No. 25A1275

IN THE

Supreme Court of the United States

JENNIFER AUER JORDAN AND SHAMIRACLE J. RANKIN,

Applicants,

v.

VICTORIA S. DARRISAW, *ET AL.*,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE ELEVENTH CIRCUIT'S STAY OF TEMPORARY RESTRAINING ORDER

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Introduction

Georgia law allows state regulators to place their thumbs on the scale of a judicial election by issuing public statements sanctioning core political speech protected under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). That sanction-by-press-release is final, unreviewable in any state court, and issued without any opportunity for the candidate to raise a constitutional defense before any tribunal authorized to consider it. Threatened with that sanction days before the election, the applicants—candidates for the State's highest court—sought relief in the only forum available to them: federal court. The district court held an evidentiary hearing and entered an eight-day temporary restraining order against the regulators' election-eve statements and three days later issued a twenty-six-page final order finding the applicants likely to succeed on three independent grounds. (App. 1a–26a, 40a–42a.) A divided three-judge panel of the Eleventh Circuit stayed the TRO under appellate-jurisdiction and stay-standard rulings that cannot be squared with *Department of Education v. California*, 604 U.S. 650 (2025), *Sampson v. Murray*, 415 U.S. 61 (1974), *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), or *Nken v. Holder*, 556 U.S. 418 (2009). Vacatur is warranted to restore the TRO, to correct stay-stage rulings that will otherwise govern every TRO entered against state action in the Eleventh Circuit, and to ensure uniformity among the circuits on the procedural questions presented.

The TRO expires on Saturday, May 23. The Court should vacate the stay.

Argument

I. The case is not moot.

A. The Special Committee does not dispute that the applicants face continuing injury from the published statements.

The Special Committee's response treats the election as the end of the case. (BIO 11–13.) It engages neither the continuing reach of the publication nor the state action behind it.

The applicants—both lawyers in private practice—lost a contested election after Georgia's judicial-conduct enforcement body published, in the hours before voters went to the polls, formal findings that they had likely violated provisions of the Code of Judicial Conduct. The publication was no glancing administrative notation. The Commission posted the two statements at the top of its public website, highlighted in red with a warning triangle, identifying the applicants by name under the heading "Statements for Immediate Release by the JQC Investigative Panel's Special Committee on Judicial Election Campaign Intervention." (Wilson Decl. ¶ 5, Dkt. No. 57-1, M.D. Ga.) The statements were the lead story on the *Atlanta Journal-Constitution*'s website for most of May 18 and were carried on the front page of the paper's digital ePaper distributed to more than 100,000 subscribers on the morning of the election. (*Id.* ¶ 8.) Election results do not retroactively cleanse that injury or the State action that produced it. *Powell v. McCormack*, 395 U.S. 486, 498 (1969).

The harm continues. The Rule 29(F) statements remain published. The Special Committee has not retracted them. It retains the authority under its own rules to refer the matter to the full Investigative Panel "for other appropriate action." (Resp.

App. 228a-229a.) And the Commission's practice is to leave Rule 29(F) statements posted indefinitely: the statement issued against the Barrow campaign in the 2024 cycle remains posted today. (Wilson Decl. ¶ 6.) Each statement will live in the public record as the State's considered conclusion that the applicants likely violated specific judicial-ethics rules—available to the press, to opposing campaigns in future elections, and to disciplinary authorities in any subsequent enforcement matter.

The Special Committee suggests that the applicants themselves caused or contributed to the dissemination by moving to unseal the case records. (BIO 12–13.) Not so. The Special Committee issued the public statements on May 17, posted them on the Commission's website on May 18, and the press carried them as the lead election-day story before any unsealing motion was filed. (Wilson Decl. ¶¶ 5, 8.) Unsealing followed the publication and allowed the public to see the applicants' side of the story—including the district court's reasoned final order finding the Special Committee's enforcement effort likely to violate the First Amendment on three independent grounds.

The continuing enforcement risk is also real. Both applicants practice law in Georgia, where the State Bar's disciplinary process now operates against a published JQC determination that they likely violated judicial-ethics rules. The Special Committee's notice letters expressly contemplated that referral to the full Investigative Panel and the filing of formal charges remain available (App. 42a); the Rule 29(F) statements repeat that warning. The statements are not just evidence of past enforcement; they are notice of future enforcement against the same speech, by the same

Special Committee, applying the same rules. The applicants thus retain "a concrete interest, however small, in the outcome of the litigation"—enough to keep the case alive. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted).

B. The Special Committee does not—and cannot—dispute that the case is capable of repetition.

Even if the personal-stake analysis somehow failed, the case fits the *Storer* exception. *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

Duration. This case turned over in under a week, and no plenary appeal, en banc petition, or certiorari proceeding can outrun that clock. The Special Committee answers that the procedural questions raised—appellate jurisdiction and the stay standard—can be reviewed "in any number of other cases where there remains a live controversy." (BIO 14.) But that argument misreads *Storer*. The inquiry is whether the *complaining party's* injury is too short to be fully litigated before its cessation, not whether the abstract legal questions raised can be reached in some other case. *Wis. Right to Life*, 551 U.S. at 462.

Recurrence. This is the second Georgia Supreme Court election cycle in a row in which the Special Committee has invoked the Rule 29 process against a candidate, and the second in which the candidate sought federal injunctive relief. *See Barrow v. Hydrick*, No. 1:24-cv-1975, 2024 WL 2216834, at *4 (N.D. Ga. May 16, 2024). The Special Committee's continued posting of the Barrow statement today, more than two years on, confirms recurrence. (Wilson Decl. ¶ 6.) The Special Committee answers that the applicants have not committed in advance to running again for the Supreme

Court of Georgia on the same conduct. (BIO 14–15.) But this Court has never required precommitment to a specific future candidacy on a specific theory of misconduct; it requires a reasonable expectation that the complaining party will be subject to the same kind of action again. *Wis. Right to Life*, 551 U.S. at 462; *Davis v. FEC*, 554 U.S. 724, 735–36 (2008). Both applicants remain subject to State Bar discipline keyed to the published Rule 29(F) findings and to future Rule 29 proceedings if either runs again for judicial office. That is enough.

C. The Special Committee's argument that vacatur is empty misunderstands what vacatur does.

The Special Committee characterizes the application as seeking "a purely advisory ruling" because, in its view, vacatur "would have no practical effect." (BIO 1, 13.) The characterization mistakes what vacatur does and what the *Coleman* standard asks. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers), governs whether a court-of-appeals stay should be vacated; it does not require the applicants to show that vacatur will undo every consequence of the stay. Vacatur has operative consequences here—both for the remaining TRO and for the panel's stay-stage rulings.

Vacatur restores the order that the panel suspended. The Special Committee argues that there is "nothing left of the TRO to restore" (BIO 13), because (a) the authorization for the public statements lies in Georgia's Constitution and the Commission's rules rather than the panel's stay, (b) no continuing authorization is needed for an act already completed, and (c) the TRO expires in fewer than seventy-two hours regardless. Each premise misstates what is at stake. The panel's stay is what allowed

the Special Committee to issue the statements before the TRO's expiration. The statements remain publicly posted as a result of that stay. And vacatur reinstates the TRO for its remaining duration. The applicants are entitled to the order that the district court entered and that the panel wrongly suspended. *Coleman*, 424 U.S. at 1304.

Vacatur also disturbs the panel's stay-stage rulings as the controlling rule of decision in the Eleventh Circuit. The panel's reading of *California*, its application of the *Garcia-Mir* sliding scale, and its disclaimer of any "definitive[]" merits review (App. 33a) are entered on the appellate docket as circuit law. *See Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir. 1986). They will be cited and applied in every subsequent stay motion in the Eleventh Circuit unless and until something disturbs them. An en banc rehearing of the stay order is unavailable. 11th Cir. R. 40-7(a). The eventual disposition of the appeal will not reach the panel's procedural reasoning at the stay stage. Only this Court's vacatur does.

The Special Committee cites *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), for the proposition that this Court will not issue "opinions upon moot questions." (BIO 14.) But *Church of Scientology* held that the case there was *not* moot even though the documents at issue had been disclosed and could not be recalled, because "[e]ven the availability of a partial remedy is sufficient to prevent [a] case from being moot." 506 U.S. at 13 (cleaned up). The Court has likewise vacated court-of-appeals stays in election-related cases where the underlying operative effect of vacatur was at least as limited as it is here. *Frank v. Walker*, 574 U.S. 929 (2014). The "bell can't be unrung" acknowledgment in the application (Appl. 20)

addressed one specific irreversibility—publication itself. It was not a concession that the case is moot, that no live controversy remains, or that this Court lacks the power to grant meaningful relief. The Special Committee's own filing concedes the contrary: post-issuance, post-election relief, it states, "must be addressed in the ordinary course by the lower courts." (BIO 13.) That concession alone defeats the claim that the entire dispute is advisory.

II. The panel's appealability ruling cannot be sustained.

The panel's appealability holding rested on the prospect that enforcement of the TRO "will irreparably harm the state," (App. 31a), supported by a passing reference to *Sampson*'s "shielding" doctrine, (App. 31a–32a). The Special Committee now relocates the foundation of that holding to shielding and supplies a new line of authorities to shore up the irreparable-harm prong. (BIO 15–17.) The Special Committee's defenses—on the ground that the panel adopted and on the alternative grounds that the Special Committee now offers—are unavailing.

California does not extend to this order. The Special Committee reads *California* as supplying a generalized "hallmarks of a preliminary injunction" inquiry broader than *Sampson*'s "potentially unlimited" prong and *Carson*'s "serious, perhaps irreparable, consequence" prong. (BIO 15–17.) But the text and the facts run the other way. *California*'s hallmarks language is bookended by citations to *Sampson*, *see* 604 U.S. at 651, and the order at issue there—a mandatory TRO extended beyond Rule 65(b)(2)'s outer bound—satisfied *Sampson* and *Carson* on their own terms. Extending *California* to reach an eight-day, prohibitory order pausing a single discretionary

state act, in which the district court committed to and did issue a reasoned final order before expiration, would convert *California* from a narrow holding into a license for interlocutory appeal whenever a State litigant articulates a non-frivolous claim of irreparable harm.

The final order has not transformed the TRO. The Special Committee presses (BIO 16–17) that the district court's May 18 final order, with its twenty-six pages of findings of fact and conclusions of law, has converted the original eight-day order into something appealable as a preliminary injunction. The final order does not do that, and its terms confirm as much. The order is expressly labeled a temporary restraining order. It preserves the original eight-day expiration. (App. 25a.) It was issued under Rule 65(b)(2), which contemplates exactly this sequence: a TRO entered on short notice, a contested hearing, and a reasoned order resolving the TRO before its expiration. *See* Fed. R. Civ. P. 65(b)(2). The district court itself drew the line between the TRO that it had entered and the preliminary injunction that it had not. (App. 26a.) The Special Committee cannot redraw that line by pointing to the order's length or care.

Sampson's "shielding" doctrine does not reach this case. The Special Committee argues that the panel's appealability holding can be sustained on the alternative ground that the district court engaged in impermissible "shielding" of the TRO from appellate review—pointing to the interval between the filing of the case and the hearing, the interval between the hearing and the TRO, the labeling of the order as a TRO

rather than a preliminary injunction, and the deferral of the final order. (BIO 16–17.) *Sampson* does not reach the conduct that the Special Committee describes.

Sampson's shielding doctrine addresses district courts that effectively convert a TRO into an unreviewable preliminary injunction by extending the TRO indefinitely without resolving the case on the merits. 415 U.S. at 86–87. That is not what happened here. The applicants filed under seal on April 30, the same day that their responses to the Special Committee's notice letters were due. The district court entered the sealing order the next day, set the case for a hearing, held the hearing after expedited briefing, and issued the TRO on Friday, May 15. On the following Monday—and three days into the eight-day TRO—the district court issued a twenty-six-page reasoned final order resolving the merits on three independent grounds. (App. 1a–26a.) That is the opposite of shielding.

The "irreparable harm to the State" framing remains backwards. The Special Committee defends the panel's appealability holding on the principle that "[a]ny time a State is enjoined" from effectuating its laws, "it suffers a form of irreparable injury." (BIO 16, quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).) That principle addresses irreparable harm at the *Coleman* stay stage, not appealability under *Carson*. *Carson* asks about the order's structural consequences for the parties, not the appellant's policy interests in enforcement. 450 U.S. at 84; *see Sampson*, 415 U.S. at 89–90. Under the Special Committee's reading, every TRO against state action would satisfy *Carson*—an inquiry that is no inquiry at all.

The structural problem. Under the panel's reading—and the Special Committee's expansion of it—every prohibitory TRO entered against state action becomes appealable whenever the State articulates a non-frivolous theory of irreparable harm. State litigants can almost always articulate such a theory; private litigants whose TROs do not trigger state opposition cannot. The result is a one-way ratchet that turns the Eleventh Circuit's three-judge stay panels into the appellate gatekeepers of every TRO entered against any state actor in the circuit. *California* did not do that. *Sampson* and *Carson* were designed to prevent it.

III. The panel's stay standard cannot be sustained.

The panel said that it was applying "the lower 'substantial case' standard." (App. 30a.) The Special Committee now defends that ruling on four grounds: that the panel's standard was tailored to extraordinary circumstances rather than announced as a circuit-wide rule (BIO 17–18); that the panel actually found likely success on the merits regardless of the standard it announced (BIO 19–20); that any disagreement among the circuits on the proper stay standard is itself reason to leave the panel's stay in place (BIO 20); and that *Younger* abstention provides an alternative basis for the stay (BIO 20–21). *See Younger v. Harris,* 401 U.S. 37 (1971). The first three reframings cannot rescue what the panel said. The fourth concerns a doctrine that the panel did not invoke and that the district court correctly rejected.

The panel's "substantial case" standard cannot be squared with Nken. The Special Committee argues that the panel's standard "was tailored to the extraordinary circumstances before it" and that the panel was not announcing a circuit-wide rule.

(BIO 17.) That argument fails on the panel's own terms. The "substantial case" standard that the panel applied is not an ad hoc accommodation; it is the Eleventh Circuit's longstanding rule. *See Garcia-Mir*, 781 F.2d at 1453. That standard descends from *Holiday Tours*'s "questions going to the merits" formulation, *see Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977), which *Nken* identified as "too lenient" and held insufficient. *Nken*, 556 U.S. at 434. The panel was applying existing circuit law, not crafting a one-off response. The order is published and will bind subsequent panels.

AIDS Vaccine (BIO 18) is an order of this Court on its discretionary emergency docket, *see Dep't of State v. AIDS Vaccine Advoc. Coal.,* 146 S. Ct. 19 (2025), not a court-of-appeals stay subject to *Nken*'s "strong showing" standard. 556 U.S. at 433–34. The panel's "expressly decline[d] to definitively resolve the merits" disclaimer (App. 33a) is not analogous; it is a tell that the panel knew that it had not made the *Nken* showing. The Special Committee's argument that the panel "actually found likely success" (BIO 19–20) fails on the panel's own words: the panel applied "the lower 'substantial case' standard" (App. 30a) and "expressly decline[d] to definitively resolve the merits" (App. 33a).

The final order forecloses the panel's predicate merits finding. The panel's substantial-case finding rested on a thin stay-stage record and a probabilistic assessment the panel itself declined to make definitive. (App. 33a.) The district court has since issued a twenty-six-page final order, with full findings of fact and conclusions of law, drawing on the same authorities the panel considered and reaching the opposite

conclusion on three independent grounds: that the Special Committee's application of the commitments and endorsement clauses to the applicants' issue-based campaign speech and joint advocacy on reproductive rights cannot be reconciled with *White* or with *Fischer v. Thomas,* Nos. 25-5385/5400, 2026 WL 1296146 (6th Cir. May 12, 2026); that Rule 4.1(A)(2) "is ambiguous and fails to provide fair notice as applied" to the applicants' joint campaign commercial; and that 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.) Each ground is independently dispositive. The Special Committee notes that the final order exists but does not engage its reasoning. (BIO 9.) That silence is the answer to the merits showing that the BIO presses now. This Court need not resolve the *Nken*/*Garcia-Mir* question to grant vacatur. The panel's stay rests on a merits assessment that the district court has now found unsustainable on three separate grounds.

The circuit split is a reason for this Court's review, not a reason to deny it. The Special Committee argues that the existence of a circuit split on the post-*Nken* survival of sliding-scale stay analysis is itself reason to leave the panel's stay in place, citing *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 134 S. Ct. 506, 507 (2013) (Scalia, J., concurring), for the proposition that "[r]easonable minds can perhaps disagree" about the correct standard. (BIO 20.) The argument inverts the doctrine. *Planned Parenthood*'s "reasonable minds can disagree" formulation addresses the application of an accepted legal standard; it does not address what the accepted standard is. When the standards themselves are in conflict across the

circuits—as they are here, on a question that this Court has not resolved—the existence of the conflict is precisely what justifies this Court's review. (*See* Appl. 23–26 (collecting Fourth, Sixth, Ninth, Tenth, and D.C. Circuit authorities).)

Younger *abstention does not provide an alternative basis for the stay.* The panel did not rely on *Younger* (BIO 20–21), and the district court correctly rejected it. (App. 16a–19a.) Under *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), abstention requires an "adequate opportunity" to raise the constitutional challenge in the state proceeding. The Georgia Supreme Court has held that the Commission "is not vested with any judicial power" and cannot exercise "the judicial discernment of constitutional, statutory, or common law." *In re Jud. Qualifications Comm'n Formal Advisory Op. No. 239,* 300 Ga. 291, 298–99 (2016). A Rule 29(F) public statement issues without judicial review, without due process, and without any opportunity to raise a constitutional defense before any tribunal authorized to consider it. *Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69, 78 (2013), confirms the result: *Younger* applies only to three "exceptional" categories of state proceedings, and the Rule 29(F) public-statement track—a one-step administrative disclosure that cannot include any judicial determination of the candidate's constitutional rights—is not one of them.

IV. The Special Committee identifies no forum other than this Court that can disturb the panel's procedural rulings.

The Special Committee characterizes this case as a "terrible vehicle" for resolving the procedural questions presented. (BIO 21.) It is not. The questions are squarely presented in a published, reasoned order from a divided three-judge panel; the

underlying merits have been fully resolved by the district court on three independent grounds (App. 1a–26a); and the pending appeal cannot reach the panel's procedural rulings.

The pending appeal cannot reach the panel's procedural rulings. The Special Committee's principal contention is that the merits appeal will resolve the questions in due course. (BIO 21–22.) It will not. The panel's stay-stage rulings on appealability and on the *Garcia-Mir* sliding scale were not directed to the merits; they were directed to whether the panel had appellate jurisdiction and to the standard governing the stay. They are entered on the appellate docket as published circuit law. They will be cited and applied by every subsequent stay panel in the Eleventh Circuit. The merits disposition of the appeal—whatever it is, whenever it comes—will not reach them. The Special Committee does not contest that.

The Special Committee's case-specific arguments do not undercut the vehicle. The Special Committee's three cert-prospects arguments (BIO 21–23) do not hold. *Salado-Alva v. Lynch*, 580 U.S. 962 (2016), is a decade-old cert denial in an alien-removal case—a markedly worse vehicle than the one before this Court now. The Special Committee's contention that the Court is "not in the business of policing the circuits' application of their own caselaw" (BIO 22) is misdirected: the application asks the Court to enforce *California*, *Sampson*, *Carson*, and *Nken*, not to police the Eleventh Circuit's internal precedent. And the Special Committee's *Fischer*-distinguishing argument (BIO 22–23) makes the cert case stronger, not weaker—the

district court has applied *Fischer* to this record (App. 20a–22a) and reached the opposite conclusion that the Special Committee draws from the same case.

Vacatur is warranted to clarify the reach of California and restore uniformity among the circuits on the standard for stays pending review. The Court has vacated court-of-appeals stays in election-related cases before. *Frank*, 574 U.S. 929. This case is at least as compelling: two recurring questions of national importance on which the courts of appeals are openly divided, a panel decision that—if left standing—eliminates meaningful federal-court protection against eve-of-election enforcement actions by state regulatory bodies, and the panel's own acknowledgment that the most recent on-point appellate authority cuts against its merits assessment (App. 32a–33a).

The structural problem. The panel's standards, the unavailability of en banc review of stay orders under Eleventh Circuit Rule 40-7(a), and the inevitable mootness of the underlying TROs make the panel's stay-stage rulings effectively unreviewable. The Special Committee offers no mechanism to break that system. None exists except this Court.

Conclusion

For these reasons, and for those set forth in the application, this Court should vacate the Eleventh Circuit's stay as soon as practicable, and in any event before the temporary restraining order expires on May 23, 2026.

May 21, 2026

Respectfully submitted,

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