No. 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.

RESPONSE TO APPELLANTS' EMERGENCY APPLICATION FOR STAY OF PANEL'S INJUNCTION FOR THE 2024 ELECTIONS

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TO THE HONORABLE JOHN G. ROBERTS, THE CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

Elections in one of South Carolina's congressional districts using the State's unconstitutional districting plan must remain enjoined—as they have for more than a year—until the State enacts a lawful remedial plan. Contrary to Defendants' pleas, thirteen full months of legislative inaction does not warrant a stay. There is still time to draft and enact a remedial plan for the 2024 congressional elections, and Defendants' misleading and unproven assertions about election imminence and voter confusion fall well short of meeting their "heavy burden" to justify a stay. And even if an emergency exists—it does not—it is of Defendants' own making. Appellate brinkmanship should not be rewarded, either under *Purcell* or this Court's ordinary stay standard. Defendants' application for a stay should be denied.

On January 6, 2023, following trial, a three-judge panel unanimously concluded that Defendants racially gerrymandered Congressional District 1 ("CD 1") and designed it with a racially discriminatory purpose. Because this unnecessary racial sorting harmed all voters in CD 1, the panel barred future elections in that district until enactment of a constitutionally compliant map. Three weeks later, Defendants moved the panel to stay its decision pending appeal to this Court, which the panel promptly denied on February 4, 2023. The panel, however, extended the deadline for Defendants to enact a remedial plan until 30 days after a final decision from this Court. At the same time, the panel was unequivocal that the 2024 elections could not proceed using an unconstitutional map, and if the appeal process was "not completed in time for the 2024 primary and general election schedule, the election for Congressional District No. 1 should not be conducted until a remedial plan is in place." JSA.7a.

Defendants did not appeal that decision. Nor did they seek any further relief until the pending requests for a stay here and a partial stay before the panel.

The timing of Defendants' current request is unusual and undercuts their case-specific demand for emergency action. Although Defendants requested a merits decision from this Court by January 1, 2024, to allow them time to redraw district lines for the 2024 primary election, this Court never stated that it would render a decision by that timeline. Defendants offer no explanation for why they did not expeditiously request the relief they now seek last year, or even in January or February of 2024. Nor do Defendants explain why they have not yet begun legislative proceedings to enact contingent remedial plans, as other states have done in response to judicial rulings. Defendants took none of those steps. Instead, they delayed until March 7, 2024—well over a year after the panel's injunction and on the eve of deadlines they now argue are immutable—to seek a partial stay from the panel. Without waiting for the panel's decision, they moved for an emergency stay with this Court *after* the candidate qualifying deadline started.

As with other forms of equitable relief, Defendants ought not benefit from a stay when their claimed harms arise from their own unjustified delay in this case where the district court made clear over a year ago that, absent a contrary ruling from this Court, the 2024 elections could not proceed under a plan it held to be unconstitutional.

Defendants' new stay application principally relies on deposition testimony taken in 2022 focused on the administrability of implementing state legislative—not congressional—districts, and that was not part of the trial record or received into evidence. Because that stale deposition testimony has not been assessed by the panel in the first instance, this Court should not consider it. But even if the Court excuses Defendants' undue delay and considers evidence outside the trial record, it should deny Defendants' delayed stay application because Defendants have not come

close to meeting their "heavy burden" to justify the "extraordinary relief" of a stay. *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). Under traditional stay principles—which apply here because this is not an "election case[ ] whe[re] a lower court has issued an injunction of a state's election law in the period close to an election," *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring)—Defendants cannot show they are likely to succeed on the merits, irreparable harm absent a stay, or that the equities and public interest favor them, all of which they must do to obtain a stay. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

On the merits, Defendants are not likely to succeed. The panel did not commit factual or legal errors based on its detailed factual findings and application of this Court's precedent. On irreparable harm, Defendants' long delay in seeking a stay of the panel's injunction and their own failure to undertake measures to prepare and move forward with an alternative map should this Court affirm, counsel against such a finding. Regarding the equities, Defendants' claims that implementing a remedial map for the 2024 election cycle will lead to election administration issues and confusion for election officials and voters are unsubstantiated and rest on a mischaracterization of the trial record.

Defendants' reliance on the *Purcell* principle to support a stay fares no better. *First*, *Purcell* cautions against the issuance of an "injunction of a state's election law *in the period close to an election*," *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (emphasis added); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). But the panel did no such thing. It enjoined the map at issue more than a year ago after a trial—well before the start of the 2024 election cycle. Extending the doctrine to the circumstances presented here would extraordinarily expand *Purcell*. The "exigency" concerns Defendants now invoke are entirely self-

inflicted. In fact, Defendants now seek further advantage from their delay, arguing that they should be allowed to proceed with elections under an unconstitutional map *even if the Court affirms the panel's findings*. *Second*, even if this Court expands the *Purcell* principle to apply here, the principle is not absolute, and any potential concerns are premature if this Court issues a final decision soon while it remains quite feasible for Defendants to implement new districts tailored to the violations found. *Third*, a stay will not help "decide the merits in an orderly fashion." *Merrill*, 142 S. Ct. at 879. The parties briefed, argued, and submitted this matter last year, well before the window in which this Court has ever invoked *Purcell*.

If Defendants' stay is granted, South Carolina voters will be forced to vote for a second time in a district that violates the U.S. Constitution. And because Defendants have not come close to meeting their burden, this Court should deny their delayed stay application in this posture.

STATEMENT

1. On January 6, 2023, after an eight-day trial featuring 42 witnesses and 652 exhibits, the three-judge district court panel unanimously ruled that CD 1 is a racial gerrymander and designed with a discriminatory purpose. JSA.45a. The panel's finding that voters were sorted predominantly based on race, not party affiliation, rests on detailed factual findings, including on unrebutted expert testimony, using methodologies that this Court relied on in *Cooper v. Harris*, 581 U.S. 285 (2017), that account for redistricting principles like compactness, contiguity, and respect for county and political boundaries. Appellees' Br. at 39-42, *Alexander*, No. 22-807 (U.S. August 11, 2023) ("Appellees' Br."); *see also* Amicus Br. of Pol. Sci. Professors, *Alexander*, No. 22-807 (U.S. August 18, 2023). Because this unjustified racial sorting harmed all voters in CD 1, the panel permanently enjoined further elections in that district until enactment of a remedial map. JSA.47a-48a. It gave the South Carolina General Assemby the first opportunity to submit such a plan.

JSA.48a. A few weeks later, Defendants moved to stay the panel's decision pending appeal to this Court. *See* Dkt. 495.

2. On February 4, 2023, the panel denied Defendants' stay motion, concluding that Defendants met no factor warranting a stay. *See* JSA.2a. Defendants did not appeal this order. In that same order, however, the panel stated that the General Assembly could (but need not) wait until 30 days after a final decision from this Court to begin the remedial process. JSA.3a. As Defendants acknowledge, *see* Defs.' Mot. for Partial Stay of Jan. 6, 2023 Order, Stay App 3-4, the panel addressed the possibility that the appeal process would not be completed in time for a remedial map to be adopted before the 2024 primary and general elections. *See* JSA.7a. If that were to happen, the panel ordered that "the election for Congressional District No. 1 should not be conducted until a remedial plan is in place." *Id*.; *see also* Stay App. 3-4.

3. When the panel issued its February 4, 2023 Order, Defendants were on notice that if this Court did not rule on the merits by a certain time, they would still either need to comply with the panel's order that no election could take place in CD 1 or seek relief from it. That is why Defendants, joined by the Plaintiffs, asked this Court for a decision by January 1, 2024. *See* May 25 Letter; Juris. Stat. at 5; Appellants' Br. at 55.

4. In their motion filed over two months after their own purported deadline, Defendants make the improbable claim that they now need "three to five months" to implement any remedial map after an enactment process that they represent could take over a month or longer. Stay Appl. at 2.[1] In introducing this new timetable, they rely on 2022 deposition testimony that was not

[1] Defendants rely on deposition testimony that South Carolina's Election Commission Director, Mr. Howard Knapp offered more than two years ago in relation to claims challenging dozens of South Carolina's 124 state House districts. Director Knapp's testimony did not concern implementation or timing considerations to address changes to the congressional map. *See* Dkt. 451-6, 417-1, 418-1 (parties' deposition designations). Notably, the March 5, 2024 declaration

focused on the administrability of changes to the congressional map and is outside the trial record. Even if stale, largely irrelevant, and extra-record testimony dictated Defendants' true implementation timetable, they would have known when this Court did not issue a decision by January 1, 2024 that they needed to either seek a stay or begin (because they had not started) the process of creating a contingent remedial map.

5. This Court has not issued a merits decision to date. Yet Defendants waited nine weeks after January 1 and did not renew their request with the panel for a partial stay until *March 7*, only nine days before the candidate filing period started, and more than thirteen months after the panel denied their initial request for a stay. Stay App. 1. Defendants asked the panel to rule on their stay application by March 14, 2024, and Plaintiffs sped up their briefing without an order from the panel, opposing Defendants' request on March 12. Stay App. 18. Briefing was completed on March 14. Stay App. 39. Without a decision from the panel, Defendants moved this Court for a stay on March 18, after the candidate qualifying period had opened. Stay Appl.

6. As the Executive Director of the State Election Commission ("SEC") explains in his March 2024 affidavit, key election dates for the 2024 election cycle remain far off. *See* Stay App. 14-17. While prospective candidates have until April 1 to file the necessary paperwork to run in the CD 1 primary, *id*. ¶ 3, that primary is not scheduled to occur until June 11. *Id.* ¶ 9. The SEC also has until April 27 to remove candidates from the ballots. *Id.* ¶ 9. Other operative dates will not occur for more than a month. *See id*. Election databases are not due until April 25, and UOCAVA absentee ballots should be sent by April 25 (a deadline which Defendants acknowledge that County Boards have missed even in ordinary election years). Stay Appl. at 5.

Director Knapp recently submitted to the panel in support of the partial stay says nothing about Defendants needing three to five months to implement a remedial congressional map. *See generally* Stay App. 14-17.

7. Defendants now assert, based on Director Knapps's 2022 deposition testimony that has never been part of the trial record, that it will take "three to five months" to implement a new map after one is enacted. But neither the trial record nor Director Knapp's March 5, 2024 declaration suggest that the SEC cannot meet existing deadlines and obligations to implement a remedial map in short order if necessary. *See generally* Stay App. 14-17. In fact, Director Knapp testified that it was unnecessary for redistricting to "be completely done by the time candidate filing occurs." *See* Knapp Dep. at 69, Stay App. 67 .

8. For more than thirteen months, Defendants have taken no steps to create a remedial map despite having the availability and resources to do so. The General Assembly is in session now and will likely remain convened for seven more weeks, until May 9. *See* S.C. Code Laws § 2-1-180. After that, the session can be extended to consider matters of importance, by *sine die* resolution. *Id*. § 2-1-180(c). The Governor of South Carolina can also extend legislative sessions. *See* S.C. Const. Art. IV, § 19. The General Assembly routinely extends sessions. In fact, from 2002 to 2022, the General Assembly passed a *sine die* resolution every single year to consider specific matters of importance, including in 2021 for redistricting.[2] In 2022, House Defendants quickly developed and passed remedial maps to resolve Plaintiffs' claims challenging the legality of certain state House legislative districts. *See* Dkt. 266 and 266-1 (Joint Stipulation & Settlement).

[2] H. 4285, 124th Gen. Assemb. Sess. (S.C. 2021), https://www.scstatehouse.gov/sess124_2021-2022/bills/4285.htm#:~:text=The%20Sine%20Die%20adjournment%20date%20for%20the,the%20General%20Assembly%20to%20continue%20in%20session.

When, in 2023, the state legislature did not extend the session of its own accord for the first time in 20 years, Governor Henry McMaster did so to take up budgetary matters. *See* S.C. Off. Governor, *Gov. Henry McMaster Calls General Assembly Back for Extra Session*, (May 12, 2023), https://governor.sc.gov/news/2023-05/gov-henry-mcmaster-calls-generalassembly-back-extra-session.

9. The General Assembly also has the resources and technology needed to draft constitutionally compliant maps with alacrity, including access to their own experienced mapdrawers and the panel's technical advisor, the South Carolina Revenue and Fiscal Affairs Office, which routinely prepares reapportionment plans for counties, cities, and school boards across South Carolina. *See* JSA.17a., 23a. Defendants need not operate from scratch in proposing a remedial map either. The General Assembly possess multiple alternative maps that may pass constitutional muster. *See*, *e.g.*, Pls.' Post-Trial Proposed Amended Findings of Fact & Conclusions of Law, Dkt. 499 ("Pls' FoF/CoL") ¶¶ 83-119, 129-32, 670. During the 2021-2022 legislative session, for example, House Defendants developed and published a map which, unlike the enacted plan at issue, did not target Black voters for exclusion from CD 1 and did not otherwise have the infirm hallmarks of the enacted congressional plan. *Id.* ¶¶ 478-81, 85-87.

10. Defendants needed fewer than three days to create congressional redistricting plans that they published and supported during the 2021-2022 legislative session. Senate Defendants, for example, claimed that they needed only three days to create their initial congressional staff plan, which largely remained the same as the enacted plan. *Id.* ¶¶ 445, 468, 602. House Defendants likewise needed just two hours to create their congressional redistricting plan, which the House passed and sent to the Senate for consideration. *Id.* ¶ 495, 500, 531.

ARGUMENT

Defendants' belated stay application should be denied. In seeking the "extraordinary relief" of a stay, Defendants bear a "heavy burden" that they have not—and cannot—meet here. *Winston-Salem/Forsyth Cnty. Bd. of Educ*, 404 U.S. at 1231. "[T]he applicant must . . . show[] not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in

chambers)). That is so because "[a] stay is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Indeed, a "stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926).

These principles should apply with fullest force here, where Defendants seek a stay of a longstanding injunction, in a submitted case on which this Court has already heard argument, and where a stay in the ordinary course has already been denied. Indeed, requests to stay court orders enjoining the use of redistricting plans are regularly denied by this Court even absent these special circumstances weighing against Defendants' stay request here. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 914 (2019); *Harris v. McCrory*, 577 U.S. 1129 (2016); *Wittman v. Personhuballah*, 577 U.S. 1125 (2016); *see also LULAC v. Perry*, 567 U.S. 966 (2012).

To establish that a stay from this Court is warranted, Defendants must meet their burden with respect to four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434. The first two factors "are the most critical." *Id.* On direct appeals from three-judge courts, this Court "weigh[s] heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers). But here, the panel has not yet ruled on Defendants' new motion for a partial stay. It should "be the first mover: It should apply the *Nken* factors and decide the motion for a stay pending appeal." *United States v. Texas*, No. 23A814, 2024 WL 1163923, at *3 (U.S. Mar. 19,

2024) (Barrett, J., concurring). Defendants' application has not come close to meeting the relevant criteria.

I. Defendants Fail to Establish a Likelihood of Success on the Merits.

The district court panel unanimously and correctly ruled that CD 1 is a racial gerrymander. The panel based its opinion on sound factual findings—including credibility determinations—that are amply supported by a full trial record and subject to highly deferential clear-error review on appeal. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021) ("If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.") (cleaned up). *See* Appellees' Br at 42-53; *see also* Oral Arg. Tr., *Alexander*, No. 22-807 at 51:43, 1:03:44, 1:14:24, 1:46:55 (U.S. Oct. 11, 2023) ("Oral Arg. Tr.").

As Plaintiffs and the United States explained to this Court, Defendants cannot overcome the vast deference the panel's factual findings warrant on appeal. *Id.*; *see also* Br. of the United States at 12-23, No. 22-807 (July 14, 2023) ("U.S. Br."). Those factual findings rely on detailed evidence, including unrebutted expert testimony, using methods this Court endorsed in *Cooper* and account for the role that state redistricting criteria could play in explaining the line-drawing, to show that race more than party affiliation explains the sorting of voters in and out of CD 1. *See*, *e.g.*, Appellees' Br. at 14, 39-42. Nor can Defendants show legal error because the panel faithfully applied relevant and governing precedent. *See* Appellees' Br. at 53-62; *see also* U.S. Br. at 23-29. Defendants, therefore, have not made a showing—let alone the strong showing required under

Nken—that they will prevail on their appeal before this Court. For this reason alone, this Court should deny Defendants' stay application.

II. Neither *Purcell* nor the Balance of Equities Justifies A Partial Stay.

A. The *Purcell* Principle Is Inapplicable Here and It Also Cuts Against a Stay.

Unlike the panel's unanimous final ruling on the merits, this Court has typically applied the *Purcell* principle after preliminary injunctions and has exclusively done so when reviewing decisions issued in the months before an election. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1207-08 (per curium); *Benisek v. Lamone*, 585 U.S. 155 (2018). Under any reasonable conception of this principle, it does not apply here.

Even if it were applicable, the *Purcell* principle instructs "that federal district courts ordinarily should not enjoin state election laws in the period close to an election," particularly where the merits are "close" and such changes would impose "significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 879, 881 (Kavanaugh, J., concurring). But neither of those two independent circumstances necessary for a stay apply here. *First*, as explained above, Defendants fail to show any factual or legal error in the panel's January 6 post-trial opinion. *Supra* section I.

Second, the General Assembly can feasibly develop and Defendants can implement a remedial congressional plan without disturbing the June 11 primary and November 5 elections. To begin, Defendants' claims about election administrability and "disorder" are overblown, contrary to the trial record, and inconsistent with their prior request that this Court issue a decision by January 1, 2024. Defendants' claims are speculative and any harms they might suffer (should this Court ultimately rule in their favor on the merits) are self-inflicted. Defendants have known about all the facts and contingencies they cite in their application since the panel's February 4, 2023

Order—more than a year ago. *See* Stay App. 9-10. Their current representation that they are entitled to at least 30 days to develop a remedial map and then would need three to five more months to implement that map, Stay Appl. at 2, is inconsistent with their prior request that this Court issue a decision by January 1. By Defendants' account, any decision this Court issues after January 1, which is the date they requested, would leave them with inadequate time to draw and implement a new map by the start of the March 16 candidate qualifying deadline and potentially subsequent primary election-related dates. *See id.* at 9-10.

Thus, on Defendants' own asserted time frame, they were on notice by January 2 that they needed to take at least one of two actions: file a stay of the panel's January 6, 2023 Order or begin drawing a contingency map that comports with the panel's order and planning for implementation of it. They did neither. Rather, Defendants waited more than nine weeks after January 1 and less than ten days before the start of the candidate qualifying period to ask the panel for a partial stay. Stay App. 1. Then, after full briefing on their partial stay request below and before the panel issued a decision, Defendants sought a stay in this Court after the candidate-qualifying period had started. If undue delay by plaintiffs in bringing a lawsuit warrants denial of a stay, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), the same reasoning should apply to defendants who unduly delay in seeking one.

Nor is there reason to credit Defendants' new assertion that they need upwards of three to five more months to complete the remedial process *after* a map is enacted by the General Assembly. Based on the trial record evidence, the panel found that a remedial plan can be easily developed without "undue difficulty." JSA.5a. The trial record contains evidence proving that the General Assembly need not craft a remedial plan from scratch, as it can draw upon the many maps and draft maps already produced during the previous redistricting cycle. One example is the map

publicly proposed by House Defendants and voted on out of committee, which keeps Charleston County whole and otherwise does not have the features of a racial gerrymander that the panel identified. *See, e.g.*, Dkt. 499, ¶¶ 83-119, 129-32, 670. If the General Assembly declines to adopt any of those or the other maps in its possession wholesale, it can at least use one or more of them as a baseline to draw a proposed remedial map, which, depending on the circumstances, could be limited to changes between CD 1 and CD 6 and a few counties within them rather than a full redrawing of the entire congressional map. *Id.*

There also is record evidence demonstrating that Defendants can draw a map in less than 30 days. While the district court panel provided this timeframe to Defendants more than a year ago in denying their initial stay request, JSA.6a, the panel retains jurisdiction to change the remedial schedule to shorten the timeframe for considering and adopting a remedial plan to avoid any risk to upcoming election deadlines and allow for the June 11 primary to remain in place. JSA.3a. Courts routinely give legislatures significantly less time to enact lawful remedial plans, including when many more districts need to be redrawn. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, 2021-1210, 2022 WL 110261, at *28 (Ohio Jan. 12, 2022) (10 days); *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (14 days); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356-57 (N.D. Ga. 2004) (per curiam) (three-judge court) (19 days).

Defendants also offer no evidence that it *must* take them anything close to the full 30 days (or more) to develop and enact a remedial map now. Rather, South Carolina's 2021-2022 legislative session shows that Defendants have developed maps in as little as three days. Dkt. 499 ¶¶ 445, 468, 602; *see also id*. ¶¶ 478, 480. House Defendants also quickly developed remedial maps during the 2022 legislative session as part of a settlement resolving Plaintiffs' claims

challenging certain state House legislative districts as being racially discriminatory. *See* Dkt. 266 and 266-1.

Since February 2023, nothing has prevented Defendants from getting a jump start on compliance by drafting potential maps that fully remedy the violations found. The General Assembly is in session now. Defendants have the resources and technology needed to quickly draft constitutionally compliant maps, including access to their own experienced mapdrawers and to the state entity responsible for assisting and providing technical assistance on redistricting matters. *See* JSA.17a., 23a.

Notably, other states have responded to court rulings by enacting remedial plans following liability decisions that are pending resolution on appeals. In Georgia, for example, despite a pending appeal in the Eleventh Circuit, the Governor called a special session of the General Assembly beginning November 29, 2023, and the General Assembly enacted remedial plans for the state senate and house districts, which were signed into law on December 8, 2023. For all these reasons, Defendants have not shown that a "constitutionally compliant map" for CD 1 cannot be designed quickly and "without undue difficulty." JSA.5a (citing January 6 Op. at JSA.46a).

Nor is there evidence that a remedial map cannot be feasibly implemented if Defendants wait for further direction from the panel before beginning remedial proceedings. The question when assessing a stay is whether the SEC can perform its usual duties for the election, and nothing in Director Knapp's affidavit suggests otherwise. Instead, Defendants' stay motion to the panel only recites a series of speculative harms to election administration—for example, "various County Boards and counties [] *may be affected* by a remedial reapportionment map" and "any changes in the statutory election schedule *can create* logistical and feasibility challenges for the State Election Commission Defendants and the affected County Boards." Stay App.. 6-7 (emphases added). But

tellingly, nothing in Director Knapp's untested declaration offered in support of that motion supports—let alone suggests—that implementing a congressional map at this point, or soon, would be unduly burdensome or otherwise infeasible, which may explain why Defendants can only offer hypotheticals.[3] *See* Stay App. 15-16. Director Knapp's recitation of the routine administrative redistricting duties and tasks that the SEC performs for elections does not support any increased—let alone "heroic"—efforts that Defendants now claim. Stay App. 7.

Defendants' unsubstantiated and conclusory assertion that adopting a remedial plan at this stage could lead to election administrative and voter confusion and chaos for candidates fares no better. Director Knapp's declaration does not address—let alone detail—how adopting changes in parts of a congressional map would create confusion for voters or election officials. Stay App. 14-17. Neither does his deposition testimony from 2022, which focused on implementation of the state House map composed of 124 districts. *See* Stay Appl. at 11. Even if Director Knapp were testifying about the congressional maps (composed of seven districts), it is inappropriate to consider this testimony because it was not moved—let alone admitted—into evidence during trial and is therefore not part of the evidentiary record and before the panel. Fed.R.App.P. 10(a); *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 559-60 (8th Cir. 2008); *see* Dkt. 451-6, 417-1, 418-1. Indeed, the Election Commission Defendants warned against relying on Director Knapp's 2022 testimony for any claims about election administration because, among other reasons, it would be "premature" and does not account for changed conditions that could apply to

[3] Neither Plaintiffs nor the panel had the opportunity to question Director Knapp about his newly submitted declaration attached to Defendants' motion for partial stay. Because Defendants cite to his declaration to support allegations about election administration and confusion to voters and election officials on which his affidavit remains silent, Plaintiffs requested the panel hold a status conference so that they and the panel could have the opportunity to question Director Knapp about it. Dkt. 520.

future election cycles, such as 2024. Dkt. 477-1 (opposition to Knapp deposition designations) (under seal).

As for any potential hypothetical confusion to candidates, Stay App. 10-11, Defendants once again offer no evidence or testimony from or about a single candidate to support their claim. *See id.* As discussed below, they have no response to Plaintiffs' contention that candidate qualifying deadlines do not depend on having a map in place now. *Compare* Stay App. 33, *with* Stay Appl.

Other factors that may be considered in assessing a stay under *Purcell*, including the merits of the case, the harm suffered to plaintiffs absent an injunction, and whether the plaintiffs unduly delayed in bringing the lawsuit, do not support a stay under *Purcell* either. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). The merits overwhelmingly favor Plaintiffs, *see supra* Section I, and Plaintiffs will suffer irreparable harms absent an injunction, *see infra* Section II(B)(1). Nor have Plaintiffs "unduly delayed bringing the complaint to court." *Merrill*, 142 S. Ct. at 881. On the contrary, Plaintiffs amended their lawsuit to add claims challenging the congressional map six days after the General Assembly passed it on January 26, 2022. Dkt. 116-2 (second amended complaint). There was a full trial on their claims in fall 2022, the panel issued a decision in early January 2023, the parties engaged in two rounds of briefing before this Court (before and after probable jurisdiction was noted) in spring and summer 2023, and the parties sought and had oral argument early in the term on October 11, 2023.

Finally, if it were necessary, the panel has the authority to order changes to candidate qualifying periods and postpone primary and general election deadlines and dates, and to order special primary elections. *See, e.g.*, *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996); *Wallace v. House*, 377 F. Supp. 1192, 1201 (W.D. La. 1974), *aff'd in part and rev'd in part on*

other grounds, 515 F.2d 619 (5th Cir. 1975); *see also Smith v. Bd. of Supervisors of Brunswick Cnty.*, 801 F. Supp. 1513 (E.D. Va. 1992), *rev'd on other grounds,* 984 F.2d 1393 (4th Cir. 1993); *Clark v. Roemer*, 777 F. Supp. 471, 484 (M.D. La. 1991) ("Federal courts have ordered special elections to remedy violations of voting rights on many different occasions."); *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. Cnty. of Albany*, 357 F.3d 260, 262 (2d Cir. 2004); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 498 (2d Cir. 1999); *Large v. Fremont Cnty.*, No. 05-cv-0270, 2010 WL 11508507, at *15 (D. Wyo. Aug. 10, 2010); *United States v. Osceola Cnty.*, 474 F. Supp. 2d 1254, 1256 (M.D. Fla. 2006); *Williams v. City of Dall.*, 734 F. Supp. 1317, 1318, 1415 (N.D. Tex. 1990). Indeed, special elections occur regularly in South Carolina.[4] A special election for Congress, for example, was last held on June 20, 2017, in CD 5.[5] And a special election was held in CD 1 on May 5, 2013.[6]

While Defendants claim that Plaintiffs should have proposed when a special election should occur, Stay Appl. at 8-9, the burden is on the state to address the violations found and set forth a process for doing so. Plaintiffs do not bear the burden to "seek further relief" from the panel or this Court after obtaining a permanent injunction barring elections in CD 1, as the burden has now shifted to Defendants to remedy the violations found and for the panel to ensure a complete remedy. *See N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016) (citing *United States v. Virginia*, 518 U.S. 515, 547 (1996)). That is because the burden to cure

[4] *See* S.C. Election Comm'n, *News & Press Releases, Special Election Results* (last updated November 27, 2023), https://scvotes.gov/category/special-election-results/.
[5] *See* S.C. Election Comm'n, *News & Press Releases, U.S. House of Representatives District 5 Special Election* (July 16, 2017), https://scvotes.gov/u-s-house-of-representatives-district-5-special-election/.
[6] *See* S.C. Election Comm'n, *News & Press Releases, U.S. House of Representatives District 1 Special Election* (last updated May 7, 2013), https://scvotes.gov/u-s-house-of-representatives-district-1-special-election/.

constitutional harm rests with the violating entity. *See id.*; *see also Green v. New Kent Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968) ("The burden on [the entity violating the constitution] today is to come forward with a [remedial] plan that promises realistically to work and promises realistically to work now."). And "once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Courts even exercised this broad remedial authority in South Carolina elections just three redistricting cycles ago. *See, e.g.*, *Beasley*, 946 F. Supp. at 1212. But, for now, these considerations are premature and unwarranted.

Ultimately, this Court should not sanction Defendants' attempt to circumvent the legal requirements imposed by the U.S. Constitution by seeking a stay so close to upcoming deadlines even though they had more than a year to refile such a motion or appeal the denial of their initial stay motion. Defendants have not met their extraordinary burden to show that a stay should be issued that would keep an unconstitutional congressional map in place for yet another election.

B. The Balance of the Harms Weighs Against a Stay.

Equitable considerations also weigh heavily against a stay of the panel's permanent injunction. The right to vote is one of the most fundamental rights in our democratic system of government and is afforded special protection. *See Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (voting is a 'fundamental political right' that in turn protects all other rights)). Voters have the right to be free from excessive governmental race-based redistricting that lacks a compelling state interest. *See*, *e.g.*, *Bethune-Hill v. Va. State Bd. of*

Elections, 580 U.S. 178, 187 (2017). Subjecting voters to a redistricting plan that has been deemed unlawful requires an "unusual" showing that doing so is a "[n]ecessity." *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *see also Reynolds*, 377 U.S. at 585 ("[I]t would be the unusual case in which a court would be justified in not taking appropriate action to ensure that no further elections are conducted under [an] invalid plan."). Defendants make no such showing here.

1. Defendants fail to demonstrate any irreparable injury.

Defendants fail to identify evidence, much less compelling evidence, that they will suffer irreparable harm if the stay is denied. As an initial matter and as noted above, this Court ought to be skeptical of Defendants' purported injury, given Defendants' delay in filing their stay application: thirteen months after their initial request for a stay was denied and nine weeks after the requested January 1 decision deadline. *See*, *e.g.*, *Chem. Weapons Working Grp. (CWWG) v. Dep't of the Army*, 101 F.3d 1360, 1361-62 (10th Cir. 1996) (denying motion for stay pending appeal because appellants waited several weeks before seeking the stay and that delay belied their claim of "extreme urgency"); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39-40 (2d Cir. 1993) (denying motion for stay pending appeal because appellant waited five weeks after district court decision before seeking stay and thus appellant's "inexcusable delay . . . severely undermine[d] [its] argument that absent a stay irreparable harm would result"). Moreover, as discussed above, Defendants' representations to this Court cast further doubt on any injury. According to those, even if this Court affirmed the panel's post-trial order by January 1, they would not have been able to implement a remedial map until late April 2024 at the earliest. *Compare* Appellants' Br. at 55 (requesting a decision by January 1, 2024) *with* Stay Appl. at 2 (claiming they would need another

three to five months to implement a map after the General Assembly took 30 days or more to create and vote on a proposed remedial map after a January 1 decision).

Even so, the passage of the candidate filing deadline is not a bar to moving forward with a remedial map because the location of congressional district lines within a state does not impact a candidate's qualification for U.S. House of Representatives. Under Article I, Section 2 of the U.S. Constitution, a candidate for U.S. Congress must be at least 25 years old, must have been a citizen of the United States for at least seven years, and must, "*when elected*, be an Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2 (emphasis added). South Carolina has no district residency requirement for Congress. *See generally Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000) (striking down application of California rule requiring residency be shown upon the filing of nomination papers). Because a candidate need only be a resident of South Carolina when elected, electoral boundaries need not be settled before candidate filings for Congress.

Even if the candidate qualifying deadline must be moved, that would entail only a minor change in election administration, and Defendants would still have ample opportunity to draw a remedial plan. JSA.7a. Mere inconvenience to election administrators and a few candidates does not justify the extraordinary act of staying the lower court's injunction, which protects voters from an unconstitutional racial gerrymander. *See Covington v. North Carolina*, No. 1:15-CV-399, 2018 WL 604732, at *6 (M.D.N.C. Jan. 26, 2018) (denying a stay despite the "inconvenience" to "legislators having to adjust their personal, legislative, or campaign schedules"), *stay denied in relevant part*, 138 S. Ct. 974 (2018).

Courts have repeatedly held that potential administrative inconveniences for election officials are not irreparable harm and cannot overcome the significant harm that the panel found Plaintiffs would suffer under the plan at issue. *See*, *e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*,

No. 3:14-CV-852, 2018 WL 11393922, at *1 (E.D. Va. Aug. 30, 2018) ("[T]he risk that a stay wholly would deprive the plaintiffs of a remedy significantly outweighs the inconvenience and any other detriments that the intervenors may experience in re-drawing the districts."); *cf. Abbott v. Perez*, 585 U.S. 579, 602-03 (2018) (holding that enjoining enforcement of enacted statute "would seriously and irreparably harm the State" *unless the statute is* unlawful). The reality is that "legislative districts change frequently," including "after every decennial census." *Bethune-Hill*, 139 S. Ct. at 1955. In any event, Defendants' argument ignores the panel's express finding that a remedial congressional plan can be implemented before the 2024 elections. JSA.7a.

2. Plaintiffs and other voters will be irreparably harmed by a partial stay.

The irreparable harm to Plaintiffs and all voters in CD 1 from conducting an election using an illegal districting map far outweighs any administrative burden on Defendants. A district constructed for unjustified and predominately racial reasons "bears an uncomfortable resemblance to political apartheid" and amounts to use of "racial stereotypes." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Residing in such districts is a palpable and ongoing injury to Plaintiffs and *every* voter who resides in the challenged district.

It is a fundamental principle of voting rights jurisprudence that Plaintiffs and other voters in the challenged district will suffer irreparable injury if they are forced to continue to reside in and cast ballots in an unconstitutional district. *See*, *e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247-48 (4th Cir. 2014) (collecting cases). Voters subjected to a racially discriminatory map are suffering an ongoing constitutional violation and a violation of their fundamental rights for which there is no adequate remedy. "[O]nce the election occurs, there can be no do-over and no redress" for citizens whose voting rights were violated. *Id.* at 247. Accordingly, "[c]ourts routinely deem restrictions on fundamental voting rights irreparable

injury." *Id*. (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)).

3. A partial stay is against the public interest.

The public interest lies in upholding fundamental voting rights. *League of Women Voters of N.C.*, 769 F.3d at 247; *Husted*, 697 F.3d at 436-37. Moreover, when a legislature impermissibly uses race to draw congressional districts, the "the public interest aligns with the Plaintiffs' . . . interests, and thus militates against staying implementation of a remedy." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016). That follows because the harms are necessarily "harms to every voter" in the racially gerrymandered district, all of whom have been duly injured by improper racial sorting. *Id.* at 560-61. The court in *Harris v. McCrory* denied a similar stay motion upon finding that, *inter alia*, the harms to the state are public harms, and "[t]he public has an interest in having congressional representatives elected in accordance with the Constitution." No. 1:13-cv-949, 2016 WL 6920368, at *2, (M.D.N.C. Feb. 9, 2016). Moreover, "[i]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (second alteration in original) (quoting *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011)).

The public interest would therefore be served by enjoining implementation of a congressional districting scheme that violates the U.S. Constitution.

CONCLUSION

Defendants' application for a stay should be denied.

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Respectfully submitted,

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