UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACKSONVILLE BRANCH OF THE NAACP, *et al.,*

Plaintiffs,

Case No.: 3:22-cv-493-MMH-LLL

v.

CITY OF JACKSONVILLE, *et al.*,

Defendants.
_________________________________/

DEFENDANTS' *TIME-SENSITIVE* MOTION FOR STAY AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

The City of Jacksonville and Supervisor of Elections Mike Hogan ask for a stay pending appeal of this Court's October 12, 2022 order enjoining the City from conducting any elections using the districts enacted in Ordinance 2022-01-E and ordering the City to file an interim remedial plan. This is for three reasons. First, the Supreme Court's impending merits determination in *Merrill v. Milligan*, Nos. 21-1086 and 21-1087, has a strong likelihood of affecting the ultimate outcome of this case. Just as the Supreme Court recently stayed an order concerning Louisiana's congressional redistricting plan for this reason, and held the underlying case in abeyance, Defendants ask this Court to do the same. *See Ardoin v. Robinson*, 142 S. Ct. 2892 (June 28, 2022). Second, Plaintiffs have waited too long to challenge a

policy position they believe to be unconstitutional but that, in their telling, was adopted in the 1991 council map and then carried forward in the 2001 and 2011 council maps. Such a decades-long delay negated irreparable harm in *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam). The same is true here. Third, the *Purcell* principle favors a stay; the process to adopt a new map takes at least three months, meaning that the district lines the City is now working on cannot be in place by December 16, 2022.

I. TIME-SENSITIVITY

All parties agree that, to avoid electoral disruption, a new map needs to be in place by December 16, 2022. That is only fifty-eight days from now. And in the October 12 order, this Court required the City to enact and file an interim remedial plan by November 8, 2022. That is only twenty days from now. Defendants do not believe that a new map can be produced in those timeframes. As such, Defendants filed this motion to stay, and should this Court deny the motion, Defendants need time to brief the matter before the Eleventh Circuit.

Defendants therefore ask this Court to order Plaintiffs to file a response to this motion by October 26, 2022, and for this Court, ideally, to resolve this motion by **October 28, 2022**. *See* M.D. Fla. Local R. 3.01(e) (a time-sensitive motion must state "the day by which a ruling is requested").

II. BACKGROUND

In 2021, the City began updating its 2011 map of city council districts, using a least-changes approach to account for changes in population. ECF No. 34-2; 34-3 at 5-9, 11-15; ECF No. 34-4 at 2-3; ECF No. 34-10 at 2, 65; ECF No. 40-13 at ¶¶12-17; ECF No. 40-14 at ¶¶4, 8, 11-17; ECF No. 40-20 at ¶¶6-9; ECF No. 40-28 at ¶¶7-11; ECF No. 40-30 at ¶¶7-11. The process concluded in 2022 when the Council passed Ordinance 2022-01-E. *See* ECF No. 34-2.

Plaintiffs challenged the map as a racial gerrymander that violates the Fourteenth Amendment's Equal Protection Clause. ECF No. 1. They waited to seek an injunction until July 22, 2022, even though Plaintiffs and Defendants agreed that any remedial maps would need to be in place by December 16, 2022 to ensure an orderly administration of the March 2023 election. Plaintiffs claimed that the Enacted Plan continued the 1991, 2001, and 2011 plans' packing of Black voters into four districts. ECF No. 1 at 17, 19; ECF No. 36 at 4–5. Plaintiffs asked the Court to enjoin the map and require Defendants to draw a new map within twenty-one days of an order. ECF No. 39 at 16.

After a September 16, 2022 hearing, the district court issued its order granting Plaintiffs' motion for preliminary injunction. ECF No. 53. It is now mid-October and the deadline for a Council-approved map is fewer than two months away. The City filed a notice of appeal from the order on October 18, 2022. ECF No. 54.

III. LEGAL STANDARDS

Federal Rule of Civil Procedure 62(c) allows this Court to enter a stay pending the appeal. The traditional standard for a stay includes four factors: (1) likelihood of stay applicant's success on the merits; (2) irreparable harm to the stay applicant without a stay; (3) harm to other parties interested in the proceeding; and (4) the public interest. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State,* 32 F.4th 1363, 1370 (11th Cir. 2022).[1] The first two factors are "the most critical." *Nken v. Holder*, 556 U.S. 418, 433 (2009). The first factor—likelihood of success on the merits—is met "upon a lesser showing of a substantial case on the merits when the balance of the equities [identified in the other factors] weighs heavily in favor of granting the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (cleaned up). *Purcell* modifies this test in election cases where changes before an election might cause voter confusion or undermine voter confidence. *LOWV*, 32 F.4th at 1370 (citing *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral)). Both the traditional test and the *Purcell* principle favor a stay.

[1] Importantly, these are factors to be considered as opposed to elements that must be satisfied. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) ("Since the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules.").

IV. ARGUMENT

A. The traditional factors favor a stay: prudence dictates waiting for a decision in *Merrill*.

There is a substantially similar case on the merits pending at a higher court. The Supreme Court currently has before it Alabama's consolidated redistricting cases in *Merrill*. A decision in those cases will decide what Section 2 of the Voting Rights Act requires in redistricting and, necessarily, what the Equal Protection Clause prohibits; those cases will tell us when, if ever, race can be considered, and when racial predominance runs afoul of the Constitution. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurral); *Merrill v. Milligan*, 142 S. Ct. 1358 (Mar. 21, 2022) (amending the question presented to "[w]hether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violate[s] section 2 of the Voting Rights Act"); *Caster v. Merrill*, 2022 U.S. Dist. LEXIS 16996, at *20 (N.D. Ala. Jan. 24, 2022) (amending complaint to add Fourteenth Amendment claims); Transcript of Oral Argument at 53–62, *Merrill v. Milligan* (Nos. 21-1086 and 21-1087).

In fact, during oral arguments earlier this month, there was a colloquy concerning core retention of legislative districts. *E.g.*, Transcript of Oral Argument at 47–51, *Merrill v. Milligan* (Nos. 21-1086 and 21-1087). That has a direct impact on this case. And it was because of *Merrill* that the Supreme Court recently stayed—and held in abeyance—the decision in *Ardoin*. 142 S. Ct. at 2892 ("The case is held

in abeyance pending this Court's decision in *Merrill, AL Sec. of State, et al. v. Milligan, Evan, et al.* (No. 21-1086 and No. 21-1087)"); *see also Nairne v. Ardoin*, 2022 U.S. Dist. LEXIS 155706, at *7 (M.D. La. Aug. 30, 2022) (noting there can be no "serious debate that the Supreme Court has expressed that cases applying Section 2 are better held until *Merrill* is decided.").

That *Ardoin* concerned congressional maps is irrelevant to the constitutional analysis in this and other cases. The central issue in *Ardoin*, in *Merrill*, and this case concerns the use of race when drawing districts. In circumstances such as these, awaiting "a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case" is "at least a good [reason], if not an excellent one" for staying proceedings. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009).

B. The traditional factors favor a stay: the equities tilt in favor of a stay because the core complaint is decades in the making.

In addition, "[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, Ltd. Liab. Co. v. Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016). Here, Plaintiffs' alleged harms stem from configurations that are decades old.

Plaintiffs say that racial packing in the challenged districts began in 1991 when the City increased the black share of the population in districts 7, 8, 9, and 10 to 63%. ECF No. 36 at 4–5. According to Plaintiffs, the City did the same in 2001,

2011, and again in 2021. *Id.* at 5–8. This decades-old harm lies at the heart of Plaintiffs' claim. They say that the City "chose to continue" a "pattern" in the same four districts over three other redistricting cycles, *id*. at 6–7, through maps that "maintained existing Black concentration of those districts." ECF No. 1 at 17 ¶¶ 84–85. Indeed, the complaint alleges that "racial targets—maintaining the Black percentage of the Packed Districts—were central considerations informing the Enacted Plan." *Id*. at 19 ¶ 95.

But *none* of the various Plaintiffs challenged the earlier maps. Their decision to wait should doom their claim just as it did for the challengers in *Benisek* where six years and three general elections was considered too long. Specifically, "[i]n considering the balance of equities among the parties," the Supreme Court concluded that the "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request." *Benisek*, 138 S. Ct. at 1944. The reason was that "the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Id*.

So too here. If Plaintiffs saw a "pattern" that "maintained" impermissible "racial targets," then they should have filed a complaint and a preliminary injunction sooner. They did not. Under the circumstances, waiting one more election cycle to get it right (assuming the City erred) makes more sense.

C. *Purcell* warrants a stay.

As this Court and the Eleventh Circuit have recognized, there is no clear definition of "what it means to be 'on the eve of an election' for *Purcell* purposes." *LOWV*, 32 F.4th at 1370 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam)). Using Justice Kavanaugh's *Merrill* concurral as guidance, however, the Eleventh Circuit noted that even small administrative hurdles, like redoing already-underway voter registration, trigger *Purcell* because "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Id.* (quoting *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral)).

Here, everyone agrees the December 16, 2022 deadline needs to be met for the election to avoid disruption. From the beginning, Defendants have argued that the Council does not have time to redraw the map under Plaintiffs' timeline. Now this Court has all but accepted Plaintiffs' proposed remedial timeline, requiring a new map in less than a month. ECF No. 53 at 137.

This timeline is "unrealistic and unreasonable under the circumstances." ECF No. 45 at 4. The Council's 2021 map took seven months to adopt using a least-changes-approach—relying on prior work as a starting point for the 2021 map. ECF No. 34-3 at 9; ECF No. 34-10 at 2; ECF No. 40-2 at 40-42, 61-62, 64-65; ECF No.

40-13 at ¶¶ 8, 10, 12; ECF No. 40-14 at ¶¶ 7-10; ECF No. 40-23 at ¶ 8; ECF No. 40-28 at ¶¶ 7, 18; ECF No. 40-31 at ¶¶ 21-22. The Council must now draw a map from scratch. And it must do so on a compressed schedule that will limit its ability to receive and respond to public input, and without the usual debate of Council members (who are part-time legislators that usually meet as a collegial body consistent with State and local requirements). *See* Jacksonville Charter § 5.02; Jacksonville Ord. Code §§ 18 *et seq.*, 15.101 *et seq.*, 129.102.

Just as important is *who* would run in the new Council districts. The Jacksonville Charter requires candidates to reside in their districts 183 consecutive days before qualifying. Jacksonville Charter § 5.04. New districts, however, would effectively negate this requirement and would potentially harm constituents; after all, candidates running in the new districts may not be familiar with the needs and interests of their constituents.

Less public input, less transparency, and less time to get things right. Combined, these problems threaten to undermine voter confidence and thus trigger the concerns at the heart of *Purcell*. To repeat, it took the Council seven months to pass the Enacted Plan. *See* ECF No. 40-2; ECF No. 40-3; ECF No. 40-31 at ¶¶19-20. At the July 8, 2022 status conference, Defendants informed the Court that they could complete the redistricting process in as little as three months. ECF No. 27 at 13–15. But two months—and especially the twenty-eight days provided in the

order—is not enough. That said, the City is continuing to work in good faith to create new lines as expeditiously as possible. The City hopes that it will make considerable progress in the redistricting process by November 8; however, it remains mindful that the task might not yet be complete and so it seeks a stay to protect its ability (and its right) to create a remedial map.

In sum, "*Purcell* effectively serves to lower the [government's] bar to obtain the stay it seeks." *LOWV*, 32 F.4th at 1372. The City has leapt over that low bar because much must be done—and done right—before putting in place a remedial map. And with the pending Supreme Court cases that will likely provide the contours for when race can (if ever) be taken into account in the redistricting process, Plaintiffs' case on the merits is not "entirely clearcut." *Id*. (quoting *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral)). Waiting is best.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court to stay the preliminary injunction.

Dated: October 19, 2022

Respectfully submitted,

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**pro hac vice* application forthcoming

LOCAL RULE 3.01(g) CERTIFICATION

I hereby certify that counsel for Defendants telephonically conferred with counsel for Plaintiffs on October 18, 2022, in accordance with Local Rule 3.01(g). Counsel for Plaintiffs oppose this motion.

Counsel for Defendants again conferred with counsel for Plaintiffs on October 19 regarding an expedited briefing schedule. Counsel for Plaintiffs did not oppose the proposed October 26 deadline to file a response in opposition, but counsel did not affirmatively consent to it.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2022, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
Mohammad O. Jazil