U.S. Department of Justice

Civil Rights Division

Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

December 1, 2023

VIA CM/ECF

Lyle W. Cayce
U.S. Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: *Petteway v. Galveston County, Tex.*, No. 23-40582

Dear Mr. Cayce,

The United States writes in response to the letter from appellants Galveston County et al., dated November 30, 2023, that asks this Court to take up the County's stay motion from October 17, 2023. "A stay pending appeal is extraordinary relief for which defendants bear a heavy burden." *Plaquemines Parish v. Chevron USA, Inc.*, 84 F.4th 362, 373 (5th Cir. 2023) (citations omitted). It is "not a matter of right, even if irreparable injury might otherwise result"; it is an "exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation omitted). This Court has appropriately exercised its discretion in declining to grant the County's October 17 stay motion, which is now obsolete and fails to carry the County's heavy burden in any event.

After the County filed the stay motion on October 17, a motions panel deferred it to the oral argument panel, which extended the administrative stay through November 10. *See* Order (Oct. 19, 2023). The panel then took three actions on November 10: issuing a published opinion affirming the judgment of the district court; entering judgment in favor of appellees; and extending the administrative stay "pending en banc poll." *See* Op., Judgment, Order (Nov. 10, 2023). At any time, the panel could have acted on the County's stay motion. But it did not. As Chief Judge Richman's order on November 30 made clear, the administrative stay expired with the en banc poll that the Court announced on November 28. *See* Order (Nov. 30, 2023).

Those actions reflect this Court's implicit determination that the County is not entitled to the extraordinary relief it requested in its October 17 stay motion. Moreover, even if the County's stay motion remained live, the motion does not account for the panel's subsequent determination that appellees prevail under the existing law that governs Section 2's results test.

Nor does the County's obsolete stay motion acknowledge the pendency of appellees' as-yet-unresolved claims that the County intentionally discriminated against Black and Latino voters in adopting the 2021 redistricting plan that destroyed historic Precinct 3 and that the 2021

plan is an unlawful racial gerrymander. The district court determined that it "[did] not need to make findings on intentional discrimination or racial gerrymandering in this case," because appellees' successful claims under Section 2's results test secured the same relief that the intent-based claims would obtain. ROA.16032; *see also* ROA.15886 n.4. Those intent-based claims remain to be decided in the event the en banc Court reverses the district court's ruling under Section 2's results test.[1]

The district court's detailed opinion indicates that the intentional-discrimination and racial-gerrymandering claims have a strong basis in evidence. The district court found that "the heart of this case" is "a textbook example of a racial gerrymander." ROA.15885-15886. It regarded the County's destruction of Precinct 3 as "egregious," "mean-spirited," and "stark and jarring." ROA.16029. It made extensive findings under the framework applied to intentional-discrimination claims, detailing the County's many "departures from the typical procedural sequence" for redistricting that "could be viewed as evidence of intentional discrimination." ROA.15950-15982 (applying *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977)). The court found that the experts that appellees offered on the County's discriminatory intent were credible. ROA.15906-15910. And it concluded that the County's mapmakers did not actually consider the neutral criteria that the County later claimed had guided its redistricting process. ROA.15977-15982.

Thus, the record demonstrates that the County's 2021 redistricting plan—no longer kept in effect by this Court's administrative stays—is unlawful on multiple grounds not implicated by the en banc rehearing that this Court has now ordered. It is "untenable to permit a law with a discriminatory effect to remain in operation for [an] election." *Veasey v. Abbott*, 830 F.3d 216, 270 (5th Cir. 2016) (en banc). That principle is all the more forceful when strong evidence indicates not just discriminatory effect, but discriminatory intent.

Accordingly, no stay is warranted. This Court's decision to allow the administrative stay to expire permitted the district court to proceed with installing a remedial plan. And it has already begun to do so, directing the implementation of Map 1, the alternative least-change plan that the County devised but did not adopt in 2021. *See* Order, *Petteway v. Galveston County, Tex.*, No 3:22-cv-00057 (S.D. Tex. Nov. 30, 2023) (attached). The district court is moving with appropriate speed to provide needed clarity and certainty about the districting plan that will govern the remaining candidate-qualifying period and all other aspects of the County's November 2024 election. Confusion and disruption should not be injected into the County's election preparations now by entertaining, much less granting, the County's stay request.

[1] Deciding only a results-based claim when it confers the same relief as intent-based claims is commonplace in voting litigation. *See LULAC v. Perry*, 548 U.S. 399, 442 (2006); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1035 (N.D. Ala. 2022), *aff'd sub. nom. Allen v. Milligan*, 599 U.S. 1 (2023). As members of this Court have recognized, Congress intended that approach when it enacted Section 2's results test. *See Veasey v. Abbott*, 830 F.3d 216, 281 n.3 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part).

Sincerely,

Nicolas Y. Riley
Deputy Chief

s/ Matthew N. Drecun
Matthew N. Drecun
Attorney
Appellate Section
Civil Rights Division
(202) 550-9589
Matthew.Drecun@usdoj.gov

cc: Counsel of Record (via CM/ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TERRY PETTEWAY, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	3:22-CV-57
	§	
GALVESTON COUNTY, TEXAS, *et al.*,	§	
	§	
	§	
Defendants.	§	

ORDER

On October 13, 2023, this court held that the 2021 commissioners-court precinct map the Galveston County Commissioners Court adopted on November 12, 2021—"the enacted plan"—violated § 2 of the Voting Rights Act. Dkt. 250. The court permanently enjoined the defendants from administering, enforcing, preparing for, or in any way permitting the nomination or election of county commissioners from the commissioners-court precinct map as portrayed in the enacted plan. Dkt. 251 at 1. That same day, it announced a remedial-proceedings schedule that allowed the defendants an opportunity to submit an alternative redistricting plan that complies with § 2 of the Voting Rights Act so that this court could order the adoption of a new redistricting plan before November 11, 2023—the statutory opening date for candidate filing. *Id.* at 2.

Soon after, the defendants appealed and moved this court to stay its injunction pending appeal. Dkts. 253, 254. After the court denied their motion, they moved the United States Court of Appeals for the Fifth Circuit for the same relief. *Petteway v. Galveston County*, No. 23-40582, ECF No. 13. The Fifth Circuit expedited the appeal and entered a temporary administrative stay until November 10. *Id.*, ECF Nos. 28-2 at 2; 40-1 at 2. On November 10, the Fifth Circuit affirmed the district court's judgment, *Petteway v. Galveston County*, 86 F.4th 214 (5th Cir. 2023), but extended the administrative stay pending an en banc poll, *Petteway*, No. 23-40582, ECF No. 122-2. Following the Fifth Circuit en banc poll, the administrative stay terminated. *Id.*, ECF No. 145-2 at 2.

Given that the candidate-filing period for the 2024 election has already begun and that the defendants' electoral map is enjoined, it is no longer practicable to permit the commissioners court the opportunity to cure its enjoined map's infirmities. *See Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016). The court will proceed accordingly to carry out its "unwelcome obligation" to devise and impose a remedy for the 2024 election. *See id.* (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)).

The Petteway and NAACP plaintiffs previously asked the court to implement "Map 1," the alternative map that the commissioners court

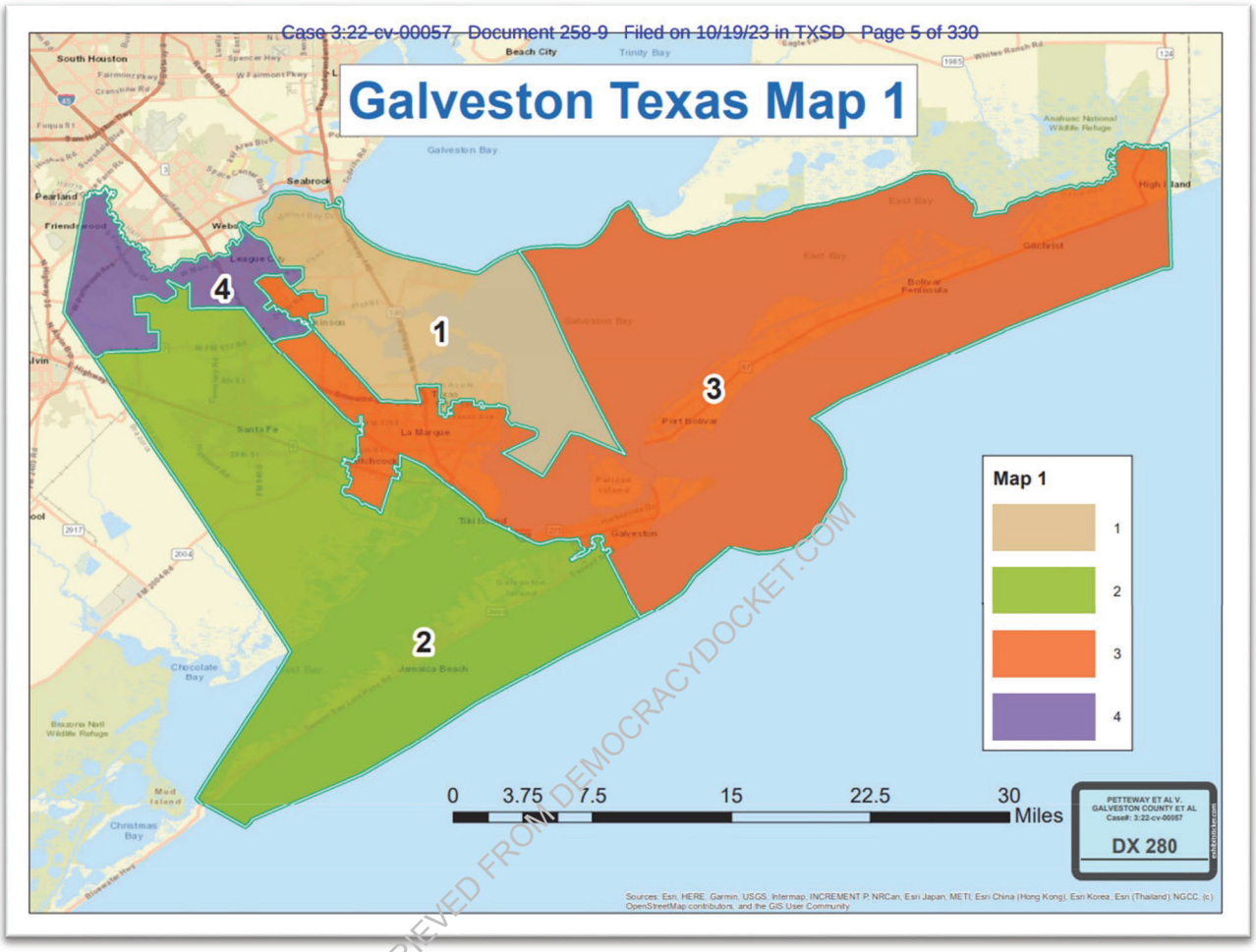
considered on November 12, 2021, and that is pictured in this order's appendix. Dkts. 241 ¶ 8; 242 ¶ 8; *see also* Dkt. 258-9 at 27. And in their emergency motion for a remedial order, the plaintiffs again ask the court to enter an order that requires Map 1 to be the remedial plan. Dkt. 266 at 2. In its order on the initial motion to stay, the court agreed to implement Map 1 if the defendants failed to, or elected not to, submit a revised plan. Dkt. 255 at 3. Map 1 remedies the vote dilution present in the enacted plan, satisfies all constitutional and statutory requirements, and preserves with "least change" the boundaries of the electoral map adopted in 2011. Accordingly, the court grants the plaintiffs' emergency motion and adopts Map 1 as the remedial plan. Dkt. 266.

The court will hold a telephonic status conference for this case on **Monday, December 4, 2023, at 1 p.m.** to discuss how this matter will proceed to ensure that the 2024 election will be conducted using Map 1. Counsel for each party are ordered to participate in the conference.

Signed on Galveston Island this 30th day of November, 2023.

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

Appendix


Case 3:22-cv-00057 Document 258-9 Filed on 10/19/23 in TXSD Page 5 of 330
Galveston Texas Map 1
Map 1
1
2
3
4
0 3.75 7.5 15 22.5 30 Miles
PETTEWAY ET AL V. GALVESTON COUNTY ET AL
Case#: 3:22-cv-00057
DX 280
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