No. _____

IN THE

Supreme Court of the United States

JENNIFER AUER JORDAN AND SHAMIRACLE J. RANKIN,

Applicants,

v.

VICTORIA S. DARRISAW, *ET AL.*,

Respondents.

EMERGENCY APPLICATION TO VACATE ELEVENTH CIRCUIT'S STAY OF TEMPORARY RESTRAINING ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

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Parties to the Proceeding

The applicants in this Court are Jennifer Auer Jordan and ShaMiracle J. Rankin. They are the plaintiffs-appellees in the proceedings below.

The respondents in this Court are Victoria S. Darrisaw, James Coursey, Jr., and Warren Selby, each in her or his official capacity as a member of the Special Committee on Judicial Election Campaign Intervention of the Judicial Qualifications Commission of Georgia. They are the defendants-appellants in the proceedings below.

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To The Honorable Clarence Thomas, Circuit Justice for the Eleventh Circuit:

Pursuant to Rules 22 and 23 of this Court and the All Writs Act, 28 U.S.C. § 1651, applicants Jennifer Auer Jordan and ShaMiracle J. Rankin respectfully apply for an emergency order vacating the order granting a stay pending appeal issued on May 17, 2026, by the United States Court of Appeals for the Eleventh Circuit. (App. 28a.[1] The court of appeals' order stayed an eight-day temporary restraining order issued two days earlier by the United States District Court for the Middle District of Georgia. (*Id. at* 40a.)

Introduction

Within two hours of the Eleventh Circuit's grant of an emergency stay of the district court's temporary restraining order, the respondents issued the Rule 29(F) public statements that the district court had enjoined them from issuing. And so, less than 36 hours before the Georgia Supreme Court election in which the applicants are candidates, the respondents have told Georgia voters that the applicants may have violated judicial ethics by campaigning together and speaking out on abortion. As Judge Kidd put it in dissent: "the bell of public misconduct allegations cannot be unrung." (App. 38a–39a (Kidd, J., dissenting).) The applicants now seek emergency vacatur of the stay that authorized that result.

The applicants are two candidates for the Supreme Court of Georgia in the May 19, 2026, election. The respondents are three members of a Special Committee

[1] En banc review of a stay order is unavailable in the Eleventh Circuit. 11th Cir. R. 40-7(a).

of the Judicial Qualifications Commission of Georgia. Under Commission Rule 29(B)(4), the Special Committee may dispose of a Rule 29 inquiry by issuing a non-confidential public statement under Rule 29(F)—an action that does not require formal charges, does not invoke any state tribunal, and is not reviewable by any Georgia court. A Rule 29(F) statement is the one component of Georgia's judicial-discipline process that bypasses Georgia Supreme Court review entirely. Once issued, it cannot be appealed, reversed, or corrected by any state court.

On May 15, after a sealed evidentiary hearing, the district court (Hon. Leslie Abrams Gardner, Chief Judge) entered an eight-day prohibitory temporary restraining order enjoining only the Rule 29(F) public statement. (App. 40a.) The order is narrow in every dimension. It enjoins one act. It does not enjoin the investigation. It does not enjoin the referral of the matter to the full Investigative Panel. It does not enjoin the filing of formal charges. It does not enjoin any of the post-election sanctions available under Georgia law—including suspension, removal, and a lifetime ban on judicial service. (App. 42a.) The district court committed to issue a fully reasoned final order "forthwith." (App. 40a.)

On May 17, a divided panel of the Eleventh Circuit stayed that order. (App. 28a.) The panel's decision is demonstrably wrong in its application of accepted standards, *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers), and it is wrong twice over. *First*, the panel held the TRO appealable under *Department of Education v. California*, 604 U.S. 650 (2025), reading that decision to permit interlocutory review of any TRO whose enforcement "will irreparably harm

the state" (App. 33a)—even where, as here, the order is short, prohibitory, and not extended. That reading is in serious tension with this Court's longstanding rule that TROs are not appealable absent the kind of features—indefinite duration or mandatory state action—that *California* itself addressed. *Sampson v. Murray*, 415 U.S. 61, 87 (1974); *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 84 (1981). *Second*, the panel applied a sliding-scale stay standard that cannot be reconciled with *Nken v. Holder*, 556 U.S. 418 (2009)—announcing that it was free to grant a stay on a "lesser showing of a substantial case on the merits" rather than the "strong showing" of "likelihood of success" that *Nken* requires. (App. 30a (quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).) The panel then applied that lower threshold to find a substantial case—while expressly declining to "definitively resolve the merits." (App. 33a.) The courts of appeals are openly divided on whether the *Garcia-Mir* sliding scale survives *Nken*: the Fourth and Tenth Circuits have rejected the approach entirely; the D.C. Circuit has signaled doubt and labeled the conflict a "circuit split" that it declined to resolve, *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011); and the remaining sliding-scale circuits have constrained the merits showing in ways the Eleventh Circuit alone has not. The order below is the most permissive sliding-scale stay decision in any federal circuit.

Judge Kidd dissented on both grounds. As to jurisdiction: "the district court issued a classic TRO and this case is not otherwise exceptional. I conclude that we lack jurisdiction to review the TRO." (App. 37a (Kidd, J., dissenting).) As to the stay itself: the equitable factors do not "weigh in the Commission's favor — much less that

they weigh *heavily* in its favor." (App. 39a.) Either ground would by itself have required denial of the respondents' motion.

Within hours of the panel's order, the respondents emailed the applicants' counsel two Rule 29(F) public statements—one for each candidate—identifying the applicants by name and asserting that the respondents had concluded that the applicants had likely violated specified provisions of the Georgia Code of Judicial Conduct. (Dkt. No. 24, 11th Cir.) The next morning, the district court issued its final order—a twenty-six-page reasoned disposition that confirms the same narrow prohibitory relief and finds, on three independent grounds, that the applicants are likely to succeed on the merits of their First Amendment and due-process challenges. (App. 1a.) The final order is what the panel did not wait for. It is also what the panel's relaxed merits review obscured: the respondents' enforcement positions do not survive full review. The harm that those statements inflict on the applicants and on Georgia voters cannot be unwound. *See Weaver v. Bonner*, 309 F.3d 1312, 1325 (11th Cir. 2002); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Those statements are now posted on the Commission's website.

The case is not moot. The respondents' issuance of the Rule 29(F) statements has consummated the most immediate harm, but the panel's stay continues to operate, the statements continue to circulate, and the applicants' injury continues to deepen as the election approaches. The capable-of-repetition-yet-evading-review doctrine applies in textbook form: emergency stays of eight-day TROs against election-eve discipline cannot be fully litigated in any procedural posture imaginable,

and similarly situated judicial candidates—in Georgia and in every other State with a similar rule—will face the same Rule 29 process in future cycles. *See Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 462 (2007); *see also Barrow v. Hydrick*, No. 1:24-cv-1975, 2024 WL 2216834, at *4 (N.D. Ga. May 16, 2024) (challenging a Rule 29 notice letter). The questions that the panel's order presents—the scope of *California* and the survival of pre-*Nken* sliding-scale stay standards—are recurring questions of national importance that warrant this Court's review. And there is meaningful relief—such as a mandatory retraction—that the district court can still provide here.

This Court should vacate the Eleventh Circuit's stay as soon as practicable, and, in any event, before the TRO expires on May 23.

Jurisdiction

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

Statement

A. **The applicants and their judicial campaigns.** The applicants are candidates in the May 19, 2026, election for two separate seats on the Supreme Court of Georgia. Both are lawyers in private practice. They have campaigned jointly for their separate seats—appearing together at events, advocating jointly on issues of public concern (including reproductive rights), and sharing endorsements from civic and advocacy organizations.

B. **The respondents and Rule 29.** The respondents are the three members of the Special Committee on Judicial Election Campaign Intervention of the Judicial

Qualifications Commission of Georgia. The Commission's Rule 29 establishes a preliminary-inquiry process for candidate speech during judicial-election campaigns. Under Commission Rule 29(B)(4), the Special Committee may dispose of a matter entirely by issuing a non-confidential public statement under Rule 29(F)—an action that does not require formal charges, does not invoke any state tribunal, and is not reviewable by any Georgia court. Alternatively, the Special Committee may refer the matter to the full Investigative Panel, which can pursue formal charges that proceed to a Hearing Panel and, ultimately, to the Georgia Supreme Court for the imposition of sanctions including suspension, removal, and a lifetime ban on judicial service.

C. **The Rule 29 notice letters.** In the weeks leading up to the May 19 election, the Special Committee sent the applicants Rule 29 notice letters identifying alleged violations of three provisions of the Georgia Code of Judicial Conduct: Rule 4.1(A)(2) (the endorsement clause), Rule 4.2(A)(2) (the commitments clause), and Rule 4.2(A)(3) (the prohibition on false or misleading statements). The letters identified specific campaign conduct—a joint commercial, joint appearances, shared endorsements, and four enumerated statements—and matched each item to specific rules. In response to the letters, the applicants have refrained from constitutionally protected campaign speech that they would otherwise make. (Dkt. Nos. 40-1, 40-2, M.D. Ga.)

D. **The federal lawsuit.** On May 1, 2026, the applicants filed a verified complaint in the United States District Court for the Middle District of Georgia, asserting as-applied First Amendment and due-process fair-notice challenges and

seeking to enjoin the Special Committee from issuing a Rule 29(F) public statement. (Dkt. No. 5, M.D. Ga.) The applicants simultaneously moved for a temporary restraining order and preliminary injunction. (Dkt. No. 7, M.D. Ga.) The matter was sealed at the applicants' request to preserve their standing under *Barrow*. (Dkt. No. 4, M.D. Ga.) The Special Committee filed its opposition on May 8. (Dkt. No. 31, M.D. Ga.) The applicants filed their reply on May 10. (Dkt. No. 40, M.D. Ga.) After a sealed evidentiary hearing on May 13, the district court (Hon. Leslie Abrams Gardner) entered the TRO on May 15. (App. 40a.)

E. **The TRO.** The TRO is a two-and-a-third-page prohibitory order. It enjoins the respondents—for eight days—from issuing a Rule 29(F) non-confidential public statement concerning the matters identified in the notice letters. It enjoins nothing else. The investigation continues. The referral to the full Investigative Panel remains available. The filing of formal charges remains available. Every post-election sanction—up to a lifetime ban on judicial service—remains available. (App. 42a.) The district court found that the applicants had carried their burden under the TRO standard and committed to issuing a merits-based final order "forthwith." (App. 40a.)

F. **The notice of appeal and stay motion.** About two hours later, the Special Committee filed a notice of appeal designating only the TRO order (Dkt. No. 49, M.D. Ga.), and it filed a sealed motion to stay the TRO in the Eleventh Circuit (Dkt. No. 8, 11th Cir.). The Special Committee's motion states that the only enforcement action it is committed to taking is a Rule 29(F) public statement identifying the plaintiffs as having likely violated Canon 4. (*Id.* at 17.) The applicants' response in opposition was

filed on May 16. (Dkt. No. 19-1, 11th Cir.) The respondents' reply was filed at noon on May 17. (Dkt. No. 20, 11th Cir.)

G. **The Eleventh Circuit's stay.** On May 17, a divided panel of the Eleventh Circuit (Newsom and Luck, JJ., per curiam) granted the respondents' motion to stay the TRO pending appeal. (App. 28a.) The majority held the TRO appealable under *California* on the theory that the order's "hallmarks of a preliminary injunction" included the prospect that enforcement "will irreparably harm the state." (App. 31a.) In a footnote, the majority dismissed the Eleventh Circuit's longstanding rule that interlocutory review of a TRO is available only in "the direst of circumstances" such as near-life-or-death emergencies, *Pearson v. Kemp*, 831 F. App'x 467, 471 (11th Cir. 2020); *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995), reasoning that *California* "recently held that it had appellate jurisdiction over a temporary restraining order that had nothing to do with near life-or-death." (App. 32a n.2.)

On the stay itself, the majority recited the four-factor *Nken* test (App. 30a) but then announced that "under our precedent, 'the movant may . . . have [its] motion granted upon a lesser showing of a substantial case on the merits when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay.'" *Id.* (quoting *Garcia-Mir*, 781 F.2d at 1453). Finding that the equities "weigh heavily" for the respondents (App. 30a), the majority applied the lower "substantial case" threshold and concluded that the respondents had cleared it. The majority based that conclusion on out-of-circuit decisions upholding analog rules against facial challenges in other States, while acknowledging that *Fischer v. Thomas*, Nos. 25-

5385/5400, 2026 WL 1296146 (6th Cir. May 12, 2026) (Thapar, J.), had reached a contrary conclusion on the commitments clause on facts materially equivalent to those at issue here. (App. 32a–33a.) The majority expressly declined to "definitively resolve the merits." (App. 33a.)

Judge Kidd dissented on both grounds. On jurisdiction: "the district court issued a classic TRO and this case is not otherwise exceptional. I conclude that we lack jurisdiction to review the TRO." (App. 37a (Kidd, J., dissenting).) On the stay's substance: the equitable factors do not "weigh in the Commission's favor—much less that they weigh *heavily* in its favor." (App. 39a.) The majority did not address *Younger* abstention.

H. **The respondents' issuance of the Rule 29(F) public statements.** Within approximately two hours of the panel's order, the respondents' counsel emailed the applicants' counsel two Rule 29(F) non-confidential public statements—one for each applicant—dated May 17, 2026, and issued under Commission Rule 29(B). (Dkt. No. 24, 11th Cir.) Each statement identifies the applicant by name and asserts that the Special Committee "reasonably believes" the applicant's "campaign conduct . . . violates Georgia's Code of Judicial Conduct." (*Id.* at 2, 3.) Each statement enumerates two such alleged violations: one under Rule 4.1(A)(2) (the endorsement clause), based on the applicants' joint campaign commercial; and one under Rule 4.2(A)(2) (the commitments clause), based on the applicants' appearances at events "related to reproductive freedom" and (in the Jordan statement only) an endorsement from a group called "Reproductive Freedom for All." (*Id.*) Each statement closes with

the warning that the matter "may be referred to the full Investigative Panel for other appropriate action." (*Id.*) Notably, neither statement alleges a violation of Rule 4.2(A)(3)—the false-and-misleading-statements provision that was a principal subject of the April 27 notice letters and the proceedings below.

By Monday morning, May 18, 2026, the respondents had posted both statements to a prominent location on the Commission's public website. The applicants' counsel has since begun receiving inquiries from members of the press, and the matter is expected to be the subject of media coverage in advance of Tuesday's election.

I. **The district court's final order.** On the morning of May 18, before the respondents' public posting of the Rule 29(F) statements, the district court issued its final order—a twenty-six-page reasoned disposition setting forth full findings of fact and conclusions of law. (App. 1a.) The final order confirms the same narrow prohibitory relief the district court entered on May 15: the respondents are enjoined from issuing a non-confidential public statement on the April 27 notice letters; everything else the applicants sought to enjoin was denied. (App. 25a–26a.) The TRO remains in effect on the eight-day schedule originally entered, expiring on May 23. (App. 25a.)

The district court found, on three independent grounds, that the applicants are likely to succeed on the merits. *First*, the court held that the respondents' application of Rule 4.2(A)(2) (the commitments clause) and Rule 4.1(A)(2) (the endorsement clause) to the applicants' issue-based campaign speech and joint advocacy on

reproductive rights cannot be squared with *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and adopted the Sixth Circuit's reasoning in *Fischer* that "[c]andidates have a constitutional right to take a position on the 'issues of the day' without giving explicit pledges about how they will rule." (App. 20a–22a (quoting *Fischer*, 2026 WL 1296146, at *7).) *Second*, the court held that Rule 4.1(A)(2) is "ambiguous and fails to provide fair notice as applied" to the applicants' joint campaign commercial. (App. 23a.) *Third*, the court held that the respondents' application of Rule 4.2(A)(3) "fails to put Plaintiffs on notice as to which statements were potentially a violation under the Rule." (App. 23a–24a.) The court's findings on irreparable harm, balance of equities, and public interest all run in the applicants' favor. (App. 24a–25a.)

In a striking footnote to its merits analysis, the district court observed that it was "unsure how Plaintiff Rankin is alleged to have committed the violation set forth in ¶ 2 [of her notice letter] and the affixed attachment 'B.'" (App. 23a n.3.) The court explained that Rankin "is not named, referenced, pictured, or attributed with anything as evidenced by the attachment—there is a small part of a campaign sign that potentially has her name on it, but it is unclear." (*Id.*) Despite the absence of any evidentiary predicate the district court could identify, the respondents have now issued a public statement against Rankin.

J. **This application.** The applicants now seek emergency vacatur of the Eleventh Circuit's stay. The panel's stay continues to operate, the respondents' Rule 29(F) public statements continue to circulate, and the applicants' injury continues to

deepen as Tuesday's election approaches. Polls open in Georgia at 7:00 a.m. EDT on Tuesday, May 19. The applicants ask this Court to vacate the panel's stay as soon as practicable, and in any event before the TRO expires on May 23.

Reasons for Granting the Application

This Court may vacate an appellate court stay where (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers). It has exercised this authority in election-related cases before and should do so again here. *See, e.g., Frank v. Walker*, 574 U.S. 929 (2014) (vacating Seventh Circuit stay of permanent injunction). Each *Coleman* factor weighs decisively in favor of vacatur.

I. The Court of Appeals' decision is demonstrably wrong.

A. The TRO is not appealable under *California*.

The threshold problem with the panel's order is that the Eleventh Circuit lacked appellate jurisdiction over the district court's TRO. Temporary restraining orders are not appealable. *See Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., AFL-CIO,* 473 U.S. 1301, 1304 (1985). A narrow exception applies only where a TRO has "the practical effect" of a preliminary injunction—because it is "potentially unlimited" in duration, *Sampson*, 415 U.S. at 87, or because it causes "a serious, perhaps irreparable, consequence" that "can be effectually challenged only by immediate

appeal," *Carson,* 450 U.S. at 84. The district court's subsequent issuance of a reasoned final order does not change this analysis—the court expressly labeled the order a temporary restraining order, invoked Rule 65(b)(2)'s extension framework, and preserved the original eight-day expiration schedule. (App. 25a.)

The TRO here meets neither prong of the appealability exception. It is not "potentially unlimited" in duration. *Sampson*, 415 U.S. at 87. It runs eight days—well within the fourteen-day period that Rule 65(b) makes the outer bound of an unextended TRO. Fed. R. Civ. P. 65(b). The district court did not extend it. The court entered the TRO with the express expectation that it would expire on its own terms and that a final merits-based order would follow before that expiration. (App. 40a.) The court has now issued that final order—on the same eight-day schedule. (App. 25a.) That is the ordinary life cycle of a TRO. It does not transform the order into a preliminary injunction.

Nor does the TRO cause "a serious, perhaps irreparable, consequence" of the kind required to permit interlocutory appeal. *Carson*, 450 U.S. at 84. The Special Committee's interest in issuing a Rule 29(F) public statement 36 hours before an election is not an irreparable consequence. The TRO leaves the investigation in place, the referral to the full Investigative Panel intact, and every post-election sanction available—including a lifetime ban on judicial service. If the applicants are elected on Tuesday, post-election sanctions can prevent them from ever taking office.

The panel's contrary conclusion turns on two doctrinal moves *California* itself will not support. The first was the panel's reading of the "hallmarks of a preliminary

injunction" inquiry as satisfied by the prospect that enforcement of the TRO "will irreparably harm the state." (App. 31a.) But the hallmarks inquiry is not about whether the *appellant* faces irreparable harm—every party seeking an emergency stay claims to. It is about whether the *order itself* carries the structural features of a preliminary injunction, *Sampson*, 415 U.S. at 87, namely indefinite duration or mandatory force. *California* arose on an emergency application to vacate a TRO that had been extended from fourteen days to twenty-eight; that required the federal government to make affirmative monetary disbursements that could not realistically be recouped; and that functioned as a mandatory injunction compelling ongoing government action. *Id.* at 651–52. On those facts, the Court found that the order carried "many of the hallmarks of a preliminary injunction" and could be reviewed as one. *Id.* at 651. The Court did not announce a new test. It applied *Sampson*. *Id.* As Justice Jackson observed in dissent, the operative inquiry remains whether the order is "potentially unlimited" in duration or causes "serious, perhaps irreparable, consequence." *Id.* at 658 (Jackson, J., dissenting) (quoting *Sampson*, 415 U.S. at 87, and *Carson*, 450 U.S. at 84).

The TRO at issue here satisfies neither prong. It is eight days, expressly time-limited, and not extended. It is prohibitory, not mandatory: it pauses one discretionary act and requires the Special Committee to do nothing. Nothing about it requires the kind of irretrievable transfer of resources that animated the *California* majority's concern. Extending *California* to reach an eight-day, prohibitory order pausing one discretionary state action—on the brink of an election in which the

district court committed to and did issue a merits-based final order before the TRO's expiration—would expand *California* well beyond its facts and convert it from a narrow holding on a mandatory-monetary TRO into a general license for early appellate intervention in TRO practice.

The panel's second doctrinal move compounds the first. In a footnote, the panel dismissed the Eleventh Circuit's longstanding rule that interlocutory review of a TRO is available only in "the direst of circumstances," *Pearson*, 831 F. App'x at 471, on the reasoning that *California* "recently held that it had appellate jurisdiction over a temporary restraining order that had nothing to do with near life-or-death." (App. 32a n.2.) That reasoning misreads *California*. *California* did not abrogate *Sampson* or *Carson*. It applied them. The Eleventh Circuit's "direst of circumstances" formulation is one expression of *Carson*'s "serious, perhaps irreparable, consequence" requirement, *Pearson*, 831 F. App'x at 471 (citing *Carson*, 450 U.S. at 84), and nothing in *California* displaces it. The panel was free to disagree with *Pearson*'s articulation of the *Carson* test as a matter of circuit law. The panel was not free to disregard *Carson* itself.

B. The panel applied a stay standard that this Court has rejected.

Even if the TRO were appealable, the panel's stay analysis cannot be reconciled with this Court's decision in *Nken*. The panel began with a correct recitation of the four-factor *Nken* test. (App. 30a.) It then announced a workaround drawn from a 1986 pre-*Nken* decision: "under our precedent, 'the movant may . . . have [its] motion granted upon a lesser showing of a substantial case on the merits when the balance

of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay.'" (*Id.* (quoting *Garcia-Mir*, 781 F.2d at 1453)). The panel deemed itself satisfied that the equities here tilted heavily, applied "the lower 'substantial case' standard," *id.*, held that the respondents had cleared it (App. 33a), and explicitly disclaimed any "definitive[]" merits ruling, *id.*

That is not what *Nken* permits. *Nken* held that a stay applicant must make "a strong showing that he is likely to succeed on the merits." 556 U.S. at 434. And the Court left no doubt about the strength of that showing. The merits factor and the irreparable-harm factor are "the most critical." *Id.* "It is not enough that the chance of success on the merits be 'better than negligible.'" *Id.* "More than a mere 'possibility' of relief is required." *Id.* The "'possibility' standard is too lenient." *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008)). And the burden rests on the movant. *Id.* at 433–34.

Justice Kennedy, joined by Justice Scalia, drove the point home in concurrence: "When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Id.* at 438 (Kennedy, J., concurring) (collecting in-chambers opinions).

The panel's substitute standard cannot be squared with this. *Nken* makes the merits factor "most critical," 556 U.S. at 434—not a sliding variable that can be relaxed whenever the panel believes the other factors tilt heavily one way. The *Garcia-Mir* "substantial case" threshold descends from *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir.

1977), where the test was framed as raising "questions going to the merits" sufficiently "substantial" to be "a fair ground for litigation." That formulation is functionally indistinguishable from the "better than negligible" and "mere possibility" standards *Nken* rejected as "too lenient." 556 U.S. at 434.

The post-*Nken* and post-*Winter* landscape confirms the point. Two courts of appeals have categorically rejected the sliding-scale approach as incompatible with this Court's recent decisions. The Fourth Circuit abrogated its prior sliding-scale framework in *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009), reaffirmed that holding in *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013) (holding *Winter* "impliedly overruled any sliding scale approach"), and again in *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019). The Tenth Circuit followed in *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016). The D.C. Circuit reads *Winter* "at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley, 644 F.3d at 392–93* (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (concurring opinion)). *Sherley* identified the resulting "circuit split" and declined to "wade into" it. 644 F.3d at 393.

The courts of appeals that have retained the sliding scale have constrained it in ways the Eleventh Circuit has not. The Second, Seventh, and Ninth Circuits permit a stay (or preliminary injunction) on a showing of "serious questions going to the merits" only when the balance of hardships "tips sharply" in the movant's favor *and*

the remaining *Winter* factors are independently satisfied. *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1130-35 (9th Cir. *2011)* ; *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 35-38 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (sliding scale is "a variant of, though consistent with," this Court's formulations); *see also Trump v. Deutsche Bank AG*, 943 F.3d 627 (2d Cir. 2019); *In re Revel AC, Inc.*, 802 F.3d 558 (3d Cir. 2015). The "serious questions" formulation is a materially higher threshold than *Garcia-Mir*'s "substantial case." Only the Eleventh Circuit retains the *Garcia-Mir* sliding scale at its full pre-*Nken* permissiveness—a circuit-binding rule that authorizes a stay on a merits showing weaker than what every other sliding-scale circuit demands. That the post-*Nken* Eleventh Circuit cases recite the *Nken* four-factor test alongside *Garcia-Mir* without resolving the obvious tension—as the panel did here (App. 30a)—only deepens the conflict. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee,* 915 F.3d 1312 (11th Cir. 2019).

The error was outcome-determinative. The respondents' merits showing, evaluated against the proper *Nken* standard, cannot constitute a "strong showing" of "likelihood of success." The panel's own description of the showing confirms it: a "substantial case" assembled from out-of-circuit decisions upholding analog rules against *facial* challenges not at issue here, against the only on-point recent authority, *Fischer*, which the panel acknowledged is contrary. (App. 32a–33a.) On the false-statement clause, the panel cited *Weaver*, 309 F.3d 1312 (App. 32a), but *Weaver* itself

requires actual malice—a showing that the respondents have not made and have not even attempted to make. On Rule 4.1(A)(2), the panel did not engage with the applicants' as-applied theory at all. None of this is what a likelihood of success on the merits looks like.

The district court's final order has now confirmed the point dispositively. The panel disclaimed any "definitive[]" merits ruling. (App. 33a.) The district court has now issued one—a twenty-six-page reasoned disposition with full findings of fact and conclusions of law, drawing on the same authorities the panel cited and reaching the opposite conclusion. (App. 1a.) The district court found the applicants likely to succeed on the merits on three independent grounds: the respondents' application of the commitments and endorsement clauses to the applicants' issue-based campaign speech and joint advocacy on reproductive rights cannot be squared with *White* and *Fischer*; Rule 4.1(A)(2) "is ambiguous and fails to provide fair notice as applied" to the joint commercial; and the respondents' application of Rule 4.2(A)(3) "fails to put Plaintiffs on notice as to which statements were potentially a violation under the Rule." (App. 20a–24a.) Whatever uncertainty *Nken*'s "strong showing" standard may leave at the margins, the standard cannot be cleared by a merits theory the district court has now found likely unconstitutional on three independent grounds.

The panel's predicate finding—that the equities favor the respondents "heavily"—is also unsupported. The TRO leaves every meaningful enforcement avenue intact. The investigation continues. The referral to the full Investigative Panel is available. The filing of formal charges is available. Every post-election

sanction—including suspension, removal, and a lifetime ban on judicial service—remains available. Comm'n Rs. 6(B), 17(D), 29(B)(4). The only thing the TRO precludes is a pre-election sanction-by-press-release. The respondents' contention that the State suffers irreparable harm from being unable to issue a Rule 29(F) public statement before the election—when an actual disciplinary disposition remains available days later—cannot be reconciled with the respondents' acknowledgment that post-election sanctions remain on the table. (Dkt. No. 24 at 2, 3, 11th Cir.) The applicants' countervailing harm is set out in Section II. Even on the panel's relaxed standard, the equities do not tilt the way the panel said they do.

II. The applicants are suffering irreparable harm.

The harm that the district court enjoined and that the panel's stay authorized is no longer hypothetical. The respondents have now issued the very Rule 29(F) public statements the district court found likely unconstitutional. (Dkt. No. 24, 11th Cir.) Those statements identify the applicants by name and assert that the State's judicial-conduct enforcement body has concluded the applicants have likely violated specified provisions of the Georgia Code of Judicial Conduct. (*Id.*) They are now public on the Commission's website. Press coverage is imminent. Every hour that the panel's stay remains in effect, the statements gain wider distribution, the applicants' campaigns suffer further damage, and the harm to the applicants—and to Georgia voters—deepens. Vacatur cannot unring the bell. But it removes the continuing authorization for the respondents' actions, restores the district court's order, and vindicates the constitutional rights the panel overrode.

The Eleventh Circuit has held in this very context that "there is no adequate post-election remedy" for unconstitutional restraints on judicial-campaign speech. *Weaver*, 309 F.3d at 1325. That principle applies even more so to a Rule 29(F) public statement issued by Georgia's judicial-conduct enforcement body less than 36 hours before voters cast their ballots. The statement functions as a pre-election sanction. It cannot be retracted, undone, or remedied by any post-election proceeding—and certainly not by the post-election sanctions the respondents themselves represent remain available to them. (Dkt. No. 24 at 2, 3, 11th Cir.) "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. The district court found exactly that injury here. (App. 24a.) The applicants' ongoing self-censorship—described in the final order's standing analysis—continues every day the threatened enforcement remains pending and every day the issued statements remain in public circulation. (App. 10a–11a.)

The respondents' issuance of the public statements is itself a First Amendment injury independent of any further enforcement action. When a state body invested with regulatory authority publicly identifies named individuals as having likely violated the rules the body enforces, the resulting injury is not merely reputational; it is the kind of coercive state action this Court has long subjected to heightened First Amendment scrutiny. *NRA v. Vullo*, 602 U.S. 175, 188-90 (2024); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). The Commission's Rule 29(F) statements are not, despite their form, mere expression. They are the State's enforcement determination

announced in the State's voice—after a confidential investigation, on the eve of an election, against named candidates that the State's own regulatory body has identified as having likely violated its rules. Voters reading those statements cannot be expected to discount them as one side of a contested constitutional dispute. They will read them as the State's view of the candidates' fitness for office. That is precisely the chilling effect on protected political speech this Court has held the First Amendment forbids. *White, 536 U.S. at 781–82* .

The harm to applicant Rankin is particularly acute. The district court observed in its final order that it was "unsure how Plaintiff Rankin is alleged to have committed the violation set forth in ¶ 2" of the underlying notice letter; she was "not named, referenced, pictured, or attributed with anything" in the evidence the respondents offered. (App. 23a n.3.) The respondents have nonetheless issued a public statement against her alleging a violation of that rule. (Dkt. No. 24 at 2, 11th Cir.) A pre-election public condemnation of a judicial candidate, issued by the State's judicial-conduct enforcement body on a record the district court found does not even support the allegation, is irreparable harm of an unusually clear kind.

The respondents, by contrast, will suffer no cognizable harm from vacatur. As described in Section I.B above, the respondents' enforcement authority is undiminished by the TRO: the investigation continues, the referral of the matter to the full Investigative Panel remains available, and every post-election sanction—including suspension, removal, and a lifetime ban on judicial service—remains available. Comm'n Rs. 6(B), 17(D), 29(B)(4). The only thing the TRO precludes is

further pre-election sanction-by-press-release. The First Amendment values the panel's stay disregarded weigh decisively in favor of vacatur.

III. There is a reasonable prospect this Court will review the merits.

The panel's order presents three recurring legal questions that this Court has expressly left open or that the courts of appeals have decided in conflicting ways. Each question, standing alone, would warrant this Court's review. Together, they make this case an unusually clean vehicle for resolving the standards governing emergency interlocutory intervention by the federal courts of appeals in election cases. Judge Kidd dissented from the panel's order on the first two grounds, (App. 35a–39a (Kidd, J., dissenting)), and the district court's final order resolved the third in the applicants' favor on three independent bases, (App. 20a–24a).

First, the panel applied a sliding-scale stay standard from *Garcia-Mir* that this Court's decisions in *Nken* and *Winter* have called into serious question. As Section I.B explains, the courts of appeals are divided in three identifiable ways on whether and how sliding-scale stay standards survive *Nken*. The Fourth and Tenth Circuits have categorically rejected the sliding scale. The D.C. Circuit has signaled skepticism and identified a "circuit split" but declined to resolve it. The Second, Seventh, and Ninth Circuits permit a sliding scale only on a "serious questions" merits showing paired with a balance of hardships that "tips sharply" in the movant's favor. The Eleventh Circuit alone retains the *Garcia-Mir* standard at its full pre-*Nken* permissiveness—authorizing a stay on a "substantial case" showing materially weaker than the "serious questions" formulation every other sliding-scale circuit

demands. The split is mature, multi-directional, and recurring: emergency stay motions arise in every federal circuit on a routine basis, and the standard governing them is among the most consequential procedural rules in federal litigation. This Court has not addressed the survival of pre-*Nken* sliding-scale standards directly since *Nken* itself. The question is squarely presented here, the error was outcome-determinative, and the Eleventh Circuit's framework is the most extreme application of the sliding scale in the country. This case is the cleanest possible vehicle for resolving the conflict.

Second, the panel extended *California* to authorize interlocutory appellate review of a TRO that *California* itself does not reach. As Section I.A explains, *California* arose on an extended, mandatory TRO requiring affirmative government disbursements that could not be recouped—features that placed that order, in this Court's view, within the longstanding exception in *Sampson* and *Carson*, for TROs with the practical effect of preliminary injunctions. The order here has none of those features. It is eight days, prohibitory, not extended, and requires the State to take no affirmative action. The panel itself acknowledged the doctrinal move it was making, dismissing the Circuit's "near life-or-death" reading in a footnote on the ground that *California* "recently held that it had appellate jurisdiction over a temporary restraining order that had nothing to do with near life-or-death because it carried the hallmarks of a preliminary injunction." (App. 32a n.2.) And as Judge Kidd put it below: "the district court issued a classic TRO and this case is not otherwise exceptional. I conclude that we lack jurisdiction to review the TRO." (App.37a (Kidd,

J., dissenting).) The panel's reading converts *California* from a narrow holding about a particular kind of TRO into a general license for emergency interlocutory review whenever a court of appeals can articulate a non-frivolous reason to second-guess the district court's equitable balance. The question—what *California* did and did not authorize—is recurring. Federal district courts issue prohibitory TROs against discretionary state action on a regular basis, including in politically salient election-eve litigation this Court's emergency docket has policed in the past. *See, e.g., Frank*, 574 U.S. 929. This Court's review is needed to confirm that *California* applied *Sampson*'s longstanding rule to a particular kind of TRO and did not silently displace *Sampson* and *Carson* for prohibitory TROs that compel no state action.

Third, the panel's stay was predicated on its assessment that the respondents had shown a "substantial case" on the merits—an assessment the district court's final order has now refuted on three independent grounds, including by adopting the Sixth Circuit's recent decision in *Fischer*. *Fischer* held that state judicial-conduct authorities cannot treat pro-life issue advocacy by judicial candidates as an impermissible commitment under rules modeled on the ABA's commitments clause. 2026 WL 1296146, at *7. The district court has now applied *Fischer*'s reasoning to the materially equivalent pro-choice issue advocacy at issue here, finding the respondents' enforcement theory likely unconstitutional. (App. 20a–22a.) The Eleventh Circuit panel, by contrast, found a "substantial case" for the respondents on the same clause—citing the same out-of-circuit authorities the district court engaged with and rejected, and acknowledging that *Fischer* cuts the other way. (App. 32a–

33a.) Whatever the ultimate resolution of the underlying First Amendment questions, the panel's order has set up a clean circuit conflict over whether *White*'s announcement/commitment distinction is viewpoint-neutral—or, instead, whether it can be deployed to punish one side of a contested political issue while leaving the other side protected. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). The First Amendment forbids viewpoint discrimination, and the resulting rule will govern every judicial election in every State with an analog provision, including elections still underway in the 2026 cycle. This Court has not addressed the limits of *White* since 2002, and the recurring nature of the question—coupled with the fresh circuit conflict between *Fischer* and the order below—makes the question one this Court ordinarily resolves.

Finally, the equities and the timing converge to make immediate intervention necessary. The applicants' First Amendment injury is, by definition, irreparable. *Elrod*, 427 U.S. at 373. The Eleventh Circuit has held there is "no adequate post-election remedy for unconstitutional restraints on judicial-campaign speech." *Weaver*, 309 F.3d at 1325. As Judge Kidd put it, "the bell of public misconduct allegations cannot be unrung." (App. 38a–39a (Kidd, J., dissenting).) This Court has vacated court-of-appeals stays in election-related cases before, *see, e.g.*, *Frank*, 574 U.S. 929, and the unrecoverable harm here—a pre-election sanction-by-press-release issued by Georgia's judicial-conduct enforcement body, against two candidates for the State's highest court, less than 36 hours before the polls open—makes this case at least as compelling as any in which the Court has intervened.

Conclusion

For these reasons, this Court should vacate the stay entered by the Eleventh Circuit on May 17 as soon as practicable, and in any event before the temporary restraining order expires on May 23, 2026.

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Respectfully submitted,

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