No. 23A523

In the Supreme Court of the United States

DICKINSON BAY AREA BRANCH NAACP, ET AL.,

Applicants,

v.

GALVESTON COUNTY, ET AL.

Respondents.

APPLICANTS' REPLY IN SUPPORT OF 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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INTRODUCTION

For three decades, Black and Latino voters have elected their representative of choice in Precinct 3, one of four commissioners precincts (and the sole majority-minority precinct) in Galveston County. Because the County demolished Precinct 3, Black and Latino voters across Galveston will be now unable to elect a single representative of their choice to the commissioners court. The underlying facts support that, when the County demolished Precinct 3, it did so in knowing violation of Section 2 of the Voting Rights Act as construed under decades-old Fifth Circuit *en banc* precedent. The County does not dispute that it raised no *Purcell*-related concerns before the district court on December 4, when the trial court imposed the remedial map, and that it *did not even move in the Fifth Circuit* for relief based on *Purcell*.

The district court's findings came 144 days before the primary election and over one year before the general election. A panel of the Fifth Circuit affirmed those factual findings 116 days before the primary election and 361 days before the general election. And not one of the court's factual findings has been called into question by a single reviewing judge.

The Court has never approved a *Purcell*-based stay under circumstances like these, and this case—with its "mean-spirited" and "egregious" map—should not be the first. The County's efforts to overturn existing precedent can be considered in due course. In the meantime, both the Voting Rights Act and the rule of law entitle Galveston County's minority voters to an equal opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

It is not too late to prevent injustice from occurring and to avoid requiring Galveston's voters to vote under a map "that renders a minority vote unequal to a vote by a nonminority

voter." *Allen v. Milligan*, 599 U.S. 1, 25 (2023). The district court's remedial order had already been in effect for a week when the Circuit Court issued this stay, and candidates have had an opportunity to file under the remedial plan. If they need more of an opportunity, Texas law already contemplates the possibility of extending the candidate filing deadline. *See* Tex. Elec. Code §§ 172.054 ("Extending Filing Deadline"), 202.004(c). No votes have been cast, nor have any ballots been prepared. Under the "clearcut," *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring), ordinary, public meaning of a valid statute, the stay should be vacated.

ARGUMENT

I. The County Waived *Purcell* Because It Concedes It Did Not Move for a Stay Based on *Purcell.*

The County does not deny that they failed to invoke *Purcell* in their December 1, 2023 motion for a stay to the Fifth Circuit. Response at 20.[1] The County's implicit representation to the Fifth Circuit that *Purcell* did not justify a stay was consistent with their prior representations to the trial court that it would have "more than sufficient time to decide this matter" even if all proceedings were stayed until after this Court's anticipated 2023 decision in *Allen v. Milligan*. Defendants' Motion to Stay, *Petteway v. Galveston Cnty.*, No. 3:22-cv-57, Dist. Ct. Dkt. 36, at 9 (May 16, 2022). It is likewise consistent with the County's conduct throughout the pretrial and trial process, where they never raised timing-related concerns about the August 7 trial date for administering relief ahead of the 2024 primary. And it is consistent with their failure to raise any *Purcell*-related concerns before the district court at

[1] The County notes that its Fifth Circuit reply brief addressed the *Petteway* applicants' arguments as to why the *Purcell* doctrine *prohibited* a stay. That is irrelevant.

its hearing on December 4 relating to the implementation of the remedial map. Under these circumstances, *Purcell* has been waived, and it was error for the Fifth Circuit to rely on *Purcell*.

Waiver aside, *Purcell* does not apply because the County can implement Map 1 without difficulty. Candidates have already filed under Map 1. The County does not substantiate its assertions that implementing Map 1 in advance of the election would cause any voter confusion, which contradict the trial court's factual findings that the enacted plan would. Instead, the County merely asserts that implementing Map 1 will require the printing of ballots and voter registration certificates reflecting the new Map. Response at 19. But the fact that a jurisdiction will have to do *some work* months in advance of the election to implement a remedial map cannot possibly be a justification for invoking *Purcell*; if it were, *Purcell* would always prohibit relief.

The County also reiterates the Fifth Circuit's conflation of election deadlines in their argument that *Purcell* requires a stay here. *See* Response at 14-15. This Court has held that lower courts cannot "alter the election rules on the *eve of an election*." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (emphasis added). But two weeks before the candidate filing deadline is not the "eve" of an election. *See* App. at 203 (granting the stay because "On November 30, 2023, the district court entered an order implementing" Map 1 "less than two weeks before Texas's filing deadline on December 11, 2023") (emphasis omitted).

It is therefore appropriate for this Court to reverse the stay, as it has under similar circumstances. *See Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022) (internal citation omitted).

II. The Stay Factors Do Not Support a Stay Under Any Standard.

a. The County Has No Likelihood of Success Under Longstanding Controlling Precedent.

The County admits that current, binding precedent in the Fifth Circuit interprets Section 2 to protect minority voters experiencing a common vote dilution on account of race within their jurisdiction. Response at 24, 32 ("The Fifth Circuit has historically permitted minority coalition claims."). The County also does not meaningfully rebut that the likelihood of success on the merits must be assessed on the basis of the law as it *is,* see NAACP/LULAC Application at 15, and it fails to cite any decision of this Court permitting a stay of a final judgment that indisputably applies currently, binding Circuit precedent. Respondents' reliance on the stay granted in *Allen v. Milligan* is inapposite here: the stay there was of a preliminary injunction, not a final judgment, and as Justice Kavanaugh explained in his concurrence, "the Court's case law" on the underlying merits question in *Milligan* was "notoriously unclear and confusing" at the time. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). Here, by contrast, the law is clear under binding circuit precedent: the 2021 enacted plan violates Section 2.

Unless vacated, a stay in this matter would set a dangerous precedent that government actors may violate longstanding precedent with impunity based upon a gamble they can change the law. *Stare Decisis* requires that a likelihood of success on the merits may not be found based on a mere prediction that the *en banc* Fifth Circuit will reverse its long-established precedent, thereby contravening a majority of other circuits considering the same issue. *See* NAACP/LULAC Application at 9-10. Issuance of a stay under these circumstances contravenes core principles of judicial administration and the rule of law that provide the backbone to our judicial system. It must be clear to government actors they have

an obligation to follow final judicial determinations based upon the law as it is, and they may not ignore such determinations merely because the law is not as they wish it to be. The County will have its chance to change the law, but it is not entitled to one free unlawful election while its efforts are underway.

In any event, the County's efforts are not likely to be successful for the textual and historical reasons outlined in the stay application. The application of the *Gingles* factors should not depend on a racially essentialist pre-determination that voters must share a somewhat arbitrary census-defined category in order to experience a common racial vote dilution. As the County admits, this Court has issued no decisions holding that Section 2 does not protect minority coalition districts, and this Court has long assumed that minority coalition claims are available. The language the County relies upon from *LULAC v. Perry*, 548 U.S. 399, 446 (2006), is clearly inapposite because it concerned so-called influence districts where "minority voters could not elect a candidate of their choice." Response at 36. Here, the facts (as affirmed by a panel of the Fifth Circuit and not the subject of the currently pending *en banc* review) conclusively show that minority voters, whether considered as a group or as Black voters separately and Latino voters separately, were electing their representative of choice. App. at 65, 151-53, 164. This was confirmed by looking not only at general election results, but also primary election results. *Id.*

Likewise, the County's discussion of *Bartlett v. Strickland*, 556 U.S. 1 (2009), is misplaced. As an initial matter, the Court explicitly stated that its opinion did "not address" claims where the injured minority voters are from more than one racial minority background. *Bartlett*, 556 U.S. at 13. Further, the reasons for not recognizing "crossover" districts, where

the minority group must rely on crossover from *majority*-group voters to elect a candidate of choice, are not applicable to these circumstances.

To the contrary, the VRA Section 2 test this Court described in *Bartlett* easily encompasses the claims here: "[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?" 556 U.S. at 18 (emphasis added). The answer to this question in *Galveston* is "yes." 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. The district court also made specific factual findings rejecting the County's argument that political rather than racial alliances explain voting in Galveston County. App. at 74. The Court cited six specific factors that all supported the conclusion that the vote dilution here was plausibly on account of race, and not mere partisanship. App. at 155. The district court's findings conclusively establish that the enacted plan, together with legally significant racially polarized voting, are the but-for cause of Applicants' lack of opportunity to elect a representative of their choice, reflecting a successful application of the *Gingles* standard. Again, these factual findings were affirmed by a panel of the Fifth Circuit and are not the subject of the pending *en banc* review. App. at 11-12.

Both because the 2021 map undisputedly violates existing Fifth Circuit law, and because the Voting Right Act protects groups of minority voters, the County is unlikely to succeed on the merits and the Court should lift the stay.

b. If the Stay Is Not Lifted, Galveston's Minority Voters Will Be Completely Shut Out of the Political Process Under the Enacted Plan, the Precise Harm the Voting Rights Act Is Meant to Prevent.

The County asks this Court to ignore the clear factual findings of the trial court, which considered and rejected the erroneous theories they now advance to try and defend their discriminatory enacted plan. Even a panel of the Fifth Circuit agreed that the district court "did not clearly err" in its factual findings in applying the test from *Thornburg v. Gingles*, 478 U.S. 30 (1986). App. at 11. These factual findings utterly contradict the Response's portrayal and show that the balance of the equities weigh definitively in favor of vacating the stay.

1. The district court found the County's actions "fundamentally inconsistent" with the Voting Rights Act. App. at 22.

> This is not a typical redistricting case. What happened here was stark and jarring. The commissioners court transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage. The circumstances and effect of the enacted plan were mean-spirited and egregious given that there was absolutely no reason to make major changes to Precinct 3. Looking at the totality of the circumstances, it was a clear violation of § 2 of the Voting Rights Act. And it must be overturned.

App. at 165 (internal quotations and citations omitted). In considering whether minority voices would be "heard in a meaningful way" or "shut out of the process altogether" under the enacted plan, the district court determined that:

> Looking—as this court must—at the totality of the circumstances, it is stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021's redistricting.

App. at 164.

These conclusions were based upon extensive findings of race-based vote dilution within Galveston, including that:

- "The 2021 redistricting process for commissioners precincts occurred within a climate of *ongoing discrimination* affecting Black and Latino voting participation." App. at 119 (emphasis added).

- "[S]ignificant evidence of non-statistical cohesion" between Black and Latino communities "[led] the court to conclude there are *distinctive minority interests that tie the two communities together*." App. at 151-52 (emphasis added).

- There was no dispute that "more than 85% of Anglos vote cohesively" to oppose candidates "supported by more than 85% of Black and Latino voters." App. at 153.

Relying on these facts and more, the district court ultimately found that "[t]he preponderance of the evidence supports the conclusion that the challenged plan 'thwarts a distinctive minority vote at least plausibly on account of race.'" App. at 155 (quoting *Milligan*, 599 U.S. at 19).

As this Court confirmed earlier this year, the harm that the County will cause Galveston's minority voters is the *precise* harm the Voting Rights Act was meant to prevent: Districts that are not "equally open" because "*minority voters* face—unlike their *majority peers*—bloc voting along racial lines, arising against the backdrop of substantial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Milligan*, 599 U.S. at 25 (emphasis added).

2. The district court found, following an intensely local appraisal, that Galveston's minority voters would suffer impermissible vote dilution on account of race, not partisanship. In short, there was definitive statistical and non-statistical evidence of legally significant *racially* polarized voting, and the County had failed to "present reliable or methodologically sound evidence sufficient to dispute that Anglo bloc voting 'thwarts' the Black and Latino voting coalition in Galveston County for reasons wholly unconnected to race." App. at 155 (quoting *Milligan*, 599 U.S. at 19).

In coming to this conclusion, the district court gave "considerable weight" to the lack of successful minority candidates emerging from Republican primaries, the extreme degree of Anglo bloc voting, the fact that minority candidates tend to only be elected from majority-minority areas, the continued racial appeals in elections, lay witness testimony recounting instances of discrimination, persistent racial disparities across a wide range of measures, and "overwhelmingly" *racial* divergence in primary participation. App. at 155.

The district court's comprehensive review and analysis considered all of the arguments the County now raises to this Court, and which fail upon close inspection. Take, for example, the County's assertion that only "Latino community leaders" expressed objections to the U.S. Department of Justice in 2012 about Latino voting power in any new plan. Response at 6. Putting aside the tenuous connection this fact would have to the conclusive findings of the trial court on racial vote dilution, it is also wrong: the 2012 letter to the DOJ was signed by Galveston's Black and Latino community organizations and leaders *together. See* County Respondents' App. at 32-33. Signatories include the same NAACP branches that joined with the local LULAC branch, and Black and Latino individuals, to form the NAACP/LULAC Applicants in this matter. And the letter expressed a common belief that their proposed map "better reflects the *minority population* of Galveston County by creating two districts where *Latino/African-Americans* have more opportunity to elect or influence the election of *their* candidate of choice." County Respondents' App. at 31 (emphasis added).

In other words, this letter—at the center of County's attack on the trial court's findings—instead underscores the longstanding, distinctive minority interest of Galveston's Black and Latino community to advocate for their collective voting power within the jurisdiction. The County does not dispute that this interest will be utterly thwarted under

the enacted plan, denying Galveston's Black and Latino voters any opportunity to elect a candidate of their choice for the first time in decades.

c. The Remaining Stay Factors Decisively Refute a Stay

The County does not dispute that NAACP/LULAC Applicants and other plaintiffs diligently litigated this matter through a full trial on the merits with the common understanding between the parties that any relief would come in time for the 2024 election, *see* NAACP/LULAC Application at 5, and they do not contend that it will be administratively infeasible for the County to administer the 2024 election under the county-drawn Map 1.

Moreover, there would be no voter confusion if Map 1 is used instead of the enacted plan. As the County admits, Map 1 is a "least-change" plan preserving historic boundary lines, and the opportunity for Galveston's Black and Latino voters to elect a candidate of choice as they have for decades. *See* Response at 9. The purported issues the County Defendants complain of all arise out of the County Defendants' unjustifiable decision to adopt an enacted plan that executed a "textbook example of a racial gerrymander," dismantling the sole majority-minority Precinct 3 when there was "absolutely no reason to make major changes to Precinct 3." App. at 21-22. The "dramatic changes in the enacted plan" mean that "the likelihood of voter confusion—such as voters not knowing in which commissioner's precinct they reside—is high" under the *enacted plan*. App. at 117-18. Map 1 is the best option for both maintaining the status quo and minimizing confusion for voters electing candidates to commissioners Precincts 1 and 3 for the first time since 2020.

CONCLUSION

For the reasons set forth above and in the Application, 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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