

No. 23-40582

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

Galveston County, Texas, the Galveston County Commissioners  
Court, Galveston County Judge Mark Henry, and Galveston County  
Clerk Dwight Sullivan,  
*Appellants*

v.

Terry Petteway, Constable Derrick Rose, the Hon. Penny Pope,  
Mainland Branch NAACP, Dickinson Bay Area Branch NAACP,  
Galveston Branch NAACP, and Galveston LULAC Council 151, and  
the United States of America,  
*Appellees*

---

On appeal from the United States District Court  
for the Southern District of Texas, Galveston Division  
No. 3:22-CV-00057 (consolidated with Nos. 3:22-CV-00093 and 3:22-CV-00117)

---

**APPELLANTS' REPLY IN SUPPORT OF THEIR RENEWED  
EMERGENCY MOTION TO STAY PENDING APPEAL**

Joseph Russo, Jr. (Lead Counsel)  
Jordan Raschke Elton  
Greer, Herz & Adams LLP  
1 Moody Plaza, 18th Fl.  
Galveston, Texas 77550  
(409) 797-3200 (Phone)

Angie Olalde  
Greer, Herz & Adams, LLP  
2525 South Shore Blvd., Ste. 203  
League City, Texas 77573  
(409)797-3262 (Phone)

Joseph M. Nixon  
J. Christian Adams  
Maureen Riordan  
Public Interest Legal Foundation  
107 S. West St., Ste. 700  
Alexandria, VA 22314  
713-550-7535 (phone)

**APPELLANTS' REPLY IN SUPPORT OF THEIR RENEWED  
EMERGENCY MOTION TO STAY PENDING APPEAL**

Appellants Galveston County, Texas, the Galveston County Commissioners Court, Galveston County Judge Mark Henry, and Galveston County Clerk Dwight Sullivan (collectively, the County or Appellants) file this brief reply in support of their renewed emergency request to stay the district court's final judgment pending the outcome of this appeal, to address the following points.

**No motion for stay was delayed.** Petteway Appellees argue the County “failed to move for a stay on November 10.” Dkt. 162 at 1.<sup>1</sup> This recitation is misleading.

On November 10th at 9:56 a.m. CST, the panel issued its opinion affirming the district court's judgment. Dkt. 118. At 1:06 p.m. CST, counsel for the County emailed Appellees to request their positions on, inter alia, an emergency motion to stay. Dkt. 153 at 3.<sup>2</sup> At 1:38 p.m. CST, the panel extended the administrative stay “pending en banc poll.” Dkt. 122. The en banc poll concluded and the panel opinion was vacated on November 28, 2023. Dkt. 137. During this time, counsel for

---

<sup>1</sup> The County moved for a stay pending appeal on October 17, 2023. Dkt. 13 at 20-21 (asking to stay the trial court “from altering the Commissioners Court boundaries during the pendency of this appeal” and in the alternative for an “administrative stay” pending consideration of the motion). The Court granted a temporary administrative stay on October 18th and deferred the opposed motion for stay pending appeal to the oral argument panel. Dkt. 28. The case was expedited, set for argument on November 7th, and the temporary stay was extended through November 10th. Dkt. 40.

<sup>2</sup> The email attached to the Petteway Appellees' letter to the Court was printed by Mark Gaber, who is in Washington, D.C., one hour ahead. Dkt. 153 at 3.

Petteway Appellees applied to Justice Alito to vacate the stay, and oddly renewed that argument before the U.S. Supreme Court on November 28th, after this Court vacated the panel opinion and granted en banc review.

On November 30th, after Appellees' filings about the clarity of whether a stay was in place, the Court entered an order stating that the temporary administrative stay expired on November 28th. Dkt. 145. That evening, the district court entered an order implementing a different districting map. Dkt. 152. On December 1st, the County (1) confirmed with the Clerk's Office that the original motion to stay was still pending before the Court, and (2) renewed that motion on an emergency basis. Dkt. 152. Appellees cite no case law that a motion to stay was required on November 10th after the Court extended its temporary administrative stay. *See* Dkts. 162 at 1, 163 at 23.

**There are no unresolved, "alternative" claims.** Appellees continue to argue intentional conduct (*see* Dkt. 161 at 15-16), when the district court clearly stated that it "declin[ed] to reach" any such finding (ROA.16034 ¶ 430), none of the Appellees appealed that decision, and all of the Appellees prayed only for affirmance on appeal. Under these circumstances, there are no unresolved or alternative claims pending. *See Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 250 (5th Cir. 2010) ("this circuit follows the general rule that, in the absence of a cross-appeal, an appellate court has no jurisdiction to modify a judgment so as to enlarge the rights

of the appellee or diminish the rights of the appellant”).<sup>3</sup> Nor must Appellants contest intent findings *when none exist*, and which Appellees have not appealed; Appellants appealed from the final judgment, which did not include a finding of intent. *See* Dkt. 162 at 2.

***Purcell* favors Appellants, not Appellees.**

*Purcell* supports a stay, despite Appellants’ arguments to the contrary. *See* Dkt. 162 at 6-7. Map 2, the 2021 enacted Plan, has been in place for two years—including for seventeen days of the 30-day candidate filing period. If *Purcell* instructs courts to refrain from acting too close to an election, then it supports keeping in place the districting plan that has been in effect for the past two years. Appellees are wrong when they say the County’s counsel confirmed that Map 1 is being implemented pursuant to the district court’s order *without any issues*; the conversation with the district court was whether additional orders were needed from it to implement Map 1 (of course, subject to this Court’s ruling on Appellants’ motion for stay). Specific issues about implementing a map switch more than mid-way through the candidate filing period were not reviewed. It would cause confusion to change the enacted Plan now, and *Purcell* supports a stay.

---

<sup>3</sup> Petteway Appellants describe the “contemporary political environment in Galveston County” as including “a local political figure referring to a Black Republican as a ‘typical nig.’” Dkt. 162 at 2-3. They omit that the text had nothing to do with any election or local politics (the text chain discussed personal loans), that it was made by Republican Yolanda Waters (who is Black and Latina), and that Waters defended herself against claims of racism in the text message when the text message was made public.

### **CONCLUSION AND PRAYER**

Appellants ask that the Court enter an order staying the district court's final judgment, its November 30, 2023 Order, and any further action that would alter the Galveston County Commissioners Court boundaries during the pendency of this appeal. In the alternative, Appellants ask that the Court enter an administrative stay until it can consider this filing.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Respectfully Submitted,

PUBLIC INTEREST LEGAL  
FOUNDATION

Joseph M. Nixon  
Federal Bar No. 1319  
Tex. Bar No. 15244800  
J. Christian Adams  
South Carolina Bar No. 7136  
Virginia Bar No. 42543  
Maureen Riordan  
New York Bar No. 2058840  
107 S. West St., Ste. 700  
Alexandria, VA 22314  
jnixon@publicinterestlegal.org  
jadams@publicinterestlegal.org  
mriordan@publicinterestlegal.org  
713-550-7535 (phone)  
888-815-5641 (facsimile)

GREER, HERZ & ADAMS, L.L.P.

By: /s/ Joseph Russo  
Joseph Russo, Jr. (Lead Counsel)  
Fed. ID No. 22559  
State Bar No. 24002879  
jrusso@greerherz.com  
Jordan Raschke Elton  
Fed. ID No. 3712672  
State Bar No. 24108764  
jraschke@greerherz.com  
1 Moody Plaza, 18th Floor  
Galveston, TX 77550-7947  
(409) 797-3200 (Telephone)  
(865) 422-4406 (Facsimile)  
Angie Olalde  
Fed. ID No. 690133  
State Bar No. 24049015  
2525 S. Shore Blvd. Ste. 203  
League City, Texas 77573  
aolalde@greerherz.com  
(409) 797-3262 (Telephone)  
(866) 422-4406 (Facsimile)

*Counsel for Defendants*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the word limit of FED. R. APP. P. 27(d)(2)(A) because this document contains **904** words which is within the 2,600 word-count limit, excluding the portions exempted by the Rules.

2. This document complies with the typeface and type styles requirements of FED. R. APP. P. 27(d)(1)(E) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ Angela Olalde  
Counsel for Appellants

Dated: December 5, 2023

**CERTIFICATE OF SERVICE**

I certify that, on December 5, 2023, this document and its attachments were electronically served on all counsel of record in this case in accordance with the Federal Rules of Appellate Procedure.

/s/ Angela Olalde  
Counsel for Appellants