

Case No. 22-14260

**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 (Morales Howard, J.)

**APPELLANTS CITY OF JACKSONVILLE AND SUPERVISOR
HOGAN'S REPLY IN SUPPORT OF THEIR TIME-SENSITIVE
MOTION FOR STAY**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Per Rule 26.1 and Circuit Rule 26.1, Appellants certify that the following have an interest in the outcome of this appeal:

1. American Civil Liberties Union of Florida of Florida Northeast Chapter, *Plaintiff*
2. American Civil Liberties Union of Florida, *Law Firm of Attorney for Plaintiffs-Appellees*
3. Barnum, Dennis, *Plaintiff*
4. Barnum, Eunice, *Plaintiff*
5. Beato, Michael, *Attorney for Defendants-Appellants*
6. Bennette, Matletha, *Attorney for Plaintiffs-Appellees*
7. Carswell, Haraka, *Plaintiff*
8. City of Jacksonville, *Defendant-Appellant*
9. Covington, Ayesha, *Plaintiff*
10. Dolan, Krista Ann, *Attorney for Plaintiffs-Appellees*
11. Duval County Supervisor of Elections Office, *Interested Party*
12. Florida Rising Together, Inc., *Plaintiff*
13. Florida State Conference of Branches and Youth Units of the National Association for the Advancement of Colored People, *Interested Party*
14. Genberg, Jack, *Attorney for Plaintiffs-Appellees*
15. Giannini, Mary Margaret, *Attorney for Defendants-Appellants*
16. Greenwood, Ruth M., *Attorney for Plaintiffs-Appellees*
17. Harrell, Sonya, *Attorney for Defendants-Appellants*
18. Harvard Law School Election Law Clinic, *Law Firm of Attorney for Plaintiffs-Appellees*

19. Heard, Bradley E., *Attorney for Plaintiffs-Appellees*
20. Hessel, Daniel, *Attorney for Plaintiffs-Appellees*
21. Hogan, Mike, in his official capacity as Duval County Supervisor of Elections,
Defendant-Appellant
22. Howard, Marcia Morales, *U.S. District Court Judge*
23. Jacksonville Branch of the NAACP, *Plaintiff*
24. Jazil, Mohammad O., *Attorney for Defendants-Appellants*
25. Johnson, Doug, *Map Drawer for Defendants-Appellants*
26. Lee, Theresa J., *Attorney for Plaintiffs-Appellees*
27. McCoy, Rosemary, *Plaintiff*
28. McNamara, Caroline Andrews, *Attorney for Plaintiffs-Appellees*
29. Montgomery, Ingrid, *Plaintiff*
30. National Association for the Advancement of Colored People, *Interested Party*
31. Northside Coalition of Jacksonville, Inc., *Plaintiff*
32. Phillips, Jon Robert, *Attorney for Defendants-Appellants*
33. Roberson, Helen Peacock, *Attorney for Defendants-Appellants*
34. Roberts, Tiffanie, *Plaintiff*
35. Singleton, Sheila, *Plaintiff*
36. Southern Poverty Law Center, *Law Firm of Attorney for Plaintiffs-Appellees*
37. Stephanopoulos, Nicholas, *Attorney for Plaintiffs-Appellees*
38. Teal, Jason R., *General Counsel for the City of Jacksonville*
39. Tilley, Daniel B., *Attorney for Plaintiffs-Appellees*
40. Torchinsky, Jason, *Attorney for Defendants-Appellants*
41. Warren, Nicholas, *Attorney for Plaintiffs-Appellees*
42. Washington, Marcella, *Plaintiff*
43. Williams, Janine, *Plaintiff*

Per Circuit Rule 26.1-2(c), Appellants City of Jacksonville and Supervisor Hogan certify that the CIP contained herein is complete.

Dated: January 4, 2023

/s/ Mohammad O. Jazil
Mohammad O. Jazil
Counsel for Defendants-Appellants

ARGUMENT

1. Ironically, and at a fundamental level, Plaintiffs attempt to justify a court-mandated remedial map that includes a district with an “all-Black voting age population” or “ABVAP” of 84.19% because, Plaintiffs now say, that such a district “reflects communities’ actual housing patterns.” Resp.20. But the City’s initial map (which is not the subject of this appeal) was found to likely be unconstitutional because it packed Black voters into districts with ABVAPs of 59.4%, 67.88, 56.89%, and 58.61%, Doc.92-1 at 117. That ruling concerned the same city with the same housing patterns. The one difference was that the earlier ruling included a detailed *Arlington Heights* analysis finding that discriminatory intent and effect worked together to likely suppress Black representation in the city council. *See* Doc.53 at 93-121. The court engaged in no such analysis of the remedial map before concluding that it failed to redress “Jacksonville’s thirty-year history of racial gerrymandering.” *See* Doc.101 at 56.

If housing patterns and other geographic limitations remain the same, and there is no *Arlington Heights* analysis, then the remedial plan can only be cast aside if the district court assumed that the city council acted in bad faith—that the ill intent from the first map carried over into the second. Such an assumption is improper. *Abbott v. Perez*, 138 S. Ct. 2305, 2327 (2018). The intent-free conclusion that the remedial plan fails to comport with the Equal Protection Clause is also improper because discriminatory impacts, or even awareness of those impacts alone, are not enough for a successful Equal Protection Clause claim. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

And it is unclear how *increasing* the percentage of Black voters packed in certain districts (and pitting two Black incumbents against one another) resolves the problems that prompted this case. *See generally Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015) (explaining that racial gerrymandering claims proceed “district-by-district”).

2. Plaintiffs argue otherwise relying almost exclusively, and erroneously, on *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) for the proposition that the Supreme Court bars the use of incumbency in remedial plans when doing so would stand in the way of remedying racial gerrymanders. The Supreme Court’s decision in *Covington*, however, did not focus on incumbency; the focus was on evidence showing the packing of Black voters as demonstrated by district shapes, core preservation, and demographics. *Id.* at 2551, 2553. The Court’s only discussion of incumbency came in a reference to the special master’s attempts to prevent the pairing of incumbents where possible. *Id.* at 2551. For its part, the district court in *Covington* took great care to avoid pairing incumbents though the plaintiffs had provided “compelling evidence” that the state legislature’s incumbency-protection rationale served a race-based purpose. 283 F. Supp. 3d 410, 433, 452-53 (M.D.N.C. 2018).

Covington does not control here. In this case, without any supporting evidence, the district court treated incumbency protection as the de-facto proxy for race-based line drawing and pitted two Black incumbents against one another. *Compare* Doc.101, *with* Doc.53; *see also Jacksonville Branch of the NAACP v. City of Jacksonville*, 2022 U.S. App. LEXIS 30883, at *8 (11th Cir. Nov. 7, 2022) (noting that the district court, when

reviewing the original map, relied on evidence of “‘sprawling’ district geometries, relevant historical background, direct quotes from council members, expert reports, public comments, and council responses (or lack thereof”).

3. Plaintiffs also use the law-of-the-case doctrine to suggest that the City and Supervisor Hogan cannot offer January 6, 2023 as the date by which a new map must be in place. Not so. That date reflects the changed circumstances between when the earlier December 16 date was offered and now: one of two possible maps (the City’s remedial map or the court-mandated map) needs to be implemented now, not some unknown and infinite permutations of a map as was the case then. And while a stay panel of this Court previously found that the *Purcell* principle did not apply to Supervisor Hogan’s December 16, 2022 deadline for a map, that holding in no way foreclosed the possibility that a subsequent date could fall into *Purcell*’s forbidden “bounds.” *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022); *see also Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985) (explaining that the law of the case doctrine “does not extend to issues the appellate court did not address”).

4. Finally, the status quo can only be the City’s enacted, remedial map. The status quo cannot be the 2011 map because, after the decennial census, that map would violate the Equal Protection Clause’s one-person, one-vote requirement. The status quo cannot be the City’s initially enacted map because, the district court concluded, with detailed findings, that the initial map is substantially likely to violate the Equal Protection Clause. And the status quo cannot be the court-mandated remedial map

ordered by the court's mandatory injunction, as opposed to prohibitory injunction, that by its very nature seeks to change the status quo. *See generally Meghrig v. KFC W.*, 516 U.S. 479, 484 (1996). That leaves only the remedial plan enacted by the elected representatives of this City of nearly one million people as the status quo requiring protection through a stay of a mandatory injunction.¹

* * *

For these reasons, and those in their motion, the City and Supervisor Hogan ask this Court to stay the district court's order.

¹ Plaintiffs also quote language from the City's remedial map ordinance that the remedial map "shall become effective upon being deemed constitutional" by the district court. Resp.5. But this quote does not tell the whole story. In reviewing the ordinance and the district court's initial order, the district court allowed the City to pass a remedial map, but explained that the court would still have to review the remedial plan. Doc.53 at 137. The council's intent was to comply with the district court's order.

Dated: January 4, 2023

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CERTIFICATE OF COMPLIANCE

This reply complies with Rule 27(d)(2)(A) because it contains 995 words, excluding the parts that can be excluded. This reply also complies with Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: January 4, 2023

/s/ Mohammad O. Jazil

CERTIFICATE OF SERVICE

I filed this reply with the Court via ECF, which will serve all counsel of record.

Dated: January 4, 2023

/s/ Mohammad O. Jazil