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 was an appellee 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 December 7, 2023, by the en banc Fifth Circuit, a copy of which is appended to this application (App. K).[1] Applicants also request that the Court treat this application as a petition for a writ of certiorari before judgment and grant that petition. *See* 28 U.S.C. § 2101(e); App. K at 16 (Judge Richman noting that possibility).

INTRODUCTION

This is a case study on how a court of appeals should not handle election litigation. In less than two months—and during the candidate filing period for the November 2024 election—the Fifth Circuit has done the following: (1) issued a temporary administrative stay to expire on November 2, (2) issued a temporary administrative stay to expire on November 10, (3) unanimously affirmed, on November 10, the district court's injunction as compelled by thirty years of precedent while simultaneously calling for the en banc court to overrule that precedent, (4) issued another temporary administrative stay that same day "pending en banc poll," (5) granted rehearing en banc on November 28—the day responses in this Court were

[1] Applicants have three times opposed a stay in the Fifth Circuit. *See Petteway* Appellees' Br. at 2, 52, *Petteway, et al. v. Galveston County, et al.*, No. 23-40582 (5th Cir.) (Nov. 2, 2023), Doc. 72; Letter from C. Dunn to Fifth Circuit Clerk, *Petteway, et al. v. Galveston County, et al.*, No. 23-40582 (5th Cir.) (Dec. 1, 2023), Doc. 153; Petteway Appellees' Response to Emergency Motion for Stay, *Petteway, et al. v. Galveston County, et al.*, No. 23-40582 (5th Cir.) (Nov. 4, 2023), Doc. 162. Pursuant to this Court's Rule 23.3, no other court can grant the relief applicants seek.

due for applicants' prior emergency application to vacate the stay, No. 23A449, (6) issued an order signed by Chief Judge Richman on November 30 confirming that the district court's injunction was no longer stayed, causing this Court to dismiss as moot applicants' prior application in this Court and the district court to issue an order imposing a county-drawn map is a remedy, and (7) reversed course and issued a new stay yesterday, December 7—one week after issuing an order announcing the termination of the stay.[2] These "conflicting orders" issued in the midst of the candidate filing period (which currently ends on December 11) directly contravene this Court's admonition for how courts are to handle election cases. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). And this head-spinning series of events was admittedly not to "correct[] an erroneous lower court injunction," *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31-32 (2020) (Mem.) (Kavanaugh, J., concurring), but rather an effort to *change* existing law.

Compare that to the district court. United States District Judge Jeffrey Vincent Brown presided over a 10-day bench trial and issued a 157-page opinion over a year prior to the November 2024 election—and less than a month after the parties

[2] The Fifth Circuit's order extending an administrative stay "pending en banc poll" is appended as App. A. The Fifth Circuit's opinion affirming the district court's injunction 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. The Fifth Circuit's November 28, 2023 order granting en banc rehearing is appended as App. H. The Fifth Circuit's November 30, 2023 order confirming that its administrative stay terminated on November 28, 2023 is appended as App. I. The district court's November 30, 2023 order confirming that Map 1 will be imposed for the November 2024 election is appended as App. J. The Fifth Circuit's December 7, 2024 order granting a stay of the district court's injunction is appended as App. K.

completed post-trial briefing—enjoining Galveston County's commissioners court map as violating Section 2 of the Voting Rights Act ("VRA"). App. D. Consistent with constitutional avoidance principles, that conclusion rendered it unnecessary for the district court to issue legal conclusions on Plaintiffs' intentional discrimination and racial gerrymandering claims, but the district court nevertheless issued 42 pages of factual findings unmistakably describing a race-predominating process that "bears the mark of intentional discrimination," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("*LULAC*"); *see also* App. K at 21.

Here are some highlights from those factual findings, which the Fifth Circuit's stay concurring opinion completely ignores and which are so unassailable that the county did not challenge them on appeal: (1) County Judge Mark Henry's first redistricting-related act in April 2021 was to email the county's redistricting lawyer, Dale Oldham, asking if the county "had to draw a majority[-]minority district"—after 30 years of having such a district, App. D at 71; (2) Mr. Oldham "knew that the Black population was centered in Precinct 3 in the 2011 plan" but also "reviewed racial-shading maps of Galveston County after the census-data release to identify where Black populations were concentrated," App. D at 73, (3) Mr. Oldham then "told [the mapdrawer] where to place the lines" and the mapdrawer "did not exercise discretion" in implementing Mr. Oldham's instructions, App. D at 76, (4) the resulting map "summarily carved up and wiped off the map" majority-minority Precinct 3, "distribut[ing] the county's Black and Latino voters, who comprise 38% of the county's eligible voter population, among all four nearly drawn commissioners precincts," App.

D at 7, (5) the map ("Map 2") "was the visualization of the instructions Judge Henry had provided Oldham," App. D at 76 (internal quotation marks omitted), (6) "all 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, and (7) "the defendants have disclaimed any consideration of race . . . [and] instead assert that they used seven factors in drafting and adopting the enacted plan," but "[t]he rationales stated by members of the commissioners court in public, in deposition testimony, and at trial are inconsistent with these purported criteria," App. D at 98. The district court characterized the facts of this case as evidencing a redistricting process that was "[a]typical," "mean-spirited," "egregious," "stark," "jarring," and "stunning" for its treatment of minority voters. App. D at 148-49.

This Court has reviewed a host of redistricting cases in recent decades. In *none*—even those in which constitutional violations have been found—has the Court encountered facts anything like what the district court found to have occurred in this case. "[S]tark and jarring" is right. App. D. at 149.

The Fifth Circuit's latest stay must be vacated. *First*, it is purportedly based upon *Purcell* concerns that the county never urged and are thus waived. *See Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.). *Second*, the Fifth Circuit's series of conflicting and confusing orders violated *Purcell*, not the district court's timely injunction that adhered to settled precedent. *Third*, the district court's *Arlington Heights* and racial gerrymandering factual findings, which the Fifth Circuit has

routinely failed to note much less consider, illustrate that applicants will ultimately prevail in this case, regardless of how the en banc court or this Court dispose of their Section 2 claim. Galveston County's minority voters cannot be forced to endure a discriminatory map—in light of the "jarring" facts of this case—merely because applicants are caught between a circuit split on a statutory claim upon which they prevailed, and the application of constitutional avoidance to constitutional claims upon which they would quite obviously prevail should their disposition become necessary. *Fourth*, the plain text and broad remedial scope of Section 2 support the district court's decision. And *fifth*, the equities disfavor a stay. The map imposed by the district court—Map 1—returns the parties to the status quo *ex ante*. The two precincts up for election in 2024, including Precinct 3, had their last election in 2020 conducted near exactly under the configuration in Map 1.[3] Map 1 was drawn by the county, the county concedes its precincts are compact, that the map is lawful, that it was not drawn based upon race, and its primary defense at trial was that the Commissioners Court *would have adopted Map 1* had the then-sole Black Commissioner simply asked more fervently for it. It does not harm the county at all, let alone irreparably.

Ultimately the primary feature of this case is a race-infused process that bears the mark of intentional discrimination. In granting its latest stay, the Fifth Circuit entirely ignored the district court's unchallenged factual findings to that effect,

[3] It is irrelevant that the *other* two precincts were elected under Map 2 in 2022 prior to the trial in this case. They are not up for election until 2026. The relevant inquiry for ascertaining the status quo is to focus on the precincts that will actually stand for election in 2024.

focusing solely on whether Section 2 imposes a single-race threshold for discriminatory results claims. Even with this artificially cabined view of the factual findings below, the circuit grievously fractured on numerous issues, including simply whether to rehear the case expeditiously in January or delay until May. *See* App. K at 9, 15, 17. This Court cannot allow a map characterized by the egregious facts found by the district court to take effect pending appeal.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

In June 2021, with bipartisan support in Congress, Juneteenth became a federal holiday commemorating Emancipation's arrival in Galveston, Texas, a year after its proclamation, 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 candidate filing period for the November 2024 election, which began November 11 and runs through

December 11. 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.

A Fifth Circuit panel has now affirmed the district court's decision, yet the court has nevertheless entered a stay of the district court's injunction pending a May en banc argument requested by the panel. That stay of an *affirmed injunction* that all involved agree faithfully applies existing law is unprecedented. Indeed, the circuit opinions issued in support of a stay cite no authority where a trial court's injunction adhering to settled law—issued with final judgment—was stayed so that the circuit court can *change* the law. This Court must vacate that 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 Fifth Circuit tossed all that aside without analysis and instead gnawed on a non-dispositive legal issue (whether Section 2 requires the *creation* of new majority-minority districts in which a multiracial group satisfies the first *Gingles* precondition) instead of whether a government can intentionally dismantle a majority-minority district without a rational or compelling basis, and flipped on its head a principle (*Purcell*) that the county itself did not raise in its motion to stay.

The Fifth Circuit opinions supporting a stay do not discuss that 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 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.

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

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*.

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 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

[5] Each Texas County elects an at-large "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).

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

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 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. Thomas Bryan was retained 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 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

[7] Mr. Bryan also drew a third concept map, at another law firm'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.

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. 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

(the Map the county proposed that preserved the majority-minority precinct) 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. In other words, the map that the county claims will cause irreparable harm if the injunction is made operative is a map that the county contended at trial would have garnered a majority of votes had the then-sole Black commissioner only said "please."

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

[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.

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. Among the district court's totality of circumstances findings were "racial appeals in campaigns" in recent years, including the use of a stock-image "Latino man covered in tattoos that indicate[] association with a violent gang" mailed in the Republican primary for tax assessor-collector accusing the incumbent Republican of allowing illegal immigrants to vote and "the chairwoman of the Galveston County Republican Party refer[ing] to a particular Black Republican as a 'typical nig.'" App. D at 107-08.

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 on Plaintiffs' *Arlington Heights* and racial gerrymandering claims to correspond with

[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.

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 in violation of the VRA, 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. None of the Fifth Circuit opinions supporting the stay even mention these findings of fact.

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 commencement of the candidate filing period of November 11. The district court ordered that the county could implement its own Map 1 as the remedy map.

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, ignoring the factual findings that the county intentionally dismantled a performing majority-minority precinct without a rational or compelling basis, concluded that it was bound by Fifth Circuit precedent holding that Section 2 imposed no single-race threshold for relief. Based on this, the panel begrudgingly held that the district court did not clearly err in finding the three *Gingles* prongs satisfied and held 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 "pending en banc poll"—with no explanation of its reasoning under settled factors that govern when the extraordinary remedy of a stay is warranted. App. A.

Applicants here filed an emergency application with this Court to vacate the Fifth Circuit's stay on November 16, No. 23A449. On the day response briefs were due in this Court, November 28, the Fifth Circuit granted rehearing en banc. App. H. On November 30, the day after applicants filed their Reply in this Court, Chief Judge Richman issued an order confirming that the administrative stay terminated on November 28. App. I. That same day, the district court granted plaintiffs' emergency

motion for a remedial order, confirming that county-drawn Map 1 would govern the November 2024 election. App. J. Three days later, December 1, the county filed a new motion for a stay, stating that the county "believe[d] action [was] needed today, December 1, 2023." Renewed Emergency Motion to Stay Pending Appeal at 1, *Galveston County v. Petteway*, No. 23-40582, ECF No. 152. That motion did not cite *Purcell*. *Id.* Exactly one week after issuing its order confirming the termination of the administrative stay—during which time Commissioner Holmes filed for reelection in reliance on the that order and its re-imposition of the district court's injunction—the Fifth Circuit reversed and issued a new stay on December 7. App. K.

Nine members of the en banc court[10] issued a concurring opinion labeling the county-drawn remedial Map 1 the "Judicial Map," contending it was "potentially unlawful," App. K at 7 (Oldham, J., concurring), despite the county's concession that it *is* lawful, App. D at 12. These judges reasoned that the "*Purcell* principle requires a stay" because the *district court* had purportedly issued a "late-breaking judicial intervention" that could cause "voter confusion." App. K at 7. The concurring judges issued "a word on the merits," concluding that it was not "unmistakably clear" that Section 2 did not impose a single-race threshold for relief, that the "anti-proportional-representation provision of VRA § 2" could be violated by claims advanced by Black and Latino voters, and because the academic scholarship regarding such claims was

[10] The Fifth Circuit now has 17 active judges, but 18 will hear this case en banc in May because a senior circuit judge was on the panel that unanimously called for the overturning of the court's precedent. *See* 5th Cir. Rule 35.6. The county had moved for initial hearing en banc—a procedure that would have resulted in only the active judges participating—but the panel accelerated its review and issued its decision before a poll was released on the request for initial en banc hearing. Presumably a grant of initial en banc review would have permitted a faster and more orderly disposition on the county's motion for a stay pending appeal.

split. App. K at 7-8. These judges thus concluded that these considerations "suggest plaintiffs' coalition claim must fail" and that the county was likely to succeed on appeal. App. K at 7-8. They said not a word about the district court's factual findings that the county intentionally destroyed a performing majority-minority precinct and that its proffered non-racial justifications for doing so were false, *post hoc* pretext.

Chief Judge Richman issued a separate concurrence. She explained that "[i]f [she] were writing on a clean slate, [she] would conclude that the district court faithfully applied existing precedent from this Circuit, and therefore there was no error" and that she would "deny the stay and proceed with en banc consideration." App. K at 9, 11. Chief Judge Richman reasoned that she agreed with Chief Justice Roberts's position in *Merrill v. Milligan* that a district court's decision should not be stayed if it adhered to existing law, but because that position "did not carry the day" in *Merrill*, she voted to grant a stay. App. K at 15. She also noted that she "and others" were willing to expedite en banc review and rehear the case in January, but the majority voted to delay until May. App. K at 15. Finally, she noted that *this Court* might not "await an en banc decision from us" before granting review of this case. App. K at 16.

Judges Ho and Elrod issued a concurring opinion objecting to the majority's decision to delay consideration of the case until May, stating that there was "no good reason why we cannot add this matter to our January 2024 en banc docket" to permit this Court to review the decision sooner. App. K at 17.

Judges Stewart, Southwick, Haynes, Graves, Higginson, and Douglas voted to deny a stay pending appeal. Judge Higginson issued a dissent, joined by three others, noting that the county delayed filing its motion until last Friday and the court provided only the weekend for responses. App. K at 19. He noted that the district court followed settled precedent not only in the Fifth Circuit but in the Second, Ninth, and Eleventh as well. App. K at 19. Judge Higginson highlighted that the majority favoring a stay

> Offer[] *no rebuttal*—factual or legal—of the district court's 150-page opinion entered with firsthand benefit of an evidentiary hearing that lasted 10 days. The veteran district court judge included in his opinion *42 pages of factual findings* detailing the 'stark and jarring' and 'mean-spirited' transformation of Precinct 3 from a majority-minority district to a district with almost no minority voters.

App. K at 21 (emphasis in original). Noting that "we are not 'on the eve of an election,'" Judge Higginson observed that the Fifth Circuit's "delay-and-default" approach to this case "stands in stark contrast to the Supreme Court's guarantee to all of an equal right to vote." App. K at 21-22.

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 if the Fifth Circuit 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, as half of the en banc judges have indicated they would do. Should a majority of the en banc court take this extraordinary action, it will be the first time a circuit has allowed the intentional destruction of a majority-minority district without a rational or compelling basis and, anyway, it would deepen a circuit split on whether Section 2 contains a single-race *Gingles* prong one threshold requirement.

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 and racial gerrymandering. This case has reached final judgment and been affirmed based upon longstanding precedent—a stay is inappropriate and is contrary to *Purcell* concerns. The Fifth Circuit acknowledges that plaintiffs prevail under long-standing law, but nevertheless stays relief for the next election in order 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. Conversely, the map the district court imposed over a week ago—when the Fifth Circuit issued an order terminating its stay—maintains the status quo *ex ante*. 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 reverses the district court's decision, as half of the en banc court has indicated they would do. 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, one that Section 5 of the VRA had held in place when many of these same officials tried to destroy it in 2011, 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 Fifth Circuit first so held in 1987. *See LULAC Council 4386 v. Midland I.S.D.*, 812 F.2d 1494, 1500 (5th Cir. 1987) ("[T]he prejudice of the majority is not so narrowly focused.") (Wisdom, J.). 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 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.

More fundamentally, there is a split of authorities on whether cases involving intentional discrimination even require a *Gingles* prong one showing. *Compare Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality) ("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."), *and Garza*, 918 F.2d 763, 769 (9th Cir. 1990) ("We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength."); *with Johnson v. DeSoto County Bd. of Comm'rs*, 204

F.3d 1355, 1344 (11th Cir. 2000) (expressing doubt that Fourteenth and Fifteenth Amendment claims could prevail in the absence of a *Gingles* prong one majority-minority district showing); *Rivera v. Schwab*, 512 P.3d 168, 189-91 (Kan. 2022) (holding that Fourteenth Amendment intentional discrimination claims require the same *Gingles* prong one majority-minority district showing as Section 2 claims).

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

The Fifth Circuit's decision to issue a stay is wrong on the merits and equities. *First*, the court's conclusion that *Purcell* required a stay gets things exactly backwards. *Purcell* requires adherence to the district court's injunction, not the Fifth Circuit's series of conflicting and confusing orders issued in the midst of the candidate filing period. Moreover, the county did not cite *Purcell*, waiving any such argument. *Second*, 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 and the predominance of racial considerations. A stay is especially inappropriate under these circumstances because applicants are likely to ultimately prevail regardless of the outcome of their Section 2 claim. *Third*, 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. *Fourth*, 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 make a stay demonstrably wrong.

A. *Purcell* compels vacatur of the Fifth Circuit's stay.

Purcell compels vacatur of the Fifth Circuit's stay. The Fifth Circuit's series of confusing and contradictory orders—issued on the eve of, and now during, the candidate filing period, contravene this Court's admonition to not change the law in the lead up to election deadlines.

The Fifth Circuit turned *Purcell* on its head, concluding that the district court's injunction—which half of the en banc court ironically labeled "late-breaking" despite occurring well before the *commencement* of candidate filing, App. K at 7—violated *Purcell* by *adhering* to existing law. Even if the Fifth Circuit's conception of *Purcell* were not backwards, it never should have reached the question. The district court set trial in accord with the timeframe jointly requested by the parties. *See* Joint Mot. for Trial Setting, *Petteway v. Galveston County*, No. 3:22-cv-00057 (S.D. Tex. Mar. 3, 2023), ECF No. 116. The district court issued its decision less than a month after the parties' jointly requested post-trial briefing schedule concluded. *See* Trial Tr. vol. 10 at 286. The county did not cite *Purcell* in its motion for a stay below. *See* Renewed Emergency Motion to Stay Pending Appeal at 1, *Galveston County v. Petteway*, No. 23-40582, ECF No. 152. Under these circumstances, the county cannot contend that

the district court's injunction violated *Purcell* and nor can the Fifth Circuit so hold. *See Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.) (granting application to vacate stay issued based upon *Purcell* where the defendant "could not fairly have advanced" that argument having approved of the district court's schedule for trial and decision).

Moreover, the Fifth Circuit's actions—not the district court's—contravene *Purcell*. The Fifth Circuit first docketed this appeal on October 17 and first issued a reasoned stay order *yesterday*, December 7. In the interim seven weeks, the Fifth Circuit has issued two "administrative stays" with expiration dates that have since passed, unanimously affirmed the district court's decision enjoining the county's enacted map, issued an unreasoned (and unrequested) post-affirmance "administrative stay" with no date-certain expiration, granted its own motion for rehearing en banc and vacated the panel decision affirming the district court's injunction, set oral argument for six months after the candidate filing period ends, allowed the administrative stay to lapse ten days ago, confirmed eight days ago by order of the Chief Judge that the administrative stay had terminated (and thus the injunction was operative), and now granted another stay four days before the candidate filing deadline. Each twist and turn in this appellate journey have been covered extensively by the local media, creating serious confusion. These are precisely the sort of "confus[ing]" and "conflicting orders" that this Court has cautioned must not occur with election deadlines afoot. *Purcell v. Gonzalez*, 549 U.S. at 4. The confusion is here; this Court might as well commit to justice.

Critically, this is not a case of the court of appeals stepping in to "correct[] an erroneous lower court injunction" issued close to an election. *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31-32 (2020) (Mem.) (Kavanaugh, J., concurring). Rather, it is the *court of appeals* issuing contradictory and confusing orders on the eve of, and in the middle of, candidate filing—all because some members of the en banc court wish to overrule settled precedent. Here, the Fifth Circuit recognized that the district court's injunction adhered to and was compelled by existing, binding en banc circuit precedent. App. B at 3. The district court likewise followed this Court's precedent on point. *See Growe v. Emison*, 507 U.S. 25, 41 (1993). Even if the election deadlines were not approaching, a stay would be 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."). But the fact that apparently a majority of the court of appeals wishes for existing law to change is a particularly insufficient basis to disrupt—in the middle of the candidate filing period—a district court's injunction that follows current precedent and an order issued just last week by the Chief Circuit Judge terminating a stay. At its core, *Purcell* is about following existing law when election deadlines are afoot. The district court's injunction followed existing law; members of the Fifth Circuit seek to overturn that law. The latter cannot happen in the midst of an election. *Purcell* demands vacatur of the Fifth Circuit's stay.

This is particularly so given that the district court did not order the creation of a *new* majority-minority district, but rather ordered the preservation of a 30-year-old majority-minority district. *See id.* at 879 (Kavanaugh, J., concurring) (noting that preliminary injunction would disrupt the "same basic districting framework that [Alabama] has maintained for several decades"). And it did so for a single county, well in advance of the election, following a full trial on the merits. *See id.* at 880-81 (Kavanaugh, J., concurring) (contrasting opposite circumstances in *Milligan* case). The district court's injunction—which permits the imposition of a map drawn by the county, that the county has conceded is lawful and not based upon race, and that the county contends would have been adopted had Commissioner Holmes fought harder for it—merely returns the parties to the status quo *ex ante*. The county faces no irreparable harm from the imposition of such a map. The equities, combined with *Purcell* concerns, preclude a stay in these circumstances.

Notably, *Purcell* does not preclude this Court from *correcting* the Fifth Circuit's errors. *See Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring) (noting that it was "obviously not the law" that an appellate court could be itself precluded by *Purcell* from correcting a *Purcell* violation). Candidates have already filed and at various times during the month-long filing period, candidates who prefer Map 1 or Map 2 have had a window to file their applications. An order from this Court vacating the stay will simply ensure that they campaign under a nondiscriminatory, lawful map. Any candidate who wishes to withdraw may do so. *See* Tex. Elec. Code § 145.001. But even if the Court finds it appropriate to order the district court to

extend the candidate filing deadline, Texas law accommodates that possibility. *See* Tex. Elec. Code § 172.054(a)(3). Under certain circumstances, the candidate filing period will be extended through December 18, 2023. *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. Because the county is already required to build the possibility of that extension into its election planning, a federal court order extending the deadline to effectuate the relief ordered by this Court would not raise any *Purcell* concerns.

B. The district court's factual findings evidencing intentional discrimination and racial gerrymandering make a stay demonstrably wrong.

The evidence of intentional discrimination and racial gerrymandering—carefully and meticulously catalogued by the district court and ignored by the circuit—makes a stay especially unjust in this case. Although the district court did not need to issue a legal conclusion on intent or racial gerrymandering 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," *LULAC*, 548 U.S. at 440, and is a racial gerrymander. 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 carefully catalogued the events leading up to the adoption of the challenged map under the *Arlington Heights* framework for assessing intentional discrimination claims. Application at 4-13, 19-22; App. D at 60-102. In doing so, the district court rejected as false and pretextual every non-racial justification the county proffered to explain its elimination of Precinct 3. App. D at 97-102, 148. The court credited alternative maps illustrating that the county's proffered justifications were false. App. D at 100-101; *see Cooper v. Harris*, 581 U.S. at 317 (describing such maps as "key evidence" to "undermin[e] a claim that an action was based on a permissible, rather than prohibited, ground"). The County Judge and commissioners who voted in favor of the enacted map *disclaimed* any partisan motivation for the dismantling of the majority-minority precinct. App. D at 101. The county's redistricting lawyer and its demographer offered contradictory testimony about the instructions regarding the use of racial data in the process. *E.g.*, Trial Tr. vol. 8 at 71:18-25; *id.* at 72:15-20; Trial Tr. vol. 9 at 21:4-10; *id.* at 21:25-22:20. The redistricting lawyer, whom the district court did not credit in resolving that disputed testimony, was found by the court to have examined racial shading maps of Black population before dictating to the demographer the precise placement of lines that splintered that population among all four precincts and converted the majority-minority Precinct 3 into having the lowest minority share of any precinct. App. D at 73, 76. The district court found that

Judge Henry and the commissioners knew that they were dismantling the sole majority-minority precinct. App. D at 59.

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, most courts conclude that 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*, 918 F.2d at 771 (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 or racial gerrymandering is permissible. The district court's factual findings on intentional discrimination and racial gerrymandering bear heavily on the Court's consideration of likelihood of success on the merits, irreparable harm, substantial injury to other parties, and the public interest in deciding the propriety of a stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Given the district court's rejection of every non-racial justification proffered to explain the map and the 42 pages of facts illustrating an intentionally discriminatory process, a stay is inappropriate in this case. Applicants will ultimately likely prevail in this case, whether on the statutory claim on appeal or on the constitutional claims on remand. The stay factors weigh heavily against the county in light of the district court's unchallenged factual findings.

Plaintiffs with such strong constitutional claims cannot be forced to endure a discriminatory map merely because they are caught between a circuit split on a statutory claim they won and the application of constitutional avoidance to claims they would otherwise likely win. 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").

C. 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*, 556 U.S. at 13-16 (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.[11] *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 minority voter experiencing vote dilution. Section 2 protects all minority voters, and

[11] 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. This distinction is one of the many limitations on the VRA results test that ensure we avoid "race-based redistricting with no logical endpoint" that the primary Fifth Circuit stay concurring opinion frets about. App. K at 8.

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 view of the judges concurring with the stay below, *see* App. K at 7, 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 panel have concluded. That is a reason to enforce the district court's injunction, not to stay it.

The county reads Section 2 of the Voting Rights Act to contain a glaring loophole in jurisdictions that have non-monolithic minority populations. Even where those minority voters have suffered a shared history of official discrimination that continues to burden their ability to participate in the political process, vote cohesively, and see their preferred candidates defeated by the strength of overwhelming white bloc voting, the county would have the Court exempt those

minority voters from the protections of the Voting Rights Act. The basis for this discrimination exemption? Congress's use of the word "class" instead of "classes." Never mind that nowhere did Congress specify that "class" refers to a single racial group, and never mind that Congress codified its rejection of precisely this sort of plural/singular nitpicking of congressional intent on the opening page of the U.S. Code. *See* 1 U.S.C. § 1. The county's argument is far too thin a reed to support its contention that Congress, in a statute that must be accorded the broadest possible interpretation, *see Chisom*, 501 U.S. at 403, intended to give a free pass to racial discrimination in voting so long as its victims were racially diverse. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Congress did not sanction racial discrimination in voting by omitting the letters "-es" in Section 2.

D. The equities 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, particularly for the two precincts up for election in November 2024 that were last elected in 2020 prior to the adoption of Map 2. 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). 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.

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 December 7, 2023 stay. Applicants also respectfully request

that the Court treat this application as a petition for a writ of certiorari before judgment and grant the petition.

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Respectfully submitted,

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