No. 23A116

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)

RETRIEVED FROM DEMOCRACYDOCKET.COM

BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF RESPONDENT

Jason B. Torchinsky
Counsel of Record
Edward M. Wenger
Dennis W. Polio
Mateo Forero-Norena
Zachary D. Henson
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW, Suite 643
Washington, DC 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com

August 14, 2023

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
RULE 29.6 STATEMENT 1
IDENTITY AND INTEREST OF *AMICUS CURIAE* 2
SUMMARY OF THE ARGUMENT 3
ARGUMENT 4
I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED *PURCELL* 4
A. Granting the Application would cause confusion and chaos in the administration of the upcoming election. 5
B. Granting the Application would harm candidates who have relied on the City's enacted districts. 8
C. Granting the Application would harm Miami's voters, as well as citizens who have contributed to the electoral effort. 10
II. THE DISTRICT COURT ERRED IN ASSUMING THAT THE INTERIM REMEDIAL PLAN WAS MARRED BY RACIAL DISCRIMINATION 12
A. The district court improperly treated the 2023 New Plan as a remedial map, and in doing so, overstepped its authority. 12
B. By treating the 2023 New Plan as a remedial map, the district court inverted the presumption of good faith due to the City. 15
CONCLUSION 20

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases **Page(s)**

Abbott v. Perez,
138 S. Ct. 2305 (2018) .... *passim*

Abrams v. Johnson,
521 U.S. 74 (1997) 19

Andino v. Middleton,
141 S. Ct. 9 (2020) 7

Arlington Heights v. Metropolitan Housing Dev. Corp.,
429 U.S. 252 (1977) 14

Barr v. Am. Ass'n of Pol. Consultants, Inc.,
140 S. Ct. 2335 (2020) 15

Benisek v. Lamone,
138 S. Ct. 1942 (2018) 12

Buckley v. Valeo,
424 U.S. 1 (1976) 13

Covington v. North Carolina,
283 F. Supp. 3d 410 (M.D.N.C. 2018) 14

Democratic Nat'l Comm. v. Wis. State Legis.,
141 S. Ct. 28 (2020) 7

Eu v. San Francisco County Democratic Cent. Comm.,
489 U.S. 214 (1989) 7

Little v. Reclaim Idaho,
140 S. Ct. 2616 (2020) 8

Karcher v. Daggett,
462 U.S. 725 (1983) 19

MacGovern v. Connolly,
637 F. Supp. 111(D. Mass. 1986) 12

Massachusetts v. Mellon,
262 U.S. 447 (1923) 15

Merrill v. Milligan,
142 S. Ct. 881 (2022) 5, 7

RETRIEVED FROM DEMOCRACYDOCKET.COM

Miller v. Johnson,
515 U.S. 900 (1995) 14, 19

Mobile v. Bolden,
446 U.S. 55 (1980) 14

New York State Rifle & Pistol Ass'n, Inc. v. City of New York,
140 S. Ct. 1525 (2020) 16

North Carolina v. Covington,
138 S. Ct. 2548 (2018) 14, 15

Ohio A. Philip Randolph Inst. v. Householder,
373 F. Supp. 3d 978 (S.D. Ohio 2019) 11

Perez v. Texas,
970 F. Supp. 2d 593 (W.D. Tex. 2013) 5

Prosser v. Elections Bd.,
793 F. Supp. 859 (W.D. Wis. 1992) 9

Purcell v. Gonzalez,
549 U.S. 1 (2006) .... *passim*

Reno v. Bossier Par. School Bd.,
520 U.S. 471 (1997) 14

Tashjian v. Republican Party,
479 U.S. 208 (1986) 19

United States v. Richardson,
418 U.S. 166 (1974) 16

United States v. Rutherford,
442 U.S. 544 (1979) 16

Veasey v. Perry,
769 F.3d 890 (5th Cir. 2014) 4

Statutes

Fla. Stat. § 99.055 6

Fla. Stat. § 99.095 6

Fla. Stat. § 101.62 6

Fla. Stat. § 101.131 6

RETRIEVED FROM DEMOCRACYDOCKET.COM

Other

Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*,
116 Harv. L. Rev. 649 (2002) 19

James Bopp, Jr. and Susan Lee*, Law of Democracy: So There Are Campaign Contribution Limits That Are Too Low*,
18 Stan. L. & Pol'y Rev. 266 (2007) 11

Byron J. Harden, *House of the Rising Population: The Case for Eliminating the 435-Member Limit on the U.S. House of Representatives*,
51 Washburn L.J. 73, 96 (2011) 11

RETRIEVED FROM DEMOCRACYDOCKET.COM

RULE 29.6 STATEMENT

Amicus Curiae, the National Republican Redistricting Trust, does not have any parent corporation. No publicly held corporation holds 10 percent or more of its stock.

RETRIEVED FROM DEMOCRACYDOCKET.COM

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Republican Redistricting Trust ("NRRT") is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort. NRRT's mission is threefold.

First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, §4 of the Constitution, it is the State legislatures that are largely entrusted with redrawing the States' electoral districts. Every citizen should have an equal voice, and laws must be followed to protect the constitutional rights of voters.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Second, NRRT believes redistricting should result in districts that are sufficiently compact and preserve communities by respecting municipal and county boundaries, and avoiding the forced combination of disparate populations as much as possible. Such districts track the principle that legislators represent individuals living within identifiable communities and not the political parties themselves.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, other than *Amicus Curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Court should deny the Emergency Application for Stay. The Eleventh Circuit properly applied the *Purcell* Principle, given the precious few weeks before polls open for the 2023 elections in South Florida. The district court, moreover, erred by declining to apply a presumption of legislative good faith to the Interim Remedial Plan. For both reasons, the injunction issued by the district court was rightly halted and this Court should keep it that way.

First, the Eleventh Circuit's application of the *Purcell* Principle was correct. The 2023 elections are upon us; indeed, some candidate-qualification deadlines have already passed. Throwing Miami's electoral landscape into upheaval *yet again* will prejudice election administrators, candidates, and voters alike. This will lead to chaos among administrators, unfair disadvantage to certain candidates, and—most critically—voter confusion. Moreover, candidates and voters will suffer if the court's injunction were to take effect because candidates will have to use less personal and more expensive methods of campaigning to reach voters in the newly drawn districts under an immense time crunch. The reduction in direct voter contact from campaigns will undermine direct constituent involvement in the political process, and it will place a greater strain on cash-strapped campaigns competing against candidates with larger resource pools.

Second, the District Court failed entirely to grant the Miami Commissioners the presumption of legislative good faith regarding their Newly Enacted 2023 Map. This improperly inverted the burden under which the Applicants should have labored

RETRIEVED FROM DEMOCRACYDOCKET.COM

and foisted it upon the Commission. Legislative bodies like the Miami Commission are entitled to deference when they act in their districting capacity, and the burden of proof in all redistricting challenges remains with the challengers. This district court's error in this regard counsels in favor of sustaining the Eleventh Circuit's stay.

ARGUMENT

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED *PURCELL*.

In granting a stay of the district court's Interim Remedial Plan, the Eleventh Circuit followed the well-established and recently affirmed principle that "federal district courts ordinarily should not enjoin state election laws in the period close to an election." *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Three of the City's five Commissioner seats are up for election this November—less than three months from now—and the City "indisputably has a compelling interest in preserving the integrity of its" rapidly approaching "election process." *Id.* at 4 (quoting *Eu v. San Francisco Cnty Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). It is beyond dispute that "court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* These concerns reach their apex "in the apportionment context," where courts "'*should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws'" when determining whether to "award or withhold immediate relief." *Veasey v. Perry*, 769 F.3d 890, 893 (5th Cir. 2014).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Application of *Purcell* depends on "the nature of the election law at issue, and how easily the [jurisdiction] could make the change without undue collateral effects."

Merrill v. Milligan, 142 S. Ct. 881, 881 n.1 (2022) (Kavanaugh, J., concurring). Accordingly, "[c]hanges that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement." *Id.* Implementation of new redistricting maps are among the most disruptive changes a court can order, not just because of the complexities involved, but also due to the downstream effects that new voting boundaries have on copious aspects of election administration and the electoral system overall. Indeed, "[s]hifting district and precinct lines can leave candidates wondering, voters confused, and election officials with a tremendous burden to implement maps in a timely manner with very limited resources." *Perez v. Texas*, 970 F. Supp. 2d 593, 606 (W.D. Tex. 2013).

RETRIEVED FROM DEMOCRACYDOCKET.COM

For this reason, the Eleventh Circuit reached the only appropriate decision. Staying the Interim Remedial Plan was proper under *Purcell* given the ongoing 2023 election cycle in South Florida. This Court should not disturb it.

A. Granting the Application would cause confusion and chaos in the administration of the upcoming election.

Context dooms the Applicants' request to upset the redistricting apple cart at this late stage. We're in Mid-August. If the Applicants have their way, the critical deadlines that remain ahead of the November 7th general election (and the November 21st runoff election) will throw the City of Miami into pandemonium. These deadlines include:

- The August 11th deadline for candidates to file petitions in lieu of qualifying (Fla. Stat. § 99.095(3)) (a deadline which has now passed);
- The September 8th–23rd candidate qualifying period (City of Miami Charter § 7);
- The October 10th deadline for individuals to register to vote in the general election, and the October 23rd deadline for voter registration in the runoff election (Fla. Stat. § 99.055);
- The October 14th deadline to submit poll watcher designations for early voting in the general election, the October 24th deadline for the same designations for Election Day, and the November 7th deadline for those designations for the runoff election (Fla. Stat. § 101.131);
- The October 28th deadline for voters to request vote-by-mail ballots from the Miami-Dade County Elections Department, and the November 11th deadline to request vote-by-mail ballots for the runoff election (Fla. Stat. § 101.62(2));
- The early voting period of October 28th–November 5th for the general election, and the early voting period of November 17th–19th for the runoff election (City of Miami Comm'n Res. R-23-0172).[2]

RETRIEVED FROM DEMOCRACYDOCKET.COM

The City's election administration machinery needs time to implement a new map as it gears up for any election. This arduous process was ongoing under the auspices of the 2022 Enacted Plan when the district court's eleventh-hour imposition of the Interim Remedial Plan took effect. Election officials were geocoding voters and assigning them to relevant voting districts—a process that normally takes weeks. Officials were preparing ballots, which can only occur *after* geocoding is complete and candidate filing closes (which also takes weeks to complete). Likewise, election

[2] *See* 2023 City of Miami General Election: Important Election Dates (available at https://tinyurl.com/ydjkxb2d) (last visited Aug. 14, 2023).

administrators were preparing to distribute voting systems and pollbooks, train election officials and volunteers, conduct absentee and in-person voting, and then carry out the tabulation and canvassing of election results.

Like the injunction at issue in *Merrill v. Milligan*, lifting the Eleventh Circuit's stay here—amid these election administration activities—would be "a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters," mostly because changing voting districts means that "those individuals and entities now do not know who will be running against whom." 142 S. Ct. at 880 (Kavanaugh, J., concurring). As Justice Kavanaugh described in his *Merrill* concurrence, "filing deadlines need to be met, but candidates cannot be sure what district they need to file for. Indeed, at this point, some potential candidates do not even know which district they live in. Nor do incumbents know if they now might be running against other incumbents in the upcoming primaries." *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

The electoral confusion that would ensue from lifting the Eleventh Circuit's stay is exactly the kind of harm that *Purcell* aims to prevent. This Court has deployed it regularly to prevent the sort of electoral havoc that would ensue if the Eleventh Circuit had not acted prudently here.[3] This Court should leave the stay in place.

[3] *See, e.g.*, *Merrill*, 142 S. Ct. at 879 (staying district court injunction ordering complete redrawing of congressional districts when voting in primary elections would occur "just seven weeks" from the Supreme Court's date of disposition); *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (noting that the district court contravened the Supreme Court's "long standing precedents" by ordering changes to Wisconsin's election laws "in the period close to an election," which was "just six weeks before" the election); *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (observing that 5-6 weeks before an election was too

B. Granting the Application would harm candidates who have relied on the City's enacted districts.

Along with the administrative burdens the City would suffer by vacatur of the Eleventh Circuit's stay, implementation of the court-ordered Interim Remedial Plan would harm the candidates who are already participating in the election. Financial data and other filings confirm that candidates have relied extensively on the boundaries first established by the Miami Commission. Candidates in Districts 1, 2, and 4 have already filed statements of candidacy—some doing so as early as late last year. These candidates have raised hundreds of thousands of dollars since then.

The upcoming election will not simply begin with the City's September 2023 qualifying period. Rather, the election began almost a year ago (when the first candidate filed a statement of candidacy). The candidates' campaign efforts are well underway, and they have depended on the geographic parameters of the districts in which they are running. *See Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (observing that district shapes "make it easier for candidates . . . to campaign for office and once elected to maintain close and continuing contact with the people they represent"). That knowledge has allowed them to develop campaign strategies that are tailored to the needs of the unique voters in their (purported)

RETRIEVED FROM DEMOCRACYDOCKET.COM

"close" to enjoin South Carolina's witness requirement for absentee ballots); *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2618 (2020) (staying district court's orders allowing initiative sponsors more time to collect signatures in a case where the Ninth Circuit would "hear Idaho's case . . . almost a month before Idaho's Secretary of State must certify ballot questions to county clerks" to have the questions printed on the ballot).

district. To allow a geographic redistribution of voters at this late stage would negate those efforts.

Not only have candidates allocated resources toward voters who, under the district court's injunction, may no longer reside in the district in which they are running (and therefore may no longer be potential constituents, supporters, or voters), they must now expend additional resources to reach new voters who may now reside in new districts. Worse yet, candidates have already been campaigning and reaching out to voters for months, and they have done so assuming that those voters are the ones who reside in the district for which they are campaigning. Tossing away those voter-outreach efforts prejudices all notions of representative democracy.

It also disproportionately advantages candidates with large cash on-hand. Effectuating a profound change in the political geography of Miami amid an election—particularly *after* the qualifying petition filing deadline, and just days before the qualifying period—forces candidates to expend massive funds to reach new constituents while also depriving them of the necessary time to raise those funds. This necessarily harms candidates who possess fewer resources than their opponents.[4]

RETRIEVED FROM DEMOCRACYDOCKET.COM

[4] *Cf. Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1158 (S.D. Ohio 2019) (finding "substantial asymmetry" in a map that hindered candidates' "ability to mobilize effectively, win elections, and accomplish their policy objectives"); *see also* Byron J. Harden, *House of the Rising Population: The Case for Eliminating the 435-Member Limit on the U.S. House of Representatives*, 51 WASHBURN L.J. 73, 96 (2011) ("Because campaigning is so expensive, candidates must devote a large portion of time to fundraising instead of meeting with voters. The costs associated with campaigns are prohibitive to anyone who is neither well-connected nor wealthy").

Moreover, given the time constraints and proximity to filing deadlines, any further changes to districts will result in the necessary deployment of more expensive methods of campaign communication to reach voters who find themselves in different districts. Grassroots efforts such as community organizing, door knocking, volunteer phone banking, canvassing, and barnstorming generally require candidates to expend less money but much more time. Given the district court's order, candidates will be forced to use more expensive—and less direct—means of voter outreach such as paid phone banking and text-messaging campaigns, as well as advertisement through television, internet, radio, and print.[5] The lack of direct voter contact from campaigns will not only fundamentally undermine direct constituent involvement in the political process, but will place a much greater strain on cash-strapped campaigns than on campaigns with large resources currently at their disposal.

C. Granting the Application would harm Miami's voters, as well as citizens who have contributed to the electoral effort.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Lifting the Eleventh Circuit's stay would prejudice the citizens of Miami. The Interim Remedial Plan's late disruption of the political landscape will create substantial uncertainty among voters as to which district they now reside in, which candidates are running in their new districts, and where their polling places are located. That is especially true since, before that map was imposed by the district

[5] *See* James Bopp, Jr. and Susan Lee, *Law of Democracy: So There Are Campaign Contribution Limits That Are Too Low*, 18 STAN. L. & POL'Y REV 266, 271 (2007) ("[W]hile some candidates might prefer grassroots campaigning, [or may] forego more expensive campaigns due to lack of resources, . . . many candidates find it necessary to utilize mass media communications").

court, the core of the City's Commissioner districts remained largely unchanged for nearly twenty-five years. *See* Plaintiffs' First Am. Compl. (ECF No. 23) at ¶¶ 59-64. Significant public outreach would thus be required to educate voters about the drastic departure from that scheme—with no guarantee that such efforts would succeed. "When the massive disruption to the political process of the [City] is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid districting scheme, equity requires that [the Court] deny relief." *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986); *see also Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (holding that a redistricting plan which had been in place for several years should not be enjoined because it would disturb "the balance of equities among the parties").

RETRIEVED FROM DEMOCRACYDOCKET.COM

Moreover, as the foregoing discussion makes clear, the citizens of Miami have been contributing to the candidates for nearly a year. Those who have contributed to support a particular campaign likely did so in reliance on the district lines that have been in place since 2022. Such support might not have been provided if the contributor resided in a different district, or if the contributor did not think the candidate could succeed due to less-favorable voting boundaries. The decisions to provide financial support for a particular Commissioner candidate was necessarily based on the boundaries of the 2022 Enacted Plan (and most recently on the 2023 New Plan).

Given this reality, another electoral-map upheaval at this late stage would chill contributors' willingness to continue engaging in the political process in the days

and weeks before Election Day. "Given the important role of contributions in financing political campaigns," there could be "a severe impact on political dialogue" if the disruptions caused by the Interim Remedial Plan "prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Because the relief sought by Applicants would result in that precise kind of "confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4-5, the citizens of Miami will suffer tremendously if the Court acquiesces in the Applicants' request to lift the Eleventh Circuit's stay.

The Eleventh Circuit got it right. This Court should therefore deny the emergency application.

RETRIEVED FROM DEMOCRACYDOCKET.COM

II. THE DISTRICT COURT ERRED IN ASSUMING THAT THE INTERIM REMEDIAL PLAN WAS MARRED BY RACIAL DISCRIMINATION.

Beyond *Purcell*, this Court should deny the application because the district court engaged in a flawed analysis that placed an improper burden on the City. Legislative bodies like the Miami City Commission are due appropriate deference when they wield their districting authority, and the burden of proof in any redistricting challenge remains with the challengers. Because the district court went beyond the scope of its power to enjoin the 2023 New Map, and in doing so flipped the presumption of good faith that must be afforded to the City, the Eleventh Circuit was right to pump the brakes.

A. The district court improperly treated the 2023 New Plan as a remedial map, and in doing so, overstepped its authority.

"Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (citing *Reno v. Bossier Par. School Bd.*, 520 U.S. 471, 481 (1997)). "[T]he good faith of [the] state legislature must be presumed." *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). Even after a finding of past discrimination, the burden of proof remains with the challenger and the presumption of legislative good faith remains. *Id.* "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (quoting *Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

That is not to say that the past is irrelevant. "The historical background of a legislative enactment is one evidentiary source relevant to the question of intent." *Id.* (citing *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)); *see also Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018), *aff'd in relevant part*, *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) ("Rather, we consider these districts after already having found that their preceding versions violated the Constitution. This remedial posture impacts the nature of our review."). If a court concludes that a current legislative enactment violates the Constitution much like a previous enactment, the court has a duty to cure and disallow the unconstitutional act. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). But at bottom, the question remains whether discriminatory intent has been proven regarding the legislative act subject to legal challenge, and past acts cannot be imparted to new ones without something connecting the two. *See Abbott*, 138 S. Ct.

RETRIEVED FROM DEMOCRACYDOCKET.COM

2305 at 2324 ("[W]e have never suggested that past discrimination flips the evidentiary burden on its head.").

Here, the district court made much of the fact that the 2023 New Plan offered by the City Commission was intended to remedy the 2022 Enacted Plan, which the district court had enjoined as a racial gerrymander. In so doing, the district court (while supposedly maintaining the presumption of legislative good faith) tasked the 2023 New Plan with absolving and offering recompence for the taint of the 2022 Enacted Plan. Order, 18–19 (Jul. 30, 2023). This analysis, however, was improper because it assumes that the City passed the 2023 New Plan to fix the racial gerrymandering violation that the Applicants originally raised. That is simply not the case. The City enacted an entirely different map that *superseded* and *replaced* the map that is the subject of this litigation. At minimum, the Applicants should have had to amend their original complaint to address the new facts driving the creation of the new map.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Federal-court authority under Article III "amounts to little more than the negative power to disregard an [unlawful] enactment." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality opinion) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Once the 2022 Enacted Plan was repealed by the adoption of the 2023 New Plan, any injunction as to the former's enforcement is inoperative. That is why challenges to an "old rule" are often "moot." *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). "[W]here the plaintiff may have some residual claim under the new

framework," any prior judgment should be vacated and "the parties may, if necessary, amend their pleadings or develop the record more fully." *Id.*

Here, of course, there was no final judgment to vacate. If the City passed a new law, federal courts may adjudicate the constitutionality of it in a proper case. But federal courts do not sit as permanent "councils of revision." *United States v. Rutherford*, 442 U.S. 544, 555 (1979); *see also United States v. Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring) (explaining that under the Council of Revision, "every law passed by the legislature automatically would have been previewed by the Judiciary before the law could take effect"). Courts decide cases or controversies—and any complaints about the 2023 New Plan present a new controversy that was not properly before the district court here.

RETRIEVED FROM DEMOCRACYDOCKET.COM

By failing to acknowledge this important distinction, the district court did not merely go beyond the scope of its Article III power. It also discarded the presumption of good faith that the City Commission would normally enjoy. Instead, the district court presumed racial discrimination and tasked the City Commission with showing that it learned its lesson. By shifting the burden to the City instead of keeping it on the challengers, the district court committed error.

B. By treating the 2023 New Plan as a remedial map, the district court inverted the presumption of good faith due to the City.

The district court's own analysis bears out the fact that it treated the 2023 New Plan as presumptively unconstitutional. In its decision, the district court first examined the "Direct Evidence." *See id.* at 20–24. It identified a statement made by the City Commission at a hearing conducted on May 11, 2023, which it construed as

the "strongest evidence" that the 2023 New Plan "carr[ies] forward the very same race-based characteristics of the [2022 Enacted Plan]." *Id.* at 23. In the statement, the City Commission asked the map drawer they hired 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 going to be properly represented, as well as other groups." *Id.* The district court characterized this statement as direction to "maintain the racial breakdown [of the 2022 Enacted Plan] of each district in a new map." *Id.* at 23–24. Despite the City Commission's explanation that the district court misinterpreted its intent and that it only meant to try to maintain the "VRA-required District 5," *id.* at 24 n. 8, the district court declined to "ascribe much weight to th[at] argument." *Id.*

That was error. Although the history of a legislative action is relevant, it does not flip the burden of proof on its head. *See supra*. The City Commission is still due the presumption of good faith. *See supra.* It provided a reasonable explanation about the statement (i.e., the language of "elect an Afro American to a seat" was an effort to ensure District 5 complied with Section 2 of the Voting Rights Act). Desiring that everyone in the City has the chance to obtain proper representation does not equate to racial gerrymandering, and no amount of twisting of plain language by the Applicants can change that.

The district court, however, failed to give the City Commission the benefit of the doubt, and it did so because it presumed that the sins prompting the 2022 Enacted Map sullied the work the City put into the 2023 New Plan. In other words, the City

RETRIEVED FROM DEMOCRACYDOCKET.COM

Commission was not granted the benefit of the presumption of good faith. *See Abbott*, 138 S. Ct. at 2324. The district court went further than simply acknowledging the remedial plan and considering the history of the legislative enactment. Instead, it allowed the original taint to color its analysis throughout the process. Under those auspices, the City's remedial map was doomed from the start.

It gets worse. Next, the district court examined the "Circumstantial Evidence." *See generally* Order, 24–40 (Jul. 30, 2023). In so doing, the district court repeatedly ignored non-racial considerations and assumed racial intent. Particularly, the district court was greatly concerned that the 2023 New Plan retained the core districts of the 2022 Enacted Plan. *See id.* at 36–40. For instance, in the 2023 New Plan, Districts 1, 3, and 4 (the predominantly "Hispanic districts" under the 2022 Enacted Plan) together have a core retention rate of 97.8 percent of the 2022 Enacted Plan. *Id.* at 36. Appellant's Emergency Mot. Stay at 18 (Jul. 31, 2023). District 2 (the "Anglo District" in the 2022 Enacted Plan) has a core retention rate of 92.2 percent of the 2022 Enacted Plan. *Id.* at 37.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Core retention, however, is suspect *only if* it perpetuates the harms of a racial gerrymander—otherwise, core-district retention remains a well-established traditional redistricting principle. *Id.* at 17 (citing *Miller v. Johnson*, 515 U.S. 900, 906 (1995). The district court disregarded how important core-district retention can be for avoiding voter confusion. *See Abrams v. Johnson*, 521 U.S. 74, 100–01 (1997); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (holding that "preserving the cores of prior districts" is a "consistently applied legislative polic[y]").

Miami's Commissioners not only represent the people that voted for them, but everyone in their district. Preserving core districts serves the purpose of furthering relationships between representatives and constituents, and it avoids confusion among voters. Commissioners have relationships with their constituents and are attuned to the specific problems facing them.[6] Additionally, preserving the cores of previously established districts avoids the confusion of changing boundaries, candidates, and polling places, which the Court has previously recognized as commendable interests. *Tashjian v. Republican Party*, 479 U.S. 208, 221 (1986).

The district court took none of these creditable goals into account. Instead, it assumed that the high percentage of the preserved district cores evidenced an intent to perpetuate the racial discrimination that it believed to be an issue with the 2022 Enacted Plan. This, again, was error. *See Abbott*, 138 S. Ct. at 2324 (citation omitted).

RETRIEVED FROM DEMOCRACYDOCKET.COM

There is profound irony in the district court's assumption that retaining district cores evidences an impermissible racial gerrymander. The voting age populations for the districts in both the 2022 Enacted Plan and the 2023 New Plan are remarkably similar. For example, the HVAP in Districts 1, 3, and 4 are as follows: 89.7 percent, 84.5 percent, and 90 percent, respectively, under the 2023 New Plan; 89.5 percent, 84.5 percent, and 90 percent, respectively, under the 2022 Enacted Plan;

---

[6] *See* Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders,* 116 HARV. L. REV. 649 (2002) ("Voters develop relationships with their representatives. Long-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies these problems.").

and 85.8 percent, 85.1 percent, and 95.6 percent, respectively, under the Interim Remedial Plan. Appellant's Emergency Mot. Stay at 18 (Jul. 31, 2023). In District 2, meanwhile, the White Voting Age Population of each plan is as follows: 36.5 percent under the 2023 New Plan; 37.4 percent under the 2022 Enacted Plan; and 37.9 percent under the Interim Remedial Plan. *Id.* at 18–19. In District 5 (the Voting Rights Act Section 2 protected district under the 2022 Enacted Plan) the Black Voting Age Population of the 2022 Enacted Plan and 2023 New Plan is 50.3 percent, and the Interim Remedial Plan is 48.4 percent. *Id.* at 22. The Black Citizen Voting Age Population of the 2022 Enacted Plan is 58.2 percent, the 2023 New Plan is 57.4 percent, and the Interim Remedial Plan is 55.8 percent. *Id.*; *see also* Second Expert Report of Dr. Carolyn Abbott at 14–15 (ECF No. 82-12).

RETRIEVED FROM DEMOCRACYDOCKET.COM

If race predominated over legitimate non-racial criteria, then one would expect the voting percentages of the relevant districts to differ dramatically between the New 2023 Plan and the Interim Remedial Plan. When comparing the numbers, however, the demographic population breakdown in the Voting Rights Act Section 2 protected district does not vary much at all. If the City's interim efforts were truly infected by a desire to silo the races, one would expect the racial percentages between the map offered by the City Commission and the one adopted by the district court to differ meaningfully. That did not happen.

The circumstantial evidence cited by the district court, particularly the analysis of the makeup of the districts themselves, does not support the proposition that race predominated the City's redistricting process. To the contrary, it shows that

the district court simply assumed the worst of the City Commission—thereby depriving it of the legislative presumption of good faith. *Abbott*, 138 S. Ct. at 2324. This error further justifies leaving intact the stay entered by the Eleventh Circuit.

CONCLUSION

For these reasons. the Court should deny the Applicants' emergency motion to lift the Eleventh Circuit's stay of the district court's preliminary injunction.

August 14, 2023 Respectfully submitted,

/s/ Jason Torchinsky

Jason B. Torchinsky
Counsel of Record
Edward M. Wenger
Dennis W. Polio
Mateo Forero-Norena
Zachary D. Henson
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
2300 N Street NW, Suite 643
Washington, DC 20037
Phone: (202) 737-8808
Fax: (540) 341-8809
jtorchinsky@holtzmanvogel.com

Counsel for Amicus Curiae

RETRIEVED FROM DEMOCRACYDOCKET.COM