Case No. 22-14260

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellees,

v.

CITY OF JACKSONVILLE, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, No. 3:22-cv-493 (Howard, J.)

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS CITY OF JACKSONVILLE AND SUPERVISOR HOGAN'S TIME-SENSITIVE MOTION FOR STAY

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CERTIFICATE OF INTERESTED PERSONS

Per Circuit Rule 26.1-2(c), Plaintiffs-Appellees certify that the CIP contained in Appellants' Time-Sensitive Motion for Stay is complete.

Per Circuit Rule 26.1-3(b), Plaintiffs-Appellees certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

CORPORATE DISCLOSURE STATEMENT

Per Rule 26.1(a), Plaintiffs-Appellees certify that the ACLU of Florida Northeast Chapter; Florida Rising Together, Inc.; Jacksonville Branch of the NAACP; and Northside Coalition of Jacksonville, Inc. each has no parent corporation, and no publicly held corporation owns 10% or more of any of those entities' stock. All other Plaintiffs-Appellees are individual persons.

Dated: January 3, 2023

/s/ Nicholas Warren
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Counsel for Plaintiffs-Appellees

INTRODUCTION

Thrice rebuffed by the federal judiciary, the City of Jacksonville pulls a last-minute bait-and-switch to try to maintain its racially gerrymandered City Council districts. For months, it insisted it needed a remedy by December 16 to avoid election administration problems and voter confusion. But now, the City concocts an entirely new deadline.

What's changed? The district court saw through the Council's continued effort to racially segregate voters. In March, under the guise of "core preservation," the Council perpetuated a longstanding practice of packing Black voters into four Council districts (D7–10, the "Packed Districts"), thereby stripping them from neighboring districts (D2, D12, D14, the "Stripped Districts"). The district court, presented with a "virtually unrebutted case" of racial gerrymandering, Doc.53, p.103, preliminarily enjoined that redistricting plan (the "Unconstitutional Plan"). The City of Jacksonville and its Supervisor of Elections ("the City") asked this Court to stay the injunction. This Court declined, in part because the City's appeal was unlikely to succeed. Order, Nov. 7, 2022, No. 22-13544 ("Stay Denial").

Given the chance to cure its constitutional violations, the City failed. Whereas in March, it invoked "core preservation" to continue the racial sorting of residents, in November it invoked the closely-related "incumbent protection" criterion. The effect was the same. In the City's proposed interim remedial plan ("Ordinance 2022-

800"), the Stripped Districts retain 98.51%, 81.05%, and 69.71% of their prior populations, Op.28[1]—populations the district court found were unconstitutionally deprived of Black residents. As a result, nearly 90% of the residents that had been packed into the Unconstitutional Plan's D7–10 remain there, Op.27–28; these four districts continue to be packed with Black residents stripped from neighboring districts, Op.28–29; and districts in northwest Jacksonville continue to bear tell-tale signs of racial gerrymandering. Op.27–36. The district court appropriately rejected this proposed "remedy," instead ordering a plan (the "court-ordered plan") that respects the Council's policy choices while *also* complying with the Constitution.

So the City asks this Court for a "stay"—but not actually a stay. What the City really seeks is a reversal and this Court's "permission" to implement a "remedy" that embeds the violations of the Unconstitutional Plan. The Court should deny that request as procedurally unsound and wrong on the merits.

BACKGROUND

On October 12, the district court preliminarily enjoined the Unconstitutional Plan, finding that seven City Council districts in northwest Jacksonville were likely racially gerrymandered. Doc.53. The court enjoined the City from conducting elections using the Unconstitutional Plan, giving the City until November 8 to submit a proposed interim remedial plan. The court's order (as well as its entire case

[1] "Op." refers to Doc.101, the Opinion under review.

management schedule) reflected the City's repeated representations that the Supervisor needed a plan by December 16 to run the March 2023 elections.

The City moved this Court to stay the district court's order, arguing that the order violated the *Purcell* principle that courts should avoid last-minute changes to election laws. Mot. Stay, Nov. 2, 2022, No. 22-13544 ("First Stay Mot."). This Court declined to apply *Purcell*, partly because of "Appellants' position that the March 21, 2023 elections can be run if the district lines are in place by December 16, 2022." Stay Denial, p.12. This Court also concluded the City's appeal was unlikely to succeed, due to the "abundance of evidence presented, and relevant caselaw" to support the order below. *Id.*, p.10.

Consistent with that order, the City submitted Ordinance 2022-800 as a proposed interim remedial plan on November 8. Plaintiffs objected and proposed three alternative plans. Doc.90. In a thorough 60-page opinion, the district court sustained Plaintiffs' objections, finding Ordinance 2022-800 perpetuated rather than cured the constitutional violations. Op.40. Even under the compressed schedule necessitated by the City's representations, the district court's opinion included detailed factual findings about each district and the plan as a whole.

The court considered Plaintiffs' proposed remedies and chose the one derived from Ordinance 2022-800. Op.53. The court explained that this remedy cures Ordinance 2022-800's most egregious violations while also respecting the Council's

legitimate policy preferences. Op.49–53. In ordering the remedy, the court noted that the City raised no legal objections to any of Plaintiffs' proposals, Op.49, and (based on the City's representations) emphasized the urgency of implementing a remedy, Op.57.

Four days later, the City noticed its appeal. Four days after that, it sought the stay now at issue.[2]

ARGUMENT

I. The City's Stay Motion Is Procedurally Flawed

A. The City Seeks a 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 "ask[s] for permission to use the City's remedial map for all upcoming elections." Mot.20. In effect, the City seeks reversal of the district court's decision and an order implementing Ordinance 2022-800. That request is wholly inappropriate and unrelated to preserving the status quo.

[2] The City didn't seek a stay from the district court, citing "impracticability" in a conclusory fashion, Mot.6, and citing a case of a child facing imminent deportation, *Gonzalez v. Reno*, 2000 WL 381901, at *4 n.4 (11th Cir. 2000). The Council is not a defendant, so it's unclear why the City had to wait for a Council meeting to appeal; nor is it evident why the City, choosing to delegate the appellate decision to the Council, did not prepare for an adverse order earlier. *See Agudath Isr. of Am. v. Cuomo*, 979 F.3d 177, 179 (2d Cir. 2020) (denying stay motion where no showing of impracticability or futility, particularly with eleven-day delay in seeking stay).

There is only one viable map for the March elections: the court-ordered remedy. The City mischaracterizes the district court's order as "enjoining the use of the City's remedial map," Mot.1, as if Ordinance 2022-800 is the status quo a stay would preserve. It isn't. By its terms, Ordinance 2022-800 "shall become effective upon being deemed constitutional by Court order in case number 3:22-cv-493-MMH-LLL"—by order of the district court. Doc.74-1, p.9. The district court never issued such an order because Ordinance 2022-800 violates the Constitution. So there is no "injunction of Ordinance 2022-800" to stay because Ordinance 2022-800 never took effect.

What *is* the status quo, then? Not the original 2022 plan. The district court enjoined that plan, and this Court declined to stay that injunction. Instead, staying the remedial order would revert to a "status quo" of the plan enacted in 2011 using 2010 Census data. But those districts are now unconstitutionally malapportioned. Doc.53, pp.28–29; *Avery v. Midland*, 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 implement Ordinance 2022-800—legislation that, on its face, never took effect. That is a reversal on the merits, sought in a time-sensitive posture, not a stay. This Court should deny that extraordinary request.

B. The City's Proposed Timeline Is Precluded by Its Prior Representations

Until last week, the City insisted that any remedial plan had to be in place by December 16 to allow the Supervisor to administer the March 2023 elections. Docs.24, 27, 41, 45, 50, 57; First Stay Mot. According to the City, absent a plan finalized by mid-December, chaos would reign. First Stay Mot., pp.14–18 (warning of "chaos" for the Council, Supervisor, candidates, and voters). Last week, everything changed. Why? Because the district court didn't rubber-stamp the City's proposed remedy. Suddenly, at the Council's behest, the City realized it had an extra three weeks before the impending pandemonium.

The December 16 date informed the management of this whole case. The district court relied on it in setting the briefing schedule (which the City agreed to "without caveat"), enjoining the Unconstitutional Plan, and setting a remedial timeline. Doc.53, p.9. This Court relied on that date in affirming that timeline. Stay Denial, p.6 (rejecting City's arguments "[g]iven Appellants' position that the election can be conducted on the schedule they made collaboratively with the district court and Appellees"). The district court worked expeditiously to honor the City's deadline, relying on it in ordering an interim remedy. Op.57 ("given the time constraint of needing to have a map in place by mid-December, the Court focused its attention on Plaintiffs' proposed maps").

At every step, the City sought to use the December 16 deadline to its benefit.

In multiple briefs and at oral argument, it unsuccessfully invoked that date to urge the district court to deny a preliminary injunction. It did the same before this Court in seeking to stay the injunction. Reversing course, the City now declares December 16 a mere "prefer[ence]," announcing "on information and belief" a new deadline: January 6, 2023—one business day before candidate qualifying begins. Mot.7–8. The concerns animating the City's first stay request—certainty for candidates and voters, and administrative feasibility, First Stay Mot., pp.14–18—have evaporated to accommodate this newfound position. *See infra* pp.9–10 (elapsed deadlines).

This Court shouldn't tolerate the City's about-face. "[A] party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). Courts prohibit these tactics "to protect the integrity of the judicial process." *Id*. As the Supreme Court recently held, a jurisdiction cannot "fairly…advance[]" a *Purcell* argument that conflicts with its "previous representations to the district court." *Rose v. Raffensperger*, 143 S.Ct. 58, 59 (2022).

It's not clear whether the City is being less-than-candid now or was being less-than-candid then. Either way, this Court shouldn't permit the City to invoke the December 16 date to avoid an adverse decision, only to abandon that date in search of a favorable reversal.

C. *Purcell* Does Not Apply

Against this backdrop, it is astounding that the City implies that *Plaintiffs* must satisfy the heightened *Purcell* standard. Mot.6–7. This Court's prior holding and *Purcell*'s animating principles foreclose this approach.

Under the law of the case doctrine, "both district courts and appellate courts are generally bound by a prior appellate decision in the same case." *Alphamed, Inc. v. B. Braun Med., Inc.*, 367 F.3d 1280, 1285–86 (11th Cir. 2004). In its November decision, this Court found *Purcell* didn't apply, and thus declined to stay the district court's preliminary injunction and its attendant remedial schedule. Stay Denial, p.6. The City now seeks to revisit that same timeline using the same arguments. The law of the case doctrine prevents precisely this tactic. *See Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985).

Moreover, the City's *Purcell* arguments turn the doctrine on its head. *Purcell* seeks to avoid "[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—not preserve it. Court-ordered relief can constitute the benchmark for *Purcell* purposes. In *Frank v. Walker*, 574 U.S. 929 (2014), the Supreme Court reversed the Seventh Circuit's stay of a district court's injunction because that stay was issued too close to the next election. *See id.* at 929 (Alito, J., dissenting); *see also RNC v. DNC*, 140 S.Ct. 1205, 1207 (2020) (characterizing Seventh Circuit's stay of injunction in *Frank* as "alter[ing] the election rules on the eve of an election").

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 business day* before candidate qualifying formally begins. The City's proposed deadline falls *after* candidates have decided whether and in which districts to run based on the court-ordered map, *after* the Supervisor's office has begun accepting candidate-qualifying paperwork based on the court-ordered map, *after* candidates who chose to qualify by petition (rather than fee) have had petitions verified, and *after* the deadline for potential candidates who hold other public office to submit their irrevocable resignation under Florida's resign-to-run law.[3]

[3] Jimmy Peluso, Appointment of Campaign Treasurer Form, https://www.voterfocus.com/CampaignFinance/pdf_duval/doc_1171_20221230123941_Appointment_of_Campaign_Treasurer_Office_Change.pdf (candidate switching districts); John Draper, Statement of Candidate, https://www.voterfocus.com/CampaignFinance/pdf_duval/doc_1219_20221229161537_Statement_of_Candidate.pdf (candidate filing); F.S. §99.061(8) (Supervisor

Moreover, the Supervisor has said his office is implementing the Court's interim remedy and has exactly one "backup plan in place": "the City's original redistricting map."[4] This suggests he can implement either the court-ordered remedy or the Unconstitutional Plan. Nothing in the record indicates he can implement Ordinance 2022-800.

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.

II. The City Is Not Entitled to a Stay

The City is not entitled to a stay under the traditional framework that applies in *Purcell*'s absence. Courts consider four factors in determining whether an applicant is entitled to a stay of injunction pending appeal:

> (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 parties interested in the proceeding; and
> (4) where the public interest lies.

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may accept papers fourteen days before qualifying period); Joshua Hicks, Twitter, https://twitter.com/joshuarhicks/status/1607809247336701955; F.S. §§99.095(3) (petition deadline), 99.012(3) (irreversible resign-to-run deadline).

[4] Press Release (Dec. 21, 2022), https://www.facebook.com/DuvalCountySOE/posts/pfbid02Z1KUC6vdqYzHmrUDM1AURGWzc4GwptdeYjZBJu3GUibPSe4bEfkrpSUMCjdoA8LSl (also attached hereto for the Court's convenience).

Nken v. Holder, 556 U.S. 418, 426 (2009). "The first two factors of the traditional standard are the most critical." *Id.* at 434.

A. The City Is Not Likely to Succeed on the Merits

The City is not likely to succeed on the merits of its appeal. The district court correctly concluded that Ordinance 2022-800 fails to cure the Unconstitutional Plan's racial gerrymandering, instead perpetuating that plan's violations.

1. The City Ignores *Covington*

In insisting the district court erred, the City never once cites (let alone grapples with) *North Carolina v. Covington* ("*Covington II*"), 138 S.Ct. 2548 (2018). But *Covington* is fatal to Ordinance 2022-800. In *Covington*, the Supreme Court upheld a district court's rejection of remedial districts for failing to cure racial gerrymandering. The North Carolina legislature hadn't considered race *at all* in drawing the remedial districts, focusing instead on protecting incumbents. *Id*. at 2551–53. But to protect incumbents, the remedial districts retained many of the problematic features of their predecessors. *Id.* They continued to feature awkward shapes, split communities, and racially-divided borders. *Covington v. North Carolina* ("*Covington I*"), 283 F.Supp.3d 410, 435–42 (M.D.N.C. 2018).

The *Covington* district court rejected that map, explaining its "'duty' to ensure 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.'" *Id.* at 424 (citation omitted).

The district court added that, in the remedial context, political considerations—even if ordinarily permissible—must "give way to [the] duty to completely remedy the constitutional violation." *Id*. at 433; *see also Jeffers v. Clinton*, 756 F.Supp. 1195, 1199–1200 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991).

The Supreme Court affirmed the district court in relevant part. It held, even assuming the remedial districts were drawn without considering race, that did "little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of those districts—that the districts unconstitutionally sort voters on the basis of race." *Covington II*, 138 S.Ct. at 2553. Because the legislature had prioritized incumbent protection, its remedial districts preserved the infirmities of their unconstitutional predecessors, and the district court correctly sustained plaintiffs' objections.

2. *Covington* Controls This Case

This case is on all fours with *Covington*. Here, too, the Council relied on criteria closely tied to the underlying violations. It acknowledged prioritizing efforts to protect incumbents, Op.21—"oddly including even those who were not eligible or had declared their intention not to run again as incumbents to be protected," Op.47.[5] It also insisted on keeping D12 "rural" and Republican, Op.10, precluding

[5] The City's claim that "incumbency protection served no purpose other than to preserve the relationships between voters and their elected officials," Mot.14, is

the addition of nearby suburbs with large Black populations—even though those suburbs had population densities similar to (or lower than) majority-white suburbs that *were* included in D12, Op.41–42.

As a result of prioritizing incumbency, the City could change the Stripped Districts only minimally. Op.41, 43. In Ordinance 2022-800, D2, D12, and D14 retain 98.51%, 81.05%, and 69.71%, respectively, of their populations from the Unconstitutional Plan, Op.28—populations that both this Court and the district court determined were likely artificially white because of race-based decision-making. Stay Denial, p.10 (Plaintiffs likely to succeed on merits); *see also In re SJR 1176,* 83 So.3d 597, 662–69 (Fla. 2012) (describing 82.6% retention as "overwhelming" and 69.7% as "high"). Ordinance 2022-800's Packed Districts and Stripped Districts also exhibit the same non-compactness, awkward shapes, split communities, and race-based demographic features that defined their unlawful predecessors. These characteristics are hallmarks of racial gerrymandering. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788, 797–98 (2017). So is the evidence that the Council

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belied by the record. First, the City sought to protect incumbents who were ineligible to run or announced they would not. Second, there's a chasm between the core-retention rates of the two sets of districts. The Packed Districts retain 19.5%, 35.4%, 37.2%, and 51.9% of their populations; the Stripped Districts retain 69.71%, 81.05%, and 98.51%. Op.28. If incumbency protection here were about accountability, there wouldn't be such a gap. *Cf. Larios v. Cox*, 314 F.Supp.2d 1357, 1369 (N.D. Ga. 2004) (retaining incumbent cores not a legitimate goal when applied disparately).

subverted its stated criteria of adhering to Citizen Planning Advisory Committee areas and that it excluded predominantly Black suburbs from D12 but not heavily white suburbs with similar population densities. Indeed, the Redistricting Committee Co-Vice-Chair announced he supported Ordinance 2022-800's basic template because it "pretty much maintains a lot of what we like about the original map." Op.12.

Because Ordinance 2022-800 retained most of each Stripped District, the district court further explained, it necessarily "kept White voters in Districts 2, 12, and 14, and reshuffled the Black voters *within*, *but not out of*, Districts 7, 8, 9, and 10, such that the overall percentage of Black voters in the Packed Districts fell by only 1.71 percentage points." Op.37–38. As a corollary to protecting the Stripped Districts' incumbents, the Council had to keep the Packed Districts packed. "88.63% of the people living in the Packed Districts under the [Unconstitutional] Plan remain in one of those four districts under [Ordinance 2022-800]," and "of the only 11% of residents who were moved from an Enjoined Packed District into…Districts 2, 12, or 14[], 47.66% of them are White, and 37.3% are Black"— a percentage "vastly disproportionate to the underlying demographics of the Packed Districts." Op.27–28. All told, under Ordinance 2022-800, "[t]he voice of Black voters largely remains unchanged in that it is still confined to the Packed Districts that were the four historically majority-minority districts." Op.38. This perpetuation of the Packed

Districts fails to remedy the Unconstitutional Plan's racial gerrymandering but rather continues its race-based segregation of voters.[6]

Within the Packed Districts, meanwhile, the Council made decision after decision to hew to the Unconstitutional Plan's district cores. D8 was changed to run north from the incumbent's residence, as opposed to south, to resemble the prior district. Op.10, 14, 42. A proposal that would have "reduced the overall percentage of Black voters in the Packed Districts by a greater margin" was abandoned so D7 could resemble its predecessor—not to protect the term-limited incumbent, but to protect a candidate *who had yet to be elected*. Op.42–43. The incumbents for D9 and D10 both expressed concern about their non-compact districts that split neighborhoods. Op.13 n.23. The need to protect the D9 and D10 incumbents also led to D14 retaining its awkward shape with a land-bridge connecting pockets of white voters. Op.43–44.

The City does not suggest that the district court's factual findings were erroneous (let alone clearly so). It is beyond dispute that the Stripped Districts retain large majorities of their prior populations, that 88.63% of the residents the Unconstitutional Plan had packed into D7–10 remain there, and that the overall Black population of the Packed Districts was reduced by less than 2%. Op.28, 38. In

[6] The district court made clear that this perpetuation of the Packed Districts is not attributable to neutral criteria. Op.40.

other words, here, like in *Covington*, voters "remain[] segregated on the basis of race." 138 S.Ct. at 2553. A straightforward application of that precedent supports the district court's order.

3. The City's Substantive Arguments Are Meritless

Ignoring *Covington*, the City relies instead on inapposite cases about a different legal theory. *See* Mot.12–13 (citing decisions that mostly predate *Covington* and are about intentional discriminatory animus, not racial gerrymandering). In each of those cases, the court explained that it is inappropriate to impute past animus to new legislation or to place the burden of refuting animus on defendants.[7] But the district court here did no such thing. In fact, it functionally assumed without deciding that it was *Plaintiffs'* burden to establish the continued race-based sorting of voters. Op.35 n.16.

Critically, at no point did the district court so much as hint that the Council acted with intentional discriminatory animus or bad faith. The crux of the City's merits argument is that the district court failed to afford the Council a presumption

[7] The City has repeatedly relied on *Abbott v. Perez*—a case about intentional discriminatory animus. Beyond dealing with an entirely different legal theory, *Abbott* is factually inapplicable: "The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. *Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature*. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court 'not to incorporate...any legal defects.'" 138 S.Ct. 2305, 2325 (2018) (emphasis added).

of good faith, but the City cites to nothing in the record supporting that contention. Mot.8–12. Instead, the City seemingly believes that because the district court didn't rubberstamp its proposal, it necessarily failed to afford the Council a good faith presumption. Not so. The district court repeatedly noted the deference owed to the Council and expressed regret that it had to step in. *See, e.g.*, Op.35 ("the Court begins with substantial deference to the City's Remedial Plan"); Op.51, 57–58. At the same time, the court correctly found that the Council's hyperfocus on incumbent protection led to remedial districts that continue to segregate voters along racial lines. A presumption of good faith does not permit the Council to do whatever it wants. It was still required to end the racial gerrymandering. Even assuming the Council acted with the noblest of intentions "does little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of those districts—that the districts unconstitutionally sort voters on the basis of race." *Covington II*, 138 S.Ct. at 2553.

The City's other argument—that the district court treated incumbency protection inappropriately—is equally meritless. While the district court repeatedly acknowledged that incumbency protection can sometimes be a legitimate redistricting criterion, Op.44–45 & n.22, the City apparently thinks incumbency protection fully insulates remedial districts from scrutiny, Mot.13. *Covington* precludes that approach. So does this Court's November ruling: the City's argument

about incumbency protection mirrors its earlier claim about "core preservation," the putatively nonracial criterion that led to the City's first round of unconstitutional districts. This Court has already explained *in this case* that core preservation cannot justify the race-based sorting of voters. Stay Denial, p.8. This reasoning applies squarely to incumbency protection and makes it an equally untenable excuse for racially segregated districts.

Moreover, the district court made extensive factual findings here showing that the effect of incumbency protection was to embed racially-sorted districts. Consistent with *Covington* and other cases, the district court thus held that incumbency protection had to give way to the obligation to cure the racial gerrymandering. *See e.g.*, *Personhuballah v. Alcorn*, 155 F.Supp.3d 552, 561 n.8 (E.D. Va. 2016); *Jeffers*, 756 F.Supp. at 1199–1200. Beyond being a faithful application of *Covington*, the district court's approach makes sense. Taken to its logical end, the City's position would permit it to rely on incumbency protection to simply re-enact the Unconstitutional Plan. What better way to protect incumbents than to give them the exact districts they have already won? That's not too different from what the Council actually did, maintaining between 69.71% and 98.51% of the districts that had been unconstitutionally stripped of Black residents (and adjusting other districts to hew closer to their unconstitutional predecessors). Op.28. The law doesn't countenance this sort of "remedy."

The City is also misguided in lamenting that the court-ordered plan includes core retention figures similar to Ordinance 2022-800. The top-level figures don't tell the whole story. The court-ordered plan genuinely reshapes D14, thereby ensuring that at least one of the Stripped Districts is not all-but-recreated. *See* Mot.11 (tbl.). In so doing, the remedy removes the non-compactness and race-based splitting of neighborhoods that defined the previous D14 and neighboring Packed Districts. Op.43–44. The remedy does this while *also* adhering more closely to the Council's stated criteria and unifying neighborhoods (especially those that councilmembers expressed a desire to unite). Op.50–52.

More fundamentally, the City's argument only underscores the district court's deference to the Council and the inadequacy of the City's proposed remedy. The district court, in ordering its remedy, cured only the most egregious violations of Ordinance 2022-800. The district court expressed trepidation about maintaining so much of the unconstitutional D12's core on the theory that it should remain "rural," but noted under the circumstances, that its plan was a permissible *interim* remedy.[8] Op.51. Because that plan respects *the Council's* purported desire to keep D12

[8] In designing the plan the court ultimately chose, Plaintiffs started with Ordinance 2022-800 and maintained much of it, noting that while that plan cured Ordinance 2022-800's most egregious violations, it didn't fully remedy all of them. Specifically, Plaintiffs retained D2 and D12 from Ordinance 2022-800, focusing only on "not stripping Black residents from D14, not packing them into the other districts, and not otherwise aligning these five districts to their unconstitutional cores." Doc.90, p.40 & n.17.

Republican and rural—which required leaving 81.05% of the unconstitutional district unchanged—the court-ordered remedy reduced the Black percentage of D7–10 less than it could have. This approach scrupulously took the Council's professed policy choices at face value (and in good faith), respecting them even where they may have stood in the way of a complete remedy. The City's position amounts to insisting it be allowed to use a "remedy" that cures *none* of the underlying violations because the district court ordered an interim remedy that may cure only *some* of those violations. That stance is especially galling because the district court's order reflected a judicious approach under severe time constraints—namely, the December 16 deadline the City now treats as malleable. Op.57.

Finally, the City's various other quibbles are meritless. First, the creation of a district with an 84% Black voting-age population (BVAP) is not *per se* problematic if it reflects communities' actual housing patterns. The court-ordered D10 is compact and keeps together neighborhoods as opposed to splitting them to facilitate the packing of neighboring districts. Moreover, D10's high BVAP is a direct consequence of leaving D12 untouched from Ordinance 2022-800. Plaintiffs' other proposals, which did not prioritize keeping D12 "rural" by including over 80% of its previous core, included a higher-BVAP D12 and a lower-BVAP D10. Plaintiffs welcome a post-trial remedy that lowers D10's BVAP by fully curing D12's constitutional infirmities.

Second, the pairing of two Black female incumbents is irrelevant. An appropriate remedy must cure the race-based sorting of *voters*, not protect politicians of any race or gender. Third, the district court did not rely only on the aggregate retention figure for the Packed Districts. *Contra* Mot.11 n.7. It analyzed each district individually in Ordinance 2022-800. *E.g.*, Op.41–46 (discussing effect of incumbency protection on each district). The district court *also* properly considered plan-wide evidence that a large majority of Black residents continue to be packed into D7–10 and stripped from D2, D12, and D14. A "common redistricting policy toward multiple districts" can shed light on the question of racial predominance. *Bethune-Hill*, 137 S.Ct. at 800; *see also, e.g.*, *Ala. Legis. Black Caucus v. Alabama* ("*ALBC*"), 575 U.S. 254, 263 (2015) ("Voters, of course, can present statewide *evidence* in order to prove racial gerrymandering in a particular district.").

B. The City Will Not Suffer Irreparable Harm

This Court has explained that the City cannot claim irreparable harm from a prohibition on using an unconstitutional plan. Stay Denial, p.11; *see also Abbott*, 138 S.Ct. at 2324 (irreparable harm "[u]nless…statute is unconstitutional"). Ordinance 2022-800 continues to unconstitutionally segregate voters along racial lines, and "the 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).

C. The Balance of the Equities Weighs Against a Stay

The balance of equities strongly weighs against a stay. "Numerous cases have described the immense harm caused by racial gerrymandering." Stay Denial, p.12. Moreover, both this Court and the district court have concluded that the enjoined districts likely violated the Constitution by sorting voters by race. Granting the City's request would allow a "remedy" that largely maintains those districts. Under these circumstances, a stay would undermine voter confidence in the election and the legitimacy of the elected councilmembers. *See ALBC*, 575 U.S. at 283 (Scalia, J., dissenting).

In November, this Court explained:

> Given that [racial] 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.

Stay Denial, p.12. This Court should now decline to require the residents of Jacksonville to live for the next four years in districts that embed rather than cure those constitutional infirmities.

Finally, granting the City's motion would be particularly damaging here given the fast-approaching election. The Supervisor has publicly indicated that his office will be able to implement the court-ordered remedy *or* the Unconstitutional Plan, making no mention of Ordinance 2022-800. *See supra* n.4. Even assuming the City

is *now* being truthful in asserting it's feasible to adopt a plan *one business day* before candidate qualifying, the potential confusion for candidates and voters remains. *See supra* p.9–10.

CONCLUSION

For the foregoing reasons, the Court should deny the City's motion.

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CERTIFICATE OF COMPLIANCE

This document complies with Rule 27(d)(2)(A) because it contains 5,198 words, excluding the parts that can be excluded. This document also complies with Rule 32(a)(5)–(6) because it is in a proportionally spaced 14-point face.

Dated: January 3, 2023

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