No. 23A-_____

IN THE

Supreme Court of the United States

TERRY PETTEWAY, *ET AL.*,

Applicants,

v.

GALVESTON COUNTY, TEXAS, *ET AL.*,

Respondents.

EMERGENCY APPLICATION TO VACATE THE FIFTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

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PARTIES TO THE PROCEEDING

The applicants in this Court are Terry Petteway, Penny Pope, and the Honorable Derreck Rose, who were plaintiffs in *Petteway, et al. v. Galveston County, Texas, et al.*, in the district court (No. 3:22-cv-57) (S.D. Tex.) and were appellees in the Fifth Circuit.

The respondents in this Court are Galveston County, Texas and Honorable Mark Henry, in his official capacity as Galveston County Judge.

The United States of America was a plaintiff in the district court (*United States of America v. Galveston County, Texas, et al.*, No. 3:22-cv-93 (S.D. Tex.))—which case was consolidated with the applicants' case in the district court—and were appellees in the Fifth Circuit.

The Dickinson Bay Area Branch of the NAACP, Galveston Branch of the NAACP, Mainland Branch of the NAACP, Galveston LULAC Council 151, Edna Courville, Joe A. Compian, and Leon Phillips were plaintiffs in the district court (*Dickinson Bay Area Branch NAACP, et al. v. Galveston County, Texas, et al.*, No. 3:22-cv-117 (S.D. Tex.))—which case was consolidated with the applicants' case in the district court—and were appellees in the Fifth Circuit.

The Galveston County Commissioners Court and Dwight D. Sullivan, in his official capacity as Galveston County Clerk, were defendants in the consolidated cases below and appellants in the Fifth Circuit.

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EMERGENCY APPLICATION TO VACATE THE FIFTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

TO: The Honorable Samuel A. Alito, Jr., Circuit Justice for the Fifth Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court, applicants respectfully apply for an order vacating the stay issued November 10, 2023, by the Fifth Circuit, a copy of which is appended to this application (App. A).

JURISDICTION

This Court has jurisdiction to grant this application pursuant to Rule 23.3. Applicants won final judgment following a 10-day bench trial in which the district court enjoined Galveston County, Texas's commissioners court map as violating Section 2 of the Voting Rights Act. *Petteway v. Galveston County, et al.*, No. 3:22-cv-00057 (S.D. Tex. Oct. 13, 2023) (Hon. Jeffrey Vincent Brown).[1] Defendants ("the county") filed an emergency motion for a stay pending appeal on October 17, 2023. *Galveston County v. Petteway*, No. 23-40582 (5th Cir. 2023), Doc. 13. On October 18, 2023, a motions panel of the Fifth Circuit granted a temporary administrative stay set to expire on November 2, 2023, and directed the clerk to expedite the appeal. App. F. On October 19, 2023, the Fifth Circuit set oral argument for November 7, 2023, and *sua sponte* extended the administrative stay until November 10, 2023. App. G. Applicants opposed the stay in their merits brief filed on November 2, 2023. *See*

[1] The Fifth Circuit's opinion is appended as App. B. The district court's injunction is appended as App. C. The district court's Findings of Fact and Conclusions of Law is appended as App. D. The district court's order denying Galveston County's Motion for a Stay is appended as App. E. The Fifth Circuit's order entering the original administrative stay to expire November 2, 2023 is appended as App. F. The Fifth Circuit's order extending its administrative stay until November 10, 2023, and directing expedited briefing and argument is appended as App. G.

Petteway Appellees' Br. at 2, 52, *Petteway, et al. v. Galveston County, et al.*, No. 23-40582 (5th Cir.) (Nov. 2, 2023), Doc. 72. That same day, the county filed a motion for initial hearing en banc. Doc. 71. The court directed the parties to file responses, *see* Doc. 79, and all appellees opposed the motion, Docs. 86, 90, 92. The panel held argument on October 7, 2023, and issued its opinion affirming the district court's decision on November 10, 2023. App. B. But the panel disagreed with the Fifth Circuit's en banc precedent that authorized applicants' claim seeking relief for Black and Latino voters and called for new en banc review to overturn that precedent, while simultaneously denying the county's pending motion for initial en banc review as moot. App. B. That same day—after affirming the district court's injunction—the panel issued an order *sua sponte* extending its "administrative stay" "pending en banc poll." App. B. Unlike the court's prior administrative stay orders on appeal, this one has no expiration date, and comes after applicants have opposed the stay and won affirmance of the district court's injunction.

The Fifth Circuit has not entered an order indicating the results of its en banc poll. Meanwhile, the candidate filing period for the November 2024 election commenced on November 11—the day after the Fifth Circuit issued its opinion affirming the district court's injunction but simultaneously administratively staying that injunction—and runs through December 11.[2] Under these circumstances, the Fifth Circuit's continued "administrative stay"—now in place for over 30 days,

[2] *See, e.g.*, Tex. Sec'y of State, Election Advisory No. 2023-20, https://www.sos.state.tx.us/elections/laws/advisory2023-20.shtml#_bookmark5. Texas law accommodates circumstances in which the candidate filing deadline will need to be extended through December 18, 2023. *See id.*

opposed by applicants, and extended after the injunction it stays was *affirmed*—has the practical effect of being a full (and unreasoned) stay pending appeal. *Cf. Abbott v. Perez*, 585 U.S. __, 138 S. Ct. 2305, 2319 (2018) (holding that "the label attached to an order is not dispositive" and an order with the "practical effect" of an injunction in a redistricting case should be treated as one for jurisdictional purposes). This is especially so in light of the need for relief in advance of the December 11 candidate filing deadline.

In light of that deadline, the need for a remedial map to take effect expeditiously, and applicants' cognizance of this Court's *Purcell* decisions, applicants seek relief from this Court now. Applicants will advise the Court if the Fifth Circuit denies en banc relief and dissolves the stay while this application is pending. But applicants cannot await that result in light of the election calendar, and the reality is that relief from this Court—either an emergency stay request filed by the county (if en banc review and further stays are denied below) or a request to vacate a stay by the applicants (if the opposite occurs)—will be before this Court regardless of the disposition of the en banc poll. Applicants believe it is therefore prudent to file this application with the Court now to ensure that it can review the matter in an orderly fashion and allow the district court's remedial order to take effect for the November 2024 election.[3]

[3] Other consolidated appellees have sent a letter to the Clerk of the Fifth Circuit requesting expedited attention to the en banc request submitted by the panel. Letter from Richard Mancino to Lyle Cayce, *Petteway, et al. v. Galveston County, et al.*, No. 23-40582 (5th Cir. Nov. 15, 2023), Doc. 130.

INTRODUCTION AND PROCEEDINGS BELOW

In June 2021, with bipartisan support in Congress, Juneteenth became a federal holiday commemorating Emancipation's arrival in Galveston, Texas in 1865—a city that was central to the slave trade in this country. Five months later, in November 2021, the Galveston County's commissioners court voted 3-1 to adopt a redistricting plan that "summarily carved up and wiped off the map" the sole majority-minority commissioners precinct, which had existed for thirty years. App. D at 7, 148. Three lawsuits were filed—two by private plaintiffs and one by the United States—alleging that the enacted plan had discriminatory effects in violation of Section 2 of the Voting Rights Act; was intentionally discriminatory in violation of Section 2, the Fourteenth Amendment, and the Fifteenth Amendment; and was a racial gerrymander in violation of the Fourteenth Amendment. App. D at 9. On October 13, 2024, the district court issued a 157-page opinion permanently enjoining the enacted plan and ordering a remedial process to ensure that a lawful map was in place ahead of the December 11 candidate filing deadline for the November 2024 election. Apps. C, D & E. United States District Judge Jeffrey Vincent Brown found "defendants' actions to be fundamentally inconsistent with § 2 of the Voting Rights Act," App. D at 6, and observed that

> [t]his is not a typical redistricting case. What happened here was stark and jarring. The Commissioners Court transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage. The circumstances and effect of the enacted plan were mean-spirited and egregious given that there was absolutely no reason to make major changes to Precinct 3.

App. D at 149. The district court observed that it was "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021's redistricting" App D. at 148, and that the county's actions were "a clear violation of § 2 of the Voting Rights Act," App. D at 149.

The Fifth Circuit has now affirmed the district court's decision, yet it has nevertheless extended its stay of the district court's injunction pending an en banc poll urged by the panel. That stay of an *affirmed injunction* was accompanied by no reasoning or application of the factors that warrant the extraordinary relief of a stay. Because the candidate filing period closes on December 11, this Court's urgent action is needed to vacate the stay. A redistricting plan that the district court characterized as "[a]typical," "stark, "jarring," "mean-spirited," and "stunning" for its dismantling of a thirty-year-old majority-minority precinct cannot be allowed to cast a discriminatory pall over the 2024 election in Galveston County.

The district court assessed the trial testimony and evidence pursuant to both the Section 2 *Gingles* preconditions and totality-of-the-circumstances factors as well as the *Arlington Heights*[4] intentional discrimination framework. App. D at 59-60. The district court made, *inter alia*, the following factual findings after observing ten days of witness testimony.

1. Black and Latino residents account for over 38% of Galveston County's population. App. D at 30. From 1991 until 2021, one of the four commissioners court precincts—Precinct 3—has been majority-minority and located in the center of

[4] *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Galveston County, including portions of Dickinson, La Marque, Texas City, and the City of Galveston. App. D at 31. Precinct 3 has been represented by two Black men during its 30-year history; the current commissioner, Stephen Holmes, has held the seat since 1999. App. D at 31, 108. The 2020 Census revealed Precinct 3 to be over 58% Black and Latino. App. D at 31-32. The 2020 Census also revealed that little change was necessary to correct the map's malapportionment—"shifting only one voting district from Precinct 2 to Precinct 3" would have resolved the population deviation. App. D at 37.

2. In November 2020, County Judge Mark Henry[5] directed the county's general counsel to hire redistricting attorney Dale Oldham to manage the county's 2021 redistricting process. App. D at 71. "Shortly after engaging Oldham, Judge Henry and the county's general counsel, Paul Ready, contacted Oldham to ask whether the county 'had to draw a majority-minority district.'" App. D at 71-72 (quoting PX-144 at 1). Oldham replied that this would depend upon the Census data, which had not yet been released. *Id.* The county additionally retained the law firm Holtzman Vogel Josefiak Torchinsky ("Holtzman Vogel") to assist Mr. Oldham. App. D at 71.

3. Following the August 2021 Census data release, Mr. Oldham obtained a chart "reflecting the racial breakdown of each commissioners precinct." App. D at 72. Because Mr. Oldham had served as the county's redistricting counsel in 2011, he

[5] Each Texas County elects a "county judge" who serves as the chief executive of the county and chair of the county commissioners court, which is comprised of four commissioners elected from single-member districts (called "precincts") and the county judge. Tex. Const. art. V, §§ 15, 16, 18(a)–(b).

testified that he was "'pretty familiar' with 'the population and the demographic location of that population in Galveston County'" and "knew that the Black population was centered in Precinct 3 in the 2011 plan." App. D at 73. Nevertheless, Mr. Oldham "reviewed racial-shading maps of Galveston County after the census-data release to identify where Black populations were concentrated." *Id.*

4. Mr. Oldham then met with Judge Henry and the four incumbent commissioners to discuss redistricting. App. D at 73-74. "Judge Henry told Oldham that he wanted a map like the one he conceived in 2011—the configuration that ultimately became Map 2."[6] App. D at 74. At trial, Mr. Oldham testified that he had advised Judge Henry in 2011 that such a configuration "wouldn't get preclearance . . . because that map would retrogress the minority voting strength in the county." Trial Tr. vol. 8 at 150:19-151:21. Indeed, Mr. Oldham testified that "the elimination of preclearance facilitated the dismantling of the majority-minority precinct" in the 2021 process. App. D at 84.

5. Mr. Oldham and Holtzman Vogel waited three weeks after meeting with Judge Henry and the commissioners to retain a demographer with the technical ability to create the redistricting map. App. D at 74-75. Holtzman Vogel retained Thomas Bryan on October 15, 2021, and two days later Mr. Bryan sent two draft maps—"(1) a 'minimum change' plan that became Map 1, and (2) an 'optimal' plan with an entirely coastal precinct and three mainland precincts—all of which fractured

[6] Map 2 was the plan ultimately enacted. App. D at 82-83.

Precinct 3—that became Map 2." App. D at 76.[7] The district court found that Mr. Bryan "did not exercise discretion in drawing Maps 1 or 2; Oldham told him where to place the lines" with "'very specific instructions.'" App. D at 76. Mr. Bryan "could not speak to what motivated the drawing of Map 2." *Id.*

6. Mr. Oldham repeatedly testified at trial that he provided "incredibly clear" instructions to Mr. Bryan to not display or use racial data while drawing the lines. *E.g.*, Trial Tr. vol. 8 at 71:18-25; *id.* at 72:15-20 (Oldham: "I told [Bryan] in both cases not to use the race data at all in any shape, form, or fashion."). But Mr. Bryan—who was present in the courtroom for Mr. Oldham's testimony—testified that this purported "incredibly clear" instruction "*never happened*." Trial Tr. vol. 9 at 21:4-10; *id.* at 21:25-22:20 (emphasis added). The district court credited Mr. Bryan's testimony and not Mr. Oldham's, App. D at 76, and found that while Mr. Bryan had not in fact consulted racial data, that was not because of any instruction from Mr. Oldham; and it nevertheless did not matter because Mr. Bryan exercised no discretion, and merely placed the lines where Mr. Oldham told him to. App. D at 76; *see also* Trial Tr. vol. 9 at 34:19-25 (Bryan testifying that the absence of racial data on his computer screen said nothing about whether racial considerations motivated the placement of the lines). Mr. Oldham, in turn, *had* reviewed racial data before the map drawing exercise, including racial shading maps to identify the concentrations of Black voters in the county. App. D at 73.

[7] Mr. Bryan also drew a third concept map, at Holtzman Vogel's instruction, that was intended to create four Republican precincts. App. D at 75. But the district court found that this map "was not the foundation upon which Bryan built Map 2," that "Oldham never told Bryan that Judge Henry wanted to create four Republican precincts, and Oldham denied any such partisan objective." App. D at 75.

7. Map 2 "represents a dramatic change in the commissioners-precinct lines, both on the coast and the mainland, in a way that distributes the population of benchmark Precinct 3 among all four new precincts and shifts Commissioner Holmes's precinct north[.]" App. D at 77. While the benchmark plan (and Map 1) retained Precinct 3 as a majority-minority precinct, "the enacted plan has no commissioners precinct with a Black and Latino CVAP larger than 35%," and "Precinct 3 now has the smallest such population at 28%." App. D at 31-32.

8. At trial, the county contended that Map 2's purpose was to create a "coastal precinct," but the district court found that this was untrue. Citing five alternative plans proffered by plaintiffs that created a coastal precinct while retaining a majority-minority precinct—something Mr. Oldham acknowledged was possible—the district court found "that a desire to create a coastal precinct cannot and does not explain or justify why Map 2 . . . was drawn the way it was—and especially does not explain its obliteration of benchmark Precinct 3." App. D at 77; *see also Cooper v. Harris*, 581 U.S. 285, 317 (2017) (explaining that such alternative maps are "highly persuasive" evidence to disprove a map's purported justification).

9. The district court likewise rejected all other non-racial explanations for Map 2's purpose. App. D at 98 ("The rationales stated by members of the commissioners court in public, in deposition testimony, and at trial are inconsistent with these purported criteria."); *id.* ("Judge Henry admitted that he did not know of or apply the criteria the commissioners court claimed in its interrogatory responses to have been used in the redistricting process."). In particular, the district court found

that achieving a partisan outcome in favor of Republicans was not the purpose behind Map 2's elimination of Precinct 3 as a majority-minority precinct. "[A]ll members of the commissioners court who voted for the enacted plan disclaimed partisanship as a predominating consideration" and "Oldham denied there was any such partisan motivation." App. D at 101.

10. The commissioners court held a single public hearing regarding redistricting on November 12, 2021—the day before the state-imposed deadline to adopt a map. App. D at 81-83. Commissioner Apffel informed Commissioner Holmes in advance that Judge Henry planned to immediately move adoption of Map 2 at the meeting and that it would be approved. App. D at 82. Notwithstanding this evidence, the county contended at trial that it was Commissioner Holmes's fault that Map 1 was not adopted and that had he lobbied his colleagues harder they would have adopted Map 1 instead of Map 2. Trial Tr. vol. 1 at 33:3-14, 35:20-36:15, 48:2-7; Trial Tr. vol. 10 at 283:16-284:12; Fifth Circuit Oral Argument at 10:40-11:30.

11. The November 12 hearing was "unusual" because unlike previous years it was the only such meeting and it was held at a small annex building 27 miles from the county seat. App. D at 91-92. The district court found that until recently only meetings involving "noncontroversial routine business, such as payroll approval" would be held at the annex building, while "[s]erious, non-run-of-the-mill county business continued to be conducted at the county courthouse in the county seat." App. D at 92. But "in recent years, it became more common for topics involving race to be taken up at the League City Annex," including meetings about the county's

Confederate statue, immigration, and redistricting. App. D at 92. The district court, citing lay testimony and video evidence, concluded that "the commissioners court failed to provide the adequate space needed to accommodate the number of persons who sought to attend the November 12 public hearing. App. D at 93. The district court found that the defendants "have not provided any credible explanation for their failure to hold the special meeting in a space that would accommodate the foreseeably sizable crowd." *Id.*

12. Substantively, the district court found that "[c]onduct by Judge Henry and the county commissioners indicated a disregard for public input from the minority communities and those critical of the enacted plan's discriminatory effects." App. D at 94. The court found that Judge Henry characterized public comments about the map's racial effect as "devoid of meaningful content." App. D at 95. And when the attendees—who were "predominantly Black and Latino and included many older residents . . . informed the commissioners court that they could not hear the proceedings, Judge Henry reacted by threatening to have the constables remove the attendees[.]" App. D at 95. Judge Henry said:

> I'm going to speak at this tone. That's all I can do. I'm not going to scream. I don't have a microphone . . . I will clear you out. If you make a noise, I will clear you out of here. I've got constables here.

Id. Commissioner Giusti "believed [Judge Henry's] conduct was 'aggressive'" and witnesses characterized Judge Henry as "real ugly about clearing the room." App. D at 95. All but one public speaker opposed Map 2, others complained about the "inconvenience of the meeting and the lack of public transparency in the process,"

and "only Commissioner Holmes attempted to respond to the audience's concerns." App. D at 95-96.

13. The district court found that Judge Henry and the two commissioners who voted in favor of Map 2 knew where the county's minority population was concentrated, App. D at 73, that the map's impact on the minority population was "evident and foreseeable," that it would "depriv[e] them of the only commissioners precinct where minority voters could elect a candidate of their choice," and that "the commissioners court was aware of that fact when it adopted the enacted plan." App. D at 59.

14. The district court found a host of "procedural anomalies as compared to previous redistricting cycles." App. D at 83. These included the failure to adopt a timeline or any public redistricting criteria, the lack of transparency in the engagement of redistricting counsel, the lack of public notice and availability for comment, the conduct surrounding the November 12 meeting, the disregard for minority input, and the exclusion of Commissioner Holmes from the process that led to the configuration of the enacted map. *Id.* The district court noted that DOJ had identified several deficiencies in its 2012 objection letter to Galveston's proposed redistricting plan, including the "failure to adopt redistricting criteria and the deliberate exclusion of Commissioner Holmes." App. D at 83-84. "The 2012 objection letter put Judge Henry on notice of procedural defects . . . that could be viewed as evidence of intentional discrimination." *Id*. The district court found that "[d]uring the

2021 redistricting process directed by Judge Henry, the county repeated these same procedural lapses." App. D at 84.[8]

15. With respect to Plaintiffs' Section 2 discriminatory results claims, the district court found that all three *Gingles* preconditions were satisfied and that under the totality of circumstances Plaintiffs had met their burden of proof. App. D at 140, 149. Citing en banc Fifth Circuit precedent, the district court found that Black and Latino voters could be aggregated for purposes of *Gingles* 1. App. D at 127-28. Moreover, the district court found that a reasonably configured majority-minority precinct could be created in varying ways—including the county's own Map 1, which defendants characterized as compact and legal. App. D at 128-33.[9]

16. The district court carefully assessed the evidence of political cohesion for purposes of the second *Gingles* precondition and found that "the county's Black and Latino populations act as a coalition and are politically cohesive." App. D at 137. The district court likewise found that it was undisputed that, with respect to the third *Gingles* precondition, Anglo voters in Galveston County are cohesive in favor of opposing candidates and that they vote sufficiently as a bloc to usually defeat minority preferred candidates in the enacted plan's precincts. App. D at 137.

17. Because the district court found that the enacted plan produced discriminatory results in violation of Section 2, it declined to issue conclusions of law

[8] The district court credited the three plaintiff experts who offered opinions about the discriminatory intent of the enacted plan and found their application of the *Arlington Heights* factors "reliable" and "credible." App. D at 26-30.

[9] During oral argument in the Fifth Circuit, counsel for the county conceded that Map 1's iteration of Precinct 3 is compact. Fifth Circuit Oral Argument at 10:10-10:40.

on Plaintiffs' *Arlington Heights* and racial gerrymandering claims to correspond with its factual findings related to intentional discrimination and racial gerrymandering. App. D at 6, 152-53. The court reasoned that these additional conclusions of law were unnecessary because the injunction Plaintiffs received for the Section 2 discriminatory results claim was the same as they would receive if the court likewise ultimately ruled on their intentional discrimination and racial gerrymandering claims. App. D at 152-53. Nevertheless, the court found that the county knew it was dismantling a performing majority-minority precinct, that it was prevented from doing this same thing in 2011 because it retrogressed minority voting strength, and that the county's proffered non-racial explanations for its actions were pretextual. App. D at 59, 84, 97-102. Indeed, the district court found that there was no reasonable, non-racial explanation or justification for the dismantling of Precinct 3. App. D at 149.

18. The district court enjoined further operation of the enacted plan, provided the county with two weeks to adopt a proposed remedial plan, and ruled that if it failed to do so, the county must implement either the illustrative plan submitted by DOJ's expert or Map 1. Apps. C & E. The district court's remedial schedule was aimed at ensuring a remedy was in place prior to the December 11 candidate filing deadline. The district court ordered that the county could implement its own Map 1 as the remedy map—a map the county defended as legal and compact, and contended would have been adopted had Commissioner Holmes lobbied his white colleagues more fervently.

The county moved for a stay, which the district court denied. App. E. A motions panel of the Fifth Circuit granted an "administrative stay" to expire on November 2, and set the case for emergency hearing at the next available oral argument date. App. F. The merits panel extended the administrative stay through November 10, and set an abbreviated briefing schedule with oral argument set on November 7. App. G. On November 10, the Fifth Circuit issued a six-page opinion affirming the district court's decision. App. B. The court concluded that it was bound by Fifth Circuit precedent holding that Section 2 authorized applicants' claim, that the district court did not clearly err in finding the three *Gingles* prongs satisfied, and that Section 2 was not unconstitutional for lack of temporal limitations. App. B at 5-6. But the panel objected that it disagreed with the Fifth Circuit's en banc precedent authorizing non-single-race Section 2 claims and requested an en banc poll to overturn that precedent. App. B at 5. That same day, the panel extended the administrative stay a second time—with no explanation of its reasoning under settled factors that govern when the extraordinary remedy of a stay is warranted. App. A. The current "administrative stay" extends indefinitely until the Fifth Circuit decides whether to grant en banc review. *Id.*

STANDARD OF REVIEW

"A Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and would very likely be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the

opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010).

ARGUMENT

This Court should vacate the Fifth Circuit's stay and ensure that a map labeled "stark and jarring" and "mean-spirited" for its precise targeting of minority voters in Galveston County is not permitted to govern the November 2024 election. This Court is likely to grant review in this case if the Fifth Circuit grants rehearing en banc, ignores the intentional destruction of a performing majority-minority precinct, and—in order to do so—reverses its decades-old en banc precedent and the district court's decision. Should the Fifth Circuit take this extraordinary action, it would deepen a circuit split on whether Section 2 contains a single-race threshold requirement and be at odds with decisions of this Court on the scope of Section 2 results claims and the intentional dismantling of performing majority-minority districts.

Moreover, the Fifth Circuit's decision to stay the district court's injunction is demonstrably wrong. This Court has repeatedly cautioned against the intentional destruction of a performing majority-minority district, and it has assumed (and most circuits have agreed) that Section 2 protects all minorities from vote dilution without limitation to the precise racial makeup of the affected class of voters. That is consistent with the statutory text and the Dictionary Act's rules of construction. It

likewise accords with Congress's broad remedial purpose and legislative history. A stay is especially inappropriate here in light of the ream of factual findings suggesting the presence of discriminatory intent. This case has reached final judgment and been affirmed based upon longstanding precedent—a stay is inappropriate and is contrary to *Purcell* concerns. The panel decision acknowledges that plaintiffs prevail under long-standing law, but nevertheless seeks to stay relief for the next election to *change* the law. This diminishes confidence in elections, the rule of law, and the judiciary.

Finally, applicants will be seriously and irreparably injured by a stay. Precinct 3 has been a majority-minority precinct preventing vote dilution in Galveston County for thirty years. The candidate elected in 2024 will not be up for reelection until 2028. Applicants cannot be forced to wait four years for an opportunity to vote in a nondiscriminatory election—particularly in light of the district court's factual findings.

I. The Court is likely to grant review of this case.

This case could, and in all likelihood will, be reviewed by this Court if the Fifth Circuit grants rehearing en banc and reverses the district court's decision. The consequences of that action would be extraordinary; it would judicially sanction the intentional destruction of a long-standing and historically important majority-minority district and would deepen a circuit split over whether Section 2 contains a single-race limitation to its prohibition of vote dilution in redistricting. Three circuits have held that it does not. *See LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc); *Pope v. Cnty. of Albany*, 687 F.3d 565 (2d Cir. 2012); *Citizens of Hardee*

Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990). The Sixth Circuit has held that it does. *See Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). A decision by the Fifth Circuit to take this case en banc and overturn its *Clements* precedent (and several prior panel decisions) will not resolve that circuit split—it would simply deepen it. This split of authorities makes it likely that this Court would review this case if the Fifth Circuit deepens the split by overruling its current precedent notwithstanding the "stark and jarring" circumstances of this case. App. D at 148.

II. The Fifth Circuit is demonstrably wrong in issuing the stay.

To begin, the Fifth Circuit was "demonstrably wrong in its application of accepted standards in deciding to issue the stay," *Western Airlines*, 480 U.S. at 1305 (O'Connor, J., in chambers), because there is no evidence of what, if any, standards the court employed in issuing its series of three, one-sentence stay orders—the latest of which follows its *affirmance* of the district court's decision. The undersigned is unaware of any authority that supports the imposition of an "administrative stay" *after* disposition of a case—the entire purpose of such an unreasoned, temporary stay is to permit time for the court to assess the case. A circuit panel's displeasure with binding precedent is insufficient grounds to order a post-affirmance "administrative stay." But even assuming the Fifth Circuit considered the accepted standards, *see Nken v. Holder*, 556 U.S. 418, 434 (2009), its issuance of a stay was demonstrably wrong.

The court's decision to issue a stay is wrong on the merits and equities. *First*, this Court has never sanctioned the knowing dismantling of a performing majority-minority district in the absence of a racially neutral compelling justification—much less a rational one—as the district court found was lacking here. The district court's factual findings reveal an "egregious" and "jarring" intentional dismantling of a thirty-year-old majority-minority precinct that bears the mark of purposeful discrimination. A stay is especially inappropriate under these circumstances. *Second*, this Court has assumed—and the majority of circuits to consider the issue (including the Fifth Circuit) have held—that Section 2 prohibits dilutive redistricting of minority citizens regardless of the individual race of the protected class's members. That accords with the plain text, broad remedial purpose, and legislative history of Section 2. *Third*, the equities do not favor a stay. The district court's decision adhered to thirty years of settled precedent in the circuit and came after a full trial on the merits regarding an *existing*—not a newly sought—majority-minority precinct. These factors, together with *Purcell* concerns, make a stay demonstrably wrong.

A. The district court's factual findings evidencing intentional discrimination makes a stay demonstrably wrong.

The evidence of intentional discrimination—carefully and meticulously catalogued by the district court—makes a stay especially unjust in this case. Although the district court did not need to issue a legal conclusion on intent considering its Section 2 results ruling, the unmistakable conclusion from its factual findings is that the county's enacted plan "bears the mark of intentional discrimination," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440

(2006) ("*LULAC*"). In *LULAC*, this Court reached that conclusion based upon the tinkering around the edges of Texas's 23rd congressional district to prevent its burgeoning Latino majority from electing their candidate of choice. *Id.* Here, a thirty-year performing majority-minority precinct was "summarily carved up and wiped off the map." App. D at 148. The district court characterized the process as "[a]typical," "mean-spirited," "egregious," "stark," "jarring," and "stunning." App. D at 148-49. The district court found that Judge Henry and the commissioners knew that they were dismantling the sole majority-minority precinct, App. D at 59, and that every single non-racial justification the county offered to justify that deliberate action was pretextual. App. D at 97-102. Normally, courts confront the difficulty of disentangling race from partisanship in these cases. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. at 2330 n.25; *cf. Cooper*, 581 U.S. at 308. Not here—the commissioners who voted in favor of the plan, Judge Henry, and the plan's mastermind, Mr. Oldham, all expressly *denied* a partisan motivation. App. D at 101. And the district court credited alternative maps that disproved the post-hoc litigation explanation that a desire for a "coastal precinct" explained the dismantling of Precinct 3. App. D at 100-01; *see Cooper*, 581 U.S. at 317 (such alternative maps "can serve as key evidence" in "undermining a claim that an action was based on a permissible, rather than prohibited, ground"). These facts alone suffice to vacate the stay.

No authority from this or any other Court permits the decimation of an existing majority-minority district absent some race-neutral justification (*e.g.*, minority population decline). Indeed, the intentional destruction of a majority-minority district

obviates the requirement to satisfy the first *Gingles* precondition by aggregating Black and Latino voters. *See, e.g.*, *Bartlett*, 556 U.S. at 20 ("Our holding does not apply to cases in which there is intentional discrimination against a racial minority"); *id.* at 24 ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments"); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (holding that first *Gingles* precondition relaxed in cases of intentional discrimination); *Perez v. Abbott*, 253 F. Supp. 3d 864, 944 (W.D. Tex. 2017) (rejecting argument that statutory VRA intentional discrimination claims required satisfying first *Gingles* prong); *Comm. for a Fair & Balanced Map v. Ill. Bd. of Elections*, No. 1:11-CV-5065, 2011 WL 5185567, at *4 (N.D. Ill. Nov. 1, 2011) ("[T]he first *Gingles* factor is appropriately relaxed when intentional discrimination is shown . . . ."). The county has offered no truthful nonracial explanation—rational, compelling, or otherwise—nor did the district court find one, to justify the intentional destruction of Precinct 3 as an effective majority-minority precinct. Even if the en banc Fifth Circuit—or this Court—ultimately interprets Section 2 not to authorize discriminatory results-only claims by multi-racial plaintiff groups, no one contends that intentional discrimination is permissible. The district court's factual findings related to the "egregious" dismantling of this existing majority-minority precinct thus make a stay of the district court's injunction pending further appellate review improper. If the *LULAC* facts alarmed this Court

and indicated the "mark of intentional discrimination," 548 U.S. at 440, this case is a five-alarm fire.

Plaintiffs cannot be made to suffer an intentionally discriminatory map simply because the district court simultaneously adhered to settled Section 2 circuit precedent authorizing Section 2 claims on behalf of Black and Latino voters—precedent the panel below seeks to upend—and also adhered to principles of constitutional avoidance to decline to issue legal conclusions to accompany its discriminatory intent and racial gerrymandering factfinding. A circuit split on whether Section 2 imposes a single-race threshold barrier to relief cannot stand in the way of immediate relief from a "stark and jarring" redistricting process infected with racial motives that dismantled an existing majority-minority precinct and converted it to having the lowest minority population share. App. D at 149. That would be unprecedented and is precisely the scenario this Court said would not arise in the absence of Section 5 preclearance—a legal requirement the county admits would have prevented what it did here. App. D at 84; *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (noting that "injunctive relief is available in appropriate cases to block voting laws from going into effect" and observing that "any racial discrimination in voting is too much").

The unchallenged factual findings illustrating a process and map that has alarming indicia of intentional discrimination, *see LULAC*, 548 U.S. at 440, alone suffice to vacate the stay and enforce the district court's injunction—which merely

returns the districting plan to the status quo *ex ante*—while the county seeks to undo existing Section 2 law on appeal.

B. A stay is inappropriate on the merits of the Section 2 claim.

A stay is inappropriate on the merits of the Section 2 claim. This Court has assumed in its decisions that Section 2 prohibits vote dilution on account of race regardless of whether the class of injured persons constitutes a monolithic racial group. In *Growe v. Emison*, the Court "[a]ssum[ed]" that "it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2" and held that in such cases "proof of minority political cohesion is all the more essential." 507 U.S. 25, 41 (1993); *see also Bartlett v. Strickland*, 556 U.S. 1, 13-16 (2009) (plurality) (applying holding to white crossover voter districts and not minority "coalition" districts). Here, the district court found that "the combined Black and Latino coalition is highly cohesive," App. D at 136, and the Fifth Circuit affirmed that conclusion. App. B. That is precisely the inquiry this Court instructed was necessary in *Growe*, and is consistent with the majority rule of the circuits. *See Pope*, 687 F.3d at 574 n. 5; *Concerned Citizens of Hardee Cnty.*, 906 F.2d at 526.

This accords with Section 2's text. "Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of rid[ding] the country of racial discrimination in voting" and this Court has held that "the Act should be interpreted in a manner that provides the broadest possible scope in combatting racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotation marks and citations

omitted) (alteration in original). The plain text of Section 2 authorizes vote dilution claims without imposing a "single race" threshold barrier to relief. Section 2(a) of the VRA prohibits any voting standard or practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or language-minority status. 52 U.S.C. §§ 10301(a), 10303(f). Section 2(b) sets forth how a violation of Section 2(a) is established, and notes that it applies to "a class of citizens protected by subsection (a)." *Id.* § 10301(b). The "class of citizens" to which Section 2(b) refers is not a singular minority group, but rather those "protected by subsection (a)"—*i.e.*, "any citizen" subject to a denial or abridgment of voting rights "on account of race or color," or language-minority status. *Id* § 10301(a), (b). Nothing in the text of Section 2 requires every member of the "class of citizens" to share the same race, as opposed to the same experience of being politically excluded "on account of race," whatever their race is.[10] *Id.* This is the common legal usage of "class"—a reference to those suffering the same injury caused by the defendant. *See, e.g.*, Fed. R. Civ. P. 23. And reading "class of citizens" to include a combination of protected minority citizens accords with the last antecedent grammatical rule. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

Accordingly, "class of citizens" means the class members must merely share the common characteristic of being a Section 2 protected racial, ethnic, or language

[10] This is what makes the panel's citation to *Bartlett* and crossover districts misplaced. App. B at 5. In this case, the Fifth Circuit affirmed the district court's conclusion that Black and Latino voters combined to exceed a majority of voters in a reasonably configured precinct, App. B at 5, and the county has not appealed the district court's totality-of-the-circumstances findings. A minority "coalition" claim stands in stark contrast to a crossover claim, where the white crossover voters do not share the same Section 2(a) injury of being politically excluded on account of their race. Rather, they merely share the same candidate choice as those who do suffer the injury Section 2(a) aims to redress.

minority voter experiencing vote dilution. Section 2 protects all minority voters, and where they are cohesive with other minority voters, the Act protects them together. Reading into the statute that it must protect only one distinct race of minority voters at a time defeats its broad textual mandate and adds words to the statute that do not exist.

The panel below reasoned that because Section 2(b) refers to a "class of citizens" rather than to "classes of citizens," all members of the protected class must be of the same race. App. B at 3; *id.* (noting the "singular" form of class). This is likewise the basis for the Sixth Circuit's decision on the question. *See Nixon*, 76 F.3d at 1386-87 (reasoning that "§ 2 consistently speaks of a 'class' in the singular"). This reasoning is unsound.

Congress rejected this method of statutory interpretation in the Dictionary Act. "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1. Section 2(b)'s use of "class" therefore includes "classes"—the very word the Sixth Circuit and the panel below believe is necessary for Section 2 to protect multi-racial minority groups from vote dilution.

The exception to this rule—*i.e.*, when "context indicates otherwise"—is not to be readily deployed. Only where the Dictionary Act's rule would "forc[e] a square peg into a round hole" and create an "awkward" result does the general rule give way. *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993). In making that determination, Congress's purpose in enacting the statute

guides the analysis. *Id.* at 209-10. For example, in *Wilson v. Omaha Tribe*, the Court held that the general rule in the Dictionary Act that "person" includes artificial entities like corporations applied to a statute that placed the burden of proof on a "white person" litigating a property claim against an Indian. 442 U.S. 653, 658 (1979) (interpreting 25 U.S.C. § 194). This Court reasoned that the "protective purposes of the Acts in which § 194 . . . [was] a part" would be frustrated if it did not apply to artificial entities, and thus rejected the argument that "context indicate[d] otherwise" so as to make the Dictionary Act's rule inapplicable. *Id.* at 666. In *Rowland*, this Court highlighted the importance of consulting the overall statutory purpose, given that the reference to "white person" in § 194 was "one of the strongest contextual indicators imaginable that 'person' [in the statute] cover[ed] only individuals." 506 U.S. at 209 (discussing *Omaha Tribe*, 442 U.S. at 665).

If "white person" is insufficiently specific to refer to white humans as opposed to limited liability corporations, then there is no plausible argument that Congress meant to limit "members of a class of citizens" in Section 2(b) to a single racial group, when it specified no racial group at all. This is especially so in light of Congress's "broad remedial purpose of rid[ding] the country of racial discrimination in voting" through passage of the Voting Rights Act and this Court's obligation to interpret Section 2 "in a manner that provides the broadest possible scope in combatting racial discrimination." *Chisom*, 501 U.S. at 403 (internal quotation marks and citations omitted) (alteration in original). Interpreting Section 2 to authorize discriminatory vote dilution by the white majority against a cohesive population of Black and Latino

voters self-evidently would frustrate Congress's desire to "rid[] the country of racial discrimination in voting." *Id.* One need only read Judge Brown's factual findings in this case to see that.

Moreover, it is the contrary reading that would "forc[e] a square peg into a round hole." *Rowland*, 506 U.S. at 200. The blindered analysis of the Sixth Circuit and the panel below assumes that every Section 2 plaintiff can—or must—be of a single race. What of a plaintiff who is half Black and half Latino? Under the "single race" theory advanced by the panel below and the Sixth Circuit, such a plaintiff would seemingly be required to satisfy the *Gingles* preconditions for a class of exclusively half Black, half Latino citizens. That, after all, would be the "particular race, color, or language-minority statute of the individual citizen[]" hypothetical plaintiff. App. B at 4. Or perhaps she would be forced to choose in her complaint—she can plead herself to be Black or Latina but not both—even though she *is* both and the totality of circumstances proves both Black and Latino voters in the jurisdiction suffer an unequal opportunity to participate in the political process on account of their race. *See* 52 U.S.C. § 10301(a). As Judge Keith explained in his dissent from the Sixth Circuit's *Nixon* decision, that circuit's reading of Section 2 is "most disturbing" in that it "requires the adoption of some sort of racial purity test. . . . Must a community that would be considered racially both Black and Hispanic be segregated from other Black who are not Hispanic?" 76 F.3d at 1401 (Keith, J., dissenting).

Even if it were ambiguous whether Section 2's text imposes a single-race threshold for relief, its legislative history and the broad remedial purpose of the VRA

both support recognizing such claims. The 1975 amendment to Section 2 added language-minority protections because Congress sought to address "pattern[s] of racial discrimination that ha[ve] stunted . . . black *and* brown communities." S. Rep. No. 94-295, at 30 (1975) (citation omitted; emphasis added); *see also generally id.* at 22-31. Congress knew that Texas, for example, had a substantial minority population "comprised primarily of Mexican Americans and [B]lacks" and "has a long history of discriminating against members of *both* minority groups." *Id.* at 25 (emphasis added). Congress thus sought to protect together all "racial or ethnic groups that had experienced appreciable prior discrimination in voting," noting that Latinos "suffered from many of the same barriers to political participation confronting [B]lacks," including "'invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others'"—like that present here. *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1549 & n.19 (5th Cir. 1992) (quoting S. Rep. No. 94-295, at 30). Indeed, the Senate stressed that "racial discrimination against language minority citizens seems to follow density of minority population" overall, citing examples of jurisdictions and electoral systems that have "den[ied] Mexican Americans *and* [B]lack voters in Texas political access." S. Rep. No. 94-295, at 27-28. And the Senate was aware of "at least one case in which African-Americans and Hispanics brought a joint claim" under the VRA. *Nixon*, 76 F.3d at 1395 (Keith, J., dissenting) (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964)).

When Congress amended Section 2 in 1982 it was no less aware of claims by non-monolithic minority groups. In its Report on the 1982 amendments, the Senate

Judiciary Committee twice referenced *Wright*—involving claim on behalf of Black and Hispanic voters, just as here. S. Rep. No. 97-417, at 19 n.60, 132 (1982) (citing *Wright*, 376 U.S. at 52-54).

Beyond citation to cases involving such claims, the 1982 Senate Report spoke repeatedly of the need to protect racial and ethnic minorities together, explaining that "the amendments would make racial and ethnic groups the basic unit of protection." *Id.* at 94. For example, in recounting an illustrative list of municipalities "in jeopardy of court-ordered change under the new results test," the Senate spoke of the overall minority population in each, without differentiating among Black, Latino, or other groups—including in jurisdictions like New York City, where its 40 percent minority population necessarily encompassed multiple minority groups. *See id.* at 154-57. The Senate thus reinforced that minority groups, together, must have "a fair chance to participate" and "equal access to the process of electing their representatives." *Id.* at 36. Just as in 1975, if Congress meant to impose a single-race threshold showing for relief from vote dilution, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment." *Chisom*, 501 U.S. at 396 (holding that the absence of exclusion of judicial elections from Section 2's statutory text meant they were within Section 2's ambit).

The panel's belief, App. B at 4, that proportionality will take hold if Section 2 is not limited to single-race plaintiff groups makes scant sense. First, as this Court explained last Term in *Allen v. Milligan*, the first *Gingles* precondition and this

Court's case law ward against proportionality. 599 U.S. at 1, 26-27 (2023). Second, this case illustrates that the perceived threat of proportionality is misplaced—Black and Latino voters account for 38% of Galveston County's population but the district court's injunction merely returns them to having an equal opportunity to elect their candidates of choice in 25% (rather than 0%) of the precincts—the configuration that has existed for three decades. Third, most claims on behalf of more than one racial group fail for want of sufficient evidence of political cohesion. *See, e.g.*, *Frank v. Forest County*, 336 F.3d 570, 575-76 (7th Cir. 2003); *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee Cnty.*, 906 F.2d at 526; *Kumar v. Frisco Indep. Sch. Dist.*, 476 F. Supp. 3d 439, 508 (E.D. Tex. 2020); *Perez v. Abbott*, 274 F. Supp. 3d 624, 670 (W.D. Tex. 2017), *reversed on other grounds*, *Abbott v. Perez*, 585 U.S. __, 138 S. Ct. 2305 (2018); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1370 (N.D. Ga. 2001); *Romero v. City of Pomona*, 665 F. Supp. 853, 858 (C.D. Cal. 1987). Courts are adhering to this Court's admonition in *Growe* to enforce a high burden of cohesion for these claims to succeed. This case met that burden, as both the district court and Fifth Circuit have concluded. That is a reason to enforce the district court's injunction, not to stay it.

C. The equities and *Purcell* considerations make a stay inappropriate.

The equities and *Purcell* considerations make a stay inappropriate in this case. The district court adhered to both this Court's precedent in *Growe* as well as three decades of Fifth Circuit precedent—as the panel acknowledged in affirming its decision. In such circumstances, a stay is inappropriate. *See Merrill v. Milligan*, 142

S. Ct. 879, 883 (2022) (Mem.) (Roberts, C.J., dissenting) ("I would not grant a stay. As noted, the analysis below seems correct as *Gingles* is presently applied, and in my view the District Court's analysis should therefore control the upcoming election."). Moreover, unlike when this Court ordered a stay in *Milligan*, the decision in this case is the product of a full trial on the merits, a final judgment, and an affirmance on appeal—not merely a preliminary injunction. *See id.* at 881 (Kavanaugh, J., concurring) (noting case was at "preliminary juncture" and merits not "clearcut"). The map enjoined by the district court *upended*—rather than preserved—"the same basic districting framework that the [County] has maintained for several decades." *Id.* at 879 (Kavanaugh, J., concurring). The district court's injunction merely returns the *ex ante* status quo districting plan that governed County elections for decades. The election is not at hand—the primary is in March and the general election is a year away. *See id.* at 879 (Kavanaugh, J., concurring) (noting that Alabama absentee voting would begin in seven weeks). It is November of the year before the election, not February of the election year. *Id.* (stay decision issued Feb. 7, 2022). Here, it is merely candidate filing that currently ends December 11. But even that deadline has existing flexibility in the law, indicating a modified deadline of December 18 would be consistent with state law. *See, e.g.*, Tex. Sec'y of State, Election Advisory No. 2023-20, https://www.sos.state.tx.us/elections/laws/advisory2023-20.shtml#_bookmark5. Nor is this the type of "extraordinarily complicated and difficult" statewide election like in *Milligan*. *Id.* at 880 (Kavanaugh, J., concurring). It is a single county commissioners court precinct. There would be no "heroic" efforts, *id.*, involved in

complying with the district court's order, rather merely implementing a map—Map 1—that the county *itself* drew.

That point bears underscoring. At trial, the county's primary defense—galling as it was—was that if Commissioner Holmes had simply lobbied harder, the commissioners court would have adopted Map 1 and retained a majority-minority precinct. Trial Tr. vol. 1 at 33:3-14, 35:20-36:15, 48:2-7; Trial Tr. vol. 10 at 283:16-284:12; Fifth Circuit Oral Argument at 10:40-11:30. The commissioners testified they were fine with Map 1. *See* App. D at 78. The county thinks it is a legally compliant map, App. D at 32-33, says race was not considered in its formulation, App. D at 76, and conceded at oral argument on appeal that its version of Precinct 3 is compact, Fifth Circuit Oral Argument at 10:10-10:40. In other words, the county will suffer *no harm*—irreparable or otherwise—from its own Map 1 being imposed, as the district court's injunction allows.

Under the unique circumstances of this case, *Purcell* counsels against the stay imposed by the Fifth Circuit. The district court's factual findings—"to which the Court of Appeals [and this Court] owe[] deference" reveal a starkly discriminatory redistricting process and map. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). The County has not challenged any of the *Arlington Heights* factual findings on appeal. By contrast, the Fifth Circuit's six-page decision and one-sentence stay order are a "bare order" that do not justify a stay. *Id.* In light of the district court's injunction—which has been *affirmed*—a stay creates confusion among the public and potential candidates in light of awareness of both the district court's order and the Fifth

Circuit's decision affirming it. The stay risks interfering with the orderly conduct of the election and must be vacated.

Finally, the county could have avoided this. In addition to not purposefully discriminating, if it wished to overturn three decades of settled Fifth Circuit precedent, it should have filed a declaratory judgment action *before* engaging in redistricting rather than knowingly violating settled law. Under *Purcell*, a county's eleventh-hour effort to upend decades of existing law should not be permitted to disrupt the electoral process.

III. Applicants will be seriously and irreparably injured by a stay.

Applicants will be seriously and irreparably injured by the Fifth Circuit's stay remaining in effect. Irreparable harm occurs where it "would be difficult—if not impossible—to reverse the harm," *Hollingsworth*, 558 U.S. at 195, or where an applicant cannot "be afforded effective relief" even if she eventually prevails on the merits, *Nken*, 556 U.S. at 435. Vote dilution, no less than vote denial, causes irreparable harm because of the "strong interest" in the right to vote, *Purcell*, 549 U.S. at 4, and to do so free of discrimination. "[O]nce [an] election occurs, there can be no do-over[s] and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin [a discriminatory] law." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

If the discriminatory map enjoined by the district court is permitted to stay in effect for the 2024 election, Galveston County's minority voters—including applicants—will for the first time in thirty years be fragmented across four precincts

and have no opportunity to elect a commissioner of their choice. Because the office is for a four-year term, applicants would not see redress until 2028—nearly the end of this decennial redistricting cycle. Commissioners—unlike members of Congress or state legislators—do not primarily spend their time voting on partisan policies. They are the face of government for their constituents—providing direct and critical services on the front lines of their communities, including responding to hurricanes, local emergencies, and constituent needs. The county—in a "mean-spirited," App. D at 148, and racially motivated scheme sought to "extinguish the Black and Latino communities' voice on its commissioners court." App. D at 148. The harm from this sordid affair is irreparable if the enacted map is permitted to take effect.

CONCLUSION

For the foregoing reasons, applicants respectfully request that the Court vacate the Fifth Circuit's November 10, 2023 stay.

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