No. 23A_____

IN THE SUPREME COURT OF THE UNITED STATES

GRACE, INC., ET AL.,

Applicants,

v.

CITY OF MIAMI,

Respondent.

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

EMERGENCY APPLICATION TO VACATE ELEVENTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

The applicants in this Court are Grove Rights and Community Equity, Inc. (GRACE); Engage Miami, Inc.; South Dade Branch of the NAACP; Miami-Dade Branch of the NAACP; Clarice Cooper; Yanelis Valdes; Jared Johnson; Alexandra Contreras; and Steven Miro.

The respondent in this Court is the City of Miami, Florida.

RULE 29.6 STATEMENT

Applicants Grove Rights and Community Equity, Inc. (GRACE); Engage Miami, Inc.; South Dade Branch of the NAACP; and Miami-Dade Branch of the NAACP do not have parent corporations, and no publicly held corporation holds ten percent or more of their stock.

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To The Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Eleventh Circuit:

Pursuant to this Court's Rules 22 and 23 and the All Writs Act, 28 U.S.C. § 1651, Applicants respectfully request an emergency order vacating the August 4, 2023 order of the U.S. Court of Appeals for the Eleventh Circuit (App. H) that granted a stay pending appeal of the district court's interim remedial redistricting plan, issued on July 30, 2023 (App. C).[1] Applicants also seek an immediate administrative stay pending the Court's consideration of this application.

Applicants seek vacatur because the Eleventh Circuit's stay permits the City of Miami to use a remedial map the district court found was an unconstitutional racial gerrymander instead of a competing map that the district court found constitutional and that was submitted to the County Elections Department (with whom the City contracts to administer its elections) *before* the City's unconstitutional map. In granting a stay, the divided Eleventh Circuit panel purported to follow the *Purcell* principle to avoid disrupting the November 2023 election, but *Purcell* cannot apply here. Unlike when a legislature enacts a map, implementation starts, and a court enjoins implementation and orders a new map to replace it, here there is no old map to return to. The choice is between two competing maps—one (the City's) an unconstitutional racial gerrymander, the other one (the Court's) a valid map that unwinds the City's racial sorting—each submitted just days ago to satisfy the County Elections Department's preferred deadline for receiving a new map, and each of which

[1] En banc review of a stay order is unavailable in the Eleventh Circuit. 11th Cir. R. 35-4(a).

the County has prepared during the last week to move forward with in parallel. The Eleventh Circuit's contrary ruling relied upon false representations by the City to hold that administrative burdens would befall the County if it used the Court's Plan, when in fact significantly greater burdens are caused by the City's Remedial Plan. All Miamians face irreparable harm if the November 2023 election are conducted under districts the City drew explicitly to impose racial balancing. This Court should vacate the stay just as it vacated a similarly erroneous Eleventh Circuit stay a year ago. *Rose v. Raffensperger*, 143 S. Ct. 58 (mem.) (Aug. 19, 2022).

INTRODUCTION

In 2022, Applicants sued the City of Miami because its decennial redistricting of the five City Commission seats ("2022 Plan") constituted an illegal racial gerrymander. The City Commission engaged in egregious, explicit, and unapologetic race-based sorting of its residents. This is not a case where Applicants cobbled together circumstantial evidence to suggest an inference of racial predominance. Rather, commissioners brazenly explained over the course of a half-dozen public meetings that Miami's City Commission must continue to have three Hispanic seats, one Black seat, and one "Anglo" (non-Hispanic white) seat. The Commission instructed its redistricting consultant to make that happen. He did.

The Commission was not subtle about its racial sorting. Its instruction to maximally divide Hispanic from Black from Anglo residents into separate districts was unequivocal:

> [W]e 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 [and] 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.

App. 25a (second alteration in original).[2]

Because, in the City Commission's view, "we have categorical representation" by race, Doc. 24-12 at 13:11, districts had to "keep the same type of last names, faces that they have," App. 27a. "Compar[ing] Hispanic voters to the sirloin of a steak and non-Hispanic voters to the bone in a steak," App. 25a, one commissioner advised one district should not be "getting all the sirloin but none of the bone. There has to be a balance into the future," Doc. 24-13 at 103:18. Commissioners expressed anxiety about how "pure in the percentage of the Hispanics" the three majority-Hispanic districts were; that anxiety drove decisions to make them each as Hispanic as possible and "keep the balance of the Hispanic population where we're going to be getting Hispanics elected there." App. 20a. The three Hispanic commissioners jockeyed over which would get a "prime Hispanic area" without "diluting the Hispanic vote" for the

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[2] *See also, e.g.,* App. 26a ("The Anglos and the African Americans, they're gonna have somebody sitting here who's gonna look like them. I'm committed."); App. 26a ("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?"); App. 26a ("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."); App. 27a ("[T]hat 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."); App. 28a ("What I care is that in the future, there is sufficient Hispanic votes [in Districts 1, 3, and 4] to elect a Hispanic.") (alteration in original).

other two. App. 28a.

Calling one region of the City "attractive" because "[t]hose are non-African American areas, mainly Hispanic or Anglo basically," commissioners moved it from the existing majority-Black district into a supermajority-Hispanic district. App. 53a. One neighborhood, Coconut Grove, was divided along racial lines, with pieces moved into two of the majority-Hispanic districts to shore up their non-Anglo numbers, because "there's ethnic diversity in Coconut Grove too." App. 18a. One commissioner asked, "[i]s there a problem with splitting Coconut Grove as an entity? Based on where the Hispanic voters live?" *Id.* To the Commission, there was no problem at all—maximum racial separation was their goal. The Commission rejected proposed changes to districts "because of dissimilar demographics," instead "find[ing] adjacent areas with similar demographics" to "keep the . . . ethnic integrity" of the districts. App. 19a, 30a.

Commissioners stressed the need to "have an Anglo elected to a district." App. 21a. They acknowledged the preexisting map, which they tried to change as little as possible, "was gerrymandered but it was a legal gerrymander so that you would have an Anglo elected commissioner." App. 25a. "The probability of electing an Afro American and an Anglo" needed to be "high;" "the Afro American district and the so-called Anglo district" needed to "stand the test of time." App. 34a–35a. In the one predominantly Black district, the Commission adopted an express numerical quota of Black voting-age population, without conducting any analysis at all to determine

whether their target number was necessary for Voting Rights Act compliance.[3] App. 83a–87a.

Based on that record evidence and more, the district court found Applicants were likely to succeed on the merits of their racial gerrymandering claim, enjoined the 2022 Plan's use, and gave the City an opportunity to propose a remedial map. Working backward from the date by which the County Elections Department requested a final plan to be sure it could conduct the November 7, 2023 elections, the parties and the district court developed a schedule for finalizing an interim remedy, building in time for the district court to review any submission by the City.[4]

In crafting its proposed remedial plan, the Commission *again* expressly directed its consultant to continue the race-based sorting. "Commissioners unanimously directed [their 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

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[3] The City concedes that the Voting Rights Act's vote-dilution standard does not protect "Anglo" or Hispanic voters in Miami. Doc. 73 (Prelim. Inj. Hr'g Tr.) at 135:8–14; *see* App. 87a–88a (explaining that the City made no effort to justify racial sorting of predominantly Hispanic Districts 1, 3, and 4, and the "Anglo" District 2, to comply with the Voting Rights Act); App. 112a–114a (adopting R&R and addressing racial predominance in Districts 1–4).

[4] Miami-Dade County is not a party to this action, but the City contracts with the County Elections Department to administer its municipal elections. *Compare* City of Miami Code § 16-3 (City Clerk responsible for conducting elections) *with* City of Miami Res. R-23-0171, https://miamifl.iqm2.com/Citizens/Detail_LegiFile.aspx?ID=13692; *2023 City of Miami General Election*, CITY OF MIAMI, *https://www.miamigov.com/My-Government/Elections/Upcoming-General-Election-November-7-2023*; *and Voter Information*, CITY OF MIAMI, https://www.miamigov.com/My-Government/Elections/Voter-Information.

going to be properly represented, as well as other groups.'" App. 159a (quoting Doc. 82-1 at 17:9–13). The product of that direction ("City's Remedial Plan" or "Remedial Plan") was more than 94% identical to the 2022 Plan. It retained specific features of the 2022 Plan that the district court found were race-based. Plentiful other circumstantial evidence pointed to continued racial predominance as well. Traditional redistricting principles were subordinated to race across the map. And once again, the City failed to narrowly tailor its predominant use of race in the one district in which it had a compelling interest to do so.

Finding the City's Remedial Plan was another impermissible racial gerrymander, the district court adopted one of Applicants' proposals as its own interim remedy ("Court's Plan") ahead of the County Elections Department's requested deadline of August 1, and before Miamians—or the Elections Department—had been told one way or another which map would be used in the November election. The Elections Department received the Court's Plan the same day it was ordered, July 30, and began preparing to implement it. Two days later, August 1, the City finally sent its own plan to the Elections Department. The Elections Department then told counsel and confirmed in public statements that it was preparing simultaneously to implement both maps pending the final outcome of the emergency stay motion the City filed in the court of appeals.

After 8:30 P.M. on Friday, August 4, a divided Eleventh Circuit motions panel stayed the district court's order. Despite the clear constitutional shortcomings of the City's Remedial Plan, the Eleventh Circuit's order directed the use of the City's

Remedial Plan because it found the Court's Plan ordered on July 30 was imposed too close to the upcoming November 7 election (despite the fact the City's Remedial Plan was provided to the County *later* than July 30). The motions panel provided no analysis of the constitutionality of the Remedial Plan or the 2022 Plan it replaced; the panel majority granted the stay based solely on the "*Purcell* principle," which instructs that federal courts ordinarily should not enjoin state election laws close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). The majority's decision to invoke *Purcell* departs from this Court's *Purcell* precedents in novel ways and is inconsistent with traditional stay principles.

To correct the panel majority's demonstrable errors and to prevent City Commission elections from proceeding in November under a system that explicitly and unconstitutionally sorts Miamians by race, this Court should vacate the Eleventh Circuit's stay **as soon as practicable and ideally by Friday, August 11, 2023.** A decision by that date—five business days after the Eleventh Circuit's stay order—would minimally disrupt the Elections Department's preparations for the November elections.

In the meantime, this Court should grant a narrow administrative stay as soon as practicable to protect Miamians from the irreparable harm that will result from the unconstitutional map the Eleventh Circuit imposes. Until the Eleventh Circuit's decision Friday night, the Elections Department was preparing to implement both the City's proposed remedial map and the district-court-ordered remedial map, proceeding on "parallel tracks" awaiting the outcome of the appeal. The Elections

Department has not yet done the final reassignment of voters into new districts, has not yet mailed Miamians information on the November election, and can still implement either the City's unconstitutional race-based map or the constitutionally compliant, court-ordered, remedial map. An administrative stay prohibiting the City from using its race-based "remedial" map for a few days while the Court considers this application would therefore facilitate this Court's review without imposing any undue hardship on the Elections Department.

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

STATEMENT OF PROCEEDINGS BELOW

In December 2022, Applicants—five Miami residents and four community membership organizations—sued the City of Miami alleging that the City violated the Fourteenth Amendment's Equal Protection Clause by racially gerrymandering the five Miami City Commission districts. After diligently gathering nearly 100 exhibits, including two expert reports and historical evidence dating back 27 years (and despite the City wrongfully ignoring multiple public-records requests), Applicants moved for a preliminary injunction on February 10, 2023. Doc. 26. Upon referral from the district court, the magistrate judge held a five-and-a-half hour evidentiary hearing and argument on March 29, *see* Docs. 48, 73, and subsequently issued a 101-page R&R recommending that the district court issue an injunction. App. A. After briefing, the district court overruled each of the City's objections and adopted the R&R on May 23, enjoining the City from using its unconstitutional 2022

Plan pending the outcome of the case. App. B.

The City appealed the district court's order granting a preliminary injunction on May 31, Doc. 63, but never sought a stay of the injunction from the court of appeals, and then voluntarily dismissed its appeal on July 11 (CA11 Case No. 23-11854, App. Doc. 14).[5] The City thus conceded that the November 2023 Commission elections would have to proceed under a new map, adopted after May 31, 2023, and not under the 2022 Plan that the district court found likely violated the Equal Protection Clause as an explicit racial gerrymander. In advance of a June 2 status conference, the parties submitted remedial schedules to the court.[6] App. 229a–238a. At the status conference, the parties agreed that a district court order on remedy should be entered by August 1, the date by which the Elections Department said it needed a map to implement the November elections. Doc. 68.

The district court expressed hope that the City's remedial map-drawing process "will not contain similar infirmities" to the record that led to the preliminary injunction. Doc. 99 at 12:13. These "infirmities" included explicit racial division of the five City Commission districts to guarantee three Hispanic, one Black, and one "Anglo" district. *See* App. 112a–113a, 116a (emphasizing "the Commissioners' repeated instructions to [the City's consultant] De Grandy to preserve the 'ethnic integrity' of each district"). Following the conference, the court entered a scheduling

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[5] All citations to the Eleventh Circuit docket ("App. Doc.") are to this current appeal (CA11 Case No. 23-12472), except when Applicants specifically cite, as here, to the City's voluntary dismissal of the earlier appeal, CA11 Case No. 23-11854.

[6] Under the City's proposed schedule, remedial briefing would have concluded *later* than under the schedule the court actually adopted. App. 232a.

ordering setting the timeline for submission and review of the remedial map. Doc. 69.

The City Commission waited more than three weeks after the preliminary injunction to adopt its proposed remedial map, passing it on June 14 by a 4-1 vote. Inexplicably, the City then **waited sixteen days** to file the map with the district court, with no legal brief or supporting evidence. Doc. 77. On July 7, Applicants filed objections to the City's map and attached their own suggested map, along with 39 supporting exhibits. Docs. 82, 83. The City replied on July 12. Doc. 86. Neither party requested an evidentiary hearing. On July 30, the district court issued its order sustaining Applicants' objections and adopting Applicants' suggested remedial map (the "Court's Plan"). App. C.

The district court's order described the factual record presented by the parties during the remedial phase, including transcripts of two Commission meetings. The first of these meetings—held on May 11 in anticipation of the impending injunction—ended with the City instructing its redistricting consultant to begin drawing a new 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." App. 143a (quoting Doc. 82-1 at 17:10–13). As the district court concluded:

> [T]he 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 [the redistricting consultant] to maintain the racial breakdown of each district in a new map. The directive to [the consultant] is clear, and the Commissioners' statements

> during the May 11 Meeting combined with their directive to [the consultant] 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**.

App. 159a–160a (emphasis added).

Finding the City's Remedial Plan untenable because it, too, was an unconstitutional racial gerrymander, the district court adopted Applicants' proposed map (called "P4"). The district court concluded Applicants' proposed map: (i) incorporated the City's lawful stated objectives; (ii) properly considered traditional redistricting criteria; and (iii) complied with applicable federal and state law. App. 177a–184a. Rather than engage on the merits of Applicants' proposed map, the City "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." App. 185a. Concluding that the City's Remedial Plan did not address the constitutional infirmities in the 2022 Plan—and that Applicants' map did—the district court adopted Applicants' map as the court's interim remedial plan pending final judgment in the action. App. 186a.

The next day—July 31—the City filed an emergency motion in the court of appeals for a stay pending appeal.[7] Recycling rejected arguments, the City quibbled with the district court's weighing of the evidence and conclusions made in rejecting

[7] This came after the district court denied an identical emergency motion to stay that the City filed earlier in the day. Docs. 97, 98; App. 188a–189a.

the City's proposed remedial map. In its 28-page motion, the City dedicated a single paragraph to its *Purcell* argument, where it argued that the district court's order implementing a remedial map—on the timeline requested *by the City's agent*, the County Elections Department—is "sweeping and destructive[.]" *See* App. Doc. 2 (Emergency Mot. to Stay) at 25–26. In its reply brief, the City offered no compelling support for its purported *Purcell* argument. It focused instead on the underlying merits of the district court's decision (and not the Elections Department's ability to implement that order). *See* App. Doc. 12 (Reply ISO Emergency Mot. to Stay) at 7–8.

The City also made significant misrepresentations in its reply brief about critical facts related to elections administration. Specifically, the City falsely stated that "[t]he City had over a month to work with its Geographic Information Systems team to put together information for the County. **With the Mandated Map, the County would have to start from scratch, adding further confusion and delay, and further running afoul of *Purcell*.**" *Id.* at 9 n.3 (emphasis added). This is patently false—the Elections Department made clear that it was prepared to implement *either* map and had begun laying the groundwork to do so pending the final outcome of the stay motion. Indeed, the Elections Department only received the City's Remedial Plan on August 1—two days *after* it received the Court's Plan. *See* App. 249a–250a. The City also asserted, without record support, that the Elections Department would need to engage in a "complicated and time consuming" precinct-redrawing process to implement the Court's Plan. App. Doc. 12 at 9 n.3. The City cited the Elections Department's description of a reprecincting process that concluded

in June, a process that did not take into account *either* the City's Remedial Plan *or* the Court's Plan.[8] At this point, the Elections Department will implement either map—which both split existing precincts—without redrawing precincts, a practice that "will not affect the accuracy or the reliability of the election." Doc. 24-30 at 2.

The City claimed in their reply brief—again without record support—that the Court's Plan split numerous precincts throughout the City, including, for example, Precinct 534. App. Doc. 12 at 9 n.3. The City lamented how "it is difficult for the Department of Elections to implement and manage the precincts and the designated polling places in such a short timeframe." But the Elections Department's precinct map demonstrates that the City's Remedial Plan splits *more* precincts than the Court's Plan—21 compared to 12. And to take the City's example of Precinct 534 cited in its reply below, *the Court's Plan keeps it whole within District 5*—while the *City's Remedial Plan* splits it between Districts 2 and 5.[9]

On August 4, a split motions panel of the Eleventh Circuit nonetheless

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[8] *Reprecinting*, MIAMI-DADE COUNTY, https://www.miamidade.gov/global/elections/reprecincting.page; Miami-Dade County Res. R-536-23, https://www.miamidade.gov/govaction/legistarfiles/MinMatters/Y2023/231117min.pdf.

[9] The Court's Plan splits populated portions of Precincts 531, 536, 545, 564, 566, 581, 596, 610, 669, 670, 976, and 984. The City's Remedial Plan splits populated portions of Precincts 517, 523, 528, 531, 534, 541, 545, 563, 569, 570, 571, 581, 582, 596, 610, 624, 670, 971, 976, 984, and 988. *Compare Precinct Group*, MIAMI-DADE COUNTY, https://gis-mdc.opendata.arcgis.com/datasets/MDC::precinct-group-1/ *with* Doc. 82-37 (Court's Plan) *and* Doc. 82-24 (City's Remedial Plan); *see also* Doc. 82 at 2–3 (links to interactive maps of plans with downloadable GIS files). Instances where only an unpopulated portion of a precinct is split from the rest are not included in these tallies.

The Elections Department's current precincts, the Court's Plan, and the City's Remedial Plan can be compared with each other on Google Maps here: https://bit.ly/3YmWOkM.

concluded that *Purcell* required it to grant a stay. The panel majority never mentioned the standard governing stays pending appeal that this Court established in *Nken v. Holder*, 556 U.S. 418 (2009). It instead began by noting this Court's statement that "lower federal courts should ordinarily not alter the election rules on the eve of an election." App. 264a (quoting *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (per curiam)). The majority then found that statement dispositive for three reasons: (1) the district-court-ordered remedial map "looks a lot like the City's March 2022 redistricting plan the district court enjoined"; (2) Applicants waited too long (nine months) to file their lawsuit challenging the City 2022 map; and (3) Applicants failed to show "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." App. 268a. Acting as factfinder—but without the facts—the panel specifically relied on the City's misrepresentations regarding split precincts to conclude that implementing the Court's Plan would result in voter confusion and hardship for election administrators. App. 269a. Indeed, relying on the City's misleading argument (and lacking record evidence to support the point), the panel criticized the Court's Plan's for splitting 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." App. 269a. The panel ignored the fact that the City's Remedial Plan splits twice as many such precincts compared with the Court's Plan (20 versus 10).[10]

[10] These precincts are 517, 523, 528, 531, 534, 541, 545, 563, 569, 570, 571, 581, 582, 596, 610, 624, 670, 976, 984, and 988 in the City's Remedial Plan, and 531, 536, 564, 566, 581, 596, 610, 669, 670, and 976 in the Court's Plan.

In dissent, Judge Wilson explained that "[b]ecause any urgency in this appeal is attributable to the City's delay, I would not reward them with a stay." App. 275a. Judge Wilson noted that:

> 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.

App. 276a. Judge Wilson concluded that the City had not met its burden with respect to the stay factors this Court established in *Nken*. App. 278a & n.2.

REASONS FOR GRANTING THE APPLICATION

This Court may vacate a stay issued by an appellate court when: (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals"; (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). The Court has exercised this authority in voting-rights cases before and should do so again here. *See, e.g.*, *Rose v. Raffensperger*, 143 S. Ct. 58 (mem.) (Aug. 19, 2022) (vacating Eleventh Circuit stay of injunction); *Frank v. Walker*, 574 U.S. 929 (2014) (vacating Seventh Circuit stay of injunction).

I. The *Purcell* Principle Is Not Implicated.

The panel majority mistakenly relies on the *Purcell* principle as its sole basis for staying the district-court order imposing the Court's Plan. *Purcell* instructs courts to avoid disrupting elections in the months leading up to election day. But here, the district-court order selecting the Court's Plan had been expected since the preliminary injunction issued in late May. The district court had no choice but to order a remedial map. Staying the district court's order selecting the Court's Plan disrupts the election. Vacating the stay corrects that error.

A. The City Agreed to Resolve the District-Court Remedial Process by August 1.

The City cannot invoke *Purcell* after repeatedly agreeing to resolve the district-court remedial process by August 1. That date has guided the district court's and Parties' conduct ever since the County Elections Department's January announcement that it needed the district boundaries by August 1 to implement the November 2023 elections. Doc. 24-30. As the district court put it, "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." App. 130a n.11 (quoting *Jacksonville Branch of NAACP v. City of Jacksonville*, 2022 WL 7089087, at *4 (M.D. Fla. Oct 12, 2022)). The City specifically acknowledged needing to develop a remedial map, field Applicants' challenges, and obtain a ruling from the district court by August 1. Doc. 36 at 22; Doc. 73 at 139:12–15. August 1 guided the Parties' proposed remedial schedules and the district court's remedial scheduling order. Docs. 69, 99.

The panel majority's decision waves all of this away, ignoring key

representations and submissions by the City. To start, the City cannot contest the viability of a date *chosen by its own agent* (the County) as appropriate to get the job done. But in any event, under the City's proposed schedule submitted to chambers before the district court's June 2 status conference, briefing on the City's newly adopted plan would have concluded on July 17—five days *later* than under the schedule the district court set. App. 232a ¶¶ 2–3. Further, the City said that it was "amenable to the Plaintiffs' proposed schedule" in the event the Commission failed to propose a new map, App. 232a ¶ 4—a proposed schedule under which briefing would conclude on July 14, App. 238a ¶ 8, two days later than the district court's schedule, Doc. 69. Additionally, the City was amenable to Applicants' proposal under that scenario that the district court "will approve an interim remedial plan by August 1." App. 238a ¶ 11; App. 232a ¶ 4. The City is in no position to complain about the timing of the district-court order when it agreed to that timing just two months ago and where its own agent—the entity doing the actual work of carrying out the election—said the timing was sufficient.

This Court rejected a similar gambit last year. In *Rose v. Raffensperger*, 143 S. Ct. 58 (mem.) (2022), the Court found the government 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. at 59. So too here, the City cannot object to a district-court order made according to a schedule developed collaboratively with the City and Applicants and pursuant to a deadline set by the City's agent, the election

administrators conducting the election.

B. The Panel Majority Misconstrues the "Status Quo."

For two other reasons, *Purcell* does not apply at this stage of the case. *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). Its underlying principle is that, "[w]hen an election is close at hand, the rules of the road must be clear and settled," so the status quo should usually prevail. *Id.* at 880–81.

First, to the extent there is a status quo to preserve, here the panel majority invokes *Purcell* to *upend* the status quo—the district court's initial injunction of the 2022 Plan and the court-ordered remedy[11]—not preserve it. The judiciary's altering of voting procedures occurred in May, when the district court enjoined the 2022 Plan. The City did not object on *Purcell* grounds at that time and voluntarily dismissed its appeal of that injunction. App. 110a; App. 129a n.10; CA11 Case No. 23-11854, App. Doc. 14. The district court had to fashion a remedial decree "in the light of well-known principles of equity," *North Carolina v. Covington*, 581 U.S. 486, 488 (2017) (citation omitted), and carry out "its own duty to cure illegally gerrymandered districts," *North Carolina v. Covington* ("*Covington II*"), 138 S. Ct. 2548, 2553 (2018). Although the district court was obliged to give the City an opportunity to proffer a legislatively enacted plan, that plan was subject to the court's review and approval. Yet the court

[11] 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*, 140 S. Ct. at 1207.

found that 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-on deadline.[12]

The second reason that *Purcell* is not ultimately implicated here is that the County has not implemented either plan, and has been preparing for both. App. 258a ("[T]he 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* [(August 1, 2023)]*, after Plaintiffs provided the County with the district court-ordered plan*."); App. 244a (Elections Department spokesperson confirming, "we can do certain preliminary work with both sets of maps while waiting for an order from the Appellate Court"). The County received both the City's Remedial Plan and the Court's Plan around the same time (first the Court's Plan, then the City's Remedial Plan two days later). App. 249a, 240a–241a.

Thus, there can be no actionable voter or candidate confusion—the districts are changing regardless of what this Court does, and any hardship on election administrators is exactly the same for both maps (except that the City's Remedial

[12] 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. App. 143a. Even after the Commission adopted a map, the City waited 16 days to submit it to the district court. App. 150a. The City cannot now claim the district court's decision came too late.

Plan splits significantly more precincts than the Court's Plan).[13] Unlike *Merrill*, where the legislature enacted a map, the state implemented it for several months, and the district court enjoined that process—without a replacement map in hand—just four days before the candidate filing deadline and seven weeks before the start of early voting, here the remedial process has already played out, and there is no old map to return to. *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 937 (N.D. Ala. 2022). Rather, the City abandoned its appeal of the initial injunction of the 2022 Plan, which halted implementation of any map, and which came nearly eighteen weeks before the candidate filing deadline, and nearly twenty-three weeks before the start of early voting. *Early Voting*, CITY OF MIAMI, https://www.miamigov.com/My-Government/Elections/Early-Voting. The old map is off the table entirely, and the choice is now between two competing maps, each of which the County received in the last few days and has prepared to move forward with in parallel. All that remains is a choice between them—and the distinction between them is simple: one has been found by a federal district court to be an unconstitutional racial gerrymander, and the other has

[13] The candidate qualifying deadline is not until September 23, meaning candidates will have more than six weeks to prepare. Up until the Eleventh Circuit's stay, candidates could not be sure which map they might run under. *See, e.g.*, Christina Vazquez and Chris Gothner, *After Ruling, Miami Considers New Commission Maps: Is Commish's Election Rival Being Targeted?*, WPLG LOCAL 10 (June 14, 2023), https://www.local10.com/news/local/2023/06/14/after-court-ruling-miami-considers-new-commission-maps-is-commishs-opponent-being-targeted/

Relatedly, the Court's Plan's impacts on incumbents who are *not* up for election this year does not implicate *Purcell* here, or at least is outweighed by the need to remedy the unconstitutional racial gerrymandering. *Accord* Fla. Stat. § 166.0321 (prohibition on considering candidate or incumbent addresses in municipal redistricting, in effect when the district court issued its order).

been found not to be. Thus, the same factors that would supposedly implicate *Purcell* are equally present regardless of which map is implemented. Since one map is an unlawful racial gerrymander, the stay should be vacated and the Court's Plan should remain in effect.

II. Applicants Are Highly 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 Black representative, and one Anglo representative.[14] App. 112a–113a, 116a. 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." *Students For Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2272 (2023) (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).

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[14] *See, e.g.*, Doc. 24-17 at 8:14–16 ("Our goal here is to have . . . a white district"); Doc. 24-15 at 4:18–5:1 (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 at 100:16–17 (sharing "intentions here today" "to have guaranteed Anglo representation, and to have three districts that were Hispanic"); Doc. 24-12 at 7:2–3 ("[W]e have to make sure that we keep the . . . ethnic integrity . . . in those two districts.").

The district-court injunction prevented the City from using that intentionally gerrymandered map in this November's elections. The City voluntarily dismissed its appeal of that injunction. CA11 Case No. 23-11854, App. Doc. 14. That preliminary finding was not presented to the Eleventh Circuit for review in its appeal of the remedial map order; the preliminary injunction stands unchallenged. That precludes the City's arguments, and the Eleventh Circuit majority's conclusions, about delay seeking preliminary relief, which the district court weighed in the injunction. App. 129a.

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 2022 Plan stands enjoined until trial on the merits, the sole issue presented to the Eleventh Circuit was whether the district court properly rejected the City's Remedial Plan and instead chose to adopt Applicants' proposed map. The merits of the City's appeal do not concern an original racial gerrymandering

challenge to the City's Remedial Plan, but how the district court evaluated the Remedial Plan after a finding that the 2022 Plan was substantially likely to violate the Equal Protection Clause.

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 has "its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections." *Covington II*, 138 S. Ct. at 2553. 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 v. Johnson*, 521 U.S. 74, 86 (1997) (holding that a remedial districting plan cannot be sustained if it "would validate the very maneuvers that were a major cause of the unconstitutional districting").

The district court's factual findings support its conclusion that the City's remedial plan failed to remedy the blatant constitutional violations of the 2022 Plan. App. 142a–143a (discussing the May 11 Commission meeting, where commissioners openly criticized the R&R and instructed their consultant to replicate the racial sorting of the 2022 Plan); App. 143a–150a (ensuring the racial sorting persists at the June 14 meeting, where commissioners tweaked their consultant's draft to hew even more closely to the 2022 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. App. 142a–143a. The City failed to fix the "infirmities" that the district court identified at the outset of the remedial process. Doc. 99 at 12:13. Instead, its commissioners knowingly reaffirmed their intent to gerrymander all five districts to achieve a balance of three Hispanic, one Black, and one Anglo commissioner. The product of that instruction was more than 94% identical to the 2022 Plan and retained specific, race-based features of the 2022 Plan. App. 162a. No presumption of good faith can overcome the blatant unconstitutionality of this instruction. Applicants met their burden to overcome the presumption of good faith, and the City offered no justification to satisfy strict scrutiny.

The district court properly rejected the City's defense that it was merely retaining the cores of existing districts, because "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 claimed motivated the Remedial Plan are either (a) nowhere to be found in the actual record of the commissioners' decision-making (political considerations, where candidates reside), or (b) had only a minimal impact on the shapes of districts such that race still predominated in their design (where commissioners invested district resources). App. 161a, 166a, 172a, 176a. And for the one district where the Voting Rights Act requires the use of race to prevent minority vote dilution, District 5, the district court found that the City's remedial map was not narrowly tailored, App. 174a–175a, while the

Applicants' map was, App. 183a–184a. The district court rejected the City's argument that the two competing maps are too similar for one but not the other to be constitutional. App. 184a–185a.

As for the Eleventh Circuit, the panel majority's only comment on the merits is that the court-ordered map "looks a lot like" the enjoined map. App. 267a. But the Court's Plan unwinds all the specific, race-based problems in the enjoined map,[15] and the district court found it better comported with traditional redistricting principles, whereas the City's Remedial Plan deviated from traditional principles in ways that pointed to racial predominance. App. 177a–185a, 197a–198a. To the extent the Court's Plan looks similar in some way to the Remedial Plan, that is because the district court also accommodated the City's race-neutral policy preferences. *See* App. 197a–198a.

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

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[15] These included (1) separating a white-majority part of the Coconut Grove neighborhood that one commissioner compared to "bone" in the "Anglo district" from an adjacent part "where the Hispanic voters live" and where "there's ethnic diversity" into a "Hispanic district"; (2) retaining in a "Hispanic district," and excluding from the "Black district," an irregular appendage "described by the Commissioners as an 'attractive' area that was 'mainly Hispanic or Anglo,'" App. 37a, 42a, 75a; (3) balancing the Hispanic population among three districts by splitting the Flagami, Shenandoah, Silver Bluff, and Little Havana neighborhoods; and (4) dividing the neighborhoods of Allapattah, Omni, Downtown, and Brickell along racial lines, replicating the Commission's strategy of drawing the 2022 Plan to "find adjacent areas with similar demographics." Doc. 83 at 12–14, 16–21, 23–25.

properly resolves the limited remedial issue facing the district court as a result of the City's explicit racial sorting.

III. Residents of Miami Would Be Irreparably Harmed Absent Vacatur.

The Eleventh Circuit imposes a blatantly unconstitutional map that a federal court found intentionally divides Miami residents by race, assigning residents to districts to match the "faces" of their representative, in an overt system of racial balancing supposedly designed to achieve diversity of representation and "harmony in our city." *See, e.g.*, App. 20a, 36a, 68a, 72a, 142a, 159a. The federal court found that map unconstitutional, the City abandoned its challenge to that determination on immediate appeal, and then the City created a remedial map that intentionally replicates the same constitutional violations.

Because of the Eleventh Circuit's stay, all Miami residents have been classified by race into their City Commission districts, and will be forced to vote in those race-based districts this November. "Racial classifications with respect to voting carry particular dangers." *Shaw*, 509 U.S. at 657. Miamians will suffer irreparable harm if elections are held under the unconstitutional map that classifies and sorts them into districts resembling "political apartheid." *Id.* at 647. Absent vacatur, Miamians will be relegated to racially gerrymandered representation for another four years, despite the district court's order remedying this unconstitutional map. This Court has granted vacatur in similar circumstances before. *See, e.g.*, *Rose v. Raffensperger*, 143 S. Ct. 58 (Mem.) (Aug. 19, 2022) (granting vacatur of an Eleventh Circuit stay one year ago in similar circumstances); *see also Lucas v. Townsend*, 486 U.S. 1301, 1305

(1988) (Kennedy, J., in chambers) (finding "irreparable harm likely would flow" if an election were allowed to "go forward" despite its violating the Voting Rights Act); *Clark v. Roemer*, 500 U.S. 646, 655 (1991) (district court erred by not enjoining elections that violated the Voting Rights Act); *cf. Wis. Leg. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022) (reversing state court's "uncritical majority-minority district maximization" and remanding for state court to develop new map weeks before candidate filing deadline).

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

IV. There Is a Reasonable Prospect This Court Would Review the Merits

This Court has regularly granted review of racial gerrymandering claims brought under the federal constitution. From *Shaw v. Reno*, 509 U.S. 603 (1993) through *Cooper v. Harris*, 581 U.S. 285 (2017), *Bethune-Hill v. Virginia State Board of Elections*, 580 U.S. 178 (2017), and *Abbott v. Perez*, 128 S. Ct. 2305 (2018), this Court has demonstrated that the predominant use of race in drawing district lines must be subject to strict scrutiny and narrowly tailored to a compelling government interest. This Court has never approved the use of race in drawing lines merely to achieve "balance" or address generalized diversity concerns. The City intentionally

flaunted strict scrutiny's clear commands. Because of the City's blatant disregard for constitutional principles concerning racial gerrymandering, this Court would likely grant review of an Eleventh Circuit decision upholding any such racial gerrymander.

CONCLUSION

For the foregoing reasons, this Court should vacate the stay entered by the Eleventh Circuit. The Court should also grant an immediate administrative stay while it considers this emergency application.

Respectfully submitted this 6th day of August, 2023,

/s/ Daniel B. Tilley

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