No. 22-807 (23A851)

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS C. ALEXANDER, ET AL.,

Appellants,

v.

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,

Appellees.

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF PANEL'S INJUNCTION FOR THE 2024 ELECTIONS

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(continued from cover page)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Appellees' Opposition only underscores that the Court should grant a stay. Appellees do not dispute that a *new* federal-court order would be required to change Enacted District 1's lines or to alter South Carolina's already-commenced election calendar for the 2024 election cycle. Indeed, the panel's existing injunction does neither of those things. Rather, the panel directed that no remedial proceeding would occur until *after* this appeal had run its course and assured the General Assembly that it would not need to submit a remedial map until 30 days after this Court's final decision.

Appellees identify no basis in law or fact to justify rewriting the panel's injunction and speeding through a remedial proceeding now, while the appeal remains pending and the election cycle is already underway. Obviously, there is no basis to deny a stay, and to leave in place the injunction prohibiting the State from using Enacted District 1 in 2024, if this Court has decided to reverse the three-judge panel's liability finding—and Appellees never suggest otherwise. But even if this Court has decided to affirm the liability finding, it is too late at this juncture for federal courts to issue, and Appellants to implement, any new remedial order for 2024—and Appellees fail to establish otherwise. Instead, Appellees misrepresent the governing case law, misstate the facts, attempt to misdirect blame to Appellants, and continue to ignore the subsequent history of cases they cite. The Court should grant a partial stay of the panel's injunction to allow South Carolina's 2024 Congressional elections to proceed under the General Assembly's Enacted Plan and election calendar.

I. A PARTIAL STAY IS WARRANTED UNDER THE *PURCELL* PRINCIPLE.

The Court should grant a stay if it has decided to reverse the panel's liability finding because any such reversal would remove the basis both for the existing injunction and for any possible remedial order in 2024. *See* Appl.1-2. But even if the Court has decided to affirm that finding, the *Purcell* principle alone warrants a stay to allow the 2024 elections to proceed under the rules adopted by the General Assembly. *See* Appl.6-11. Appellees' various arguments against a *Purcell* stay uniformly fail.

A. Appellees argue that the *Purcell* principle is "inapplicable" here, Opp.11, but they are wrong even under their own formulation of that principle. Appellees acknowledge that *Purcell* and its progeny prohibit federal courts from issuing remedial orders that "change[]" a State's election rules "in the months before an election." *Id.* That is precisely what would occur here if the federal courts issue a remedial order changing Enacted District 1's lines or altering South Carolina's election calendar for 2024: any such order would "change[]" the governing rules "in the months before an election" and even *after* the election cycle has already commenced. *Id.*; *see* Appl.6-11; *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (federal courts may not require a State to "alter [its] election rules on the eve of an election").

The panel's own January 2023 and February 2023 Orders further confirm that *Purcell* applies with full force here. The panel assured the General Assembly it would not have to submit a new map until "30 days after a final decision of the United States Supreme Court." JSA.3a. The panel has never altered that deadline, and it now falls

too close to the start of mail-in voting to allow for feasible implementation of a new map. *See* Appl.6-11. Thus, although Appellees fault the General Assembly for taking the panel at its word and not diverting scarce legislative resources from more pressing priorities to "draw[] a contingency map," Opp.12; *see id.* at 13-14, their real quarrel is with the panel. Indeed, so long as the panel's orders remain in place, the General Assembly was and is under no obligation to come up with any new map. If Appellees had wanted to ensure a new map could be approved and implemented in time for the 2024 election cycle, they should have asked the panel to modify its orders, including after the jointly requested January 1 date for a decision in this appeal came and went. But they did not do so.

It is simply too late now to seek such a change in the panel's orders or to rush through a remedial proceeding for 2024. In *Milligan*, 65 days before the onset of mail-in voting, the district court gave Alabama 14 days to submit a new Congressional map. *Singleton v. Merrill*, 582 F. Supp. 3d 924, 937 (N.D. Ala. 2022). Even with that turnaround time, this Court granted a *Purcell* stay. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Here, there is less than half as much time until the start of mail-in voting—only 32 days. And Appellees at no point even attempt to explain how 32 days *or fewer* could be enough time to draw and implement a new map when 65 days were not enough in *Milligan*.

Indeed, Appellees fail to identify even a single case denying a *Purcell* stay under remotely similar facts. *See* Opp.9, 20-21. To begin, the district court in *LULAC v. Perry*, 567 U.S. 966 (2012), *relied on* the *Purcell* principle to deny a stay. *See Perez*

v. Texas, 891 F. Supp. 2d 808 (W.D. Tex. 2012). *The plaintiff* there had sought to stay the court's interim remedial map to replace it with yet another map, arguing an intervening appellate decision made the interim map unlawful. *Id.* at 811. The district court found "taking any action at this juncture is not feasible" and thus denied the stay without addressing the merits. *Id.* This Court too then denied a stay application by the plaintiff. *LULAC*, 567 U.S. 966. These denials reinforce rather than undermine the applicability of *Purcell* here.

Appellees' other cases denying stays have no persuasive value because they considered only the traditional stay factors, without addressing the *Purcell* principle. *See Bethune-Hill v. Va. State Bd. of Elections*, 2018 WL 11393922 (E.D. Va. Aug. 30, 2018) (applying only the traditional stay standard), *stay denied*, 139 S. Ct. 914 (2019); *Harris v. McCrory*, 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016) (same), *stay denied*, 577 U.S. 1129 (2016); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 557 (E.D. Va. 2016) (adopting plan in January when defendants had represented they needed "to have a plan in place by late March"), *stay denied sub. nom. Wittman v. Personhuballah*, 577 U.S. 1125 (2016); *see also Rose v. Raffensperger*, 143 S. Ct. 58, 59 (2022) (requiring stay applicant to "advance[]" a *Purcell* argument distinct from an argument based "on the traditional stay factors and a likelihood of success on the merits" to preserve a request for a *Purcell* stay). Moreover, in two of those cases, the movants not only did not press a *Purcell* argument, but state election officials also affirmatively *opposed* a stay sought by plaintiffs or intervenors. *See* State Appellees' Resp. in Opp. to Appellants' Emergency App. for Stay, *Va. House of Delegates v.*

Bethune-Hill, 139 S. Ct. 914 (No. 18A629 (18-281));[1] Mem. in Support of Intervenor-Defs.' Motion to Suspend, Dkt. 271, *Personhuballah*, 155 F. Supp. 3d 552 (No. 3:13-cv-678), 2015 WL 13158667; Defs.' Br. in Opp., Dkt. 284, *Personhuballah*, 155 F. Supp. 3d 552 (No. 3:13-cv-678), 2015 WL 13158666. Those cases thus are doubly distinguishable from this case, where the State Election Commission Appellants have *joined* the request for a stay.

B. Appellees argue at length that Appellants have not produced enough "evidence" of disruption and voter confusion to satisfy the "heavy burden" of obtaining the "'extraordinary relief' of a stay." Opp.8, 11-16. This approach entirely inverts the *Purcell* principle, which holds that when voting is imminent, the ordinary presumption against stays flips to an all-but-conclusive presumption in favor of them. Once "the eve of an election" approaches, "lower federal courts should ordinarily not alter the election rules." *RNC*, 140 S. Ct. at 1207. And where a lower court's injunction violates that principle, the reviewing court "should correct that error" with a stay. *Id.*; *accord Milligan*, 142 S. Ct. at 882 n.3 (Kavanaugh, J., concurring). The principle *presumes* a "risk" of "voter confusion" resulting from late-breaking judicial intervention that justifies keeping the existing voting rules in place. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). And it falls on the "plaintiff" to "establish[]," among other points, that "the changes" it proposes "are at least feasible before the election

[1] Available at https://www.supremecourt.gov/DocketPDF/18/18A629/77028/20181220112142600_State%20Appellees%20Response%20to%20Application%20for%20Stay.pdf.

without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

Given this strong presumption against last-minute judicial tinkering, this Court has never conditioned *Purcell* stays on the kind of detailed evidence Appellees demand. The defendants in *Milligan* did not identify any specific record evidence of voter confusion, reduced turnout, or erosion of public confidence. *See* Emergency Appl. for Stay, *Milligan*, 142 S. Ct. 879 (No. 21A375 (21-1086)), 2022 WL 385302, at *38-39. Nor did the Court or Justice Kavanaugh cite any. *See Milligan*, 142 S. Ct. 879; *id.* at 880 (Kavanaugh, J., concurring). And this Court has granted *Purcell* stays in many other cases based simply on the common-sense presumption that changing the rules at the eleventh hour is likely to be disruptive, not on specific factual findings rooted in developed evidentiary records. *See, e.g.*, *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring); *RNC*, 140 S. Ct. at 1206-07; *Purcell*, 549 U.S. at 4-6. Appellees' demand for a mini-trial on *Purcell*, like their request for a status conference below, is simply an effort to delay disposition of this application.

Nor have Appellees presented anything close to the evidence needed to overcome the *Purcell* presumption in favor of granting a stay. Although Appellees identify cases where state legislatures have *enacted* new maps in fewer than 30 days (a requirement that would, again, contradict the panel's assurances *in this case*), Opp.11-14, they present no evidence showing it would be feasible, uncostly, and nondisruptive to *implement* a new map in time for the 2024 primary. Instead, they argue only that Appellants have not done enough to show a likelihood of disruption.

Opp.14-16. But at this late hour, it is *Appellees'* burden to show a *lack* of disruption. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

In any event, the evidence of disruption and voter confusion is undeniable. Appellees do not dispute that, without a stay, candidates and voters cannot be sure which candidates and voters live in which district. *See* Opp.20. They do not contest that it is infeasible to pass and implement a new map before the April 1 candidate-filing deadline, which is only six days away. *See id.* Nor do they dispute that moving the deadline would make compliance with UOCAVA extremely difficult, if not impossible. *See* Appl.4-5; Opp.6. Instead, their proposed solution is to require candidates to file before "electoral boundaries" are "settled," meaning candidates would have to pick a district while not knowing its location or whether they even live in it. Opp.20; *but see Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (identifying this kind of uncertainty as calling for a *Purcell* stay).[2]

Further, even forcing candidates to file for office blindly would not fix the problem that there is simply no longer enough time to implement a new map before the start of mail-in voting. Even if this Court were to issue a final decision today, the UOCAVA deadline would fall only three days after the panel's deadline for the General Assembly to submit a new map for approval. And a final decision on the

[2] Nor is it of any moment that South Carolina "has no district residency requirement for Congress," Opp. 20, since any such requirement would violate the Constitution's exclusive prescription of the qualifications for serving in Congress, *see, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and thus has not been present and operative in any other cases in which the Court has granted *Purcell* stays, *see, e.g.*, *Milligan*, 142 S. Ct. 879.

appeal (not to mention the conclusion of any remedial proceedings) may not come until after the UOCAVA deadline has already passed, or even after the June 11 primary date altogether.

An implementation process that took *days* would not be fast enough under these circumstances. But as Director Knapp testified, and Appellees fail to rebut, the process would take *months*. Appl.5-6. Appellees claim that, contrary to Director Knapp's testimony, the panel found a remedial map could be drawn without "undue difficulty." Opp.12. The panel, however, addressed only whether it was feasible to "design[]" a map that was "constitutionally compliant" on its understanding; it said nothing at all about how long it would take for the General Assembly to *agree* to such a map through a deliberate process or for the State Election Commission Appellants to *implement* such a map once finalized and approved. JSA.5a n.2. For this same reason, Appellees' recitation that it took Senate staff only days "to create their initial congressional staff plan," Opp.8, ignores both the nearly two months it took for the General Assembly to consider and enact a plan and the subsequent time for the State Election Commission Appellants to implement it, *see, e.g.*, Appl.5-6; Br.10-15.

Appellees also object that Director Knapp's discussion of the implementation timeline specifically concerned the State House map, which they assert may take longer to implement because there are more State House districts than Congressional districts. Opp.15. But Director Knapp clarified that the number of districts involved "doesn't really change the timeline." Stay.App.72. Finally, although Appellees urge this Court not to credit Director Knapp, they previously recognized the persuasive

value of his deposition testimony. Below, far from attacking it, they sought to introduce it at trial, asserting his statement that it would "take three to five months to implement and administer" "a new map" would be "relevant" to a motion for stay "pursuant to *Purcell*." Dkt.463-8.[3]

C. Next, reprising their "heads I win, tails you lose" routine, Appellees fault Appellants for not seeking a stay immediately after this Court did not issue a final decision on January 1. Opp.11-12. Appellants, however, properly deferred to this Court's right to manage its own docket. Rather than seek additional relief the moment this Court did not act on the parties' preferred timeline, Appellants sought to give this Court as much time as possible to issue a decision and have only sought a stay now that Appellants' need for one is truly inescapable. This, again, shows due regard for equity, not lack of diligence. *See Nken v. Holder*, 556 U.S. 418, 433 (2009).

In reality, it is Appellees who have shown a lack of diligence. As noted, under the panel's orders, Appellants have no duty to produce a new map until 30 days after a final decision from this Court. JSA.3a. If Appellees had wanted to ensure a new map could be implemented in time for the 2024 election cycle, they should have asked

[3] Appellees also complain that the Knapp Deposition is not part of the record on appeal. Opp.15. That is irrelevant. The facts relevant to a stay pending appeal, such as irreparable harm to the Appellees of implementing a *remedy*, are not necessarily relevant to a trial on the issue of *liability*. Thus, a defendant moving for a stay pending appeal can introduce new supporting evidence with the motion. *See* Fed. R. App. P. 8(a)(2)(B)(ii), (iii) (requiring a motion for stay pending appeal to include both supporting "affidavits or other sworn statements" *and* "relevant parts of the record"). Appellants properly introduced the Knapp Deposition in their stay reply below after Appellees claimed they had no "opportunity to question" Director Knapp about his testimony on election administration. *See* Stay.App.41 n.1.

the panel to modify that deadline. They chose not to do so.

In any event, a laches defense to a stay motion requires Appellees to show both "lack of diligence" *and* "prejudice." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002). Even if Appellants could have obtained a *Purcell* stay in January, Appellees could not possibly have suffered prejudice from Appellants waiting until March to seek one. Since no remedial proceedings are currently ongoing, *see* JSA.3a, Appellees have incurred no costs in reliance on the injunction presently being in force and, thus, suffer no prejudice from the timing of Appellants' motion.

D. Finally, Appellees simply ignore the insurmountable problems with their alternative proposed approach of ordering a special election. They make no attempt to show that such an election would even be feasible, Opp.17-18, even though that would certainly be part of the "case-specific" "balance of the equities" a court would have to consider before ordering that remedy. *North Carolina v. Covington*, 581 U.S. 486, 488–89 (2017). They do not identify any harms justifying that remedy beyond those present "in *every* racial-gerrymandering case." *Id.* at 489; *see* Opp.17-18, 21-22. And they do not address that the well-established remedy in *Purcell* cases is to "allow the election to proceed" under the State's enacted laws, not uproot the entire election. *Purcell*, 549 U.S. at 6; *see* Appl.10-11. This Court should grant a stay.

II. A PARTIAL STAY IS WARRANTED UNDER THE TRADITIONAL STANDARD.

Alternatively, Appellants are entitled to a partial stay under the traditional standard because their appeal is likely to succeed. *See* Appl. 11-13. At this point,

this Court very likely knows whether it intends to reverse or not. If it does, Appellees have offered no reason to decline to issue a stay.

All of Appellees' arguments on irreparable harm and the equities rest on their position that Enacted District 1 is unconstitutional. Appellees concede that the inability to enforce the State's duly enacted redistricting plan and election deadlines constitutes irreparable harm if the plan or deadlines are not "unlawful." Opp.21. And the only harm they claim a stay will cause themselves, voters, or the public is the harm of an unconstitutional redistricting. Opp.21-22. If this Court agrees that Enacted District 1 is constitutional, there is no legitimate reason to leave the panel's injunction in place for the 2024 election cycle.

And even if the Court does not agree, the balance of equities, and in particular the public interest in orderly elections, necessitates a stay, Appl.13, as even Appellees' own cited cases confirm in subsequent history they still ignore despite Appellants having pointed it out below. *See Covington v. North Carolina*, 2018 WL 604732, *1 (M.D.N.C. Jan. 26, 2018) (cited at Opp.20) (noting that the district court "denied Plaintiffs' request for a special election and reluctantly permitted a third biennial general election (2012, 2014, and 2016) to proceed under an unconstitutional redistricting scheme"), *stay entered for yet another cycle*, 138 S. Ct. 974 (2018); *North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (2015) (staying the *League of Women Voters* decision cited at Opp.21-22); Stay.App.48-49.

CONCLUSION

This Court should grant a partial stay of the panel's injunction to allow South

Carolina's 2024 Congressional elections to proceed under the General Assembly's Enacted Plan and election calendar.

Date: March 26, 2024

Respectfully submitted,

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