In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13544

JACKSONVILLE BRANCH OF THE NAACP,
NORTHSIDE COALITION OF JACKSONVILLE,
ACLU OF FLORIDA NORTHEAST CHAPTER,
FLORIDA RISING TOGETHER,
MARCELLA WASHINGTON, et al.,

Plaintiffs-Appellees,

versus

CITY OF JACKSONVILLE,
DUVAL COUNTY SUPERVISOR OF ELECTIONS,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:22-cv-00493-MMH-LLL

Before WILSON, JORDAN, and LAGOA, Circuit Judges.

BY THE COURT:

On March 22, 2022, the Jacksonville City Council passed new district maps (the "Enacted Plan") as a product of its redistricting efforts. Appellees filed a lawsuit on May 3, 2022, alleging that the Council racially gerrymandered districts in violation of the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. In a Joint Motion for a Preliminary Pretrial Conference filed on July 1, 2022, Appellants represented to the district court that they needed to know the map boundaries by December 16, 2022, in order to proceed with the March 21, 2023, elections. Based on that date, the parties worked with the district court to develop a briefing schedule, which the parties accepted without objection.

On July 22, 2022, Appellees filed their Motion for Preliminary Injunction, which the district court granted on October 12. As part of its Order, the district court gave Appellants until November 8 to file an interim remedial redistricting plan. Appellants subsequently filed their Time-Sensitive Motion for Stay on October 19, which the district court denied on November 1. The following day, Appellants filed this Emergency Motion to Stay. After review, we

conclude "Appellants City of Jacksonville and Supervisor Hogan's Emergency Motion to Stay" is **DENIED** because Appellants have not shown they are likely to succeed on the merits, and the other equitable factors weigh against them. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "separate[ing] its citizens into different voting districts on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). When a plaintiff alleges the state drew race-based lines, we generally engage in a two-step analysis. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). At the first step, the plaintiff must prove "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* (quoting *Miller*, 515 U.S. at 916). This can be shown through both direct and circumstantial evidence. *Id.* at 1463–64; *Shaw v. Hunt*, 517 U.S. 899, 905 (1996). If the plaintiff makes the requisite showing, we move to the second step, where the state "bears the burden of showing that the design of that district withstands strict scrutiny." *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022). Here, Appellants never argued that its plan could withstand strict scrutiny. So, our review is limited to the district court's analysis at the first step.

We review a district court's decision to deny a stay for abuse of discretion, "reviewing *de novo* any underlying legal conclusions and for clear error any findings of fact." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). The conclusion

that racial considerations predominated in redistricting is a factual finding and, therefore, is reviewed only for clear error. *Cooper*, 137 S. Ct. at 1465. However, "whether the court applied the correct burden of proof is a question of law subject to plenary review." *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018).

Appellants first argue we should use the *Purcell* principle to review the issuance of this injunction. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). Like the district court, we disagree.

The *Purcell* principle stands for the proposition 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) (per curiam); *Purcell*, 549 U.S. at 4–5. This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion," and the risk of confusion increases as election dates draw nearer. *Purcell*, 549 U.S. at 4–5. So, courts issuing injunctions close to elections are "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Id.* at 4. Plaintiffs whose challenges are controlled by *Purcell* are subject to a heightened burden of proof. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1372 (11th Cir. 2022) (per curiam). The question, then, is whether this injunction was issued on the "eve of an election" such that *Purcell* should apply. There is no clear guidance from the Supreme Court on this point, *see id.* at 1371, so we look to our recent precedent, the facts of this case, and

the concerns animating *Purcell*—all of which militate against applying the principle.

In *League of Women Voters of Florida*, we found an injunction to be within *Purcell*'s "outer bounds" because it was issued while local elections were ongoing, voter registration (which was implicated by the injunction) had begun, and the next statewide election was less than four months away. *Id.* Here, the district court issued its injunction three months prior to the candidate qualifying period1 and five months prior to the elections for a single county. Applying *Purcell* to this case would extend the "eve of an election" farther than we have before.

Our decision not to further those outer bounds—at least, not in this case—is bolstered by *Rose v. Raffensperger*, No. 22A136, 2022 WL 3568483 (S. Ct. Aug. 19, 2022). There, the Supreme Court rejected our application of *Purcell* when the plaintiff made "previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November elections should applicants win at trial." *Id.* at *1. Although (unlike in *Rose*) Appellants made *Purcell* arguments to the district court and never explicitly stated they would not appeal based on that case, *see Rose v. Sec'y, State of Ga.*, No. 22-

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[1] We note that a Florida statute is designed to aid candidates seeking ballot positions in years of apportionment, permitting them to obtain the required number of signatures from "any registered voter in the respective county, regardless of district boundaries." Fla. Stat. § 99.095(2)(d).

12593, 2022 WL 3572823, at *5–6 (11th Cir. Aug. 12, 2022) (Rosenbaum, J., dissenting), *vacated sub nom.*, *Rose v. Raffensperger*, No. 22A136, they nonetheless clearly stated as far back as July 1, 2022, that they would be able to conduct the March 2023 elections if they had maps in place by December 16, 2022. Indeed, the entire schedule on which the district court proceeded was developed with Appellants, working backwards from the date they provided, and the final schedule was accepted "without caveat." Given Appellants' position that the election can be conducted on the schedule they made collaboratively with the district court and Appellees, we do not believe *Purcell* applies here.

And, finally, we find *Purcell*'s heightened standard is not appropriate because the district court found the primary reason for applying that standard—risk of voter confusion—to be lacking. *See Purcell*, 549 U.S. at 4–5. Indeed, after conducting an extensive analysis, and recognizing courts should be reluctant to issue injunctions affecting county elections, the district court concluded that Appellants did not show "any substantial risk of harm, confusion, or disruption in the March 2023 election." We find this determination was not clearly erroneous. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317.

Therefore, we decline to apply *Purcell* and instead utilize our traditional factors for reviewing motions to stay, which include "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay

will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317. "The first two factors are the most critical." *Id.*

After reviewing the district court's thorough 139-page Order, we find no clear error in its conclusion that race was substantially likely a predominant factor in the redistricting process. To make its determination, the district court properly utilized the factors laid out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265–68 (1977), as summarized by our court in *Greater Birmingham Ministries v. Secretary of State for State of Alabama*, 992 F.3d 1299, 1321–22 (11th Cir. 2021). Presuming good faith by the Council, *Miller*, 515 U.S. at 915, and assessing the challenged districts, *see Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 264 (2015), the district court reviewed ample evidence, including the "sprawling" district geometries, relevant historical background, direct quotes from councilmembers, expert reports, public comments, and Council responses (or lack thereof) to public concerns. It concluded that "the circumstantial evidence considered in combination with the historical evidence presents a virtually unrebutted case that the Challenged Districts exist as they do in the Enacted Plan as a result of racial gerrymandering." We do not find this factual determination to be clearly erroneous and therefore agree Appellees are likely to succeed on the merits, and as a necessary corollary, Appellants are not. Indeed, in their briefs to this court, Appellants make no argument that they

will succeed at trial. Instead—making an argument relevant if *Purcell* applied—they contend only that Appellees' claims are not "clear cut." Even so, the arguments Appellants put forth fall short of the requisite showing they must make.

To start, Appellants argue that the district court erred by faulting them for adopting a map that retained the cores of existing districts because "preserving the cores of prior districts" is a legitimate objective. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). However, the district court made clear that the issue was not that Appellants opted to preserve district cores, but rather that their intent was (substantially likely) to maintain the race-based lines created in the previous redistricting cycle. The Supreme Court has been equally clear that this is not a legitimate objective. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2551 (2018) (per curiam).

Appellants next argue that while racial considerations may have played a role in earlier redistricting processes, there is no evidence that they factored into the 2021 decision to maintain preexisting lines. Yet, previous redistricting iterations can be relevant circumstantial evidence to help understand the actions taken by the Council in 2021. *Abbott*, 138 S. Ct. at 2325. And, as noted above, the district court found that the choice to maintain preexisting lines was likely made to maintain racial borders drawn in 2011. Reviewing the factual findings that support the district court's conclusion—including the Council's historical background and contemporaneous statements of its councilmembers—we find no clear error in the determination that race was substantially likely a

predominant consideration in the 2021 choice to maintain preexisting district lines.

Next, Appellants contend they were improperly faulted for discussing racial demographics and partisanship data, since awareness of the former and consideration of the latter do not violate the Equal Protection Clause. *See Miller*, 515 U.S. at 916 (awareness of racial demographics); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (consideration of partisanship). However, the district court did not fault Appellants for being merely aware of racial demographics, but rather for the substantial likelihood that those considerations were a predominant factor in their redistricting efforts, which would be a clear violation of the Equal Protection Clause. *Miller*, 515 U.S. at 916; *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

Appellants then argue that the district court placed too much weight on the statements of one of its councilmembers. They opine that we have shown skepticism about whether the statements of a single bill sponsor can be imputed to the rest of a legislative body. *See Greater Birmingham Ministries*, 992 F.3d at 1324–25. To be sure, in *Greater Birmingham Ministries*, we expressed doubt that one legislator's comments about "a different topic unrelated to the" issue at hand could be imputed to a 105-member body. *Id.* However, here, the district court found that the councilmember was a key figure in the nineteen-member Council, cited the Appellants' own expert to support that conclusion, and offered numerous direct quotes that suggested race was a primary

motivating factor for that councilmember. Because relevant, contemporaneous statements of key legislators are to be assessed when determining whether racial considerations predominated in redistricting processes, *id.* at 1321–22, we find no clear error in the court's weighing of that evidence.

Finally, Appellants argue that the district court wrongly faulted them for not responding to public criticisms even though its redistricting procedures were transparent. Yet, this was simply one piece of circumstantial evidence that supported the district court's conclusion. To be sure, by itself, it is unlikely that this would support a determination of discriminatory intent. However, we see nothing clearly erroneous about finding significance in the fact that the Council generally did not attempt to respond to public concerns about racial gerrymandering, or that the one councilmember who did respond seemed to confirm that race was a priority. *See Cooper*, 137 S. Ct. at 1463–64 (noting that plaintiffs may use circumstantial evidence to show that other factors were subordinated to racial considerations).

Reviewing the district court's Order, the abundance of evidence presented, and the relevant caselaw, we find the district court did not clearly err by determining Appellees made the "requisite clear showing" that race was the predominant factor in the redistricting process. Thus, we agree Appellees are substantially likely to succeed on the merits and, therefore, Appellants are not. *Democratic Exec. Comm. of Fla.*, 915 F.3d at 1317; *Nken*, 556 U.S. at 434.

We also conclude Appellants will not suffer irreparable harm absent a stay. Given that the district court found the Enacted Plan is substantially likely to be unconstitutional, we do not see how Appellants would be irreparably harmed by using a different map. *See Abbott*, 138 S. Ct. at 2324; *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

Nonetheless, Appellants understandably argue, and the district court recognized, that some inconveniences will result from this injunction. These include voters and candidates potentially having to readjust to new districts, the Council having to quickly develop a new map, and the Supervisor of Elections' Office having a shorter runway to prepare for the March 2023 elections. These inconveniences, we do not doubt, may have been exacerbated by Appellees' slight delay in filing their lawsuit and motion for preliminary injunction. However, the district court found, and we agree, that certain facts mitigate these concerns. Without repeating everything laid out by the district court, we do not believe that the inconveniences caused by this injunction amount to irreparable harm to Appellants. We also accept the district court's finding that "given [Appellees'] high evidentiary burden and the voluminous record they developed, including the comprehensive reports of two experts . . . [Appellees] were moving expeditiously under the circumstances in compiling their evidence."

We further note that since the filing of this motion, the Council has managed to pass an interim remedial plan—four days before the district court's deadline. *See* David Bauerlein & Hanna

Holthaus, *Jacksonville City Council Approves a Proposed Redistricting Map After Twists and Turns*, Florida Times-Union (Nov. 5, 2022), https://bit.ly/3fvREkJ. This, along with Appellants' position that the March 21, 2023 elections can be run if the district lines are in place by December 16, 2022, fortifies our confidence in the public servants of Jacksonville and their ability to effectively carry out their duties to the people of their city.

Briefly, we also note Appellees have shown that the issuance of this stay would likely injure them and the people of the Challenged Districts. Numerous cases have described the immense harm caused by racial gerrymandering. *See, e.g.*, *Bethune-Hill*, 137 S. Ct. at 797; *Miller*, 515 U.S. at 911–12; *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Given that such gerrymandering would constitute irreparable harm to the Appellees, and the public has no interest in enforcing unconstitutional redistricting plans, we decline to require the residents of Jacksonville to live for the next four years in districts defined by a map that is substantially likely to be unconstitutional.

Therefore, we find that the factors laid out in *Nken*, 556 U.S. at 434, as modified by our court for motions to stay in *Democratic Executive Committee of Florida*, 915 F.3d at 1317, all weigh in favor of denying Appellants' motion to stay.

As a final matter, we address Appellants' argument that we should grant the stay pending the Supreme Court's decision in *Merrill v. Milligan*, No. 21-1086. Waiting for the outcome of a "federal appellate decision that is likely to have a substantial or

controlling effect on the claims and issues" of a case is an "excellent" reason to grant a stay. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009). However, *Milligan* is unlikely to have a substantial or controlling effect on this case. Indeed, *Milligan* does not involve a claim under the Equal Protection Clause; rather, it addresses a violation of Section 2 of the Voting Rights Act (VRA). *Merrill v. Milligan*, 142 S. Ct. 1105 (2022). And while (at the moment) complying with the VRA can be a compelling interest that justifies the predominance of racial considerations in redistricting, *see Cooper*, 137 S. Ct. at 1464, Appellants did not contend that its line-drawing was done to comply with the VRA. In fact, Appellants did not put forth any arguments that its redistricting plan served a compelling interest. Therefore, we do not find the district court abused its discretion in declining to stay the injunction on this basis, and we decline to do so as well.

Finding the district court did not abuse its discretion in granting the preliminary injunction and concluding the Appellants did not make the requisite showing to justify a stay, "Appellants City of Jacksonville and Supervisor Hogan's Emergency Motion to Stay" is **DENIED**.

The Clerk is directed to treat any motion for reconsideration of this order as a non-emergency matter.

LAGOA, Circuit Judge, Concurring in the Result:

I concur in the result of the majority's denial of the Appellants' motion to stay the district court's preliminary injunction order. Regardless of whether Appellants affirmatively conceded the *Purcell* principle, I conclude that Appellants have not met their burden under *Purcell* for a stay. Additionally, because Appellants have not argued that they will suffer irreparable harm absent a stay, *see Nken v. Holder*, 556 U.S. 418, 425–26 (2009), I would deny the stay motion on that ground alone without commenting on the merits of the appeal. I write briefly to explain my reasoning.

First, the issue of whether Appellants have conceded the *Purcell* principle is a close call. In *League of Women Voters of Florida, Inc. v. Florida Secretary of State*, 32 F.4th 1363 (11th Cir. 2022), this Court explained that it was "doubtful that the *Purcell* principle is subject to the ordinary rules of waiver [or] . . . forfeiture," as courts "have an independent obligation to 'weigh . . . considerations specific to election cases.'" 32 F.4th at 1370 n.4 (quoting *Purcell*, 549 U.S. at 4). It is true that a party can affirmatively concede that *Purcell* does not apply to a case; in such a situation, the defendant cannot rely on *Purcell*'s heightened stay standard. Recently, in *Rose v. Raffensperger*, No. 22A136, 2022 WL 3568483 (S. Ct. Aug. 19, 2022), the Supreme Court rejected this Court's application of the *Purcell* principle where "respondent could not fairly have advanced himself in light of his previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November

elections should applicants win at trial." Indeed, the *Rose* defendant had conceded to the district court that he would not "make an appeal based on *Purcell*" and did not invoke *Purcell* to argue that the district court's scheduling would create problems for the upcoming election. *See Rose v. Sec'y, State of Ga.*, No. 22-12593, 2022 WL 3572823, at *5–6 (11th Cir. Aug. 12, 2022) (Rosenbaum, J., dissenting), *vacated sub nom.*, *Rose v. Raffensperger*, No. 22A136.

In agreeing to the briefing schedule for the preliminary injunction, Doc. 24, Appellants informed the district court that "[i]n order to proceed with the 2023 general consolidated government elections, the Supervisor of Elections needs to know the City Council district boundaries no later than Friday, December 16, 2022," Doc. 24-1. As the district court noted, the briefing schedule below was collaboratively developed with Appellants and accepted "without caveat" at the time it was submitted.

On the other hand, unlike the *Rose* defendant, Appellants, in their remedy brief, argued against Appellee' interim remedy and supporting rationale in the event that the district court ordered the Jacksonville City Council (the "Council") to draw new districts. Doc. 45 at 1–2. Specifically, Appellants argued for the March 21, 2023, elections to proceed under the current district lines, for the Council to pass new district lines, "in not less than five months" and subject to Plaintiffs' challenge and the court's review, and for the court or another judicially designated body to draw new lines if the Council was unable to pass new lines in the mandated time frame. *Id.* at 2. In support of their position, Appellants argued

against Plaintiffs' position that the March 2023 elections were not imminent, explaining that "the City's election machinery is already well in gear" and invoking the *Purcell* principle. *Id.* at 6–8. They also argued that it would be "nearly impossible for a newly-crafted and Court-approved district map to be in place by December 16, 2022," and that "even if it could be, the undue burdens, confusion and hardships associated with doing so weigh against implementing new lines at this time." *Id.* at 12.

It is unclear from the Supreme Court's brief opinion in *Rose* whether the affirmative concessions made by the defendant were critical to its vacatur of the stay under *Purcell*.[1] But, even if Appellants did not affirmatively concede the *Purcell* principle, I agree with the majority that, under the circumstances of this particular case, *Purcell* does not apply. First, the district court issued its preliminary injunction against the current redistricting plan more than five months before the March 2023 elections. By contrast, the relevant statewide election in *League of Women Voters of Florida* was less than four months away, with other elements of the enjoined laws such as voter registration and poll worker training underway. *See* 32 F.4th at 1371. Although an injunction affecting an election that is issued five months before that election might fall within *Purcell*'s "outer bounds" in some cases, I, like the majority, decline to extend *Purcell* to the facts of this case. Notably, the

[1] Given this lack of clarity in *Rose*, parties seeking to raise the *Purcell* principle should raise it at the first available opportunity.

Council was able to pass an interim remedial plan before the district court's November 8, 2022, deadline. Appellants have stated that, if the district lines are in place by December 16, 2022, the local elections can be run. And the interim lines were passed more than a month before the December 12, 2022, deadline for candidates to qualify for the ballot via petition. The substantial risks of harm, confusion, or disruption as to the March 2023 elections that Appellants raise—and which the district court found lacking—have ultimately not come to fruition, given the passage of the interim plan.

Moreover, Appellants have not made any real argument for a stay under *Nken*'s "traditional" stay standard. Under the "traditional" standard, this Court considers four factors: (1) whether the stay applicants have "made a strong showing that [they] are likely to succeed on the merits"; (2) whether the applicants "will be irreparably injured absent a stay"; (3) "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *League of Women Voters of Fla.*, 32 F.4th at 1370 (quoting *Nken*, 556 U.S. at 425–26). Appellants have not made any argument as to irreparable harm in their stay motion, and I agree with the majority that any of the inconveniences resulting from the injunction do not rise to the level of irreparable harm. Appellants thus have not carried their burden to show their entitlement to a stay pending appeal, *see Nken*, 556 U.S. at 433–34, and I would deny Appellants' motion for stay on this basis alone without commenting on the merits of the appeal.