatives. Plaintiffs recount in their Motion a series of alternative proposals advanced but rejected by a majority of the Commissioners that Plaintiffs' expert attests would have had less of a discriminatory impact on the Commission Districts. The City does not respond or rebut this evidence, which the Court finds weighs slightly in favor of finding race predominated.

Summary. In sum, the Court's assessment of the *Arlington Heights* factors strongly supports a finding that Plaintiffs are substantially likely to succeed in establishing that racial considerations predominated in the City's design of Districts 1, 2, 3, and 4. The evidence in the record at this posture includes the unambiguous statements of a majority of the Commissioners that they: (i) believed that the City had in the past established single-member districts with the intention of creating a Commission with three Hispanic seats, one Black seat, and one Anglo seat; (ii) understood that some of the districts created in prior redistricting cycles were intentionally gerrymandered to preserve that overarching goal; and (iii) intended to preserve the cores of the existing districts in the 2022 Enacted Plan to perpetuate a Commission with three Hispanic districts, one Black district, and one Anglo-access district. The Commissioners directed the

redistricting consultant to preserve the cores of the existing districts reflecting that racial composition. *See Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *40 ("As stated in the underlying *Bethune-Hill* decision, core retention 'holds a special place in the predominance balance' because, among other reasons, it 'may be used to insulate the original basis for the district boundaries.'"). Indeed, the Commissioners expressed their concerns that specific, proposed changes to the borders of Districts 1, 3, and 4 would dilute the "ethnic integrity" of those districts as majority-Hispanic districts; they redrew borders to avoid diluting those majorities and instead to preserve the HVAP super-majorities in those districts. The Commissioners expressed that District 2 should be preserved as a district in which an Anglo could be elected, and the core of that district, which Commissioner Carollo asserted had been gerrymandered in the past, was drawn to encompass the highest WVAP among the Commission Districts. The Commissioners directed the redistricting consultant to divide neighborhoods in furtherance of preserving the racial composition of all the districts consistent with previous redistricting cycles. The shapes of the Commission Districts contain irregular appendages and indeed reflect that neighborhoods were divided in the 2022 Enacted Plan. District 2 is facially not compact. And the racial demographic data for the resulting 2022 Enacted Plan reflect that the Commission succeeded in preserving the racial breakdowns of the prior redistricting.

Accordingly, the evidence before the Court supports a finding that Plaintiffs are substantially likely to succeed in establishing that racial considerations predominated in the designs of Districts 1, 2, 3, and 4.

3. Strict Scrutiny

Having found that Plaintiffs are substantially likely to succeed in establishing that racial considerations predominated in the designs of Districts 1, 2, 3, and 4, and given the Parties'

agreement that race did predominate in the design of District 5, the burden shifts to the City to establish that the City's use of race in designing the challenged Commission Districts withstands strict scrutiny. The Court first turns to District 5.

a. District 5

The Parties do not dispute that the City drew the borders of District 5 to comply with Section 2 of the VRA, and thus there is no dispute that the predominance of race in the design of District 5 was in furtherance of a compelling governmental interest. *See Abbott*, 138 S. Ct. at 2315. Accordingly, the dispute in this case centers on whether the City's consideration of race in the design of District 5 was narrowly tailored to comply with Section 2 of the VRA.

In a racial gerrymandering case, the burden is on the City to establish that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 581 U.S. at 292. Because the "Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" *Abbott*, 138 S. Ct. at 2315 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)). Accordingly, the Supreme Court has consistently assumed that "compliance with the VRA may justify the consideration of race that would not be otherwise allowed," and therefore that complying with the VRA is a compelling governmental interest. *Id.* at 2315; *see also Bethune-Hill*, 580 U.S. at 193 ("As in previous cases, therefore, the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling."). In this regard, courts will find that the government's "consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the [government] has 'good reasons' for believing that its decision is necessary in order to comply with the VRA." *Id.* (quoting *Cooper*, 581 U.S. at 293).

As the Supreme Court has explained, "[t]hat standard does not require the [the City] to show that its action was 'actually . . . necessary' to avoid a statutory violation, so that, but for its use of race, the [City] would have lost in court. Rather, the requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act, 'even if a court does not find that the actions were necessary for statutory compliance.'" *Bethune-Hill*, 580 U.S. at 194 (emphasis in original) (internal citation omitted) (quoting *ALBC*, 575 U.S. at 278); *see also ALBC*, 575 U.S. at 278 ("[A] court's analysis of the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made. . . . [L]egislators 'may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance.").

So, as relevant here, "[i]f [the City] has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not."[24] *Cooper*, 581 U.S. at 302 (internal citation omitted) (citing *Bush*, 517 U.S. at 978).

[24] The *Gingles* preconditions are as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Gingles, 478 U.S. at 50–51 (internal citations and footnotes omitted).

According to Plaintiffs, the City's adherence to a minimum BVAP of 50% for District 5 was arbitrary, not necessary to afford Black voters an opportunity to elect preferred candidates of their choice, and not informed by any pre-enactment functional analysis of the voting patterns of Black voters. Rather, Plaintiffs argue that the City's consideration of BVAP (Black Voting Age Population), as opposed to BCVAP (Black *Citizen* Voting Age Population), Black voter registration, or Black voter turnout, underestimates Black voting strength. (ECF No. 26 at 34). Plaintiffs assert that their expert, Moy, concluded that a Section 2 compliant district would afford Black voters the ability to elect candidates of their choice with Black *Citizen* Voting Age Population proportions of at least 48.8%, and District 5's current BCVAP proportion of 58.2% far-exceeds that minimum. Plaintiffs also note that De Grandy opined that BVAPs of less than 50% were Section 2 compliant for District 5.

The City responds that the VRA required a BVAP of more than 50% for District 5 in light of the declining size of City's Black population in both relative and absolute terms. The City disputes that Plaintiffs' expert opines District 5 needed any particular BCVAP proportion to permit Black voters to elect candidates of their choice, and that he instead only analyzes past races to conclude that racially polarized voting exists in the City. According to the City, it was not required to draw the borders of District 5 based on citizenship as opposed to total population. The City ultimately argues that it is not required to prove that it with mathematical precision determined and then drew the borders of District 5 to encompass the minimum population necessary for Black voters to have an opportunity to elect candidates of their choice. Rather, the City notes that the Commissioners were concerned, based on population trends, that a 51% Black majority in District 5 would not be sufficient.

Plaintiffs' Reply correctly points out that the City's Response addresses Plaintiffs' claims as though Plaintiffs brought a VRA challenge. Instead of addressing its burden, the City attacks Plaintiffs' ability to prove that the 50% BVAP floor set by the City was improper. The City simply ignores its burden to demonstrate that its use of race in redistricting was narrowly tailored.

The Court is mindful that "[d]etermining what minority population percentage will satisfy that standard is a difficult task[.]" *Bethune-Hill*, 580 U.S. at 194. The City is not necessarily required to memorialize in writing the functional analysis undertaken in determining the minority population percentage required for compliance with the VRA—but the City's determination of a minority population percentage for VRA compliance must nonetheless be well-supported. *See id.* at 195 (internal citations omitted) ("First, the challengers contest the sufficiency of the evidence showing that Delegate Jones in fact performed a functional analysis, in part because that analysis was not memorialized in writing. But the District Court's factual findings are reviewed only for clear error. The findings regarding how the legislature arrived at the 55% BVAP target are well supported, and 'we do not . . . require States engaged in redistricting to compile a comprehensive administrative record." (omission in original)). Moreover, the City is not required to, "when redistricting, determine *precisely* what percent minority population" compliance with the VRA demands. *Bethune-Hill*, 580 U.S. at 195 (emphasis in original) (quoting *ALBC*, 575 U.S. at 278). Rather, the question is whether the City "had '*good reasons*' to believe" the BVAP floor it selected "was necessary to avoid liability" under the VRA. *Id.* (emphasis in original).

With the foregoing principles in mind, the Court concludes that Plaintiffs are substantially likely to prevail in establishing that the City's design of District 5 does not withstand strict scrutiny. The City argues throughout its Response that the VRA required the City to maintain a BVAP of 50% in District 5. The City's Response does not clearly identify how that figure was determined,

beyond noting that the Commissioners were concerned about lower BVAPs in light of population trends within the City. The City ultimately misapprehends what the VRA required of it; as Plaintiffs note, the City has conflated a numerical 50% BVAP majority with the ability of Black voters to elect preferred candidates.

Nonetheless, the Court has reviewed De Grandy's presentations, initial report, and the transcripts of the redistricting sessions of the Commission. The Court notes that De Grandy in his Initial Report alluded to having conducted an analysis of the *Gingles* preconditions. *See* (ECF No. 50-11) (Init. Rpt. at 6, 15). The City has not offered into evidence in this proceeding any pre-enactment report memorializing that analysis—nor does the City argue in its Response that any such analysis, though not in evidence, would nonetheless support the City's decision. Indeed, as Plaintiffs note, the City has not adduced any evidence in this proceeding memorializing any pre-enactment analysis that was presented or provided to the Commissioners regarding the BVAP *or* BCVAP proportions that would facilitate Section 2 compliance. To the extent presentations and reports discussed BVAP proportions throughout the redistricting process, they provided summary-level, race-focused Voting Age Population breakdowns for the Commission Districts under different proposed plan configurations. *See* (ECF Nos. 24-3 through 24-10); (ECF No. 50-11).

The Court recognizes that De Grandy's April 2, 2022 Memorandum to Mayor Suarez, issued in response to the ACLU of Florida's second letter from March 31, 2022, does also assert that Black registered voter and Black actual voter proportions in District 5 were taken account into De Grandy's and Cody's analysis.[25] (ECF No. 50-12) (De Grandy Mem. at 4). However, the City does not direct the Court to any point in the six redistricting Commission sessions at which De

[25] De Grandy's Memorandum also argues that the Enacted Plan is a plan for the next decade and accounts for expected population trends, which he claimed that the ACLU of Florida had neglected in its second letter. (ECF No. 50-12 at 5).

Grandy made the Commission aware of that fact. The Court is, again, mindful that the City is not required to compile a comprehensive administrative record. *See Bethune-Hill*, 580 U.S. at 195. But to the extent the Commission relied upon De Grandy's pre-enactment analyses, those analyses have not been offered into evidence on the record in *this case*, and thus there is no evidence on the record before the Court that those analyses were completed, beyond De Grandy's passing references.

So, the Court is left only with the statements of the Commissioners and De Grandy at sessions of the Commission to determine the basis for the City's selection of a 50% BVAP quota in District 5. The Court declines to afford De Grandy's testimony much weight, given his testimony at the March 29, 2023 hearing contradicted his statements made during the redistricting process. For example, De Grandy presented on February 7, 2022 a preliminary plan with a BVAP of less than 50% in District 5 but later testified on March 29, 2023 that he believed the VRA required a BVAP of more than 50% in District 5.

Moreover, based on the Commissioners' statements, and as Plaintiffs note, the Commission was aware that the BVAP of District 5 would be Section 2 compliant even below 50% based on proposed plans that De Grandy presented to or discussed with the Commissioners. *See* (Tr. Feb. 7 at 8:12–19); (Tr. Mar. 24 at 8:5–9). Nonetheless, from the Commissioners' statements, it appears that they selected 50% as a floor in light of generalized expectations regarding population trends, *see, e.g.*, (Tr. Feb. 25 PM at 19:13–20:12); (Tr. Mar. 11 PM at 8:8–21), or possibly in light of what they believed Section 2 compliance required. But as to the former, and despite De Grandy's explanation that he too was designing a plan for the next 10 years, (Tr. Feb. 25 PM at 2:10–14), no analysis grounded in any data was conducted into population trends.[26] De Grandy further

[26] As noted above, De Grandy testified on cross-examination at the March 29, 2023 hearing that no studies were conducted to assess the potential impact of gentrification in District 5, and that his assessment of the effects were

testified that he did not develop models or attempt to quantify the need to preserve the ability of the Black minority voters to elect the candidate of their choice.

Plaintiffs' expert concluded based on statistical analysis that, where racially polarized voting existed, there were elections conducted in the City where the Black preferred candidate prevailed when Black *registered voters* made up 49% of the registered voting population. (Moy Rpt. at 54). Plaintiffs interpret the range of similar findings in terms of Black Citizen Voting Age Population, arguing that on the more conservatively-estimated end, only a BCVAP of approximately 48% was needed to ensure compliance with the VRA and afford Black voters the ability to elect preferred candidates, but the BCVAP of District 5 is 58% under the Commission's BVAP target of 50%. That is, Plaintiffs have adduced evidence in the form of expert analysis that Section 2 compliance might not necessarily require the City to select a BVAP minimum of 50% for District 5, which was what the Commissioners appeared to believe the law required.

Based on the foregoing, the Court finds that the City lacked strong evidence for drawing District 5, but instead mechanically set a minimum BVAP for the District. There is no evidence in the record before the Court of any pre-enactment analysis that informed the Commission's decision to select 50% as a BVAP floor; nor does the City point the Court to evidence that the Commissioners considered in selecting 50%. *See Cooper*, 581 U.S. at 306 (internal citation omitted) ("We by no means 'insist that a state legislature, when redistricting, determine precisely what percent minority population [§ 2 of the VRA] demands.' But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose raison d'être is a legal

based on his personal experience having grown up in the City, based on his general awareness of construction and land use permitting activity in the City, and based on his understanding of general demographic trends in the City. De Grandy would not reveal the extent to which he shared his personal forecasts with the individual Commissioners in private discussions invoking privilege for withholding any such communications. Accordingly I cannot assume, as it was suggested at the hearing, that a further basis in fact existed for the Commissioners' application of a greater than 50% BVAP.

mistake."). Strict scrutiny requires more than "uncritical majority-minority district maximization." *See Wis. Legislature*, 142 S. Ct. at 1249 (finding that the Wisconsin Governor failed to satisfy strict scrutiny in his design of an electoral map because "[h]e provided almost no other evidence or analysis supporting his claim that the VRA required the seven majority-black districts that he drew."). Accordingly, the Court finds that Plaintiffs are substantially likely to succeed in establishing that the redistricting of District 5 does not withstand strict scrutiny.

b. Districts 1, 2, 3, and 4

As to Districts 1, 3, and 4, the City raises no argument that it had a good reason for drawing those districts to preserve their HVAP super-majorities. Nor does the City advance evidence that it had good reason to believe that the VRA required the City to create three districts each with HVAP super-majorities. In fact, review of the transcripts does not suggest that the City's consideration of race in drawing Districts 1, 3, and 4 was directed to VRA compliance whatsoever.

The Court recognizes that De Grandy testified on cross-examination that based on an analysis conducted by his co-consultant Steve Cody, the *Gingles* preconditions were met for the Black *and* Hispanic populations in the City. The Court also observes that at the February 25, 2022 morning session of the Commission, De Grandy stated that Districts 1, 3, and 4 complied with the VRA because they enable the Hispanic majorities in those districts to elect preferred candidates.[27] There is no indication that the Commissioners' consideration of race when drawing those districts was aimed at VRA compliance; notwithstanding that the Commissioners were simply attempting to maximize the HVAP of those districts, the basis for De Grandy's opinion, that Districts 1, 3, and 4 are VRA compliant, has not been explained on the record before the Court.

[27] As noted above, the Court is unable to locate any *Gingles* analysis performed by the City's redistricting consultants in the record and the City has not pointed the Court to or advanced any argument regarding any pre-enactment analysis for Districts 1, 3, and 4.

The City does not here assert that the consideration of race in the design of Districts 1, 3, and 4 withstands strict scrutiny. At best, the City argues that it was not impermissible for racial considerations to predominate in the drawing of Districts 1, 3, and 4 because it was required to create District 5 with a BVAP of more than 50% and therefore it was "not unconstitutional to deliberately place Hispanics in other Districts in order to diminish their influence [in District 5] and preserve the Black majority." (ECF No. 36 at 13). This misapprehends the permissible use of race with respect to the design *of each Commission District*. Again, racial gerrymandering claims apply district-by-district, *see ALBC*, 575 U.S.at 262, and so permissible gerrymandering in one district does not necessarily license the exaggerated consideration of race in *other* districts, even where, like here, each Commission District is contiguous with at least three other Commission Districts. The record reveals moreover that the City's predominant consideration of race and ethnicity to draw Districts 1, 3, and 4 was not limited to the impact on District 5. The City has failed to meet its burden to show that the redistricting of Districts 1, 3, and 4 withstands strict scrutiny.

These same considerations apply to District 2. The City advances no argument or evidence whatsoever to demonstrate that its consideration of race in the design of District 2 withstands strict scrutiny. No argument or evidence is advanced that the VRA required the City to draw the borders of District 2 so that an Anglo could be elected there; De Grandy testified that no determination of the *Gingles* factors for District 2 was even conducted, because it is not a protected class. Based on the City's failure to offer any response or justification explaining the explicit gerrymandering of District 2, the Court finds that the redistricting of District 2 does not withstand strict scrutiny.

The Court therefore finds that Plaintiffs are substantially likely to succeed in establishing that Districts 1, 2, 3, and 4 are racial gerrymanders in violation of the Equal Protection Clause of

the Fourteenth Amendment. The permission to consider race in drawing District 5 did not warrant the City's exaggerated consideration of race in the other districts.

As the Court noted above, this is not to say that the Commissioners' goal of ensuring diversity of representation on the Commission is not a laudable one. The Court's conclusion should not be understood as a finding that the Commission's and therefore the City's focus on the laudable goal of diversity of representation is what renders the Commission Districts racial gerrymanders in violation of the Fourteenth Amendment. Rather, the Commissioners' own statements expressly show that they viewed means of achieving that goal through mechanical racial quotas. The Commissioners believed that doing so was required by law. But the categorization of residents and voters on the basis of their race, for compliance with the Fourteenth Amendment's Equal Protection Clause and the Voting Rights Act, requires more searching and fulsome analysis than that done here.

C. Irreparable Harm

Next, the Court finds that Plaintiffs have established that they will suffer irreparable harm absent the entry of a preliminary injunction.

Plaintiffs argue that, if elections are held under the Enacted Plan, they will be classified and sorted based on race. Plaintiffs also assert that commissioners elected under the Enacted Plan will be more likely to believe that their primary obligation is to represent only one racial group. Plaintiffs assert that impairments to their fundamental right to vote cannot be undone through monetary remedies.

The Court is mindful that irreparable injury is not here presumed. *See Siegel v. LePore*, 234 F.3d 1163, 1178 (11th Cir. 2000) ("The only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right

of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether."). Moreover, "[t]he plaintiff's 'success in establishing a likelihood it will prevail on the merits does not obviate the necessity to show irreparable harm.'" *Ne. Fla. Chapter of Ass'n of Gen. Contractors*, 896 F.2d at 1285 (quoting *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983). Rather, to establish entitlement to a preliminary injunction, the "standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Here, Plaintiffs have filed declarations attesting to the injuries Plaintiffs suffer under the Enacted Plan. The attested-to injuries include that the Enacted Plan classifies them on the basis of their race and sends the message to their commissioners that their duty is to represent the majority racial group within the respective Commission Districts.[28] There is no dispute that Plaintiffs' concerns constitute injuries. As previously noted, "[w]hen the [government] assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, 515 U.S. at 911–12 (quoting *Shaw*, 509 U.S. at 647). Moreover, the Supreme Court has explained, as noted above, that "[t]he harms that flow from racial sorting

[28] *See* (ECF No. 24-33 at ¶ 9) (Plaintiff GRACE: stating that the Enacted Plan unfairly classifies Plaintiff GRACE's members on the basis of race); (ECF No. 24-34 at ¶ 6) (Plaintiff Engage Miami: same for Plaintiff Engage Miami's members); (ECF No. 24-35 at ¶ 6) (Plaintiff South Dade NAACP: same for Plaintiff South Dade NAACP's members); (ECF No. 24-36 at ¶¶ 6, 8) (Plaintiff Miami-Dade NAACP: same for Plaintiff Miami-Dade NAACP's members and also expressing concern that commissioners or districts surrounding District 5 "will think their job is primarily *not* to serve and represent Black constituents"); (ECF No. 24-37 at ¶¶ 6–7) (Plaintiff Cooper: stating that the Enacted Plan redistricts her based on her race and expressing concern that the Enacted Plan "sends a message to [her] commissioner that their job is to primarily serve white residents and be the commissioner for white voters"); (ECF No. 24-38 at ¶¶ 6–7) (Plaintiff Johnson: same but stating that the Enacted Plan sends the message that his commissioner is "elected to represent the interests of Hispanic voters only"); (ECF No. 24-39 at ¶ 5) (Plaintiff Miro: expressing concern that Hispanic residents had been packed into District 3 based on race); (ECF No. 24-40 at ¶ 6) (Plaintiff Contreras: same as to District 4); (ECF No. 24-41 at ¶ 6) (Plaintiff Valdes: expressing concern that Hispanic residents had been redistricted based on their race).

'include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group.'" *Bethune-Hill*, 580 U.S. at 187 (quoting *ALBC*, 575 U.S. at 263).

Having found that Plaintiffs are substantially likely to succeed in establishing that the City's use of race in the design of the challenged districts violates the Fourteenth Amendment and therefore that those districts are racial gerrymanders, and with the November 2023 general elections forthcoming, Plaintiffs' injuries will likely become fully realized this fall. Monetary remedies cannot undo the impairments to Plaintiffs' (or their members') right to vote. *See Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987)) (observing in the context of a First Amendment case that "[a]n injury is irreparable 'if it cannot be undone through monetary remedies.'"); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348 (N.D. Ga. 2015) (quoting *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986)) ("Given the fundamental nature of the right to vote, monetary remedies would obviously be inadequate in this case; it is simply not possible to pay someone for having been denied a right of this importance.").

Indeed, in recent cases district courts in the Eleventh Circuit have found that plaintiffs in voting rights cases have established irreparable harm on motions for preliminary injunctions, noting that the injury to a plaintiff of voting under an unconstitutional electoral map, or an electoral map that violates Section 2 of the VRA, "cannot be undone through any form of monetary or post-election relief[.]" *See, e.g.*, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1320–21 (N.D. Ga. 2022) (citing *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), for the proposition that "once the election occurs, there can be no do-over and no redress," but ultimately denying the motion for a preliminary injunction

upon application of the *Purcell* principle upon balancing the equities); *Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *49 (citing *League of Women Voters of N.C.*, 769 F.3d at 247) ("Plainly these are egregious harms that cannot be redressed once an election has occurred.").

And, recently, the Eleventh Circuit denied a motion to stay a district court's preliminary injunction entered against the City of Jacksonville, Florida in a Fourteenth Amendment racial gerrymandering case similar to the instant case, observing as follows:

> Briefly, we also note Appellees have shown that the issuance of this stay would likely injure them and the people of the Challenged Districts. Numerous cases have described the immense harm caused by racial gerrymandering. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 797; *Miller*, 515 U.S. at 911–12; *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Given that such gerrymandering would constitute irreparable harm to the Appellees, and the public has no interest in enforcing unconstitutional redistricting plans, we decline to require the residents of Jacksonville to live for the next four years in districts defined by a map that is substantially likely to be unconstitutional.

Jacksonville II, 2022 WL 16754389, at *5.

The City does not advance specific argument to refute that Plaintiffs fail to establish they stand to suffer irreparable harm. To the extent the City does so argue, it asserts that the issue of irreparable harm is tied to the issue of standing—that Plaintiffs fail to allege that any of the Plaintiffs reside in the particular parcels that were moved between districts upon the adoption of the 2022 Enacted Plan. (ECF No. 36 at 21). The Court has rejected that argument above in finding that Plaintiffs have standing to sue. As the Court noted above, a plaintiff in a racial gerrymandering case is not required to reside in the particular or specific parcels or geographic areas that were moved between districts as part of the Enacted Plan. *See ALBC*, 575 U.S. at 262. Rather, the Supreme Court has emphasized that the harms underlying a racial gerrymandering claim are personal and "directly threaten a voter who lives in the *district* attacked." *Id.* at 263 (emphasis in original).

Accordingly, the Court finds that Plaintiffs have established that they stand to suffer irreparable harm absent the entry of a preliminary injunction.

D. Balance of Harms

Last, the Court turns to the balance of the equities. "The last two requirements for a preliminary injunction involve a balancing of the equities between the parties and the public." *Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1293 (11th Cir. 2021). "Where the government is the party opposing the preliminary injunction, its interest and harm—the third and fourth elements—merge with the public interest." *Id.* (citing *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020)). Accordingly, the Court addresses the third and fourth prongs for a preliminary injunction together.

Plaintiffs assert that the irreparable harm to them outweighs any burden on the City, and that the entry of a preliminary injunction is in the public interest. According to Plaintiffs, the Miami-Dade County Supervisor of Elections requires the borders of the Commission Districts be set by August 1, 2023 to administer the November 2023 elections on behalf of the City. Plaintiffs claim the balance here "is not a close call." (ECF No. 26 at 36).

The City raises two arguments in response. First, the City asserts that the entry of a preliminary injunction would disserve the public interest because a nonracial redistricting would lower the BCVAP in District 5 without increasing Black voters' influence elsewhere. To that end, the City argues that there is no benefit to Black voters if the City is preliminarily enjoined. Second, the City argues that Plaintiffs unduly delayed seeking a preliminary injunction because they are both a year too late and 25 years too late. (ECF No. 36 at 22). According to the City, Plaintiffs are a year too late because they did not seek a preliminary injunction until over 11 months after the adoption of the Enacted Plan. The City proffers that a special election for District 2 has already

occurred, in February 2023. The City argues that there is insufficient time to enact a remedial map prior to August 1, 2023, and argues that Plaintiffs have not been diligent. The City asserts that Plaintiffs are 25 years too late because they complain of redistricting choices made in the late 1990s.

In their Reply, Plaintiffs aver that they diligently brought this case. Plaintiffs distinguish the City's caselaw and argue that they had to compile voluminous record evidence and wait for public records requests to be fulfilled. Plaintiffs also argue that their harms are not realized until an election takes place. Plaintiffs also aver that the City has sufficient time to adopt a remedial map by August 1, 2023, citing voting rights cases where 14 to 27 days were provided to submit an interim remedial map. Last, Plaintiffs assert that the *Purcell* principle does not warrant a heightened standard for preliminary relief in this case because Plaintiffs' Motion is not before the Court on the eve of an election, and because election administrators have provided assurances that they can comply with an injunction without throwing an election into chaos.

The Court first addresses Plaintiffs' diligence before discussing the harms and public interest.

1. Plaintiffs' Delay Versus Diligence

The Court first addresses whether Plaintiffs have been diligent or whether they have unduly delayed seeking preliminary relief. The Supreme Court has explained that "a party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)) (affirming denial of preliminary injunction where the plaintiffs did not seek preliminary injunctive relief "until six years, and three general elections,

after the 2011 map was adopted, and over three years after the plaintiffs' first complaint was filed").

At the outset, the Court rejects the City's argument that Plaintiffs are 25 years too late in seeking a preliminary injunction. The harms in this case are new harms resulting from the 2022 Enacted Plan, which is a different electoral map from that enacted in 1997 (although, with the same cores). *See Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *51 ("To the extent the City contends that injunctive relief is not warranted because the alleged harms have been in existence since at least 2011 if not before, the Court is not persuaded. Plaintiffs in this case complain about a new harm—the maps enacted in 2022, and the harms posed by those maps, as described above, are irreparable and ongoing."). Indeed, as Plaintiffs note, two of the organizational plaintiffs GRACE and Engage Miami were founded in 2019 and 2015, respectively. (ECF No. 24-33 at ¶ 2); (ECF No. 24-34 at ¶ 2). One of the individual plaintiffs, Johnson, moved to Miami in 2021. (ECF No. 24-38 at ¶ 4). And there is no reason not to accept Plaintiffs' proffer in their Reply that one of the individual Plaintiffs, Contreras, was born after the City switched to single-member commissioner districts. (ECF No. 39 at 15). Thus, the Court rejects that Plaintiffs were 25 years too late in seeking preliminary relief.

However, the City's argument that Plaintiffs have delayed in seeking a preliminary injunction by approximately one year is well placed. As noted above, the Enacted Plan was adopted in March 2022; this suit was initiated 9 months later in December 2022. Moreover, Plaintiffs did not move for a preliminary injunction until February 10, 2023, just under 11 months after the Enacted Plan was adopted. A special election has already occurred in that intervening time—Commissioner Russell resigned as the commissioner of District 2 effective December 29,

2022 and a special election to fill that vacancy occurred on February 27, 2023. *See* (ECF Nos. 24-24 through 24-27).

Plaintiffs explain in their Reply that the delay was driven by prudence, the difficulties of coordinating among multiple organizational plaintiffs, and the collection of a voluminous record that, in part, necessitated public records requests of the City. Plaintiffs note for example that as of the time of their Reply in March 2023, they had still not received through a December 2022 public records request a copy of De Grandy and Cody's Initial Report—that Initial Report was made part of the record in this case when the City offered it into evidence at the March 29, 2023 hearing. But it is not clear why Plaintiffs waited from March 2022 until December 2022 to submit a public records request for a report that was created prior to a Commission session that occurred in November 2021. Moreover, six of the eight transcripts in this case bear transcription certifications reflecting August 2022 certification dates.[29] A large number of Plaintiffs' exhibits consist of news articles relating to redistricting cycles from decades past. Two of Plaintiffs' exhibits were authored by Plaintiffs' counsel. Nonetheless, the record is large, and Plaintiffs' evidentiary burden is high. While Defendant contends that Plaintiffs' delay is unexplained, there is no argument advanced that Plaintiffs' delay was "intentional, strategic, or even negligent." *Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *52.

The delay is exacerbated by the occurrence of the special election to fill the vacancy in District 2. However, the Court notes that the vacancy that culminated in that election occurred after Plaintiffs' Complaint was filed and the special election occurred after the instant Motion was filed. Commissioner Russell's letter of resignation, providing the date and time certain for his resignation, was submitted to the City's Clerk after the filing of the Complaint in the instant

[29] One of the transcripts bears an October 2022 date, and one of the transcripts bears no certification but was nonetheless admitted into evidence without objection.

action.[30] Moreover, as Plaintiffs note, the City's Charter provided for the vacancy appointment of Commissioner Russell's successor by a majority of the remaining Commissioners, with a special election to be called only if the remaining Commissioners failed to or refused to fill that vacancy. *See* Miami City Charter § 12. Thus, while a possibility, it was not a foregone conclusion that a special election to fill the vacancy would be called. And in any event, unlike *Benisek* where three general elections had occurred, the February 2023 election was a special election and no general election involving a majority of the challenged districts has yet happened in this case. *Cf. Benisek*, 138 S. Ct. at 1944.

The Court is mindful that the Eleventh Circuit has explained, generally, that "[a] delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (affirming denial of preliminary injunction in trademark infringement case where the plaintiff "failed to offer any explanation for its five-month delay" between filing the complaint and seeking preliminary relief). And courts in racial gerrymandering cases similar to this one have noted that "every single day matters" where plaintiffs seek to compel a city to entirely redraw the district maps prior to an election. *Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *52 (finding "not egregious" a delay of 6 weeks between adoption of map and filing of the suit and 2-and-a-half-month delay between filing the suit and seeking preliminary relief). While this factor weighs against the issuance of an injunction, it must be balanced with the other harms.

[30] Commissioner Russell's first letter of resignation, dated June 3, 2022, provided an effective date of resignation conditioned upon the earlier of the date he would take office if elected to other office or the date his successor was required to take office as Commissioner of District 2. See (ECF No. 24-26). A concrete effective date of resignation was not known until Commissioner Russell's second letter of resignation, dated December 29, 2022, which provided an effective date of that same day, December 29, 2022, at 5:00 P.M. (ECF No. 24-27).

Plaintiffs' harms in this case are irreparable even despite their relative lack of diligence, as noted above; those harms will not become realized fully realized until the November 2023 election. While the delay in this case is more "egregious" than in *Jacksonville I*, it is by no means as egregious as the delay in *Benisek*. Here, the Enacted Plan was adopted at the end of March 2022. This case was brought approximately 9 months later in December 2022. Plaintiffs sought their preliminary injunction 2 months after the Complaint was filed, and approximately 10-and-a-half-months after the Enacted Plan was adopted. From the vantage of when the Enacted Plan was adopted, the election for which Plaintiffs now seek to enjoin the use of the Enacted Plan was November 2023, approximately 20 months after the Enacted Plan was adopted. Thus, the request for preliminary relief in this case was filed near the midpoint between the adoption of the Enacted Plan and the November 2023 general election: close enough to the election that Plaintiffs' irreparable harm would be imminent, but possibly not too close in time to November 2023 to implicate the *Purcell* principle.[31]

2. Harm

Accordingly, the Court turns to an assessment of the harms the City and the public would stand to suffer should the District Court preliminarily enjoin the City from calling any elections

[31] *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam) teaches that "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *League of Women Voters of Fla.*, 32 F.4th at 1371 (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring)). This is because "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5. When *Purcell* applies, it "only (but significantly) 'heightens' the standard that a plaintiff must meet to obtain injunctive relief that will upset a state's interest in running its elections without judicial interference." *League of Women Voters of Fla.*, 32 F.4th at 1372 (citing *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)). To that end, the Eleventh Circuit has explained that "courts issuing injunctions close to elections are 'required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures.'" *Jacksonville II*, 2022 WL 16754389, at *2 (quoting *Purcell*, 549 U.S. at 4). While the Supreme Court has not defined what constitutes the eve of an election under the *Purcell* principle, a case fits within those bounds when an election is set to begin in less than four months. *See id.* at 1371. *But see Jacksonville II*, 2022 WL 16754389, at *2 (denying motion to stay preliminary injunction where the district court "issued its injunction three months prior to the candidate qualifying period and five months prior to the elections for a single county" and noting that "[a]pplying *Purcell* to this case would extend the 'eve of an election' farther than [the court] ha[d] before").

under the 2022 Enacted Plan. The City identifies two harms. As noted above, the City first argues that the entry of a preliminary injunction would disserve the public because a nonracial redistricting would lower the BCVAP in District 5 without increasing Black voters' influence elsewhere, and thus there would be no benefit to Black voters if the City is preliminarily enjoined. Second, in arguing that Plaintiffs have unduly delayed seeking preliminary relief, the City implies that there is insufficient time to adopt an interim remedial map, asserting that "[e]ven if there is a ruling on the Motion, new districts would have to be drawn, face inevitable challenges by Plaintiffs, and be ruled on by this Court, and this does not even factor in any appellate remedies." (ECF No. 36 at 22).

The first harm the City identifies—that a "nonracial redistricting" would disserve Black voters—is not responsive to the balance of the equities prong for a preliminary injunction and is instead responsive to the first prong: whether Plaintiffs are substantially likely to succeed on the merits of their racial gerrymandering claim under the Fourteenth Amendment. In arguing that there is no support for Plaintiffs' position, that a lower BVAP in District 5 would still afford Black voters an opportunity to elect preferred candidates, the City in effect argues that the predominance of race in the design of District 5 was narrowly tailored; that is, that the BVAP the Commission selected for District 5 "was necessary to avoid liability" under the VRA. *Bethune-Hill*, 580 U.S. at 195.

In any event, a "nonracial redistricting" is not the result should the District Court enjoin the City. Rather, the City would have to create an interim remedial map in compliance with the Voting Rights Act and the Fourteenth Amendment's Equal Protection Clause, which pull in opposite directions. *See Abbott*, 138 S. Ct. at 2314 ("At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the Voting

Rights Act of 1965, 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.* (VRA), pulls in the opposite direction: It often insists that districts be created precisely because of race."); *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."). Thus, the City should be required to redistrict applying these principles, which does not necessarily lead to the conclusion that the Black voters' influence would be diminished in a revised plan.

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. *See also Jacksonville I*, --- F. Supp. 3d ---, 2022 WL 7089087, at *3.

The District Court's review of the Motion, Response, Reply, this Report and Recommendations, and any objections thereto, necessarily will occur closer in time to the upcoming November 2023 election than the issuance of this Report and Recommendation. Given the passage of time between the entry of this Report and Recommendations and a final ruling on the Expedited Motion for Preliminary Injunction, the consideration of the *Purcell* principle may be required the time at which a final ruling on the Expedited Motion is entered, if necessary.

***

In sum, the Court finds that the balance of the equities weighs in favor of the entry of a preliminary injunction. While Plaintiffs' lack of diligence weighs against the issuance of an

injunction, in this case, the balance of harms militates in favor of its issuance. Having found the Enacted Plan constitutionally infirm, and mindful of the undertaking that remains ahead to remediate the Enacted Plan, this Court nonetheless recommends that the City be enjoined from conducting an election implementing that Plan. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[I]t would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.").

V. RECOMMENDATIONS

Based on the foregoing, having found upon assessment of the requirements for a preliminary injunction and weighed the equities, the undersigned respectfully **RECOMMENDS** that:

(1) Plaintiffs' Expedited Motion for Preliminary Injunction (ECF No. 26) be **GRANTED**;

(2) The City of Miami, and its officers, agents, employees, and attorneys, be **PRELIMINARILY ENJOINED** from calling, conducting, supervising, or certifying any elections using the City Commission districts enacted in City of Miami Resolution 22-131 until the entry of final judgment in this case; and,

(3) The District Court establish a schedule for the preparation of a remedial plan with new district lines; that plan must not use race as a predominant factor in the design of any district unless that use of race is narrowly tailored to comply with a constitutionally permissible compelling government interest.

A party shall serve and file written objections, if any, to this Report and Recommendation with the Honorable K. Michael Moore, United States District Judge for the Southern District of Florida, on or before **May 13, 2023**.[32] Any response to a Party's objections are due on or before

[32] The objections period is shortened upon the consent of the Parties.

May 20, 2023. Failure to timely file objections will bar a *de novo* determination by the District Judge of anything in this recommendation and shall constitute a waiver of a party's "right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." 11th Cir. R. 3-1 (2016); 28 U.S.C. § 636(b)(1)(C); *see also Harrigan v. Metro-Dade Police Dep't Station #4*, 977 F.3d 1185, 1191–92 (11th Cir. 2020).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida, on this 3rd day of May, 2023.

LAUREN F. LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: Honorable K. Michael Moore
Counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:22-cv-24066-KMM

GRACE, INC., *et al.*,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon the Report and Recommendation of the Honorable Lauren F. Louis, United States Magistrate Judge ("R&R") (ECF No. 52). Therein, Magistrate Judge Louis recommends that the Court grant Plaintiffs' Expedited Motion for Preliminary Injunction ("Motion" or "Mot.") (ECF No. 26).[1] *See generally* R&R. Defendant City of Miami ("City" or "Defendant") filed objections to the R&R ("Obj.") (ECF No. 55), Plaintiffs filed a response ("Resp.") (ECF No. 57), and Defendant filed a reply ("Reply") (ECF No. 59). As set forth below, the Court ADOPTS the Report and Recommendation.

I. BACKGROUND

The factual circumstances of this case have been discussed at length, both in the Parties' briefings and in the R&R. Therefore, for the purposes of this Order, the Court presumes that the Parties are familiar with the relevant background and adopts the facts as set forth in the R&R.

[1] Plaintiffs in this Action are Clarice Cooper, Yanelis Valdes, Jared Johnson, Alexandra Contreras Steven Miro, ("Individual Plaintiffs"), and GRACE, Inc., Engage Miami, Inc., South Dade Branch of the NAACP and Miami-Dade Branch of the NAACP ("Organizational Plaintiffs") (collectively, "Plaintiffs").

II. PROCEDURAL HISTORY

Plaintiffs bring this Action alleging that Defendant approved a new redistricting plan (the "Enacted Plan") for the five electoral districts in the City of Miami which resulted in a racial gerrymander, thereby violating the Equal Protection Clause of the Fourteenth Amendment. *See* (ECF No. 23 ¶¶ 358–64) ("Am. Compl." or "Amended Complaint"). After initiating this Action, Plaintiffs filed the Motion requesting that the Court enjoin Defendant from conducting the election in November 2023 under the Enacted Plan. *See generally* Mot. The Court referred the Motion to Magistrate Judge Louis for an R&R, *see* (ECF No. 27), who in turn recommended that the Court grant the injunction. *See generally* R&R.

III. LEGAL STANDARD

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). A *de novo* review is therefore required if a party files "a proper, specific objection" to a factual finding contained in the report. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). "It is critical that the objection be sufficiently specific and not a general objection to the report" to warrant *de novo* review. *Id.*

However, a party's objections are improper if they expand upon and reframe arguments already made and considered by the magistrate judge, or simply disagree with the magistrate judge's conclusions. *See Melillo v. United States*, No. 17-CV-80489, 2018 WL 4258355, at *1 (S.D. Fla. Sept. 6, 2018); *see also Marlite, Inc. v. Eckenrod*, No. 10-23641-CIV, 2012 WL 3614212, at *2 (S.D. Fla. Aug. 21, 2012) ("It is improper for an objecting party to . . . submit [ ] papers to a district court which are nothing more than a rehashing of the same arguments and

positions taken in the original papers submitted to the Magistrate Judge. Clearly, parties are not to be afforded a 'second bite at the apple' when they file objections to a R & R.") (quoting *Camardo v. Gen. Motors Hourly-Rate Emps. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992))).

When the objecting party has improperly objected, or failed to object, to the magistrate judge's findings, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b) advisory committee's note to 1983 addition; *see Lopez v. Berryhill*, No. 1:17-CV-24263, 2019 WL 2254704, at *2 (S.D. Fla. Feb. 26, 2019) (stating that a district judge must "evaluate portions of the R & R not objected to under a clearly erroneous standard of review").

IV. DISCUSSION

As set forth in the R&R, Magistrate Judge Louis recommended that the Court grant Plaintiffs' Expedited Motion for Preliminary Injunction. *See generally* R&R. In doing so, Magistrate Judge Louis found that Plaintiffs collectively had standing, met each of the Eleventh Circuit's prerequisites for the granting of a preliminary injunction, and that the potential grant of an injunction by Plaintiffs' requested May 23, 2023 deadline would not occur too close to an election period such that a remedy would be impracticable. *See generally id.* Defendant's Objections consisted of both generalized grievances with the R&R's conclusions, as well as proper, specific objections to the R&R's findings. *See generally* Obj. Where the objections are proper, the Court reviews the R&R's findings *de novo*. *Macort*, 208 F. App'x at 784. Where Defendant makes an improper objection or raises no objection at all, the Court reviews the R&R for clear error. *Lopez*, 2019 WL 2254704, at * 2.

The Court's analysis below mirrors the structure of the R&R and proceeds in two parts. The Court first addresses whether Plaintiffs have standing to bring the instant Action. Next, the Court analyzes whether Plaintiffs have properly demonstrated that a preliminary injunction should be granted. In doing so, the Court specifically considers the findings of fact and law in the R&R, Defendant's Objections, Plaintiffs' Response to Defendant's Objections, and the record as a whole.

A. Standing

The R&R found that the Individual and Organizational Plaintiffs have standing to bring the instant Action. *See* R&R at 52–56. An individual who resides in a racially gerrymandered district "has standing to challenge the legislature's action" in that specific district. *United States v. Hays*, 515 U.S. 737, 745 (1995). The R&R found that the Individual Plaintiffs satisfied this standard because the Individual Plaintiffs each "submitted signed declarations supporting their averments that they reside in the challenged districts" and that Defendant produced no evidence to the contrary. R&R at 55–56. Regarding the Organizational Plaintiffs, standing exists when: (1) the interests at stake are germane to the organization's purpose; (2) the claim does not require the participation of individual members in the lawsuit, and (3) its members would otherwise have standing to bring suit. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Here, the R&R found that the unrefuted evidence demonstrates the Organizational Plaintiffs satisfied the requirements for standing. *See* R&R at 52–56; *see also* Am. Compl. ¶¶ 19–29 (noting that the Organizational Plaintiffs have members residing in each challenged district); (ECF No. 24-33); (ECF No. 24-34); (ECF No. 24-35); (ECF No. 24-36) (explaining the interests of each Organizational Plaintiff as relevant to the instant Action).

After carefully evaluating the R&R's findings, the Court agrees that Plaintiffs have standing to bring this Action. The record demonstrates that Plaintiffs reside in each challenged

district. Further, as the R&R correctly identified, each Organizational Plaintiff attested to having members residing in each challenged district, and that the interests at stake in the instant Action were germane to the organization's purpose. *See* R&R at 55 n.20. Thus, the Court agrees with the R&R and finds that both the Individual and Organizational Plaintiffs satisfy the standing requirements to bring this Action.

Defendant raises three objections to this conclusion: (1) Plaintiffs assert a shotgun pleading; (2) Plaintiffs failed to demonstrate a link between any specific plaintiff and any specific districting decision; and (3) Plaintiffs have not suffered any harm. *See* Obj. at 16–17. The Court finds that the objections are properly pled and reviews them *de novo*. For the following reasons, the Court finds each objection unavailing.

First, Defendant objects to the R&R's conclusion that Plaintiffs have standing because according to Defendant, Plaintiffs assert a shotgun pleading. *Id.* This argument has no bearing on the question of standing. A shotgun pleading analysis is relevant to a determination of whether Plaintiffs have complied with the procedural requirements to give Defendant adequate notice of the claims against it, not whether the Court has power to adjudicate the dispute. *See Weiland v. Palm Beach Cty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015) (explaining that a shotgun pleading involves the violation of Federal Rule of Civil Procedure 8(a)(2) or 10(b)). Accordingly, the Court finds that this objection is irrelevant to the R&R's standing analysis. Even so, the Court holds that the Amended Complaint is not a shotgun pleading because Plaintiffs assert a single cause of action, against one Defendant, with each factual allegation in the Amended Complaint supporting Plaintiffs' claim that the Defendant's redistricting process resulted in a racial gerrymander. *See generally* Am. Compl. The Amended Complaint surely "give[s] the defendant[] adequate notice of the claims against [it] and the grounds upon which [the] claim rests." *Vibe*

Micro, Inc. v. Shabanets, 878 F.3d 1291, 1294–95 (11th Cir. 2018) (internal quotations omitted). As such, Defendant's objection is overruled.

Next, Defendant argues that Magistrate Judge Louis erred because the R&R found that Plaintiffs bring a "whole map challenge," and the R&R failed to "match[] [any] particular plaintiff to any particular redistricting decision that affected their particular district." Obj. at 17. Both of Defendant's assertions are factually untrue. First, the R&R did not characterize the Action as a "whole map challenge," but rather stated that "the Court must decide whether race was the predominate factor that the City considered" and that this decision "must be made as to each Commission District, district-by-district, and not as to the [E]nacted [P]lan as a whole."[2] R&R at 56–57. The R&R did just that, identifying specific Plaintiffs who reside in each district and finding that each district was impacted by the redistricting decisions. *See id.* at 55–56. On these facts, the Court rejects this objection.

Finally, Defendant argues that the R&R incorrectly found Plaintiffs had standing because "Plaintiffs have not made a case they were harmed." Obj. at 17. As discussed later, a plaintiff suffers harm when the legislature racially gerrymanders its citizens because such assignment arises from the assumption that voters of a particular race, "think alike, share the same political interests, and will prefer the same candidate at the polls."[3] *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotations omitted). Here, the Court finds that a racial gerrymander did occur.

[2] Defendant mistakes the R&R's analysis with its own. Defendant cites to the following quote to support its argument that the R&R found that Plaintiffs bring a whole map challenge: "[t]hat Plaintiffs in essence bring a 'whole map challenge,' *as the City argued* at the March 29, 2023 hearing, does not preclude the instant Action. No Supreme Court precedent the Court is aware of forbids Plaintiffs from challenging all five of the Commission Districts." R&R at 59 (emphasis added). Defendant improperly cites to the R&R's restatement of Defendant's position on the issue, not the R&R's overall conclusion on the matter. And the R&R plainly found that Plaintiffs bring a district-by-district challenge. *See id.* at 55–56.

[3] *See* Section IV.B, *infra*.

Therefore, the Court finds that Plaintiffs, citizens of the City, were harmed when the City racially gerrymandered its districts. Accordingly, the Court rejects Defendant's objection.

Having dispensed with Defendant's objections to standing, the Court next proceeds to the merits of Defendant's arguments as to the preliminary injunction.

B. Preliminary Injunction

Pursuant to Federal Rule of Civil Procedure 65(a), the Court may enter a preliminary injunction "to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990) (quoting *Am. Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 483 F.2d 1, 4 (5th Cir. 1973)). Before a court grants a preliminary injunction, the plaintiff must establish four conditions: (1) a substantial likelihood of success on the merits; (2) a showing that the plaintiff will suffer irreparable injury if an injunction does not issue; (3) proof that the threatened injury to plaintiff outweighs any harm that might result to the defendant; and (4) a showing that the public interest will not be disserved by the granting of a preliminary injunction. *See id.* at 1284–85 (citing *Cunningham v. Adams*, 808 F.2d 815, 819 (11th Cir. 1987)). The "[f]ailure to show any of the four factors is fatal" to a motion for a preliminary injunction. *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Where the government is the opposing party, "[t]he third and fourth factors merge" in the preliminary injunction analysis. *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271 (11th Cir. 2020) (internal quotations omitted).

Finding that Plaintiffs satisfied their burden as to each of the four factors, the R&R recommended that the Court grant the Expedited Motion for Preliminary Injunction. *See generally* R&R. Defendant offers multiple objections. *See generally* Obj. The Court summarizes the R&R's

findings, analyzes each factor necessary to grant a preliminary injunction, and considers Defendant's objections in turn.

i. Substantial Likelihood of Success on the Merits

Plaintiffs bring this Action alleging each of the five Commission Districts were drawn in violation of the Fourteenth Amendment's Equal Protection Clause. *See* Am. Compl. ¶¶ 358–64. Specifically, Plaintiffs allege that the City impermissibly racially gerrymandered the districts. *See id*. Under the Fourteenth Amendment, "[w]hen a voter sues state officials for drawing such race-based lines," the court undertakes "a two-step analysis." *Cooper v. Harris*, 581 U.S. 285, 291 (2017). First, Plaintiffs must first prove that "race was the predominate factor motivating the legislature's decision to place a significant number of voters within or without a district." *Miller*, 515 U.S. at 916. Next, should Plaintiffs succeed, Defendant must demonstrate that its sorting of voters by race withstands strict scrutiny, that is, Defendant must show that the race-based sorting of citizens constitutes a compelling interest that is narrowly tailored to that end. *See Cooper*, 581 U.S. at 292 (citing *Bethune-Hill v. Va. State Bd. Of Elections*, 580 U.S. 178, 193 (2017)).

a. Whether Race was the Predominate Factor

When considering whether race was the predominant factor considered in the drawing of the districts, the Court considers each gerrymandering claim on a "district-by-district basis." *Bethune-Hill*, 580 U.S. at 191; *see also Ala. Legis. Black Caucus v. Ala.* ("*ALBC*"), 575 U.S. 254, 262 (2015). Plaintiffs must show that in each challenged district, Defendant "'subordinated traditional race-neutral districting principles' . . . to racial considerations." *Miller*, 515 U.S. at 916; *see also Cooper*, 581 U.S. at 291. To prove racial predominance, Plaintiffs can submit direct evidence of legislative intent and circumstantial evidence of a challenged district's shape and demographics. *See Bethune-Hill*, 580 U.S. at 187; *Cooper*, 581 U.S. at 291. Nevertheless, a court

must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race" because of the "intrusive potential of judicial intervention into the legislative realm." *Miller*, 515 U.S. at 916. Though "race-based decisionmaking is inherently suspect," the good faith of the Commissioners "must be presumed." *Id.* at 915.

The R&R found that "Plaintiffs are substantially likely to prevail in establishing that race was the predominant factor considered in the drawing of each of the five Commission Districts." R&R at 59. The Court addresses the R&R's findings as to each individual district.

At the outset, the Court notes that neither Party objects to the R&R's finding that "race was the predominant factor considered in the design of District 5" because Defendant attempted to design this district to comply with the Voting Rights Act ("VRA"). *Id.* at 60; *see also* Obj. at 15 ("The Court concluded that race was the predominant factor in placing a significant number of voters within a particular district. That was permissible regarding District 5."). Accordingly, the Court reviews this finding for clear error. *Lopez*, 2019 WL 2254704, at * 2. Here, the R&R analyzed Defendant's argument that "Section 2 of the VRA required the City to draw the borders of District 5 such that it has a BVAP of more than 50%," and further, Defendant's concession that District 5 must withstand strict scrutiny, to conclude that Defendant itself recognized race was the predominant factor considered. R&R at 60. Finding no clear error in this analysis, the Court adopts the R&R's findings that race predominated in the drawing of District 5.

As to Districts 1–4, the R&R found that race predominated in the design of each of the remaining districts through a review of direct evidence of legislative intent and the weighing of circumstantial evidence. *See id.* at 60–78. In support of this finding, the R&R thoroughly catalogued multiple occasions where a majority of Commissioners expressed their intent on the

public record that District 2 would be an "Anglo district," Districts 1, 3, and 4 would be "Hispanic districts," and District 5 would be a "Black district." *See id.* at 65–71.

Regarding Districts 1–4, the Court agrees that it "need not look much beyond what a majority of the Commissioners expressly stated on the record at public meetings regarding their understanding of historical redistricting cycles and their goal for the 2022 redistricting process resulting in the Enacted Plan." *Id.* at 64. When the record is replete with evidence that legislators instructed a mapmaker to draw districts to comport with a "purposefully established [] racial target," as is the case here, the Court may properly conclude that race predominated. *See Cooper*, 581 U.S. at 300–01 (holding that when legislators instructed the mapmaker to draw districts so that a particular district would be "a majority black district," and the mapmaker followed such instructions, that this evidence showed the announced racial target "subordinated other districting criteria"); *see Jacksonville Branch of NAACP v. City of Jacksonville* ("*Jacksonville II*"), No. 22-13544, 2022 WL 16754389, at *4 (11th Cir. Nov. 7, 2022) ("relevant, contemporaneous statements of key legislators are to be assessed when determining whether racial considerations predominated in redistricting processes").

As the R&R meticulously catalogued, multiple Commissioners over the course of six meetings expressed their desire that Districts 1, 3, and 4 remain "Hispanic districts," and that District 2 remain an "Anglo district."[4] *See, e.g.*, (ECF No. 24-14) (Tr. Feb. 25 AM at 60:17–61:22) (Carollo stated: "[w]e, yes, gerrymandered District 2, so that someone that would be of an Anglo

[4] The R&R thoroughly catalogued statements demonstrating this intent. *See, e.g.*, R&R at 65 (citing (Tr. Nov. 18 at 15:22–16:22); (Tr. Nov. 18 at 28:2–29:3); (Tr. Dec. 9 at 14:5–14); (Tr. Dec. 9 at 24:8–10); (Tr. Feb. 7 at 50–51); (Tr.Feb. 7 at 54:5–15); (Tr. Feb. 7 at 67:19–68:9); (Tr. Mar. 11 PM at 8:8–21); (Tr. Mar. 24 at 56:12–57:1); (Tr. Mar. 24 at 38:23–39:20)). The Court adopts these facts as stated in the R&R. For a more elaborate discussion of the Commissioners expressing their goals with respect the redistricting plan, see R&R at 11–40, 65–71.

background, not Hispanic, would be elected"); (ECF No. 24-17) (Tr. Mar. 11 PM at 8:8–21) (Commissioner Díaz de la Portilla stated: "[o]ur goal here is to have an African American district, for the lack of a better term, a white district, which is the coastal district, and three Hispanic districts"). The Commissioners instructed De Grandy, the consultant charged with proposing the redistricted map, to adhere to their redistricting goals to preserve the racial makeup of these districts, and De Grandy explained that he followed these instructions.[5] *See* (ECF No. 24-12) (Tr. Dec. 9 at 24:8–10). Speaking to the other Commissioners and De Grandy, Commissioner Carollo stated; "[t]his is what I feel that I have an obligation to protect. Not just [District 5]. District 4, and District 1. The other districts, like I said, no matter how we carve them, they're going to have the representation that we intended those districts to have for some time to come."); *see also* (ECF No. 24-11) (Tr. Nov. 18 at 17:9–15) (De Grandy stated: "[i]f there's three of you [Commissioners] that want to maintain the core of existing districts, that's what I do."). Accordingly, the Court considers the repeated, explicit statements from the majority of Commissioners in conjunction with De Grandy's admission that he followed such instructions, and that the Enacted Plan largely preserved this racial breakdown, to be sufficient in finding that Districts 1–4 were also drawn with race as the predominate factor.

Defendant proffers multiple objections, proper and improper, to these findings. *See generally* Obj. Specifically, Defendant objects to the following findings in the R&R:

(1) The R&R improperly focused on the Commissioners' statements that the districts were drawn to create a Black district, three Hispanic districts, and a so-called White district, when the city provided Mr. De Grandy with instructions adopted in Resolution R-21-0485 that did not incorporate such statements;

[5] Miguel De Grandy, Esq. was Defendant's redistricting consultant during the 2022 redistricting process.

(2) The R&R improperly found that Plaintiffs' expert attested that there were alternative maps that would have had less of a discriminatory impact;
(3) The R&R recommended a remedial plan with new district lines, but any such plan would closely resemble the existing plan, or alternatively, a new, constitutionally conforming map could not be created under the R&R's guidance;
(4) The R&R made no distinction between districting choices made regarding areas abutting District 5 and other areas unrelated to District 5;
(5) The changes to Districts 1–4 were not racial, but were intended to equalize population;
(6) The R&R impermissibly relied on post-enactment statements from Commissioner Carollo to determine legislative intent;
(7) The R&R impermissibly relied on the personal understanding of various Commissioners about the history of the how the districts were designed;
(8) The R&R incorrectly found the division of traditional neighborhoods, shape of the borders, and designs of the districts support a finding that the consideration of race was a predominate factor.

See generally id. As discussed below, the Court finds that each of these objects are unavailing, irrelevant to the analysis, or improper.

Regarding Defendant's first objection, the Court does not find that the R&R erred by reviewing "what a majority of Commissioners expressly stated on the record at public meetings." R&R at 64. To prove that districting decisions were made with race as the predominant factor, a plaintiff is entitled to use direct evidence of legislative intent. *Cooper* 581 U.S. at 291 ("The plaintiff may make the required showing through direct evidence of legislative intent, circumstantial evidence of a district's shape and demographics, or a mix of both.") (internal quotations omitted). Here, the record is replete with evidence suggesting the Commissioners intended that the districts be drawn in a particular manner to ensure candidates of certain ethnicities would be elected. *See* R&R at 64–71. And, while it is true that Defendant instructed its consultant to comply with the United States Constitution and VRA, maintain the core of existing districts,

consider voter cohesion, achieve substantial equality of population as opposed to mathematical equality, and maintain communities of interest and neighborhood where feasible in Resolution R-21-0485, *see* (ECF No. 50-1), the R&R correctly noted that the Commissioners frequently and explicitly emphasized over the course of six public meetings their intention to maintain three Hispanic districts, one Black district, and one Anglo district. *See* R&R at 64–71. Therefore, the R&R did not err in relying on the Commissioners' repeated instructions to De Grandy to preserve the "ethnic integrity" of each district, even if those instructions were not contained in the resolution itself. *See id.* at 68–69.

Defendant's second objection takes issue with one particular aspect of circumstantial evidence that the R&R considered: namely, the R&R's finding that Plaintiffs' expert opined there were alternative rejected maps that would have had less of a discriminatory impact than the Enacted Plan.[6] *See* Obj. at 3. Specifically, Defendant argues that Plaintiffs' expert, Dr. Abott, only "lays out the demographics of these alternative plans, demonstrating they are essentially the same [as the Enacted Plan]." *Id.* Yet, Defendant's argument is factually incorrect because it mischaracterizes Dr. Abott's report. Dr. Abott opined that the current districts' configurations were discriminatory because "areas moved from one district to another were done so on the basis of race and that other areas could have been moved without further segregating the districts by race but were rejected by the Commission." (ECF No. 24–31, at 2). As the R&R also found, Defendant "does not respond or rebut this evidence." R&R at 77. Because Defendant failed to rebut the evidence that these alternative maps could have had less of a discriminatory impact, the

[6] Defendant's objection on this point purports to undermine the R&R's conclusion regarding one of the eight factors to determine circumstantial evidence of legislative intent articulated in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

R&R found this evidence "weighs slightly in favor of finding race predominated." *Id.* Given that Defendant incorrectly characterizes the R&R and Plaintiffs' expert report, the Court rejects this objection. Rather, the Court finds that the R&R did not err in its consideration of the expert report on less discriminatory alternative map configurations as circumstantial evidence that race predominated.

Defendant also improperly objects to the overall conclusion of the R&R by asserting that should the R&R be adopted, a new map "will pass muster [either] if it is adopted without looking at race, even if is the same map, or [] no map can pass muster." Obj. at 4. Additionally, Defendant argues that as a practical matter, new districts cannot be created without creating "supermajorities of Hispanics," and that Defendant is in a "mathematically impossible position." *See id.* at 4, 9, 14. To the extent Defendant objects to the R&R as a whole, the objection is improper because Defendant does not identify the "portions of the proposed findings and recommendation" which it claims to be erroneous. *See Macort*, 208 F. App'x at 783. Further, any practical argument is misplaced and premature at this point in the litigation; the inquiry here focuses solely on if Plaintiffs are substantially likely to succeed on the merits and whether an injunction should be granted. The Court therefore rejects this objection.

Likewise, the Court also considers improper Defendant's objection that the changes to Districts 1–4 "were not racial, but were intended to equalize population." Obj. at 8. To reiterate, objections must "specifically identify the portions of a proposed finding" to which objection is made. *Macort*, 208 F. App'x at 783. Here, Defendant has not identified any specific factual finding it disputes, but rather, objects generally to the R&R's analysis of each district and its conclusion regarding racial predominance in each of Districts 1–4. *See* Obj. at 8. This objection is thus improper.

Defendant also objects to the R&R's findings of racial predominance insofar as it allegedly fails to make a "distinction between districting choices made regarding areas abutting District 5 and other areas unrelated to District 5." *See id.* at 5. According to Defendant, the R&R fails here by erroneously "focus[ing] primarily on areas surrounding District 5 where [race-based sorting] indisputably serves a compelling government interest." *Id.* Not so. The R&R properly and thoroughly conducted a district-by-district analysis examining factors relevant to each district on an individualized basis. *See* R&R at 60–78. Defendant cites to no authority suggesting the Court is required to consider the portions of the other districts abutting District 5 differently from the other areas within those districts, nor is the Court aware of any such requirement. Obj. at 5; *see also Bethune-Hill*, 580 U.S. at 192 ("Concentrating on particular portions [of district lines] in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target."). Thus, the Court overrules this objection.

The Court next addresses Defendant's objection that the R&R improperly relied on Commissioner Carollo's statements about the history of why the City originally adopted a five-district electoral map with one "Black district," one "Anglo district," and three "Hispanic districts" as circumstantial evidence of legislative intent in the 2022 redistricting cycle.[7] *See* Obj. at 8. Defendant argues that the R&R cannot rely on statements that Carollo made when he was Mayor about why the City originally designed the districts in this manner. *Id.* (citing *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974)) (explaining that generally, a court cannot rely on post-enactment statements of a legislator to determine legislative intent).

[7] Commissioner Carollo recounted this decision which occurred in 1997, when he was mayor. *See* (ECF No. 24-1) (Tr. Nov. 18 at 28:2–12).

However, that is not what the R&R does. Rather, the R&R considered Commissioners' statements regarding the history of the City's change to a single-member district system only insofar as it informed the Commissioners' present intent to preserve the racial breakdown of the districts *in this 2022 redistricting process*. *See* R&R at 65 ("But the Court need not delve into that historical evidence in this case because the Court need not draw inferences from that historical evidence."). The R&R's consideration of the Commissioners' statements in this context is permissible, even if the Commissioners based their current intent on their understanding of the historic evidence. *Cf. Jacksonville Branch of NAACP v. City of Jacksonville* ("*Jacksonville I*"), --- F. Supp. 3d ---, No. 3:22-CV-493-MMH-LLL, 2022 WL 7089087, at *41 (M.D. Fla. Oct 12, 2022), (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018)) ("[T]he Court considers the 2011 historical evidence only to the extent it gives rise to inferences regarding the intent of the City Council in 2022."). Instead of relying on Commissioner Carollo's description of why the City originally changed to single-member districts to determine legislative intent, the R&R instead focused on the myriad of statements from multiple Commissioners explaining that they desired to preserve three Hispanic districts, one Black district, and one Anglo district in the *2022 redistricting process*. *See* R&R at 11–40, 65–71. Therefore, the Court finds that contrary to Defendant's assertions, the R&R did not improperly rely on Commissioner Carollo's understanding of the history of the electoral districts, but rather, the R&R properly analyzed the *contemporaneous* statements of multiple Commissioners as relevant to their *present legislative intent*.

For the same reasons, the Court rejects Defendant's objection that the R&R mistakenly relied upon other various Commissioner's "statement[s] [sic] about their personal understanding of the history of the districts." Obj. at 8 (annotations omitted). Defendant proffers no additional argument why the R&R is not permitted to rely on such statements, nor does it refute the R&R's

assertion that the R&R considered the Commissioners' statements regarding the history of the districts only insofar as it informed their contemporaneous statements intending to preserve the racial breakdown of these districts in the 2022 redistricting cycle. *See id.* As noted above, the Court finds that the stated intent of multiple Commissioners is sufficient to demonstrate that the body considered race as the predominant factor in redistricting decisions. Because the R&R extensively details multiple Commissioners' statements regarding their desire to implement a plan to preserve the racial breakdown of each of the districts in the 2022 redistricting cycle, the Court finds that this objection is also unavailing. *See* R&R at 64–71.

Defendant's last objection argues the R&R improperly found that the splitting of neighborhoods, the racial makeup of the districts, and the shape of districts supported a finding that race predominated. *See* Obj. at 11. Defendant argues that the R&R should not have found the splitting of neighborhoods supports racial motive because "[t]hese divisions did not disenfranchise or dilute any community." *Id.* This argument fails; legally, a Fourteenth Amendment claim involves whether race was the predominate factor in drawing district lines, not whether vote dilution occurred. *Cooper*, 581 U.S. at 291. Further, Defendant argues that the R&R's finding regarding the splitting of neighborhoods, the racial makeup of the districts, and the shapes of the districts was an improper analysis, and if adopted, "will create a situation where any map made by the City will be unconstitutional." Obj. at 11. Again, rather than contesting a specific finding in the R&R or alleging that it improperly considered certain evidence, Defendant proffers an argument about the practical difficulties in drawing a constitutional map. As noted above, such a practical argument is not relevant to the question of whether race predominated in the districting decisions. Consequently, these objections are also unavailing.

In sum, the Court adopts the R&R's finding that race was the predominate consideration in each of the challenged districts and overrules each of Defendant's objections.

b. Strict Scrutiny

Once the R&R found that Plaintiffs were likely to succeed in establishing that racial considerations predominated in the drawing of each district, Magistrate Judge Louis then addressed whether Defendant met its burden of establishing that its use of race withstands strict scrutiny. *See* R&R at 78–88. To withstand strict scrutiny, "the burden [] shifts to the State to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 581 U.S. at 292. For the following reasons, the Court adopts the R&R's conclusion that Defendant has failed to demonstrate any of the challenged districts withstand strict scrutiny.

First, regarding District 2, Defendant failed to proffer any argument or justification for its consideration of race. *See* R&R at 87. As such, the R&R found that the design of this district does not withstand strict scrutiny because Defendant did not demonstrate that its consideration of race constituted a compelling governmental interest. *See id.* For that same reason, the Court agrees that District 2's design does not withstand strict scrutiny.

As to Districts, 1, 3, and 4, Defendant argued that it had to consider race when designing these districts as a necessary consequence of its mandate to consider race in District 5 pursuant to the VRA. *See id.* at 86–88. Notably, Defendant argued that it could consider race in Districts 1, 3, and 4, but never explained how doing so would constitute a compelling governmental interest as to those specific districts. *See id.* The R&R found that Defendant's argument for why it could consider race was not a compelling governmental interest because Defendant failed to produce any evidence that (1) it had "good reason to believe that the VRA required the City to create three

districts each with HVAP super-majorities," and (2) "review of the transcripts does not suggest that the City's consideration of race in drawing Districts 1, 3, and 4 was directed to VRA compliance whatsoever." *Id.* at 79, 86. Explaining that racial gerrymandering in one district "does not necessarily license the exaggerated consideration of race in other districts," the R&R found that the racial considerations in Districts 1, 3, and 4 also failed to withstand strict scrutiny because Defendant failed to articulate a compelling governmental reason to consider race in the design of these districts. *Id.* at 87.

Regarding the R&R's findings as to 1, 3, and 4, Defendant proffers no objection, and accordingly, the Court reviews the findings for clear error. *See generally* Obj. The Court first notes that Defendant only argued that racial considerations with respect to Districts 1, 3, and 4 were permissible when considering the design of District 5 under the VRA, but it did not demonstrate on an individualized basis how each district would withstand strict scrutiny. *See id.* at 57. Because Defendant does not argue that that the racial considerations of any of Districts 1–4 were justified by a compelling governmental interest that was narrowly tailored to that end, the Court finds that Defendant failed to meet its burden. Accordingly, Defendant's use of racial considerations in the design of Districts 1–4 fails to withstand strict scrutiny.

Lastly, as to District 5, Defendant argued that (1) its consideration of race was a compelling governmental interest because it was required to ensure District 5 complied with the VRA, and (2) in doing so, its use of a 50% Black Voting Age Population ("BVAP") was narrowly tailored to achieve that goal. *See* Obj. at 12–15. The R&R acknowledged that the consideration of race when designing this district to comport with the VRA was a compelling governmental interest. *See* R&R at 79–86. However, the R&R found that Defendant's attempt to comply with the VRA was not narrowly tailored because its "adherence to a minimum BVAP of 50% for District 5 was arbitrary,

and not necessary to afford Black voters an opportunity to elect preferred candidates of their choice, and not informed by pre-enactment functional analysis of Black voters." *Id.* at 81. Thus, because the R&R found Defendant's method for complying with the VRA was not narrowly tailored to that end, the R&R found that racial considerations within District 5 also did not withstand strict scrutiny. *See id.* at 86.

The Court agrees that Defendant has not met its burden to demonstrate that the racial considerations in the design of District 5 withstand a strict scrutiny analysis. Though the Court also acknowledges that VRA compliance is a compelling governmental interest, Defendant has failed to provide "good reason" for its belief that a 50% BVAP figure was required when designing that district. *See Abbott*, 138 S. Ct. at 2315. As the Court explains further below when addressing Defendant's objection, Defendant failed to provide sufficient pre-enactment analysis explaining what good reason it had for selecting the 50% BVAP figure, and without such evidence in the record, the Court cannot conclude that Defendant's consideration of race in the design of District 5 was narrowly tailored to achieve VRA compliance. *See* R&R at 83; *see generally* Obj. As such, the Court adopts the R&R's finding that the racial considerations which predominated in District 5 do not withstand strict scrutiny.

Defendant proffers one objection to this portion of the R&R, asserting that its method of complying with the VRA in District 5 was narrowly tailored.[8] Specifically, Defendant argues that the R&R erred when finding the Defendant's adherence to a minimum BVAP of 50% for District

[8] Defendant also argues "there is no way to redistrict without diminishing Black voter influence and jeopardizing the slim majority in District 5, other than to leave it as is." Obj. at 15. The Court does not construe this as a proper objection because it fails to identify any dispute to a finding within the R&R. As explained several times above, the focus at this juncture is on the potential infraction, not the remedy. Further, Defendant does not advance this argument to demonstrate its design of District 5 was narrowly tailored to a compelling interest and is therefore irrelevant to this analysis. *See id.* (arguing that redistricting could impact Black voter influence).

5 was arbitrary and not narrowly tailored to the goal VRA compliance. *See* Obj. at 14. Defendant avers that it had to ensure District 5 was designed so that it contained a BVAP of at least 50% because that is "the threshold required to bring a claim under Section 2 of the VRA," and further, that 50% is "the mathematical definition of a majority," which would ensure Black voters could elect a candidate of their choosing. *Id.* According to Defendant, it would be "reversible error" for the Court to conclude "that an election district that needed to be created under the VRA nevertheless had to be created at less than [a BVAP of] 50%." *Id.* at 15.

The Court agrees with the R&R that Defendant confuses its burden under the Fourteenth Amendment with a VRA claim. Plaintiffs brings their claim under the Fourteenth Amendment. *See generall*y Am. Compl. And as the Court has made clear, Defendant therefore must demonstrate that its use of predominately racial considerations was narrowly tailored to a compelling interest, (here, compliance with the VRA). Not only has it failed to do so, but among Defendant's scattered arguments about what BVAP figure is required under the VRA, the phrase "narrowly tailored" is never even mentioned. *See* Obj. at 14–15. Thus, even if the Court were to conclude the R&R was incorrect when finding the Defendant's use of the 50% figure for BVAP in District 5 was arbitrary, Defendant still advances no argument as to how that figure is narrowly tailored to achieve the goal of compliance with the VRA. *See id*.

And to be clear, the Court finds that the R&R correctly concluded the 50% figure for BVAP in District 5 was arbitrary and not narrowly tailored to VRA compliance. Though Defendant was not required to "determine precisely what percent minority population" is required for VRA compliance, it must have "good reasons" to believe the BVAP figure it selected is sufficient to avoid violating the VRA. *Bethune-Hill*, 580 U.S. at 194 (emphasis omitted). As the R&R correctly identified, Defendant failed to offer sufficient pre-enactment analysis presented to the

Commissioners explaining why it had for selected the 50% BVAP figure. *See* R&R at 83. Indeed, at various points in the pre-enactment process, both De Grandy and various Commissioners stated their belief that a BVAP figure would be VRA compliant with a figure below 50%. *See id.* at 84 (citing Tr. Feb. 7 at 8:12–19); (Tr. Mar. 24 at 8:5–9)). And, despite Defendant's assertion that "[n]o published case of which the City is aware has ever found that an election district that needed to be created under the VRA nevertheless had to be created at less than 50%," Plaintiffs have identified multiple such examples. *See* Resp. at 5–6 (citing *Jacksonville Branch of NAACP v. City of Jacksonville* ("*Jacksonville III*"), No. 3:22-cv-493-MMH-LLL, 2022 WL 17751416 (M.D. Fla. Dec. 19, 2022); *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1088, 1089 n.5 (N.D. Fla. 1992)).

In sum, Defendant fails to provide sufficient evidence demonstrating why and how the Commissioners decided that the 50% BVAP figure was sufficient for VRA compliance. To the extent Defendant provides any justification for choosing the 50% figure, it fails to demonstrate how that justification constituted a "good reason" to believe it complied with the VRA. Without a showing that Defendant had "good reason" to use the 50% BVAP figure in the design of District 5, the Court finds that Defendant's method of attempting to comply with the VRA was not narrowly tailored and thus, does not withstand strict scrutiny.

After careful review of the R&R's findings, the Court finds that Plaintiffs are substantially likely to succeed on the merits to demonstrate: (1) race was a predominate factor in the design of each individual district; and (2) Defendant has not met its burden to demonstrate that the design of these districts withstands strict scrutiny. Consequently, Plaintiffs have met the first requirement necessary to grant a preliminary injunction.

ii. Irreparable Harm

The R&R found that Plaintiffs would likely suffer irreparable harm if elections were held under the Enacted Plan in November 2023. *See* R&R at 88–92. In a racial gerrymandering case, a plaintiff suffers harm by virtue of the racial sorting itself and the subsequent participation in an election conducted pursuant to an unconstitutional map. *See ALBC*, 575 U.S. at 263. The R&R concluded that Plaintiffs would likely suffer irreparable harm here based on two factors: (1) Supreme Court and Eleventh Circuit precedent establishing that a plaintiff who votes under an unconstitutional electoral map suffers a harm that cannot be undone; and (2) Defendant does not specifically refute Plaintiffs' argument that they stand to suffer irreparable harm. *See* R&R at 89–91.[9] Consequently, the R&R found that Plaintiffs have also satisfied the second prerequisite necessary to grant a preliminary injunction.

The Court agrees with the R&R that Plaintiffs will likely suffer irreparable harm should they be required to vote in racially gerrymandered districts in the November 2023 election. Well-established precedent supports this proposition. *See, e.g.*, *Miller*, 515 U.S. at 911–12 ("When the [government] assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)); *Bethune-Hill*, 580 U.S. at 187 ("The harms that flow from racial sorting 'include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group.'") (quoting *ALBC*, 575 U.S. at 263); *Jacksonville II*, 2022 WL 16754389, at *5 ("Given that such gerrymandering would constitute irreparable harm to the Appellees . . . we

[9] The R&R noted that Defendant does not refute the argument about irreparable harm, but "asserts that the issue of irreparable harm is tied to the issue of standing." R&R at 91. As noted before, the Court adopts the R&R's conclusion that Plaintiffs have standing for the purposes of this Motion.

decline to require the residents of Jacksonville to live for the next four years in districts defined by a map that is substantially likely to be unconstitutional"). Furthermore, the harm that Plaintiffs would suffer from voting under an unconstitutional electoral map without the grant of an injunction "are egregious harms that cannot be redressed once an election has occurred." *Jacksonville I*, 2022 WL 7089087, at *49 (citations omitted). Once the Court has concluded that Plaintiffs have demonstrated a substantial likelihood of success on the merits regarding their claim that each district has been racially gerrymandered in violation of the Fourteenth Amendment, the harm that flows from such racial sorting is apparent. *See ALBC*, 575 U.S. at 263. Should Plaintiffs vote in the November 2023 election pursuant to the Enacted Plan, they will suffer a fundamental harm which cannot be remedied.

Defendant erroneously attempts to refute this finding by alleging that no group's voting power was diluted. *See* Obj. at 16. Defendant once again confuses the issues. Plaintiffs' burden in demonstrating irreparable harm under the Fourteenth Amendment does not require a showing of vote dilution, as Defendant seems to repeatedly suggest. *See Miller*, 515 U.S. at 911–12. Rather, Plaintiffs' harm arises by virtue of the racial sorting itself and the subsequent participation in an election where voting occurred under an unconstitutional map. *See ALBC*, 575 U.S. at 263. As such, the Court adopts the R&R's finding that Plaintiffs are likely to establish irreparable harm.

Aside from vote dilution, Defendant essentially offers one objection: "Plaintiffs have not made a case they were harmed either by the core districts remaining the same or by any redistricting change." Obj. at 17. Like much of Defendant's filing, this argument is not a proper objection because it fails to "specifically identify the portions of the proposed findings and recommendation" that Defendant disputes. *Macort*, 208 F. App'x at 783. A blanket assertion that the Defendant disagrees with the R&R's conclusion will not do. At no point in the Objection does

the Defendant dispute any factual finding or portion of the R&R's analysis regarding irreparable harm. *See generally* Obj. And as mentioned above, a harm exists because Plaintiffs were racially gerrymandered in an unconstitutional map. *See ALBC*, 575 U.S. at 263. Therefore, the Court rejects this objection and finds that the R&R correctly concluded that Plaintiffs are likely to suffer irreparable harm.

iii. Balance of Harms

Turning to the last prerequisites required to grant a preliminary injunction, the R&R assessed the remaining two factors together: (1) whether the threatened injury to Plaintiffs outweighs any harm that might result to Defendant; and (2) whether the public interest will not be disserved by the granting of a preliminary injunction. *See* R&R at 92 (citing *Fla. v. Dep't of Health & Hum. Servs.*, 19 F. 4th 1271, 1293 (11th Cir. 2021)) ("Where the government is the party opposing the preliminary injunction, its interest and harm—the third and fourth elements—merge with the public interest."). In its analysis, the R&R weighed the harm that Plaintiffs would suffer against Defendant's argument that Plaintiffs unduly delayed in seeking a preliminary injunction. *See id.* at 92–97. Further, the R&R addressed Defendant's arguments that an injunction would disserve the public because redistricting would lower the Black Citizen Voting Age Population ("BCVAP") in District 5 without increasing Black voters' influence, and secondly, that there is insufficient time to adopt an interim remedial map. *See id.* at 97–98. Ultimately, the R&R concluded that: (1) Plaintiffs' potential injury outweighs any harm Defendant may suffer "even despite [Plaintiffs'] relative lack of diligence" in filing the Motion; (2) the alleged harm that nonracial redistricting "would disserve black voters" is "not responsive to the balance of the equities prong for a preliminary injunction;" and (3) given that the next election is six months

away, there is sufficient time for the City to draw a map that comports with the Constitution.[10] *See id.* at 96, 98, 99.

First, the Court finds that Plaintiffs demonstrated a relative, but not fatal, lack of diligence in filing the Motion. Any lack of diligence must be weighed against the harm a plaintiff suffers. *Jacksonville II*, 2022 WL 16754389, at *2 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). Further, while the Court is wary that "[a] delay in seeking a preliminary injunction of even only a few months" can "militate[] against a finding of irreparable harm," such delay is not necessarily fatal. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Here, the Enacted Plan was adopted in March 2022, but Plaintiffs did not file the instant Action until December 2022 and they did not file the Motion until February 2023 (a period of nearly nine and eleven months, respectively). *See* R&R at 94–95. Though in relative terms this delay is lengthy, the Court gives credence to Plaintiffs' argument that its delay arose from caution and a need to ensure that Plaintiffs could satisfy their high evidentiary burden on such a large record. *See id.* at 95. Indeed, despite the relative delay, at the time the Motion was filed, the November election was still nine months away. Furthermore, despite the amount of time it took Plaintiffs to file the Motion, the delay was not so "egregious" that the Court would deny Plaintiffs relief from the grave harm they stand to suffer. *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)) (denying a preliminary injunction where the plaintiffs filed a motion for preliminary injunction "six years, and three general elections[] after the 2011 map was adopted, and over three years after the plaintiffs' first complaint was filed"). To the extent

[10] The R&R also explained Defendant's argument that "there is insufficient time to adopt a remedial map" was "implied and not directly argued or substantiated." R&R at 99. In fact, Defendant "does not [] raise or invoke" the *Purcell* principle when alleging this harm. *Id.* Defendant raises this argument for the first time in its Objection.

that the Court finds that Plaintiffs lacked diligence, it also finds that any lack of diligence does not weigh strongly in favor of denying the Motion.

On the other hand, the Court finds that Plaintiffs suffer serious harm when the legislature sorts its citizens based on race, and subsequently, when those individuals vote in racially gerrymandered districts. *See ALBC*, 575 U.S. at 263. Such harm to Plaintiffs cannot be redressed with monetary remedies. *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010). Weighing the serious nature of this harm against the Plaintiffs' relative lack of diligence, the Court finds Plaintiffs' potential harm is greater.

Turning to Defendant's next argument, the Court disagrees that there is insufficient time to redraw constitutionally conforming maps. *Cf. Jacksonville I*, 2022 WL 7089087, at *54–55 (granting an injunction against the City of Jacksonville on October 12, 2022 and ordering the City to file an interim remedial plan by November 8, 2022, to be finalized by December 16, 2022 for a March election).[11] Ordering Defendant to draw a conforming map on May 23, 2023, the date of this Order, allows for a 70 day window prior to August 1, 2023 (i.e. the date the Miami-Dade County Elections Department said that it would need a map transmitted to it). The election will not occur until November. Such a timeline is within the date that Plaintiffs requested, is less condensed than the remedial plan that the court ordered in *Jacksonville I*, and accordingly, the Court sees no reason why the Parties could not comply with the Order here.

Finally, the Court also finds that based on the aforementioned timeline, this case does not fall within the *Purcell* principle. "Federal district courts ordinarily should not enjoin state election

[11] Much like in *Jacksonville I*, the Parties in this case "worked backwards" from the August 1, 2023 deadline to craft a briefing schedule considering the potential time needed for a remedy. *Id.* at *4 (finding the Parties knew that to proceed with the March 2023 general elections, the City Council needed district boundaries by December 16, 2022, which in turn, informed the Parties briefing schedule).

laws in the period close to an election.*" League of Women Voters of Fla., Inc., v. Fla. Sec'y of State* ("*LOWV*"), 32 F. 4th 1363, 1371 (11th Cir. 2022) (internal quotations omitted). The Supreme Court "has never specified precisely what it means to be on the eve of an election for *Purcell* purposes." *Jacksonville I*, 2022 WL 7089087, at *3 (internal quotations omitted). The Eleventh Circuit has found the *Purcell* principle to apply when an election is set to begin in less than four months, *see LOWV*, 32 F. 4th at 1371, but not when the elections for a single county occurred five months after an injunction. *See Jacksonville II*, 2022 WL 16754389 at *2. From the time of this Order, the November 2023 election is over four months away from May. To find that this Order implicates the *Purcell* Principle "would extend the eve of an election" farther than the Eleventh Circuit has before. *See id.* (internal quotations omitted).

Thus, after a careful review of the R&R, the Court determines that given the Plaintiffs' likelihood of success on the merits, the harm Plaintiffs will suffer outweighs any harm to Defendant—namely harm arising from Plaintiffs' alleged lack of diligence and the practical concerns about how quickly a constitutionally conforming map could be enacted.

Defendant offers two categories of objections to the R&R's findings, one of which relates to various findings in the R&R supporting the conclusion that Plaintiffs did not unreasonably delay filing the Motion, and the other relating to legal questions arising under *Purcell* and whether there is sufficient time to implement a remedial map that comports with the Constitution. Obj. at 17–20. Regarding the first category, Defendant asserts three objections: (1) Plaintiffs are challenging decisions that, in essence, were made twenty-five years prior to the Enacted Plan; (2) because a Special Election already occurred in February 2023, the R&R should have found the filing of the Motion had been unreasonably delayed; and (3) the R&R erroneously concluded that Defendant had the burden to prove the delay was "intentional, strategic, or even negligent," when actually

Plaintiffs had the burden to demonstrate "reasonable diligence." *Id.* at 18–19. As to *Purcell*, Defendant argues this Court should not grant the injunction largely because the R&R stated that "the consideration of the *Purcell* principle may be required [by] the time at which a final ruling on the Expedited Motion is entered." *Id.* at 20.

Beginning with Defendant's objection that Plaintiffs are actually challenging a districting decision from twenty-five years ago, the Court notes that Defendant is seeking a "second bite at the apple." *Marlite, Inc. v. Eckenrod*, No. 10-23641-CIV, 2012 WL 3614212, at *2 (S.D. Fla. Aug. 21, 2012) ("It is improper for an objecting party to . . . submit [ ] papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge") (internal quotation omitted). Defendant has already argued this exact point and the R&R expressly considered and rejected it. *See* R&R at 94 ("At the outset, the Court rejects the City's argument that Plaintiffs are 25 years too late in seeking a preliminary injunction. The harms in this case are new harms resulting from the 2022 Enacted Plan, which is a different electoral map from that enacted in 1997.").

After careful review, the Court agrees with the R&R that this is not a case brought twenty-five years too late. *Jacksonville I* is instructive. There, the "racial percentage of a district's residents was a significant factor" in designing voting districts during the 2011 redistricting cycle. *Id.* at *9. In the 2021 redistricting cycle, "it was immediately apparent that equalizing the district populations would not require drastic changes [to the 2011 plan]." *Id.* at *11. Ultimately, the court found that the "contemporary statements of key legislators in the 2021 redistricting cycle," demonstrated an "unequivocal intention to maintain the shape of these Challenged Districts," with slight alterations, to preserve the racial demographics of the 2011 redistricting cycle. *Id.* at *48. The *Jacksonville I* Court rejected the defendant's argument that the plaintiffs delayed in filing the

preliminary injunction motion because plaintiffs were essentially attempting to enjoin decisions from the 2011 redistricting cycle. *Id*. at *51–52. In doing so, the court held that "to the extent the City contends that injunctive relief is not warranted because the alleged harms have been in existence since at least 2011 if not before, the Court is not persuaded. Plaintiffs in this case complain about a new harm—the maps enacted in 2022." *Id.*

In the instant Action, Defendant presents the same unavailing argument. While true, the contemporary statements of multiple Commissioners demonstrate that their intent was to preserve the demographic breakdown of each district from the original redistricting decisions in the late 1990s, like in *Jacksonville I*, the harms in this case arise from the new Enacted Plan and the result of the most recent redistricting. Accordingly, the Court finds that R&R correctly rejected Defendant's argument that "Plaintiffs are 25 years too late in seeking a preliminary injunction." R&R at 94.

The Court now turns to Defendant's second objection regarding the February 2023 Special Election and what bearing it has on the R&R's finding that Plaintiffs did not delay in filing the Motion. From what the Court can decipher, Defendant appears only to take issue with the fact that the R&R allegedly "brushes off the Special Election because it did not involve most of the challenged districts." Obj. at 18.

The R&R did no such thing. Rather, the R&R carefully considered the timing of the Special Election in relation to when the Motion and Amended Complaint were filed. *See* R&R at 95–96. Indeed, the R&R explained that "the vacancy that culminated in [the Special Election] occurred after Plaintiffs' Complaint was filed and the [S]pecial [E]lection occurred after the [M]otion was filed." *Id.* at 95. Moreover, the R&R noted that, based on the City's Charter, "it was not a foregone conclusion that a [S]pecial [E]lection to fill the vacancy" regarding

Commissioner Russel's successor "would be called." *Id.* at 96. Considering these facts, the R&R found that the Special Election contributed to a finding that Plaintiffs unreasonably delayed filing the Motion, but the delay was not as egregious as the delay in *Benisek*. *See id.* at 96.

At no point did the R&R "brush off" the Special Election. *See* Obj. at 18; R&R at 95–96. Nor did the R&R's analysis of the Special Election mention how the election would or would not impact the other challenged districts. *See* R&R at 95–96. Defendant's characterization of the R&R's findings regarding the Special Election is flatly incorrect and has no basis in the text of the R&R. Rather, the Court finds that the R&R properly evaluated Plaintiffs' diligence in filing the Motion by assessing the timing of both the Motion itself and the Amended Complaint in relation to the Special Election. Defendant's objection to this point is therefore unavailing.

Lastly, Defendant argues that the R&R applied the incorrect standard to determine whether Plaintiffs unreasonably delayed in filing their Motion. Obj. at 19. Defendant states that the "R&R implies that [Defendant] bore the burden to prove that the delay was 'intentional, strategic or even negligent.'" *Id.* (citing R&R at 95). Correctly, Defendant notes that the proper standard mandates that "Plaintiffs must show reasonable diligence where there has been delay" in filing the Motion. *Id.*; *see also Benisek*, 138 S. Ct. at 1944. However, for the following reasons, the Court reiterates that Plaintiffs' relative delay was not unreasonable.

"The Supreme Court has explained that a party requesting a preliminary injunction must generally show reasonable diligence." R&R at 93 (quoting *Benisek*, 138 S. Ct. at 1944) (internal quotations omitted). Here, the R&R properly examined the arguments regarding the alleged filing delays through a lens of Plaintiffs' reasonableness. *See id.* at 94–96. Specifically, the R&R examined whether Plaintiffs' delay was reasonable by analyzing (1) the time it took for Plaintiffs to file the Complaint and the Motion after the Enacted Plan was executed; (2) the impact of the

Special Election that occurred in February 2023; and (3) the time it took for Plaintiffs to gather sufficient evidence to file their Motion. *See id.* at 96–98. In doing so, the R&R even found that Plaintiffs demonstrated a "relative lack of diligence." *See id.* at 97. After a *de novo* review, the Court finds that the R&R properly analyzed whether Plaintiffs' delay was reasonable. Considering Plaintiffs' evidentiary burden in filing the Motion, the impact of the February Special Election, and that the Motion was filed well before the November election, the Court finds that Plaintiffs' delay was not unreasonable. The Court therefore rejects each of Defendant's objections.

To conclude, the Court finds that Plaintiffs have satisfied each element necessary for the granting of a preliminary injunction. For the foregoing reasons, the Court ADOPTS the R&R.

V. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Report & Recommendation (ECF No. 52) is ADOPTED. Plaintiffs' Expedited Motion for Preliminary Injunction (ECF No. 26) is GRANTED. Upon the entry of this Order, the Court shall issue separate Orders referring the Parties to supplemental mediation and setting a Status Conference. At the Status Conference, the Parties shall be prepared to discuss a potential timeline to create and implement a constitutionally conforming remedial map.

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of May 2023.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:22-cv-24066-KMM

GRACE, INC., *et al.*,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant City of Miami's ("Defendant" or "the City") Notice of Passage of Redistricting Plan. ("Notice") (ECF No. 77). Therein, Defendant gives notice that it has enacted a new redistricting plan, Resolution 23-271 ("Remedial Plan"), to replace the redistricting plan that this Court previously enjoined, Resolution 22-131 ("2022 Enacted Plan" or "Enjoined Plan"). *See id.* Plaintiffs[1] filed Objections to Defendant's Proposed Interim Remedial Plan. ("Objections" or "Obj.") (ECF No. 83). In turn, Defendant filed a Memorandum of Law in Response to Plaintiffs' Objections. ("Reply") (ECF No. 86).

For the reasons discussed below, the Court finds that the Remedial Plan does not completely correct the constitutional defects the Court found were substantially likely to exist in the Enjoined Plan. Thus, the Court finds it necessary to adopt its own remedial plan.

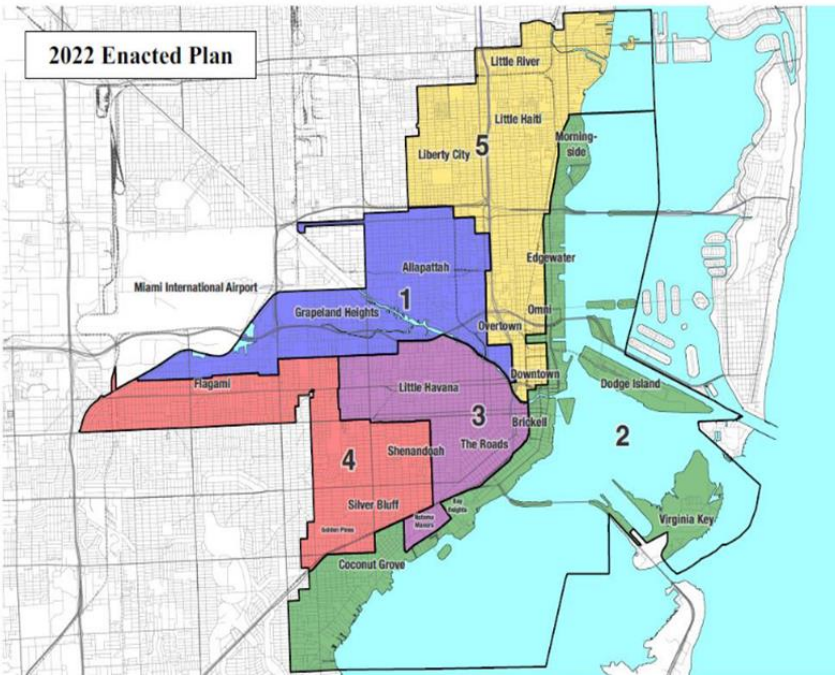
[1] Plaintiffs in this action are Clarice Cooper, Yanelis Valdes, Jared Johnson, Alexandra Contreras Steven Miro, GRACE, Inc., Engage Miami, Inc., South Dade Branch of the NAACP and Miami-Dade Branch of the NAACP (collectively, "Plaintiffs").

I. BACKGROUND AND PROCEDURAL HISTORY

Though the Parties are surely familiar with the background of the instant Action, the Court nonetheless finds it valuable to give a thorough recitation of the facts to provide necessary context for its decision.

A. Passage of the Enjoined Plan

On March 24, 2022, the Commission of the City of Miami (the "Commission") passed the 2022 Enacted Plan following the results of the 2020 United States Census. The plan provided the new jurisdictional borders for each of the five commission districts.



On December 15, 2022, Plaintiffs commenced this action. *See* (ECF No. 1). In the First Amended Complaint ("Complaint" or "Compl."), Plaintiffs claim that the 2022 Enacted Plan violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because Defendant improperly used race as the predominant factor in drawing each of Miami's five commission districts. *See* (ECF No. 23 ¶¶ 358–365). In the Complaint, Plaintiffs

seek: (1) a declaration that each of the commission districts in the 2022 Enacted Plan are unconstitutional racial gerrymanders in violation of the Fourteenth Amendment; (2) a preliminary and permanent injunction enjoining Defendant from conducting elections under the 2022 Enacted Plan; and (3) an order requiring the City to hold special elections should adequate relief not be available prior to the next regularly scheduled election in November. *See generally* Compl.

B. The Preliminary Injunction

On February 10, 2023, Plaintiffs filed an Expedited Motion for Preliminary Injunction ("Motion"). *See* (ECF No. 26). Therein, Plaintiffs requested the Court enjoin Defendant from "calling, conducting, supervising, or certifying any elections under the [2022] Enacted Plan, beginning with the regular 2023 elections until the entry of a final judgment." *Id.* at 36. Defendant opposed the Motion, *see* (ECF No. 36), and the Court referred the Motion to United States Magistrate Judge Lauren F. Louis for a Report and Recommendation. *See* (ECF No. 27).

After an evidentiary hearing lasting over five hours, which included the presentation of ninety-three exhibits from Plaintiffs, twelve exhibits from Defendant, and the testimony of the City's redistricting consultant, Miguel De Grandy, Esq. ("De Grandy"), *see* (ECF No. 48), Magistrate Judge Louis issued a thorough Report and Recommendation ("R&R"). Therein, Magistrate Judge Louis recounted at length the redistricting process, expert reports, and other exhibits and record materials. *See* (ECF No. 52).

First, by examining the contemporaneous statements of various Commissioners and examining the sequence of events leading to the passage of the 2022 Enacted Plan, Magistrate Judge Louis found that race predominated in the drawing of each of the five commission districts. *See id.* 76–77. Magistrate Judge Louis explained the Commissioners' "intent was, as expressed, to preserve previously-drawn race-based lines of the Commission Districts in the 2022 redistricting

process." *Id.* at 67. Magistrate Judge Louis supplemented this finding with an examination of the *Arlington Heights* factors, which in her opinion, also "strongly support[ed] a finding that Plaintiffs are likely to succeed in establishing that racial considerations predominated in the City's design of Districts 1, 2, 3, and 4."[2] *Id.* at 77 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). After finding that race predominated in the design of each district, Magistrate Judge Louis also opined that none of the districts withstood strict scrutiny as is required under the Fourteenth Amendment. *Id.* at 78–87. Accordingly, Magistrate Judge Louis concluded that Plaintiffs demonstrated a substantial likelihood of success on the merits. *See id.* at 87–88.

Turning next to irreparable harm and a balancing of equities between the parties, Magistrate Judge Louis found that Plaintiffs stand to suffer irreparable harm because "the injury to a plaintiff of voting under an unconstitutional electoral map, or an electoral map that violates § 2 of the VRA, 'cannot be undone through any form of monetary or post-election relief.'" *Id.* at 90 (quoting *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 687 F. Supp. 3d 1222, 1320–21 (N.D. Ga. 2022)). Magistrate Judge Louis found that the potential harm to Defendant, namely that there was insufficient time to enact a remedial map and that nonracial redistricting would disserve Black voters, was outweighed by the harm Plaintiffs would suffer from racial gerrymandering.[3] *See id.* at 88–100. After carefully considering each prong of the preliminary injunction test, Magistrate Judge Louis recommended that the Court: (1) enjoin Defendant from using the 2022 Enacted Plan

[2] The Parties did not dispute that Defendant was required under § 2 of the Voting Rights Act of 1965 ("VRA") to consider race when drawing District 5 in a manner where race would predominate.

[3] Magistrate Judge Louis rejected the argument that nonracial redistricting would disserve Black voters as non-responsive to the balance of the equities portion of the preliminary injunction test. R&R at 98. Rather, according to Magistrate Judge Louis, that argument is relevant to the likelihood of success on the merits. *See id.*

until the entry of a final judgment; and (2) establish a schedule for the preparation of a remedial plan which comports with the United States Constitution. *Id.* at 100.

Defendant filed Objections to the R&R, *see* (ECF No. 55), which "consisted of both generalized grievances with the R&R's conclusions, as well as proper, specific objections to the R&R's findings." *See* (ECF No. 60 at 3). Plaintiffs filed a Response to Defendant's Objections affirming their support for the R&R. *See* (ECF No. 57). Defendant also filed a Reply in Support of Objections. *See* (ECF No. 59).

After careful consideration of the R&R, the Parties' briefings, and the relevant record material, the Court granted Plaintiffs' preliminary injunction motion and adopted the R&R in full ("Order"). *See* (ECF No. 60). In the Order, the Court reaffirmed Magistrate Judge Louis's findings that: (1) race was the predominant factor in the drawing of each commission district, and Defendant could not demonstrate the design of any district withstood strict scrutiny; (2) Plaintiffs would likely suffer irreparable harm if they were required to vote in racially gerrymandered districts in the November 2023 election; (3) any harm Defendant may suffer would be outweighed by the harm to Plaintiffs; and (4) there was sufficient time to create a constitutionally conforming remedial map without running afoul of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).[4] *See generally id.*

On June 2, 2023, the Court issued a Scheduling Order. *See* (ECF No. 69). Therein, the Parties were directed to complete mediation by June 22, 2023. *Id.* at 1. If the Parties could not reach a settlement, Defendant was ordered to enact a proposed remedial map and file it with the Court by June 30, 2023. *See id.* Upon Defendant's filing of the proposed remedial map, Plaintiffs

[4] Under *Purcell*, district courts should generally refrain from enjoining state election laws in the period close to an election. *League of Women Voters of Fla., Inc., v. Fla. Sec'y of State*, 32 F. 4th 1363, 1371 (11th Cir. 2022) (internal quotations omitted)

were informed that they needed to notify the Court within two days if they had no objections. *Id.* However, if Plaintiffs objected to the newly proposed remedial map, Plaintiffs would have seven days to file a memorandum in opposition, and in turn, Defendant would have five days to file a reply. *Id.* at 1–2. The Court set these deadlines to ensure Defendant would be able to provide the Court's Order approving any remedial plan to the Miami-Dade County Elections Department by August 1, 2023, the date the Miami-Dade County Supervisor of Elections requires a remedial map to administer the November 2023 elections. *See id.* at 2; *see also* (ECF No. 26 at 36).

C. Passage of the Remedial Plan

After a series of meetings discussed below, Defendant passed the Remedial Plan. The Court provides background on what occurred at those meetings.

1. The May 11, 2023 Meeting

On May 11, 2023, after Magistrate Judge Louis issued the R&R, but before the Court granted the preliminary injunction, the City Commissioners began discussing how to alter the commission districts if the Court were to enjoin the 2022 Enacted Plan. *See* ("May 11 Meeting" or "5/11 Tr.") (ECF No. 82-1).

Considering that Magistrate Judge Louis had recently issued the R&R, the May 11 Meeting began with Commissioner Díaz de la Portilla discussing the reason why Miami originally created single member districts, while also explaining his desire to maintain the diversity within those districts. *Id.* 4:16–5:20 ("Because what happened, the reason why single member districts were created back then was to make sure the diversity that Miami has, as we said, it's already in on the record, doesn't matter if I say it again, right. . . the reason [it] was created was to keep harmony in our city because we have a very diverse community. . . we want an African American representation, we want a non-Hispanic white representation, we want that."). According to

Commissioner Díaz de la Portilla, the Commissioners have been trying to "be fair and to provide representation for all communities in our city." *Id.* 5:12–13. Commissioner Reyes echoed the sentiment. *See id.* 5:14, 13:8–14.

Then, the Commissioners (mostly Commissioner Díaz de la Portilla) discussed a potential alternative to single member districts, suggesting the potential return to "at large districts throughout the city." *Id.* 3:8–9, 4:1–4, 7:19–21, 13:9–14. The City Commissioners then opened the meeting for public comment. *See id.* 8:19. Multiple citizens spoke about the Enjoined Plan and the importance of community representation. *See id.* 8:21–12:18. After permitting public comment, Defendant's counsel informed the Commissioners about the present state of the instant Action. *See id.* 13:3–14:1.

The May 11 Meeting concluded with Commissioners Díaz de la Portilla and Reyes providing instruction to De Grandy to commence drawing a new map, which, according to Commissioner Reyes, "will guarantee that ten years from now we're going to have the diversity. . . . in the city government and we are going to elect an Afro American to a seat, that they're going to be properly represented, as well as other groups." *Id.* 17:10–13. With this instruction, combined with the additional directive to "explore the at large districts" as possible alternatives, the City Commissioners directed De Grandy to begin redrawing a map of the Enjoined Plan. *See id.* 17:17–18:1.

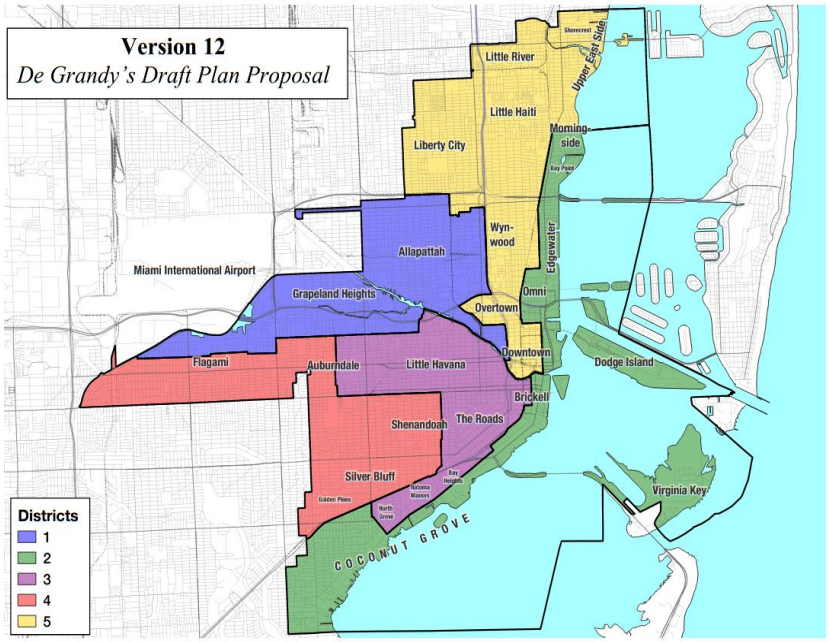
2. The June 14, 2023 Meeting

After the May 11 Meeting, and after this Court entered its Order adopting the R&R, thereby enjoining the use of the 2022 Enacted Plan, the City Commission convened on June 14, 2023 to discuss potential remedial plans. *See* ("June 14 Meeting" or "6/14 Tr.") (ECF No. 82-2).

At the beginning of the June 14 Meeting, the Plaintiffs presented and advocated for three alternative remedial maps ("P1," "P2," and "P3," respectively). *Id.* 5:21–7:2. Specifically, Plaintiff Yanelis Valdes argued that each of the three maps Plaintiffs created "feature compact and logical districts that respect neighborhoods, follow major geographic boundaries, and preserve genuine communities of interest. They don't pack Hispanic voters into three specific districts and no longer designate one district as an Anglo access seat. They also fully comply with the VRA and provide[] Black voters with the ability to elect their preferred candidate in District 5." *Id.* 6:13–17. Plaintiff Valdes then, for the first time, unveiled a new map, P3, "incorporating community feedback and input from [the Commissioners]" which kept together key neighborhoods such as "Flagami, Edgewater, Allapattah and Shenandoah." *Id.* 6:11–12, 6:19–20. In concluding the presentation, Plaintiff Valdes requested the City Commissioners seriously consider the alternative maps to "undo the violations and remedy the wrongs in the [Enjoined Plan]." *Id.* 6:21–7:1.

De Grandy also presented a thorough examination of his newly proposed plan ("V12"), as well as a comparison between V12 and the Plaintiffs' first two alternative maps.[5] *See id.* 8:5–16:13. According to De Grandy, he did not receive Plaintiffs' third alternative map until the day of the presentation and therefore he had not yet fully reviewed it. *Id.* 8:5.

[5] De Grandy's proposed map at the June 14 Meeting was entitled "V12." Despite the name, Defendant claims that there were no other versions of the proposed map, even though De Grandy discusses both V12 and V14 in the June 14 Meeting.



De Grandy began his presentation by explaining that his current proposal, V12, originated from Plaintiffs' second proposed alternative map, P2. *Id.* 9:1–3. Using P2 as a template, De Grandy explained that he then made "changes consistent with the policy choices of this elected body." *Id.* 9:2–3. When crafting V12, De Grandy informed the City Commission that he focused on "political and policy considerations," "where Commissioners have invested district resources in their projects," "the need to balance poor areas with areas that have significant economic potential or activity," "natural and manmade boundaries," and "keeping as many communities of interest together as feasible." *Id.* 11:23–12:3, 12:10.

Beginning with a discussion of District 5, De Grandy explained that V12 was crafted to ensure compliance with the Voting Rights Act, but also considered Commissioner King's directive to include areas that would generate significant economic activity. *See id.* 12:2–3. As a result, V12's District 5 kept together traditional neighborhoods such as Shorecrest, Belle Meade, Bayside, Little River, Lemon City, Liberty City, and Buena Vista, but also included areas with significant economic activity such as Wynwood, Midtown, and the Design District. *Id.* 12:15–17. Further,

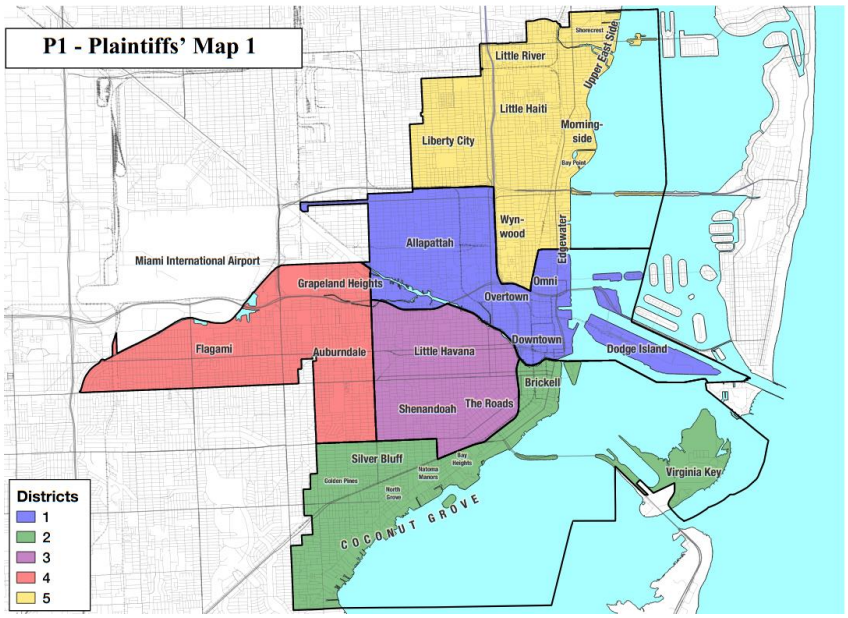
portions of Overtown remained in V12's District 5 based on Commissioner King's prior work in that area regarding affordable housing and public transportation. *Id.* 12:19–22.

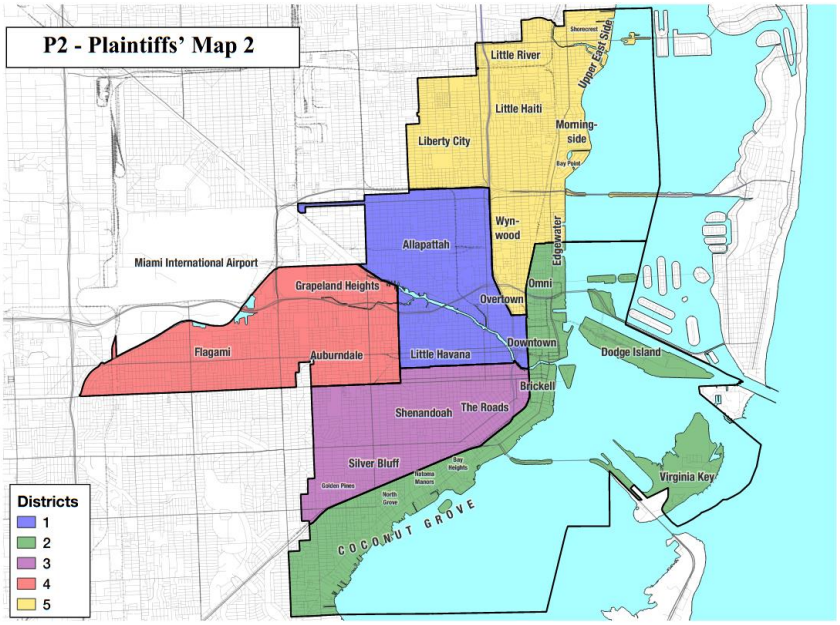
As to District 1, V12 "restored the connection to the western part of the city" and contained "the bulk of the Miami riverfront." *Id.* 13:5–8. De Grandy explained that the riverfront is an important business community worth keeping together in the district, as were other traditional neighborhoods such as Allapattah, Civic Center, Grapeland Heights, and parts of West Flagler and Flagami. *Id.* 13:8–16. V12's boundaries, according to De Grandy, track "significant manmade and natural boundaries such as water boundaries, major roads, the city's municipal boundaries. . . and the borders of traditional neighborhoods as well as I-95." *Id.* 13:16–19.

Regarding District 2, De Grandy explained that V12 extended District 2 north to take parts of Morningside, and to include "significant portions" of neighborhoods such as Bay Point, Omni, Downtown, Brickell and Coconut Grove. *Id.* 13:20–14:11.

Where V12 is markedly different from the Enjoined Plan, however, are Districts 3 and 4. Because De Grandy concluded that "there is no way to apportion the population of those two districts in a manner that would not result in majority Hispanic percentages in both," V12 delineates the borders of Districts 3 and 4 based on policy choices. *Id.* 14:16–18. In V12, District 4 splits Flagami, and "preserves the bulk of" Shenandoah, Silver Bluff, and Coral Gate. *Id.* 15:3–6. Consequently, V12's District 3 "wraps around District 4" to ensure "most of Shenandoah" remained in District 4, "while preserving Little Havana intact" in District 3. *Id.* 15:13–15. Finally, De Grandy explained that District 3 "utilizes manmade and natural borders" like the Miami River and Bayshore Drive as logical boundaries. *Id.* 15:16–17.

De Grandy also used his time presenting to explain why, in his opinion, Plaintiffs' first two alternative maps, P1 and P2, were comparatively worse alternatives to V12.

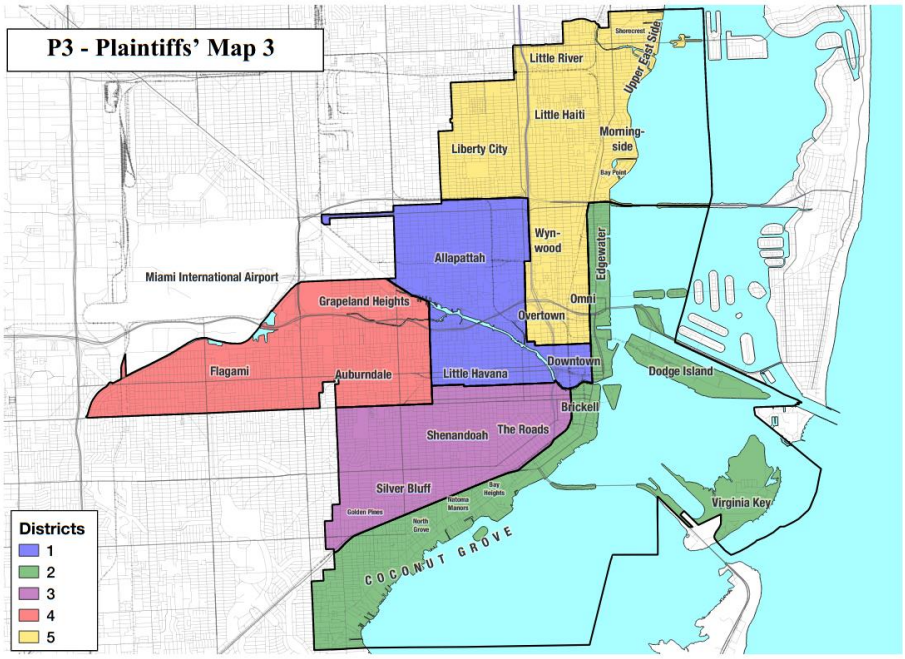




Much of De Grandy's discussion about Plaintiffs' P1 and P2 revolved around his belief that Plaintiffs created their alternative maps based on their own political preferences. For example, De Grandy explained that "both plans pack the more conservative voters in the western part of the city into D[istrict] 4." *Id.* 9:12–13. "By packing more conservative voters into D[istrict] 4, shifting areas around, and submerging part of the compact and cohesive Overtown community in D[istrict]

1, the plan is geared to result in a more liberal voting pattern for D[istrict] 1." *Id.* 9:13–15. De Grandy explained P1 and P2 had a decrease of Republican voters in District 1. *See id.* 10:7–11:2.

Other than presupposing Plaintiffs' political motives for why P1 and P2 were drawn as they were, De Grandy's presentation was lacking in discussion as to the substantive merits or detriments of Plaintiffs' alternatives other than to identify where P1 and P2's district borders differed from V12. De Grandy did, however, express his confusion regarding one aspect of P1 and P2, namely, that each alternative split parts of Overtown, thereby removing the neighborhood from consisting entirely within District 5. *Id.* 10:2–3. According to De Grandy, he did not understand Plaintiffs' "radical shift in position" and why Plaintiffs' alternative maps split Overtown into multiple districts. *Id.* 10:5. However, as mentioned above, De Grandy did not review P3, which included all of Overtown in District 5.



Following De Grandy's presentation, several citizens expressed their displeasure with V12 for varying reasons, and the Commissioners began negotiating among themselves about how to adjust V12. *See id.* 16:17–31:22. In response to Commissioner Carollo's comments that Coconut

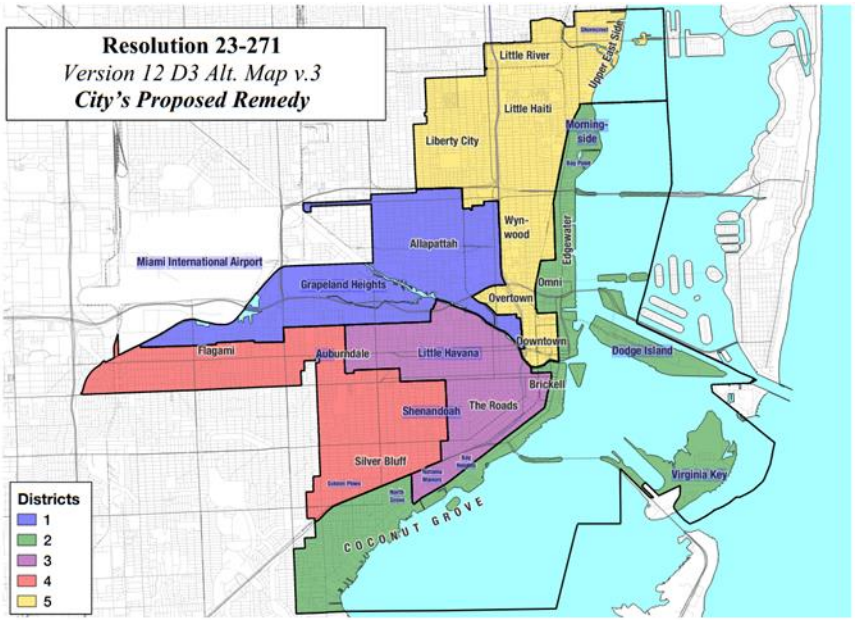
Grove has many different communities, Commissioner Covo expressed her desire to keep Coconut Grove united within one district. *See id.* 39:11–40:12, 42:9–43:3. Commissioner King asked De Grandy if V12 could be altered so none of Morningside would be in District 5, but rather, if it could be moved entirely into District 2. *See id.* 43:21–47:2. Commissioner Carollo indicated that he wanted the entirety of Domino Park to be in District 3. *See id.* 52:21–53:5. Then, Commissioner Reyes informed De Grandy that multiple Commissioners, including Commissioners Covo and Díaz de la Portilla, also made copies of alternative maps. *See id.* 48:20–49:1, 50:4 (Commissioner Díaz de la Portilla explaining that his alternative map was entitled "V14"). Presuming each of the tweaks that each of the Commissioners wished to make to V12 would be minor, the Commission recessed for three hours so De Grandy could make the requested adjustments. *See id.* 55:3–22.

Upon reconvening, De Grandy had prepared another presentation, this time with five alternatives for the Commissioners to consider. *See id.* 58:21–23. Specifically, the presentation included the following five maps: an unaltered V12, V14, Commissioner Carollo's alternative map, Commissioner King's alternative map, and Commissioner Covo's alternative map.[6] *See id.* 59:5–12.

From this point on, the Commissioners used V12 and the alternate maps to create a finalized remedial map. Commissioner King, on behalf of Commissioner Carollo, indicated her support for a map where Domino Park would be placed entirely into District 3. *See id.* 69:11–18. Commissioner King then asked if People's Bar-B-Que (an historic restaurant) could be included in District 5. *See id.* 70:8–11. The Commission obliged, and the southern border of District 5 was

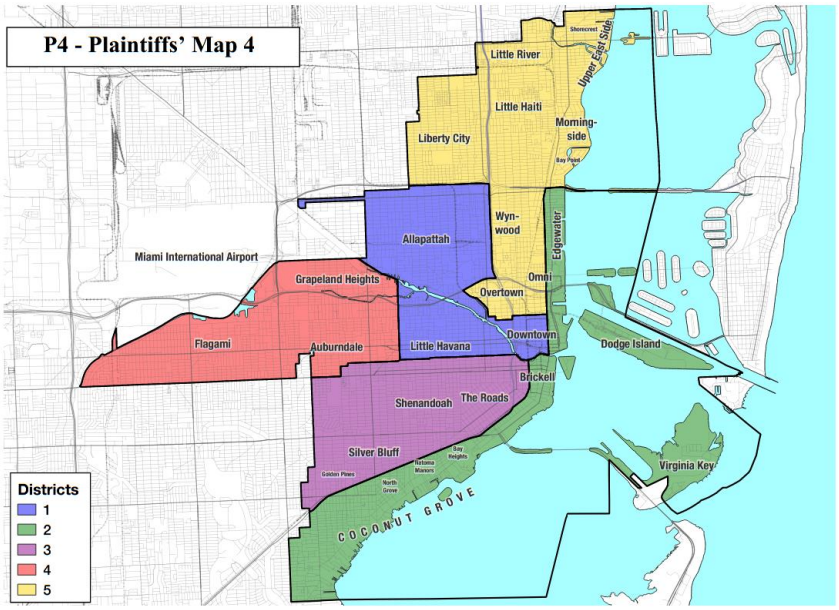
[6] At this juncture, the Commissioners were no longer considering Plaintiffs' proposed alternative maps.

moved to include only that restaurant. *See id.* 72:16–17 (noting, however, that only that block containing People's Bar-B-Que would be moved to District 5, "nothing to the left, nothing to the right, nothing to the center"). Lastly, the Commissioners agreed to restore the "Bahamanian Grove" into District 2, though Commissioner Covo failed in her attempt to convince the other Commissioners to place all of Coconut Grove into one district. *See id.* 87:21–22, 89:14–91:19. By majority vote, the Commissioners agreed to pass the Remedial Plan. *See id.* 90:19.



Defendant timely notified the Court of the passage of the Remedial Plan on June 30, 2023. *See* Notice. In their Objections, Plaintiffs allege that the Remedial Plan does not completely remedy the constitutional violation that the Court found was substantially likely to exist in the Enjoined Plan. *See generally* Obj. According to Plaintiffs, the Court should reject the Remedial Plan, and instead, implement Plaintiffs' fourth alternative map ("P4"). *See id.* at 26–31. Plaintiffs aver that P4 remedies the likely constitutional violations of the Enjoined Plan, adheres to traditional redistricting criteria, complies with federal and state law, comports with the priorities of the city commission where possible, and does not segregate citizens on racial lines. *See id.* In

response, Defendant urges the Court to adopt the Remedial Plan as a constitutional remedy. *See generally* Reply.



Considering the relevant factual background, the Court evaluates the Remedial Plan to determine whether it is constitutionally compliant and if it provides a sufficient remedy for the Enjoined Plan.

II. LEGAL STANDARD

In the instant Action, the Court is not confronted "with an original racial gerrymandering challenge" to the Remedial Plan, but rather, it evaluates the Remedial Plan after a finding that the Enjoined Plan was substantially likely to violate the Equal Protection Clause of the Fourteenth Amendment. *Covington v. North Carolina* ("*Covington I*"), 283 F. Supp. 3d 410, 431 (M.D. Fla. 2018), *aff'd in relevant part*, 138 S. Ct. 2548 (2018). "As such, 'when a federal court concludes that a . . . districting plan violates the Constitution, the appropriate [legislative] redistricting body should have the first opportunity to enact a plan remedying the Constitutional violation.'" *Jacksonville Branch of NAACP v. City of Jacksonville* ("*Jacksonville II*"), No. 3:22-cv-493-MMH-

LLL, 2022 WL 17751416, at *11 (M.D. Fla. Dec. 19, 2022) (alterations in original). Indeed, "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

Should the legislature proffer a "new legislative plan. . . [it] will then be the governing law unless it too, is challenged and found to violate the constitution." *Id.* at 540. At that point, the "remedial posture impacts the nature of [a court's] review." *Covington I*, 283 F. Supp. 3d at 431. Legislative enactments, including a remedial plan, are still cloaked with the "presumption of legislative good faith," even after a finding of past discrimination, and the "burden of proof lies with [Plaintiffs], not the State" to demonstrate the remedial map is unconstitutional. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). But the Court must also ensure that any remedial plan "so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). "In the remedial posture, courts must ensure that a proposed remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Covington I*, 283 F. Supp. 3d at 431 (citing *Abrams v. Johnson*, 521 U.S. 74, 86 (1997)). 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); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) (holding that a court should not "refrain from providing remedies fully adequate to address constitutional violations"); *Abrams*, 521 U.S. at 86 (holding a remedial districting plan cannot be sustained if it "would validate the very maneuvers that were a major cause of the unconstitutional districting").

III. DISCUSSION

At this juncture, the Court has granted Plaintiffs' motion for a preliminary injunction. *See generally* Order. Now, while affording great deference to the City Commission and presuming good faith on their behalf when passing the Remedial Plan, *see Abbott*, 138 S. Ct. at 2324, the Court must determine whether the Remedial Plan completely corrects the constitutional infirmities the Court found were substantially likely to exist in the Enjoined Plan. *Covington I*, 283 F. Supp. 3d at 431. If the Remedial Plan does not make the necessary corrections, the Court has the duty to "cure [the] illegally gerrymandered districts" by creating a constitutional reapportionment plan or choosing an alternative. *North Carolina v. Covington* ("*Covington II*"), 138 S. Ct. 2548, 2553 (2018) (per curiam); *see also White*, 412 U.S. at 794.

When considering whether the Remedial Plan is a sufficient remedy to the Enjoined Plan, the Court first assesses Defendant's arguments in favor of the Remedial Plan's constitutionality. Next, the Court considers Plaintiffs' argument that, based on direct evidence of the Commissioners' stated intent when redistricting and circumstantial evidence that the Remedial Plan perpetuates the unconstitutional aspects of the Enjoined Plan, the Remedial Plan fails to provide a constitutional remedy. Finally, after determining that the Remedial Plan is not a constitutional remedy, the Court analyzes whether Plaintiffs alternative map, P4, passes constitutional muster.

A. Defendant's Arguments in Favor of the Remedial Plan's Constitutionality are Unavailing

Defendant proffers two main arguments in support of why, in its view, the Remedial Plan is constitutional. First, Defendant would have the Court evaluate the Remedial Plan as a new redistricting plan, and "not an interim remedial plan."[7] Reply at 2; *cf. Jacksonville II*, 2022 WL

[7] According to Defendant, because the Remedial Plan was "not an interim remedial plan," Plaintiffs' "attacks on the [Remedial] Plan are moot." Reply. at 2; *see also* (ECF No. 80)

17751416, at *13 (explaining "the City would have the Court start its review of racial predominance on a clean slate"). According to Defendant, because the new plan is not "remedial," the Court must consider the action anew, meaning the Court should not consider whether the Remedial Plan completely corrects the constitutional infirmities that are substantially likely to exist in the Enjoined Plan. Reply at 5–6, *see also* (ECF No. 80). In Defendant's view, it follows that when the Remedial Plan is considered anew, it is constitutional. Reply at 5–6. Secondly, Defendant avers that aside from District 5 (the VRA district), the entire process by which the Remedial Plan was enacted occurred "without any discussion of race" and is thus constitutional. *See id.* at 5, 7 ("At no other point was race discussed except to the extent it was necessary to confirm that District 5 would be a VRA performing district."). Instead, according to Defendant, the Commissioners focused on "maintaining communities in which they had invested District resources," "maintaining population variances at acceptable levels," "political considerations," and ensuring the Commissioners would "not be[] drawn out of their districts." *Id.* at 5–6, 9. The Court addresses each argument in turn.

Defendant's first argument—that the Remedial Plan should be considered anew, as if it were entirely untethered to the Enjoined Plan—is unavailing. Try as it may, Defendant's attempt to classify the Remedial Plan as an entirely new plan will not alter the remedial nature of this action, nor will it alter the Court's review. *See* Section II, *supra*. As the Court has already made clear, the "remedial posture impacts the nature of our review." *Covington I*, 283 F. Supp 3d at 431; *see also Jacksonville II*, 2022 WL 17751416, at *1 (following the issuance of a preliminary injunction, the court reviewed the remedial plan to determine whether it "cure[d] the constitutional

(Defendant's Motion to Dismiss on mootness grounds). Finding Defendant's argument unsupported by decades of Supreme Court and Eleventh Circuit precedent, the Court denied Defendant's Motion to Dismiss. *See generally* (ECF No. 91).

violations that the Court found were substantially likely to exist"). While the Remedial Plan still enjoys a presumption of good faith, "courts must ensure that a proposed remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Covington I*, 283 F. Supp. 3d at 431 (citing *Abrams*, 521 U.S. at 86). The Remedial Plan is not insulated from this type of review simply because Defendant claims the plan is not remedial; the Court's duty to assess the constitutionality of a remedial map does not turn on whether Defendant classifies it as such.

Defendant is also mistaken that the Remedial Plan is constitutional because, in Defendant's view, there was no discussion of race during its enactment (other than to ensure VRA compliance regarding District 5). But as courts have made clear, "the race-blind criterion alone does not immunize the districts in the Remedial Plan from further review nor does it necessarily remedy the constitutional violation." *Jacksonville II*, 2022 WL 17751416, at *14. "[T]he Supreme Court long has recognized that a statute enacted by a state legislature to remedy an unconstitutional race-based election law can perpetuate the effects of the constitutional violation, and thereby fail to constitute a legally acceptable remedy, even when the remedial law is facially race-neutral." *Covington I*, 283 F. Supp. 3d at 434. Such an approach is only logical. Otherwise, "a state redistricting body tasked with redrawing districts to remedy a racial gerrymander could adopt the exact same districts as those held unconstitutional so long as the redistricting body relied on prior district lines, not race, in drawing the purportedly remedial districts." *Id.* at 435 (emphasis omitted). Therefore, Defendant's argument that race was not a factor in the process of enacting the Remedial Plan is not dispositive, because even if the Remedial Plan was enacted in a facially race-neutral manner, circumstantial evidence may yet demonstrate that the plan unconstitutionally

sorted voters based on race. *See Covington II*, 138 S. Ct. at 2553. And, as discussed later, *see* Section III.B.1, *infra*, the Court finds that race *did* factor into the creation of the Remedial Plan.

Based on the aforementioned discussion, the Court disagrees with Defendant's arguments.

B. Considering Direct and Circumstantial Evidence, the Court Finds that the Remedial Plan Does Not Remedy the Enjoined Plan

Now the Court must evaluate whether the Remedial Plan "completely corrects" the unconstitutional gerrymanders the Court found was substantially likely to exist in each district in the Enjoined Plan. The Court examines whether: (1) direct evidence demonstrates the Commissioners intended the Remedial Plan to perpetuate the unconstitutional aspects of the Enjoined Plan; and (2) circumstantial evidence demonstrates that the Commissioners chose "to rely on redistricting considerations that have the potential to carry forward the effects of the constitutional violation—like preserving district cores." *Covington I*, 283 F. Supp 3d at 435. The Remedial Plan will be unconstitutional if Defendant "prioritized criteria that were predestined to perpetuate, rather than correct, the preexisting racial gerrymandering." *Jacksonville II*, 2022 WL 17751416, at *14.

1. Direct Evidence

A party can demonstrate that a remedial plan perpetuates the unconstitutional aspects of its predecessor by relying on "direct evidence going to legislative purpose" in the drawing of the remedial plan. *See Miller v. Johnson*, 515 U.S. 900, 916 (2018). Such evidence would clearly demonstrate that a remedial plan's "new districts were mere continuations of the old, gerrymandered districts" and that voters "remain segregated on the basis of race." *Covington II*, 138 S. Ct. at 2553.

Plaintiffs argue that "from the outset of their process, multiple Commissioners repeated their attitude that representation on the Commission was racially categorical, that the redistricting's

goal was to draw one Black, one Anglo, and three Hispanic seats. . . and that [the Commissioners] had done the right thing [when enacting the Enjoined Plan]." Obj. at 9. According to Plaintiffs, the Commissioners reiterated their commitment to drawing a map that would ensure the aforementioned racial breakdown of the districts would remain during the May 11 Meeting. *See id.* Defendant retorts that the relevant meeting to determine legislative intent is the June 14 Meeting where the Remedial Plan was adopted, not the May 11 Meeting. *See* Reply at 7–8. Further, Defendant argues that the statements of legislative intent Plaintiffs identify are "taken out of context, or simply misleadingly editorialized." *Id.* at 8.

Before examining the content of the statements at the May 11 Meeting, the Court pauses briefly to explain that it *should* consider the May 11 Meeting when determining the Commissioners' intent. Defendant attempts to convince the Court otherwise, arguing that "[a]t the May 11 meeting, redistricting plans were not considered and [De Grandy] was not present." *Id.* Yet, at the May 11 Meeting, the Commissioners discussed potential redistricting solutions, and the conversation ultimately culminated in the Commissioners unanimously agreeing to direct De Grandy to begin redrawing a map based on certain criteria discussed during the meeting. *See* 5/11 Tr. 17:9–20. Thus, the Court finds the May 11 Meeting relevant insofar as it provides insight to both the Commissioners' legislative intent and their directions to De Grandy.

Regarding the Commissioners' statements during the May 11 Meeting, the Court agrees with Plaintiffs that some statements reaffirm Defendant's intent to ensure that one district would have a Black representative, one would have an "Anglo" representative, and the other three representatives would be Hispanic. Obj. at 9. As noted above, Defendant argues that these statements were "taken out of context" and "are utterly devoid of racial intent." Reply at 8–9. To a certain extent, Defendant is correct. For example, one such statement Plaintiffs cite to, a

statement from Commissioner Reyes, appears to summarize the drafters' approach in the Enjoined Plan rather than demonstrate any present intent to perpetuate the racial gerrymandering in the forthcoming Remedial Plan.

> I'm gonna say the ACLU, they're claiming that it was not fair. You see? You be careful what you wish for because the way that we have been dealing for a long time, every time that they have been since day one when their boundaries were drawn, it was to assure diversity in the city of Miami. And the only way that we can assure diversity of the city of Miami is by—I'm going to call a spade a spade—[sic] gerrymandering. We have to bunch together ethnicity, ethnic borders in order to be able to have Afro American, make sure that they are represented, and non-Hispanic white in the—in representing the city of Miami. So, if they are—now they are accusing us of gerrymandering, if we go now on and instead of having districts and we don't draw the districts to assure [sic] that we have that representation. You have a point there and see, what do they think, because they are going to be the culprit of eliminating diversity in the city of Miami government.

Id. at 8 (quoting 5/11 Tr. 6:2–14).

But, while this one statement does not demonstrate present legislative intent, the multiple other statements Plaintiffs identify during the May 11 Meeting do. For example, when discussing the lawsuit and the possibility of returning to a citywide election system in light of the R&R's findings, Commissioner Díaz de la Portilla stated: "we want an African American representation, we want a non-Hispanic white representation, we want that. I think it adds to the—to the fiber of our city and adds to the representation that we provide up here." 5/11 Tr. 4:21–22. With this comment, Commissioner Díaz de la Portilla reiterated his belief that the racial breakdown of the districts in the Enjoined Plan was actually beneficial, thus suggesting his intent that any remedial plan should also retain these race-based characteristics.

Further, when explaining what he believed to be the consequences of eliminating election districts altogether, Commissioner Reyes stated: "what are the consequences if we go and we eliminate the districts. . . if we eliminate the districts, we're going to have five Hispanics sitting here, just because of the composition of the population. It is just that simple. You see?" *Id.*

13:10–14. As noted above, the Commissioners believed the Enjoined Plan assured diversity in Miami, and if election districts were removed, the Commissioners believed it would "eliminate diversity" of representation. *Id.* Commissioner Reyes's commentary supports the notion that the Commissioners' intended any remedial plan moving forward should not "eliminate diversity" of representation in the electoral districts.

Then, as a result of the conversation explaining the original rationale for using electoral districts, and after the Commissioners had the opportunity to explain that they passed the Enjoined Plan (and plans prior) to provide for representation of "all groups in our city," the Commissioners unanimously directed De Grandy to "start redrawing a map[,] that will guarantee that ten years from now we're going to have the diversity. . . in the city government and we are going to elect an Afro American to a seat, that they're going to be properly represented, as well as other groups." *Id.* 17:9–13. This explicit directive provides the strongest evidence that the Commissioners intended the Remedial Plan to carry forward the very same race-based characteristics of the Enjoined Plan that the Court found was substantially likely to be unconstitutional.

Defendant argues that the "transcripts [of the May 11 Meeting] speak for themselves." Reply at 8. Indeed, they do. After review of the May 11 Meeting and the quotations referenced above, the Court does not view the Commissioners as only discussing "why single member districts were created back then," or whether to return to an at-large electoral system. Reply at 8 (quotations and emphasis omitted). Instead, the May 11 Meeting is better understood as the Commissioners explaining why they believed their initial approach when enacting the Enjoined Plan (*i.e.* creating the gerrymandered districts), was the correct approach, and after some discussion, unanimously directing De Grandy to maintain the racial breakdown of each district in

a new map.[8] The directive to De Grandy is clear, and the Commissioners' statements during the May 11 Meeting combined with their directive to De Grandy support a finding that the Commissioners intended for the Remedial Plan to preserve the prior racial breakdown of the Enjoined Plan, thus perpetuating rather than remedying the unconstitutional racial gerrymandering.

2. Circumstantial Evidence

In addition to direct evidence, a plaintiff may rely upon "'circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing' the lines of legislative districts." *Covington II*, 138 S. Ct. at 2553 (quoting *Miller*, 515 U.S. at 913). During the remedial portion of a case, "circumstantial evidence [can] demonstrate[] that the effects of prior racial gerrymandering . . . remain present in [a] [r]emedial plan." *Jacksonville II*, 2022 WL 17751416, at *17 (reviewing circumstantial evidence such as core retention data, demographic shifts between the enjoined and remedial plan, and that district borders were drawn to ensure incumbency protection).

Here, Plaintiffs identify multiple circumstantial reasons as to why the Remedial Plan perpetuates the racial gerrymandering from the Enjoined Plan. First, Plaintiffs argue that the Remedial Plan is staggeringly similar to the Enjoined Plan, and accordingly, the Remedial Plan suffers from the same impact of the unconstitutional race-based sorting as its predecessor. *See*

[8] Defendant attempts to describe the Commissioners' directive to De Grandy as something entirely different—a discussion where Commissioner Reyes explained his desire to preserve the VRA-required District 5 among a greater discussion of at-large districts. Reply at 9. The Court does not ascribe much weight to this argument given that during the relevant portion of the May 11 Meeting, Commissioner Reyes only references District 5 implicitly when directing De Grandy to preserve a "Afro American to a seat" along with other groups and doesn't mention at-large electoral districts at all. *See* 5/11 Tr. 17:9–16. Though this directive may have occurred in the context of a larger discussion, it still included instructions to begin drawing a map preserving the racial breakdown from the Enjoined Plan.

Obj. at 10–11. Further, Plaintiffs aver that Defendant's alterations to V12 during the June 14 Meeting "claw[ed] back even more elements of the Enjoined Plan," thereby reaffirming "the Commission's original handiwork."[9] *Id.* at 11. Likewise, Plaintiffs argue race remains the predominant factor the Commission considered in the unaltered aspects of V12 which the Commissioners incorporated in the Remedial Plan, and Defendant has not made a showing of satisfying strict scrutiny. *See id.* at 16–26.

In turn, Defendant argues the Remedial Plan is constitutional because the Commissioners focused on legitimate, non-racial criteria, such as political considerations, where they had invested substantial district resources, and where candidates reside. *See* Reply at 5–6, 9. For the following reasons, the Court finds that even if the Commissioners did employ the above-mentioned criteria, those considerations had the impact of perpetuating, rather than completely correcting, the constitutional infirmities of the Enjoined Plan.

Specifically, the Court considers the following circumstantial evidence: the Remedial Plan's core retention rate, whether the Commissioners' alterations (or lack thereof) to V12 incorporated in the Remedial Plan preserve the unconstitutional aspects of the Enjoined Plan, and whether race still predominates in each district in the Remedial Plan.

i. The Remedial Plan's Core Retention Rate Provides Evidence of the Commissioners' Intent to Maintain the Enjoined Plan's Features

[9] As previously discussed, after this Court enjoined Defendant from using the 2022 Enacted Plan, De Grandy proposed V12. Plaintiffs argue the Commissioners made changes to V12 such that V12 became more similar to the Enjoined Plan than V12 was originally. *See* Obj. at 11–15. These alterations were incorporated in the Remedial Plan. *Id.* at 11. Plaintiffs argue that these alterations, resulting in the Remedial Plan more closely resembling the Enjoined Plan than V12 did, is circumstantial evidence that the Remedial Plan does not fully remedy the Enjoined Plan. *Id.*

When determining "core retention rate," "mapmakers lock in prior district configurations with the aim of populating each new district with the residents of its predecessor district, adjusting as needed to restore population equality." Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. Rev. 985, 1006 (2022). Generally, high core retention rates provide circumstantial evidence of legislative intent to preserve the features of the previously unconstitutional district. *See Covington II*, 138 S. Ct. at 2551. Indeed, the Supreme Court affirmed the rejection of a remedial plan where the districts "retain[] the core shapes of districts that [the trial court] had earlier found to be unconstitutional." *Id.*

The core retention rates in the instant Action show that nearly all Miamians remain in the same district under the Remedial Plan as in the Enjoined Plan. *See* Obj. at 10 (citing ("McCartan Rep.") (ECF No. 82-11 at 8)). When core retention rates in a remedial plan are high, *Jacksonville II* is instructive. In *Jacksonville II*, the court found that the "unrebutted data [shows] that the vast majority of Black residents living in the Packed Districts under the Enjoined Plan remain in one of the Packed Districts under the Remedial Plan." *Id.* at *13. According to the *Jacksonville II* Court, the high core retention rates demonstrated that the remedial plan perpetuated "the harmful effects of the City's decades-long history of racial gerrymandering." *Id.* at *14. Similarly, in the instant Action, 94.1% of Miamians remain in the same district under the Remedial Plan. *See* McCartan Rep. at 8; *cf. In re SJR 1176*, 83 So. 3d 597, 662, 665 (Fla. 2012) (finding a core retention rate of 82.6% to be overwhelming). The Court agrees with Plaintiffs that the core retention rates between the Remedial Plan and the Enjoined Plan are "staggeringly high," and, like in *Jacksonville II*, indicate that the Remedial Plan does not completely correct the unconstitutional aspects of the Enjoined Plan. Obj. at 10.

Importantly, the Remedial Plan not only retains the vast majority of the district cores from the Enjoined Plan, but the actual citizens who were moved to a different district under the Remedial Plan "point to continued racial predominance." *Id.* Plaintiffs' expert Dr. Abott explains that, though 5,125 residents were moved from Districts 1, 3, and 4 (the predominantly "Hispanic districts" under the Enjoined Plan) to Districts 2 and 5, these citizens were only 58.8% Hispanic Voting Age Population ("HVAP") (compared to the HVAP of Districts 1, 3, and 4, in the Enjoined Plan ranging from 88–90%).[10] *See* ("2nd Abott Rep.") (ECF No. 82-12 at 8–9). Moreover, Dr. Abott showed that, of the 4,735 residents removed from District 5 in the Remedial Plan, only 16.6% are Black, even though the Black Voting Age Population ("BVAP") of District 5 is 50.3%. *Id.* at 4, 9. Moreover, areas that were approximately 90% HVAP were shuffled among Districts 1, 3, and 4—"creating the illusion they changed while maintaining their demographics." Obj. at 10 (citing 2nd Abott Rep. at 5, 7, 8–9) (explaining that the approximately 1,000 people moved between Districts 1,3, and 4 were predominantly Hispanic and did not alter the racial breakdown from the Enjoined Plan). These changes suggest that the voters who were either moved out of, or among Districts 1, 3, and 4, did not result in meaningful changes from the Enacted Plan.

The Court finds it illustrative to see which voters the Commissioners chose to move in the Remedial Plan. As explained above, District 2 retains a large Anglo population with a disproportionately "less-Hispanic" population moved into it, District 5 remains a 50.3% BVAP,

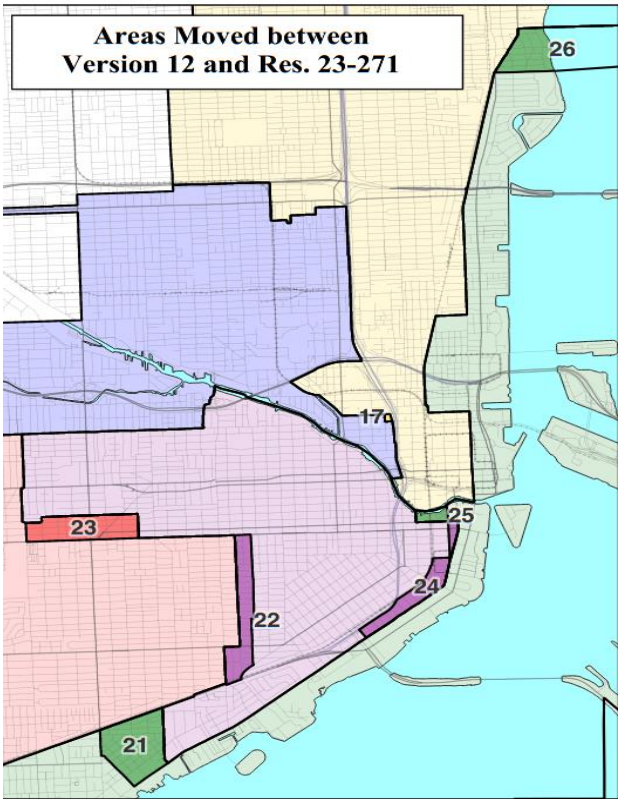
[10] The Court notes that Defendant has filed a Motion to Strike Carolyn Abott's Improper Opinions Assessing the Credibility of Witnesses and Speculating About the City's Considerations and Motivations in Creating a New Plan. (ECF No. 87). Therein, Defendant argues that Dr. Abott improperly "conclu[ded] that the changes in the City's proposed new map appear to continue to be designed around racial and ethnic considerations, and there is no basis on which to make the argument that these considerations were instead partisan in nature." *Id.* at 2. (internal quotations omitted) (alterations in original). Because the Court does not rely upon her conclusions about the Commissioners' intent or state of mind, but solely considers the underlying data and related analyses from her expert report, the Court will issue an order denying as moot the Motion to Strike.

and the Hispanic populations of Districts 1, 3, and 4, are shuffled among each other. *See Jacksonville II*, 2022 WL 1775146, at *13 (rejecting a remedial plan, in part, because "Black voters [were] shuffled among—but not out of—the Packed Districts") (emphasis omitted). The populations that were moved, and what districts they were moved into, conspicuously align with the racial breakdown of the Enjoined Plan. Considering that 94.1% of Miamians remain in the same district as they were under the Enjoined Plan, and which citizens were moved indicate a legislative intent to retain the racial breakdown of the Enjoined Plan, the Court finds that this circumstantial evidence supports the conclusion that the Remedial Plan perpetuates the unconstitutional aspects of the Enjoined Plan.

ii. The Commissioners' Adjustments to V12 Provide Circumstantial Intent to Preserve the Racial Breakdown of the Enjoined Plan

A party may also provide circumstantial intent that a remedial plan preserves the unconstitutional aspects of prior plan by demonstrating that a remedial plan does not meaningfully alter an enjoined plan's district borders. *Jacksonville II*, 2022 WL 17751416, at *14; *see also Covington I*, 283 F. Supp 3d at 436 (examining circumstantial evidence that the remedial version of a map still retains the core of the unconstitutional version of a district). Here, Plaintiffs argue that, following De Grandy's initial presentation unveiling V12, the Commissioners suggested alterations to V12 (which were included in the Remedial Plan). According to Plaintiffs, these alterations "claw back even more elements of the Enjoined Plan."[11] Obj. at 11. Because these alterations were incorporated into the Remedial Plan, Plaintiffs argue that the similarities between Remedial Plan and the Enjoined Plan demonstrate the Commissioners' intent to preserve the Enjoined Plan's unconstitutional components.

[11] Darker shaded areas in the below figure represent the alterations to V12 that were ultimately incorporated into the Remedial Plan.



Areas Shifted Between District 2 and District 3

Multiple changes to V12 that were incorporated into the Remedial Plan preserved elements of the Enjoined Plan. Recall, in the Enjoined Plan, District 2 was intended to be the so-called "Anglo-District." At Commissioner Carollo's request, Area 21 in V12 was removed from District 3 and returned to District 2, just as it was in the Enjoined Plan. *See* 6/14 Tr. 65:6–7. Area 21 has one of the highest White Voting Age Populations ("WVAP") in the city, 54.8%. *See* 2nd Abott Rep. at 19. The Commissioners also added Area 25—with no instruction to do so during the May 11 or June 14 Meetings—to District 2. *See* Obj. at 12. Area 25 is a plurality-white part of the city. *See* 2nd Abott Rep. at 19. Then, the Commissioners moved the plurality HVAP Area 24 into District 3. *See* 6/14 Tr. 38:5–39:10; Obj. at 12. Plaintiffs argue that these changes not only altered V12 so that the eventual remedial map would be more like the Enjoined Plan, but that the specific

alterations were done to "preserve the categorical racial divisions in the Enjoined Plan." Obj. at 11–12.

Defendant argues that "[t]he Commission had valid, non-racial reasons for the lines it drew," "Coconut Grove. . . had to shed population," and that "[d]rawing Commissioner Carollo's house into his district is not a racial motivation."[12] Reply at 7. All of these points may be true. But, simply ensuring that Commissioner Carollo maintains a residence in District 3 does not explain the other alterations along the District 2 and District 3 border. Moreover, that Coconut Grove had to shed population does not explain why the Commissioners decided that majority and plurality WVAP portions of District 3 would be added back to District 2, as opposed to any other area. *See* 6/14 Tr. 65:6–7 (Commissioner Carollo requested that an area of the North Grove between 22nd and 27th Avenues (Area 21) be returned to District 2 without providing any explanation). Nor does it explain why the plurality HVAP Area 24 was moved out of District 2 to District 3. *See id*. 38:5–39:10 (Commissioner Carollo asked for this area to be moved but again provided no rationale). While Defendant avers there were non-racial reasons for the alterations it made to V12, it provides very little, if any explanation.

Thus, the Court finds that the areas shifted between Districts 2 and 3 in the Remedial Plan provide circumstantial evidence that the Commissioners intended the Remedial Plan retain the race-based characteristics of the Enjoined Plan.

Areas Shifted Between District 3 and District 4

Next, Commissioner Carollo requested a change to V12 involving the border of District 3 and District 4, which in the Enjoined Plan, were majority Hispanic districts. Initially, in V12, all

[12] Commissioner Carollo owns a residence in Coconut Grove, and his residence was incorporated into District 3 in both the Enjoined and Remedial Plan.

of Silver Bluff existed within District 4, as did all but two blocks of Shenandoah. *See* 6/14 Tr. 15:2–6 (V12 shifted the border of the two districts eastward from 17th Avenue in the Enjoined Plan to 14th Avenue). Commissioner Carollo requested that De Grandy adjust V12 so that the border of 17th Avenue in the Remedial Plan be restored to "that same line as before" (i.e., in the Enjoined Plan). *Id.* 37:1–2. De Grandy obliged, and the 17th Avenue border was restored in the Remedial Plan to mirror its predecessor. *See id.* 77:6–9.

According to Plaintiffs, the consequences of this alteration resulted in the splitting of traditional neighborhoods. Obj. at 13. Plaintiffs aver that "nearly 2,000 people between 14th and 17th Avenues moved back into D[istrict] 3." *Id.* (citing 2nd Abbott Report at 19). To equalize population, Plaintiffs argue De Grandy then moved portions of Auburndale and Little Havana into District 3. *See id.* Therefore, Plaintiffs aver that "at Commissioners' requests, [the alterations to V12] continu[ed] the division of 'distinct' and 'historical' Shenandoah, Silver Bluff, and Little Havana that Commissioners had kept divided in the Enjoined Plan to balance Hispanic populations and facilitate racial separation." *Id.*

Defendant (and Commissioner Carollo in the June 14 Meeting) explain that this specific alteration occurred because the "Commissioners publicly allocated blocks based on where they had invested resources in parks." Reply at 5. Indeed, when discussing a potential alteration to include the 17th Avenue border, Commissioner Carollo explained that the area was "where we just invested significant amounts in a park." 6/14 Tr. 34:13–14. Plaintiffs, however, argue that Defendant's explanation is insufficient because the "park [i]s *still* on the D[istrict] 4 side of the line." Obj. at 12–13 (emphasis in original). After a thorough review of the record, the Court finds that the transcripts of the June 14 Meeting do not indicate which park Commissioner Carollo was referencing, nor does Defendant provide an address of the park. *See generally* Reply; 6/14 Tr.

Accordingly, the Court is unable to fully evaluate the rationale of the shift of the border between District 3 and District 4, and thus, does not consider these changes to perpetuate the unconstitutional features of the Enjoined Plan.

Morningside

Plaintiffs also argue that the Commission's alterations of Morningside from V12, which culminated in the neighborhood being split in the Remedial Plan, perpetuated the unconstitutional impact of the Enjoined Plan. *See* Obj. at 13–14. V12 proposed moving Area 26 (41.9% WVAP and 11.8% BVAP) out of District 2 and into District 5, which would split the neighborhood. *Id.* at 13 (citing 2nd Abott Rep. at 19). Upon review of V12, Commissioners Covo and King discussed the alteration. *See* 6/14 Tr. 42:13–47:6. Specifically, Commissioner Covo objected to Morningside being split between districts, and Commissioner King opined that the entirety of Morningside should be restored to District 2. *See id.* 42:13, 44:2. Commissioner King requested that De Grandy revise V12 accordingly. *See id.* 45:13–15. De Grandy partially obliged, and the Remedial Plan includes Area 26, but not all of Morningside, in District 2.

According to Plaintiffs, the Remedial Plan's inclusion of Area 26 in Districts 2 is problematic. *See* Obj. at 13–14. Plaintiffs argue that this change "excludes from D[istrict 5] the low-BVAP neighborhoods south of the existing district boundary" and that the "southern part [Commissioner] King declined adding from V12 to make Morningside whole in District 5 is 10.1% BVAP." *Id.* at 14. Moreover, Plaintiffs find it significant that the Commission rejected "at least four alternative plans that avoided 'splitting up neighborhoods' in and around Morningside by adding the neighborhood to D[istrict] 5." *Id.* (noting that the Commissioners rejected the following Plans: P1, P2, P3, and one of De Grandy's alternatives, D1). To Plaintiffs, this evidence

demonstrates that the Remedial Plan divided Morningside along racial lines to preserve the racial breakdown of Districts 2 and 5 from the Enjoined Plan. *See id.* at 13–14.

Defendant responds, but only to explain "[t]he Commissioners from District 2 & 5 publicly discussed keeping that community together and where it should go." Reply at 9. Defendant does not address Plaintiffs' allegation that the low-BVAP neighborhoods were deliberately excluded from District 5 in the Remedial Plan, nor does it provide a response regarding why, after the Commissioners expressed their concern about splitting Morningside, Morningside was not wholly included in District 2. Rather, Defendant only explains that "there was nothing nefarious about the conversation or the decision." *Id.*

Because Defendant provides little explanation, if any, on why Area 26 (but not all of Morningside) was restored to District 2, and Plaintiffs have provided evidence that the Remedial Plan (1) splits neighborhoods in and around Morningside; and (2) excludes low-BVAP neighborhoods from District 5, the Court finds Plaintiffs' more argument persuasive. The alterations to Morningside from V12 to the Remedial Plan provide circumstantial evidence that the Remedial Plan perpetuated the unconstitutional aspects of the Enjoined Plan.

Overtown

Lastly, Plaintiffs argue that the Commissioners' alterations to V12 regarding Overtown were racially motivated. *See* Obj. at 14–16. During the June 14 Meeting, De Grandy's presentation of V12 as it pertained to Overtown included an extended discussion of Plaintiffs' P1 and P2 alternative maps. First, De Grandy criticized Plaintiffs' suggested alternative district configurations that would divide Overtown.[13] *See* 6/14 Tr. 16:4–8. Then, De Grandy explained

[13] As referenced, Section I, *supra*. De Grandy mentioned that he did not have time to review Plaintiffs' P3. Plaintiffs' P3 included all of Overtown in District 5.

how his review of Google Maps and the Neighborhood Enhancement Team ("NET") confirmed that all of Overtown was included in District 5 in V12. *See id.* 16:6–7.

But, according to Plaintiffs, De Grandy's definition of Overtown and its inclusion in V12's District 5 is not as straightforward as the consultant would suggest. *See* Obj. at 15. Plaintiffs' expert, Dr. Abott, opined that De Grandy excluded portions of Overtown in V12 which are included in Google Maps and NET, the very sources upon which De Grandy relied. *See* 2nd Abott Rep. at 9–11. Further, Dr. Abott explained that the portions De Grandy omitted from his definition of Overtown are included in both the Miami Police Department ("MPD") and Convention & Visitors Bureau's ("CVP") description of the neighborhood. *See id.* at 9–10. Plaintiffs also identify that the City Code provides an even broader definition of Overtown than the MPD and CVP, all three of which provide a broader definition of Overtown than the one De Grandy used when drawing the border of V12's District 5. Obj. at 15 (citing City Code § 2-1051). According to Plaintiffs, "'De Grandy defined Historic Overtown along racial lines, resulting in the area being split into District 1 and District 5 on the basis of race,' with his 'definition shor[ing] up the existing racial composition of District 5 and . . . the Hispanic supermajority in District 1.'"[14] *Id.* (quoting 2nd Abott Rep. at 11) (alterations in original).

Consequently, Plaintiffs argue that "[t]he Commission ratified a definition of Overtown that defined it along racial lines, excluding majority Hispanic areas," and "[i]n doing so, [Defendant] strenuously ensured that none of the majority-Hispanic parts of the area would move out of D[istrict] 1." *Id.* (emphasis omitted). The result, to Plaintiffs, is that the definition of

[14] Plaintiffs also identify the Commissioners' discussion of one minor alteration—the addition to District 5 of the Overtown restaurant People's Bar-B-Que—as further evidence that V12's borders separated Overtown along racial lines because no other portion of the border was moved. Specifically, Plaintiffs emphasize Commissioner Díaz de la Portilla's comments that "*only* the restaurant should move, nothing more" into District 5. Obj. at 15 (emphasis in original).

Overtown as incorporated into the Remedial Plan "is predominantly a function of the Commission's goal to hew to the Enjoined Plan and separate Hispanic from Black residents." *Id.*

Defendant hardly engages with Plaintiffs' arguments. Defendant only states that "Plaintiffs quibble over the boundaries of Overtown, an undefined neighborhood, and cite to the boundaries of the . . . City Code (§2-1051). . . which states that the boundaries of this purely advisory board are approximate and meant to be construed expansively." Reply at 4 n.3. Otherwise, Defendant does not refute Plaintiffs' description of Overtown as defined by the multiple other sources, and it does not even attempt to engage with the findings of Plaintiffs' expert. Just as importantly, Defendant also fails to offer any explanation of why the Remedial Plan's conception of Overtown splits the historic neighborhood as Plaintiffs suggests it does. After reviewing the record and considering Plaintiffs' evidence as proffered by their expert, Dr. Abott, the Court finds that Defendant selectively defined Overtown to entrench the racial divisions from the Enjoined Plan.

In sum, though the Court presumes the good faith of the Commissioners when making alterations for V12 in the Remedial Plan, their explanations for the alterations are often entirely unsubstantiated in the record. And, the Commissioners consistently altered V12 so that the Remedial Plan would have districts coinciding with the racial breakdown the Commissioners intended to exist within the Enjoined Plan, without justification. Therefore, the Court agrees with Plaintiffs' argument that alterations to V12 serve as circumstantial evidence of the Remedial Plan's perpetuation, rather than the eradication, of the unconstitutional aspects of the Enjoined Plan.

iii. The Analysis of Each District Demonstrates Continuing Racial Predominance

Though the Court has recognized that direct evidence and circumstantial evidence indicate the Remedial Plan is not an adequate remedy to the Enjoined Plan, the Court nevertheless examines each district in the Remedial Plan to determine whether race predominates.

Districts 1, 3, and 4

The Court begins its analysis first with the Remedial Plan's Districts 1, 3, and 4, the so-called "Hispanic districts" in the Enjoined Plan. Plaintiffs argue that these districts collectively retain nearly identical portions of the Hispanic population. Indeed, according to Plaintiffs' expert, Dr. McCartan, these districts, in the aggregate, have a core retention rate of 97.8% of the Enjoined Plan. *See* McCartan Rep. at 8; Obj. at 24 (explaining that individually the districts have core retention rates ranging from 90.6% to 98.2%); *see also* Section III.B.2.i, *supra* (discussing that generally, high core retention rates are evidence of legislative intent to preserve the features of the previously unconstitutional district). Further, Plaintiffs argue that the border between Districts 1 and 4, as well as the border connecting Districts 3 and 4, remain "nearly untouched" and divide Flagami, Silver Bluff, Shenandoah, and Little Havana as in the Enjoined Plan. Obj. at 25. Plaintiffs also explain that the Remedial Plan's District 1 maintains a slightly reconfigured version of the "staircase-like stepping pattern in the northeastern corner in Allapattah" that the Court found problematic in the Enjoined Plan, *see* R&R at 74, and selectively included portions of Overtown in majority-HVAP areas. Obj. at 25. Lastly, Dr. McCartan explains that District 3 has become less compact by adding portions of Bay Heights and "minimizing additions from the whiter northern end of Brickell." *Id.* Defendant does not respond to any of these arguments. *See generally* Reply.

Based on a review of the evidence and the unrebutted arguments described above, the Court agrees with Plaintiffs. The Remedial Plan's high core-retention rates, the irregular shape of District 1, the selective inclusion and exclusion of certain areas in District 1, and the fact that District 3 became less compact in the Remedial Plan, all support the Court's conclusion that the Remedial Plan entrenches, rather than remedies, the Enjoined Plan.

District 2

Turning next to District 2, otherwise described as the "Anglo District" in the Enjoined Plan, Plaintiffs make similar arguments. Plaintiffs assert that District 2 in the Remedial Plan was "shaped by the Commission's intent to reserve it as an 'Anglo-access' seat, and surgically exclude more-Black or more-Hispanic areas on the north and south end, respectively." Obj. at 24. Plaintiffs argue that District 2 retains a "white affluent" portion of Morningside, and "adds a thin, low BVAP adjacent strip." *Id.* (citing 2nd Abott Rep. at 17) (explaining the District 2 border retains the "whiter Condo Canyon, add[s] an additional lower-BVAP area around Omni, and separate[s] higher BVAP areas of Downtown kept in D[istrict] 5"). On the southern border, Plaintiffs argue that areas of Coconut Grove which contain more Hispanic voters were kept in District 3 and out of District 2. *Id.* Likewise, "whiter areas on Brickell's north end remain excised from District 3, achieved via an irregular finger [in District 2]." *Id.* Plaintiffs note that District 2 also had a strikingly high core-retention rate of 92.2%, and its compactness scores were identical to the Enjoined Plan. *See id.* (citing McCartan Rep. at 8). As a result of these districting decisions, core-retention, and identical compactness cores, Plaintiffs argue that District 2 maintains the hallmarks of racial predominance. *See id.* at 23–24.

As with Districts 1, 3, and 4, Defendant offers no rebuttal to Plaintiffs' proffered evidence. *See generally* Reply. Rather, Defendant only notes that "Coconut Grove is in District 2 which had to shed population." *Id.* at 7. Here, the crucial question is not whether District 2 had to shed population, but whether the changes Defendant was required to make in District 2 completely correct, rather than perpetuate, the constitutional defects of the Enjoined Plan. After review of the which voters were retained or excluded from District 2 in the Remedial Plan, as well as the core retention rates and compactness scores, the Court agrees with Plaintiffs that race still predominates

in the design of District 2. Therefore, the Court finds that District 2 in the Remedial Plan does not change the racial predominance that existed prior.

District 5

Finally, the Court turns to District 5, the VRA protected district. The relevant question for this district is not whether the Remedial Plan's District 5 continues to perpetuate the hallmarks of racial predominance, but whether Defendant's consideration of race when drawing the borders of District 5 to ensure a BVAP floor of 50%, *see* ("Alford Rep.") (ECF No. 86-2), was narrowly tailored to satisfy strict scrutiny. *See Bethune-Hill*, 580 U.S. at 195. The Parties contest whether District 5 is indeed narrowly tailored. *See* Obj. at 25–26; Reply at 10–11.

As the Supreme Court has explained, "the narrow tailoring requirement insists only that the legislature have a *strong basis in evidence* in support of the (race-based) choice that it has made." *Ala. Legis. Black Caucus v. Alabama* ("*ALBC*"), 575 U.S. 254, 262 (2015) (emphasis added) (quotations omitted). To demonstrate a strong basis in evidence, Defendant was required to conduct a "functional analysis of the electoral behavior within the particular. . . election district" to determine "what minority population percentage satisfy[ies] [§2 of the VRA's] standard." *Bethune-Hill*, 580 U.S. at 194. By performing such analysis, Defendant could demonstrate it had "good reasons to believe" it must use race to satisfy § 2 of the VRA. *Id.* at 187. Nowhere in the record is this functional analysis present. Accordingly, District 5 of the Remedial Plan is not narrowly tailored.

Defendant argues otherwise, relying largely on the legal conclusions of its expert, Dr. Alford. *See* Reply at 10–11. Dr. Alford's report explains that the Remedial Plan is narrowly tailored to satisfy § 2 of the VRA because "Black-preferred candidates always prevail[] and typically by large margins." Alford Rep. at 4. Dr. Alford also explains, "if the plaintiffs' District

5 in P4 is narrowly tailored, as they assert, then so are [Defendant's] versions of District 5." *Id.* at 8.

In reliance upon Dr. Alford's conclusion, Defendant misunderstands the "narrowly tailored" standard. And so, the Court reiterates: Defendant must have had good reason to select its BVAP target in District 5, meaning Defendant was required to conduct a functional analysis of the electoral behavior to determine what minority population percentage would satisfy § 2 of the VRA. *Bethune-Hill*, 580 U.S. at 194. As demonstrated by *Bethune-Hill*, this functional analysis must occur when deciding upon the BVAP target, *not after the decision has already been made*. *Id.* (finding "the legislature performed that kind of functional analysis of District 75 when deciding upon the 55% BVAP target"). To the extent Dr. Alford's report conducts the appropriate analysis, he completed his report on July 12, 2023, nearly a month after the Remedial Plan was enacted. *See generally* Alford Rep. In other words, Defendant may not rely on the post-hoc findings of its expert to justify why it determined the 50% BVAP figure was necessary to comply with the VRA in District 5. Doing so is hardly the type of functional analysis required.

Apart from Dr. Alford's report, the record contains no further discussion of how District 5 might be narrowly tailored in the Remedial Plan. In the June 14 Meeting, De Grandy told the Commissioners without justification that V12 "fully compl[ied] with the VRA." 6/14 Tr. 6:16–17. Though he offered this conclusory statement frequently, at no point did De Grandy ever discuss what functional analysis occurred to ensure that District 5 was narrowly tailored to VRA compliance. *See id.* 9:4, 12:8–10, 16:11–12, 66:10–11. With no other evidence in the record, the Court finds Defendant's arguments regarding the constitutionality of District 5 in the Remedial Plan unavailing.

iv. Partisanship Does Not Explain Districting Decisions in the Remedial Plan

Finally, though the Court has disposed of most of Defendant's arguments above, one broad argument Defendant advances in support of the Remedial Plan warrants addressing specifically. Throughout its Reply, Defendant emphasizes that some of its districting decisions were the result of the Commissioners' political judgment, and that Plaintiffs impermissibly seek to "substitute their political judgment for that of the elected City Commission." Obj. at 4, 6. This argument has no merit. First, Commissioner Carollo expressly denied the idea that the commissioner position is partisan in nature, thus suggesting partisan politics did not influence the Remedial Plan's creation. *See* 6/14 Tr. 32:13–21. Further, as Plaintiffs correctly identify, "[n]o Commissioner expressed a partisan motivation for any decision in [the Remedial Plan]." Obj at 20; *see generally* 6/14 Tr. The Court is satisfied that nothing in the record demonstrates that partisanship played any role in the districting decisions in the Remedial Plan.

In sum, after extensively reviewing the direct and circumstantial evidence surrounding the enactment of the Remedial Plan, the Court finds that the Remedial Plan fails to correct the constitutional violations it found substantially likely to exist in the Enjoined Plan, and that the Remedial Plan perpetuates the impact of the Enjoined Plan's unconstitutional racial gerrymandering of the election districts.

C. Plaintiffs' Alternative Map is a Constitutional Remedy

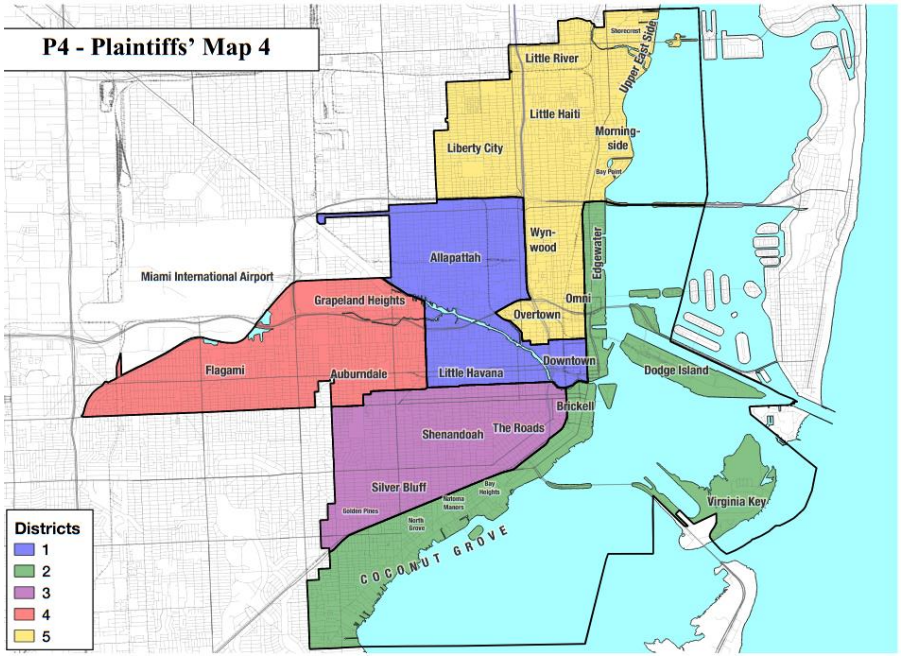
Because Defendant could not enact a constitutionally sufficient remedial map, and the date by which the Miami-Dade Board of Elections requires a map is August 1, 2023, there is no longer enough time to order the Commissioners to draw another map. Nor is there sufficient time to appoint a special master to draw one for the upcoming election. Regardless, Miami requires a new map, and "it now becomes this Court's unwelcome burden to craft a new plan for implementation

on an interim, remedial basis." *Jacksonville II*, 2022 WL 17751416, at *17. Before doing so, the Court also emphasizes that it "endeavors to address the unconstitutionality of the Enjoined and Remedial Plans and no more. Broader or more systemic changes to [the City of Miami's] electoral maps are the province of the legislators, not the Court." *Id.* at *21.

With this limited goal in mind, the Court examines Plaintiffs' most recent alternative map, P4, which Plaintiffs urge the Court to adopt. *See* Obj. at 26–31. The Court reviews P4 to determine whether it, when possible, respects the Commission's legitimate, non-race-based policy goals, complies to traditional districting criteria, and complies with state and federal law. The Court reviews P4, and Defendant's arguments against its adoption, below.

1. P4 Incorporates Defendant's Lawful Stated Objectives

"When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or Voting Rights Act." *Abrams*, 521 U.S. at 79. Under such circumstances, a court must reconcile the goals of state political policy with the requirements of the Constitution. *See Connor v. Finch*, 431 U.S. 407, 414 (1977); *see also Upham v. Seamon*, 456 U.S. 37, 43 (1982) ("An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect."). The Court therefore reviews P4 to determine if it properly considers Defendant's lawful political preferences (substantial equality of population, respecting communities of interest, and use of natural and manmade boundaries), while simultaneously remedying the constitutional defects of the Enjoined Plan.



i. Substantial Equality of Population

First the Court addresses whether P4 complies with the Commission's lawful (and constitutionally required) goal of substantial equality of population among the districts. *See Reynolds v. Sims*, 377 U.S. 533, 579 (1964). Plaintiffs aver that P4 "is within the population equality limits the Commission set in its [Remedial Plan]." *See* Obj. at 27. Indeed, Plaintiffs rely on Dr. Abott's expert report to demonstrate that P4's population deviation among each district is 2.4%, an improvement on the Remedial Plan's total population deviation of 3.6%. *See id.* (citing 2nd Abott Rep. at 14–16). Based on the unrebutted expert report, the Court is satisfied that P4 achieves Defendant's goal for population equality limits.

ii. Respecting Traditional Neighborhoods and Communities of Interest

Another one of Defendant's goals throughout the redistricting process was to ensure the Remedial Plan retained traditional communities of interest within one district. *See, e.g.*, Reply at 5 (explaining "many of the requests by Commissioners were geared towards maintaining communities in which they had invested district resources"); 6/14 Tr. (referencing throughout the

importance of towns such as Allapattah, Civic Center, Grapeland Heights, West Flagler, Flagami, Overtown, Coconut Grove, and Morningside). For the following reasons, the Court finds that P4 adequately preserves the Defendant's goal of maintaining the unity of traditional neighborhoods, without dividing them among racial lines.

In P4's District 5, Overtown's southern boundary is consistent with how Google Maps, NET, CVB, and MPD define it. *See* Obj. at 27 (explaining that all of Overtown "east of the Seybold Canal and south to NW 5th Street. . . is made whole within D[istrict] 5"). P4 includes in District 5 the entirety of the more-broadly-defined Overtown except for "one city block moved to better equalize population" and "three unpopulated blocks east of I-95." *Id.* According to Plaintiffs, where the Remedial Plan "excised less-Black portions from D[istrict] 5," P4 restores them. *Id.* Indeed, certain traditional communities of interest that Commissioner King emphasized should remain in District 5 are there in P4, including Liberty City, Little Haiti, Wynwood, the Upper East Side, and Morningside. *See id.*; *see also* (ECF No. 82-16) (Miami Times article expressing same); 6/14 Tr. 12:17–22 (Commissioner King expressing her desire to retain Wynwood as a significant economic driver for District 5).

Similarly, in other districts, P4 unites communities of interest. In line with Commissioner Covo's request, Coconut Grove is kept whole in District 2. *See* 6/14 Tr. 42:9–43:3. District 2 also contains areas such as the West Grove, Edgewater, and Grapeland Heights. *See* Obj. at 28. Throughout the June 14 Meeting, De Grandy identified the importance of these areas as traditional neighborhoods. *See* 6/14 Tr. 6:19–20, 13:15–16. Further, P4 also ensures that Domino Park remains in District 3. *See id.* 36:22–37:2 (Commissioners emphasizing the need for District 3 to retain Domino Park in its entirety).

Other neighborhoods that P4 splits are neighborhoods that the Commission did not prioritize. For example, "P4 splits Brickell between D[istrict] 2 and D[istrict] 3, but the dividing line is the Metrorail rather than [the Remedial Plan's] jagged border that scoops whiter blocks into D[istrict] 2." Obj. at 28 (emphasis omitted). Moreover, the "Downtown/Omni area remains divided among three districts, but no longer surgically separates more-Hispanic, more-Anglo, and more-Black areas into D[istrict] 1, D[istrict] 2, and D[istrict] 5, respectively." *Id.* And, while P4 divides the traditional neighborhoods of Little Havana and Auburndale, so too did the Remedial Plan. *See id.*

Therefore, the Court agrees with Plaintiffs that, to the extent practicable, P4 unites many traditional neighborhoods into one district, largely in accord with the Commissioners' expressed intent. The Court is also satisfied that P4 delineates districts in a manner that preserves communities of interest, without dividing the neighborhoods among racial lines. Where some neighborhoods were split, P4 largely mirrors the Remedial Plan, but does so in a manner that is race-neutral.

iii. Recognition of Significant and Natural Boundaries

Plaintiffs also assert that P4, where possible, "utilizes natural and manmade boundaries the Commission recognized as logical." Obj. at 28 (internal quotations omitted). Indeed, the Remedial Plan incorporated "natural and manmade boundaries such as the city's municipal boundaries, the bay, the railroad, the Miami River, an expressway, and the contours of traditional neighborhoods," along with "water boundaries" and "major roads." 6/14 Tr. 13:3–4, 13:18. P4 follows this directive, with "SW 4th and 8th Streets and 32nd Avenue coninu[ing] to form boundaries." Obj. at 28. Further, P4 also contains borders tracking "SE/NE 2nd Avenue, 22nd

Avenue, and US 1." *Id.* at 28–29. Accordingly, the Court finds that Plaintiffs incorporated Defendant's lawful goal of using natural and manmade boundaries into P4.

2. P4 Properly Considers Traditional Redistricting Criteria

When tasked with redistricting, courts must also consider traditional redistricting criteria. *See Bethune-Hill*, 580 U.S. at 183. Traditional redistricting criteria "include[e] compactness, contiguity, respect for political subdivisions or communities defined by shared interests, incumbency protection, and political affiliation." *ALBC*, 575 U.S. at 254 (internal citation omitted). The list of traditional criteria is not exhaustive, nor is the reviewing court required to consider each consideration when evaluating the redistricting plan. *See Jacksonville II*, 2022 WL 17751416, at *18–19 (evaluating the remedial plan only for compactness, respect for traditional communities, and incumbency protection). Nevertheless, a court must use these criteria when drawing its own map or selecting one suggested by one of the Parties.[15]

i. Compactness

Here, the Court notes that P4's districts are compact, both visually and according to statistical compactness scores. Plaintiffs' expert, Dr. McCartan, calculated the compactness of P4 using a simulation algorithm.[16] *See generally* McCartan Rep. As part of his analysis, Dr. McCartan calculated P4's Polsby-Popper compactness scores, Reock compactness scores, Convex Hull compactness scores, and edge-cut measures. *See id.*; *see also Alpha Phi Alpha Fraternity Inc.*, 587 F. Supp. 3d at 1258 (identifying the Polsby-Popper and Reock measures as "widely acceptable tests to determine compactness scores"). The Polsby-Popper, Reock, and Convex Hull

[15] The Court will not consider incumbency protection. *See* Section III.C.3, *infra*. Further, as there is no factual dispute regarding contiguity, the Court finds P4's districts contiguous.

[16] All Polsby-Popper, Reock, and Convex Hull scores were multiplied by 100 for ease of reference. McCartan Rep. at 5–6. Accordingly, when the Court refers to these scores, or any comparators, it will refer to the scores with such a multiplier.

scores lie on a 0–100 scale, with higher values indicating more compact districts. McCartan Rep. at 6–7. As for the edge-cut score, lower values indicate more compact districts. *Id.* at 7. P4 had an average compactness score of 39.6 on the Polsby-Popper scale, 35.4 on the Reock scale, and 77.0 on the Convex Hull scale. *Id.* at 6–7; *see also Alpha Phi Alpha Fraternity*, 587 F. Supp. 3d at 1277 (rejecting the argument that districts in an illustrative plan were not compact with an average Polsby-Popper scores ranging from of 17 to 34, and Reock Scores ranging from 22 to 57). On the edge-cut measure, P4 had a compactness score of 237, a score lower than the Remedial Plan. McCartan Rep. at 7. Accordingly, the Court finds that P4 is more statistically compact than the Remedial Plan, is more visually compact, and thus, P4 properly considered compactness as a traditional districting criterion.

ii. Respect for Traditional Neighborhoods

As discussed extensively above, the Court finds that P4 keeps traditional neighborhoods and communities of interest united. *See* Section III.C.1.ii, *supra*. P4 was crafted to ensure that communities would be united within a single district to the extent possible. The Court finds that P4 properly considered traditional neighborhoods and respects communities of interest.

3. P4 Complies with Applicable Federal and State Law

When a federal court is tasked with redistricting, it must ensure that any remedial map adheres to relevant state and federal law. *Perry v. Perez*, 565 U.S. 388, 394 (2012). The Court thus analyzes whether P4 complies with the applicable state and federal statutes.

Beginning first with the applicable state law, the Court must ensure any remedial plan adheres to state law, so long as the state law "does not detract from the requirements of the Federal Constitution." *White*, 412 U.S. at 795. As Plaintiffs correctly identify, in this instance, the only applicable state law is Fla. Stat. § 166.0321. Obj. at 30. According to the statute, no electoral

district may be "drawn with the intent to favor or disfavor a candidate. . . or an incumbent. . . based on the candidate's or incumbent's residential address." Fla. Stat. § 166.0321. Here, the record does not indicate, nor has Defendant argued, that Plaintiffs drew P4 with the intent to favor or disfavor any candidate or incumbent based on where the candidate may reside. Obj. at 30; *see generally* Reply. Moreover, the Court agrees with Plaintiffs that "P4 has no irregular appendages or bizarre lines 'that serve as objective indicators of intent'" to consider any candidate's residence. Obj. at 30 (quoting *In re SJR 1176*, 83 So. 3d at 670). Therefore, the Court is satisfied that P4 complies with Florida state law.

P4 must also comply with applicable federal law. Here, the crucial question is whether District 5 in P4 complies with § 2 of the VRA. Both Parties agree that § 2 "protects Black Miamians from vote dilution, *see id.* at 30, (citing Notice at 6), and thus, P4 must adhere to the VRA in a manner that satisfies strict scrutiny.

When drafting P4, Plaintiffs relied on their expert Dr. Moy's functional analysis to ensure the BVAP of P4's District 5 was narrowly tailored to comply with § 2 of the VRA. *Id.* at 30; *see also* (ECF No. 82-13) ("Moy Supp. Rep."). Regarding the ability to elect a candidate of their choice under § 2 of the VRA, minority voters are entitled to "equality of opportunity, not a guarantee of electoral success." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 428 (2006) (citation omitted). Put differently, "[w]hile minority voters need not be guaranteed to elect their preferred candidates in every election. . . they should at least regularly be able to do so." Obj. at 31 (internal citation omitted) (emphasis omitted). Dr. Moy's report demonstrates that P4 fits that criterion and explains that based on his reconstituted election analysis of P4, a Black-preferred candidate would prevail in P4's District 5. *See* Moy Supp. Rep. at 10. Dr. Moy's process involved "re-aggregating historical election results in the newly drawn districts and counting how

many votes would have been cast for the various candidates in the elections." Obj. at 31. According to his report, Black-preferred candidates, in eleven racially polarized state and local elections ranging from 2020 to 2022, would always prevail in P4's District 5. *Id.* Based on this analysis, Plaintiffs argue that P4's District 5 complies with the VRA, and Plaintiffs underwent the required functional analysis to ensure VRA compliance, thereby ensuring that District 5 was narrowly tailored.

To the extent Defendant responds, it reiterates that the Remedial Plan's version of District 5 was narrowly tailored. *See* Reply at 10. As mentioned above, Defendant relies mostly on its expert, Dr. Alford, for the proposition that "if the plaintiffs' District 5 in P4 is narrowly tailored, as they assert, then so are the City's versions of District 5." Alford Rep. at 8. But importantly, Dr. Alford never opines that P4's District 5 is not narrowly tailored, and in fact, states that P4 "provide[s] highly secure election margins for Black-preferred candidates." *Id.* Thus, Dr. Alford's Report does not provide the basis for any argument that P4's District 5 is not narrowly tailored. And most importantly, aside from relying on Dr. Alford's Report, Defendant advances no other theory regarding whether District 5 in P4 is not narrowly tailored.

After considering Plaintiffs' largely unrebutted argument and the expert reports of Dr. Moy and Dr. Alford, the Court finds that P4 complies with § 2 of the VRA in a manner consistent with the United States Constitution.

4. The Political Consequences of P4 Do Not Alter the Court's Analysis

In response to Plaintiffs' proposed P4, Defendant offers two interrelated arguments against its adoption, both of which are misguided. First, Defendant argues that Plaintiffs' proposed maps (including P4) are "fundamentally similar" to the Remedial Plan, including a VRA protected district, and a coastal district. Reply at 2. Where the similarities end, according to Defendant, is

that Plaintiffs' P4 "keep[s] the more politically conservative western part of the City packed into a single district, District 4." *Id.* at 4. Citing its expert, Dr. Alford, Defendant even claims "the remainder of Plaintiffs[']s case is really about swapping population between three Hispanic districts to claim their plans are 'more different' from the Enjoined Plan, and to change the political performance of those districts." *Id.* at 11.

Neither argument is appropriate given the posture of the instant Action. The Court is only reviewing P4 because, after being given the opportunity to proffer a constitutional remedial plan, Defendant was unable to do so. *See* Section III.A–B, *supra*. At this juncture, the Court reviews P4 only to ensure that it (1) retains Defendant's lawful objectives of the Remedial Plan and remedies only the aspects of the plan the Court found unconstitutional; (2) adheres to traditional redistricting criteria; and (3) does not otherwise violate state or federal law. Because P4 must retain the legislature's lawful objectives, that P4 is "fundamentally similar" to the Remedial Plan, to a certain extent, should be expected. Moreover, that P4 results in a different political outcome is irrelevant at this point in the Court's review.

Lastly, it is telling that aside from the above arguments, Defendant provides no rebuttal to any portion of Plaintiffs' P4 arguments. *See generally* Reply. Defendant does not even attempt to rebut Plaintiffs' claims about the merits and legalities of P4. *See id.* In the Court's view, rather than contesting P4 as a constitutional remedy, Defendant has proffered a variety of grievances about potential political outcomes that would result from its implementation. Such grievances are misplaced when the Court is evaluating a remedy to resolve the unconstitutional aspects of the Enjoined Plan.

IV. CONCLUSION

UPON CONSIDERATION of the NOTICE, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Plaintiffs' Objections to the City's Proposed Interim Remedial Plan (ECF No. 83) are SUSTAINED.

IT IS FURTHER ORDERED THAT:

1. Plaintiffs' Alternative Map P4 is ADOPTED as the Court's Interim Remedial Plan pending final judgment in this Action.
2. Defendant City of Miami is DIRECTED to implement the Court's Remedial Plan (P4) beginning with the City of Miami November 2023 Municipal Election.
3. Defendant City of Miami is DIRECTED to transmit the Court's Remedial Plan (P4), along with any other necessary materials, to the Miami-Dade County Elections Department by July 31, 2023.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of July, 2023.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:22-cv-24066-KMM

GRACE, INC., *et al.*,
Plaintiffs,
v.

CITY OF MIAMI,
Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant City of Miami's ("Defendant") Emergency Motion to Stay Order Rejecting Redistricting Map. ("Motion" or "Mot.") (ECF No. 97). Therein, Defendant requests that the Court stay its Order Sustaining Objections to Defendant's Notice of Passing Remedial Plan, ("Order") (ECF No. 94), pending appeal. *See generally* Mot. Plaintiffs did not file a response.[1] For the following reasons, the Court DENIES Defendant's Motion.

I. BACKGROUND

The Court assumes the Parties' familiarity with the background in this matter. Previously, the Court entered an order enjoining Defendant from conducting the November election pursuant to the election districts set forth in City of Miami Resolution 22-131 ("Enjoined Plan" or "2022 Enacted Plan"). *See* (ECF No. 60). Thereafter, Defendant filed a notice informing the Court that it passed Resolution 23-271 ("Remedial Plan"). *See* (ECF No. 77). The Court subsequently found that the Remedial Plan did not completely correct—but rather perpetuated—the unconstitutional

[1]Plaintiffs in this Action are Clarice Cooper, Yanelis Valdes, Jared Johnson, Alexandra Contreras, Steven Miro, GRACE, Inc., Engage Miami, Inc., South Dade Branch of the NAACP and Miami-Dade Branch of the NAACP (collectively, "Plaintiffs").

racial gerrymandering that was substantially likely to exist in the Enjoined Plan. *See generally* Order. In the instant Motion, Defendant requests that the Court stay the Order pending a resolution of its appeal to the Eleventh Circuit. *See generally* Mot. The Court denied the Motion in a paperless order, *see* (ECF No. 98), but provides this supplemental order to explain its rationale.

II. LEGAL STANDARD

The issuance of a stay pending appeal is an "extraordinary remedy." *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citing *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* (quoting *Virginian Ry. Co.*, 272 U.S. at 672–73). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–44. Specifically, the movant must show: "(1) that the movant is likely to prevail on the merits on appeal; (2) that absent a stay the movant will suffer irreparable damage; (3) that the adverse party will suffer no substantial harm from the issuance of the stay; and (4) that the public interest will be served by issuing the stay." *Garcia-Mir*, 781 F.2d at 1453. "The first two factors are the most critical." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019) (citing *Nken* at 434–35). "To satisfy its burden as to those factors, the party seeking the stay must show more than the mere possibility of success on the merits or of irreparable injury." *Id.*

III. DISCUSSION

Before addressing the merits of Defendant's Motion, the Court notes that the Eleventh Circuit addressed and denied a motion to stay under nearly identical circumstances. *See Jacksonville Branch of NAACP v. City of Jacksonville*, No.22-14260, 2023 WL 119425 (11th Cir.

Jan. 6, 2023). In that case, the district court enjoined the City of Jacksonville from using a districting plan because it found that the districts were substantially likely to be unconstitutionally gerrymandered. *Id.* at *1. The City of Jacksonville then passed a remedial map, which the district court found did not remedy the unconstitutional aspects of the prior plan. *Id.* The City of Jacksonville then filed a motion to stay the district court's order which found the remedial plan unconstitutional and implemented one of the plaintiffs' alternative maps.[2] *Id.*

Addressing the City of Jacksonville's Motion, the Eleventh Circuit explained that by ruling on the defendant's motion to stay, it "would have to hold on the merits that the City Council's proposed interim remedial plan is constitutional. Such a determination would be a ruling on the merits of the City's appeal, and an order on a motion for stay pending appeal is not a resolution of the appeal itself." *Id.* at *3. The Eleventh Circuit denied the motion, explaining that the City was not asking to stay the order and restore the status quo. *Id.* Instead, what the City was really seeking was "a ruling on the merits of its appeal." *Id.*

In this case, Defendant makes the same request. Defendant asks the Court to stay its Order adopting Plaintiffs' P4 as the Court's remedial plan, and instead, to proceed forward with the Remedial Plan for the upcoming elections. *See generally* Mot. Like in *Jacksonville*, there is no status quo to which Defendant may return; the Court has already found that the Enjoined Plan is substantially likely to be racially gerrymandered, and the Remedial Plan is not a constitutional remedy. *See generally* Order. Asking the Court to stay its Order, when neither the Enjoined Plan nor the Remedial Plan is constitutional, would necessarily require the Court to reverse course on

[2] Unlike Defendant in the instant Action, the defendant in *Jacksonville* only filed the motion to stay in the Eleventh Circuit.

the merits of its Order and uphold the Remedial Plan's constitutionality. Just as in *Jacksonville*, the Court will not grant a motion to stay under these circumstances.

Though the Court finds a stay inappropriate for the reasons previously discussed, for the sake of providing a thorough explanation, it turns now to the merits of Defendant's Motion. Defendant proffers two arguments: (1) the Court should not apply the traditional standard to analyze a stay because the instant Action runs afoul of *Purcell v. Gonzalez*, 549 U.S. 1 (2006); and (2) even under the traditional standard, Defendant satisfies each element necessary for the Court to grant a stay. *See generally* Mot. Upon review, the Court reiterates, once again, that the circumstances of this case do not implicate *Purcell*, and thus, the Court will not consider Defendant's Motion under an alternative standard. Reviewing the Motion under the traditional legal standard, the Court finds that granting a stay is not warranted given that Defendant has failed to satisfy the necessary elements.

A. The *Purcell* Principle

In the Motion, Defendant again raises the argument that *Purcell* applies to the instant Action. *See* Mot. at 3–4. In fact, Defendant copies its argument regarding how *Purcell* should alter the standard by which the Court considers the instant Motion verbatim from its prior motion to stay. *See* (ECF No. 64 at 1–2). The Court has already addressed whether *Purcell* applies, not just once, but twice.[3] *See* (ECF No. 60 at 27–29) (comparing the instant Action to other cases in the Eleventh Circuit and concluding that *Purcell* is inapplicable); (ECF No. 70 at 3–4) (refusing to apply *Purcell* to Defendant's prior motion to stay because doing so "would extend the eve of an

[3] The proper time to raise a *Purcell* argument was prior to the Court's order enjoining the use of the 2022 Enacted Plan on May 23, 2023. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (explaining that "federal district courts ordinarily should not enjoin state election laws in the period close to an election") (internal quotations omitted). The injunction has already occurred, and *Purcell* is inapplicable at this stage in the case.

election farther than the Eleventh Circuit has before") (internal quotations omitted). It will not evaluate the argument a third time.[4] Therefore, finding *Purcell* inapplicable to the instant Action, the Court reviews the Motion under the traditional framework.

B. Stay Analysis

A party requesting a stay must demonstrate (1) it is likely to succeed on the merits on appeal; (2) absent a stay, the moving party will suffer irreparable harm; (3) the adverse party will not suffer substantial harm from the issuance of a stay; and (4) the issuance of a stay will serve the public interest. *Garcia-Mir*, 781 F.2d at 1453. The Court addresses each factor in turn.

i. Likelihood of Success on the Merits

By filing the Emergency Motion, Defendant essentially asks the Court to reconsider vast swaths of its Order, and in doing so, Defendant seeks to relitigate much of its case. *See* Mot. at 4–11. Defendant advances the following arguments: (1) the May 11 Meeting was not direct evidence of racial gerrymandering; (2) the Court improperly considered core-retention rates in the Remedial Plan; (3) the Court improperly disregarded legitimate, non-racial criteria when rejecting the Remedial Plan, including partisan considerations; (4) the Court applied the incorrect standard when finding District 5 was not narrowly tailored to Voting Rights Act ("VRA") compliance; and (5) the Court cannot find the Remedial Plan unconstitutional while adopting Plaintiffs' alternative map ("P4"), which is fundamentally similar. *See id.*

[4] Separately from arguing that *Purcell* should alter the framework by which the Court analyzes a motion to stay, Defendant also argues that, because it believes *Purcell* applies, the Court should stay the injunction. Mot. at 14. The Court does not address this argument because (1) it has already explained *Purcell* does not apply, and (2) the time to request a stay of the original injunction has passed. It is unclear why Defendant advances this argument asking the Court to stay the injunction when the subject of this Motion is the Court's Order Sustaining Objections to the Remedial Plan.

To the extent Defendant seeks to use this Motion as a second opportunity to argue in favor of the Remedial Plan, it is too late. Defendant had an opportunity to pass a constitutional plan that would remedy the unconstitutional violations the Court found was substantially likely to exist in the Enjoined Plan. It did not do so. Accordingly, while the Court will explain why Defendant is not likely to succeed on the merits on appeal, it will not use this order to simply explain its rationale for rejecting the Remedial Plan once more.

Addressing Defendant's first argument about the May 11 Meeting, Defendant asserts that "there was no expressed intent to racially sort [from the Commissioners]; the Court is inferring it." Mot. at 5. To Defendant, the Court's finding contradicts the legal requirement that "the Commission is due a presumption of good faith." *Id.*

The Court's findings were not inferred. Rather, while the Court explained the Commissioners were entitled to a presumption of good faith, the Court evaluated multiple statements and described how each demonstrated the Commission's legislative intent that a remedial plan should perpetuate the unconstitutional aspects of the Enjoined Plan. *See* Order at 20–24. One such statement was a unanimous directive from the Commissioners to the redistricting consultant, De Grandy, to "start redrawing a map[,] that will guarantee that ten years from now we're going to have the diversity. . . in the city government and we are going to elect an Afro American to a seat, that they're going to be properly represented, as well as other groups." *Id.* at 23 (quotations omitted) (alterations in original). Based on the Commissioners' explicit, unequivocal statements from the May 11 Meeting, the Court found direct evidence "that the Commissioners intended the Remedial Plan to carry forward the very same race-based characteristics of the Enjoined Plan." *Id.* To describe the Court's analysis of the expressed intent

of multiple commissioners about their desire for a future map to maintain the gerrymandered voting districts as an "inference" is at best inaccurate, and at worst disingenuous.[5]

Turning to the next argument, Defendant argues the Court "placed undue emphasis on the notion of core retention" and in doing so, improperly relied upon *Jacksonville Branch of NAACP v. City of Jacksonville* ("*Jacksonville II*"), No. 3:22-cv-493-MMH-LLL, 2022 WL 17751416 (M.D. Fla. Dec. 19, 2022).[6] Mot. at 6–7. But, by Defendant's own words, "[c]ore retention can only be suspect insofar as it perpetuates the harms of a racial gerrymander." *Id.* at 6. That is precisely how the Court analyzed it. *See* Order at 26 ("The Court agrees with Plaintiffs that the core retention rates between the Remedial Plan and the Enjoined Plan are 'staggeringly high' and . . . indicate that the Remedial Plan does not completely correct the unconstitutional aspects of the Enjoined Plan."). The Court's analysis of core retention was therefore appropriately limited to an evaluation of whether the Remedial Plan perpetuated the harms of racial gerrymandering, which the Court found it did.

Defendant also argues that the Court improperly disregarded the Commission's "legitimate, non-racial criteria, such as political considerations, where [the Commissioners] had

[5] Defendant also asserts that "[d]etermining legislative intent from statements by a minority of the Commission is always problematic." Mot. at 5 (quoting *Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1324 (11th Cir. 2021)). While a true statement of law, Defendant's assertion is entirely divorced from the Court's finding. The Court identified specific statements from Commissioners Díaz de la Portilla and Reyes, and then considered the *unanimous* directive to De Grandy mentioned above to determine legislative intent. *See* Order at 22–23.

[6] Defendant argues that the Court should not rely upon *Jacksonville II* because this is not a claim of vote dilution, and there, "the new plan still diluted the votes of minority voters [so] the Court replaced it with a plan that did not dilute these votes." Mot. at 7. *Jacksonville II* directly addressed the question of whether the City of Jacksonville's remedial plan remedied the unconstitutional gerrymander from the enjoined plan, and in doing so, the *Jacksonville II* Court evaluated core retention rates as one factor to demonstrate that it did not. *See id.* at *14. To the extent the Court analogized to *Jacksonville II*, it did so to demonstrate that, as in that case, the Remedial Plan in the instant Action "perpetuates the impact of the Enjoined Plan's unconstitutional racial gerrymandering of the election districts." Order at 40.

invested substantial district resources, and where candidates reside" because the Court found those reasons "'had the impact of perpetuating, rather than completely correcting the constitutional infirmities [of the Enjoined Plan].'" Mot. at 7 (quoting Order at 12). As a matter of law, Defendant's argument is unavailing. In the remedial posture, courts must ensure that a proposed remedial districting plan "completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Covington v. North Carolina* ("*Covington I*"), 283 F. Supp. 3d 410, 431 (M.D. Fla. 2018) (citing *Abrams v. Johnson*, 521 U.S. 74, 86 (1997), *aff'd in relevant part,* 138 S. Ct. 2548 (2018)). Thus, while the Court properly considered the Commission's legitimate goals, it nevertheless found that those considerations did not completely correct the unconstitutional aspects of the Enjoined Plan. *See* Order at 25, 29–33. The Court's analysis was not just appropriate; it was also legally necessary.

Relatedly, Defendant asserts that political considerations influenced the creation of the Remedial Plan, in contrast to the Court's findings that they did not. *See* Mot. at 7 n.4. According to Defendant, the court "lack[s] jurisdiction to undo what is essentially a political question." *See id.* (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019)). In support of its argument, Defendant cites to a portion of the June 14 Meeting and its accompanying presentation materials. *Id.* During that portion of the June 14 Meeting, De Grandy only discusses the political outcomes of two unadopted alternative maps, P1 and P2. (ECF No. 82-2 at 9:9–11:2). For example, De Grandy explained that in "[P]laintiffs['] Alternative 1, the percentage of Republican registered voters in D[istrict] 1 drops by close to 9% compared to our proposal." *Id.* 10:9–10. Further, De Grandy explained that in Plaintiffs' "Alternative 2, the percentage of Republican registered voters in D[istrict] 1 drops by 6%. . . compared to our proposal." *Id.* 10:16–17.

At no point during that meeting, however, did De Grandy opine that he factored in political considerations when drafting V12 or the Remedial Plan. *See generally id.* Nor did any Commissioner. *See id.* Contrary to Defendant's argument, the Court concluded that partisanship did not play a role in the Remedial Plan's creation based on an absence of any record material demonstrating otherwise. *See* Order at 40 (finding "nothing in the record demonstrates that partisanship played any role"). Accordingly, the Court is satisfied that it correctly determined partisanship did not influence the creation of the Remedial Plan.

Defendant also takes issue with how the Court analyzed whether District 5 was narrowly tailored under the Remedial Plan. *See* Mot. at 8–10. Specifically, Defendant argues that the Court used an incorrect legal standard when evaluating the Remedial Plan and did not actually consider whether District 5 in P4 is narrowly tailored. *See id.* at 8.

As to the Remedial Plan, Defendant asserts that the Court imposed the duty upon Defendant to "determine[] with precision" the Black Voting Age Population ("BVAP") required in District 5, and to "memorialize the analysis or compile a comprehensive record" of how Defendant calculated the BVAP figure. *Id.* at 8. Defendant misconstrues the Court's analysis. The Court explained that "the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." Order at 38 (emphasis omitted). To demonstrate a strong basis in evidence, the Court explained that Defendant was required to conduct a functional analysis of the electoral behavior within District 5 to determine how District 5 would comply with the VRA's requirements. *See id.* (citations omitted). The Court further elaborated that by having this strong basis in evidence, Defendant "could demonstrate it had 'good reason to believe' it must use race to satisfy § 2 of the VRA." *Id.* (citation omitted)

Nowhere in this explanation did the Court require Defendant to memorialize or compile a comprehensive record of that analysis, nor did it require Defendant to demonstrate with precision the necessary BVAP. Rather, the Court explained that the record did not contain any evidence suggesting a *functional analysis ever occurred*, meaning there was no record evidence demonstrating what "good reason" Defendant had for drawing District 5 as it did in the Remedial Plan. *See id.* at 38–40. Accordingly, the Court properly evaluated District 5 to determine if it was narrowly tailored in the Remedial Plan.

Secondly, the Court did evaluate whether P4 was narrowly tailored. *See id.* at 47–48. In doing so, the Court considered Dr. Moy's functional analysis to conclude that P4's District 5 would enable Black voters to regularly elect a candidate of their choosing, as is required under § 2 of the VRA. *See id.* Because Plaintiffs used Dr. Moy's analysis to craft P4, the Court found that P4 was narrowly tailored to ensure VRA compliance. *See id.* at 48. Defendant's assertion that the Court did not undergo this analysis is patently false.

Defendant's final argument regarding its likelihood of success on the merits is that the Court cannot possibly find the Remedial Plan unconstitutional, but simultaneously find P4 constitutional, when the maps are fundamentally similar. *See* Mot. at 7–8, 11. To Defendant, the Court's conclusion is "inconceivable," and if the Remedial Plan perpetuates the constitutional infirmities from the Enjoined Plan, then P4 must do the same. *See id.* at 7. But, as the Court explicitly noted in its Order, "'[w]hen faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or Voting Rights Act.'" Order (citing *Abrams*, 521 U.S. at 79). Thus, when evaluating P4, the Court had to ensure

that P4 reconciled two goals: (1) adherence to the Commission's lawful objectives, and (2): that the map remedied the unconstitutional aspects of the Enjoined Plan.

The Court evaluated the process by which P4 was created accordingly. In doing so, it considered how P4 incorporated the Commission's goals of substantial equality of population, respect for traditional neighborhoods and communities of interest, and the use of significant and natural boundaries, while also considering traditional districting criteria, which the Enjoined Plan did not. After undergoing this analysis, the Court found that P4 properly reconciled those two objectives. *See* Order at 40–49. *Cf. Jacksonville II*, 2022 WL 17751416, at *18–19 (evaluating a remedial plan to ensure it "adheres to the legitimate redistricting criteria advocated by the City Council" while also ensuring it did not result in the perpetuation of the unconstitutional effects from the enjoined plan). Accordingly, even if P4 is facially similar to the Remedial Plan, as Defendant suggests, P4 is a constitutional remedy if it reconciles the two objectives mentioned above. Because the Court found that it does, the Court is satisfied that P4 is a sufficient remedial plan based on the underlying considerations that factored into its creation. *See* Order 40–49.

In sum, none of Defendant's arguments indicate a "strong showing that [it] is likely to succeed on the merits." *Nken*, 556 U.S. at 434.

ii. Irreparable Harm

Defendant does not suffer irreparable harm because it "has no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). "[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute." *Id.* (quoting *Joelner v. Vill. of Washington Park,* 378 F.3d 613, 620 (7th Cir. 2004)). Defendant's claims that it will be harmed absent a stay of the

Court's Order finding the Remedial Plan unconstitutional are thus unavailing. The Court could properly end its analysis there.

Nevertheless, Defendant argues that absent a stay, it will suffer irreparable harm because the Court's Order created "districting changes [which] are 'prescriptions for chaos.'" *See id.* at 12 (citing *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J. concurring)). According to Defendant, the Court's Order "will 'affect candidates, campaign organizations, independent groups, political parties, and voters, among others.'" *Id.* (citing *Milligan*, 142 S. Ct. at 880). Defendant gives one example of the consequence of the Court's Order, explaining that like in *Milligan*, "candidates and elected officials no longer even know what [sic] district they live [sic] in, where they may run, and where they must campaign."[7] *Id.* Defendant believes that the ensuing "chaos" from the Court Order constitutes irreparable harm. *See id.*

But the instant Action is not like *Milligan*. In *Milligan*, an Alabama district court concluded that "Alabama's congressional districts [must] be completely redrawn" seven weeks prior to the next election. *Id.* at 779. Importantly, because no map existed and the election was fast-approaching, the Supreme Court opined that the district court's injunction was "a prescription for chaos." *Id.* at 880. Accordingly, the Supreme Court stayed the district court's order, explaining that individuals and entities "now do not know who will be running against whom," "candidates cannot be sure what district they need to file for," and "potential candidates do not even know which district they live in." *Id.*

[7] Lastly, Defendant argues that based on Miami residence requirements, "Commissioners who are up for reelection may be drawn out of their districts with no opportunity to qualify in a new district." *See* Mot. at 12 (citing City of Miami, Code of Ordinances § 16-6(b)(3)). Defendant cites to no authority to suggest that a Commissioner who *may* be drawn out of his district constitutes harm on behalf of Defendant, the City of Miami. Moreover, the Court finds that any potential harm that a Commissioner may suffer by virtue of no longer residing in a particular district must give way to the Court's duty to remedy the Defendant's unconstitutional districting decisions.

There is no such chaos here. Unlike in *Milligan*, the Court already adopted its own remedial map. The Court has done so before August 1, 2023, the date by which the Miami-Dade Board of Elections stated it would need a map to conduct the November Election. The map clearly delineates the borders of each district. Consequently, it strains credulity to claim, as Defendant does, that candidates do not know the district in which they live or where they may run. Mot. at 12. The Court's remedial map specificizes it clearly. Otherwise, Defendant fails to explain what other "chaos" will result from the Court's Order, much less explain how it will be harmed. *See id.*

As noted above, the "first two factors are the most critical" when analyzing a motion for a stay pending appeal: likelihood to prevail on the merits and irreparable harm absent a stay. *See Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317. Here, both factors weigh against the stay Defendant now proposes. Accordingly, the Court need not examine the other two factors, and denies Defendant's Motion.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the Court finds that a stay is not warranted. For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Defendant's Emergency Motion to Stay Order Rejecting Redistricting Map (ECF No. 97) IS DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of August, 2023.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record

APPENDIX E

No. 23-12472

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GRACE, INC., ET AL.,

Plaintiffs-Appellees,

v.

CITY OF MIAMI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:22-cv-24066 (Moore, J.)

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT CITY OF MIAMI'S EMERGENCY MOTION TO STAY

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No. 23-12472 — *GRACE, Inc. v. City of Miami*

CERTIFICATE OF INTERESTED PERSONS

Under FRAP 26.1 and this Circuit Rule 26.1, Plaintiffs-Appellees certify that the following have an interest in the outcome of this appeal:

1. Abott, Carolyn, *Testifying Expert for Plaintiffs-Appellees*
2. ACLU Foundation of Florida, Inc., *Counsel for Plaintiffs-Appellees*
3. Alford, John, *Testifying Expert for Defendant-Appellant*
4. Bardos, Andy, *Counsel for Defendant-Appellant*
5. Carollo, Joe, *Defendant-Appellant*
6. City of Miami, *Defendant-Appellant*
7. Cody, Steven, *Defendant-Appellant's expert*
8. Contreras, Alexandra, *Plaintiff-Appellee*
9. Cooper, Clarice, *Plaintiff-Appellee*
10. Covo, Sabina, *Defendant-Appellant*
11. De Grandy, Miguel, *Testifying Expert for Defendant-Appellant*
12. Dechert LLP, *Counsel for Plaintiffs-Appellees*
13. Díaz de la Portilla, Alex, *Defendant-Appellant*
14. Engage Miami, Inc., *Plaintiff-Appellee*
15. GrayRobinson, P.A., *Counsel for Defendant-Appellant*
16. Grove Rights and Community Equity, Inc. (GRACE), *Plaintiff-Appellee*
17. Greco, John A., *Counsel for Defendant-Appellant*

18. Johnson, Christopher N., *Counsel for Defendant-Appellant*

19. Johnson, Jared, *Plaintiff-Appellee*

20. Jones, Kevin R., *Counsel for Defendant-Appellant*

21. King, Christine, *Defendant-Appellant*

22. Kirsch, Jocelyn, *Counsel for Plaintiffs-Appellees*

23. Levesque, George T., *Counsel for Defendant-Appellant*

24. Louis, Lauren F., *U.S. Magistrate Judge, Southern District of Florida*

25. McCartan, Cory, *Testifying Expert for Plaintiffs-Appellees*

26. McNamara, Caroline A., *Counsel for Plaintiffs-Appellees*

27. McNulty, Kerri L., *Counsel for Defendant-Appellant*

28. Méndez, Victoria, *Counsel for Defendant-Appellant*

29. Merken, Christopher J., *Counsel for Plaintiffs-Appellees*

30. Miami-Dade Branch of the NAACP, *Plaintiff-Appellee*

31. Moore, K. Michael, *U.S. District Judge, Southern District of Florida*

32. Moy, Bryant J., *Testifying Expert for Plaintiffs-Appellees*

33. NAACP Florida State Conference, *State Affiliate of Plaintiffs-Appellees*

34. Quintana, Marlene, *Counsel for Defendant-Appellant*

35. Reyes, Manolo, *Defendant-Appellant*

36. NAACP, *National Affiliate of Plaintiffs-Appellees*

37. South Dade Branch of the NAACP, *Plaintiff-Appellee*

38. Steiner, Neil A., *Counsel for Plaintiffs-Appellees*

39. Suarez, Francis X., *Defendant-Appellant*

40. Tilley, Daniel B., *Counsel for Plaintiffs-Appellees*

41. Unger, Jason L., *Counsel for Defendant-Appellant*

42. Valdes, Yanelis, *Plaintiff-Appellee*

43. Warren, Nicholas L.V., *Counsel for Plaintiffs-Appellees*

44. Wysong, George, *Counsel for Defendant-Appellant*

CORPORATE DISCLOSURE STATEMENT

Under FRAP 26.1, Plaintiffs-Appellees certify that GRACE, Inc.; Engage Miami, Inc.; South Dade Branch of the NAACP; and Miami-Dade Branch of the NAACP each has no parent corporation, and no publicly held corporation owns 10% or more of any of those entities' stock. The remaining Plaintiffs-Appellees are individual persons.

Counsel for Plaintiffs-Appellees further certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: August 1, 2023

/s/ Nicholas L.V. Warren

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INTRODUCTION

When sorting and distributing their constituents by race, Miami's leaders have not been shy. Some districts, we are informed, must be sure to "keep the same type of last names" and "faces." Report and Recommendation ("R&R") (Doc.52) p.26. One must also, we are told, be cautious if one district is "getting all the sirloin but none of the bone." Doc.24-13 103:18; *accord* R&R p.26. With Miami's Hispanic-rich areas being compared to "sirloin" and majority-white areas to "bone," R&R p.26, it's hardly surprising to see areas described as "attractive" not for their tree cover or cultural offerings but because of the race of their constituents, *id.* p.17, 74. Questioning this system of race-based sorting, though, does not earn one plaudits at the Commission. It instead garners accusations of being the product of someone (here, the magistrate judge) "who probably knows nothing about our city," Doc.82-1 5:15-16 (comments of Commissioner Díaz de la Portilla). The City does not contest those facts and chose not to appeal the preliminary injunction they impelled.

Although "[o]utright racial balancing is patently unconstitutional." *Students for Fair Admissions v. President & Fellows of Harvard Coll.* (*SFFA*), 143 S.Ct. 2141, 2219 (2023) (cleaned up), the commitment from Miami's leadership runs deep. Only District 5 is protected by the Voting Rights Act and thus can be drawn in a race-predominant manner, but the City drew all five districts with race as their predominant factor. Rather than seriously contesting the preliminary-injunction

order, the City passed a new map nearly identical to the enjoined map. Although this Court may not "know[] [much] about our city," Doc.82-1 5:15-16, it knows about the Constitution—and specifically that sorting and distributing citizens based on their "attractive" physical resemblance to cuts of steak does not comport with it.

BACKGROUND

I. Proceedings Below

Plaintiffs—five Miami residents and four community membership organizations—sued the City, contending the Enjoined Plan violated the equal-protection clause by impermissibly sorting residents by race into different districts. On February 10, nearly nine months before the November 2023 election, Plaintiffs filed a motion for preliminary injunction. Doc.26. Upon referral, the magistrate judge held a five-and-a-half hour evidentiary hearing and argument on March 29. *See* Doc.48.

The magistrate judge's 101-page R&R recommended the district court issue an injunction. Doc.52. Following briefing, on May 23, the district court adopted the R&R and enjoined the City from using its unconstitutional map ("Enjoined Plan") during the pendency of the case, more than five months ahead of the November election. Doc.60.

Eight days later, the City appealed. Doc.63, docketed as No. 23-11854. The City voluntarily dismissed its appeal on July 11, effectively conceding that the

Enjoined Plan likely violated the Equal Protection Clause as an explicit racial gerrymander.

The City instead focused its efforts on the remedial mapmaking process in compliance with the preliminary injunction. The district court held a June 2 status conference to plan the remedial process and ensure completion before the August 1 date by which the County Elections Department said it needed a map to guarantee it could implement the November elections. Doc.68.[1] Before the conference, the parties submitted proposed remedial schedules. Exs.1-2. From the outset, the parties and court agreed that a district-court order on remedy needed to be entered by August 1—the polestar date for election administrators. At the June 2 conference, the district court expressed hope that the City's remedial-map process "will not contain similar infirmities" to the record that led to the preliminary injunction. Doc.99 12:13. Those "infirmities" were explicit racial division of the five Commission districts to ensure three Hispanic, one Black, and one Anglo district. *See* Doc.60 p.9-10; *id.* p.13 (emphasizing "the Commissioners' repeated instructions to [the City's consultant] De Grandy to preserve the 'ethnic integrity' of each district"). After the conference, the court entered a scheduling order setting the timeline for remedial-map submission and review. Doc.69.

The Commission adopted its proposed remedial map on June 14 by a 4-1 vote.

[1] The County Elections Department conducts elections for the City.

The City waited until the June 30 deadline to file the map with the district court—with no accompanying legal brief or supporting evidence. Doc.77. On July 7, Plaintiffs filed objections to the City's map along with Plaintiffs' suggested map and 39 supporting exhibits. Docs.82, 83. The City replied on July 12, Doc.86. After neither party requested an evidentiary hearing, the district court issued the July 30 order sustaining Plaintiffs' objections and adopting Plaintiffs' suggested remedial map. Doc.94 ("Op."). The current appeal and stay motion ("Mot.") followed.

II. The Order Sustaining Plaintiffs' Objections and Adopting Plaintiffs' Suggested Remedial Map

The Order described the factual record presented by the parties during the remedial process. The record begins after the R&R, at the Commission's May 11 meeting. Op.6. The meeting transcripts—which the City concedes "speak for themselves"—show "the Commissioners explaining why they believed their initial approach when enacting the Enjoined Plan (i.e. creating the gerrymandered districts), was the correct approach, and after some discussion, unanimously directing De Grandy to maintain the racial breakdown of each district in a new map." Op.23-24.

The Order also explains how the City met once more on June 14. Doc.83 p.4. At this meeting, the City's consultant presented a map labeled "Version 12"—nearly identical to the Enjoined Plan and which maintained many features the district court identified as unconstitutional—and the Commissioners made some tweaks to that

version before voting to adopt a final map ("Res. 23-271"). Op.7-14. The changes made from Version 12 to Res. 23-271 caused the map to hew even more closely to the Enjoined Plan, leaving 94.1% of Miamians in the same district. Op.26. The City refused to share any drafts before "Version 12," claiming no earlier versions existed. Op.8 n.5.

The Order walks through the direct evidence that the City's remedial map failed to correct the constitutional violations, and that in fact commissioners intended to perpetuate the City's tripartite racial division into designated districts for Black, Anglo, and Hispanic residents. Op.20-24. Other direct evidence showed commissioners deliberately moved "white affluent" areas from the "Black district" to the "Anglo district" and carefully rebalanced Hispanic populations to avoid "packing Hispanic voters." Op.37; Doc.82-2 9:9–10, 13:5–6, 14:17–18; Doc.77 p.34. The Order also summarizes the circumstantial evidence in the record supporting its conclusion—including the retention of specific, race-based features of the Enjoined Plan that the Commission perpetuated.[2] Op.24-40. Once the district

[2] These included (1) separating a white-majority part of Coconut Grove 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,'" R&R.36, 41, 74; (3) balancing the Hispanic population among three districts by splitting Flagami, Shenandoah, Silver Bluff, and Little Havana; (4) dividing Allapattah, Omni,

court weighed the record for the remedial process, it was compelled to reject the City's remedial map. Op.40 (finding "the Remedial Plan fails to correct the constitutional violations it found substantially likely to exist in the Enjoined Plan, and that the Remedial Plan perpetuates the impact of the Enjoined Plan's unconstitutional racial gerrymandering of the election districts").

At that point, with the August 1 deadline looming, the district court had to choose an alternative plan that withstood constitutional scrutiny. Op.40-41. The district court assessed Plaintiffs' remedial submission and concluded it better satisfied the City's permissible policy choices without attempting to achieve racial balancing like the City instructed its consultant to do. Op.41-44. Plaintiffs' submission followed traditional redistricting criteria, Op.45-46, and narrowly tailored the use of race only to ensure District 5 complied with Section 2 of the Voting Rights Act, Op.46-48. Plaintiffs' submission thus met the standard the City's remedial map failed to achieve.

The Order imposes Plaintiffs' remedial map as the interim remedy for the 2023 election, two days before the August 1 date the parties agreed must govern the remedial timeline. Op.50. The Order further commanded the City to deliver the materials necessary to implement that map to the County officials on July 31. *Id.*

Downtown, and Brickell along racial lines, replicating the Commission's strategy of drawing the Enjoined Plan to "find adjacent areas with similar demographics." Doc.83 pp.12-14, 16-21, 23-25.

Although there is no evidence in the record that the City did this, Plaintiffs forwarded these materials to the County, and the County confirmed receipt. Ex. 3; *see also* Christina Vazquez, *Will New Miami Electoral Map Force Carollo Out?*, Local 10, https://www.local10.com/news/local/2023/07/31/will-new-miami-electoral-map-force-carollo-out-citys-redistricting-battle-not-over/.

ARGUMENT

I. The City's Stay Motion is Procedurally Flawed

A. The City Seeks Reversal, Not a Stay

"Simply put, a stay preserves the status quo." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020). That's not what the City seeks here. Instead, it "requests that this Court ... permit the New Plan enacted by the City [Res. 23-271] to be given full effect pending appeal." Mot.6. In effect, the City seeks reversal of the district-court decision and an order implementing Res. 23-271. That request is inappropriate and unrelated to preserving the status quo.

There is only one viable map for the November elections: the court-ordered remedy. The City mischaracterizes the district-court order as "enjoin[ing] state election laws," Mot.25, as if Res. 23-271 is the status quo a stay would preserve. It isn't. As much as the City objects to the district-court characterization of Res. 23-271 as its "proposed remedial map," that is exactly what it is. After a court enjoins elections under an unconstitutional redistricting plan, "the legislature should be

given a reasonable opportunity *to recommend for consideration* a remedial plan that meets constitutional standards." *S.C. State Conf. of NAACP v. Alexander*, 2023 WL 118775, at *14 (D.S.C. Jan. 6, 2023) (emphasis added), *appeal filed and prob. juris. noted*, 143 S.Ct. 2456; *see McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988) (noting court must "consider whether the proffered remedial plan is legally unacceptable"); *see also United States v. Virginia*, 518 U.S. 515, 547, (1996) ("remedial decree" "must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination") (cleaned up); *Milligan v. Allen*, No. 2:21-cv-1530-AMM (N.D. Ala. July 27, 2023), Docs.168, 194 (three-judge court setting schedule to review legislature's enacted proposed remedy and plaintiffs' objections thereto).

The district court never approved the City's "proffered plan" as an interim remedy because it violates the Constitution. So there is no "injunction of Res. 23-271" to stay. What is the status quo, then? Not the original 2022 plan. The court enjoined that plan, and the City dismissed its appeal of that injunction. Instead, staying the remedial order would revert to a "status quo" of the plan enacted in 2013 using 2010 Census data. But those districts are now unconstitutionally malapportioned. Doc.24-31, p.34; *Avery v. Midland Cnty.*, 390 U.S. 474 (1968). Functionally, then, the City cannot now seek a stay—there is no legal status quo to preserve.

Instead, the City asks this Court for "permission" to "give full effect" to Res. 23-271. That is a reversal on the merits, sought in a time-sensitive posture, not a stay. This Court should deny that extraordinary request.

B. *Purcell* Does Not Apply

The City tries, and fails, to invoke *Purcell* to shield its race-based sorting from judicial review. *Purcell* is inapplicable for three reasons.

First, the City cannot invoke *Purcell* after repeatedly representing that a remedy in place by August 1 would allow effective relief. Since the County Elections Department's January announcement that, to implement the November 2023 City Commission elections, it needed the district boundaries by August 1, that date has guided the district court's and parties' conduct. Doc.24-30. Indeed, "the Parties in this case 'worked backwards' from the August 1, 2023 deadline to craft a briefing schedule considering the potential time needed for a remedy." Doc.60 p.27 n.11 (quoting *Jacksonville Branch of NAACP v. City of Jacksonville* (*Jacksonville I*), 2022 WL 7089087, at *4 (M.D. Fla. Oct 12, 2022)). The City specifically acknowledged needing to develop a remedial map, field Plaintiffs' challenges, and get a district-court ruling by August 1. Doc.36 p.22; Doc.73 139:12-15. August 1 guided the Parties' proposed remedial schedules and the district court's remedial

scheduling order.[3] Docs.69,99.

Both the Supreme Court and this Court rejected similar gambits last year. In *Rose v. Raffensperger*, 143 S.Ct. 58 (2022), and *Jacksonville Branch of NAACP v. City of Jacksonville* (*Jacksonville II*), 2022 WL 16754389 (11th Cir. Nov. 7, 2022), "the entire schedule on which the district court proceeded was developed with Appellant[], working backwards from the date they provided, and the final schedule was accepted 'without caveat.'" 2022 WL 16754389, at *2. So too here, the City cannot now "fairly ... advance" a *Purcell* argument "in light of [its] previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief." *Rose*, 143 S.Ct. 58; *see also Jacksonville II*, 2022 WL 16754389, at *2 ("Given Appellants' position that the election can be conducted on the schedule they made collaboratively with the district court and Appellees, we do not believe *Purcell* applies here.").

Second, *Purcell* does not apply at this stage of the case. *Purcell* seeks to avoid

[3] Under the City's proposed schedule submitted to chambers before that status conference, briefing on the Commission's newly adopted plan would have concluded on July 17—five days *later* than under the schedule the district court set. Ex.1 ¶ 2–3. Further, the City said it was "amenable to the Plaintiffs' proposed schedule" in the event the Commission failed to propose a new map—a proposed schedule under which briefing would conclude on July 14, two days later than the district court's schedule. *Id.* ¶ 4. Additionally, the City was amenable to Plaintiffs' proposal under that scenario that the district court "will approve an interim remedial plan by August 1." The City is in no position to complain about the timing of a district-court order when it agreed to that timing just two months ago.

"[l]ate judicial tinkering with election laws" to avoid "disruption" and "unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S.Ct. 879, 881 (2022) (Kavanaugh, J., concurring). *Purcell*'s underlying principle is that, "[w]hen an election is close at hand, the rules of the road must be clear and settled," *id.* at 880–81, so the status quo should usually prevail.

Here, the City invokes *Purcell* to upend the status quo—the court-ordered remedy[4]—not preserve it. The judiciary's alteration of state voting procedures occurred in May, when the district court enjoined the City's 2022 map. The City did not object on *Purcell* grounds at that time and dismissed its appeal of that injunction. Doc.52 p.99; Doc.60 p.26 n.10; No. 23-11854. Now, the district court must fashion a remedial decree "in the light of well-known principles of equity," *North Carolina v. Covington*, 581 U.S. 486, 488 (2017) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)), "ensur[ing] that [the] remedy 'so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future,'" *Covington v. North Carolina* (*Covington I*), 283 F.Supp.3d 410, 424 (M.D.N.C.) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)), *aff'd in relevant part*, 138 S.Ct. 2548 (2018). Although the district court was obliged to give the City

[4] Court-ordered relief can constitute the benchmark for *Purcell* purposes. *Frank v. Walker*, 574 U.S. 929 (2014), *id.* at 929 (Alito, J., dissenting); *RNC v. DNC*, 140 S.Ct. 1205, 1207 (2020).

an opportunity to proffer a legislatively enacted plan, that plan was subject to the court's review and approval. Yet the court found the City's plan failed to cure the underlying constitutional violations, and instead continued to impermissibly sort voters because of their race. Ensuring "the rules of the road [were] clear and settled," *Merrill*, 142 S.Ct. at 880–81 (Kavanaugh, J., concurring), the district court adopted a remedial plan by the Parties' agreed-upon deadline.

It is the City, then, that seeks last-minute judicial tinkering with election laws. It insists this Court alter "the rules of the road" one day before the Elections Department says it needs a map. Consequently, granting the City's request risks chaos and may be wholly infeasible. Under these circumstances, if any party must meet the heightened *Purcell* standards, it's the City.[5]

Third, none of the hardships courts have found relevant for *Purcell* purposes

[5] The City's inexplicable delay in developing and submitting its proffered remedy also weighs against it. The Commission convened to consider redistricting more than three weeks after the district-court injunction. Op.7. Even after the Commission adopted a map, the City waited 16 days to submit it to the district court. Op.14. The City cannot now claim the district-court decision came too late.

In that same vein, the City's gripe that Plaintiffs did not "disclose" P4 until 25 days ago rings hollow. Mot.25. The City "disclosed" its own plan only 23 days before that. P3, the near-identical plan on which P4 is based (and which was altered to better conform to the *City's* permissible policy choices), was released *before* the City's plan. Doc.82-7. Candidate qualifying ends almost two whole months from now. Candidate Qualifying, City of Miami, https://www.miamigov.com/My-Government/Elections/Candidate-Qualifying; *see Jacksonville II*, 2022 WL 16754389, at *6 (Lagoa, J., concurring) (finding *Purcell* inapplicable where new map was in place more than a month before the candidate qualifying deadline).

are present here. There is no substantial risk of harm, confusion, or disruption resulting from the district court implementing a remedy on the agreed-upon timeline, following its May 23 injunction that the City did not appeal.[6] Significantly, the City did not submit any evidence to support its case on harm, confusion, and disruption in the district court—*or even raise* Purcell *at all in the remedial process, until the court ordered a map the City did not like*. Doc.86. No statutory deadlines would have to be moved for relief; unlike the statewide injunction in *Milligan*, state and local officials won't need to coordinate; and the injunction here doesn't alter voting procedures in a way that courts have found would be a source of "judicially created confusion" in the past. *RNC*, 140 S.Ct. at 1207. There would be no "chaos" for

[6] The City condemns "draw[ing] an incumbent out of his district" as a "sweeping and disruptive" change. But were the court to consider this factor in weighing a remedial plan, it would be violating a Florida statutory mandate that the court is bound to follow. Fla. Stat. § 166.0321; *Perry v. Perez*, 565 U.S. 388, 394 (2012); *White v. Weiser*, 412 U.S. 783, 795 (1973). Even if that were not the case, incumbent protection has the effect of embedding racially-sorted districts, and must give way to the obligation to cure the racial gerrymandering. *Personhuballah v. Alcorn*, 155 F.Supp.3d 552, 561 n.8 (E.D. Va. 2016); *Jeffers v. Clinton*, 756 F.Supp. 1195, 1199–1200 (E.D. Ark. 1990). After all, what better way to protect incumbents than to give them the exact districts they had already won? That's not too different from what the Commission actually did, maintaining between 90%+ of the race-based districts. Doc.83 p.23-24. The law doesn't countenance this sort of "remedy."

Regardless, the City appears less worried about the impact on the incumbent in question than it represents to the Court. Joey Flechas, *Federal Appeals Court Temporarily Pauses Change to City of Miami Voting Maps*, MIA. HERALD (July 31, 2023), https://www.miamiherald.com/article277835528.html ("The Commissioner was elected until 2025, Méndez wrote. "Moreover, fairness dictates that he remains the Commissioner of the district until such time, regardless of redistricting and based on case law.").

election administrators—their assurance that they could implement a map in hand by around this time has guided this case's timeline.[7] *Accord Jacksonville Branch of NAACP v. City of Jacksonville* (*Jacksonville III*), 2022 WL 17751416, at *21 (M.D. Fla. Dec. 19, 2022) (city twice as large as Miami implementing map ordered 13 weeks before election); *Black Voters Matter v. Lee*, No. 2022 CA 666 (Fla. 2nd Jud. Cir. Ct. Apr. 26, 2022), Doc.23 p.412–415 (affidavit of elections supervisor and then-president-elect of state association of county elections officials, testifying he could implement new congressional map less than 12 weeks before primary).

In short, the City inappropriately seeks an aggressive application of *Purcell*, without showing significant risk of harm to electoral administration, and after the district court managed the case to meet the August 1 agreed-upon deadline. This Court should not reward that tactic.

II. The City is Not Entitled to a Stay

A. The City is Not Likely to Succeed on the Merits

The City failed to enact a constitutional map during its 2022 redistricting process. Its violations were blatant, explicit, and on the record: repeatedly directing its consultant to draw the five districts to ensure three Hispanic representatives, one

[7] The City suggests it would be impractical to give the Elections Department all materials necessary to implement the court-ordered plan by the district-court deadline. Mot.25. Plaintiffs' counsel sent the relevant files to the Elections Department's attorneys, who confirmed receipt. Ex.3; Vazquez, *Will New Miami Electoral Map Force Carollo Out?*, *supra* p.11.

Black representative, and one Anglo representative.[8] Doc.60 p.9-10, 13. This "political apartheid" cannot withstand strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). The law is clear: "Outright racial balancing is patently unconstitutional." *SFFA*, 143 S.Ct. at 2219 (cleaned up); *see also Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("When the [government] assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'") (quoting *Shaw*, 509 U.S. at 657).

The district-court injunction prevented the City from using that intentionally gerrymandered map in this November's elections. The City dismissed its appeal of that injunction. No. 23-11854. The time to appeal that ruling has passed. That preliminary finding is not presented to this Court for review in this appeal of the remedial map order; the preliminary injunction stands unchallenged. That precludes the City's arguments about delay seeking preliminary relief, which the district court weighed in the injunction. Doc.60 p.26.

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[8] *See, e.g.*, Doc.24-17 8:14-16 ("Our goal here is to have ... a white district"); Doc.24-15 (Commissioner Carollo: "Silver Bluff is one of those communities that was split in half to be able to create a District 2 that would elect someone like Mr. Russell – Commissioner Ken Russell: Japanese American. Commissioner Carollo: I didn't hear – well you didn't quite mention the Oriental part when you were running."). Doc.24-13 100:16-17 (sharing "intentions here today" "to have guaranteed Anglo representation, and to have three districts that were Hispanic"); Doc.24-12 ("[W]e have to make sure that we keep the … ethnic integrity … in those two districts.").

An appeal that has been voluntarily dismissed "cannot be revived after the expiration of the original appeal period." *Colbert v. Brennan*, 752 F.3d 412, 415–16 (5th Cir. 2014). Although the City may still assert the constitutionality of its explicit racial gerrymander at trial, its failure to appeal the preliminary injunction "logically preclude[s] a subsequent interlocutory appeal under § 1292(a)(1) from an unwarranted successive motion" that results from the preliminary injunction. *F.W. Kerr Chem. Co. v. Crandall Assoc.*, 815 F.2d 426, 428–29 (6th Cir. 1987); *see also Am. Optical Co. v. Rayex Corp.*, 394 F.2d 155, 156 (2d Cir. 1968) ("We will not further consider at this stage of the proceeding the validity of the underlying preliminary injunction from which appellants took no appeal.").

Given that the City's original 2022 map stands enjoined until trial on the merits, the sole issue presented on this appeal is whether the district court properly rejected the City's remedial map and instead chose to adopt Plaintiffs' proposed map. The merits of the City's appeal do not concern "an original racial gerrymandering challenge" to the City's remedial map, but how the district court evaluated the City's remedial map "after a finding that the Enjoined Plan was substantially likely to violate the Equal Protection Clause." *See Covington I*, 283 F.Supp.3d at 431.

Although the City's remedial plan begins with the "presumption of legislative good faith," *Abbott v. Perez*, 138 S.Ct. 2305, 2324 (2018), the district court must ensure that any remedial plan "so far as possible eliminate[s] the discriminatory

effects of the past as well as bar[s] like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). "In the remedial posture, courts must ensure that a proposed remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful." *Covington I*, 283 F.Supp.3d at 431 (citing *Abrams v. Johnson*, 521 U.S. 74, 86 (1997)). 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); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) (holding that a court should not "refrain from providing remedies fully adequate to address constitutional violations"); *Abrams*, 521 U.S. at 86 (holding a remedial districting plan cannot be sustained if it "would validate the very maneuvers that were a major cause of the unconstitutional districting"); *Jacksonville Branch of NAACP v. City of Jacksonville*, 2023 WL 119425, at *3 (11th Cir. Jan. 6, 2023) (citing *Covington*, 138 S.Ct. at 2554).

The district court's factual findings support its conclusion that the City's remedial plan failed to remedy the blatant constitutional violations of the Enjoined Plan. Op.6-7 (discussing the May 11 Commission meeting, where commissioners openly criticized the R&R and instructed their consultant to replicate the racial sorting of the Enjoined Plan); Op.7-14 (ensuring the racial sorting persists at the June 14 meeting, where the Commission tweaked the "Version 12" draft to hew even more

closely to the Enjoined Plan).

The record of the remedial process amply reflected the City's instruction to its consultant to perpetuate the racial sorting between the five districts. Op.67. The City failed to fix the "infirmities" that the district court identified at the outset of the remedial process. Doc.99 at 12:13. Commissioners knowingly reaffirmed their intent to gerrymander all five districts to achieve a balance of three Hispanic, one Black, and one Anglo commissioner. No presumption of good faith can overcome the blatant unconstitutionality of this instruction. Plaintiffs' Objections met their burden to overcome the presumption of good faith, and the City has offered no justification to satisfy strict scrutiny.

The City erroneously now attacks Plaintiffs' remedial map as improperly "packing Hispanics" into District 4. That argument is meritless. During the proceedings below, the City repeatedly conceded the VRA protects Black voters in Miami but does not apply to Hispanic voters (the majority of City residents) or Anglo voters. Doc.73 135:814, R&R.86-87. Because of these concessions, its arguments about how Hispanic and Anglo voters are distributed in the court-ordered map are irrelevant: intentional focus on the numbers of Hispanic and Anglo voters in Miami's districts is inappropriate, unsupported by the VRA, and cannot withstand strict scrutiny. *See* R&R.83, 86, 87.

Nor can the City invoke maintaining the cores of existing districts to

perpetuate the unconstitutional districts from the Enjoined Plan. Mot.16-17. "[W]here a government opts to preserve district cores to maintain the race-based lines created in previous redistricting cycles, '[t]he Supreme Court has been equally clear that this is not a legitimate objective.'" R&R.71 (quoting *Jacksonville II*, 2022 WL 16754389, at *3); *see also* Doc.39 p.3-5 (citing cases).[9] "[A] State [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 S.Ct. 1487, 1505 (2023).

The other "legitimate, non-racial criteria" the City claims motivated Res. 23-271 are either nowhere to be found in the actual record of commissioners' decision-making (political considerations, where candidates reside), or had only a minimal impact on the shapes of districts such that race still predominated in their design (where commissioners invested district resources).

For these reasons, the City's remedial map fails to correct the constitutional violations while the Plaintiffs' map does. The City is not likely to succeed on the merits of its appeal because the Order properly resolves the limited remedial issue facing the district court as a result of the City's explicit racial sorting.

[9] The City claims *Jacksonville* is inapposite because "that was a case of vote dilution." In fact, that case was identical to this. *Jacksonville I*, 2022 WL 7089087, at *42 n.62) ("Plaintiffs do not assert an intentional vote dilution claim in this case. Rather, the racial gerrymandering claim at issue here is based on *Shaw*.").

B. The City Will Not Face Irreparable Harm

The City will not be irreparably harmed absent a stay—"the second 'most critical' factor" governing its request. *Florida v. HHS*, 19 F.4th 1271, 1291 (11th Cir. 2021) (quoting *Nken*, 556 U.S. at 434). Both the Supreme Court and this Court have explained a government can claim no harm from being enjoined from enforcing an unconstitutional election statute. *See Abbott*, 138 S.Ct. at 2324 (no irreparable harm in enjoining state from enforcing unconstitutional map); *New Ga. Project*, 976 F.3d at 1283 (same). "[T]he city has no legitimate interest in enforcing an unconstitutional ordinance," so it cannot be harmed by being barred from doing so. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Because the City makes no serious effort to contest the district-court determination that race predominated in its districting, it cannot be irreparably harmed by the injunction.

C. A Stay Will Harm Plaintiffs and the Public

Holding elections under unconstitutionally racially gerrymandered maps cause irreparable harm. Granting a stay now will cause that harm, not just to Plaintiffs, but to all Miamians. They would continue to be forced to live in districts unconstitutionally based on racial "[c]lassifications … [that] 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw*, 509 U.S. at 643. Their "elected representatives," meanwhile, will continue receiving a "pernicious" message making them "more likely to believe that their

primary obligation is to represent only the members of [one racial] group." *Id.* at 648. These serious, irreparable harms are "altogether antithetical to our system of representative democracy." *Id.* Further, "the public … has no interest in enforcing an unconstitutional law," *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010); it is always in the public interest to follow the Constitution. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019).[10]

CONCLUSION

For the foregoing reasons, the Court should deny the City's motion.

Respectfully submitted this 1st day of August, 2023,

/s/ Nicholas L.V. Warren

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Caroline A. McNamara (FBN 1038312)
Daniel B. Tilley (FBN 102882)
ACLU Foundation of Florida
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Neil A. Steiner*
Dechert LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3822
neil.steiner@dechert.com

Christopher J. Merken
Dechert LLP
Cira Centre

[10] The City raises the specter of a VRA challenge against the court-ordered plan for diluting Black voters' ability in District 5. The district court found—and the City's own expert acknowledged—that District 5 under P4 will afford Black voters the ability to elect preferred candidates, as the VRA requires. Op.47-48; Doc.86-2 p.5.

Plaintiffs address the City's other arguments on public interest in the *Purcell* section, above.

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cmcnamara@aclufl.org
dtilley@aclufl.org

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(215) 994-2380
christopher.merken@dechert.com

* *Not admitted in the Eleventh Circuit*

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,198 words, excluding the parts that can be excluded. This motion also complies with Federal Rule of Civil Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word, 14-point Times New Roman font.

Dated: August 1, 2023

/s/ Nicholas L.V. Warren

Nicholas L.V. Warren

Exhibit 1

City's Proposed Remedial Schedule
Submitted to Chambers June 2, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:22-cv-24066-KMM

GRACE, INC.; ENGAGE MIAMI, INC.; SOUTH DADE BRANCH OF THE NAACP; MIAMI-DADE BRACH OF THE NAACP; CLARICE COOPER; YANELIS VALDES; JARED JOHNSON; and ALEXANDER CONTRERAS,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFFS' PROPOSED INTERIM REMEDIAL SCHEDULE

The City of Miami, Defendant, in response to the Plaintiffs' Proposed Interim Remedial Schedule, submits the below response and proposed schedule for the interim remedial process.

This Court has preliminarily enjoined the City from using the district plan adopted in City of Miami Resolution 22-131 in its next election to be held in November, 2023. (ECF No. 60.) The Court has not yet ruled on the merits of Plaintiffs' claims. Defendant's chief objection to the Plaintiffs' proposed schedule is that it impermissibly shifts the burden of proof to the City and turns the presumption of good faith that attaches to any legislatively-enacted remedial redistricting plan on its ear. As the Supreme Court has explained:

> Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State. This rule takes on special significance in districting cases. Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious

> intrusion on the most vital of local functions. In assessing the sufficiency of a challenge to a districting plan, a court must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. And the good faith of the state legislature must be presumed. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.

Abbott v. Perez, 138 S. Ct. 2305, 2324–25 (2018) (cleaned up).

Both *Perez* and *Covington v. North Carolina*, 283 F. Supp. 3d 410, 424 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S.Ct. 2548 (2018), cited by Plaintiffs, involved a remedial phase implemented *after* a district court's ruling on the merits of the challengers' claims. At this time, no meaningful discovery has occurred[1], let alone a ruling on the merits of Plaintiffs' claims. To require the City to come back to this Court and request approval of its redistricting plan, as Plaintiffs request in bullet 3 of their proposal, flips the burden of proof and disregards the presumption of legislative good faith, and does so well before a merits finding of discriminatory intent. If *Perez* concluded that a challenger still bears the burden of proof and the legislative body still enjoys the presumption of good faith for its plans *after* a finding of discriminatory intent in a prior enacted plan, such burden and presumption most assuredly apply here. "[A] legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands' of federal law." *North Carolina v.*

[1] Indeed, Plaintiffs have filed a motion seeking to stay discovery on the merits. *See* ECF No. 64.

Covington, 138 S.Ct. 2548, 2554 (2018) (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966)).

Against that background, the City proposes the following schedule and process:

1. Mediation is set for 6/13. The parties must notify the Court by June 23 if an agreement is reached, or the status of such discussions.

2. The City must apprise the Court by June 30 if the City has passed or anticipates that it will pass a new redistricting plan and the status of such efforts.

3. If and when the City adopts a new redistricting plan, Plaintiffs may amend their complaint to challenge the new redistricting plan. Upon amending their complaint, Plaintiffs may also seek an injunction, or both, as permitted under the Federal Rules of Civil Procedure. If Plaintiffs seek such relief and if the Court wishes to set a schedule, Plaintiffs should have 7 days after the passage of a new redistricting plan to file seek such motions. Defendants may respond to any such motions within 7 days. And Plaintiffs may file a reply within 3 days.

4. If the City fails to adopt a map by June 30, and the Court is unwilling to stay its injunction, the Court should commence its process for filling the vacuum and imposing a map. Defendants are amenable to the Plaintiffs' proposed schedule for this scenario, but first request the Court to indicate whether the Court would prefer to use a special master or consider proposals from the parties in lieu of engaging a special master.

Respectfully submitted,

GRAYROBINSON, P.A.
333 S.E. 2nd Avenue, Suite 3200
Miami, Florida 33131

Telephone: (305) 416-6880
Facsimile: (305) 416-6887

By: *s/ Christopher N. Johnson*
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Florida Bar No. 69329
Email: Christopher.Johnson@gray-robinson.com
Marlene Quintana, B.C.S.
Florida Bar No. 88358
Email: Marlene.Quintana@gray-robinson.com

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CITY OF MIAMI
Kevin Jones, Esquire
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Facsimile: (305) 416-1801
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ *Christopher N. Johnson*
Christopher N. Johnson

Exhibit 2

Plaintiffs' Proposed Remedial Schedule
Submitted to Chambers June 1, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 1:22-cv-24066-KMM

GRACE, INC., *et al.*,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.

_____/

PLAINTIFFS' PROPOSED INTERIM REMEDIAL SCHEDULE

In advance of the June 2, 2023 status conference, Plaintiffs submit the below proposed schedule for the interim remedial process in this case. Plaintiffs' counsel conferred with counsel for the City regarding this submission by videoconference on May 31, 2023. The City does not agree to this proposed schedule.

* * *

On May 23, 2023, the Court preliminarily enjoined the district map for the Miami City Commission challenged in this case, finding that Plaintiffs are substantially likely to succeed on their claim that each of the five districts are racially gerrymandered in violation of the Fourteenth Amendment (ECF No. 60.)

"When a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate . . . to afford a reasonable opportunity for the legislature to . . . adopt[] a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). The Court also has "its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections," *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018), and "has a 'duty' to ensure that any remedy 'so far as possible eliminate[s] the discriminatory effects of the past as well as bar[s] like discrimination in the future.'" *Covington v. North Carolina*, 283 F. Supp. 3d 410, 424 (M.D.N.C.

2018), *aff'd in part, rev'd in part*, 138 S.Ct. 2548 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

Accordingly, the Court orders the following schedule for the approval of an interim remedial plan for use in all City Commission elections to be held pending final judgment in this case:

1. The Parties must complete mediation by **June 22**. Mediation is currently scheduled for **June 13** (ECF No. 65).

2. If mediation is successful in reaching a full or partial settlement regarding an interim remedial plan, the Parties must promptly notify the Court of the settlement in accordance with Local Rule 16.2.F, by filing a notice of settlement within **10 days** of the mediation conference, and a joint motion to approve the settlement within **20 days** of the mediation conference.

3. If mediation is unsuccessful in reaching an agreement on an interim remedial plan, the City shall have until **June 28** to enact a proposed interim remedial plan, and file with the Court a motion to approve the plan and memorandum of law of no more than 35 pages, and any evidence in support.

    a. With its plan or as soon within three days thereafter as is practicable, the City must file all of the following relating to the enactment process and the development of the plan, not otherwise exempt from disclosure pursuant to Florida's public records law, Fla. Stat. ch. 119: files; data; correspondence, including text messages; transcripts, minutes, and recordings of meetings; notes; instructions; event calendars; and analyses.

    b. Any meetings of commissioners, staff, and/or mapping consultants not exempt from being open to the public under Fla. Stat. § 286.011 must be recorded and/or transcribed, and the recording and/or transcripts filed with the Court.

4. If at any point before **June 28** the City determines that it will not enact an interim remedial plan, the City must notify the Court immediately.

5. If, after the City Commission passes and submits a proposed interim remedial plan, Plaintiffs determine that they have no objections to the plan, Plaintiffs must notify the Court immediately.

    a. Plaintiffs may file a memorandum of no more than 20 pages in support of the plan within **7 days** of the City's motion.

6. Within **9 days** of the City's motion, Plaintiffs may file an opposing memorandum of no more than 35 pages, alternative remedial plans, and evidence in support.

7. Within **7 days** of the Plaintiffs' opposing memorandum, the City may file a reply memorandum of no more than 15 pages.

8. If the City fails to enact and file with the Court a proposed interim remedial plan by **June 28** or the City files a notice pursuant to Paragraph 4, each Party may each file a brief of no more than 35 pages proposing interim remedial plans for the Court's consideration by **July 5** or **7 days** after the City's notice, whichever occurs earlier.

    a. Each Party may file a response brief within **9 days**.

9. At the same time as any brief is due pursuant to Paragraph 8, each Party may also file a notice nominating up to three persons confirmed to be available to serve as special masters, in the event the Court decides it is appropriate to appoint one or more special masters to assist in developing an interim remedial plan.

10. As part of their initial submissions, the Parties must indicate whether they desire an evidentiary hearing or oral argument, what witnesses they intend to call if any, and whether they intend to depose any witnesses. The Court will set this matter for evidentiary hearing or oral argument, if necessary, by further order.

11. The court will approve an interim remedial plan by **August 1**. Upon receiving the Court's order, the City must immediately provide the Miami-Dade County Elections Department with all files and data necessary for implementation of the plan in the November elections.

* * *

Respectfully submitted this 1st day of June, 2023,

/s/ Nicholas L.V. Warren

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* *Admitted pro hac vice*

Counsel for Plaintiffs

Exhibit 3

Email from First Assistant County Attorney to Plaintiffs' Counsel
Re: Court order on Miami City Commission redistricting map
July 31, 2023

Re: Court order on Miami City Commission redistricting map

Sanchez, Gerald (CAO) <Gerald.Sanchez@miamidade.gov>
Mon 7/31/23 9:22 AM

To:Nicholas Warren <NWarren@aclufl.org>
Cc:Bonzon-Keenan, Geri (CAO) <Geri.Bonzon-Keenan@miamidade.gov>;Sanchez, Gerald (CAO) <Gerald.Sanchez@miamidade.gov>;Carrie McNamara <CMcNamara@aclufl.org>;Daniel Tilley <dtilley@aclufl.org>;Christopher Merken <christopher.merken@dechert.com>;Valdes, Michael B. (CAO) <Michael.Valdes@miamidade.gov>;andy.bardos@gray-robinson.com <andy.bardos@gray-robinson.com>;Neil Steiner <neil.steiner@dechert.com>;Christopher N. Johnson <Christopher.Johnson@gray-robinson.com>;George Levesque <George.Levesque@gray-robinson.com>;Jason Unger <jason.unger@gray-robinson.com>;krjones@miamigov.com <krjones@miamigov.com>;klmcnulty@miamigov.com <klmcnulty@miamigov.com>;Marlene Quintana, B.C.S. <Marlene.Quintana@gray-robinson.com>;VMendez@miamigov.com <VMendez@miamigov.com>;gwysong@miamigov.com <gwysong@miamigov.com>;jagreco@miamigov.com <jagreco@miamigov.com>

Good morning,

Thanks for letting us know. Take care.

Gerald Sanchez

Sent from my iPhone

> On Jul 31, 2023, at 9:17 AM, Nicholas Warren <NWarren@aclufl.org> wrote:
>
> EMAIL RECEIVED FROM EXTERNAL SOURCE
>
> Ms. Bonzon-Keenan and Mr. Sanchez,
>
> Please see the below message and attachments regarding the court-ordered map for the Miami City Commission. I called and learned Oren has left, and got Michael's OOO message yesterday, so wanted to make sure your office had this information as soon as possible.
>
> Let me know if there is anything else we can do to assist.
>
> Best,
> Nick
>
> **Nicholas Warren** (*he/him*) **| Staff Attorney**
> **American Civil Liberties Union of Florida**
> Direct: (786) 363-1769 | nwarren@aclufl.org | aclufl.org
>
> ---
>
> **From:** Nicholas Warren
> **Sent:** Sunday, July 30, 2023 1:07 PM
> **To:** Rosenthal, Oren (CAO) <Oren.Rosenthal@miamidade.gov>; Valdes, Michael B. (CAO) <Michael.Valdes@miamidade.gov>
> **Cc:** Carrie McNamara <CMcNamara@aclufl.org>; Daniel Tilley <dtilley@aclufl.org>; Christopher Merken <christopher.merken@dechert.com>; andy.bardos@gray-robinson.com <andy.bardos@gray-robinson.com>; Neil Steiner <neil.steiner@dechert.com>; Christopher N. Johnson

<Christopher.Johnson@gray-robinson.com>; George Levesque <George.Levesque@gray-robinson.com>; Jason Unger <jason.unger@gray-robinson.com>; krjones@miamigov.com <krjones@miamigov.com>; klmcnulty@miamigov.com <klmcnulty@miamigov.com>; Marlene Quintana, B.C.S. <Marlene.Quintana@gray-robinson.com>; VMendez@miamigov.com <VMendez@miamigov.com>; gwysong@miamigov.com <gwysong@miamigov.com>; jagreco@miamigov.com <jagreco@miamigov.com>
Subject: Court order on Miami City Commission redistricting map

Michael and Oren,

I'm sure the Elections Department will hear directly from the city soon, but Judge Moore of the Southern District just issued the attached order in *GRACE, Inc. v. City of Miami*, adopting a map submitted by the plaintiffs ("P4") as the redistricting plan for the Miami City Commission. The mandatory injunction is:

<image.png>

I've attached the court-ordered map in three file formats (CSV census block assignment file, KML, and shapefile ZIP).

Please let me know if we can further assist in any way.

Best,
Nick

Nicholas Warren (*he/him*) **| Staff Attorney**
American Civil Liberties Union of Florida
Direct: (786) 363-1769 | nwarren@aclufl.org | aclufl.org

<Miami-P4-court-ordered-map.csv>
<Miami-P4-court-ordered-map.kml>
<Miami-P4-court-ordered-map.zip>
<094 Order on Interim Remedy - GRACE v City of Miami.pdf>

APPENDIX F

August 2, 2023

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., NW
Atlanta, GA 30303

Re: Citation of Supplemental Authorities in *GRACE, Inc. v. City of Miami*, No. 23-12472

Mr. Clerk:

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Florida

336 E. College Ave., Ste. 203
Tallahassee, FL 32301
(786) 363-1769
nwarren@aclufl.org
www.aclufl.org

Nicholas Warren
Staff Attorney

Pursuant to FRAP 28(j), Plaintiffs-Appellees in the above-referenced case submit the following pertinent and significant supplemental authorities (also attached), which have come to their attention after filing their Response in Opposition to the City of Miami's Emergency Motion to Stay (App. Doc. 10).

These authorities explain that the Miami-Dade County Elections Department is preparing to implement *both* the district-court-ordered redistricting plan (P4), *and* the City Commission's plan adopted in June. The Elections Department also confirms they are "waiting for an order from the Appellate Court." They support Plaintiffs-Appellees' arguments at pp. 15–18 of their brief and contradict Defendant-Appellant's argument at pp. 8–9 and n.3 of their reply brief (App. Doc. 12).

1. Christina Vazquez (@CBoomerVazquez), TWITTER (Aug. 2, 2023, 8:08 AM), https://twitter.com/CBoomerVazquez/status/1686710652537044992

2. Christina Vazquez and Chris Gothner, *City, 'Frustrated' Plaintiffs Await New Ruling After Court Pauses New Miami Commission Map*, WPLG LOCAL 10 (updated Aug. 2, 2023, 8:14 AM) https://www.local10.com/news/local/2023/08/01/city-frustrated-plaintiffs-await-new-ruling-after-court-pauses-new-miami-commission-map/

3. Email from Assistant City Clerk to County Supervisor of Elections, *City of Miami - Redistricting Map (June 2023)*, Aug. 1, 2023, 3:25 PM

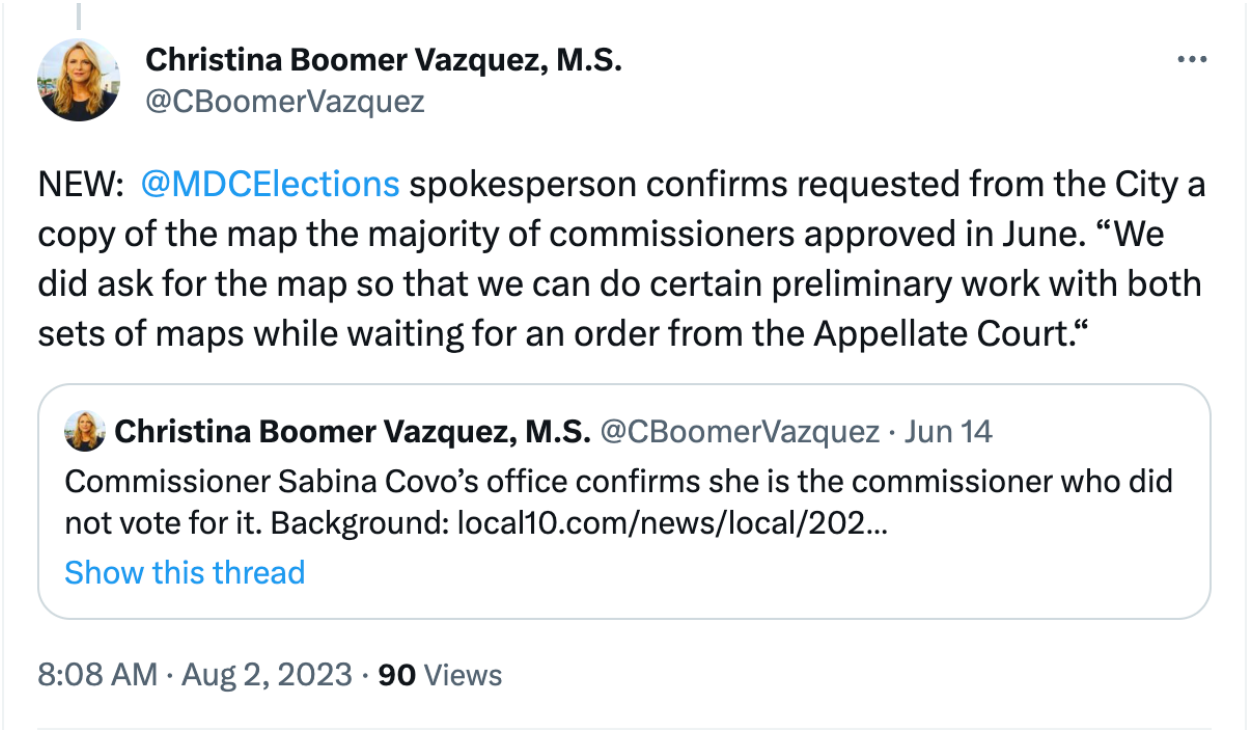
Sincerely,

Nicholas Warren

Counsel for Plaintiffs-Appellees

Exhibit 1

Christina Vazquez (@CBoomerVazquez), TWITTER
(Aug. 2, 2023, 8:08 AM),
https://twitter.com/CBoomerVazquez/status/1686710652537044992



Christina Boomer Vazquez, M.S.
@CBoomerVazquez

NEW: @MDCElections spokesperson confirms requested from the City a copy of the map the majority of commissioners approved in June. "We did ask for the map so that we can do certain preliminary work with both sets of maps while waiting for an order from the Appellate Court."

> **Christina Boomer Vazquez, M.S.** @CBoomerVazquez · Jun 14
> Commissioner Sabina Covo's office confirms she is the commissioner who did not vote for it. Background: local10.com/news/local/202...
> Show this thread

8:08 AM · Aug 2, 2023 · **90** Views

Exhibit 2

Christina Vazquez and Chris Gothner, *City, 'Frustrated' Plaintiffs Await New Ruling After Court Pauses New Miami Commission Map*,
WPLG Local 10 (updated Aug. 2, 2023, 8:14 AM),
https://www.local10.com/news/local/2023/08/01/city-frustrated-plaintiffs-await-new-ruling-after-court-pauses-new-miami-commission-map/

City, 'frustrated' plaintiffs await new ruling after court pauses new Miami commission map

City officials 'stalling' to keep old map, plaintiff says

Christina Vazquez, Reporter
Chris Gothner, Digital Journalist

Published: August 1, 2023 at 5:15 PM
Updated: August 2, 2023 at 8:14 AM

MIAMI – Miami's redistricting saga **took another turn** Monday after a court placed a temporary halt on **a new city commission district map** ordered in place by a federal judge the day prior.

After a months-long legal tussle, the new map was designed to fix commission districts Judge K. Michael Moore said were "**racially-gerrymandered**" and split up the city's neighborhoods.

He rejected both the city's original map and the commissioners' purported fix, which featured boundaries that largely mimicked the original map. He said the updated map did not make sufficient changes.

Moore said the new map, drawn by the plaintiffs in the case, "keeps traditional neighborhoods and communities of interest united," in contrast to the previous maps, which split up neighborhoods like Coconut Grove and Flagami.

But the city, after filing **an emergency motion**, was able to get the 11th Circuit Court of Appeals to issue a stay on the same day Moore ordered officials to send the map to Miami-Dade's elections department for use in November's races.

“The judge has decided they need more time to decide if they are going to put the brakes on what is happening here,” legal analyst David Weinstein said.

The plaintiffs, which include the NAACP and other groups, represented by the American Civil Liberties Union, filed their response Tuesday.

“Holding elections under unconstitutionally racially gerrymandered maps cause irreparable harm. Granting a stay now will cause that harm, not just to Plaintiffs, but to all Miamians,” they wrote. “They would continue to be forced to live in districts unconstitutionally based on racial “[c]lassifications … [that] ‘are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”

They added: “There is only one viable map for the November elections: the court-ordered remedy.”

Citing Local 10 News’ story on Monday, they pointed out in their order that while the ACLU delivered the maps to county elections officials on Monday, there’s no evidence the city complied with the ruling.

“Right now we are frustrated,” Nora Vinas the deputy executive director of Engage Miami, one of the plaintiffs, said. “We worked tirelessly to come up with this community-driven map and the city seems to be stalling.”

A spokesperson for the Miami-Dade Elections Department confirms they requested from the City a copy of the map the majority of commissioners approved in June.

The spokesperson explained, “We did ask for the map so that we can do certain preliminary work with both sets of maps while waiting for an order from the Appellate Court. The plaintiff had already provided their map on 07/30/2023.”

Miami’s city attorney praised Monday evening’s ruling.

“The City is pleased with the 11th Circuit Court of Appeals acting swiftly to review Judge Moore’s order,” City Attorney Victoria Mendez told Local 10 News in a statement. “The Stay works to place a pause on the transmittal of the new map to the County Election’s Department. The City awaits further direction from the 11th Circuit Court of Appeals.”

Court documents show the city is arguing that it is “not the City’s burden to prove that the New Map was constitutional. The court below impermissibly shifted that burden and did not afford the City the presumption of good faith.”

Weinstein said he would expect to see a ruling by the federal appeals court as soon as Wednesday afternoon.

County elections officials tell Local 10 News they’re hoping for a decision by Wednesday so they can move forward with preparing for November’s general election.

Exhibit 3

Email from Assistant City Clerk to County Supervisor of Elections, *City of Miami - Redistricting Map (June 2023)*, Aug. 1, 2023, 3:25 PM

Merken, Christopher

From: Ewan, Nicole <newan@miamigov.com>
Sent: Tuesday, August 1, 2023 3:25 PM
To: Christina.White@miamidade.gov
Cc: Vanessa.Innocent@miamidade.gov; Roberto.Rodriguez@miamidade.gov; gbk@miamidade.gov; Michael.Valdes@miamidade.gov; Gerald.Sanchez@miamidade.gov; Mendez, Victoria; Greco, John A.; McNulty, Kerri L.; Wysong, George K.; Jones, Kevin R.; Gomez, Marta; Santos, Christina; Hannon, Todd; Forges, Sandra; ben.kuehne@kuehnelaw.com; CMcNamara@aclufl.org; dtilley@aclufl.org; Merken, Christopher; andy.bardos@gray-robinson.com; Steiner, Neil; Christopher.Johnson@gray-robinson.com; George.Levesque@gray-robinson.com; jason.unger@gray-robinson.com; Marlene.Quintana@gray-robinson.com
Subject: City of Miami - Redistricting Map (June 2023)
Attachments: City of Miami map; GRACE (11th Cir) - DE 8 Order Administratively Staying District Court's Order.pdf; Certified Copy - Resolution R-23-0271 - Redistricting.pdf; Commission_Districts_Final_Adopted_June142023.zip

Importance: High

[EXTERNAL EMAIL]

Christina White, Supervisor of Elections,

I am the Assistant City Clerk of the City of Miami, and I am acting on behalf of the City Clerk, Todd Hannon. Pursuant to the City's discussions with the Miami-Dade County Department of Elections and in response to an email request from Vanessa Innocent at the County Department of Elections, attached, please find the current City of Miami district map that was approved by the City Commission on June 14, 2023, and rendered by the City on June 29, 2023 (see attached, City of Miami Resolution 23-271). In light of the August 1, 2023 deadline for submitting voting maps for the November 7, 2023 election, the City requests that you implement this approved and rendered map. Your office had previously mentioned that you required a finalized map for implementation by today, August 1, 2023.

The previous City of Miami district map on file with the Miami-Dade County Department of Elections is not valid. That map had been enacted and rendered in City of Miami Resolution 22-131. That map was enjoined by the U.S. District Court for the Southern District of Florida and replaced by the City with the map from the referenced City of Miami Resolution 23-271 that is attached.

The district map is the subject of litigation in *Grace, Inc., et al. v. City of Miami* (S.D. Fla., Case No. 1:22-cv-24066-KMM). The District Judge entered an order on Sunday, July 30, 2023, invalidating the attached map and instead adopted an alternative map. The City appealed that order and requested a stay from the Eleventh Circuit. (*Grace, Inc., et al. v. City of Miami*, 11th Cir., Case No. 23-12472). Last night (July 31, 2023), the Eleventh Circuit issued an order staying the district court's order until the Eleventh Circuit fully considers the City's motion to stay (see attached July 31, 2023 Order (DE8)). The Eleventh Circuit ordered the Plaintiffs in the litigation to respond to the Motion to Stay by 9:00 a.m. on August 2, 2023. Accordingly, the district court order is stayed. Therefore, in order to comply with the Elections Department's August 1, 2023 deadline, the City submits the map rendered in June 2023 by the City Commission as the currently applicable map.

The old map on file with the County is no longer valid and cannot be used for the November election. The City Clerk will bring to your attention any further developments.

Please do not hesitate to contact our office with any questions or concerns concerning this matter, or if you need anything further from us to implement the attached map.

Thank you,

Nicole Ewan, MPA, CMC
Assistant City Clerk
City of Miami
City Clerk's Office
3500 Pan American Drive
Miami, FL 33133
Ph: (305) 250-5347
Fax: (305) 858-1610
Website: www.miamigov.com/cityclerk
Boards & Committees: www.miamigov.com/boards

APPENDIX G

No. 23-12472

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GRACE, INC., ET AL.,

Plaintiffs-Appellees,

v.

CITY OF MIAMI,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:22-cv-24066 (Moore, J.)

PLAINTIFFS-APPELLEES' RESPONSE TO CITY OF MIAMI'S MOTION TO STRIKE NOTICE OF SUPPLEMENTAL AUTHORITY

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Attorneys for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

Under FRAP 26.1 and this Circuit Rule 26.1, Plaintiffs-Appellees certify that the following have an interest in the outcome of this appeal:

1. Abott, Carolyn, *Testifying Expert for Plaintiffs-Appellees*
2. ACLU Foundation of Florida, Inc., *Counsel for Plaintiffs-Appellees*
3. Alford, John, *Testifying Expert for Defendant-Appellant*
4. Bardos, Andy, *Counsel for Defendant-Appellant*
5. Carollo, Joe, *Defendant-Appellant*
6. City of Miami, *Defendant-Appellant*
7. Cody, Steven, *Defendant-Appellant's expert*
8. Contreras, Alexandra, *Plaintiff-Appellee*
9. Cooper, Clarice, *Plaintiff-Appellee*
10. Covo, Sabina, *Defendant-Appellant*
11. De Grandy, Miguel, *Testifying Expert for Defendant-Appellant*
12. Dechert LLP, *Counsel for Plaintiffs-Appellees*
13. Díaz de la Portilla, Alex, *Defendant-Appellant*
14. Engage Miami, Inc., *Plaintiff-Appellee*
15. GrayRobinson, P.A., *Counsel for Defendant-Appellant*
16. Grove Rights and Community Equity, Inc. (GRACE), *Plaintiff-Appellee*
17. Greco, John A., *Counsel for Defendant-Appellant*

18. Johnson, Christopher N., *Counsel for Defendant-Appellant*

19. Johnson, Jared, *Plaintiff-Appellee*

20. Jones, Kevin R., *Counsel for Defendant-Appellant*

21. King, Christine, *Defendant-Appellant*

22. Kirsch, Jocelyn, *Counsel for Plaintiffs-Appellees*

23. Levesque, George T., *Counsel for Defendant-Appellant*

24. Louis, Lauren F., *U.S. Magistrate Judge, Southern District of Florida*

25. McCartan, Cory, *Testifying Expert for Plaintiffs-Appellees*

26. McNamara, Caroline A., *Counsel for Plaintiffs-Appellees*

27. McNulty, Kerri L., *Counsel for Defendant-Appellant*

28. Méndez, Victoria, *Counsel for Defendant-Appellant*

29. Merken, Christopher J., *Counsel for Plaintiffs-Appellees*

30. Miami-Dade Branch of the NAACP, *Plaintiff-Appellee*

31. Moore, K. Michael, *U.S. District Judge, Southern District of Florida*

32. Moy, Bryant J., *Testifying Expert for Plaintiffs-Appellees*

33. NAACP Florida State Conference, *State Affiliate of Plaintiffs-Appellees*

34. Quintana, Marlene, *Counsel for Defendant-Appellant*

35. Reyes, Manolo, *Defendant-Appellant*

36. NAACP, *National Affiliate of Plaintiffs-Appellees*

37. South Dade Branch of the NAACP, *Plaintiff-Appellee*

38. Steiner, Neil A., *Counsel for Plaintiffs-Appellees*

39. Suarez, Francis X., *Defendant-Appellant*

40. Tilley, Daniel B., *Counsel for Plaintiffs-Appellees*

41. Unger, Jason L., *Counsel for Defendant-Appellant*

42. Valdes, Yanelis, *Plaintiff-Appellee*

43. Warren, Nicholas L.V., *Counsel for Plaintiffs-Appellees*

44. Wysong, George, *Counsel for Defendant-Appellant*

CORPORATE DISCLOSURE STATEMENT

Under FRAP 26.1, Plaintiffs-Appellees certify that GRACE, Inc.; Engage Miami, Inc.; South Dade Branch of the NAACP; and Miami-Dade Branch of the NAACP each has no parent corporation, and no publicly held corporation owns 10% or more of any of those entities' stock. The remaining Plaintiffs-Appellees are individual persons.

Counsel for Plaintiffs-Appellees further certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Dated: August 4, 2023

/s/ Daniel B. Tilley

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RESPONSE

Plaintiffs-Appellees respond to the City's motion to strike (App. Doc. 19) Plaintiffs' Rule 28(j) letter (App. Doc. 13).

The City claims that a 28(j) letter always distinguishes between "authorities" and "evidence." App. Doc. at 6. The City acknowledges a general rule well enough but overstates its applicability. For example, one court relied on *factual* assertions in a 28(j) letter to find that a case was not moot. *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 7 (1st Cir. 2021) ("Critically for this case, after briefing but before oral argument, Governor Baker told us by letter (submitted under Federal Rule of Appellate Procedure 28(j)), and publicly announced, that he had terminated the COVID-19 state of emergency by issuing 'COVID-19 Order No. 69' — which ultimately ended his authority 'to impose any COVID-19 related restrictions' under the earlier emergency declaration and rescinded his COVID-19 emergency orders issued pursuant to the Civil Defense Act too."). Another relied on a *factual* assertion that established diversity jurisdiction. *TCF Nat. Bank v. Mkt. Intel., Inc.*, 812 F.3d 701, 705 (8th Cir. 2016) ("This court has diversity jurisdiction. Appellee asserts in a Federal Rules of Appellate Procedure 28(j) letter that Defendant LSI Appraisal, LLC's sole constituent member at the time of removal was LPS Property Tax Solutions, Inc., a Delaware corporation with the principal place of business located in Florida.").

The throughline in these cases is not that they go to jurisdiction but that they concern matters that the parties cannot dispute. *See, e.g.*, *Redfern v. Napolitano*, 727 F.3d 77, 83 (1st Cir. 2013) (court took judicial notice of factual assertions in 28(j) letter because, while opposing counsel objected to introduction of that evidence through a 28(j) letter, they were "willing to accept as true" certain factual assertions); *United States v. Townsend*, 886 F.3d 441, 444 & n.2 (4th Cir. 2018) (following government's filing of 28(j) letter, stating, "We may take judicial notice of facts outside the record where the fact may not be reasonably disputed and is relevant and critical to the matter on appeal.") (quotations omitted).

The material included in Plaintiffs' 28(j) letter contained statements of government officials that bear directly and importantly on the matter before the Court and thus are properly before the Court. Particularly given that there are other means that parties may introduce newly arising factual assertions—*e.g.*, Rule 10(e) (Correction of Modification of the Record), and Rule 27(a)(2)(b) (Accompanying Document to a motion)—it elevates form over substance to contend that this important newly arising evidence cannot be considered—and indeed the City's argument is wrong on the "form" as well. Factual assertions of this kind can be properly considered in a 28(j) letter, as numerous courts have found.

Like the Streisand Effect,[1] the City's assiduousness in seeking to shield the

[1] https://en.wikipedia.org/wiki/Streisand_effect.

Court from its eyebrow-raising acts hurts, rather than helps, its cause. The City has made representations about the district court that the district court itself called "patently false." Doc. 101 at 10. The district court elsewhere stated that the City's explanation of the district court's analysis was "at best inaccurate, and at worst disingenuous." *Id.* at 7. And the City's officers continue to question the very legitimacy of the judiciary itself. *See* Joshua Ceballos, WLRN, https://www.wlrn.org/government-politics/2023-08-03/miami-joe-carollo-federal-judge-tv (Aug. 3, 2023) (Commissioner Carollo stating, "The most ironic thing in all of this, is that this judge, who lives in Coral Gables . . . It's incredible that someone from Coral Gables, and outsiders, are gonna make decisions for the residents of Miami.").

This approach has complicated the City's assertions to this Court as well. The City asserts, without any record evidence in support, that it "had over a month to work with its Geographic Information Systems team to put the information together for the County. With the Mandated Map, the County would have to start from scratch." App. Doc. 12 (City's Reply in support of Emergency Motion to Stay Order Rejecting Districting Map) at 9 n.3. Plaintiffs submitted information from the County demonstrating that the City has not been working with the County for months to implement its new map, but rather sent the plan files to the County *three days ago, after Plaintiffs provided the County with the district court-ordered plan*.

App. Doc. 13 (Plaintiffs' first 28(j) letter) at 7; Ex. 1 (Aug. 1 email from County Elections Department requesting the City "provide us with a copy of the map that was approved by the City of Miami in June").

The City also asserts that "the plan mandated by the Court is just a picture of a map without underlying data at a block level as would be necessary for the Elections Department to act." App. Doc. 12 (City's Reply) at 7 n.1; *contra* Doc. 82 (Plaintiffs' Notice of Filing Exhibits in Support of Plaintiffs Objections to the City Proposed Remedial Plan) at 3 (link to publicly accessible website where court-mandated plan P4 is available for download in KML GIS file format). While the City claims the Elections Department lacks the needed files, the information Plaintiffs submit show the Elections Department is already preparing to implement the court-ordered map *as we speak*. App. Doc. 13 (Plaintiffs' first 28(j) letter) at 2 (Miami-Dade Elections Department spokesperson confirming, "we can do certain preliminary work with both sets of maps while waiting for an order from the Appellate Court").[2]

This Court should deny the City's motion to strike.

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[2] *See also* Joey Flechas, *Decision on Miami Voting Map Rests with Federal Appeals Court. Here Are the Arguments*, MIA. HERALD (updated Aug. 2, 2023, 12:13 PM), https://www.miamiherald.com/article277869183.html ("'The department is waiting for a decision from the appellate court, which we hope to receive by August 2nd, so that we can proceed with preparing for the city's November 7th election, including making any necessary changes to precinct boundaries and polling locations in time for the election,' said Vanessa Innocent, a spokesperson for the department.").

Respectfully submitted this 4th day of August, 2023,

/s/ Daniel B. Tilley

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* *Not admitted in the Eleventh Circuit*

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This response complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 978 words, excluding the parts that can be excluded. This response also complies with Federal Rule of Civil Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word, 14-point Times New Roman font.

Dated: August 4, 2023

/s/ Daniel B. Tilley
Daniel B. Tilley

From: **Innocent, Vanessa (Elections)** Vanessa.Innocent@miamidade.gov
Subject: City of Miami map
Date: August 1, 2023 at 12:28 PM
To: Ewan, Nicole newan@miamigov.com
Cc: Rodriguez, Roberto (Elections) Roberto.Rodriguez@miamidade.gov

VI

Good afternoon Nicole,

Could you please provide us with a copy of the map that was approved by the City of Miami in June.

Thank you for your attention to this matter.

Sincerely,

Vanessa Innocent
Elections Department
(305) 499-8342
www.miamidade.gov
"Delivering Excellence Every Day"

APPENDIX H

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12472

GRACE, INC.,
ENGAGE MIAMI, INC.,
SOUTH DADE BRANCH OF THE NAACP,
MIAMI-DADE BRANCH OF THE NAACP,
CLARICE COOPER, et al.,

Plaintiffs-Appellees,

versus

CITY OF MIAMI,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

D.C. Docket No. 1:22-cv-24066-KMM

Before WILSON, BRANCH, and LUCK, Circuit Judges.

BY THE COURT:

A little more than three months before City of Miami voters go to the polls to elect commissioners, the district court adopted the plaintiffs' remedial plan to redraw the borders for the City's five single-member districts and ordered the City to implement the remedial plan in lieu of the City's redistricting legislation. Yet the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *see also League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) ("[F]ederal district courts ordinarily should not enjoin state election laws in the period close to an election." (quotation omitted)); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) ("The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (quotation omitted)). This is "called the *Purcell* principle," *League of Women Voters*, 32 F.4th at 1370, which comes from the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).[1]

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[1] In *Purcell*, the Supreme Court considered "an application to enjoin operation of voter identification procedures just weeks before an election" in Arizona and held that the court of appeals "was required to weigh, in addition to the

"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.*

"[E]ven seemingly innocuous late-in-the-day judicial alterations to [local] election laws can interfere with administration of an

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harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." 549 U.S. at 4.

election and cause unanticipated consequences." *League of Women Voters*, 32 F.4th at 1371 (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).

For these reasons, and others, "when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this [c]ourt, as appropriate, should correct that error." *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also League of Women Voters*, 32 F.4th at 1371 ("[I]f a district court violates that principle, the appellate court should stay the injunction, often (as it could not do under the traditional test) while expressing no opinion on the merits." (cleaned up)). "[I]t would be preferable if federal district courts did not contravene the *Purcell* principle by rewriting [local] election laws close to an election. But when they

do, appellate courts must step in." *Democratic Nat'l Comm.*, 141 S. Ct. at 32 (Kavanaugh, J., concurring). So we do.

Still, the plaintiffs may "overcome" the *Purcell* principle, "even with respect to an injunction issued close to an election," if they "establish[] at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff[s]; (ii) the plaintiff[s] would suffer irreparable harm absent the injunction; (iii) the plaintiff[s] have not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *accord League of Women Voters*, 32 F.4th at 1372–73 (applying Justice Kavanaugh's framework from *Merrill*). Here, the plaintiffs have not made that showing.

First, it is not clearcut that the remedial plan the district court adopted remediates the alleged racial sorting in the City's redistricting legislation. Comparing the maps, the district court's remedial plan looks a lot like the City's March 2022 redistricting plan the district court enjoined. And, comparing the population data, the racial makeup of the district court's remedial plan is close to the racial makeup of the City's June 2023 redistricting plan.

Second, as to undue delay, the City adopted its redistricting legislation in March 2022. The plaintiffs waited nine months—December 2022—to file their lawsuit. And then they waited two more months—February 2023—to move for a preliminary injunction. In their response to the stay motion, the plaintiffs do not explain the eleven month delay.

Finally, the plaintiffs argue that, under *Purcell*, the City did not submit any evidence to show the cost, confusion, or hardship of the district court's remedial plan. But the plaintiffs are confused about their burden under *Purcell*. Under the *Purcell* principle, "lower federal courts should ordinarily not alter the election rules on the eve of an election." *New Ga. Project*, 976 F.3d at 1284 (quotation omitted). But *Purcell* is not "absolute." *League of Women Voters*, 32 F.4th at 1372. Instead, it "simply heightens the showing necessary for [the] plaintiff[s] to overcome the [s]tate's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *accord League of Women Voters*, 32 F.4th at 1372 ("[W]e agree with Justice Kavanaugh that *Purcell* only (but significantly) heightens the standard that a plaintiff must meet to obtain injunctive relief that will upset a state's interest in running its elections without judicial interference." (footnote and quotation omitted)).

To "overcome" the *Purcell* principle "with respect to an injunction issued close to an election," the "plaintiff[s] [must] establish[] . . . the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Because of the City's "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws," the plaintiffs must make the showing that the remedial plan is feasible without significant costs, confusion, or hardship.

They have not made that showing. At best, the plaintiffs argue that there will be no chaos in election administration because the elections' supervisor said she could implement the new map by August 1, 2023. But the absence of chaos is hardly acceptable under *Purcell*. This says nothing about the significant costs, confusion, and hardships on candidates, voters, and the public. Even if the elections' supervisor can pull off the election (although the plaintiffs never mention the significant cost of pulling it off), the district court's remedial plan still imposes significant costs on candidates, voters, and the public. The district court's remedial plan, for example, splits some existing precincts between districts that are up for election (not all the districts are up for election in November) and between one district that is up for election and one that is not. The result, therefore, of implementing the district court's remedial plan could very likely be voter confusion: voters who were under the impression that they would be casting their ballots in November for seats in their district will no longer be doing so, and vice versa. Because "the plaintiffs have not established that the changes are feasible without significant cost, confusion, or hardship," they "cannot overcome even a more relaxed version of the *Purcell* principle." *Id.* at 881–82.

The plaintiffs push back that *Purcell* is inapplicable for two reasons. First, they contend that the City cannot rely on the *Purcell* principle "in light of [its] previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief." *See Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022). But the City never made that representation

to the district court. Here are the two parts of the record that the plaintiffs cite in support. In its response to the plaintiffs' motion for a preliminary injunction, the City wrote:

> Plaintiffs' Motion seeking an injunction is either a year too late or 25 years too late. The redistricting occurred in March of 2022. This case was filed nine months later, in December. Plaintiffs then waited two more months before filing the Motion. A special election has already occurred last month, and another election is coming in November. Plaintiff[s] admit that the new districts would have to be set by August 1. Even if there is a ruling on the Motion, new districts would have to be drawn, face inevitable challenges by Plaintiffs, and be ruled on by this Court, and this does not even factor in any appellate remedies. Plaintiffs make no excuse and give no explanation for their delay.

(citations omitted). This is not a representation that the district court's schedule was sufficient to enable effectual relief. On the contrary, the City argued that, because of the plaintiffs' delay in bringing their complaint to court, there was not enough time to get full review of any remedial plan.

The other part of the record is more of the same. At the hearing on the preliminary injunction motion, the City told the magistrate judge:

> But the question then becomes, without any alternative math, and given that we are down to the wire, and that by August 1st, according to the Division of

> Elections, according to the e-mail they put in, there needs to be a final, non-appealable map that's gonna happen by November, and we would be in a situation—and they did wait; they waited nearly a year for the preliminary injunction to bring it. You would be in a situation where we would essentially be drawing the same maps and they would be rejecting them conceivably and then coming back here to have rulings upon them.

The City was clear that the August 1, 2023 deadline worked only if the district court's remedial plan was "a final, non-appealable map." But the district court didn't adopt a "final, non-appealable map." It adopted a temporary remedial plan while it considered the merits of the plaintiffs' claim that the City's redistricting legislation violated the Fourteenth Amendment. And, now, the temporary remedial plan is on appeal. Again, the City did not represent that the district court's schedule was sufficient to enable effectual review in time for the November election.

Even the district court acknowledged that the City raised the *Purcell* problem throughout the litigation. As the district court explained in its order denying the City's stay motion:

> In the Motion, Defendant again raises the argument that *Purcell* applies to the instant Action. In fact, Defendant copies its argument regarding how *Purcell* should alter the standard by which the Court considers the instant Motion verbatim from its prior motion to stay. The Court has already addressed whether *Purcell* applies, not just once, but twice. It will not

> evaluate the argument a third time. Therefore, finding *Purcell* inapplicable to the instant Action, the Court reviews the Motion under the traditional framework.

(footnotes and citations omitted). The district court understood that the City did not waive its *Purcell* argument.

Second, the plaintiffs contend that the *Purcell* principle doesn't apply because the district court's order adopting the remedial plan is the status quo and granting a stay (as the City asks us to do) would be tinkering with the election laws in violation of *Purcell*. But "[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." *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) ("Applicants retort that the *Purcell* principle precludes an appellate court . . . from overturning a district court's injunction of a state election rule in the period close to an election. That argument defies common sense and would turn *Purcell* on its head. Correcting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule. That obviously is not the law.").

The dissenting opinion gives its own reasons for why the *Purcell* principle does not apply. First, it says, the City isn't entitled

to a stay because it delayed seeking review of the district court's preliminary injunction. But the dissenting opinion misunderstands what the City is appealing. The City isn't seeking review of the preliminary injunction. The City is seeking review of the order, issued months later, adopting the plaintiffs' remedial plan. The remedial plan didn't exist before July 31, 2023. The district court adopted one that day. And, that same day, the City appealed and sought a stay pending appeal. There was no remedial plan for the City to appeal before July 31; the preliminary injunction didn't impose one. The City was the opposite of dilatory.

Second, the dissenting opinion contends that applying *Purcell* is perverse because it incentivizes the City to submit a constitutionally problematic map close to election time. But there's nothing perverse about what the City did here. The City approved its redistricting legislation in March 2022. The plaintiffs waited eleven months to seek an injunction. We're rubbing up against the election because of the plaintiffs' delay. The City, in contrast, approved its redistricting twenty months before voters are set to go to the polls in November 2023.

Third, the dissenting opinion relies on an unpublished, nonprecedential order in *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-14260, 2023 WL 119425 (11th Cir. Jan. 6, 2023). Of course, that order is not binding on anyone, including us. But, to the extent it was, the *Jacksonville Branch* order didn't discuss or analyze the *Purcell* principle. Not one word about the application of

Purcell to these facts. It says nothing about the issues we address in this order.

* * * *

"[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). As in *Merrill*, this is one of those times. While we "express[] no opinion on the merits" of the plaintiffs' claims, *League of Women Voters*, 32 F.4th at 1371 (quotation omitted), the "*Purcell* principle requires that we stay" the district court's order adopting the remedial plan and ordering the City to implement it. *See Merrill*, 142 S. Ct. at 882 (Kavanaugh, J., concurring). We therefore grant the City's emergency motion to stay.

WILSON, Circuit Judge, Dissenting:

Today, the majority allows the City of Miami's November 2023 municipal elections to proceed under a map that the district court found "perpetuates the impact of the Enjoined Plan's unconstitutional racial gerrymandering." The majority faults the Plaintiffs for dilatory litigation and applies the *Purcell* principle[1] to stay the implementation of the district court's interim plan. Because any urgency in this appeal is attributable to the City's delay, I would not reward them with a stay. Accordingly, I respectfully dissent.

As the majority describes, in February of this year, the Plaintiffs sued the City of Miami to enjoin newly drawn district maps. In May, the district court preliminarily enjoined the City's use of those maps (the Enjoined Plan) and, in consultation with the parties, set a schedule for the creation of remedial maps. The City's officials stated that they needed new maps by no later than August 1, 2023. The City appealed the preliminary injunction and sought a stay pending appeal from the district court, which was denied. The City could have then petitioned this court for a stay, but it did not. Ultimately, it voluntarily dismissed that appeal.

Around the same time, the City adopted a new map (the Remedial Plan) and submitted it to the district court. Because of the preliminary injunction, the district court had to review the Remedial Plan before it could be used and had to ensure that it corrected

[1] *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam).

the constitutional defects found in the Enjoined Plan. The district court compared the Enjoined Plan and the Remedial Plan, analyzing shifts in populations and geographic boundaries. Ultimately, as the factfinder, the district court concluded that there was both direct and circumstantial evidence that the Commissioners intended for the Remedial Plan to preserve the prior racial breakdown of the Enjoined Plan. Thus, the district court found that rather than remedying unconstitutional gerrymandering, the Remedial Plan perpetuated it. Because neither the Enjoined Plan nor the Remedial Plan passed constitutional muster, the district court ordered that an interim plan submitted by the Plaintiffs be used. The district court chose this plan because it respected the City's legitimate, non-race-based policy goals; complied with traditional redistricting criteria; and adhered to state and federal law.

In asking us to invoke *Purcell* to stay the district court's interim plan, the City is in effect asking us to overturn not just the district court's order denying approval of the Remedial Plan, but because the district court found the Remedial and Enjoined Plans to be substantially similar in constitutional inadequacies, the City essentially requests that we reverse the merits of the preliminary injunction entered in May of this year. Yet, the time for challenging that order has long since passed. The City was fully entitled to appeal that order—in fact, it did appeal initially, but then opted to voluntarily dismiss its case.

Thus, the emergency, time-constrained position in which we find ourselves is not the result of the "undue delay," Maj. Op.

at 6, of the Plaintiffs in bringing this suit, but rather the City's choice to not pursue a stay at the preliminary injunction stage. The City seeks the extraordinary equitable remedy of a stay pending appeal. But, "a party's inequitable conduct can make equitable relief inappropriate." *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022). Such is the case here. *See Wreal, LLC v. Amazon.com Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months . . . militates against a finding of irreparable harm."); *see also Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021) ("The self-inflicted nature of the [movant's] asserted harm "severely undermines" its claim for equitable relief." (cleaned up)). Just as a stay applicant may not delay, and self-inflict the imminent harm it seeks relief from, in my view the City may not delay in seeking a stay to justify invocation of the *Purcell* principle. Because of the City's dilatory actions in this litigation, I would not grant them a stay.

Before I conclude, I would like to make two further points. First, the majority focuses on the fact that *Purcell* does not prevent this court from correcting the district court's *erroneous* injunction. But again, if the City believed the preliminary injunction was erroneous, it abandoned that position by dismissing its prior appeal. What the City now asks this court to do is stop an *interim* and (what the district court concluded is a) constitutionally sound map from being used in favor of the Remedial Plan that was found to perpetuate the same racial gerrymandering that plagued the Enjoined Plan. Allowing the *Purcell* principle to be invoked in situations like this creates a perverse incentive. Loose application of the *Purcell*

principle incentives litigants like the City to submit constitutionally problematic maps to the district court close in time to the election, with the knowledge that, if the district court disapproves the map the City will receive a stay from this court. Respectfully, I would not incentive such behavior.

Second, we have addressed a similar situation in a recent case from the City of Jacksonville. *Branch of NACCP v. City of Jacksonville*, No. 22-14260, 2023 WL 119425 (11th Cir. Jan. 6, 2023). There, the City of Jacksonville asked us to allow the City's approved remedial plan to go into effect despite the district court finding that the remedial plan perpetuated the constitutional violations of the original enjoined plan. *Id.* at *2. We declined to do so because this request in effect required us to rule on the constitutionality of the remedial plan. *Id.* at *3. "[A]nd an order on a motion for stay pending appeal is not a resolution of the appeal itself." *Id.* Here, the City is asking us to do the exact same thing. Staying the district court's interim plan in effect casts our approval on the constitutionality of the Remedial Plan.

Finally, because I would find that the *Purcell* principle does not apply, I would consider the typical stay factors[2] and find that the City has not met its burden.

[2] In determining whether to grant a stay, the court considers the following: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other

I respectfully dissent.

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parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation marks omitted).