No. 23A449

IN THE
Supreme Court of the United States

TERRY PETTEWAY, *ET AL.*,

Applicants,

v.

GALVESTON COUNTY, TEXAS, *ET AL.*,

Respondents.

APPLICANTS' 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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INTRODUCTION

The district court issued 42 pages of factual findings cataloguing a redistricting process in Galveston County marked by intentional racial discrimination and rejecting as false pretext all proffered non-racial justifications for the decimation of a 30-year-old majority-minority precinct. App. D at 60-102. Its decision to enjoin the map it labeled as "stark and jarring" and "mean-spirited" for its treatment of minority voters, App. D at 149, followed decades of settled en banc circuit precedent and was affirmed by a panel of the Fifth Circuit. Nevertheless, the district court's injunction has been mired in a series of conflicting and confusing orders by the Fifth Circuit—including three stay orders (not one of them explaining the reasons that purportedly justify a stay). The candidate filing period is now underway, and the status of Galveston County's election map is unknown chaos. The County simultaneously contends that the permanently enjoined enacted map is both in place and—in an effort to evade this Court's review—that the "administrative stay" thrice imposed below expired yesterday. The basis for this chaos? The Fifth Circuit panel seeks to *change* settled law in the middle of the candidate filing period.

Purcell forecloses a stay in these circumstances. The principle's entire purpose is to enforce existing law in the face of pending election deadlines. The candidate filing period closes on December 11—it is too late for the eleventh-hour change in the law the Fifth Circuit panel seeks. This is especially so where, as here, the district court's injunction *preserves*, rather than *creates*, a majority-minority precinct. Its injunction would merely maintain the status quo *ex ante*, using a map drawn by the

County and heralded by it at trial as one it would have adopted had the Black commissioner lobbied more strenuously for it. Moreover, the startling facts of this case illustrate a redistricting process that bears the mark of intentional discrimination, as evidenced by the district court's unchallenged factual findings. Those findings bear heavily on the factors the Court considers in determining the propriety of a stay and make a stay inappropriate here. Finally, the merits of the Section 2 discriminatory results claim are in Applicants' favor. The Court should not permit the November 2024 election to take place under a discriminatory map that silences the voices of 38% of the county's population.

ARGUMENT

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

Purcell compels vacatur of the Fifth Circuit's stay. The current situation is untenable. The County's response brief illustrates as much. In the same brief, the County contends *both* that the enacted plan—permanently enjoined by the district court—is in effect today and governing the ongoing candidate filing period *and* that the Fifth Circuit's administrative stay of the district court's injunction has expired. *Compare* Resp. at 1 ("The current map has been in place since November 2021" and changing it "in the middle of the candidate filing period . . . would cause confusion.") *and id.* at 15 (noting that the "candidate filing period has been open for over two weeks based on [the enjoined] plan"), *with id.* at 12 ("Applicants seek relief from a temporary administrative stay that has now expired. . . . [T]he Fifth Circuit's temporary stay has concluded . . . ." (citations omitted)). Either (1) the County

actually thinks the stay has *not* expired and it is simply seeking to evade this Court's review by suggesting it has or (2) it is openly violating a binding federal court injunction. Either way, this Court's intervention is needed.

The Fifth Circuit's series of confusing and contradictory orders—issued on the eve of, and now during, the candidate filing period have caused this chaos. Over the course of several 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, and remained silent as to whether its "administrative stay" remains in effect pending en banc review. This is 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. 1, 4 (2006).

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 the panel hopes the en banc court will eventually *change* existing law. 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). The district court's final judgment followed a year and a half of litigation, a ten-day trial, and was entered a month prior to the commencement of candidate filing. 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 a panel 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. At its core, *Purcell* is about following existing law when election deadlines are afoot. The district court's injunction followed existing law; the Fifth Circuit panel seeks 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.*[1] 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.

The County's procedural objections, Resp. at 12-13, are also meritless. The County contends that Applicants were required to ask the Fifth Circuit to "extend the candidate filing period, or to remove the stay," before filing their application with this Court. Resp. at 12. But Applicants *opposed* the stay in their merits brief below, and the Fifth Circuit subsequently extended the stay. Application at 1-2. Rule 23.3 does not require futile, repeated efforts to ask lower courts to dissolve a stay after having *opposed* the stay. Here, the Fifth Circuit had decided—*three times*—to stay the district court's injunction. Even if repeated efforts to undo a stay in the court of appeals are ordinarily advisable before seeking relief from this Court, they are neither wise nor required under "extraordinary circumstances." S. Ct. R. 23.3. The impending December 11 candidate filing deadline makes this such an extraordinary circumstance. Had Applicants waited, the County would undoubtedly be arguing that Applicants waited too long before seeking relief from this Court and that time was

[1] The County misleadingly contends that "[n]o commissioner voted for Map 1, not even Commissioner Holmes." Resp. at 9. As the district court found, County Judge Henry had always planned to jump in immediately after public comment and move adoption of Map 2. App. D at 82. There was no opportunity for anyone to vote on Map 1. The commissioners all testified at trial that they would have been fine voting for Map 1—the map the district court's injunction permits to be implemented. App. D at 78.

up. Applicants' duty was to expeditiously seek this Court's intervention while there was still time to do so. They did not err by doing so.

Nor is this application moot. Resp. at 12. The Fifth Circuit's conflicting and confusing orders notwithstanding, the County is not complying with the district court's injunction, Resp. at 1, 15, and the candidate filing deadline is in two weeks. The Fifth Circuit has stayed the district court's injunction three times, once after *affirming* it. It has now granted en banc review to re-decide an issue that it already decided en banc 30 years ago. Under the circumstances, this Court is not required to await a *fourth* stay order, further compressing the time it has to consider this matter in the next two weeks. If ever there were an example of a stay decision being "capable of repetition, yet evading review," *Federal Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 462 (2007), this would be it. A court of appeals cannot evade review of its decision to stay a case by sequencing a series of expiring and then reappearing "administrative stays" over a 40-day period as an election deadline approaches. At the very least, this Court should order the Fifth Circuit to clarify by an expedited deadline the status of its stay so this Court in an orderly fashion can consider the application in time to grant relief before the December 11 candidate filing deadline.

II. The district court's intentional discrimination and racial gerrymandering factual findings make a stay inappropriate.

The district court's intentional discrimination and racial gerrymandering factual findings make a stay inappropriate. As Applicants have detailed, 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 why it "summarily carved up and wiped off the map" the majority-minority precinct. 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. 285, 317 (2017) (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. Application at 8. 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 County contends, Resp. at 15-17, that this Court should ignore these factual findings—which the district court characterized 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. In the County's telling, this is a run-of-the-mill Section 2 discriminatory results case, and nothing

more. Not so. The district court issued *42 pages* of factual findings under the *Arlington Heights* framework detailing the events that led to the adoption of the map and rejecting all non-racial justifications proffered to explain the map. App. D at 60-102. Having done so, the district court concluded that "[t]his is not a typical redistricting case." App. D at 149. Indeed. 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 County contends that the district court did not issue legal conclusions to accompany its intentional discrimination and racial gerrymandering factual findings. Resp. at 15-17. True. But that was an exercise of constitutional avoidance—the court had already concluded on statutory grounds that the map must be enjoined. That does not eliminate those factual findings, and those findings 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). The district court's factual findings unmistakably reveal a redistricting process that "bears the mark of intentional discrimination." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("*LULAC*"). They do so much more starkly than the machinations this Court found to likewise suggest purposeful discrimination in *LULAC*. 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. That is so even if the Court concludes that the district court's Section 2 discriminatory results ruling may ultimately be reversed. The evidence of intent and racial gerrymandering is so strong as to suggest that regardless of any dispute over "coalition" Section 2 claims, Applicants will ultimately 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.

The County bizarrely faults Applicants for not appealing the district court's decision not to issue intentional discrimination and racial gerrymandering legal conclusions. Resp. at 1, 15, 16. Applicants *won*. They sought for the enacted map to be enjoined and it was. "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 *County's* failure to appeal the district court's factual findings is the salient fact, not Applicants' failure to appeal a decision they won.

The County offers several "significant facts" that it contends "counter[] intent." Resp. at 16. These include the appointment in May 2022—months after the adoption of the challenged map and the commencement of litigation—of a Black Republican to a commissioner court vacancy,[2] the election of some minority officeholders (mostly to

[2] The County absurdly moved to dismiss plaintiffs' suit three weeks after appointment Dr. Armstrong on the basis that his appointment "moot[ed]" the lawsuit. Defendants' Mot. to Dismiss at 2 (June 8, 2022), ECF No. 46.

majority-minority municipal districts), the offering of a two-week early voting period for elections, implementation of (statutorily mandated) Spanish language ballot materials, and the fact that a Cinco de Mayo celebration occurs in a county building once a year. The County does not explain how any of these "significant facts" actually bear on the state of mind or intent of the County Judge and commissioners in adopting the enacted map in November 2021, or contradict the district court's rejection of every non-racial justification proffered to explain the map. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 234 (5th Cir. 2016) (en banc) (holding that post-enactment statements and conduct are of little probative value to ascertaining intent).

The County's meager response to the district court's unchallenged factual findings on intent and racial gerrymandering illustrate the accuracy of those findings. In light of those findings, the equities do not favor a stay—regardless of the Court's view of the Section 2 discriminatory results "coalition" claim. 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.

III. A stay is inappropriate on the merits of Applicants' Section 2 discriminatory results claim.

A stay is inappropriate on the merits of Applicants' Section 2 discriminatory results claim. As Applicants have explained, the text, history, broad remedial purpose, and precedent illustrate that there is no single-race threshold for Section 2

vote dilution claims. Application at 23-30. The County's response is unpersuasive and falls far short of demonstrating the likelihood of success on appeal necessary to justify a stay.

First, the County contends that Section 2's text refers to a singular "class of citizens," and that this creates a single-race threshold requirement for relief. Resp. at 18. The County resists application of the Dictionary Act's rule that the U.S. Code's use of the singular includes the plural, contending that it would be "unworkable" for "class" to include "classes" and thus permit Applicants' claim. Resp. at 18. But just pages later, the County adopts the Sixth Circuit's position that Applicants' claim would be permissible if Section 2 had said "classes of citizens"—the very thing the Dictionary Act makes clear it says. Resp. at 23. Nor does the County explain why the "class" referred to in Section 2(b) does not refer to those sharing the experience of facing an unequal opportunity to vote on account of race, whatever their race—as opposed to sharing the same race. The County's textual argument is incoherent and inconsistent with the Court's obligation to "interpret[] [the Act] 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). Moreover, the County does not explain how its proposed racial purity test for defining the "class of citizens" protected by Section 2 could possibly work in practice.

Second, the County's discussion of legislative history disregards that Congress specifically and approvingly cited to case law recognizing claims on behalf of Black

and Latino citizens and discussed the groups in the aggregate in noting how Section 2 would protect minority voting rights. Application at 27-29.

Third, the County discusses at length how the failure to impose a single-race threshold requirement would merely sanction partisan political alliances untethered to racial discrimination. Resp. at 26-31. For this point, the County relies on *LULAC* and *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality), in which this Court held that Section 2 does not extend to claims in which *white voters* are aggregated with minority voters. But the County's appeal to influence and crossover districts is misplaced. In influence and crossover districts, the white voters necessary for the *Gingles* prong one numerosity requirement have not suffered "a denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a). They simply share the same *candidate choice* as minority voters who *have* suffered such a denial or abridgment. They are thus definitionally not among the "class of citizens protected by subsection (a)" and do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

That is nothing like the Galveston County Black and Latino voters whom the district court found—based upon a searching, local appraisal—have an unequal opportunity to vote under the totality of the circumstances. These voters easily surpass a majority of a potential precinct, all suffer "a denial or abridgment of the right . . . to vote on account of race or color," and are thus collectively a "class of citizens" protected by subsection (a). 52 U.S.C. § 10301(b). The County's dismissal of

these voters as merely sharing a partisan candidate preference disregards the district court's finding that their unequal opportunity to participate in the political process in Galveston County is on account of race.

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.

CONCLUSION

For the foregoing reasons, the application to vacate the stay should be granted. At the very least, if the Court is unsure of the status of the Fifth Circuit's most recent (third) stay, it should set a deadline for the Fifth Circuit to clarify the issue to permit this Court to timely address the application in advance of the December 11 candidate filing deadline.

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Respectfully submitted,

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