UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:22-cv-24066-KMM

GRACE, INC.; ENGAGE MIAMI, INC.; SOUTH DADE BRANCH OF THE NAACP; MIAMI-DADE BRANCH OF THE NAACP; CLARICE COOPER; YANELIS VALDES; JARED JOHNSON; and ALEXANDER CONTRERAS,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.
_____/

DEFENDANT'S MOTION TO STAY CASE PENDING APPEAL AND TO CONTINUE TRIAL AND PRETRIAL DEADLINES

Pursuant to Rule 62(d) Florida Rules of Civil Procedure, Defendant, City of Miami (the "City"), moves to stay discovery and further proceedings pending appeal and to continue the trial and pretrial deadlines. Plaintiffs have indicated that they seek to supplement their pleadings, as they must because the Amended Complaint is now moot. The City does not oppose that filing as long as the case is continued and stayed pending appeal to allow the issues raised in the Court's remedial order and echoed in the proposed supplemental pleading may be addressed by the Court of Appeals.[1]

[1] While the City has had less than 24 hours to review the new pleading, it does intend to move to dismiss the Supplemental Pleading on the merits because it fails to state a claim and because Plaintiffs are judicially estopped from taking positions that are contrary to the positions that they took in this case to obtain the preliminary injunction.

Plaintiffs, Grace, Inc. ("Grace"), Engage Miami, Inc. ("Engage Miami"), South Dade Branch Of The NAACP ("South Dade NAACP"), Miami-Dade Branch Of The NAACP ("Miami-Dade NAACP"), Clarice Cooper, Yanelis Valdes, Jared Johnson, Alexandra Contreras and Steven Miro (collectively, the "Plaintiffs"), filed this case on December 15, 2023 (DE 1), and amended the complaint on February 10, 2023. DE 23. That same day they filed a motion for preliminary injunction. DE 26. Defendants moved to dismiss the Amended Complaint. DE 34. This Court set the case for trial on January 29, 2024. DE 32. Pursuant to this Court's order, the discovery cut off is October 21, 2023. *Id*.

On March 29, the Court's Magistrate conducted an evidentiary hearing on Plaintiffs' Expedited Motion, and issued her Report and Recommendations on May 3, 2023. *See* DE 52. The Magistrate found that Plaintiffs had a likelihood of success on the merits that the City's Redistricting Plan was unconstitutional. *Id*. This Court adopted that recommendation and found that the City's redistricting map set forth in City of Miami Resolution 22-131 (the "Enjoined Plan") unconstitutionally racially gerrymandered the City to preserve "three Hispanic districts, one Black district, and one Anglo district." DE 60 p.16; DE 94 pp.20-21. The Court issued an order enjoining the City from going forward with that plan for the upcoming election on November 7, 2023. DE 60.

On June 1, 2023, Plaintiffs moved to stay discovery while the parties engaged in mediation and a remedial process. The following day, the Court entered an order granting the stay "until the interim remedial phase of this case has concluded." DE 67. The parties unsuccessfully mediated, and then the City adopted a new plan enacted in Resolution 23-271 (the "New Plan"). DE 77. This was not a remedial plan insofar as the Enjoined Plan has been superseded by the New Plan and will no longer reflect the City's districts regardless of the

outcome of this case. *Id*. The City then moved to dismiss this action as moot. DE 80. Plaintiffs objected to the New Plan [DE 83]. This Court denied the motion to dismiss as moot, not on the merits, but because it found it had the remedial authority to ensure that any new plan passed "does not suffer from the same constitutional infirmities" as the Enjoined Plan. DE 91 p.10.

On July 30, 2023, this Court entered an Order that rejected the "New Plan" finding that it failed to correct the prior racial predominance of the Enjoined Plan (the "Remedial Order"). DE 94 pp.27,35-39. The Court mandated that the City adopt a plan proposed by Plaintiffs (Plan 4 or the "Mandated Plan"). The City appealed [DE 96] and filed a motion for stay. DE 97. The Appellate Court stayed the Remedial Order on August 4, 2023. Exhibit A (ECF 25). The Court observed that Plaintiffs Map 4 looked a lot like the New Plan and had a similar racial make-up. *Id*. p.5. Plaintiffs then filed an application with the Supreme Court of the United States to reverse that stay. On August 17, 2023 the Supreme Court denied the application. Exhibit B. The appeal in the Eleventh Circuit is proceeding on an expedited basis with the City's brief due on September 11, 2023. Exhibit C.

The pleadings are not closed and this case is currently not at issue. The Amended Complaint is solely directed to the now moot Enjoined Plan. It should either be dismissed as moot, or Plaintiffs must file an amended (or supplemented) pleading to challenge the New Plan, which they have indicated their intention to do.[2] With the remedial phase currently on appeal (and thus not concluded), the discovery stay appears to be still in effect. Plaintiffs apparently feel otherwise and have served a request for production of documents. If the stay is lifted, then the parties only have two months left to conduct discovery in this significant case. Additionally,

[2] Plaintiffs submitted the proposed pleading to the City for review to see if the City opposes it as part of their conferral.

the appeal will necessarily address the merits of whether the New Plan "suffers from the same constitutional infirmities" as the Enjoined Plan, and thus whether it is unconstitutional. The outcome of the appeal will significantly shape this proceeding.

For example, in their challenge to the New Plan, and in this Court's Order rejecting the New Plan, the basis for the position that District 5 is an unconstitutional racial gerrymander was that the City failed to consider a functional analysis prior to adopting a Voting Rights Act ("VRA") district with a 50.3% Black Voting Age Population ("BVAP"), notwithstanding that it is was not statistically different than the BVAP in Plaintiffs' proposed plans. This Court rejected that narrow tailoring was objective test as to whether it is the least restrictive means because the Supreme Court adopted a subjective safe harbor in this context that, as long as the legislative body had a strong basis in evidence for the belief that it was narrowly tailored, such as considering a functional analysis,[3] the district could not be challenged. DE 94 pp. 38-39 (citing *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 580 U.S. 178, 187 (2017). This question is squarely before the Court of Appeal, and it is also a key part of Plaintiff's supplemental pleadings. Indeed, it must be because they cannot claim that 50.3% is not objectively narrowly tailored in light of their own proposed districts. If District 5 is not unconstitutional, then none of the racial gerrymandering of District 5 (which affected the

[3] A functional analysis is used to determine whether the Legislature in good faith believed a VRA district was required. *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 580 U.S. 178, 193 (2017) Is there a large enough population, does it vote cohesively, and is there racially polarized voting? Plaintiffs conceded all of these points, and the only issue was whether 50.3% was excessive.

adjoining districts) is unconstitutional. This question of law on appeal will have an immense impact on this case and on the scope of discovery and expert analysis.

It is two and a half months until the election. Discovery in this case will burden the City and the Commissioners while they are preparing for the election. For example, Plaintiffs have served a Request for Production related to every redistricting cycle for the past three decades. *See* Request for Production, Exhibit D. Additionally, the Plaintiffs have requested the depositions of City Commissioners and the City Attorney—depositions that will undoubtedly involve discovery motions involving legislative privilege and attorney-client and attorney work product privileges. Moreover, as the Plaintiffs have now indicated their intent to amend the pleadings to redirect their challenge to the New Plan, notwithstanding the fact that the time for amendment of the pleadings has passed, conducting discovery on a yet-to-be-filed amended complaint would be premature.

"The district court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 n.7 (11th Cir. 2004) (quoting *Clinton v. Jones*, 520 U.S. 681, 706 (1997)). The length of the requested stay will not be indefinite or immoderate. *See Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 (11th Cir. 2000). Defendant's request for stay is only pending the outcome of the appeal, which as noted above, has been expedited at the Plaintiffs' request and Defendant's consent.

Where, like here, the case is not at issue and the pleading is subject to a dispositive motion[4] the Eleventh Circuit has held the district court should generally stay all discovery

[4] The Amended Complaint is subject to a motion to dismiss and the Supplemental Complaint will also be subject to a dispositive motion.

during the pendency of that motion. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997) (reversing district court's order compelling discovery entered during pendency of motion to dismiss). Though the district court is vested with discretion over discovery matters, "[t]his discretion is not unfettered…" *Id.* at 1367. "Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should … be resolved before discovery begins." *Id.* "[N]either the parties nor the court have any need for discovery before the court rules on the motion." *Id.* As the Eleventh Circuit explained in *Chudasama*, "[i]f the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided." *Id.* at 1368. The court reasoned:

> Allowing a case to proceed through the pretrial processes with an invalid claim that increases the costs of the case does nothing but waste the resources of the litigants in the action before the court, delay resolution of disputes between other litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system.

Id.

It is appropriate to delay discovery until the district court determines that there is a cognizable cause of action asserted in the complaint. *Moore v. Potter*, 141 Fed. Appx. 803, 807-08 (11th Cir. 2005) (affirming stay of discovery during pendency of motion to dismiss complaint); *see also Solar Star Sys., LLC v. Bellsouth Telecomms., Inc.*, No. 10-21105-CIV, 2011 WL 1226119, *1 (S.D. Fla. Mar. 30, 2011) (staying all discovery pending ruling on motion to dismiss that is "potentially dispositive of the entire action"); *Staup v. Wachovia Bank, N.A.*, No. 08-60359-CIV, 2008 WL 1771818, *1 (S.D. Fla. Aug. 16, 2008) (staying all discovery, including Rule 26(a) initial disclosures, until resolution of pending motion to dismiss); *Carcamo v. Miami-Dade County*, No. 03-20870-CIV, 2003 WL 24336368, *1 (S.D. Fla. Aug. 1, 2003)

(granting stay of discovery until court rules on pending motion to dismiss); *In re Managed Care Litig.*, No. 00-1334-MD, 2001 WL 664391, *3 (S.D. Fla. June 12, 2001) (staying discovery until ruling on pending motions to dismiss).

Even absent such a motion, such a stay would be appropriate here. The factors to consider in deciding whether to grant a stay of discovery in the absence of a dispositive motion are: "(1) whether the litigation is at an early stage; (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Chico v. Dunbar Armored, Inc.*, 2017 WL 4476334, at *2 (S.D. Fla. Oct. 6, 2017) (quoting *Grice Eng'g, Inc. v. JG Innovations, Inc*., 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010)); *see also Prisua Eng'g Corp. v. Samsung Elecs*. Co., 472 F. Supp. 3d 1183 (S.D. Fla. 2020). Plaintiffs supplemental pleading is essentially a new action. Additionally, as set forth above, a stay pending a resolution of the appeal will substantially streamline the issues and reduce the burden on the parties and the Court.

There will be no prejudice to Plaintiffs from the Stay. The November 7, 2023 election is no longer at issue. In accordance with the stay issued by the Eleventh Circuit, it will be conducted according to the New Plan. The next election is not until November 2025. Staying this case and continuing the trial date will provide time for the Eleventh Circuit to rule, providing necessary guidance on the applicable law, and for the parties to conduct discovery and develop the case.

Certificate of Conferral

I certify that prior to filing this motion, I attempted to resolve the matter in good faith by discussing the relief requested via e-mail on August 24, 2023 with opposing counsel. They oppose the request.

WHEREFORE, Defendant respectfully asks this Court to stay the Order pending appeal and continue the trial and pretrial deadlines in this case.

Dated this 25th day of August, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Christopher N. Johnson*
Christopher N. Johnson, Esq.

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12472

GRACE, INC.,
ENGAGE MIAMI, INC.,
SOUTH DADE BRANCH OF THE NAACP,
MIAMI-DADE BRANCH OF THE NAACP,
CLARICE COOPER, et al.,

Plaintiffs-Appellees,

versus

CITY OF MIAMI,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

D.C. Docket No. 1:22-cv-24066-KMM

Before WILSON, BRANCH, and LUCK, Circuit Judges.

BY THE COURT:

A little more than three months before City of Miami voters go to the polls to elect commissioners, the district court adopted the plaintiffs' remedial plan to redraw the borders for the City's five single-member districts and ordered the City to implement the remedial plan in lieu of the City's redistricting legislation. Yet the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *see also League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) ("[F]ederal district courts ordinarily should not enjoin state election laws in the period close to an election." (quotation omitted)); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1284 (11th Cir. 2020) ("The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (quotation omitted)). This is "called the *Purcell* principle," *League of Women Voters*, 32 F.4th at 1370, which comes from the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).[1]

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[1] In *Purcell*, the Supreme Court considered "an application to enjoin operation of voter identification procedures just weeks before an election" in Arizona and held that the court of appeals "was required to weigh, in addition to the

"That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion—and thereby protects the [local] interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. "When an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanugh, J., concurring). That's because running an election "is a complicated endeavor." *Id.* "Lawmakers initially must make a host of difficult decisions about how best to structure and conduct the election." *Id.* "[V]olunteers must participate in a massive coordinated effort to implement the lawmakers' policy choices on the ground before and during the election, and again in counting the votes afterwards." *Id.* "And at every step, state and local officials must communicate to voters how, when, and where they may cast their ballots through in-person voting on election day, absentee voting, or early voting." *Id.*

"[E]ven seemingly innocuous late-in-the-day judicial alterations to [local] election laws can interfere with administration of an

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harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." 549 U.S. at 4.

election and cause unanticipated consequences." *League of Women Voters*, 32 F.4th at 1371 (quotation omitted). "If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). "Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The *Purcell* "principle also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring).

For these reasons, and others, "when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this [c]ourt, as appropriate, should correct that error." *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also League of Women Voters*, 32 F.4th at 1371 ("[I]f a district court violates that principle, the appellate court should stay the injunction, often (as it could not do under the traditional test) while expressing no opinion on the merits." (cleaned up)). "[I]t would be preferable if federal district courts did not contravene the *Purcell* principle by rewriting [local] election laws close to an election. But when they

do, appellate courts must step in." *Democratic Nat'l Comm.*, 141 S. Ct. at 32 (Kavanaugh, J., concurring). So we do.

Still, the plaintiffs may "overcome" the *Purcell* principle, "even with respect to an injunction issued close to an election," if they "establish[] at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff[s]; (ii) the plaintiff[s] would suffer irreparable harm absent the injunction; (iii) the plaintiff[s] have not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *accord League of Women Voters*, 32 F.4th at 1372–73 (applying Justice Kavanaugh's framework from *Merrill*). Here, the plaintiffs have not made that showing.

First, it is not clearcut that the remedial plan the district court adopted remediates the alleged racial sorting in the City's redistricting legislation. Comparing the maps, the district court's remedial plan looks a lot like the City's March 2022 redistricting plan the district court enjoined. And, comparing the population data, the racial makeup of the district court's remedial plan is close to the racial makeup of the City's June 2023 redistricting plan.

Second, as to undue delay, the City adopted its redistricting legislation in March 2022. The plaintiffs waited nine months—December 2022—to file their lawsuit. And then they waited two more months—February 2023—to move for a preliminary injunction. In their response to the stay motion, the plaintiffs do not explain the eleven month delay.

Finally, the plaintiffs argue that, under *Purcell*, the City did not submit any evidence to show the cost, confusion, or hardship of the district court's remedial plan. But the plaintiffs are confused about their burden under *Purcell*. Under the *Purcell* principle, "lower federal courts should ordinarily not alter the election rules on the eve of an election." *New Ga. Project*, 976 F.3d at 1284 (quotation omitted). But *Purcell* is not "absolute." *League of Women Voters*, 32 F.4th at 1372. Instead, it "simply heightens the showing necessary for [the] plaintiff[s] to overcome the [s]tate's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *accord League of Women Voters*, 32 F.4th at 1372 ("[W]e agree with Justice Kavanaugh that *Purcell* only (but significantly) heightens the standard that a plaintiff must meet to obtain injunctive relief that will upset a state's interest in running its elections without judicial interference." (footnote and quotation omitted)).

To "overcome" the *Purcell* principle "with respect to an injunction issued close to an election," the "plaintiff[s] [must] establish[] . . . the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Because of the City's "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws," the plaintiffs must make the showing that the remedial plan is feasible without significant costs, confusion, or hardship.

They have not made that showing. At best, the plaintiffs argue that there will be no chaos in election administration because the elections' supervisor said she could implement the new map by August 1, 2023. But the absence of chaos is hardly acceptable under *Purcell*. This says nothing about the significant costs, confusion, and hardships on candidates, voters, and the public. Even if the elections' supervisor can pull off the election (although the plaintiffs never mention the significant cost of pulling it off), the district court's remedial plan still imposes significant costs on candidates, voters, and the public. The district court's remedial plan, for example, splits some existing precincts between districts that are up for election (not all the districts are up for election in November) and between one district that is up for election and one that is not. The result, therefore, of implementing the district court's remedial plan could very likely be voter confusion: voters who were under the impression that they would be casting their ballots in November for seats in their district will no longer be doing so, and vice versa. Because "the plaintiffs have not established that the changes are feasible without significant cost, confusion, or hardship," they "cannot overcome even a more relaxed version of the *Purcell* principle." *Id.* at 881–82.

The plaintiffs push back that *Purcell* is inapplicable for two reasons. First, they contend that the City cannot rely on the *Purcell* principle "in light of [its] previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief." *See Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022). But the City never made that representation

to the district court. Here are the two parts of the record that the plaintiffs cite in support. In its response to the plaintiffs' motion for a preliminary injunction, the City wrote:

> Plaintiffs' Motion seeking an injunction is either a year too late or 25 years too late. The redistricting occurred in March of 2022. This case was filed nine months later, in December. Plaintiffs then waited two more months before filing the Motion. A special election has already occurred last month, and another election is coming in November. Plaintiff[s] admit that the new districts would have to be set by August 1. Even if there is a ruling on the Motion, new districts would have to be drawn, face inevitable challenges by Plaintiffs, and be ruled on by this Court, and this does not even factor in any appellate remedies. Plaintiffs make no excuse and give no explanation for their delay.

(citations omitted). This is not a representation that the district court's schedule was sufficient to enable effectual relief. On the contrary, the City argued that, because of the plaintiffs' delay in bringing their complaint to court, there was not enough time to get full review of any remedial plan.

The other part of the record is more of the same. At the hearing on the preliminary injunction motion, the City told the magistrate judge:

> But the question then becomes, without any alternative math, and given that we are down to the wire, and that by August 1st, according to the Division of

> Elections, according to the e-mail they put in, there needs to be a final, non-appealable map that's gonna happen by November, and we would be in a situation—and they did wait; they waited nearly a year for the preliminary injunction to bring it. You would be in a situation where we would essentially be drawing the same maps and they would be rejecting them conceivably and then coming back here to have rulings upon them.

The City was clear that the August 1, 2023 deadline worked only if the district court's remedial plan was "a final, non-appealable map." But the district court didn't adopt a "final, non-appealable map." It adopted a temporary remedial plan while it considered the merits of the plaintiffs' claim that the City's redistricting legislation violated the Fourteenth Amendment. And, now, the temporary remedial plan is on appeal. Again, the City did not represent that the district court's schedule was sufficient to enable effectual review in time for the November election.

Even the district court acknowledged that the City raised the *Purcell* problem throughout the litigation. As the district court explained in its order denying the City's stay motion:

> In the Motion, Defendant again raises the argument that *Purcell* applies to the instant Action. In fact, Defendant copies its argument regarding how *Purcell* should alter the standard by which the Court considers the instant Motion verbatim from its prior motion to stay. The Court has already addressed whether *Purcell* applies, not just once, but twice. It will not

> evaluate the argument a third time. Therefore, finding *Purcell* inapplicable to the instant Action, the Court reviews the Motion under the traditional framework.

(footnotes and citations omitted). The district court understood that the City did not waive its *Purcell* argument.

Second, the plaintiffs contend that the *Purcell* principle doesn't apply because the district court's order adopting the remedial plan is the status quo and granting a stay (as the City asks us to do) would be tinkering with the election laws in violation of *Purcell*. But "[c]orrecting an erroneous lower court injunction of a [local] election law does not itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct late-breaking lower court injunctions of a [local] election law. That would be absurd and is not the law." *Merrill*, 142 S. Ct. at 882 n.3 (Kavanaugh, J., concurring); *see also Democratic Nat'l Comm.*, 141 S. Ct. at 31–32 (Kavanaugh, J., concurring) ("Applicants retort that the *Purcell* principle precludes an appellate court . . . from overturning a district court's injunction of a state election rule in the period close to an election. That argument defies common sense and would turn *Purcell* on its head. Correcting an erroneous lower court injunction of a state election rule cannot itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule. That obviously is not the law.").

The dissenting opinion gives its own reasons for why the *Purcell* principle does not apply. First, it says, the City isn't entitled

to a stay because it delayed seeking review of the district court's preliminary injunction. But the dissenting opinion misunderstands what the City is appealing. The City isn't seeking review of the preliminary injunction. The City is seeking review of the order, issued months later, adopting the plaintiffs' remedial plan. The remedial plan didn't exist before July 31, 2023. The district court adopted one that day. And, that same day, the City appealed and sought a stay pending appeal. There was no remedial plan for the City to appeal before July 31; the preliminary injunction didn't impose one. The City was the opposite of dilatory.

Second, the dissenting opinion contends that applying *Purcell* is perverse because it incentivizes the City to submit a constitutionally problematic map close to election time. But there's nothing perverse about what the City did here. The City approved its redistricting legislation in March 2022. The plaintiffs waited eleven months to seek an injunction. We're rubbing up against the election because of the plaintiffs' delay. The City, in contrast, approved its redistricting twenty months before voters are set to go to the polls in November 2023.

Third, the dissenting opinion relies on an unpublished, nonprecedential order in *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 22-14260, 2023 WL 119425 (11th Cir. Jan. 6, 2023). Of course, that order is not binding on anyone, including us. But, to the extent it was, the *Jacksonville Branch* order didn't discuss or analyze the *Purcell* principle. Not one word about the application of

Purcell to these facts. It says nothing about the issues we address in this order.

* * * *

"[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). As in *Merrill*, this is one of those times. While we "express[] no opinion on the merits" of the plaintiffs' claims, *League of Women Voters*, 32 F.4th at 1371 (quotation omitted), the "*Purcell* principle requires that we stay" the district court's order adopting the remedial plan and ordering the City to implement it. *See Merrill*, 142 S. Ct. at 882 (Kavanaugh, J., concurring). We therefore grant the City's emergency motion to stay.

WILSON, Circuit Judge, Dissenting:

Today, the majority allows the City of Miami's November 2023 municipal elections to proceed under a map that the district court found "perpetuates the impact of the Enjoined Plan's unconstitutional racial gerrymandering." The majority faults the Plaintiffs for dilatory litigation and applies the *Purcell* principle[1] to stay the implementation of the district court's interim plan. Because any urgency in this appeal is attributable to the City's delay, I would not reward them with a stay. Accordingly, I respectfully dissent.

As the majority describes, in February of this year, the Plaintiffs sued the City of Miami to enjoin newly drawn district maps. In May, the district court preliminarily enjoined the City's use of those maps (the Enjoined Plan) and, in consultation with the parties, set a schedule for the creation of remedial maps. The City's officials stated that they needed new maps by no later than August 1, 2023. The City appealed the preliminary injunction and sought a stay pending appeal from the district court, which was denied. The City could have then petitioned this court for a stay, but it did not. Ultimately, it voluntarily dismissed that appeal.

Around the same time, the City adopted a new map (the Remedial Plan) and submitted it to the district court. Because of the preliminary injunction, the district court had to review the Remedial Plan before it could be used and had to ensure that it corrected

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[1] *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam).

the constitutional defects found in the Enjoined Plan. The district court compared the Enjoined Plan and the Remedial Plan, analyzing shifts in populations and geographic boundaries. Ultimately, as the factfinder, the district court concluded that there was both direct and circumstantial evidence that the Commissioners intended for the Remedial Plan to preserve the prior racial breakdown of the Enjoined Plan. Thus, the district court found that rather than remedying unconstitutional gerrymandering, the Remedial Plan perpetuated it. Because neither the Enjoined Plan nor the Remedial Plan passed constitutional muster, the district court ordered that an interim plan submitted by the Plaintiffs be used. The district court chose this plan because it respected the City's legitimate, non-race-based policy goals; complied with traditional redistricting criteria; and adhered to state and federal law.

In asking us to invoke *Purcell* to stay the district court's interim plan, the City is in effect asking us to overturn not just the district court's order denying approval of the Remedial Plan, but because the district court found the Remedial and Enjoined Plans to be substantially similar in constitutional inadequacies, the City essentially requests that we reverse the merits of the preliminary injunction entered in May of this year. Yet, the time for challenging that order has long since passed. The City was fully entitled to appeal that order—in fact, it did appeal initially, but then opted to voluntarily dismiss its case.

Thus, the emergency, time-constrained position in which we find ourselves is not the result of the "undue delay," Maj. Op.

at 6, of the Plaintiffs in bringing this suit, but rather the City's choice to not pursue a stay at the preliminary injunction stage. The City seeks the extraordinary equitable remedy of a stay pending appeal. But, "a party's inequitable conduct can make equitable relief inappropriate." *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022). Such is the case here. *See Wreal, LLC v. Amazon.com Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("A delay in seeking a preliminary injunction of even only a few months . . . militates against a finding of irreparable harm."); *see also Texas v. Biden*, 10 F.4th 538, 558 (5th Cir. 2021) ("The self-inflicted nature of the [movant's] asserted harm "severely undermines" its claim for equitable relief." (cleaned up)). Just as a stay applicant may not delay, and self-inflict the imminent harm it seeks relief from, in my view the City may not delay in seeking a stay to justify invocation of the *Purcell* principle. Because of the City's dilatory actions in this litigation, I would not grant them a stay.

Before I conclude, I would like to make two further points. First, the majority focuses on the fact that *Purcell* does not prevent this court from correcting the district court's *erroneous* injunction. But again, if the City believed the preliminary injunction was erroneous, it abandoned that position by dismissing its prior appeal. What the City now asks this court to do is stop an *interim* and (what the district court concluded is a) constitutionally sound map from being used in favor of the Remedial Plan that was found to perpetuate the same racial gerrymandering that plagued the Enjoined Plan. Allowing the *Purcell* principle to be invoked in situations like this creates a perverse incentive. Loose application of the *Purcell*

principle incentives litigants like the City to submit constitutionally problematic maps to the district court close in time to the election, with the knowledge that, if the district court disapproves the map the City will receive a stay from this court. Respectfully, I would not incentive such behavior.

Second, we have addressed a similar situation in a recent case from the City of Jacksonville. *Branch of NACCP v. City of Jacksonville*, No. 22-14260, 2023 WL 119425 (11th Cir. Jan. 6, 2023). There, the City of Jacksonville asked us to allow the City's approved remedial plan to go into effect despite the district court finding that the remedial plan perpetuated the constitutional violations of the original enjoined plan. *Id.* at *2. We declined to do so because this request in effect required us to rule on the constitutionality of the remedial plan. *Id.* at *3. "[A]nd an order on a motion for stay pending appeal is not a resolution of the appeal itself." *Id.* Here, the City is asking us to do the exact same thing. Staying the district court's interim plan in effect casts our approval on the constitutionality of the Remedial Plan.

Finally, because I would find that the *Purcell* principle does not apply, I would consider the typical stay factors[2] and find that the City has not met its burden.

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[2] In determining whether to grant a stay, the court considers the following: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other

I respectfully dissent.

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parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation marks omitted).

(ORDER LIST: 600 U.S.)

THURSDAY, AUGUST 17, 2023

ORDER IN PENDING CASE

23A116 GRACE, INC., ET AL. V. MIAMI, FL

The application to vacate stay presented to Justice Thomas and by him referred to the Court is denied.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 18, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-12472-D
Case Style: GRACE, Inc., et al v. City of Miami
District Court Docket No: 1:22-cv-24066-KMM

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Briefing
Pursuant to 11th Cir. R. 31-1, the appellant's brief is due on or before September 11, 2023. The appendix is due 7 days after the appellant's brief is filed. An incarcerated pro se party is not required to file an appendix.

The appellee's brief is due within 30 days after the service of the last appellant's brief. The appellant's reply brief, if any, is due within 21 days after the service of the last appellee's brief. This is the only notice you will receive regarding the due date for briefs and appendices.

Please see FRAP 32(a) and the corresponding circuit rules for information on the form of briefs and FRAP 32(b) and 11th Cir. Rules 30-1 and 30-2 for information on the form of appendices.

This is the only notice you will receive concerning the due date for filing briefs and appendices. See Fed.R.App.P. 28, 30, 31, 32, the corresponding circuit rules, General Order 39 and the Guide to Electronic Filing for further information. Pro se parties who are incarcerated are not required to file an appendix.

If you have not entered your appearance in this appeal, please note that the clerk may not process your filings. See 11th Cir. R. 46-6. Appearance of Counsel Forms are available on the court's Web site.

Attorneys must file briefs electronically using the ECF system. Use of ECF does not modify the requirements of the circuit rules that counsel must also provide four (4) paper copies of a brief

to the court, nor does it modify the requirements of the circuit rules for the filing of appendices in a particular case.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

BR-1CIV Civil appeal briefing ntc issued

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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

GRACE, INC., *et al*.,

Plaintiffs,

v.

CITY OF MIAMI,

Defendant.

_____/

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs serve their First Request for Production of Documents on the City of Miami. Plaintiffs request that the City provide the following documents and things herein requested within 30 days by email; at the offices of the ACLU of Florida, 4343 West Flagler Street, Suite 400, Miami, FL 33134; or in such other method as may be agreed upon by counsel. Each document request is subject to the definitions and instructions set forth below. These requests are continuing in nature, as provided in Federal Rule of Civil Procedure 26(e).

DEFINITIONS

1. "City" or "City of Miami" means the municipal corporation the City of Miami, its elected and appointed officials, its component departments and offices, its board and commissions, and all other entities formally or informally associated with the government of Miami.

2. "Associated with" means employed by, under contract with, acting as the agent of, representing, or otherwise affiliated with, an organization or person.

3. "Commission" and "City Commission" means the Miami City Commission.

4. "Commissioners" means any members of the Miami City Commission during the period from 1996 to the present, inclusive.

5. "You" or "Your" means the City of Miami and all persons acting or purporting to act on its behalf, including its agents and employees.

6. "Communication" is used in the broadest possible sense and means every manner or means of disclosure, transfer, or exchange of oral or written information between one or more persons, entities, devices, platforms, or systems.

7. "Complaint" means the First Amended Complaint in this case, ECF No. 23, and any subsequently filed amended complaints.

8. "Concerning," "reflecting," "regarding," and "relating to" are used in the broadest possible sense and mean addressing, analyzing, constituting, containing, commenting, in connection with, dealing with, discussing, describing, embodying, evidencing, identifying, pertaining to, referring to, reporting, stating, or summarizing.

9. "Document" is used in the broadest possible sense and means anything that may be within the meaning of Federal Rule of Civil Procedure 34, and includes any written, printed, typed, photocopied, photographed, recorded, or otherwise reproduced or stored communication or representation, whether comprised of letters, words, numbers, data, pictures, sounds or symbols, or any combination thereof. "Document" includes without limitation: correspondence, memoranda, notes, records, letters, envelopes, telegrams, messages, studies, analyses, contracts, agreements, working papers, accounts, analytical records, reports and/or summaries of investigations, press releases, comparisons, books, calendars, diaries, articles, magazines, newspapers, booklets, brochures, pamphlets, circulars, bulletins, notices, drawings, diagrams, instructions, notes of minutes of meetings or communications, electronic mail/messages and/or "e-mail," text messages, social media communications, voice mail messages, instant messaging, questionnaires, surveys, charts, graphs, photographs, films, tapes, disks, data cells, print-outs of

information stored or maintained by electronic data processing or word processing equipment, all other data compilations from which information can be obtained (by translation, if necessary, by You through detection devices into usable form), including electromagnetically sensitive storage media such as CDs, DVDs, memory sticks, floppy disks, hard disks and magnetic tapes, and any preliminary versions, as well as drafts or revisions of any of the foregoing, whether produced or authored by the City or anyone else. The term "Document(s)" includes the defined term "Electronically Stored Information," which is defined below.

10. "Electronically Stored Information" or "ESI" includes, but is not limited to, any and all electronic data or information stored on a computing device. Information and data is considered "electronic" if it exists in a medium that can only be read through the use of computing device. This term includes but is not limited to databases; all text file and word processing Documents (including metadata); presentation Documents; spreadsheets; graphics, animations, and images (including PNG, JPG, GIF, BMP, PDF, PPT, and TIFF files); email, email strings, and instant messages (including attachments, logs of email history and usage, header information and "deleted" files); email attachments; calendar and scheduling events, invites, and information; cache memory; Internet history files and preferences; audio; video, audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; computer system activity logs; servers; archives; back-up or disaster recovery systems; hard drives; discs; CDs; diskettes; removable drives; tapes; cartridges and other storage media; printers; scanners; personal digital assistants; computer calendars; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems. This term includes but is not limited to onscreen information, system data, archival data, legacy data, residual data, and metadata that may not be readily viewable or accessible, and all file fragments and backup files.

11. "Database" means any data sets, reports, programs, and files accessible by computer that contain data that can be processed and/or sorted using standard spreadsheet or database software (including, but not limited to, Microsoft Access and Microsoft Excel).

12. "Redistricting" means the drawing or redrawing of district lines for City Commission districts.

13. "1997 Redistricting Cycle" means Redistricting in advance of and preparation for the City of Miami adopting a single-member district system for City Commission. This term includes the preparation for Redistricting and Redistricting in 1996 and 1997.

14. "2003 Redistricting Cycle" means Redistricting following the 2000 Census. This term includes the preparation for Redistricting following the release of data from the 2000 Census and Redistricting following the release of data from the 2000 Census.

15. "2013 Redistricting Cycle" means Redistricting following the 2010 Census. This term includes the preparation for Redistricting following the release of data from the 2010 Census and Redistricting following the release of data from the 2010 Census.

16. "2022–23 Redistricting Cycle" means Redistricting following the 2020 Census. This term includes the preparation for Redistricting following the release of data from the 2020 Census, Redistricting following the release of data from the 2020 Census, and any and all subsequent processes, including litigation, remedial or replacement processes, to alter district lines. This term includes the processes to enact Resolution 22-131 and Resolution 23-271.

17. "Past Redistricting Cycles" means the 1997 Redistricting Cycle, the 2003 Redistricting Cycle, and the 2013 Redistricting Cycle.

18. "Meeting" shall refer not only to in-person meetings, but also to telephonic and video conference meetings.

19. "Person(s)" shall refer not only to natural persons, but also without limitation to firms, partnerships, corporations, associations, unincorporated associations, organizations, businesses, trusts, government entities, and/or any other type of legal entities. All references to a person also include that person's agents, employees (whether part-time or full-time), and representatives.

20. "Possession" means Your immediate possession, including items held by agents and employees, and any and all other principals or assigns, as well as constructive possession by virtue of Your ability to retrieve the aforesaid Document or information.

21. The term "relating to" shall mean concerning, relating to, pertaining to, consisting of, constituting, reflecting, evidencing or concerning in any way logically or factually the subject matter of the request.

22. The term "including" means including but not limited to.

23. "And" and "or" shall be construed both disjunctively and conjunctively to bring within the scope of these Document Requests all relevant responses that might otherwise be construed outside the scope.

24. "Any" and "all" shall be construed to mean "any and all."

INSTRUCTIONS

1. You are to produce entire Documents including all attachments, cover letters, memoranda, and appendices, as well as the file, folder tabs, and labels appended to or containing any Documents. Each request seeks the requested documents in their entirety, without abbreviation, redaction, or expurgation, including all attachments or other matters affixed to them. Copies which differ in any respect from an original (because, by way of example only, handwritten or printed notations have been added) should be produced separately. Documents are to be produced as they are kept in the ordinary course of business. Please produce all electronically stored Documents in electronic, machine-readable form, together with sufficient Documentation of variable names and descriptions and any other information necessary to interpret and perform calculations on such data.

2. In responding to these document requests, produce all documents available to Defendant or subject to Your reasonable access or control. Documents requested are those in the actual or constructive possession or control of you, your attorneys, investigators, experts, and anyone else acting on your behalf. A document is in Defendant's possession, custody or control (a) if it is in the Defendant's physical custody, or (b) if it is in the custody of any other person and the Defendant: (i) owns such document in whole or in part; (ii) has a right, by contract, statute or otherwise, to use, inspect, examine or copy such document on any terms; or (iii) has an understanding, express or implied, that the Defendant may use, inspect, examine or copy such document when they seek to do so.

3. If there are no documents responsive to any particular category, please so state in writing.

4. If any documents or parts of documents called for by this document request have been lost, discarded or destroyed, identify such documents as completely as possible on a list, including the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.

5. If You object to any part of a Request, set forth the basis for Your objection and respond to all parts of the Request to which You do not object.

6. If any privilege or immunity is claimed as a ground for not producing a Document or tangible thing, provide a written log describing the basis for the claim of privilege or immunity that identifies each such Document and states the ground on which each such Document is asserted to be privileged or immune from disclosure. Any attachment to an allegedly privileged or immune Document shall be produced unless You contend that the attachment is also privileged or immune from disclosure.

7. Whenever necessary to bring within the scope of a Request a relevant response that might otherwise be construed to be outside its scope, the following constructions should be applied:

a. Construing the terms "and" and "or" in the disjunctive or conjunctive, as necessary, to make the Request more inclusive;

b. Construing the singular form of any word to include the plural and the plural form to include the singular;

c. Construing the past tense of the verb to include the present tense and the present tense to include the past tense;

d. Construing the masculine form to include the feminine form;

e. Construing "include" to mean include or including "without limitation."

8. These Document Requests request Documents in Your possession, including Documents of Your officers, employees, agents, and representatives, and unless privileged, Your attorneys.

9. These Document Requests are continuing in character so as to require You to produce additional Documents if You obtain further or different information at any time before trial. All responsive Documents in existence as of the date of production are to be produced. Any Documents created or obtained after that date are to be produced under Defendant's continuing obligation to supplement their production immediately upon the creation or development of additional responsive Documents.

10. If there is any question as to the meaning of any part of these Requests, or an issue as to whether production of responsive Documents would impose an undue burden on You, the undersigned counsel for Plaintiffs should be contacted promptly.

REQUESTS FOR PRODUCTION

REQUEST NO. 1: All Documents and electronically stored information (ESI) related to the 2022–23 Redistricting Cycle, including memoranda related to redistricting, methodology used, criteria for redistricting and their application, the use of race, proposed maps, boundary lines, reports, data, databases, analyses, feedback, instructions, GIS files, consultants and experts retained, or drafts and proposals for any of the foregoing categories.

This at a minimum includes, but also includes significantly more than:

(a) all notes, taken electronically, handwritten, or otherwise, by commissioners, the Commission, or its staff or consultants, or by any City offices outside the Commission, related to the Recent Redistricting Cycles;

(b) all Communications, Documents, or notes, whether electronic or handwritten, transmitted within, to, and/or from the commissioners, the Commission or its staff, any City offices outside the Commission, or the public, related to the Recent Redistricting Cycles; and

(c) all complete or partial draft redistricting plans created by consultants, commissioners, Commission staff, or others, including Miguel De Grandy's Versions 1 through 11, Version 13, and any subsequent Versions after 14.

REQUEST NO. 2: All Documents and electronically stored information (ESI) related to the Past Redistricting Cycles, including memoranda related to redistricting, methodology used, criteria for redistricting and their application, the use of race, proposed maps, boundary lines,

reports, data, databases, analyses, feedback, instructions, GIS files, consultants and experts retained, or drafts and proposals for any of the foregoing categories.

This at a minimum includes, but also includes significantly more than:

(a) all notes, taken electronically, handwritten, or otherwise, by commissioners, the Commission, or its staff or consultants, or by any City offices outside the Commission, related to the Recent Redistricting Cycles; and

(b) all Communications, Documents, or notes, whether electronic or handwritten, transmitted within, to, and/or from the commissioners, the Commission or its staff, any City offices outside the Commission, or the public, related to the Recent Redistricting Cycles.

REQUEST NO. 3: All agreements, resolutions, and contracts between the City of Miami and Miami-Dade County or its Elections Department regarding the conduct of City of Miami elections that govern the 2023 or 2025 elections.

Served this 18th day of August, 2023,

/s/ Christopher J. Merken

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