No. 23A-___

In the Supreme Court of the United States

DICKINSON BAY AREA BRANCH NAACP, ET AL.,

Applicants,

v.

GALVESTON COUNTY, ET AL.

Respondents.

EMERGENCY APPLICATION TO VACATE THE FIFTH CIRCUIT'S STAY OF THE ORDERS ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

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RULE 29.6 STATEMENT

Applicants Dickinson Bay Area Branch, Galveston Branch, and Mainland Branch NAACPs are local units of the National Association for the Advancement of Colored People. Plaintiff-Respondents Galveston LULAC Council 151 is a local unit of the League of United Latin American Citizens. The local and national NAACP and LULAC organizations are all non-profit entities, and no publicly traded company owns stock in them.

Applicants Edna Courville; Joe A. Compian; and Leon Phillips are individuals.

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PARTIES TO THE PROCEEDING

The applicants in this Court are The Dickinson Bay Area Branch of the NAACP, Galveston Branch of the NAACP, Mainland Branch of the NAACP, Galveston LULAC Council 151, Edna Courville, Joe A. Compian, and Leon Phillips, who were plaintiffs in the district court (Dickinson Bay Area Branch NAACP, et al. v. Galveston County, Texas, et al., No. 3:22-cv-117 (S.D. Tex.)) and were appellees in the Fifth Circuit.

The respondents in this Court are Galveston County, Texas and Honorable Mark Henry, in his official capacity as Galveston County Judge.

The United States of America was a plaintiff in the district court (*United States of America v. Galveston County, Texas, et al.*, No. 3:22-cv-93 (S.D. Tex.))—which case was consolidated with the applicants' case in the district court—and was an appellee in the Fifth Circuit.

Terry Petteway, Penny Pope, and the Honorable Derreck Rose were plaintiffs in *Petteway, et al. v. Galveston County, Texas, et al.*, in the district court (No. 3:22-cv-57) (S.D. Tex.) —which case was consolidated with the applicants' case in the district court—and were appellees in the Fifth Circuit. The Petteway Plaintiffs made an application on 08 December 2023 for an Emergency Stay of the same orders at issue in this Application, docketed as Case No. 23A521.

The Galveston County Commissioners Court and Dwight D. Sullivan, in his official capacity as Galveston County Clerk, were defendants in the consolidated cases below and appellants in the Fifth Circuit.

TO THE HONORABLE SAMUEL A. ALITO, JR., CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to Rules 22 and 23 of the Rules of this Court, applicants respectfully apply for an order vacating the stay issued December 7, 2023, by the en banc Fifth Circuit, a copy of which is appended to this application (App. K). Applicants also request that the Court treat this application as a petition for a writ of certiorari before judgment and grant that petition. *See* 28 U.S.C. § 2101(e); App. K at 16.

INTRODUCTION

This application involves the Fifth Circuit's unlawful use of a stay, mid-candidate filing, to thwart enforcement of existing law. After a year and a half of litigation and a ten-day trial, the Southern District of Texas (Hon. Jeffrey Vincent Brown presiding) found on October 13, 2023, that Galveston County's newly enacted County Commissioners Court map is "fundamentally inconsistent with" and a "clear violation" of Section 2 of the Voting Rights Act and ordered the use of a remedial map for the 2024 elections. Appendix to Application ("App.") at 22, 165. Although defendants immediately sought a stay pending appeal—citing the ordinary stay standards—they did not raise *Purcell* or suggest that the district court's order came too late for the 2024 elections. On November 10, 2023, a panel of the Fifth Circuit unanimously affirmed this decision based on controlling en banc Fifth Circuit precedent. App. at 11. That should have ended the matter. Instead, the panel unjustifiably extended a prior administrative stay "pending en banc poll," thereby blocking the district court's injunction and remedy. App. at 5. After the Plaintiff-Appellees sought relief from this Court to vacate the unlawful administrative stay, but prior to this Court's ruling on the requested relief, the

Fifth Circuit granted *en banc* review on November 28, 2023, and clarified on November 30 that the granting of review lifted the administrative stay. App. at 191.

With its original order enjoining use of the County's challenged plan once again effective, the district court ordered a *County-drawn* alternative Map 1 into immediate effect on November 30, 2023. *Petteway v. Galveston County*, Consolidated No. 3:22-CV-57, Dkt. 267 (S.D. Tex. Nov. 30, 2023). Since that order, candidate filing has proceeded under Map 1. On December 1, defendants again sought a stay pending appeal in light of the en banc grant. Once again, their motion did not cite *Purcell* or contend that it was too late to implement the district court's remedial map. In the late afternoon of December 7, 2023, four days before the statutory close of candidate filing, the Fifth Circuit once again stayed the district court's order, relying on *Purcell*.

The Fifth Circuit's stay is plainly inappropriate. The district court's October 13 judgment came a full 144 days before the primary and over a year before the election. Applicants are unaware of any court ever applying *Purcell* in those circumstances—especially where the defendants *themselves* sought no *Purcell*-based relief. As in *Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022), here the defendants' "emergency motion for a stay pending appeal relied on the traditional stay factors and a likelihood of success on the merits, yet the [appellate] Circuit failed to analyze the motion under that framework. Instead, it applied a version of the *Purcell* principle that respondent could not fairly have advanced [it]self in light of [its] previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November elections should applicants win at trial." *Id.* (citing *Nken v. Holder*, 556 U.S. 418 (2009); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)); *see generally* Appellants'

Renewed Emergency Motion To Stay Pending Appeal, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 152 (Dec. 1, 2023) (relying on the traditional *Nken* factors exclusively). Further, a stay would be unjustifiable even under a heightened version of the traditional *Nken* factors. Neither the original Fifth Circuit panel nor any of the judges voting to grant a stay have denied that the district court's judgment correctly applies binding precedent. At their core, Defendants' arguments are "not about the law as it exists," but "about [their] attempt to remake . . . § 2 jurisprudence anew." *Allen v. Milligan*, 599 U.S. 1, 33 (2023).

Time is of the essence if Applicants are to obtain the relief to which they are entitled. The briefing schedule set forth for en banc reconsideration extends far into the future, with oral argument in May of 2024. The stay should be immediately vacated, and the 2024 election should be held under the remedial County-drawn Map 1 that current, binding Circuit precedent requires.

STATEMENT

NAACP/LULAC Applicants filed this action in April of 2022, joining challenges to the 2021 commissioners precinct plan filed by other private plaintiffs and the United States Department of Justice. App. at 25. Defendants filed unsuccessful motions to stay the matter in the spring and fall of 2022, arguing that the district court should wait until this Court had issued its decision in *Merrill v. Milligan* to account for possible changes to Section 2 law. In filing these motions, the County represented to the district court that "[a *Milligan*] decision in even June 2023 is well in advance of the pertinent County Commission election in 2024 where the voters of Precinct 3 will elect their next commissioner. . . . As such, even if the Court grants this Motion, the Court will have sufficient time to hear this matter in the normal

course prior to the 2024 Precinct 3 elections." Defendants' Motion to Stay, *Petteway v. Galveston Cnty.*, No. 3:22-cv-57, Dist. Ct. Dkt. 36, at 8-9 (May 16, 2022).

Through 2022 and 2023, the parties diligently pursued discovery and other motion practice, and in March of 2023 jointly requested a trial setting in July. *Petteway v. Galveston Cnty.,* Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 116 (Mar. 3, 2023). The Court ordered trial to begin August 7, and a ten-day bench trial commenced on this date after the parties diligently met pre-trial deadlines. *Petteway v. Galveston Cnty.*, Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 117 (S.D. Tex. Mar. 8, 2023).

On October 13, 2023—a full 144 days before the March 5, 2024 primary election—Judge Jeffrey Vincent Brown of the Southern District of Texas issued a 157-page Findings of Fact and Conclusions of Law finding the Galveston County Commissioners Court committed a "clear violation" of § 2 of the Voting Rights Act when it redrew the County's four commissioners precincts in a manner that dismantled the longstanding majority-minority commissioners precinct 3, submerging every minority voter in Galveston County within Anglo-majority precincts. App. at 165.

This opinion was based upon a voluminous record adduced in a ten-day bench trial and an intensely local appraisal of the conditions within Galveston County as well as a faithful application of this Court's precedent as set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Allen v. Milligan*, 599 U.S. 1, 143 (2023). App. at 157-58. The district court concluded that the 2021 commissioners-precinct plan "illegally dilutes the voting power of Galveston County's Black and Latino voters by dismantling [majority-minority] Precinct 3"; App. at 23, the court also credited testimony that the 2021 plan was "a textbook example of a racial gerrymander," App. at 22, that "summarily carved up and wiped off the map" Precinct 3, and

that defendants' actions adopting this plan were "mean-spirited and egregious given that there was absolutely no reason to make major changes to [the majority-minority] Precinct 3." App. at 165. The district court found it "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021's redistricting," App. at 164, a process that it found was "fundamentally inconsistent with § 2 of the Voting Rights Act." App. at 22. The district court thus reached the "grave conclusion" that it "must enjoin" future use of the map. App. at 22.

Defendants appealed this judgment to the Fifth Circuit and moved in the district court for an emergency stay pending appeal, which the district court denied after finding that "defendants have established none" of the four stay factors. App. at 175. Defendants' motion did not cite *Purcell*. Again not citing *Purcell*, Defendants then filed a motion for an emergency stay pending appeal and for a temporary administrative stay with the Fifth Circuit. *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 13 at 6 (Oct. 17, 2023). The Fifth Circuit motions panel expedited the appeal to the next available Oral Argument Calendar, granted a "temporary administrative stay . . . until November 2, 2023," and deferred the stay motion to the oral argument panel. App. at 181. The next day, the merits panel set oral argument for November 7, 2023, and, over respondents' objections, extended the administrative stay through Friday, November 10, 2023. App. at 184.

On November 10, 2023, the Fifth Circuit affirmed, ruling that the district court "did not clearly err" in applying the test from *Thornburg v. Gingles*, 478 U.S. 30 (1986), and that it "appropriately applied precedent when it permitted the black and Hispanic populations of Galveston County to be aggregated for purposes of assessing compliance with Section 2." App. at 11. But despite having just agreed that the district court properly applied the law, the Fifth

Circuit summarily extended the administrative stay indefinitely and pending an en banc poll. App. at 5.

On November 15, 2023, NAACP/LULAC Applicants notified the Clerk of Court of the Fifth Circuit of the approaching candidate filing deadline on December 11, 2023, and the likely need to seek relief from the Supreme Court if the administrative stay was not promptly dissolved. Letter, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 130 (Nov. 15, 2023). Petteway Appellees filed an Application to Vacate Stay with this Court the following day, November 16, 2023, requesting this Court dissolve the administrative stay. Application to Vacate Stay, *Terry Petteway, et al. v. Galveston County, Texas, et al.*, No. 23A449 (Nov. 16, 2023). Prior to this Court ruling on that application, the Fifth Circuit voted to grant en banc review on November 28, 2023.

On November 30, 2023, the Fifth Circuit clarified that the "administrative stay imposed terminated when the court granted rehearing en banc." App. at 191.[1] Thereafter, the trial court granted Appellees' joint request that it enforce the unstayed judgment permanently enjoining use of the enacted plan, and ordered a remedial plan for the 2024 election. App. at 193-95. The trial court found it was "no longer practicable to permit the commissioners court the opportunity to cure its enjoined map's infirmities" as originally provided for, and that it was forced to order the use of the County's Map Proposal 1 (an alternative map proposal originally drawn by the County, which maintained a majority-minority district). App. at 194-95. Candidate filing then proceeded under Map 1.

[1] Following this order, this Court dismissed the Application to Vacate Stay as moot. No. 23A449 (Dec. 01, 2023).

On December 1, Defendants filed a Renewed Emergency Motion to Stay Pending Appeal. That motion did not cite *Purcell* or argue that it would be infeasible to implement the map for the 2024 elections. Instead, it relied exclusively on the traditional stay factors. Appellants' Renewed Emergency Motion To Stay Pending Appeal, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 152 (Dec. 1, 2023)

On December 04, 2023, the district court held a status conference to "discuss how this matter will proceed to ensure that the 2024 election will be conducted using Map 1." App. at 195. During that conference, Defendants asserted that implementing the county-drawn Map 1 would not require an extension of the candidate filing period. Defendants did not raise any other potential deadlines or other challenges that would prevent them from successfully implementing Map 1, despite Judge Brown inviting them to share any other topics they wanted to discuss.

Until yesterday, the 2024 election was proceeding under County's Map Proposal 1, drafted by the County itself, which the County recognizes is legally compliant. Map 1 accounts for all current incumbents and its use will maintain the status quo for voters because it is a least-change plan based on a decades-old configuration of the commissioner precincts. By contrast, the 2021 enacted plan that Defendants desire would effectively "extinguish[] the Black and Latino communities' voice on [the] commissioners court" and "shut [them] out of the process altogether." App. at 164. Because the enacted plan "summarily carved up and wiped off the map" the sole majority-minority precinct, ROA.16028, it was a "clear violation of § 2 of the Voting Rights Act." App. at 165. What's more, it was a "textbook example of a racial gerrymander" enacted under "mean-spirited and egregious [circumstances] given that there was absolutely no reason to make major changes

to Precinct 3." App. at 22, 165. (internal quotation marks omitted). It would be a grave injustice to allow such an egregious, demonstrably harmful plan to proceed based on misguided speculation of overturning longstanding precedent.

On December 7, 2023, over a dissent, the Fifth Circuit again stayed the district court's orders enjoining use of the challenged plan and ordering use of County Map Proposal 1 for 2024. The lead concurring opinion supporting the stay asserted that "the *Purcell* principle requires a stay," notwithstanding that the County's motion did not mention *Purcell*.

STANDARD OF REVIEW

"A Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and would very likely be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

ARGUMENT

I. This Court is likely to grant review.

Both sides agree that this case presents an important issue and that "following the Fifth Circuit's en banc outcome, one side will almost certainly seek further review." Galveston County Response to Application to Vacate Stay, No. 23A449 at 13 (Nov. 28, 2023). Currently four circuit courts have recognized that a group of injured minority voters in a jurisdiction might include individuals from more than one racial minority background, whereas one circuit court has imposed a single-racial-group threshold requirement on Plaintiffs seeking

to bring Section 2 vote dilution claims. *Compare Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc), *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 273, 278 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994), *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992), and *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990), *with Nixon v. Kent County*, 76 F.3d 1381, 1392-93 (6th Cir. 1996). If the en banc Fifth Circuit reverses its longstanding precedent and concludes otherwise, it is likely that the Court will agree to resolve this circuit split. Indeed, this Court could appropriately treat this application as a request for certiorari before judgment and grant certiorari to consider the question before the en banc Fifth Circuit.

II. The Fifth Circuit misapplied *Purcell*

A. Defendants waived any *Purcell* argument, and it is inappropriate for a reviewing court to sua sponte invoke *Purcell*.

As this Court held just last year, it is inappropriate for reviewing courts to invoke *Purcell* to stay a court order when the political jurisdiction itself has represented that the order was issued in accordance with an appropriate timeline for election administration. *See Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022) (reversing where the appellate court "applied a version of the Purcell principle [] that respondent could not fairly have advanced himself in light of his previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November elections should applicants win at trial.").

Here, the County moved for a stay of the district court proceedings pending a Supreme Court decision in *Merrill v. Milligan*, and, in so doing, represented to the court that "[a *Milligan*] decision in even June 2023 is well in advance of the pertinent County

Commission election in 2024 where the voters of Precinct 3 will elect their next commissioner. . . . As such, even if the Court grants this Motion, the Court will have sufficient time to hear this matter in the normal course prior to the 2024 Precinct 3 elections." Defendants' Motion to Stay, *Petteway v. Galveston Cnty.*, No. 3:22-cv-57, Dist. Ct. Dkt. 36, at 8-9 (May 16, 2022); *see also id.* at 9 (the "Court will have more than sufficient time to decide this matter following *Merrill* and before the 2024 Precinct 3 elections"). At that point the County had not even moved to dismiss. In other words, the County assured all parties that all pre-trial and trial proceedings, including a motion to dismiss and discovery, could *start* in July 2023 while providing relief in time for 2024. The County cannot now claim that an August 7, 2023 trial and an October 13 judgment were too late for 2024.

Indeed, the County did not rely on *Purcell* in moving for a stay of the district court's order. As in *Raffensperger*, its "emergency motion for a stay pending appeal relied on the traditional stay factors and a likelihood of success on the merits." 143 S. Ct. at 59. Earlier this week, on December 4, 2023, in a status conference before the district court, counsel for the County stated that continuing under the court-ordered, county-drawn Map Proposal 1 *would not require extending the candidate filing deadline or any other election related deadlines.* This alone is reason to vacate the stay.

Purcell is "probably best understood as a sensible refinement of ordinary stay principles for the election context," *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), not an invitation for reviewing courts to sua sponte reflexively invalidate lower court orders that

are months away from an election in instances where the government body itself has not raised serious administrability concerns.

B. The Fifth Circuit's unprincipled actions are the sole source of confusion in this election, whereas the district court's order applied clear, existing law.

In any event, even if the County had invoked *Purcell*—which it didn't—*Purcell* would not apply here. The district court's thoroughly reasoned order was issued 144 days before the primary election. That decision was affirmed by a panel of the Fifth Circuit the day before candidate filing opened. App. at 11-12 (vacated pursuant to Fifth Circuit Rule 41.3 upon grant of en banc review). Accordingly, there was a judgment requiring a remedial map that was affirmed as correct under current law by an appellate court the day before the candidate filing even began. There was no need for any appellate intervention under these circumstances, where all agreed that the district court correctly applied existing law sufficiently in advance of the election to feasibly implement a new map.

But thereafter the Fifth Circuit nonetheless sowed confusion through a series of administrative stays that were granted without applying any of the traditional stay factor analysis, and at a time when all reviewing courts agree the judgment was required by current, binding precedent. After applicants first sought relief from this Court, that administrative stay was rightfully dissolved, and thus the district court's original order enjoining use of the challenged plan automatically went back into effect. In light of these facts, the trial court's implementation of a remedial map on November 30 was required by law: It enforces a previously-imposed remedy under current, binding precedent, as determined by the trial court in its October 13, 2023 Judgment, and as a panel of the Fifth Circuit affirmed on November 10, 2023.

Applicants are not aware of any decision of this Court applying *Purcell* to prevent the enforcement of a judgment upheld on appeal in similar circumstances. Judge Oldham's concurring opinion cited six examples. App. at 201-202. The first three, to the extent they even relied on *Purcell*, involved orders issued less than 2 months before the general election. *Id.* Neither the appellate court nor this Court cited *Purcell* as the basis for a stay in *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.), and in any event the relevant decision was less than two months before the primary election. In *Moore v. Harper*, 142 S. Ct. 1089 (2022) (mem.), the Court *denied* a stay of the lower court's order changing the map. And in *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.), the Court stayed a January 24, 2022 injunction where primary elections began on March 30, where no new map had been drawn, and where the jurisdiction alleged that implementing the injunction would require "heroic efforts."

This matter is of a different nature entirely. The election is many months away. Implementing this remedial map would be no more difficult than implementing any other. Indeed, candidates have *already filed* under the remedial map. As the County's own "least-change" alternative, it largely preserves the district boundaries for the two commissioner precincts up for re-election in 2024 (Precincts 1 and 3), and importantly will preserve the ability of Galveston's Black and Latino voters to elect a candidate of choice as they have for over three decades, where the enacted plan indisputably changes this status quo to deny them that opportunity. As it stands, it would create less confusion and be more consistent with the status quo if the district court's order is allowed to remain in effect rather than once again changing the rules based on mere speculation that the state of the law may some day change.

III. A stay would be inappropriate even if the Court considers the traditional *Nken* factors in light of *Purcell*.

Even if the County had not waived any *Purcell*-based claim by its representations to the district court and its failure to invoke *Purcell* in any of its multiple stay motions, and even if the election were close at hand, a stay would still be inappropriate. *Purcell* principles do not obviate the need for *some* equitable analysis based on the traditional *Nken* stay factors. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) ("[T]he *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context."). The principle "thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.* (citing *Lucas v. Townsend*, 486 U.S. 1301, 108 S. Ct. 1763, 100 L.Ed.2d 589 (1988) (Kennedy, J., in chambers); *McCarthy v. Briscoe*, 429 U.S. 1317, 97 S. Ct. 10, 50 L.Ed.2d 49 (1976) (Powell, J., in chambers)).

Here, though the *Purcell* principle does not apply even on its own terms, a stay would still be inappropriate even if it did, because the merits are clearcut, plaintiffs face irreparable harm, they did not unduly delay, and implementing the remedial map is entirely feasible. The fact that the order in this case was a final judgment on the merits, as opposed to a preliminary injunction, weighs all the more against granting a stay on *Purcell* grounds.

A. The underlying merits are clear cut in Applicants' favor.

i. Existing law governs the stay analysis and unequivocally supports the judgment

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). When an en banc court decides a legal principle, it is an "authoritative" expression of the "law of the circuit." *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960) (superseded on other grounds by statute). It is entirely undisputed that currently binding *en banc* circuit precedent required affirmance of the district court judgment. *See Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc); *Petteway v. Galveston County*, 86 F.4th , 216–18 (5th Cir. 2023) (per curiam).

In other words, the judgment the Fifth Circuit stayed was undeniably correct under the law governing in the Fifth Circuit. The proximity of an election has no bearing on this fundamental consideration, which is grounded in the rule of law itself. Thus, "[m]embers of this Court have argued," "a determination regarding an applicant's likelihood of success must be made under existing law." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting) (internal quotations omitted). Where the district court faithfully applies existing law, the judgment below should govern. *See Milligan*, 142 S. Ct. 879, 882-83 (Roberts, C.J., dissenting from stay) ("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.").

To hold anything other than that the merits are entirely clear cut in Applicants' favor when their position *is* the law would pervert the equitable stay analysis. The premise of a rule of law requires a "presumption" that the law will not change every time the composition of a court changes, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424

(1986) (overturned on other grounds); to instead *assume* that an en banc court will reverse its own en banc precedent would stand that presumption on its head. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) ("Adherence to precedent is 'a foundation stone of the rule of law.'") (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014).

Additionally, like the doctrine of *stare decisis*, requiring a stay applicant to establish the merits of their argument under existing law "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation," *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015)—and, what's more, saves courts from the need to confront novel challenges to settled law in an emergency posture, without the benefit of full briefing, argument, and adequate time to deliberate. *Cf. Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (emergency motions are a disfavored posture for consideration of difficult merits questions because they require decision on a "short fuse without benefit of full briefing and oral argument").

Indeed, this case demonstrates the perverse incentives that would emerge should courts make it a practice to "reflexively hold[] a final order in abeyance pending review," *Nken v. Holder*, 556 U.S. 418, 427 (2009), when that order correctly applies existing law. Defendants consciously designed a redistricting map that they knew contradicted existing law for the very purpose of trying to change that law.[2] A principle that encourages government actors to violate the law anytime they disagree with it is hardly sustainable.

[2] Andre Perrard, *Federal Judge Ruling In Galveston County Lawsuit May Reshape Redistricting*, KTRH (Sep. 11, 2023) https://ktrh.iheart.com/featured/houston-texas-news/content/2023-09-08-federal-judge-ruling-in-galveston-county-lawsuit-may-reshape-redistricting ("That is where I get excited . . . this will make it easier for any entity, state or county, to redistrict. We can do away with this fantasy of coalition districts, which will make it easier for everyone," [County Judge Mark Henry] says. "If the 5th Circuit rules how I think they will . . . it will cover the entire region.").

ii. Defendants are unlikely to succeed in their argument that an injured minority class under the VRA must consist of "one" minority

The Fifth Circuit's previous decisions recognizing that an injured minority group in a jurisdiction can include individuals of more than one racial minority background are grounded in the text, structure, history, and purpose of the statute, and accord with the weight of authority around the country. *See, e.g., Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 273, 278 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990).

The textual linchpin of a § 2 effects claim is that a given practice or procedure "results in a denial or abridgement of the right . . . to vote *on account of race* . . . ." 52 U.S.C. § 10301(a) (emphasis added). A "class" means "[a] group of people . . . that have common characteristics or attributes," Black's Law Dictionary (11th Ed. 2019), and so when subsection (b) refers to a "class of citizens protected by subsection (a)," it is referring to is a group of voters subject to suffering the injury of racial vote dilution in a given jurisdiction, much like a "class" in any class action. Minority voters in a particular jurisdiction can be said to suffer such dilution as much for not belonging to a majority group (e.g., for being a class of nonwhite citizens) as for belonging to one specific census-defined minority group. *See, e.g., Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198 (1973) (holding that Black and Hispanic students "suffer[ed] identical discrimination in treatment when compared with the treatment afforded Anglo students"); *see also United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 150 n.5 (1977) (classifying Puerto Rican and Black citizens as a minority group and using the term "nonwhite" collectively).

As this case demonstrates, statutory text and Supreme Court precedent effectively guide courts in identifying when minority voters suffer unlawful racial vote dilution as opposed to mere political defeat. After an intensely local application of the § 2 framework, the district court found that "Black and Latino voters in Galveston County have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," App. at 165 (quotation marks omitted), a finding the appellate court affirmed. This was substantiated by findings of racially polarized voting specifically establishing racial, not political, polarization within the County. See, e.g., App. at 156-164.

Moreover, it is the individual Black and/or Latino voters who suffer the dilution on account of their race. *See, e.g., Milligan*, 599 U.S at 36. An artificial single-race threshold test for vote dilution claims would require courts themselves to make unjustifiable race-based assumptions about those individuals regardless of what an intensely local appraisal of the facts show. For example, voters in a community where Japanese-Americans and Pakistani-Americans together make up 50+% of a potential district could invoke § 2 because they happen to fall under the common census classification "Asian," but Black and Latino voters similarly situated could not—regardless of jurisdiction-specific facts, including experiences of discrimination and whether majority voters as a factual matter prevent them from electing common candidates of choice. Whether minority voters belong to one census-defined group or two, courts do not make race-based assumptions of cohesion; voters must still prove (as Applicants did here) they are cohesive in expressing a "distinctive minority vote" that is thwarted "at least plausibly on account of race." *Milligan*, 599 U.S. at 28 (internal quotation marks omitted).

As the facts here also show, recognizing minority coalition claims does not present the administrability or structural problems of crossover-districts (when a minority group relies on crossover votes from the majority group). As this Court itself recognized in *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (Kennedy, J., Roberts, C.J., Alito, J., lead op.), "[u]nlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do *minorities* make up more than 50 percent of the voting-age population in the relevant geographic area" (emphasis added). This threshold was examined and easily met in Galveston. And unlike with crossover districts, here there is no "serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates." *Id.* at 16. Even Defendants' expert did not dispute that Anglo bloc voting would defeat the minority candidate of choice "in every election in every commissioners precinct" of the enacted plan. App. at 68.

None of defendants' arguments warrant the drastic change in Circuit precedent they desire, much less the extraordinary stay they request. As matters stand today—under current, binding law—the enacted map is indisputably unlawful, and the district court's judgment is correct. That judgment must be enforced.

B. Delaying implementation of the district court order is also unjustified because Applicants will likely prevail on their alternative claims below.

In light of its decision that defendants violated § 2, the district court concluded that it did not need to formally decide the Petteway and NAACP/LULAC Plaintiffs' intentional discrimination or racial gerrymandering claims. *See* App. at 168. But the court's detailed findings of fact make it abundantly clear that the enacted plan would be struck down on these grounds upon remand even if Defendants succeed in their § 2 claim appeal. The Fifth Circuit

panel held, correctly, that the district made no clear error in its factual findings and did not suggest that further en banc review of those findings would be warranted. *See* App. at 11.

First, the district court's findings of fact establish that the enacted plan was adopted with a discriminatory purpose and has discriminatory effects in violation of the Fourteenth and Fifteenth Amendments, and under the intent-test of § 2. *See Anne Harding v. Cnty. of Dallas*, 948 F.3d 302, 312 (5th Cir. 2020); *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). The district court found that the commissioners court "summarily carved up and wiped off the map" the historic majority-minority commissioners Precinct 3 in a "mean-spirited" and "egregious" manner despite "absolutely no reason to make major changes to Precinct 3." App. at 164-65. In adopting this plan, defendants caused "an evident and foreseeable impact on racial minorities in Galveston County by eliminating the sole majority-minority precinct . . . depriving them of the only commissioners precinct where minority voters could elect a candidate of their choice." App. at 75.

Evidence of the map-drawing process reinforced the intentional nature of defendants conduct in dismantling the sole majority-minority precinct in the county. The enacted plan follows the specific design of County Judge Henry, App. at 90-91, who "underst[ood] that Galveston County's Black and Latino population was centered around Precinct 3" and then intentionally demolished that precinct. App. at 89. The district court determined that there was no credible alternative motivation for the severe discriminatory impact of the plan: it does not fulfill any partisan objective, App. at 91, and any "desire to create a coastal precinct cannot and does not explain or justify why" the enacted plan was "drawn the way it was—and especially does not explain its obliteration of benchmark Precinct 3." App. at 93.

These findings establish "a clear pattern, unexplainable on grounds other than race," making the "evidentiary inquiry . . . relatively easy." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 (1977). The enacted plan was designed with the "essential inevitable effect" of discriminating on the basis of race, *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960), and there is a "strong inference" that these adverse effects were desired because they were an inevitable result of a government's chosen action, but otherwise avoidable. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 & n.25 (1979).

The circumstances of the enacted plan's adoption further satisfy the specific factors outlined for determining illicit intent in *Arlington Heights*, 429 U.S. 252. *See also Brown*, 561 F.3d at 433 (applying *Arlington Heights* factors in § 2 intent claims). The enacted plan's severe discriminatory impact is "an important starting point" in the inquiry, *Arlington Heights*, 429 U.S. at 266, and the district court's findings further show: (1) the historical background of the decision includes longstanding discrimination against minorities in Galveston, including practices that "extended to voting," App. at 77, and a prior 2012 redistricting cycle that included "significant" efforts to reduce majority-minority districts, App. at 82. (2) The specific sequence of events leading up to the decision included a redistricting process marked by the exclusion of the sole minority commissioner, App. at 112, and rife with (3) at least seven significant departures from the normal procedural sequence, App. at 99, for which Defendants could offer no credible explanations. *See, e.g.*, App. at 97, 100-02, 104-05, 109. (4) The commissioners court substantively departed from its purported redistricting criteria given that the "rationales stated by members of the commissioners court in public, in deposition testimony, and at trial are inconsistent" with

the redistricting criteria they claimed to have used. App. at 114. Overall, (5) the record reflects a legislative history that is "stark and jarring." App. at 165.

Under these facts, the enacted plan is unlawful regardless of whether it destroyed a minority coalition district or a functioning crossover district. *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (Kennedy, J., Roberts, C.J., Alito, J., lead op.) ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) (holding that *Gingles* I precondition only requires showing of majority-minority district in absence of showing of intentional discrimination). Applicants thus can succeed in striking down the enacted plan on alternative grounds of intentional discrimination even if defendants fully prevail in their current appeal.

These same factual findings would also support the conclusion that race predominated in the design of the enacted plan in violation of the Fourteenth Amendment. The district court credited Applicants' expert William Cooper's determination that the commissioners court executed a "textbook example of a racial gerrymander" that was "egregious," App. at 22, providing "strong circumstantial evidence" of racial gerrymandering under applicable law. *Thomas v. Bryant*, 938 F.3d 134, 158 n.119 (5th Cir. 2019). Plaintiffs' alternative maps that "perform as well or better than the enacted plan under the disclosed criteria" while maintaining a majority-minority precinct, App. at 115, prove that race, and not some other objective, predominated in the enacted plan's design. *Cooper v. Harris*, 581 U.S. 285, 317 (2017) (holding alternative plans "can serve as *key evidence* in a race-versus-politics dispute" and present a "*highly persuasive* way to disprove" a defendant's purported

goals caused the design) (emphasis added). Since defendants have offered no explanation for their use of race as a predominating factor, it cannot survive strict scrutiny.

C. Applicants have not unduly delayed bringing their complaint to court.

At every step of the way, Applicants acted with utmost urgency to protect their right to a lawful map that does not deny minority voters an equal vote, and the County has not argued otherwise. Applicants filed this lawsuit 6 months after the challenged plan was passed, and well over 2 years before the 2024 elections. Applicants opposed the County's requests to stay district court proceedings, *see* Opposition to Renewed Motion to Stay, *Petteway v. Galveston Cnty.*, Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 79 (Oct. 21, 2022), despite the County's representations that a stay would not have impaired the ability of the court to order effective relief for the 2024 election. Defendants' Motion to Stay, *Petteway v. Galveston Cnty.*, No. 3:22-cv-57, Dist. Ct. Dkt. 36, at 8-9 (May 16, 2022). Applicants diligently concluded discovery without extending its closing date. After the conclusion of trial, Applicants also opposed Defendants' motion for an extension to post-trial briefing. Joint Opposition to Extension, *Petteway v. Galveston Cnty.*, Consolidated No. 3:22-cv-57, Dist. Ct. Dkt. 235 (Sept. 6, 2023).

Over the course of appellate proceedings, Applicants promptly opposed every request for an administrative stay or stay pending review, and proactively sought prompt resolution of any procedural barriers that prevented enforcement of the district court's indisputably lawful order. *See*, Letter, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 130 (Nov. 15, 2023); Application to Vacate Stay, *Terry Petteway, et al. v. Galveston County, Texas*, et al., No. 23A449 (Nov. 16, 2023). By contrast, Defendants have repeatedly caused undue delay, such as by waiting three days to seek a stay pending en banc review after taking

the position with this Court that the Circuit's administrative stay had dissolved by its own terms. *Compare* County's Response to Application to Vacate Stay at 12, *Terry Petteway, et al. v. Galveston County, Texas*, et al., No. 23A449 (Nov. 28, 2023) (arguing the "temporary administrative stay that has now expired") *with* Appellants' Renewed Motion, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 152 (Dec. 01, 2023).

In sum, Applicants acted diligently to secure an extensive, factually and legally sound final lower court order a full 144 days before the primary and over a year before the 2024 election – a timeline that the County itself contended was appropriate. This order was required under existing law, and it would work a grave injustice to minority voters in Galveston County to prevent its enforcement.

D. Applicants and Galveston's minority voters are certain to suffer irreparable harm if the enacted plan is used in 2024.

There is no dispute that the enacted plan "disproportionately affects Galveston County's minority voters by depriving them of the *only* commissioners precinct where minority voters could elect a candidate of their choice." App. at 75 (emphasis added). Defendants' assertion that a stay would preserve the status quo is therefore wrong. If the 2024 elections are permitted to proceed under the enacted plan, the status quo will actually *change* in a way particularly harmful to the Black and Latino community: they will be effectively "shut out" from any representation in the commissioners court. App. at 164. The dramatic change from the benchmark plan's Precinct 3, in effect for well over a decade, to the enacted plan for the 2024 election also risks significant voter confusion, as the likelihood of "voters not knowing in which commissioner's precinct they reside . . . is high." App. at 117-18.

The denial of equal voting power is a severe restriction on the right to vote of NAACP/LULAC Plaintiffs' and Galveston's Black and Latino voters, and "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)). "[O]nce the election occurs, there can be no do-over and no redress" for citizens whose voting rights were violated: "The injury to these voters is real and completely irreparable" if the election is held under the enacted plan. *League of Women Voters of N.C.*, 769 F.3d at 247.

E. The County's own alternative plan, already in effect for the past week, is easily administrable without significant cost, confusion, or hardship.

The district court enjoined the use of the 2021 enacted plan on October 13, 2023, and ordered that the County-drawn alternative Map 1 be instead used in place of the enjoined plan on November 30, 2023. Both orders preceded the candidate filing deadline, and thus were in place well before any voting will take place during the 2024 primaries, which is still true today. Indeed, in a status conference on December 4, 2023, Defendants themselves conceded that no extension of the sole impending deadline, the candidate filing deadline, was necessary. They have never suggested that it would be infeasible to hold the election under Map 1 or that doing so would cause any confusion, cost, or hardship. And they did not raise a need for any other extensions or alterations ahead of the primary elections. Indeed, they did not invoke *Purcell* in their own stay application. Even if an extension of the candidate filing deadline were needed, Texas law already contemplates extending the filing deadline when necessary due to death of a candidate or vacancy in office. *See* Tex. Elec. Code §§ 172.054 ("Extending Filing Deadline"), 202.004(c). The Fifth Circuit's stay is thus an overstep of law in light of the circumstances of this case.

IV. This application should also be treated as a petition for a writ of certiorari before judgment and the petition should be granted.

With the panel opinion having been vacated upon the granting of en banc review, pursuant to Fifth Circuit Rule 41.3, judgment is now pending in a United States Court of Appeals, and this Court can and should treat the application as a petition to grant certiorari before judgment under Supreme Court Rule 11.

Both sides agree that this case presents an issue of imperative public importance and that "following the Fifth Circuit's en banc outcome, one side will almost certainly seek further review." Galveston County Response to Application to Vacate Stay, No. 23A449 at 13 (Nov. 28, 2023); *see also* Appellants' Renewed Motion at 7, *Galveston Cnty. v. Petteway*, No. 23-40582, 5th Cir. Dkt. 152 (Dec. 01, 2023) ("This case presents a question of national importance . . . ."). Currently four circuit courts have recognized that a group of injured minority voters in a jurisdiction might include individuals from more than one racial minority background, whereas one circuit court has imposed a single-racial-group threshold requirement on Plaintiffs seeking to bring Section 2 vote dilution claims. *See supra* Section 1. As this Court recently confirmed in *Allen v. Milligan*, 599 U.S. 1, 33 (2023), § 2 of the Voting Rights Act is still the law of the land and clarity in its enforcement is of utmost importance. Similar to its treatment of the stay application as a petition for certiorari before judgment in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), this Court could grant cert before judgment in this matter.

CONCLUSION

For the reasons set forth above, the Fifth Circuit's stay of the district court's final judgment should be vacated. Applicants also respectfully request that the Court treat this application as a petition for writ of certiorari before judgment and grant the petition.

Respectfully submitted.

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