No. 23A449

In the Supreme Court of the United States

TERRY PETTEWAY, ET AL.,

Applicants,

v.

GALVESTON COUNTY, ET AL.

RESPONSE OF DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; LEON PHILLIPS IN SUPPORT OF APPLICATION TO VACATE STAY

Richard Mancino
Michelle A. Polizzano
Andrew James Silberstein
Molly L. Zhu
Kathryn C. Garrett
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

Hani Mirza
Joaquin Gonzalez
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741

Aaron E. Nathan
Diana C. Vall-llobera
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006

Hilary Harris Klein
Counsel of Record
Adrianne M. Spoto
SOUTHERN COALITION FOR SOCIAL JUSTICE
5517 Durham Chapel Hill Blvd.
Durham, NC 27707
919-323-3380
hilaryhklein@scsj.org

R. Stanton Jones
Elisabeth S. Theodore
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001

Nickolas Spencer
SPENCER & ASSOCIATES, PLLC
9100 Southwest Freeway, Suite 122
Houston, TX 77074

Rule 29.6 Statement

Respondents Dickinson Bay Area Branch, Galveston Branch, and Mainland Branch NAACPs are local units of the National Association for the Advancement of Colored People. Plaintiff-Respondents Galveston LULAC Council 151 is a local unit of the League of United Latin American Citizens. The local and national NAACP and LULAC organizations are all non-profit entities, and no publicly traded company owns stock in them.

Respondents Edna Courville; Joe A. Compian; and Leon Phillips are individuals.

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Respondents Dickinson Bay Area Branch NAACP, Galveston Branch NAACP, Mainland Branch NAACP, Galveston LULAC Council 151, Edna Courville, Joe A. Compian, and Leon Phillips (the "NAACP/LULAC Respondents"), who were Plaintiffs-Appellees in the Fifth Circuit, respectfully submit this response in support of Applicants' application to vacate the stay of the district court's judgment in this case.

Introduction

This application involves the Fifth Circuit's unjustifiable abuse of a so-called "administrative stay" to thwart the law. After a year and a half of litigation and a ten-day trial, the district court found on October 13, 2023, that Galveston County's newly enacted County Commissioners Court map is "fundamentally inconsistent with" and a "clear violation" of Section 2 of the Voting Rights Act and ordered the use of a remedial map for the 2024 elections. Appendix to Application ("App.") at 22, 165. On November 10, 2023, a panel of the Fifth Circuit unanimously affirmed this decision in full based on controlling en banc Fifth Circuit precedent. App. at 11. That should have ended the matter. Instead, the panel extended its prior administrative stay "pending en banc poll," thereby blocking the district court's injunction and remedy. App. at 5. And while the Fifth Circuit earlier today granted en banc review, vacated the panel decision, and set oral argument for May, it was silent on ending the administrative stay. *Infra*, at Appendix A.

To the extent defendants contend a stay remains in effect, and this Court agrees, this Court should vacate that administrative stay immediately. It is totally improper for an appellate court to stay a final judgment on a prospect that the appellate court might reverse its own precedent. The fact that a Fifth Circuit panel *disagrees* with its own court's binding precedent and hopes that precedent will be overruled is not a valid basis to stay relief

compelled by existing law. Thus there is no basis for any further administrative stay, the effect of which is simply to allow Galveston County to conduct one illegal election under an invalidated map.

It has been 41 days since the Fifth Circuit panel administratively stayed the district court's judgment. App. at 181. During that time, no judge or panel of judges has ruled on the propriety of a stay pending appeal under the equitable factors that govern whether such a stay should issue. The "administrative stay" issued by the Fifth Circuit was and is improper and, to the extent it is still in place, should be immediately vacated. First, the Fifth Circuit issued the stay without analyzing the equitable factors that, under this Court's precedent, must be satisfied before an appellate court holds a final judgment in abeyance pending appellate review. *Nken v. Holder*, 556 U.S. 418, 427 (2009). Although courts sometimes deploy temporary administrative stays to protect their ability to *consider* whether a stay is justified under the equitable factors, that is not the situation here: by its terms, the administrative stay was issued only to protect the Fifth Circuit's ability to conduct an en banc poll (and now, if still in effect, to consider overruling longstanding en banc precedent) while not giving effect to a final judgment that had already been affirmed on the merits. App. at 5. That anomalous use of an unreasoned administrative stay should not be tolerated. An appellate court may not delay implementation of a final judgment that a panel already agreed admits faithfully applied binding en banc precedent by employing an unreasoned administrative stay that has no connection to any pending analysis of the traditional equitable factors.

Second, the traditional equitable factors forbid any stay in these circumstances. An applicant's likelihood of success on appeal must be evaluated under existing law, not based upon a gamble that a higher court might change the law. *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting)); *see also Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 406 (2022) (Sotomayor, J., dissenting) (summary relief should be disfavored where an applicant is not likely to succeed under existing precedent). Under that standard, there is no justification for a stay here, where a Fifth Circuit panel has already confirmed that the final judgment correctly applied acknowledged, binding law, a position that remains accurate notwithstanding the vacating of the panel's opinion pending en banc review. Moreover, that binding law—itself part of a lower-court consensus—is correct as a matter of plain statutory text, structure, and purpose. And the remaining factors lead to the same result: There is no harm, much less irreparable harm, in requiring government officials to follow the law, nor is there any private or public interest in perpetuating a government policy that has been adjudicated to be unlawful in a final judgment affirmed on appeal. Finally, the trial court's detailed findings of fact unambiguously show that the enacted plan is under no scenario enforceable: even if it were to survive a § 2 challenge on appeal, it would be deemed unconstitutional on remand.

Time is of the essence if Plaintiffs are to obtain the relief to which they are entitled. The briefing schedule set forth for en banc reconsideration extends far past the December 11 candidate filing deadline, with oral argument in May of 2024. An unjustified stay of this length would run askew of a federal court's equitable discretion, risks denying justice due

to prevailing parties, and frustrates Supreme Court review. This Court should vacate the stay, to the extent it remains in place, to confirm the district court may resume implementation of the judgment below in time for the 2024 election cycle.

Statement

NAACP/LULAC Respondents filed this action in April of 2022, joining challenges to the 2021 commissioners precinct plan filed by Applicants and the United States Department of Justice. App. at 25. Defendants filed motions to stay the matter in the spring and fall of 2022; the trial court denied both attempts after observing that "plaintiffs have made clear that they hope to have the Commissioner Court precinct lines redrawn in time for the 2024 election," that "any delay in reaching a final ruling . . . could impair this court's ability to issue effective relief later," and thus denying a stay was necessary to "ultimately achieve a just and lawful result." Order, *Dickinson Bay Area NAACP v. Galveston Cnty.*, No. 3:22-cv-00117, Dist. Ct. Dkt. 36 at 3 (S.D. Tex. May 24, 2022); *see also* Order, *Petteway v. Galveston Cnty.,* Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 85 (S.D. Tex. Nov. 17, 2022) (denying renewed motion to stay, adopting the reasoning of its earlier order).

Through 2022 and 2023, the parties diligently pursued discovery and other motions practice, and in March of 2023 jointly requested a trial setting in July. *Petteway v. Galveston Cnty.,* Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 116 (Mar. 3, 2023). The Court ordered trial to begin August 7, *Petteway v. Galveston Cnty.*, Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 117 (S.D. Tex. Mar. 8, 2023), and a ten-day bench trial commenced on this date after the parties diligently met pre-trial deadlines.

On October 13, 2023, Judge Jeffrey Vincent Brown of the Southern District of Texas issued a 157-page Findings of Fact and Conclusions of Law finding the Galveston County

Commissioners Court committed a "clear violation" of § 2 of the Voting Rights Act when it redrew the County's four commissioners precincts in a manner that dismantled the longstanding majority-minority commissioners precinct 3, submerging every minority voter in Galveston County within Anglo-majority precincts. App. at 165. This opinion was based upon a voluminous record adduced in a ten-day bench trial and an intensely local appraisal of the conditions within Galveston County as well as a faithful application of this Court's precedent as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Allen v. Milligan*, 599 U.S. 1, 143 (2023). App. at 157-58. The district court concluded that the 2021 commissioners-precinct plan "illegally dilutes the voting power of Galveston County's Black and Latino voters by dismantling [majority-minority] Precinct 3"; App. at 23, the court also credited testimony that the 2021 plan was "a textbook example of a racial gerrymander," App. at 22, that "summarily carved up and wiped off the map" Precinct 3, and that defendants' actions adopting this plan were "mean-spirited and egregious given that there was absolutely no reason to make major changes to [the majority-minority] Precinct 3." App. at 164-65. The district court found it "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021's redistricting," App. at 164, a process that it found was "fundamentally inconsistent with § 2 of the Voting Rights Act." App. at 22. The district court thus reached the "grave conclusion" that it "must enjoin" future use of the map. App. at 22.

Defendants appealed this judgment to the Fifth Circuit and moved in the district court for an emergency stay pending appeal, which the district court denied after finding that "defendants have established none" of the four factors considered. App. at 175.

Defendants then filed a motion for an emergency stay pending appeal and for a temporary administrative stay with the Fifth Circuit, requesting a ruling on their request by October 24, 2023. *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 13 at 6 (Oct. 17, 2023). The Fifth Circuit motions panel expedited the appeal to the next available Oral Argument Calendar, granted a "temporary administrative stay . . . until November 2, 2023," and deferred the stay motion to the oral argument panel. App. at 181. The next day, in a scheduling order, the merits panel set oral argument for November 7, 2023, and extended the administrative stay through Friday, November 10, 2023. App. at 184. NAACP/LULAC Respondents opposed the requested stay in their Appellee Brief. NAACP/LULAC Appellees' Br., *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 69 at 48-53 (Nov. 2, 2023).

On November 10, 2023, the Fifth Circuit affirmed, ruling that the district court "did not clearly err" in applying the test from *Thornburg v. Gingles*, 478 U.S. 30 (1986), and that it "appropriately applied precedent when it permitted the black and Hispanic populations of Galveston County to be aggregated for purposes of assessing compliance with Section 2." App. at 11. But despite having just agreed that the district court properly applied the law, and denying Defendants' emergency stay request as moot, the Fifth Circuit summarily extended the administrative stay indefinitely and pending an en banc poll, a stay that remains in place as of the date of this filing. App. at 5.

On November 15, 2023, NAACP/LULAC Respondents notified the Clerk of Court of the Fifth Circuit of the approaching candidate filing deadline on December 11, 2023, and the likely need to seek relief from the Supreme Court if the administrative stay was not

promptly dissolved. Letter, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 130 (Nov. 15, 2023). Applicants filed their application the following day, November 16, 2023, requesting this Court dissolve the administrative stay. Application to Vacate Stay, *Terry Petteway, et al. v. Galveston County, Texas, et al.*, No. 23A449 (Nov. 16, 2023).

On November 28, 2023, the day of this filing, the Fifth Circuit granted en banc review, vacated the panel decision pursuant to Fifth Circuit Rule 41.3, and set oral argument for May of 2024. *Infra*, at Appendix A.

Argument

I. To the Extent Defendants Argue the Stay Remains In Place, and This Court Agrees, The Fifth Circuit's Stay Pending En Banc Review Is Unjustifiable as an Administrative Stay.

"A stay is an 'intrusion into the ordinary processes of administration and judicial review'" meant to allow appellate courts to "responsibly fulfill their role in the judicial process." *Nken*, 556 U.S. at 427. A stay of a lower court order is an "extraordinary remedy," *id.* at 437 (Kennedy, J., concurring), and thus courts may not "reflexively hold[] a final order in abeyance pending review" without weighing the relevant equitable factors. *Id.* at 427. This limitation furthers important values of judicial administration, public policy, and the rule of law, allowing for the "prompt execution" of lawful orders. *Nken*, 556 U.S. at 427 (citations and internal quotation marks omitted). Consistent with these principles, this Court has vacated lower-court stays that improperly apply the traditional stay factors or, as here, fail to apply the proper framework altogether. *See, e.g., Rose v. Raffensperger*, 143 S. Ct. 58 (2022); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

"[A]n appellate court's power to hold an order in abeyance while it assesses the legality of the order" is constrained by the four factors that govern the issuance of a stay.

"Accordingly, an *administrative stay* . . . cannot be employed to grant a party effectual relief." *Hassoun v. Searls*, 976 F.3d 121, 130, n.5 (2d Cir. 2020) (emphasis added) (citing *Nken*, 556 U.S. at 426, 434); *see also* Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 Notre Dame L. Rev. 1941, 1951 (2022) ("A key feature of administrative stays is that they are issued in connection with another form of emergency relief."). In other words, as this Court made clear in *Nken,* an appellate court may not issue a stay of a lower-court order that lacks any connection to the equitable factors that govern stays pending appeal. Temporary administrative stays can only legitimately establish such a connection when they are facilitating a live, timely determination of the *Nken* factors pursuant to a pending motion for a stay.

The Fifth Circuit's "temporary" administrative stay does not purport to protect the Fifth Circuit's ability to weigh the traditional stay factors in consideration of a stay motion before the Court because no such motion exists. Instead, by its terms (if still in effect), the administrative stay exists only to allow the Fifth Circuit time to consider whether it would take the unusual step of overturning three decades of circuit precedent recognizing that § 2 claims can be brought by individuals from more than one racial minority group who experience a common racial vote dilution within a community. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (recognizing that a minority group comprising Black and Latino voters can be considered for purposes of *Gingles* analysis); *see also Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (same); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (same); *Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988)*; LULAC Council No. 4386 v. Midland Indep.*

Sch. Dist., 812 F.2d 1494, 1499-1502 (5th Cir. 1987), *opinion vacated on reh'g on other grounds*, 829 F.2d 546 (5th Cir. 1987).

The existence of an en banc review alone does not automatically stay a final judgment any more than the mere filing of a notice of appeal. Just as an appellate panel cannot issue an "administrative stay" during its own consideration of an appeal except for purposes of considering a timely stay motion pursuant to the *Nken* factors, it cannot issue an "administrative stay" during the en banc court's consideration of whether to accept a further appeal. In either case, the extraordinary remedy of a stay pending appeal must be warranted by a consideration of the *Nken* factors themselves, not the mere hypothetical prospect of further appellate review. To hold otherwise would be to gut *Nken*.

Here, both the trial and a panel of the Fifth Circuit agreed the Judgment in this matter faithfully applies the law as it is and as required by binding precedent. Thus, the practical effect of the current administrative stay is to delay a remedial process required under current law. With each passing day (if left unchecked), this stay narrows the likelihood NAACP/LULAC Respondents and their members will have an equal opportunity to elect a candidate of their choice to commissioners court in the 2024 election under a lawful map. This is especially true if the administrative stay extends for the months-long en banc consideration as scheduled. In this way, the Fifth Circuit's unreasoned and unjustified "temporary administrative stay" here does precisely what this Court has held an appellate court may not do: "resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review." *Nken*, 556 U.S. at

427 (citations and internal quotation marks omitted). The stay should be vacated as procedurally impermissible on these grounds alone.

II. Any Stay of the District Court's Judgment Would Be Inappropriate Under the Traditional Stay Factors.

Any stay of the district court's judgment would also be plainly inappropriate under the traditional equitable factors. "The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review." *Nken*, 556 U.S. at 418 (citations and internal quotation marks omitted). Here, the Fifth Circuit stayed a final judgment entered by the district court and affirmed by a three-judge panel, in an opinion only vacated to allow for en banc review, so that it can consider overturning precedent that was previously set by the same court sitting en banc. It is difficult, if not impossible, to see how such a stay would protect the legitimate interests of any party, or the public. And the equitable factors governing stays do not protect an appellate court's refusal to enforce longstanding precedent while that court reconsiders it en banc.

The traditional stay analysis requires consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (internal quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify" a stay. *Id.* at 433–34. None of these factors weigh in favor of a stay here.

A. Defendants Are Not Likely to Succeed on the Merits.

It is undisputed that currently binding en banc circuit precedent required affirmance of the judgment, as the panel concluded. App. at 9. A party with no right to relief under existing law is not likely to succeed on the merits and therefore not entitled to a stay pending appeal. As numerous "Members of this Court have argued," "a determination regarding an applicant's likelihood of success must be made under 'existing law.'" *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting)); *see also Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 406 (2022) (Sotomayor, J., dissenting) (summary relief should be disfavored where an applicant is not likely to succeed under existing precedent).

To hold that the County Defendants are likely to succeed on the merits despite their position being clearly foreclosed under binding law would pervert the likelihood-of-success analysis. *Stare decisis*, and indeed the premise of a rule of law, requires a "presumption" that the law will not change every time the composition of a court changes, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (overturned on other grounds); to instead assume that it is *likely* an en banc court will reverse its own en banc precedent would stand that presumption on its head. Like the doctrine of *stare decisis*, requiring a stay applicant to demonstrate a likelihood of success under existing law "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation," *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015)—and, what's more, saves courts from the need to confront novel challenges to settled law in

an emergency posture, without the benefit of full briefing, argument, and adequate time to deliberate. *Cf. Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (emergency motions are a disfavored posture for consideration of difficult merits questions because they require decision on a "short fuse without benefit of full briefing and oral argument").

Further, the Fifth Circuit's previous decisions recognizing that an injured minority group in a jurisdiction can include individuals of more than one racial minority background were grounded in the text, structure, history, and purpose of the statute, and accord with the weight of authority around the country. *See Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988);[1] *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 273, 278 (2d Cir. 1994) (same), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992) (same, though finding the class was not cohesive as a factual matter); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990) (same).

The textual linchpin of a § 2 effects claim is that a given practice or procedure "results in a denial or abridgement of the right . . . to vote *on account of race* . . . ." to a "class of citizens." 52 U.S.C. § 10301(a), (b). (emphasis added). A "class" means "[a] group of people . . . that have common characteristics or attributes," Black's Law Dictionary (11th Ed. 2019), and so the "class of citizens protected by subsection (a)" is any group of voters that is subject to suffering racial vote dilution. 52 U.S.C. § 10301(b). Minority voters in a particular jurisdiction can be said to suffer such dilution as much for not belonging to a majority group (e.g., for being a class of nonwhite citizens) as for belonging to one specific

[1] The en banc Fifth Circuit adopted the reasoning in *Campos* to hold that "[i]f blacks and Hispanics vote cohesively, they are legally a single minority group" for the purposes of Section 2. *Clements*, 999 F.2d at 864.

census-defined minority group. *See, e.g.*, *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198 (1973) (holding that Black and Hispanic students "suffer[ed] identical discrimination in treatment when compared with the treatment afforded Anglo students"); *see also United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 150 n.5 (1977) (classifying Puerto Rican and Black citizens as a minority group and using the term "nonwhite" collectively).[2]

The facts in this case demonstrate that the statutory text and this Court's precedent, when faithfully applied, effectively guides courts to identify the class of voters subject to unlawful vote dilution in a given jurisdiction, and that recognizing these claims is "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring). Black and Latino voters in Galveston County were able to cohesively elect, and indeed *had been electing for decades*, a representative of their choice for county commissioner, yet under the newly enacted plan will be unable to elect a single representative of choice in any of the county commissioner precincts. *See, e.g.*, App. at 47, 61, 65. Thus, after careful application of the § 2 framework, the district court found that "Black and Latino voters in Galveston County have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," a finding the appeals court affirmed by applying existing law. App. at 165 (quoting *Gingles*, 478 U.S. at 63; 52 U.S.C. 10103(b)).

[2] Precisely because it is unmoored from the statutory text, limiting vote dilution claims to voters of a single minority group would also create an incongruity between vote dilution claims and time, place, and manner claims brought under § 2. No party disputes that voters experiencing a common discriminatory practice may bring time, place, and manner claims under § 2 regardless of whether they belong to a single racial group that can make up a majority of some theoretical single-member district on its own. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc); *cf. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021) ("The size of any disparities in a rule's impact on *members of different racial or ethnic groups* is also an important factor to consider.") (emphasis added).

It is the individual Black and/or Latino voters who suffer the dilution on account of their race. *See, e.g.*, *Milligan*, 599 U.S at 36 ("Individuals thus lack an equal opportunity to participate in the political process when a State's electoral structure operates [to minimize or cancel out their voting strength]."). For courts to impose an artificial single-race threshold test would require courts themselves to make unjustifiable race-based assumptions: for example, § 2 would protect minority voters in a community where Japanese-Americans and Pakistani-Americans together make up 50+% of a potential district because they happen to fall under a common census classification of "Asian," but not Black and Latino voters similarly situated—regardless of jurisdiction-specific facts, such as experiences of discrimination and whether white voters as a factual matter prevent them from electing their common candidates of choice. It is improper for courts to make such initial racial assumptions one way or the other: whether the minority voters belong to one census-defined classification or more than one, the voters must still show that they are a cohesive group with a "distinctive minority vote" that is thwarted "at least plausibly on account of race." *Milligan*, 599 U.S. at 28 (internal quotation marks omitted).

As matters stand today—under current, binding law—the enacted map is indisputably unlawful, and the district court's judgment is correct. It is fundamentally inequitable to stay that judgment based upon speculation that this law might change.

B. Delaying Implementation of the District Court Order Is Also Unjustified Because the Plaintiffs Will Likely Prevail on their Alternative Claims Below.

In light of its decision that defendants violated § 2, the district court concluded that it did not need to formally decide the Petteway and NAACP/LULAC Respondents' intentional discrimination or racial gerrymandering claims. *See* App. at 168. But the court's

detailed findings of fact make it abundantly clear that the enacted plan would be struck down on these grounds upon remand even if Defendants succeed in their § 2 claim appeal. The Fifth Circuit panel held, correctly, that the district made no clear error in its factual findings, and did not suggest that further en banc review of those findings would be warranted. *See* App. at 11.

First, the district court's findings of fact establish that the enacted plan was adopted with a discriminatory purpose and has discriminatory effects in violation of the Fourteenth and Fifteenth Amendments, and under the intent-test of § 2. *See Anne Harding v. Cnty. of Dallas*, 948 F.3d 302, 312 (5th Cir. 2020); *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). The district court found that the commissioners court "summarily carved up and wiped off the map" the historic majority-minority commissioners Precinct 3 in a "mean-spirited" and "egregious" manner despite "absolutely no reason to make major changes to Precinct 3." App. at 164-65. In adopting this plan, Defendants caused "an evident and foreseeable impact on racial minorities in Galveston County by eliminating the sole majority-minority precinct . . . depriving them of the only commissioners precinct where minority voters could elect a candidate of their choice." App. at 75.

Evidence of the map-drawing process reinforced the intentional nature of Defendants conduct in dismantling the sole majority-minority precinct in the county. The enacted plan follows the specific design of County Judge Henry, App. at 90-91, who "underst[ood] that Galveston County's Black and Latino population was centered around Precinct 3" and then intentionally demolished that precinct. App. at 89. The district court determined that there was no credible alternative motivation for the severe discriminatory

impact of the plan: it does not fulfill any partisan objective, App. at 91, and any "desire to create a coastal precinct cannot and does not explain or justify why" the enacted plan was "drawn the way it was—and especially does not explain its obliteration of benchmark Precinct 3." App. at 93.

These findings establish "a clear pattern, unexplainable on grounds other than race," making the "evidentiary inquiry . . . relatively easy." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The enacted plan was designed with the "essential inevitable effect" of discriminating on the basis of race, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), and there is a "strong inference" that these adverse effects were desired because they were an inevitable result of a government's chosen action, but otherwise avoidable. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 & n.25 (1979).

The circumstances of the enacted plan's adoption further satisfy the specific factors outlined for determining illicit intent in *Arlington Heights*, 429 U.S. 252. *See also Brown*, 561 F.3d at 433 (applying *Arlington Heights* factors in § 2 intent claims). The enacted plan's severe discriminatory impact is "an important starting point" in the inquiry, *Arlington Heights*, 429 U.S. at 266, and the district court's findings further show: (1) the historical background of the decision includes longstanding discrimination against minorities in Galveston, including practices that "extended to voting," App. at 77, and a prior 2012 redistricting cycle that included "significant" efforts to reduce majority-minority districts, App. at 82. (2) The specific sequence of events leading up to the decision included a redistricting process marked by the exclusion of the sole minority commissioner, App. at 112, and rife with (3) at least seven significant departures from the normal procedural

sequence, App. at 99, for which Defendants could offer no credible explanations. *See, e.g.*, App. at 97, 100-02, 104-05, 109. (4) The commissioners court substantively departed from its purported redistricting criteria given that the "rationales stated by members of the commissioners court in public, in deposition testimony, and at trial are inconsistent" with the redistricting criteria they claimed to have used. App. at 114. Overall, (5) the record reflects a legislative history that is "stark and jarring." App. at 165.

Under these facts, the enacted plan is unlawful regardless of whether it destroyed a minority coalition district or a functioning crossover district. *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (Kennedy, J., Roberts, C.J., Alito, J., lead op.) ("[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. Cnty. of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) (holding that *Gingles* I precondition only requires showing of majority-minority district in absence of showing of intentional discrimination). Plaintiffs thus can succeed in striking down the enacted plan on alternative grounds of intentional discrimination even if Defendants fully prevail in their current appeal.

These same factual findings would also support the conclusion that race predominated in the design of the enacted plan in violation of the Fourteenth Amendment. The district court credited Plaintiffs' expert William Cooper's determination that the commissioners court executed a "textbook example of a racial gerrymander" that was "egregious," App. at 22, providing "strong circumstantial evidence" of racial gerrymandering under applicable law. *Thomas v. Bryant*, 938 F.3d 134, 158 n.119 (5th Cir.

2019). Plaintiffs' alternative maps that "perform as well or better than the enacted plan under the disclosed criteria" while maintaining a majority-minority precinct, App. at 115, prove that race, and not some other objective, predominated in the enacted plan's design. *Cooper v. Harris*, 581 U.S. 285, 317 (2017) (holding alternative plans "can serve as *key evidence* in a race-versus-politics dispute" and present a "*highly persuasive* way to disprove" a defendant's purported goals caused the design) (emphasis added). Since Defendants have offered no explanation for their use of race as a predominating factor, it cannot survive strict scrutiny.

C. Defendants Will Not Suffer Irreparable Harm Absent a Stay.

Nor would a stay pending appeal protect Defendants from any cognizable irreparable harm. Defendants have many plans in their possession that account for incumbency (including the residence of Precinct 1 Commissioner Apffel) and thus would preserve the current status quo of political representation they contend is put at risk by the judgment below. Plaintiffs provided many such plans that account for current incumbency, several of which include the coastal precinct that Defendants have previously argued they desired. *See* App. at 53, 116.

Defendants also already have a map of their own that would resolve the § 2 violation: Map 1. App. at 48. A majority of the commissioners court expressed an initial preference for this map configuration. App. at 94. And both the county's redistricting counsel Dale Oldham and Judge Mark Henry testified that Map 1 would be legally compliant. App. at 48-49, 97. Defendants even argued in their closing brief that Commissioner Giusti and Judge Henry would have voted for Map 1 had Commissioner Holmes asked. *Petteway v. Galveston*

Cnty., Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 244, at 9-10 (S.D. Tex. Sept. 11, 2023). They cannot now contend this same map is no longer a viable alternative.

And even if Defendants want to draw a *new* plan to accommodate any Precinct 3 candidates, there is every reason to believe that any new remedial schedule the district court orders will allow Defendants sufficient time to do so, "considering that the defendants required Thomas Bryan to draw . . . the enacted plan adopted during the 2021 redistricting cycle[] in just eight days." App. at 176 (denying motion for stay pending appeal). Likewise, the district court was also correct in rejecting Defendants' *Purcell* arguments, given "the 2024 primary election is still several months away, and the general election will not occur for another year." *Id.*; *cf. Patino v. Pasadena*, 229 F. Supp. 3d 582, 585, 588-89 (S.D. Tex. 2017) (denying a motion for stay pending appeal when the close of candidate filing was one month away and the general election was four months away). "The classic *Purcell* case is different. It concerns an injunction entered days or weeks before an election—when the election is already underway." *Robinson v. Ardoin*, 37 F.4th 208, 228 (5th Cir. 2022).[3] Furthermore, to the extent the candidate filing period is an issue, "'the District Court has the power appropriately to extend' that deadline and other 'time limitations imposed by state law.'" *Id.* at 230 (quoting *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972)). And seeing as Defendants themselves orchestrated an unjustifiably "rushed process," and waited until the day before the candidate filing period opened to adopt the enacted plan in 2021, they cannot complain that they are now being required to

[3] Importantly, when this Court subsequently granted a stay in *Ardoin* it did so on different grounds and due to circumstances not at issue here: a controlling case already before the Supreme Court that warranted holding the case in abeyance. 142 S. Ct. 2892 (2022).

adopt a legally compliant map close to that timeframe. *See* App. at 104-06. The alleged harm to Defendants is illusory or, at best, minimal, and does not warrant a stay.

D. Plaintiffs and Galveston's Black and Latino Voters Are Certain to Suffer Irreparable Harm if the Enacted Plan Is Used in 2024, and the Public Interest Does Not Support a Stay.

There is no dispute that the enacted plan "disproportionately affects Galveston County's minority voters by depriving them of the *only* commissioners precinct where minority voters could elect a candidate of their choice." App. at 75 (emphasis added). Defendants' assertion that a stay would preserve the status quo is therefore wrong. If the 2024 elections are permitted to proceed under the enacted plan, the status quo will actually *change* in a way particularly harmful to the Black and Latino community: they will be effectively "shut out" from any representation in the commissioners court. App. at 164. The dramatic change from the benchmark plan's Precinct 3, in effect for well over a decade, to the enacted plan for the 2024 election also risks significant voter confusion, as the likelihood of "voters not knowing in which commissioner's precinct they reside . . . is high." App. at 117-18.

The denial of equal voting power is a severe restriction on the right to vote of Plaintiffs and Galveston's Black and Latino voters, and "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)). "[O]nce the election occurs, there can be no do-over and no redress" for citizens whose voting rights were violated: "The injury to these voters is real and completely irreparable"

if the election is held under the enacted plan. *League of Women Voters of N.C.*, 769 F.3d at 247.

Likewise, "the public interest is best served by ensuring not simply that more voters have a chance to vote but ensuring that all citizens of [the] County have an equal opportunity to elect the representatives of their choice." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348-49 (N.D. Ga. 2015). Moreover, "[i]t is clear that it would not be equitable or in the public's interest to allow the [County] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (third alteration in original) (quoting *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011)). Allowing the enacted plan to be used in 2024 would deny a most basic and fundamental right to thousands of Galveston's voters, and thus the public interest and the risk of irreparable harm to interested parties weigh heavily against a stay.

Congress amended the Voting Rights Act to add § 2's effects test in order to further the Act's core purpose of ending discriminating in voting—without requiring courts to reach the "unnecessarily divisive" issue of intent. *See Thornburg v. Gingles,* 478 U.S. 30, 71 (1986). Any stay of the lower court's judgment here, which faithfully applied binding circuit precedent to enjoin the enacted plan pursuant to Section 2, frustrates that core purpose and is antithetical to concepts of stare decisis and the rule of law.

Conclusion

For the reasons set forth above, to the extent defendants contend the administrative stay remains in effect, and this Court agrees, the Fifth Circuit's stay of the district court's final judgment should be vacated.

Respectfully submitted.

Hilary Harris Klein
Counsel of Record
Adrianne M. Spoto
SOUTHERN COALITION FOR SOCIAL JUSTICE
5517 Durham Chapel Hill Blvd.
Durham, NC 27707
919-323-3380
hilaryhklein@scsj.org

R. Stanton Jones
Elisabeth S. Theodore
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
202-942-5000

Nickolas Spencer
SPENCER & ASSOCIATES, PLLC
9100 Southwest Freeway, Suite 122
Houston, TX 77074
713-863-1409

Richard Mancino
Michelle A. Polizzano
Andrew James Silberstein
Molly L. Zhu
Kathryn C. Garrett
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
212-728-8000

Hani Mirza
Joaquin Gonzalez
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
512-474-5073

Aaron E. Nathan
Diana C. Vall-llobera
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
202-303-1000

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