**No. 23A521**

IN THE

# Supreme Court of the United States

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TERRY PETTEWAY, *ET AL.*,

*Applicants,*

v.

GALVESTON COUNTY, TEXAS, *ET AL.*,

*Respondents.*

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## REPLY IN SUPPORT OF *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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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## ARGUMENT

### I. *Purcell* concerns compel vacatur of the stay.

*Purcell* concerns compel vacatur of the Fifth Circuit's last-minute contradiction of its prior termination of the stay in this case. The Fifth Circuit terminated its stay on November 28—after a panel had already affirmed the district court's injunction and after the en banc court reviewed the panel decision and the County's prior motion for initial en banc hearing. In other words, the en banc court was fully exposed to the parties' various and voluminous merits briefs and arguments for two months and decided to terminate the stay on November 28 and confirm that fact to the world—including Galveston County election officials, candidates, and voters—in a November 30 order. App. J. Since that time—until two business days ago—the County has been implementing Map 1 pursuant to the Fifth Circuit's and district court's orders. In a status conference with the district court on December 4, the County advised the court that it was complying with the order and identified no problem with implementing Map 1 for the 2024 elections. In reliance on the Fifth Circuit's November 30 order expressly confirming that the stay had terminated, App. J, candidates filed for office to run under Map 1. The precincts up for election in November 2024—Precincts 1 and 3—have nearly exactly the same configuration under Map 1 as they did for their prior election cycle, 2020 (and the preceding decade). The district court's injunction preserves the status quo.



The Fifth Circuit's last minute stay decision, which it waited to issue until 3:20 PM two business days before today's candidate filing deadline (despite the case being

docketed with that court for seven weeks and despite expressly *terminating* the stay the week prior), contravenes this Court's admonition not to issue "confus[ing]" and "conflicting" orders when election deadlines loom. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

In the *one business day* since the Fifth Circuit's about-face reimposed Map 2, the County now contends—with no evidentiary support—that "[t]he County may not meet statutory deadlines for registrations, voter registration certificate delivery, and ballot preparation and certification for the primary elections if the stay is vacated." Resp. at 15. Unsurprisingly, the County's counsel did not find a single county elections employee willing to submit a declaration to this Court saying as much, because it is absurd on its face. The County was implementing Map 1 as of Thursday at 3:19 PM. That work did not disappear into the ether over the weekend. The County does not need to start from scratch if this Court orders the County to return to the map it was implementing last week. Moreover, implementing Map 1 is not a difficult task—it is a "least change" map, which the County acknowledges. Resp. at 9. The Court should not accept the County's disingenuous contention that it is somehow too late to return to the map that was in place two business days ago. This Court has the power to correct the court of appeals' error in issuing conflicting orders regarding elections. *See Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Mem.) (Kavanaugh, J., concurring). This is especially so because the County *did not*

*seek a stay from the Fifth Circuit on the basis of Purcell. See* Application at 26-27; *see Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.).[1]

The district court's injunction followed existing law, imposed a map the County drew, contended was lawful, and blamed Commissioner Holmes at trial for the County not adopting. The Fifth Circuit's topsy-turvy treatment of this case, culminating in conflicting orders issued one week apart, should not be countenanced. *Purcell* compels the vacatur of the stay.

## II. The district court's intentional discrimination and racial gerrymandering factual findings compel vacatur.

The district court's intentional discrimination and racial gerrymandering factual findings compel vacatur. *See* Application at 30-33. The County contends that applicants have not "preserve[d] their [c]onstitutional claims" because they "never filed a cross-appeal." Resp. at 3. Applicants *could not* file a cross-appeal because they *won*. The district court's injunction granted Applicants complete relief—the court enjoined Map 2. Winning parties cannot invoke an appellate court's Article III jurisdiction merely because they wish the district court had listed additional reasons for why they prevailed. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980). The district court issued 42 pages of factual findings and concluded that every non-racial



[1] Texas law envisions candidate filing may continue for another week. *See* Application at 29-30. The Court can direct the district court to order an extension if the Court concludes that the timing of the Fifth Circuit's conflicting order requires as much to accommodate potential candidates who have not already filed.

justification proffered by the County for the intentional destruction of a 30-year performing majority-minority district was false pretext. The County cites no case for the proposition that applicants would not be entitled to obtain the district court's legal conclusions on those claims if their victory on a different claim was eventually reversed. Indeed, such a result would violate due process. That is why it is not the rule, and why the County cites no authority to support its contention.

The intentional discrimination and racial gerrymandering factual findings are central to this Court's decision whether to vacate the stay because they show that *applicants* are likely to ultimately prevail, regardless of how their Section 2 claim is eventually resolved on appeal. All of the factors this Court set forth in *Nken v. Holder*, 556 U.S. 418 (2009), counsel sharply against staying an injunction where the district court (following a 10-day trial on the merits) found the County to have engaged in a "mean-spirited" and "jarring" dismantling of majority-minority district with no truthful non-racial explanation for why. App. D at 97-102, 148-49. A stay is inappropriate where a district court's factual findings—unchallenged on appeal—evince a racially motivated process that "bears the mark of intentional discrimination." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006).



The County complains that applicants drew this Court's attention to the district court's vivid recounting of the County's sordid redistricting process. It objects that applicants use the phrase "'intentional discrimination' 21 times" in the application while the district court "used 'intent' only 19 times." Resp. at 42 n.22.

Okay. Even if applicants had deleted two of their references, the result would be the same.

Moreover, one would think—faced with the serious charge made by applicants and the 42-pages of the district court's factual findings on the issue, that the County would muster some sort of convincing defense that it had *not* engaged in intentional discrimination or that it had *not* racially gerrymandered. Here is what the County offers this Court: (1) a Black Republican was appointed by Judge Henry to a vacancy six months *after* the map was adopted—which fact the County then cited to seek dismissal of this lawsuit as "moot",[2] (2) "[t]wo County-elected, Hispanic district court judges have served in the past five years," Resp. at 43, (3) some of the plaintiffs were elected to local offices, (4) *casting a ballot* is easier than it used to be, and (5) the County allows Latinos to use a county building once a year for a "Cinco de Mayo event." Resp. at 43-44.



That's it. Those are the County's "significant facts" that it says show that it did not engage in intentional discrimination and racial gerrymandering when it "summarily carved up and wiped off the map" the only majority-minority precinct where the district court found no truthful non-racial justification for it doing so. App. D at 7, 97-102, 148. Judge Henry's *first act* in April 2021 was to send an email asking whether he "had to draw a majority[-]minority district" after 30 years of Precinct 3's existence. App. D at 71. The County's final act is to cite its allowance of a Cinco de Mayo celebration in a county building to explain why it was not racially

[2] Defendants' Mot. to Dismiss at 2 (June 8, 2022), ECF No. 46.

discriminating and gerrymandering when it created and enacted its map. "Meager" does not even describe the County's refutation of applicants' argument. Whatever happens to the Section 2 claim, applicants evidently will prevail on their intentional discrimination and racial gerrymandering claims. The Court cannot allow the County's discriminatory map to govern a single election in light of the district court's unchallenged factual findings.

## III. A stay is unwarranted on the Section 2 merits.

A stay is unwarranted on the Section 2 merits. The parties have extensively briefed the issue, and applicants will add just this point. This Court has assumed that Black and Latino voters may collectively assert Section 2 vote dilution claims, and it warned district courts that in adjudicating those claims, "proof of minority political cohesion is all the more essential." *Growe v. Emison*, 507 U.S. 25, 41 (1993). This usually defeats these claims. *See* Application at 41 (collecting cases). Here, the evidence of cohesion was overwhelming, and the Fifth Circuit panel found no clear error. Given that the district court *followed this Court's precedent*, a stay is inappropriate, particularly given the intentional discrimination and racial gerrymandering factual findings. Indeed, the intent findings mean that the *Gingles* prong one showing that is the sole basis for the characterization of this as a "coalition" claim should not even apply in this case. *See, e.g.*, *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.").

## IV. The Court should grant certiorari before judgment.

The Court should grant certiorari before judgment. Nothing is to be gained by the Fifth Circuit's en banc consideration—it will not change the split of authorities, and the judges on the court are fractured over the schedule in the case and have expressed skepticism of their ability to even render a decision before *2026*. *See* App. K at 17 (Ho, J., concurring). This case raises important issues on which there are multiple circuit splits, warranting this Court's review.

## CONCLUSION

For the foregoing reasons, the Court should vacate the stay and grant certiorari before judgment.

December 11, 2023

Respectfully submitted,

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