Nos. 23A521 & 23A523

In the Supreme Court of the United States

Terry Petteway, et al.,

Applicants,

v.

Galveston County, Texas, et al.,

Respondents

RESPONSE TO EMERGENCY APPLICATIONS TO VACATE STAY

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants for Cause No. 23A521 are Terry Petteway, Constable Derrick Rose, and the Hon. Penny Pope (Petteway). The Petteway Applicants were plaintiffs in the district court and Appellees in the Fifth Circuit Court of Appeals. Applicants for Cause No. 23A523 are Dickinson Bay Area Branch NAACP, Galveston Branch NAACP, Mainland Branch NAACP, Galveston League of United Latin American Citizens Council 151, Edna Courville, Joe A. Compian, and Leon Phillips (NAACP). The NAACP Applicants were plaintiffs in the district court and Appellees in the Fifth Circuit Court of Appeals. While the United States of America (DOJ) is an Appellee in the Fifth Circuit, it did not file an application to vacate the stay, here.

Respondents are Galveston County, Texas, the Galveston County Commissioners Court, Galveston County Judge Mark Henry, and Galveston County Clerk Dwight Sullivan, in their official capacities (Galveston County). Respondents were the defendants before the U.S. District Court for the Southern District of Texas.

The proceedings below are:

1. *Petteway, et al. v. Galv. Cnty.*, No. 3:22-CV-00057 (consolidated with Nos. 3:22-CV-00093 and 3:22-CV-00117) (S.D. Tex.) (Oct. 13, 2023 injunction (Petteway & NAACP Apps' Appdx. C) and final judgment (Petteway & NAACP Apps' Appdx. D); Oct. 15, 2023 denied stay request (Petteway & NAACP Apps' Appdx. E); Nov. 30, 2023 Order imposing Judicial Map (Petteway & NAACP Apps' Appdx. J));

2. *Petteway, et al. v. Galv. Cnty,* , No. 23-40582 (5th Cir. Oct. 18, 2023 temporary administrative stay (Petteway & NAACP Apps' Appdx. F) and twice renewed through November 28, 2023, when panel opinion was vacated and the Fifth Circuit granted en banc review (Petteway NAACP Apps' Appdx. H); on December 7, 2023 Appellants/Respondents' opposed motion for stay pending appeal granted (Petteway & NAACP Apps' Appdx. H)).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents represent that they do not have any parent entities and do not issue stock.

Dated: December 11, 2023

Respectfully submitted,

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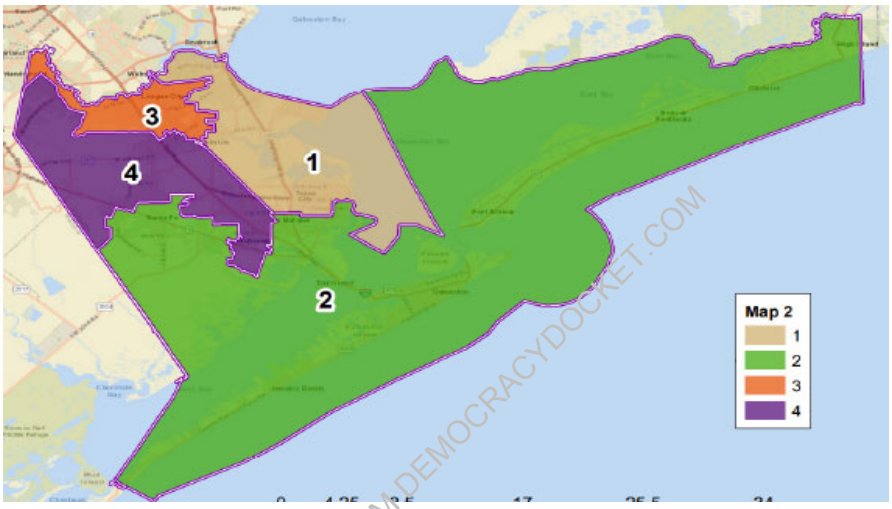
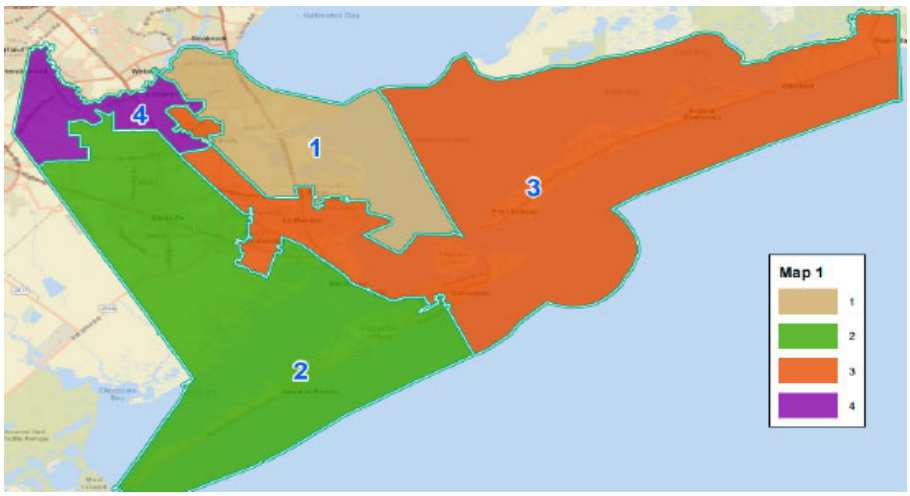
TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND JUSTICE FOR THE FIFTH CIRCUIT:

Respondents file this response to the NAACP and Petteway parties' separate emergency applications to vacate the Fifth Circuit's en banc stay order.

Last November, Galveston County voters elected their County Commissioners for Precincts 2 and 4 under this map enacted in 2021 ("Enacted Map" or "Map 2"):



Respondents' Appdx. 8. Without a stay pending appeal, elections for Galveston County Commissioners Precincts 1 and 3 will be held in November 2024 under this Judicial map, also called Map 1 ("Judicial Map" or "Map 1"):



Id. The Fifth Circuit's en banc stay order should remain in place pending appeal, for the reasons discussed herein and summarized below:

1. Coalitions are not a protected class under Section 2 of the VRA. The en banc Fifth Circuit considered and granted a stay after considering the circumstances, effect of late changes to election boundaries, and the likelihood of Respondents' success on appeal. This case asks whether a coalition of two distinct minority groups—neither of which is sufficiently numerous on its own—may aggregate to raise a VRA claim. Such claims are unsupported by Section 2 and necessarily subordinate one minority group's voice to that of another's, risking loss of each group's unique identity in support of a larger *political* goal—a problem identified by the Fifth Circuit panel in their recently vacated opinion. Petteway & NAACP Apps' Appdx. B at App-9-11.

2. Stay standards in election cases. In considering a stay pending appeal, federal appeals courts must consider the case and circumstances. A stay standard arising from a court's general exercise of jurisdiction and authority is not a tool for allowing courts to change district boundaries close to an election when those boundaries have been in place for over two years, **and** a majority of the appellate court does not see a likelihood that Applicants' theory will succeed upon appellate review.

3. Federal Judicial Voter Disenfranchisement. The Enacted Map has already been used to elect County Commissioners for Precincts 2 and 4; Applicants never sought to enjoin use of the Enacted Map for that 2022 election. If not stayed pending appeal, the district court's mandatory injunction to implement the Judicial Map will deprive some Galveston County residents of the ability to vote for their County Commissioner for at least four years.

4. A "Results" Only Case. This is a Voting Rights Act ("VRA") results-only appeal. Be it descriptions of invidiousness, or erroneous conjecture about what findings were challenged on appeal and why, no amount of argument will change that this is only a Section 2 results case on appeal. The district court did not find intentional discrimination and expressly "declin[ed] to reach" any such finding. Petteway & NAACP Apps' Appdx. D at 170 ¶ 430. ***No plaintiff appealed from that decision***. And Applicants' story provides no equitable basis to reverse an en banc stay order.

BACKGROUND AND PROCEDURAL HISTORY

Applicants' sole claim on appeal, subject to the stay order, is a Section 2 VRA results claim. On October 13, 2023, after a bench trial, the district court issued its

findings and final judgment, and a mandatory injunction aimed to replace the Enacted Map that had been in place for 650 days and had already been used for one round of elections.[1] Simultaneously arguing that *Purcell* supports their claim, and that the Fifth Circuit cannot issue a stay order based on *Purcell*, Applicants erroneously claim the timeline favors implementation of the Judicial Map more than halfway through the candidate filing period for an election, whose primary occurs early in 2024. Then, presuming they are entitled to remand to seek a ruling on other claims even if minority coalitions do not provide them a remedy, Applicants ignore that they never filed a cross-appeal or otherwise sought to preserve their Constitutional claims, and did not request that relief in the Fifth Circuit. When properly considered, the Fifth Circuit's en banc stay order is appropriate and should remain intact.

I. Galveston County's background and politics

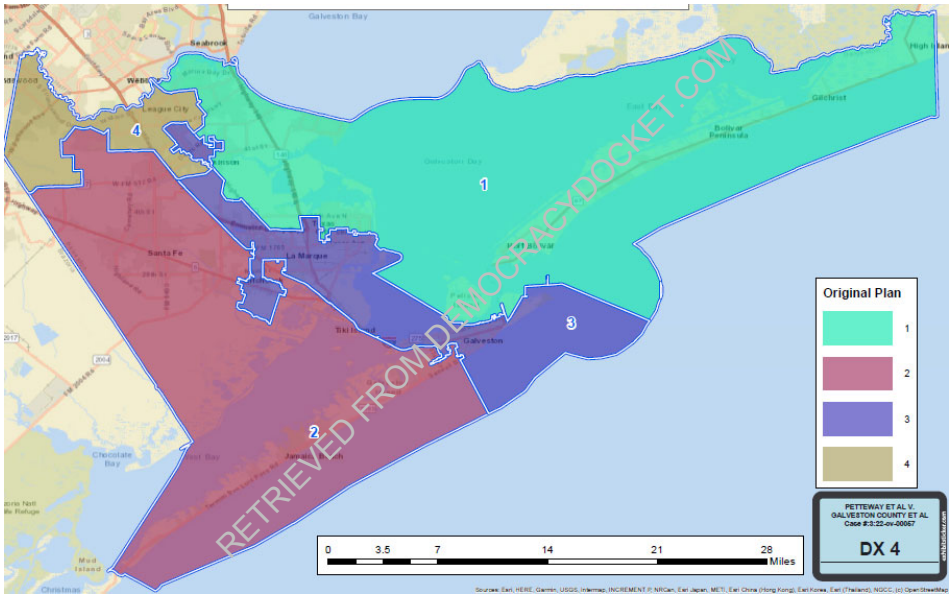
Galveston County residents generally voted majority Democrat until 2010, when rising populations in the northern suburbs helped shift the overall political landscape to Republican. Galveston County Judge Mark Henry, a Republican, was first elected in 2010, and has served as County Judge ever since. Petteway & NAACP Apps' Appdx. D at App-33 ¶ 28. The County has historically been mostly Anglo[2] and, since 2010, is mostly Republican. Petteway & NAACP Apps' Appdx. D at App-71, 73.

[1] The November 2022 elections elected commissioners from Precincts 2 and 4.

[2] Respondents' Appdx. 7 at App-52.

II. In the last pre-*Shelby* redistricting cycle, the DOJ favored Galveston County Black voters over Galveston County Latino voters, causing the County's Latino community to object to the last redistricting map that Applicants want to maintain with the least possible change.

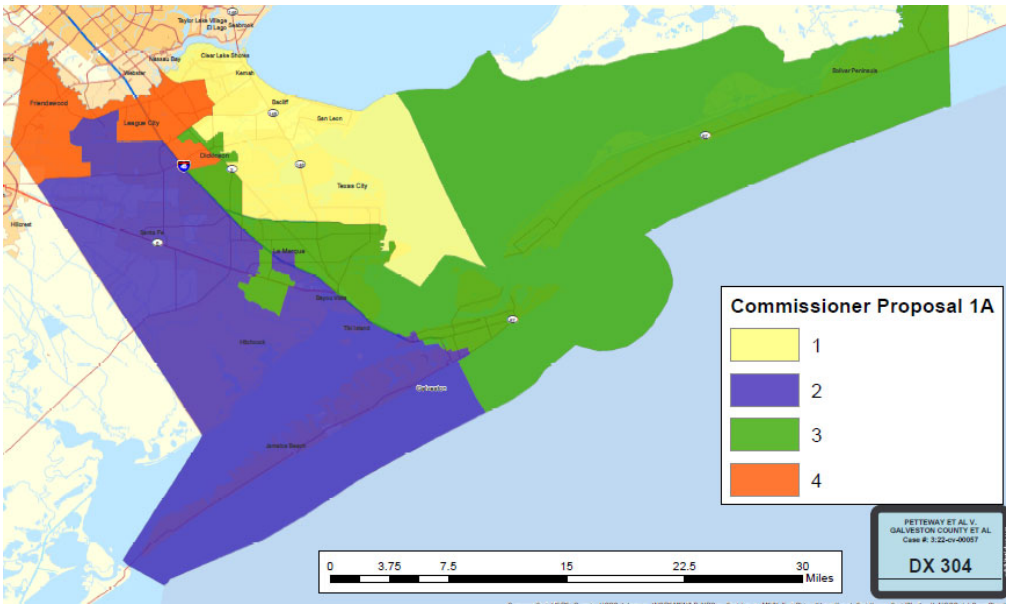
Before *Shelby County*,[3] Galveston County was subject to Section 5 preclearance, and through years of anti-retrogression policies, the Department of Justice largely created Galveston County Commissioner Precinct 3. Through DOJ mandates, Precinct 3 was drawn as a majority-minority precinct which has looked, over time, much like the center purple strip in the image below ("2011 Map"):



Respondents' Appdx. 1.

In 2011, ten years before the maps in this dispute, the County submitted the following map for preclearance:

[3] *Shelby County v. Holder*, 570 U.S. 529, 553 (2013).



Respondents' Appdx. 3. The proposed change was, primarily, the inclusion of Bolivar Peninsula and Pelican Island[4] in Precinct 3. Before the DOJ issued any response to this submission, some of the same plaintiffs in this case sued to enjoin the use of any unprecleared map. *See Petteway v. Henry*, 738 F.3d 132, 135 (5th Cir. 2013). Though the County had not implemented the proposed map, and repeatedly assured the court it would not do so, the suit's procedural entanglements included a temporary restraining order; that order was vacated by a three-judge panel. *Id.* When it finally did respond, the DOJ criticized placing Bolivar Peninsula into Precinct 3, contending it reduced the Black percentage of the electorate in that precinct while increasing the Hispanic and Anglo populations. Respondents' Appdx. 4 at App-19.

The County promptly entered into discussions with the DOJ and negotiated a new plan that the DOJ precleared. Respondents' Appdx. 9 at App-97. During those

[4] These are sparsely populated areas of the County, both of which are accessible from within the County by ferry, only.

negotiations, the DOJ decreased the Hispanic population and increased the Black population in Precinct 3. Respondents' Appdx. 5 at App-24.

Latino community leaders wrote to the DOJ in 2012 to express the Galveston County Latino community's resentment at the DOJ's unequal treatment of Latinos in the negotiated map. They stated the map "absolutely does not recognize the growth of the Latino population in [Galveston] County," and that the DOJ's concern with only Black percentages leads "**our Latino congregations and organizations . . . to believe that the DOJ places a greater value on the voting rights of African Americans.**" Respondents' Appdx. 5 at App-24 (emphasis added). They also argued the map "**undervalues Latinos**." Respondents' Appdx. 6 at App-46 (emphasis added).

Despite concern that the agreement was "repugnant" to Latinos, the DOJ precleared the plan, which became the 2011 Map. Of note, the bubble at the top of the purple Precinct 3 in the 2011 Map captures Commissioner Holmes'[5] residence, since he must live within the precinct he serves.

III. Applicants cannot raise a VRA challenge unless they do so as a coalition of two distinct minority groups.

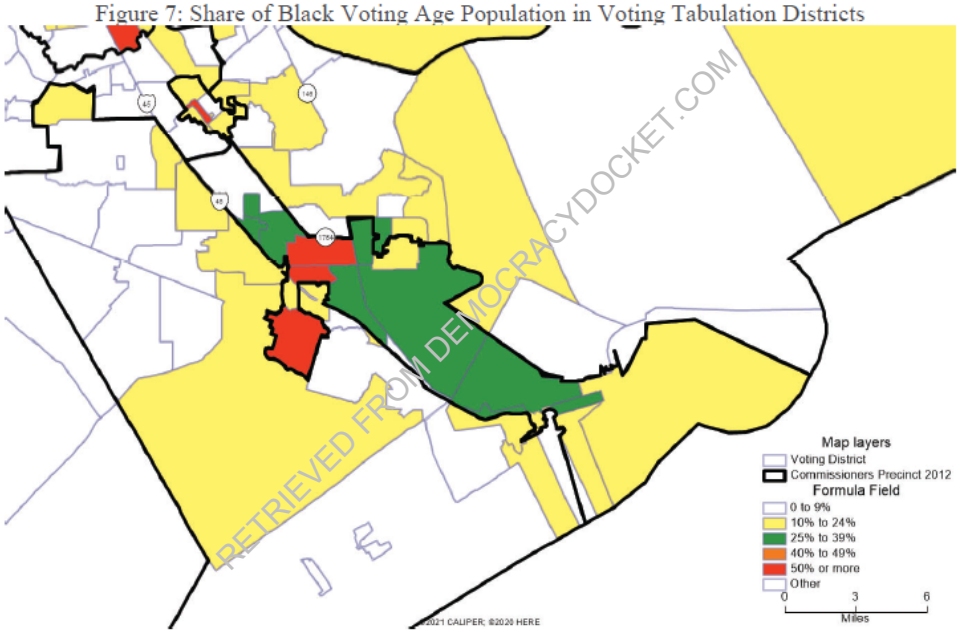
Neither the Black nor Hispanic population in Galveston County is sufficiently numerous to form a majority-minority precinct. Petteway & NAACP Apps' Appdx. D at App-48 ¶ 74. 19.2% of the citizen-age voting population, or "CVAP," is Latino, and

[5] Commissioner Stephen Holmes, who is one of two Black members of the Commissioner's Court, and the only Democrat, has served as Galveston County's Precinct 3 Commissioner since 1999. Petteway & NAACP Apps' Appdx. D at App-33 ¶ 27 & App-124-125 ¶ 311. Oddly, the trial court found Commissioner Holmes was excluded from the redistricting process—even though his own notes describe his involvement in detail. Respondents' Appdx. 2.

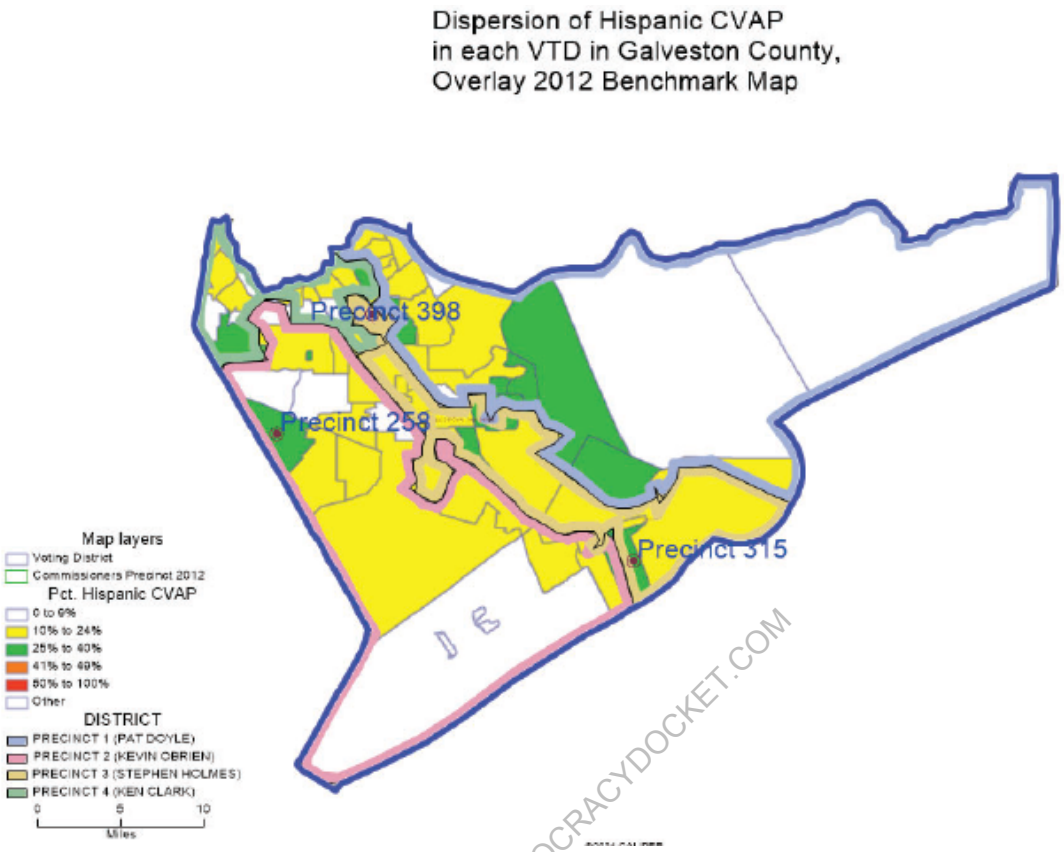
12.75% is Black. Apps' Appdx. D at App-74 ¶ 154; Respondents' Appdx. 10 at App-106. Latino CVAP has grown in the past 10 years, while Black CVAP has decreased.

There is no dispute that the Black and Latino communities are distinct minority groups in Galveston County. Black and Latino residents do not generally live in the same areas. The County's Black population is largely concentrated along a central corridor through the County, stretching from the mainland to Galveston Island:

Figure 7: Share of Black Voting Age Population in Voting Tabulation Districts



The Hispanic population, by contrast, is evenly dispersed throughout the County, and not highly concentrated in any single area. Petteway & NAACP Apps' Appdx. D at App-89 ¶ 197; Petteway & NAACP Apps' Appdx. D at App-48 ¶ 73.



Respondents' Appdx. 7 at App-55 (showing dispersion of Hispanic CVAP in each voting tabulation district on the 2011 Map, with yellow at 10-24% and green at 25-40%).

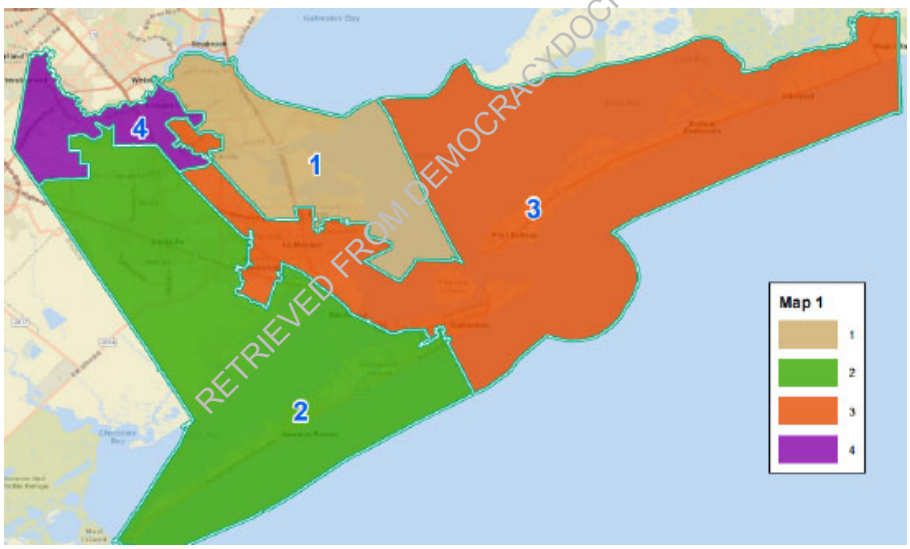
The differing dispersions between the Black and Latino minority groups are important and highlight a significant problem with minority coalitions. The Black population in Galveston County is roughly 13% and Latino population is roughly 25%. Respondents' Appdx. 11 at App-124; Petteway & NAACP Apps' Appdx. D at App-46 ¶ 68. Yet, because of the configuration of Precinct 3 in the Court's Judicial Map 1, the Black voting population has greater influence over the candidate to be elected in

Precinct 3, as Black voters outnumber the rest of the Democrat voters[6] and can proportionally influence results of primaries in Judicial Map Precinct 3.

IV. 2021 Redistricting

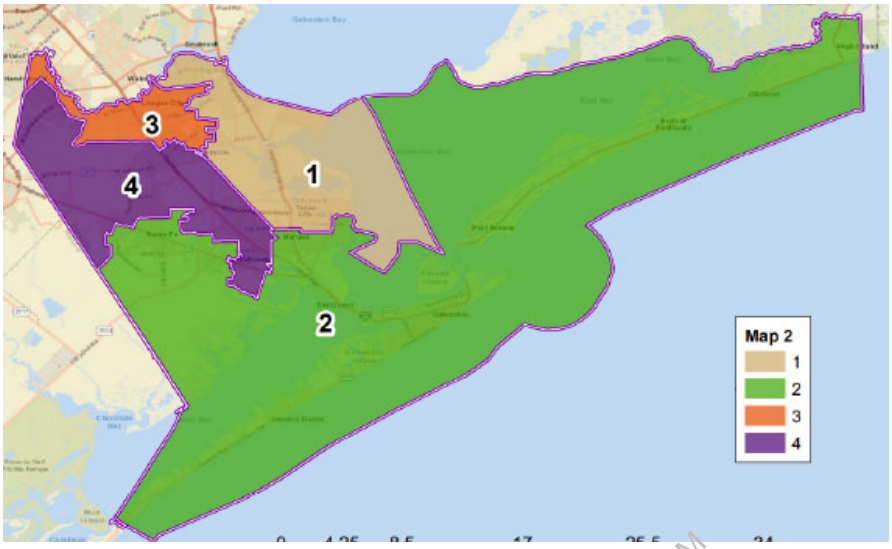
In 2021, after *Shelby County*, the County faced a new problem: what protection from legal exposure would it have since Precinct 3 had been drawn predominantly on the basis of race? It hired redistricting counsel to assess and assist. With a demographer, counsel generated two map proposals—a "least change" map (which is Map 1), and a coastal precinct map (which is Map 2):

The Map 1 Proposal ("Judicial Map" or "Map1")



[6] According to the district court, experts agree that few Anglo voters participate in Democratic primaries. Petteway & NAACP Applicants' Appdx. D at App-72 ¶148. Anglo voters are therefore unlikely to defeat the candidate of choice of Black voters.

The Map 2 Proposal (Enacted Map or Map 2)



Respondents' Appdx. 8. Both proposed plans kept the Commissioners within their precinct boundaries as required by Texas Constitution article. 16 Section 14. Under Map 2, the incumbent Democrat for Precinct 3 is less likely to be reelected, considering the political makeup of the County and of Map 2 Precinct 3. *See* Petteway & NAACP Apps' Appdx. D at App-71, App-73, App-144-145 ¶¶ 144, 149, 370.

Both Map 1 and Map 2 were presented to all Commissioners. Each proposal went through the same timeline and process.[7] Though Commissioner Holmes knew he would be reelected under Map 1, **he never told his constituents or the public this crucial fact**. Respondents' Appdx. 9 at App-85-87, App-89-91 & App-93-95. So the public did not support it. Instead, many objected to it and some asked that Map 1 be changed back by taking out the sparsely populated Bolivar Peninsula area, an

[7] Due to the late release of Census data, the process for drawing and implementing new maps was compressed, and the maps were posted online for public comment. Respondents' Appdx. 8.

unincorporated part of the County that did not alter expected Democrat election outcomes. Respondents' Appdx. 9 at App-99-100. At trial, experts testified Map 1 included "30.86% Black and 24.28% Latino by CVAP" (Petteway & NAACP Apps' Appdx. D at App-48 ¶ 75, App-144-145 ¶ 370), even though Latino CVAP in the County is much higher than Black CVAP.

Although favorable to him, Commissioner Holmes did nothing to seek adoption of Map 1, not even tell his constituents that it likely would have elected him. As a result, Map 1 failed politically.[8]

V. Procedural History—Different Paces for Trial and Appellate Timelines

A. Applicants sued in April 2022 and did not seek a preliminary injunction or to enjoin use of the Enacted Map for the 2022 elections.

Five months after the County adopted the Enacted Map in November of 2021, Applicants and the DOJ filed separate suits that were later consolidated. They claimed the Enacted Map illegally diluted the Black and Latino vote. None of the three sets of Plaintiffs sought an injunction and instead conducted full trial discovery, each with their own set of overlapping experts and proposed maps.

Trial eventually began in August of 2023, almost two years after the County adopted the Enacted Map and three months before opening of the candidate-filing period for election under Commissioner Precinct 3. As evidenced by their experts' proposed least-change plans, Applicants essentially argue that Section 2 contains a

[8] Redistricting counsel for the County described both map proposals as "legally defensible." But, in being legally defensible, the County was not concerned that Maps 1 and 2 met the *Gingles* preconditions. Those elements and that burden rests on the plaintiff in asserting a VRA claim.

no-retrogression standard. Taking that argument to its logical result, Applicants would have a nation-wide federal mandate imposed upon localities to draw only least-change districting plans, presumably ad infinitum.[9] Applicants have even argued that Respondents somehow were obligated under *Purcell* to file a declaratory judgment action to obtain a ruling on an unfiled coalition claim "*before* engaging in redistricting." No. 23A449, Petteway App'n at 33 (Nov. 16, 2023). If what they meant was that Respondents were required to obtain federal court clearance for their districting maps post-*Shelby*, they are clearly wrong.

B. The district court entered judgment on the VRA Section 2 results claim only, and Applicants only sought affirmance on appeal, therefore not preserving any other relief or constitutional challenges.

Following a bench trial, the plaintiffs obtained relief on their VRA results claim. The district court entered a final judgment ordering a new plan with "supporting expert analysis" be submitted within seven days; alternatively, the court would implement a least-change illustrative plan from the DOJ's expert. When Respondents pointed out that this plan drew a Republican commissioner out of his precinct, the district court amended its order, extended the deadline to fourteen days, and ordered Respondents to either submit a revised plan or implement the Fairfax Plan or Map 1. Petteway & NAACP Apps' Appdx. E at App-177. Both of the least-

[9] The Petteway Applicants practically admit this when they argue that a stay somehow judicially sanctions "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 . . . ." Petteway App'n at 23. Not only do they invent "intentional destruction" in their argument—a holding that never occurred—they praise Section 5 as a non-retrogressive mandate and attempt to squeeze a Section 5 review into a Section 2 framework.

change plans favor a Democrat for County Commissioner Precinct 3 over a Republican. The Court expressly declined to rule on any claims involving discriminatory intent and made no such finding. Petteway & NAACP Apps' Appdx. D at App-97 ¶ 228. No plaintiff appealed to alter that decision.

C. The Fifth Circuit has kept a stay of the district court's injunction largely in place pending its review.

On October 17, 2023, four days after final judgement was entered, Respondents appealed to the Fifth Circuit, sought an emergency stay pending appeal, and requested a temporary administrative stay which the Fifth Circuit reasonably implemented. On November 10, 2023, after expedited briefing and oral argument, a panel affirmed the district court's judgment—but only after providing reasoned criticism of opinions permitting minority coalition claims, and urging that the en banc court consider the matter. Petteway & NAACP Apps' Appdx. B at App-12. The panel extended the administrative stay pending the en banc poll. Petteway & NAACP Apps' Appdx. A at App-5.

The candidate filing period for the November 2024 election opened on November 11, 2023. On November 16, 2023, the Petteway Applicants asked Justice Alito to vacate the stay (No. 23A449); that application was dismissed as moot after the Fifth Circuit, on November 28, 2023, vacated the panel's opinion and granted en banc review. Respondents' Appdx. 12; Petteway & NAACP Apps' Appdx. H.

On November 30, 2023, the district court ordered implementation of the Judicial Map, and on December 1, 2023, Respondents renewed their pending and opposed motion to stay. Petteway & NAACP Apps' Appdx. J. That motion was granted

on December 7, and Applicants sought to vacate it here, the following day. Petteway & NAACP Apps' Appdx. K.

Applicants' focus is on Commissioner Precinct 3, for which the longtime Democratic incumbent, Commissioner Stephen Holmes, has served. At the time of this Response, and according to the Texas Secretary of State, Commissioner Holmes has registered as a candidate for Commissioner Precinct 3 and, due to his address, can run under either the Enacted Map or the Judicial Map. A Republican candidate filed for Commissioner Precinct 3 while the Enacted Map (Map 2) was in place. He does not live within the boundaries of the Judicial Map's Precinct 3. At this time, no Republican has filed for Commissioner of Precinct 3 who is eligible under the Judicial Map due to residency restrictions. Therefore, an election under that map will most likely guarantee Commissioner Holmes' reelection in 2024.

D. The upcoming primary election requires preparations that need to be complete in early January.

The primary election is on March 5, 2024, 86 days away. The timeline to implement any map change is much shorter: early voting for the primary begins February 20, 2024 (72 days away), the clerk's deadline to mail primary election ballots to overseas voters under Texas Elections Code § 86.004(b) is January 20, 2024 (62 days away), and finalizing and ordering primary ballots is recommended to be completed by January 3, 2024 (24 days away).[10] The candidate filing period closes

[10] *See* Tex. Sec'y State, Important Dates for the Party Conventions, Primary Elections and General Election, *available at* https://www.sos.texas.gov/elections/candidates/guide/2024/dates2024.shtml.

December 11, 2023, (the day this Response is filed). A change in maps at this time will require the County to check and change as appropriate the precinct (and voter tabulation district) assignments for a sizable segment of Galveston County's 250,000+ registered voters. The 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. While the NAACP Applicants contend the County has never discussed any hardship or confusion due to changes in maps (NAACP App'n at 25), that is not true. *See* Respondents' Appdx. 13 at App-183, Respondents' Appdx. 14 at App-204-205. More importantly, the affected registration, mailing and balloting deadlines are more sensitive at this point. Applicants' request to vacate should be denied to obviate late-change issues, as eleven Fifth Circuit judges determined.

ARGUMENT

To vacate the en banc stay order, Applicants must show (1) this Court will likely grant review upon final disposition in the Fifth Circuit, (2) there is a "fair prospect" this Court will reverse, and (3) there is a likelihood of irreparable harm should emergency relief be denied. *See Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

I. The Fifth Circuit's en banc order staying the district court's injunction is appropriate, and should not be vacated.

A. Appellate courts have the power to stay a district court's injunction pending appeal to prevent the "premature enforcement of a determination which may later be found to have been wrong."[11]

An appellate court's power to stay enforcement of a judgment pending appeal (here, an **injunction** that alters a duly enacted districting map that has been in place for over 650 days) is "part of [the appellate court's] traditional equipment for the administration of justice." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10 (1942). This "traditional equipment" gives appellate courts the ability "to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." *Id.* Depriving courts of appeal of this ability, without regard to the circumstances of the case or the current state of the law as they are able to write it, would undermine not only their power, but the very reason they have that power in the first place.

[11] *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10 (1942).

In 2006, the Court refused to allow a district court to enjoin voter identification procedures that had been approved by state voters weeks before an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The Court explained the court of appeals had to weigh not only the harms that would flow if an injunction was or was not issued, but also "considerations specific to election cases" and the court's "own institutional procedures." *Id.* Considerations such as voter confusion, incentive to stay away from the polls, and conflicting orders are issues specific to election cases, and those concerns "increase" as elections draw closer. *Id.* Additionally, as Justice Stevens noted in his concurring opinion, there was little data about the impact of the laws in that case, and permitting their use would allow for a better understanding (as opposed to mere speculation) about their effect and utility. *Id.* at 6 (Stevens, J., concurring).

Three years later, this Court addressed whether a federal statute enjoined an appellate court's authority to stay a deportation order; a divided Court held it did not. *Nken v. Holder*, 556 U.S. 418, 436 (2009). An appellate court's "inherent" power to abate an order while the court "assesses the legality" of that order derives from courts' authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* at 426 (quoting All Writs Act, 28 U. S. C. § 1651(a) and *In re McKenzie*, 180 U. S. 536, 551 (1901)). Courts of appeal should consider, "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially

injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 426. The first two factors are the "most critical." *Id.* Arguing, therefore, that an en banc court cannot consider the likelihood of success in light of its own power to issue or overrule prior opinions, actually contradicts *Nken*'s standard.

Enjoining the enforcement of state law "in the thick of election season" is improper. *Dem. Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (Roberts, C.J., concurring). That is, an appeals court must consider in its stay analysis whether there is "federal intrusion on state lawmaking processes." *See id.* Judge Oldham, in his concurring opinion in support of the stay order, acknowledges this important issue:

> If we did not stay this "extraordinary departure from the traditional course of relations between the States and the Federal Government," the people of Galveston would have to endure an entire election cycle under a "federal intrusion into sensitive areas of state and local policymaking."

Petteway & NAACP Apps' Appdx. K at App-203-204 (Oldham, J., concurring) (internal quotations omitted).

Federal district courts therefore should not ordinarily "enjoin state election laws in the period close to an election" and "federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879, (2022) (Kavanaugh, J. concurring).

This is because any change close to an election deadline will cause a ripple effect that can interfere with local administration of the election—the order changing the procedures or boundaries must be reviewed and implemented, voters and election officials must be informed. *Dem. Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). Here, the alteration of precinct boundaries now carries even greater

disruption to processes already completed or ongoing: to implement the Judicial Map, local County administration must first assess and reassign residential and tabulation district data for each of the thousands of voters whose precinct information changes and then reprint and distribute voter registration certificates to the County's registered voters reflecting the appropriate precinct in which the voter lives, and create, test and distribute ballots, including, significantly, mail-in ballots. As Justice Kavanaugh has explained,

> It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.

Id.

Applicants' argument on *Purcell*—that they are entitled to the district court's injunction changing the Enacted Plan at the end of the candidate filing period—"defies common sense and would turn *Purcell* on its head." *Id.* An appellate court must have the power to consider and correct a lower court's injunction—in light of the circumstances of the case before it, both legally and factually. *See id.* at 32. "Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election rule." *Id.*

Oddly, Applicants argue that the Fifth Circuit could not consider applicable *Purcell* standards that warn courts not to change local election laws close to or during election processes; they even argue the Fifth Circuit cannot consider *Purcell* because it was somehow waived. Petteway App'n 4, 27 (citing *Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.)). *Rose* does not stretch to where Applicants seek to take it. In

Rose, the applicants moved for a preliminary injunction (something Applicants chose not to do here), and at the hearing on that request, the Secretary told the district court "for the record" that "we may appeal based on the merits, but we won't make an appeal based on *Purcell*," meaning whether the election is too close. *See* No. 22A136, Aug. 14, 2022 Application to Vacate Stay, at 4-5.[12] The County made no such argument or concession in this case.

Nor is the Court of Appeals' inherent authority under the All Writs Act so tightly belted, as Applicants claim. The Court of Appeals is familiar with the law and facts, and may issue a stay based on arguments of counsel and its own consideration of applicable standards under the law. Any argument to the contrary is an invitation to completely preclude sua sponte stay orders. *See, e.g., Latta v. U.S. Dep't of Educ.*, 653 F. Supp. 3d 435, 439 (S.D. Ohio 2023) (discussing inherent authority of courts to issue stay orders, including sua sponte stay orders citing, inter alia, *Collins on Behalf of Collins v. Barry*, 841 F.2d 1297, 1299 (6th Cir. 1988) (sua sponte staying appellate proceedings pending the outcome of a Supreme Court case)).

But even if Courts of Appeals' authority were limited, Respondents argued in their original emergency motion for stay that the district court's two-week deadline to adopt a new map just before the candidate filing period was too short,[13] the Petteway Applicants extensively discussed *Purcell* in their response in the Fifth

[12] No. 22A136, Aug. 14, 2022 Application to Vacate Stay, at 4-5, *available at* https://www.supremecourt.gov/DocketPDF/22/22A136/233394/20220814185113753_Final%20SCOTUS%20Emergency%20Application%20to%20Vacate%20Stay.pdf.

[13] *See* Respondents' Appdx. 15 at App-226, 230-231, 240-241.

Circuit,[14] and Respondents addressed that analysis in their reply. Respondents' Appdx. 13 at App-183. There is no surprise here. Moreover, creating a "waiver" argument in this context would lead to absurd results, such as precluding courts from considering the very same rapidly changing circumstances that they must consider when assessing a stay request.[15]

While Circuit Justices have the ability to dissolve stays entered by courts of appeals, such stays are "entitled to great deference[,]" and that power "is to be exercised 'with the greatest of caution and should be reserved for exceptional circumstances.'" *O'Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301, 1304 (1980) (Stevens, J., in chambers). Here, the stay issued following the careful consideration of the en banc Fifth Circuit court, supported by **eleven** judges, and should not be vacated.

B. The status quo favors a stay, not a change to the Enacted Map right before the 2024 primaries.

In arguing the Fifth Circuit's stay is improper, Applicants twist the timeline to their story.

In reality, the Enacted Map was constantly in effect from January 1, 2022 until October 13, 2023—**650 days** before the district court's injunction. During those 650

[14] Respondents' Appdx. 16 at App-458-459, 463-466.

[15] Nor does it make any sense that, when a defendant opposes any change to an enacted districting plan throughout litigation, that same defendant could somehow waive a *Purcell* argument by agreeing to a specific date for trial.

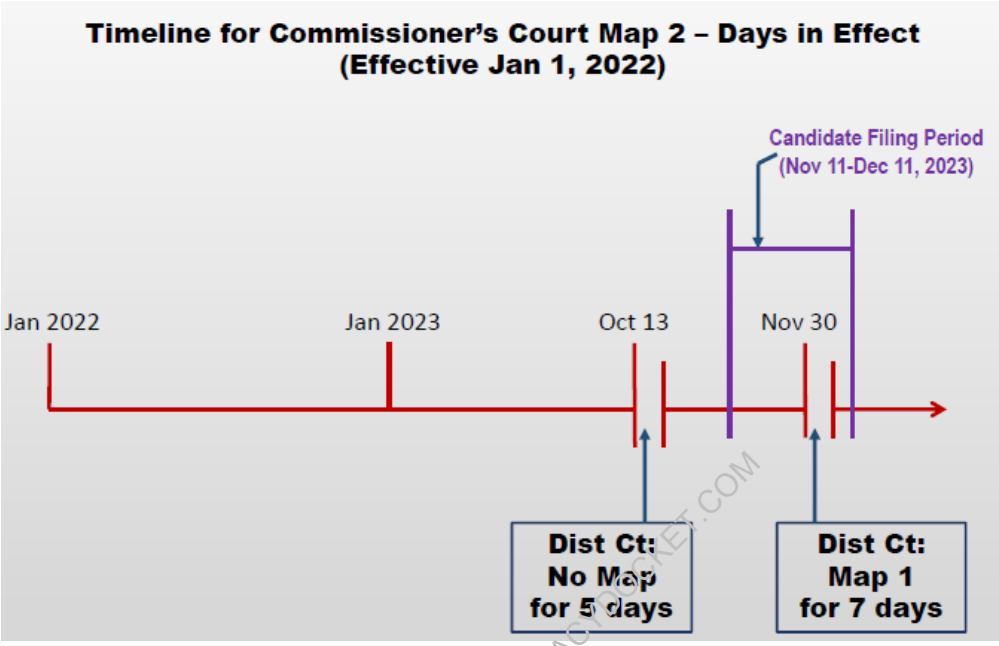
days, Applicants never sought to stay use of the Enacted Map, even for the 2022 elections.[16]

The district court's October 13 injunction introduced confusion into the upcoming election process, leaving the County with no map for 5 days, less than a month before the candidate filing period opened. On October 18, 2023, the Fifth Circuit entered a temporary administrative stay permitting the Enacted Map to continue in place during a 42-day period, through en banc review being granted on November 28, 2023. Applicants' then represented to this Court that the Fifth Circuit's November 28, 2023 order did not "terminate" the temporary administrative stay. When the Fifth Circuit pointed out that the stay had terminated, Applicants moved for emergency entry of a remedial plan with the district court on November 30, 2023. All the while, Respondents' original motion for stay pending appeal was still pending.

Hours after Applicants filed and more than halfway through the candidate-filing period (19 days), the district court ordered the Judicial Map to take effect in Galveston County. The Fifth Circuit's en banc stay order entered December 7, 2023 continued the Enacted Map in place for the last four days of the candidate filing period. During this entire process, the Judicial Map, which Applicants claim is the way to minimize County confusion and work leading to the upcoming primary

[16] In fact, the 2022 election is when Dr. Robin Armstrong, who is Black, was elected as Commissioner for Precinct 4. He was appointed to represent Precinct 4 after the sitting commissioner passed away, was elected by Republican Party chairs over several Anglo candidates, and then elected to office in November 2022 under the Enacted Map, with no Democrat opponent. Petteway & NAACP Apps' Appdx. D at App-72-73 ¶ 148.

elections, replaced the Enacted Map 2 for only seven days, and was put in place more than halfway through the candidate filing period.



The confusion or contradiction in this case is more the result of Applicants' rushed attempts to change the duly Enacted Map so close to the primary elections. Applicants argue both sides when they contend that (1) the general election is too far off for *Purcell* to apply, and (2) the December 11, 2023 close of the candidate filing period is too imminent to permit Galveston County's Enacted Plan to remain in force pending appeal. To be fair, it is the Fifth Circuit's stay that maintains the status quo: it provides for use of the duly Enacted Map that was in place for 650 days before judgment, under which elections have occurred, and which was in place for the majority of the month-long time period for candidates to file to run for office. The stay order provides continuity rather than confusion, and should therefore not be vacated.

II. The parties agree the minority coalition issue is important and may work its way to this Court—but the Fifth Circuit has yet to complete its review, and Respondents oppose certiorari before judgment.

Respondents' lone agreement with Applicants is that, following the Fifth Circuit's en banc outcome, one side or the other will likely seek further review. This Court has not directly ruled on the minority coalition issue. *See Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (declining to address "coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice"); *Perry v. Perez*, 565 U.S. 388, 398-99 (2012) (creating a coalition district is likely not necessary to comply with VRA Section 5); *Growe v. Emison,* 507 U.S. 25, 41 (1993) (declining to rule on the validity of coalition claims writ large). The circuit courts of appeal are split on whether the VRA permits sub-majority minority coalition claims. The Sixth Circuit rejects such claims. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1387 (6th Cir. 1996). The Fourth and Seventh Circuits have voiced similar concerns about the legitimacy of minority coalitions. *See Hall v. Virginia*, 385 F.3d 421, 431-32 (4th Cir. 2004); *Frank v. Forest Cnty.*, 336 F.3d 570, 575-76 (7th Cir. 2003). The First Circuit has also expressed concern over the issue. *Metts v. Murphy*, 347 F.3d 346, 359 (1st Cir. 2003), *vacated on reh'g. en banc*, 363 F.3d 8 (1st Cir. 2004). The Eleventh and Second Circuits appear to permit minority coalitions. *Pope v. Cnty. of Albany*, 687 F3d 565 (2nd Cir 2012); *Citizens of Hardee Cty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F2d 524, 526 (11th Cir. 1990).

This Court may grant review of any final decision in the Fifth Circuit to provide

a clear resolution of this issue. Respondents and Applicants part ways from there.[17]

Respondents oppose Applicants' request to grant certiorari before the full court in the Fifth Circuit has the opportunity to consider and rule on this issue. *See* 28 U.S.C. § 2101(e). While this case presents an important issue, it does not warrant skipping full review by the Court of Appeals. *See U.S. v. Nixon*, 418 U.S. 683, 686-87 (1974) (certiorari granted before judgment in case involving the President and "because of the public importance of the issues presented and the need for their prompt resolution"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (involving Executive Order directing the seizure and operation of most U.S. steel mills); *U.S. v. Mine Workers*, 330 U.S. 258 (1947) (involving nationwide strike of coal mine workers).

III. The Fifth Circuit panel is not demonstrably wrong in ordering en banc review or a stay.

A. Respondents are likely to succeed on the merits.

Coalitions of distinct racial groups are not protected under the Section 2 of the VRA because they attempt to use Section 2 as a tool to advance cross-racial political goals. But, the VRA does not permit race to be used as a proxy for political parties. And, nothing more clearly reveals the political nature of a coalition's claim than its structure and effect—beginning with the pretense of addressing an aggregation of

[17] While the NAACP Applicants appear to argue that the issue of whether intentional discrimination cases require proof under *Gingles* I is at issue, it is not. Again, there is no intentional discrimination finding in this case, and the legal question concerns whether distinct minority groups can form a coalition and bring a VRA claim, not an unpreserved issue of whether intentional conduct somehow obviates a compactness assessment under *Gingles* I.

distinct minority groups as a single entity. The link among such a coalition (as here) is not race, it is political *ideology*, which the VRA clearly does not protect. *See Rucho v. Common Cause,* 139 S. Ct. 2484, 2500 (2019).

Here, Black and Latino Democrats in Galveston County (thus excluding Dr. Armstrong and other minority Republicans and elected officials in the County) oppose a Republican majority. The coalition claim therefore focuses not on equally open processes closed off **on account of** race, but to increase their joined political voice. While such aggregation may address political goals, it is a stretch of the VRA's text, purpose and constitutional bounds.

Applicants contend that existing law compelled the Fifth Circuit to deny a stay pending appeal, since the panel affirmed the district court's injunction. They forget that the panel's opinion has since been vacated. Nor is an en banc Court of Appeals bound by Circuit precedent they intend to revisit. As Chief Judge Richman explained, argument that a change-in-the-law cannot support a stay did not prevent entry of a stay in *Merrill*. Petteway & NAACP Apps' Appdx. K at App-212. And, as further discussed herein, *Growe* is not precedent on minority coalitions raising Section 2 claims. *See Growe v. Emison*, 507 U.S. 25, 41 (1993) ("[a]ssuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential").

B. Section 2 does not protect sub-majority, aggregate coalitions.

This Court has repeatedly rejected sub-majority and political-alliance VRA plaintiffs. Coalitions of distinct minority groups acting as one group are another sub-majority variant not protected by the VRA.

i. The VRA's text shows coalition claims are not protected.

The text of the VRA does not support aggregate sub-majority claims. It protects against the denial or abridgment of a citizen's right to vote "on account of race or color, or in contravention of" protections established for language minorities. 52 U.S.C. § 10301(a) (emphasis added). The statute establishes a violation if it is shown that processes leading up to nomination or election "are not equally open to participation by members of a class of citizens" who are protected under subsection (a)." 52 U.S.C. § 10301(b). The text is singular—"a class of citizens."

While Applicants contend that singular words include the plural, they downplay the importance of context. *See* 1 U.S.C. § 1 (general interpretive rules "unless the context indicates otherwise"). "A class" cannot be determined in isolation—and it is undisputed here that the coalition for which Applicants advocate is comprised of two distinct minority groups. Nor does the "last antecedent" rule apply here, as there is no immediate, last antecedent phrase. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Applicants' citation to the singular-plural canon equally fails to resolve the issue here. Their simplistic application of singular-plural construction is unworkable. The phrase "class of citizens" already contemplates multiple citizens within a class, and the construction provides no instruction that separate "classes" may be aggregated. *See F.D.I.C. v. RBS Sec. Inc.*, 798 F.3d 244, 258-59 (5th Cir. 2015).

As Applicants concede, Congress does not "hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Equating this situation to *Whitman*, minority coalition claims are the elephant. Congress neither alters fundamental details of a regulatory scheme in vague or ancillary provisions nor implicitly created minority coalition claim elephants in such an important area of the law—in fact, Congress nowhere prescribes such a claim under the VRA.

The Fifth Circuit addressed this issue, acknowledging in its stay order that courts must be certain of Congressional intent "before finding that federal law overrides the usual constitutional balance of federal and state powers." Petteway & NAACP Apps' Appdx. K at App-204 (Oldham, J., concurring) (internal quotation omitted). Applicants also cite *Chisom*, which resulted in clarification that the VRA applied to "representatives" who include elected judges, just as the pre-1982 version of the VRA had. *See Chisom v. Roemer*, 501 U.S. 380, 403 (1991). The same is not true for Applicants' claims. Coalitions were not protected under the original enactment, and were not silently made a protected aggregate class in 1982.

ii. Section 2's legislative history shows coalition claims were not contemplated.

Section 2 of the VRA was enacted in 1965 and amended in 1982. No fair reading of the Senate and House reports from 1982 support the notion that a racial coalition was anticipated, or protected.

As explained in the Senate Report for the 1982 amendments, the legacy of the VRA stems from the need to combat the denial of Black Americans' voting rights. S. Rep. No. 97-417, 97th Cong., 2d Sess. 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177,

182.[18] Once statutory bars to Black citizens' ability to vote were lifted, other means of discrimination in voting followed—violence, harassment, literacy tests, and other types of screening. *Id.* Eventually, there was a "dramatic rise in registration" among Black citizens, and then "a broad array of dilution schemes [that] were employed to cancel the impact of the new black vote." *Id.* at 6. The 1982 amendments were meant to "make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice" to establish a VRA violation. *Id.* at 27.

The amendments also show "Congress clearly walked a fine line" in its work to "codify the results test for vote dilution claims while expressly prohibiting proportional representation for minority groups." *See LULAC v. Clements*, 999 F.2d 831, 896 (5th Cir. 1993) ("*Clements*") (Jones, J. concurring). A results-based VRA claim will therefore sometimes fail because a minority will lack sufficient population to create a majority single-member district. *Id.* However, "opportunistic minority coalitions" can circumvent this numerosity requirement to seek a remedy prohibited under the VRA, which is "possibly unconstitutional"—court-mandated proportional representation. *Id.*

The Senate Report shows that Congress envisioned Section 2 protections to provide Black citizens an equal chance at effective political participation. Of course, the VRA applies to any denial or abridgement of a citizen's right "to vote on account

[18] The Court discusses this history in *Brnovich v. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021).

of race or color." 42 U.S.C. § 1973(a). The Report, however, nowhere indicates that the VRA was meant to allow different minority groups to form into a single coalition to raise a VRA claim. Such claims would greatly expand and increase the impact and rate of VRA claims. *See, e.g., Rucho*, 139 S. Ct. at 2502 & 2507 (discussing "unprecedented expansion of judicial power" by ultimately asking federal courts to "take the extraordinary step of reallocating power and influence between political parties").

Such a stretched interpretation of the VRA contradicts the statute's intent to eliminate racially discriminatory structures (*see* S. Rep. No. 97-417 at 54, discussing a jurisdiction's ability to end Section 5 coverage), since expanding claims to a coalition of multiple races is potentially unlimited in scope. This logical conclusion is evident in Senate Report references to a single class of VRA plaintiffs. In fact, one of the few instances in which the Senate Report explicitly references racial groups that the amended Section 2 would affect speaks in the disjunctive, using "or," not "and." In cataloging how the amendment would undo *Mobile v. Bolden*,[19] the Senate Report explains that an intent requirement "asks the wrong question," since VRA claims challenge electoral systems that operate "today to **exclude blacks or Hispanics** from a fair chance to participate . . . ." S. Rep. No. 97-417 at 36 (emphasis added). The Report, which serves as the seminal document courts have turned to for interpreting the 1982

[19] *Mobile v. Bolden*, 446 U.S. 55 (1980), *superseded by statute as stated in Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984).

amendments to Section 2, nowhere references the concept of a multiracial, or Black-Hispanic, fusion claim.

The House Report on the 1982 amendments likewise mentions racial groups discretely, giving no indication of any intent to lump different minority voting groups together to raise a claim under Section 2. Like the Senate Report, it primarily discusses Black voters, but when it mentions other groups, it does so distinctly. For example, the Committee recognized that, before 1965, "the percentage of black registered voters in the now covered states was 29 percent" and white registered voters was 73%, while:

> [t]oday, in many of the states covered by the Act, more than half the eligible black citizens of voting age are registered, and in some states the number is even higher. Likewise, in Texas, registration among Hispanics has increased by two-thirds.

H.R. Rep. No. 97-227 at 7 (1981). The Report contains several examples discussing minority voters separately, providing distinct examples of black, Hispanic, Native American, and other groups' situations under the VRA's provisions. *See id.* at 14-20.

Had Congress, in its 1982 reformulation of the VRA, intended to permit coalition claims, it would have done so expressly. It did not. Had it meant to apply a single claim to different **races**, it would have said so. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) and *U.S. v. Bass*, 404 U.S. 336, 349 (1971) (in "traditionally sensitive areas" like statutes that affect "the federal balance," courts rely on the statute's clear or plain statements to assure "that the legislature has, in fact, faced, and intended to bring into issue, the critical matters involved in the judicial decision").

Applying a statute's plain statements acknowledges "that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

iii. The Fifth Circuit stay seriously questions the merits of minority coalition claims under the VRA.

The Fifth Circuit has historically permitted minority coalition claims. *See Clements*, 999 F.2d at 864; *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (per curiam). Despite that precedent, the stay order issued en banc seriously questions the merits of minority coalition claims. As Judge Oldham stated in his concurring opinion, **the County has shown a likelihood of success on the merits**. Petteway & NAACP Apps' Appdx. K at App-204-205 (Oldham, J., concurring) (internal quotation omitted). He reconfirms that "we must be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Id.* at App-204. Yet, the language of minority coalitions under the VRA is far from unambiguous. The Court further expressed doubt over a reading that includes minority coalitions stating, "[Applicants] would read § 2 to require race-based redistricting with no logical endpoint." *Id.* at App-205. All told, the County has shown likelihood of success. *Id.*

Even the prior Fifth Circuit precedent involving minority coalitions contained strong and well-reasoned opposition. *See LULAC v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987) (Higginbotham, J., dissenting), *vacated on reh.*, 829 F.2d 546 (5th Cir. 1987); *see also Campos v. City of Baytown, Tex.*, 849 F.2d 943, 945 (5th Cir. 1988)

(per curiam) (Higginbotham, J., dissenting from denial of reh. en banc); *Clements*, 999 F.2d at 894 (Jones, J., concurring).

As Judge Higginbotham explained, the question is whether "Congress intended to *protect* [] coalitions" rather than whether the VRA prohibits them. *Campos*, 849 F.2d at 945 (Higginbotham, J. dissenting on denial of reh,). No such Congressional intent can be deduced. *Id.* Furthermore, the notion "that a group composed of [different minorities] is itself a protected minority" "stretch[es] the concept of cohesiveness" beyond its intended bounds to include political alliances, undermining Section 2's effectiveness. *See id.* That is, assuming that a coalition "is itself a protected minority is an unwarranted extension of congressional intent." *Id.*

Analyses from sister circuits also address a lack of Congressional support or authority from this Court permitting coalition claims. The Sixth Circuit has rejected the validity of coalition claims under Section 2. *Nixon*, 76 F.3d at 1387. The *Nixon* court relied on the "clear, unambiguous language" of Section 2 and the legislative record concluding that minority coalitions were not contemplated by Congress. *Id.* at 1386. If Congress had intended to extend protection to coalition groups, it would have invoked protected "classes of citizens" instead of a (singular) protected "class of citizens" identified under the Act. *Id.* at 1386-87. Because Section 2 "reveals no word or phrase which reasonably supports combining separately protected minorities," the Sixth Circuit concluded that coalition claims are not cognizable. *Id.* at 1387. It expressly disagreed with *Campos* as an "incomplete [and] incorrect analysis." *Id.* at 1388, 1390-92 (noting the difficulties of drawing district lines for minority coalitions,

and that permitting coalition claims would effectively eliminate the first *Gingles* precondition). As discussed above, the Fourth and Seventh Circuits have voiced similar concerns. *See Hall*, 385 F.3d at 431-32; *Frank*, 336 F.3d at 575-76.

Citing the dissenting opinion in *Nixon*, Applicants ask whether VRA claimants must pass "some sort of racial purity test," and whether a community that is racially both Black and Hispanic must be segregated from a community that is non-Hispanic Black. App'n at 27 (citing *Nixon*, 76 F.3d at 1401 (Keith, J., dissenting)). This question forgets that the VRA arose to secure the voting rights of Black citizens and that, at the same time it was passed, other titles in the Civil Rights Act outlawed segregation in businesses, public places, and schools. The entire premise of the VRA, and indeed of many civil rights statutes of its era, is protection based upon a racial classification. The VRA requires individual parsing along racial lines, much of which is typically driven by Census-reported data. Increasing the number of different minority groups within a single coalition to raise one VRA challenge not only facilitates confusion (as questions of racial classification are multiplied by the number of minority groups aggregated into one coalition), but shifts the focus from each minority's circumstances to an aggregate coalition's political concerns.

The Fourth Circuit's discussion in *Hall* highlights this concern—permitting multiracial coalitions to bring VRA claims would transform the statute from a source of minority protection to an advantage for *political* coalitions, and a redistricting plan that prevents political coalitions among racial or ethnic groups "does not result in vote dilution 'on account of race' in violation of Section 2." *Hall*, 385 F.3d at 431. This

Court has cited *Hall* favorably. *Bartlett*, 556 U.S. at 14-15. In *Frank*, which involved an Indian tribe's vote dilution claim brought with Black voters challenging a single-member municipal voting district, the Seventh Circuit acknowledged the circuit split, observed the "problematic character" of coalition claims, but avoided ruling on the issue and, instead, rejected the claim based on a lack of evidence that the two groups had a mutual interest in county governance. *See Frank*, 336 F.3d at 575.

The real question at the time of enactment was not whether a mixed-race VRA claimant could be a member of a class of Black, non-Hispanic citizens; that was also not the question at the time of the 1982 amendments. The original (and continued) goal or aspiration, just as it is under the Constitution, is to reach "a political system in which race no longer matters." *See Shaw v. Reno*, 509 U.S. 630, 657 (1993). As we get closer to that goal, fewer Section 2 cases will be successful. *See Allen v. Milligan*, 599 U.S. 1, 29 (2023) ("as residential segregation decreases—as it has 'sharply' done since the 1970s—satisfying traditional districting criteria such as the compactness requirement 'becomes more difficult'" and therefore fewer Section 2 cases will be successful).

Judge Jones discussed this, looking to the VRA's history and text: the statute first protected Black voters, then was expanded to reach language minorities—separately identifying them as persons of Spanish Heritage, American Indians, Asian Americans, and Alaskan natives. *See Clements*, 999 F.2d at 894 (Jones, J., concurring). That the VRA separately identified these groups shows that Congress "considered members of each group and the group itself to possess homogenous

characteristics" and "[b]y negative inference," *did not* indicate that these groups "might overlap with any of the others" or with Black voters. *Id.* The VRA also discusses the protection of a "class of citizens" and "a protected class"—had Congress meant to expand VRA coverage to "classes" comprised of minority coalitions, it would have done so explicitly. *See id.*

The legislative history's comparison of discrimination faced by language minority citizens with that experienced by Black citizens explains why the VRA's protections apply to language minority voters. It is an unfounded leap to go from there to holding the VRA allows different minority groups to join together to present a single claim under the VRA—especially where none is expressly permitted by the statute.

iv. This Court has rejected sub-majority and political alliance claims.

Without the potential to elect a candidate of choice, there is no wrong, no remedy—and no VRA claim.

1. LULAC v. Perry rejected sub-majority influence districts.

In *LULAC v. Perry*, the Court rejected influence districts, where minority voters could not elect a candidate of their choice, though they could play a substantial, if not decisive, role in the electoral process. *LULAC v. Perry*, 548 U.S. 399, 446 (2006) ("*LULAC* I"). Where a proposed influence district does not give a minority group the opportunity to elect a candidate of their choice, a Section 2 claim is not stated—or else "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* While Applicants comparing the Enacted Map

to "tinkering" in *LULAC* I, they forget their own goal (as witnesses testified at trial) was to obtain the reelection of Commissioner Holmes in Precinct 3.[20]

2. Bartlett rejected sub-majority crossover districts.

In *Bartlett*, the Court ruled that crossover districts contradict the VRA's mandate, because the VRA requires proof that minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice." *Bartlett*, 556 U.S. at 14 (quotation omitted). In a crossover district, minority voters make up less than a majority but "might be able to persuade" voters "to cross over and join with them." *Id.* A minority group could "join other voters—*including other racial minorities*, or whites, or both—to reach a majority and elect their preferred candidate." *Id.* But as less than a majority, a minority group "standing alone ha[s] no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Id.* Recognizing a Section 2 claim where a minority group cannot elect a candidate without assistance from others "would give minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance.'" *Id.* at 14-15 (quoting *Hall*, 385 F.3d at 431 and *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (minorities in crossover districts "could not dictate electoral outcomes independently").

[20] Section 2 affords minorities a right to equal opportunity to elect "representatives of their choice," which is different than a right to elect representatives of their choice. 52 U.S.C. § 10301(b). Section 2 does not confer on minority groups the right to elect their ideal candidate; that is a right no one in the political system enjoys. *See Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground").

With crossover district claims, courts would have to "make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term." *Id.* at 17. Those judicial inquiries—including what percentage of white voters supported minority-preferred candidates in the past, how reliable will crossover votes be in the future, what types of candidates have both white and minority support and whether that trend will continue, how did incumbency affect voting, and whether those trends depended on race—"are speculative" and the answers to these questions "would prove elusive." *Id.* *Bartlett* explained the VRA does not create a requirement to draw election districts based on these types of inquiries, these questions go well beyond the typical fact-finding entrusted to federal district courts by entering into "highly political judgments" that courts are "inherently ill-equipped" to make. *Id.* The crossover district sub-majority problems are only heightened when one considers that Section 2 applies nationwide, to every jurisdiction that draws election districts, and every type of election. *Id.* at 17-18. *Bartlett* cautioned:

> There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions.

Id. Instead, an objective, numerical test is much less fraught: "Do minorities make up more than 50% of the voting-age population in the relevant geographic area?" *Id.* This same advice applies here—rather than trudging through the deep waters of whether a coalition of minority voters form a community of interest, or whether they will *continue* to comprise a coalition in the future. For example, will Hispanic voters continue along a trend of voting for more Republican candidates, while Black voters

continue to support Democrats, and how will incumbency or candidate Spanish surnames affect voter cohesion? A simple test of whether a single minority group makes up more than 50% of a particular area is what the VRA envisioned, and what *Gingles* tests.

The same problems with a crossover district are present with a coalition minority district, and more. There is no line as to how many minority groups could join to form a VRA claim—beyond a Black and Hispanic coalition, plaintiffs could raise any combination or number of minority voter groups. Such claims would almost certainly constitute *political*, rather than racial minority, coalitions.

Even though the Court did not rule on coalition claims in *Growe*, Justice Scalia's opinion is no ringing endorsement of coalition claims. As he explained,

> . . . even if we make the dubious assumption that the minority voters were "geographically compact," there was quite obviously a higher-than-usual need for the second of the *Gingles*[21] showings. Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential.

Growe, 507 U.S. at 41.

v. *Rucho* instructs that federal courts are not equipped to apportion political power.

Finally, *Rucho* reminds that the federal judiciary is not equipped to apportion political power. Minority coalitions, for which the glue is political alliance, are comprised of distinct sub-majority groups, and therefore cannot bring a VRA claim.

[21] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

There is no right to proportional representation, or even a guarantee that redistricting "come as near as possible" to proportional representation—that argument is "clearly foreclose[d]'" under Section 2's express language and this Court's case law. *See Rucho* , 139 S. Ct. at 2499.

Distilling the Court's cases into one unwavering point, without the opportunity to elect a representative of a minority group's choice, there is no claim for harm—or relief available—under the VRA.

vi. The VRA is not a vehicle for maximizing political strength.

A significant hazard in recognizing a minority "coalition district" VRA claim is that treating a coalition of separate minority groups as a single minority stretches *Gingles* cohesiveness to include political alliances, which Section 2 does not protect and the Fifteenth Amendment cannot reach. The Court has made clear that partisan vote dilution claims are not actionable. *See Rucho*, 139 S. Ct. at 2500. Racial gerrymandering does not review whether a "fair share of political power and influence" has been apportioned, but "asks instead for the elimination of a racial classification. A partisan gerrymandering claim" on the other hand "cannot ask for the elimination of partisanship." *Id.* at 2495-96.

Section 2 does not require or provide that a minority group's political strength be maximized. Rather, reapportionment "is primarily the duty and responsibility of the State[s]," not the federal courts. *Allen*, 599 U.S. at 29. Section 2 limits judicial action to "instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." *Id.* (cleaned up).

Bartlett rejects any argument that minority groups have special protection under the VRA to form *political* coalitions. *Id.* at 15 ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground") (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). Simply stated, the VRA "does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id.* at 15.

Federal courts lack the power to apportion political power, or "vindicat[e] generalized partisan preferences." *Id.* at 2499-2501. The impropriety of using Section 2 to gain political ground is unmistakable. *See e.g.*, *Clements*, 999 F.2d at 854 ("§ 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats").

C. Applicants insist on arguing intentional discrimination when no intent finding exists—and the equities do not favor vacating a stay.

Applicants contend the equities counsel against keeping a stay in place. There is no denying that a federal court's intrusion into state—or here, *county*—governance is unwarranted absent proper authority. Allowing such intrusion prefaced on a minority coalition wades too far into connections based on political ideologies to be appropriately characterized as a VRA claim.

Applicants do not bother wrestling with the upcoming primary races, for which early voting begins February 20, 2023. They apparently believe implementation of a map that the County has been forced to deal with for seven total days and which the County is not currently subject to will be effortless; they do not consider the time or

work required to implement and generate ballots based on district voting tabulation districts, which depend upon the data behind the design of commissioner precinct boundaries. They do not address the fact that the Judicial Map was not voted for by **any** Commissioner, and was not supported as drawn by any County residents.

Applicants repeat that the district court carefully considered the merits after a bench trial. Judge Higginson picked up on that argument in his dissent. Petteway & NAACP Apps' Appdx. K at App-216-219. But,

> [i]f careful District Court consideration sufficed for an appellate court to deny a stay, then appellate courts could usually end the stay inquiry right there. That is not how stay analysis works. Contrary to the dissent's implication, the fact that the District Court here issued a lengthy opinion after considering a substantial record is the starting point, not the ending point, for our analysis of whether to grant a stay.

Merrill, 142 S. Ct. at 882 (Kavanaugh, J., concurring). Not only do Applicants misstate whether intentional discrimination was ever found by the district court (it was not), they attempt to use their misstatements of the district court's findings as a basis for vacating an en banc stay order.

Applicants gloss over the fact that the findings and related conclusions only extend so far as a VRA Section 2 results claim. Petteway & NAACP Apps' Appdx. D at App-165 ¶ 420. The Fifth Circuit proceedings rest on the legitimacy of a VRA effects claim. There was no intentional discrimination finding made, or appealed.[22]

[22] The Petteway Applicants use the phrase "intentional discrimination" 21 times in their 44-page filing. The district court, in its 157-page findings and conclusions, used "intent" only 19 times. Apart from repeating legal standards, the district court mentioned that intent claims brought against the County in 2013 were **dismissed** from the bench (¶180), and that there was "no need to make findings on intentional discrimination" (¶427). One statement touted by Applicants is a reference to a DOJ objection letter from 2012 about perceived procedural

Even Applicants repeated efforts at reframing the case and references to words such as "stark", "jarring", and "mean-spirited," do not establish intentional racial discrimination or have any bearing on the question at issue here: i.e., does the VRA apply to minority coalition claims. Applicants not only disregard the trial court's findings, they disregard this Court's recent reminder that Section 2 "turns on the presence of discriminatory effects, not discriminatory intent." *Allen*, 599 U.S. at 25. Applicants additionally disregard their failure to appeal the district court's decision, leaving only their Section 2 results claim at issue on appeal. Finally, there is **no** support for the NAACP Applicants' comment that the Enacted Plan was drawn with the devious purpose of trying the change the law. NAACP App'n at 16. That is wholly unfounded rhetoric in Applicants' tale.

Contrary to Applicants' representations, there are significant facts countering their views. Dr. Armstrong, who is Black, was elected by local Republicans to serve as their candidate for Precinct 4. Applicants disregard him because he is a Republican. Two County-elected, Hispanic district court judges have served in the past five years. Four Black and two Latino individual plaintiffs throughout the course of this case were elected officials in Galveston County. It is easier to vote now in Galveston County than ever—residents can vote at any available voting location anywhere in the County (a program the County opted into when it was first made available in Texas), voter registration is an easy process, and early voting lasts two

deficiencies that "could be viewed as evidence of intentional discrimination" (¶233)—but the district court did **not** state that it found evidence of intentional discrimination.

weeks. Applicants' Appdx. D at App-78 ¶ 164. The elected County Clerk (also a Republican) is Hispanic; he confirmed his office will cover any unpaid postage for mail-in ballots because he "want[s] every vote to count." *Id.* ¶ 165. Election materials are provided in English and Spanish for all elections. *Id.* ¶ 166. The County also "collaborates with LULAC and allows them to use [C]ounty property for its Cinco de Mayo event" which is also a "get-out-the-vote effort." *Id.* ¶ 168. Applicants' attempts to create a discriminatory intent finding fail and, in any event, lend nothing to a stay analysis for a VRA results claim.

Applicants' misdirection and, respectfully, Judge Higginson's dissent from the stay order, do the very thing federal courts are instructed **not** to—look beyond the case at hand to justify judicial tinkering in local election plans. Judge Higginson even cites a 1944 opinion, presumably to support allowing a district court, in 2023, to modify Galveston County redistricting plans.

Allowing the County to proceed with the Enacted Map, which has been in place now for over two years and through the first half and end of the candidate filing period, is appropriate. *See Maryland*, 567 U.S. at 1302 (permitting stay to allow state to continue to enforce statute pending conclusion of petition for writ of certiorari); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018) (noting Court granted stay of district court orders).

IV. Respondents will suffer irreparable harm if their duly Enacted Map is enjoined—especially where there are serious questions about the viability of their claim in the first place.

The Constitution grants States the privilege of protecting voting rights of all of its citizens without regard to their race. It also reserves to the States the power to

redistrict. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Applicants claim there is no irreparable injury in imposing a map presented to the Commissioners Court—and not adopted by that Court, ignoring this rule. In 2011, the DOJ rejected the incorporation of Bolivar Peninsula into Precinct 3 when proposed by the County. The DOJ then negotiated only slight population shifts to reach a settlement for the 2011 Map. In 2021, without a Section 5 preclearance requirement or retrogression, the plaintiffs sued to maintain what is in effect a least-changes requirement, and extend federal control over local districting. But whether they can join distinct minority groups to form one claim under the VRA is an important threshold issue that, as the Fifth Circuit panel opined, should not be allowed.

CONCLUSION

If the basis for a federal court's intrusion into state and local government is questionable (as here, where a coalition claim was brought under the VRA), a stay is particularly appropriate.

The VRA protects equal access to voting processes for minority citizens. The problem with a coalition theory is its pretense that several minority groups (or multiple classes of minority citizens) are one. Where a class of minority citizens do not have sufficient CVAP to elect a candidate of their choice, an amalgam of two

separate classes of minority citizens together—who have distinct backgrounds, ethnicities, concerns, and even languages, but share **political** ideologies—does not meet the VRA's statutory intent. The VRA is too important to be misused for political gain, and the Constitution's guarantee of state sovereignty is too fundamental to allow political coalitions to wield federal power over localities. Applicants have not shown any exceptional circumstance to reverse any stay, and their emergency applications should be denied.

Respectfully submitted,

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