

No. 23-40582

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Galveston County, Texas, the Galveston County Commissioners
Court, Galveston County Judge Mark Henry, and Galveston County
Clerk Dwight Sullivan,
Appellants

v.

Terry Petteway, Constable Derrick Rose, the Hon. Penny Pope,
Mainland Branch NAACP, Dickinson Bay Area Branch NAACP,
Galveston Branch NAACP, and Galveston LULAC Council 151, and
the United States of America,
Appellees

On appeal from the United States District Court
for the Southern District of Texas, Galveston Division
No. 3:22-CV-00057 (consolidated with Nos. 3:22-CV-00093 and 3:22-CV-00117)

**APPELLANTS' REPLY IN SUPPORT OF THEIR RENEWED
EMERGENCY MOTION TO STAY PENDING APPEAL**

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Appellants Galveston County, Texas, the Galveston County Commissioners Court, Galveston County Judge Mark Henry, and Galveston County Clerk Dwight Sullivan (collectively, the County or Appellants) file this brief reply in support of their renewed emergency request to stay the district court’s final judgment pending the outcome of this appeal, to address the following points.

No motion for stay was delayed. Petteway Appellees argue the County “failed to move for a stay on November 10.” Dkt. 162 at 1.¹ This recitation is misleading.

On November 10th at 9:56 a.m. CST, the panel issued its opinion affirming the district court’s judgment. Dkt. 118. At 1:06 p.m. CST, counsel for the County emailed Appellees to request their positions on, inter alia, an emergency motion to stay. Dkt. 153 at 3.² At 1:38 p.m. CST, the panel extended the administrative stay “pending en banc poll.” Dkt. 122. The en banc poll concluded and the panel opinion was vacated on November 28, 2023. Dkt. 137. During this time, counsel for

¹ The County moved for a stay pending appeal on October 17, 2023. Dkt. 13 at 20-21 (asking to stay the trial court “from altering the Commissioners Court boundaries during the pendency of this appeal” and in the alternative for an “administrative stay” pending consideration of the motion). The Court granted a temporary administrative stay on October 18th and deferred the opposed motion for stay pending appeal to the oral argument panel. Dkt. 28. The case was expedited, set for argument on November 7th, and the temporary stay was extended through November 10th. Dkt. 40.

² The email attached to the Petteway Appellees’ letter to the Court was printed by Mark Gaber, who is in Washington, D.C., one hour ahead. Dkt. 153 at 3.

Petteway Appellees applied to Justice Alito to vacate the stay, and oddly renewed that argument before the U.S. Supreme Court on November 28th, after this Court vacated the panel opinion and granted en banc review.

On November 30th, after Appellees' filings about the clarity of whether a stay was in place, the Court entered an order stating that the temporary administrative stay expired on November 28th. Dkt. 145. That evening, the district court entered an order implementing a different districting map. Dkt. 152. On December 1st, the County (1) confirmed with the Clerk's Office that the original motion to stay was still pending before the Court, and (2) renewed that motion on an emergency basis. Dkt. 152. Appellees cite no case law that a motion to stay was required on November 10th after the Court extended its temporary administrative stay. *See* Dkts. 162 at 1, 163 at 23.

There are no unresolved, "alternative" claims. Appellees continue to argue intentional conduct (*see* Dkt. 161 at 15-16), when the district court clearly stated that it "declin[ed] to reach" any such finding (ROA.16034 ¶ 430), none of the Appellees appealed that decision, and all of the Appellees prayed only for affirmance on appeal. Under these circumstances, there are no unresolved or alternative claims pending. *See Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 250 (5th Cir. 2010) ("this circuit follows the general rule that, in the absence of a cross-appeal, an appellate court has no jurisdiction to modify a judgment so as to enlarge the rights

of the appellee or diminish the rights of the appellant”).³ Nor must Appellants contest intent findings *when none exist*, and which Appellees have not appealed; Appellants appealed from the final judgment, which did not include a finding of intent. *See* Dkt. 162 at 2.

***Purcell* favors Appellants, not Appellees.**

Purcell supports a stay, despite Appellants’ arguments to the contrary. *See* Dkt. 162 at 6-7. Map 2, the 2021 enacted Plan, has been in place for two years—including for seventeen days of the 30-day candidate filing period. If *Purcell* instructs courts to refrain from acting too close to an election, then it supports keeping in place the districting plan that has been in effect for the past two years. Appellees are wrong when they say the County’s counsel confirmed that Map 1 is being implemented pursuant to the district court’s order *without any issues*; the conversation with the district court was whether additional orders were needed from it to implement Map 1 (of course, subject to this Court’s ruling on Appellants’ motion for stay). Specific issues about implementing a map switch more than mid-way through the candidate filing period were not reviewed. It would cause confusion to change the enacted Plan now, and *Purcell* supports a stay.

³ Petteway Appellants describe the “contemporary political environment in Galveston County” as including “a local political figure referring to a Black Republican as a ‘typical nig.’” Dkt. 162 at 2-3. They omit that the text had nothing to do with any election or local politics (the text chain discussed personal loans), that it was made by Republican Yolanda Waters (who is Black and Latina), and that Waters defended herself against claims of racism in the text message when the text message was made public.

CONCLUSION AND PRAYER

Appellants ask that the Court enter an order staying the district court's final judgment, its November 30, 2023 Order, and any further action that would alter the Galveston County Commissioners Court boundaries during the pendency of this appeal. In the alternative, Appellants ask that the Court enter an administrative stay until it can consider this filing.

Respectfully Submitted,

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/s/ Angela Olalde
Counsel for Appellants

Dated: December 5, 2023

CERTIFICATE OF SERVICE

I certify that, on December 5, 2023, this document and its attachments were electronically served on all counsel of record in this case in accordance with the Federal Rules of Appellate Procedure.

/s/ Angela Olalde
Counsel for Appellants