No. 23-40582

United States Court of Appeals
for the Fifth Circuit

Honorable Terry Petteway; Honorable Derrick Rose; Honorable Penny Pope,
Plaintiffs-Appellees

v.

Galveston County, Texas; Galveston County Commissioners Court; Mark Henry, *in his official capacity as Galveston County Judge*
Defendants-Appellants

United States of America,
Plaintiff-Appellee

v.

Galveston County, Texas; Galveston County Commissioners Court; Mark Henry, *in his official capacity as Galveston County Judge*
Defendants-Appellants

Dickinson Bay Area Branch NAACP; Galveston Branch NAACP; Mainland Branch NAACP; Galveston LULAC Council 151; Edna Courville; Joe A. Compian; Leon Phillips,
Plaintiffs-Appellees

v.

Galveston County, Texas; Mark Henry, *in his official capacity as Galveston County Judge*; Dwight D. Sullivan, *in his official capacity as Galveston County Clerk*,
Defendants-Appellants

On appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 3:22-CV-00057, 3:22-CV-00093, 3:22-CV-00117

PETTEWAY APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' RENEWED EMERGENCY MOTION TO STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

The Supreme Court has warned that "[c]ourt orders affecting elections, *especially conflicting orders*," result in voter and candidate confusion and are inappropriate as election deadlines near. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (emphasis added). This Court allowed the administrative stay previously in effect to terminate last Tuesday, November 28. It confirmed the termination of the stay in an order issued Thursday, November 30. The electoral map for the 2024 Galveston County election is set: Map 1 is governing the election pursuant to the district court's injunction and candidates are filing to run for county commissioner under that map in reliance on this Court's November 30 order. The filing deadline is just one week from today, December 11.

The County invites this Court to contradict its order—issued just last *Thursday*—and change the election map with just *one week* left in the candidate filing period. That would directly contravene the Supreme Court's *Purcell* instructions—something this Court cannot do. The time to seek a stay has come and gone. The County failed to move for a stay with the en banc Court on November 10, notwithstanding the fact that it advised the parties that it would do so, *see* Doc. 153 at 3, and then failed again to do so when the administrative stay terminated on November 28. Instead, it waited three more days until Friday, December 1 to file its "emergency" motion—and boldly demanded that a stay issue *that same day* because

the County viewed it as the last possible day to obtain effective relief. By the County's own admission, time is up.

But even if the County had not delayed and even if issuing a stay would not cause conflicting orders from this Court, a stay is inappropriate. The County seeks to *change* existing law with en banc review in this case. That is not an appropriate circumstance in which to grant a stay—particularly on the eve of an election deadline. This is especially so here, where the County has left unchallenged the district court's factual findings related to intentional discrimination and racial gerrymandering, claims upon which Plaintiffs will quite evidently prevail on remand even if this Court overturns its *Clements* and *Campos* precedent. In findings uncontested by the County, the district court found the circumstance of this case to be "[a]typical," "stark," "jarring," "mean-spirited," "egregious," and "stunning." ROA.16029. The County's redistricting attorney consulted racial shading maps showing concentrations of Black voters and then instructed the mapdrawer with precise instructions that fragmented that population into four pieces. ROA.15953, 15956. His testimony about the use of race in the redistricting process was directly contradicted by the County's own witness. ROA.15956. The district court rejected every non-racial explanation for the map's purpose as false, *post hoc* pretext. ROA.15977-15982. The contemporary political environment in Galveston County includes a local political figure referring to a Black Republican as a "typical nig."

ROA.15988. Given the facts and circumstances of this case, a stay is wholly unwarranted.

BACKGROUND

I. Factual Background

During the 2021 redistricting process, the Commissioners Court proposed two redistricting maps to the public. ROA.15960. The first proposal, Map 1, largely maintained the same lines as the plan in place for the past decade but added the Bolivar Peninsular to Commissioner Precinct 3. Map 1 retained Precinct 3 as a majority-minority precinct, as it had been for 30 years. ROA.15911, 15988. The second proposal, Map 2, was ultimately adopted. Map 2 "has no commissioners precinct with a Black and Latino CVAP larger than 35%," and "Precinct 3 now has the smallest such population at 28%." ROA.15911-15912.

The district court carefully catalogued the events leading up to the adoption of the challenged map under the *Arlington Heights* framework for assessing intentional discrimination claims. ROA.15940-15982. In doing so, the district court rejected as false and pretextual every non-racial justification the County proffered to explain why it "summarily carved up and wiped off the map" the majority-minority precinct. ROA.15977-15982, 16028. The court credited alternative maps illustrating that the County's proffered justifications were false. ROA.15980-15981. The County Judge and commissioners who voted in favor of the enacted map *disclaimed* any

partisan motivation for the dismantling of the majority-minority precinct. ROA.15981. The County's redistricting lawyer and its demographer offered contradictory testimony about the instructions regarding the use of racial data in the process. ROA.18562-18563; 18872-18873. The redistricting lawyer, whom the district court did not credit in resolving that disputed testimony, was found by the court to have examined racial shading maps of Black population before dictating to the demographer the precise placement of lines that splintered that population among all four precincts and converted the majority-minority Precinct 3 into having the lowest minority share of any precinct. ROA.15953, 15956. The County Judge and commissioners who voted in favor of Map 2 all knew where the minority populations were concentrated and that Map 2 fragmented them, ROA.15953, and Map 2 was the "visualization of the instructions" the County Judge provided the mapdrawers, ROA.15956.

The commissioners who formed the majority in support of Map 2 testified they were fine with Map 1. *See* ROA.15958. The County has conceded that Map 1 is a compact,[1] legally compliant map that was drawn without regard to race. ROA.15912-15913.

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[1] The County's counsel conceded at oral argument that Precinct 3 under Map 1 is compact. Fifth Circuit Oral Argument at 10:10-10:40.

II. Procedural Background

On November 10, 2023, a panel of this Court affirmed the district court's injunction, holding that "[t]he district court appropriately applied precedent when it permitted the black and Hispanic populations of Galveston County to be aggregated for purposes of assessing compliance with Section 2." Doc. 118-1 at 5-6. Nevertheless, the panel requested a poll on whether to rehear the case en banc to revisit this Court's precedent holding that there is no single-race threshold requirement for vote dilution claims under Section 2 of the Voting Rights Act. The panel also extended the administrative stay that had been in effect "pending en banc poll." Doc. 122-1.

On November 28, 2023, this Court ordered rehearing en banc, with oral argument to take place in May 2024. The administrative stay previously imposed expired on that day, a fact of which the County was aware. *See* Response to Emergency Application to Vacate Stay at 12, *Petteway, et al. v. Galveston County, et al.*, No. 23A449 (U.S. Nov. 28, 2023). On November 30, 2023, this Court issued an order confirming that the stay had terminated on November 28. The next day, the district court issued an order confirming that Map 1 would be imposed for the 2024 election and scheduling a status conference for today, Monday December 4. That status conference occurred this morning and the County's counsel confirmed that Map 1 is being implemented pursuant to the district court's order without any issues

or need for further court action and the County did not request an extension of the candidate filing period from the district court. On Friday, December 1, the County filed its "emergency" motion requesting that a stay be issued that very day. This came three days after the administrative stay had terminated and three weeks after its prior motion for a stay was rendered moot by the panel's decision affirming the injunction.

ARGUMENT

I. The *Purcell* principle forecloses a stay.

Purcell considerations make a stay inappropriate in this case. The Supreme Court has held that lower courts must not issue "conflicting orders" on the eve of election deadlines. *Purcell*, 549 U.S. 4-5. The previous administrative stay in this case ended last Tuesday—a fact this Court confirmed in an order issued on Thursday. A contradictory order reimposing a stay now—just one week before the candidate filing deadline—would directly contravene the Supreme Court's admonition not to issue conflicting court orders in the midst of an election. Candidates are filing for office pursuant to the district court's injunction and imposition of Map 1, and in reliance on this Court's order confirming the termination of the stay. The County itself argued that Friday, December 1 was the final day it could obtain effective relief in its emergency stay motion. That date has passed. A decision to reverse course and

change the map at this eleventh hour would directly contravene the Supreme Court's *Purcell* jurisprudence.

Even in the absence of the prospect of late-breaking conflicting orders, *Purcell* would counsel against a stay. The district court adhered to both Supreme Court precedent in *Growe* as well as three decades of this Court's precedent. In such circumstances, a stay is inappropriate. *See Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Mem.) (Roberts, C.J., dissenting) ("I would not grant a stay. As noted, the analysis below seems correct as *Gingles* is presently applied, and in my view the District Court's analysis should therefore control the upcoming election."). Moreover, unlike when the Supreme Court ordered a stay in *Milligan*, the decision in this case is the product of a full trial on the merits, a final judgment, and an affirmance on appeal[2]—not merely a preliminary injunction. *See id.* at 881 (Kavanaugh, J., concurring) (noting case was at "preliminary juncture" and the merits were not "clearcut"). The map enjoined by the district court *upended*—rather than preserved—"the same basic districting framework that the [County] has maintained for several decades." *Id.* at 879 (Kavanaugh, J., concurring).

Under the unique circumstances of this case, *Purcell* counsels against a stay. The district court's factual findings—"to which the Court of Appeals owes deference"—reveal a starkly discriminatory redistricting process and map infused

[2] The panel's decision has been vacated in light of the of en banc rehearing.

with racial motivations. *Purcell*, 549 U.S. at 5. The County has not challenged any of the *Arlington Heights* or racial gerrymandering factual findings on appeal. Any further stay would create confusion among the public and potential candidates in light of awareness of the district court's more recent order.[3] Any further stay, imposed *at a minimum* almost a week after the prior stay terminated, risks interfering with the orderly conduct of the election.

Under *Purcell*, an eleventh-hour effort to upend decades of existing law should not be permitted to disrupt the electoral process. Yet that is exactly what the County seeks to do. And it has not acted with haste in its effort to do so. On November 10, 2023, the County's counsel indicated that they would file a motion for a stay pending en banc review, but they never did. Doc. 153 at 3 (November 10, 2023 Email). The County then claimed to have immediately known that the administrative stay expired on November 28, yet still it did nothing. *See* Response to Emergency Application to Vacate Stay at 12, *Petteway, et al. v. Galveston County, et al.*, No. 23A449 (U.S. Nov. 28, 2023). Only after plaintiffs filed a motion with the district court regarding remedial issues did the County think to move the en banc

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[3] *See, e.g.*, B, Scott McLendon*, Judge order Galveston County to use map that largely preserves Pct. 3 for 2024 elections*, The Daily News (Dec. 1, 2023), https://www.galvnews.com/news/judge-orders-galveston-county-to-use-map-that-largely-preserves-pct-3-for-2024-elections/article_31e8e37f-2fa4-545b-97af-b5ebe558124c.html

Court for a stay.[4] Although the County claimed to urgently need relief by December 1, it sat on its hands before requesting that relief. A party who delays seeking relief in an election case cannot claim it suffers irreparable harm from the injunction. The County's self-identified deadline of December 1 for effective relief has come and gone. It is too late for a new stay.

II. The County is not likely to succeed on the merits.[5]

A. The district court's factual findings evidencing intentional discrimination and racial gerrymandering make a stay unwarranted.

The district court issued 42 pages of factual findings cataloguing a redistricting process in Galveston County marked by intentional racial discrimination and racial gerrymandering and rejecting as false pretext all proffered non-racial justifications for the decimation of a 30-year-old majority-minority precinct. ROA.15940-15982. The evidence of intentional discrimination and racial gerrymandering makes a stay unjust in this case. Although the district court did not need to issue a legal conclusion on intent and racial gerrymandering considering its

[4] Even this delayed request was procedurally defective as the County failed to file a renewed request for a stay with the district court prior to requesting it of this Court. *See* Fed. R. App. P. 8.

[5] The County contends that it need only show that it has a "substantial case on the merits when a serious legal question is involved" in order to obtain a stay. Mot. at 6 (quoting *U.S. v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). But the validity of *Baylor* is doubtful following the Supreme Court's decision in *Nken v. Holder*, 556 U.S. 418 (2009).

Section 2 results ruling, the unmistakable conclusion from its factual findings is that the county's enacted plan "bears the mark of intentional discrimination," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("*LULAC*"). In *LULAC*, the Supreme Court reached that conclusion based upon the tinkering around the edges of Texas's 23rd congressional district to prevent its burgeoning Latino majority from electing their candidate of choice. *Id.* Here, a thirty-year performing majority-minority precinct was "summarily carved up and wiped off the map." ROA.16028. The district court characterized the process as "[a]typical," "mean-spirited," "egregious," "stark," "jarring," and "stunning." ROA.16028-16029. The district court found that County Judge Henry and the commissioners knew that they were dismantling the sole majority-minority precinct, ROA.15939, and that every single non-racial justification the county offered to justify that deliberate action was false and pretextual. ROA.15977-15982. Normally, courts confront the difficulty of disentangling race from partisanship in these cases. *See*, *e.g.*, *Abbott v. Perez*, 585 U.S. __, 138 S. Ct., 2305, 2330 n.25; (2018), *cf. Cooper v. Harris*, 581 U.S. 285, 308 (2017). Not here—the commissioners who voted in favor of the plan, Judge Henry, and the County's redistricting attorney, Mr. Oldham, all expressly denied a partisan motivation. ROA.15981. And the district court credited alternative maps that disproved the *post hoc* litigation explanation that a desire for a "coastal precinct" explained the dismantling of Precinct 3. ROA.15980-15981; *see Cooper*, 581 U.S.

at 317 (such alternative maps "can serve as key evidence" in "undermining a claim that an action was based on a permissible, rather than prohibited, ground"). These facts alone suffice to denial of a stay.

No authority permits the decimation of an existing majority-minority district absent some race-neutral justification (e.g., minority population decline). Indeed, the intentional destruction of a majority-minority district obviates the requirement to satisfy the first Gingles precondition by aggregating Black and Latino voters. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality) ("Our holding does not apply to cases in which there is intentional discrimination against a racial minority"); *id*. at 24 ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (holding that first Gingles precondition relaxed in cases of intentional discrimination); *Perez v. Abbott*, 253 F. Supp. 3d 864, 944 (W.D. Tex. 2017) (rejecting argument that statutory VRA intentional discrimination claims required satisfying first Gingles prong); *Comm. for a Fair & Balanced Map v. Ill. Bd. of Elections,* No. 1:11-CV-5065, 2011 WL 5185567, at *4 (N.D. Ill. Nov. 1, 2011) ("[T]he first Gingles factor is appropriately relaxed when intentional discrimination is shown . . . ."). The County has offered no truthful nonracial explanation—rational, compelling, or otherwise—nor did the

district court find one, to justify the intentional destruction of Precinct 3 as an effective majority-minority precinct. Even if this Court ultimately interprets Section 2 not to authorize discriminatory results-only claims by multi-racial plaintiff groups, no one contends that intentional discrimination or racial gerrymandering is permissible. The district court's factual findings related to the "egregious" dismantling of this existing majority-minority precinct thus make a stay of the district court's order pending further appellate review improper.

Plaintiffs cannot be made to suffer an intentionally discriminatory, racially gerrymandered map simply because the district court simultaneously adhered to this Court's settled Section 2 precedent authorizing Section 2 claims on behalf of Black and Latino voters—and also adhered to principles of constitutional avoidance to decline to issue legal conclusions to accompany its discriminatory intent and racial gerrymandering factfinding. *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (noting that "injunctive relief is available in appropriate cases to block voting laws from going into effect" and observing that "any racial discrimination in voting is too much"). Plaintiffs are likely to ultimately prevail, even if on their constitutional claims on remand, making a stay of the injunction inappropriate.

B. The County's single-race argument is unlikely to prevail.

A stay is also inappropriate on the merits of the Section 2 claim. The Supreme Court has assumed that Section 2 prohibits vote dilution on account of race

regardless of whether the class of injured persons constitutes a monolithic racial group. In *Growe v. Emison*, the Court "[a]ssum[ed]" that "it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2" and held that, in such cases, "proof of minority political cohesion is all the more essential." 507 U.S. 25, 41 (1993); *see also Bartlett*, 556 U.S. at 13-16 (applying holding to white crossover voter districts and not minority "coalition" districts). Here, the district court found that "the combined Black and Latino coalition is highly cohesive," ROA.16016, and a merits panel of this Court affirmed that conclusion. *See* Panel Opinion at 5-6, Doc. 118-1. That inquiry is consistent with *Growe* and the majority rule of the circuits. *See Pope v. Cnty. of Albany,* 687 F.3d 565, 574 n.5 (2d Cir. 2012)*; Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs,* 906 F.2d 524, 526 (11th Cir. 1990).

This accords with Section 2's text. "Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of rid[ding] the country of racial discrimination in voting" and the Supreme Court has held that "the Act should be interpreted in a manner that provides the broadest possible scope in combatting racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotation marks and citations omitted) (alteration in original). The plain text of Section 2 authorizes vote dilution claims without imposing a "single race" threshold barrier to relief. Section 2(a) of the VRA prohibits any voting standard or practice that "results

in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or language-minority status. 52 U.S.C. §§ 10301(a), 10303(f). Section 2(b) sets forth how a violation of Section 2(a) is established, and notes that it applies to "a class of citizens protected by subsection (a)." *Id*. § 10301(b). The "class of citizens" to which Section 2(b) refers is not a singular minority group, but rather those "protected by subsection (a)"—i.e., "any citizen" subject to a denial or abridgment of voting rights "on account of race or color," or language-minority status. *Id* § 10301(a), (b). Nothing in the text of Section 2 requires every member of the "class of citizens" to share the same race, as opposed to the same experience of being politically excluded "on account of race," whatever their race is. *Id*. This is the common legal usage of "class"—a reference to those suffering the same injury caused by the defendant. *See*, *e.g*., Fed. R. Civ. P. 23. And reading "class of citizens" to include a combination of protected minority citizens accords with the last antecedent grammatical rule. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

The County contends that because Section 2 refers to a "class of citizens" rather than to "classes of citizens," it imposes a single-race threshold for Section 2 claims. Mot. at 11. But Congress rejected this method of statutory interpretation in the Dictionary Act. "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to

several persons, parties, or things." 1 U.S.C. § 1. Section 2(b)'s use of "class" therefore includes "classes."

The exception to this rule—*i.e.*, when "context indicates otherwise"—is not to be readily deployed. Only where the Dictionary Act's rule would "forc[e] a square peg into a round hole" and create an "awkward" result does the general rule give way. *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 (1993). In making that determination, Congress's purpose in enacting the statute guides the analysis. *Id*. at 209-10. For example, in *Wilson v. Omaha Tribe*, the Supreme Court held that the general rule in the Dictionary Act that "person" includes artificial entities like corporations applied to a statute that placed the burden of proof on a "white person" litigating a property claim against an Indian. 442 U.S. 653, 658 (1979) (interpreting 25 U.S.C. § 194). The Court reasoned that the "protective purposes of the Acts in which § 194 . . . [was] a part" would be frustrated if it did not apply to artificial entities, and thus rejected the argument that "context indicate[d] otherwise" to make the Dictionary Act's rule inapplicable. *Id*. at 666.

If "white person" is insufficiently specific to refer to white humans as opposed to limited liability corporations, then there is no plausible argument that Congress meant to limit "members of a class of citizens" in Section 2(b) to a single racial group, when it specified no racial group at all. This is especially so considering Congress's "broad remedial purpose of rid[ding] the country of racial discrimination

in voting" through passage of the Voting Rights Act and the judiciary's obligation to interpret Section 2 "in a manner that provides the broadest possible scope in combatting racial discrimination." *Chisom*, 501 U.S. at 403 (internal quotation marks and citations omitted) (alteration in original). Interpreting Section 2 to authorize discriminatory vote dilution by a white majority against a cohesive population of Black and Latino voters self-evidently would frustrate Congress's desire to "rid[] the country of racial discrimination in voting." *Id*. One need only read the district court's factual findings in this case to see that.

Moreover, it is the contrary reading that would "forc[e] a square peg into a round hole." *Rowland*, 506 U.S. at 200. The County's interpretation assumes that every Section 2 plaintiff can—or must—be of a single race. What of a plaintiff who is half Black and half Latino? Under the "single race" theory advanced by the County, such a plaintiff would seemingly be required to satisfy the *Gingles* preconditions for a class of exclusively half Black, half Latino citizens. Or perhaps she would be forced to choose in her complaint—she can plead herself to be Black or Latina but not both—even though she is both and the totality of circumstances proves both Black and Latino voters in the jurisdiction suffer an unequal opportunity to participate in the political process on account of their race. *See* 52 U.S.C. § 10301(a). As Judge Keith explained in his dissent from the Sixth Circuit's *Nixon* decision, that circuit's reading of Section 2 is "most disturbing" in that it "requires

the adoption of some sort of racial purity test. . . . Must a community that would be considered racially both Black and Hispanic be segregated from other Black who are not Hispanic?" *Nixon v. Kent County*, 76 F.3d 1381, 1401 (6th Cir. 1996) (Keith, J., dissenting).

There is also little risk that proportionality with take hold if Section 2 is not limited to single-race plaintiff groups. First, as the Supreme Court explained last Term in *Milligan*, the first Gingles precondition and this Court's case law ward against proportionality. 599 U.S. at 1, 26-27. Second, this case illustrates that the perceived threat of proportionality is misplaced—Black and Latino voters account for 38% of Galveston County's population but the district court's injunction merely returns them to having an equal opportunity to elect their candidates of choice in 25% (rather than 0%) of the precincts—the configuration that has existed for three decades.

The County discusses at length how the failure to impose a single-race threshold requirement would merely sanction partisan political alliances untethered to racial discrimination. Mot. at 7-11. For this point, the County relies on *LULAC* and *Bartlett*, in which the Supreme Court held that Section 2 does not extend to claims in which *white voters* are aggregated with minority voters. But the County's appeal to influence and crossover districts is misplaced. In influence and crossover districts, the white voters necessary for the *Gingles* prong one numerosity

requirement have not suffered "a denial or abridgement of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a). They simply share the same *candidate choice* as minority voters who *have* suffered such a denial or abridgment. They are thus definitionally not among the "class of citizens protected by subsection (a)" and do not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). That is nothing like the Galveston County Black and Latino voters whom the district court found—based upon a searching, local appraisal—have an unequal opportunity to vote on account of race.

The County reads Section 2 of the Voting Rights Act to contain a glaring loophole in jurisdictions that have non-monolithic minority populations. Even where those minority voters have suffered a shared history of official discrimination that continues to burden their ability to participate in the political process, vote cohesively, and see their preferred candidates defeated by the strength of overwhelming white bloc voting, the County would have the Court exempt those minority voters from the protections of the Voting Rights Act. The basis for this discrimination exemption? Congress's use of the word "class" instead of "classes." Never mind that nowhere did Congress specify that "class" refers to a single racial group, and never mind that Congress codified its rejection of precisely this sort of plural/singular nitpicking of congressional intent on the opening page of the U.S.

Code. *See* 1 U.S.C. § 1. Congress did not sanction racial discrimination in voting by omitting the letters "-es" in Section 2.

II. The County fails to show that it will be irreparably injured absent a stay

The County faces no irreparable injury, or any injury, if this Court denies a stay. The district court's injunction merely returns the status quo *ex ante* districting plan that governed County elections for decades and puts in place a map that the County drew and has conceded is lawful. The County's main defense at trial was that it *would have adopted Map 1* if only Commissioner Holmes—then the only Black Commissioner—had pleaded more vociferously for it. *See, e.g.*, ROA.16149-16150, 18317, 18579-18580, 18581, 18597, 18681, 18950-18951, 19578. The County cannot claim that a map it drew, says is lawful, and contends would have been adopted possibly causes it irreparable harm.

The County contends that the imposition of Map 1 harms potential Republican candidates who live in Map 2's iteration of Precinct 3 but not Map 1's iteration of Precinct 3. Mot. at 13-14. But the same is true of potential Democratic candidates who live in Map 2's iteration of Precinct 3 but not Map 1's. In any event, the County does not explain how *it* is irreparably harmed by Map 1. Potential candidates do not have any right to a particular election map—least of all one that dilutes minority voting strength. Moreover, the district court made a factual finding—one that has not been challenged on appeal—that partisanship did not motivate the selection of

Map 2. ROA.15955. The effort by the County's litigation counsel to make partisanship the *post hoc* rationale for the plan fails.

III. Plaintiffs, not the County, will be substantially injured by a stay.

Plaintiffs will be seriously and irreparably injured by a stay. Irreparable harm occurs where it "would be difficult—if not impossible—to reverse the harm," *Hollingsworth*, *v. Perry*, 558 U.S. 183, 195 (2010), or where a party cannot "be afforded effective relief" even if she eventually prevails on the merits, *Nken*, 556 U.S. at 435. Vote dilution, no less than vote denial, causes irreparable harm because of the "strong interest" in the right to vote, *Purcell*, 549 U.S. at 4, and to do so free of discrimination. "[O]nce [an] election occurs, there can be no do-over[s] and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin [a discriminatory] law." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

If the discriminatory map enjoined by the district court is permitted to stay in effect for the 2024 election, Galveston County's minority voters—including Appellees—will for the first time in thirty years be fragmented across four precincts and have no opportunity to elect a commissioner of their choice. Because the office is for a four-year term, Appellees would not see redress until 2028—nearly the end of this decennial redistricting cycle. Commissioners—unlike members of Congress or state legislators—do not primarily spend their time voting on partisan policies.

They are the face of government for their constituents—providing direct and critical services on the front lines of their communities, including responding to hurricanes, local emergencies, and constituent needs. The County—in a "mean-spirited" and racially motivated scheme sought to "extinguish the Black and Latino communities' voice on its commissioners court." ROA.16029. The harm from this sordid affair is irreparable if the enacted map is permitted to take effect.

IV. Public Interest does not support a Stay pending appeal

The public interest does not support a stay because the public interest favors elections conducted under lawful, nondiscriminatory election maps. The County contends that "public interest similarly supports the enforcement of properly enacted laws—including redistricting plans adopted by governmental bodies within the State of Texas." Mot. at 14-15. But Map 2 was not "properly enacted." As detailed in the district court's 157-page opinion, this case was not a close call. The district court described the County's redistricting process as "[a]typical," "stark," "jarring," "mean-spirited," "egregious," and "stunning." ROA.16029. The Court should not permit the November 2024 election to take place under a map that silences the voices of 38% of the county's population.

CONCLUSION

For the foregoing reasons, the County's renewed motion for a stay pending appeal should be denied.

December 4, 2023

Respectfully submitted,

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I hereby certify that on December 4, 2023, this document was electronically served on all counsel of record via the Court's CM/ECF system.

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