IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

THOMAS C. ALEXANDER, *et al.*,

Defendants.

Case No. 3:21-cv-03302-MGL-TJH-RMG

DEFENDANTS' MOTION FOR A PARTIAL STAY OF THE COURT'S JANUARY 6, 2023 ORDER FOR THE 2024 ELECTION CYCLE

Defendants—the Senate Defendants, House Defendants, and State Election Commission Defendants—respectfully move this Court for a partial stay of its January 6, 2023 Order ("January 6 Order") (Dkt. 493), to the extent that Order enjoins Defendants from carrying out primary and general elections in Enacted Congressional District 1 in 2024. This Court has already clarified that it "has no intention to proceed with consideration and adoption of a remedial plan during the pendency of the appeal before the United States Supreme Court." Feb. 4, 2023 Order at 2 ("February 4 Order") (Dkt. 501). The parties have moved expeditiously with the appeal and jointly requested that the Supreme Court issue a decision by January 1, 2024. *See, e.g.*, Juris. Stat. at 5, *Alexander v. S.C. State Conf. of the NAACP*, No. 22-807 (U.S. Feb. 17, 2023); Letter Re: Argument and Briefing Schedule, *Alexander*, No. 22-807 (U.S. May 25, 2023) ("May 25 Letter"). The Supreme Court held oral argument on October 11, 2023, but has not yet issued a decision or indicated a date by which it may do so.

The commencement of South Carolina's 2024 primary election cycle for all offices other than president, including Congress, is imminent. The period for candidates to file a Statement of Intention of Candidacy opens on March 16 and closes on April 1. *See* Knapp Aff. ¶ 3 (Exhibit A); S.C. Election Comm'n, *2024 Election Calendar*, https://scvotes.gov/wp-

content/uploads/2023/12/2024-Election-Calendar-scVOTES-2023-12-4-updated.pdf (last visited Mar. 5, 2024). The Election Commission Defendants, through the respective County Boards of Voter Registration and Elections ("County Boards"), must mail absentee ballots to military and overseas voters by April 27 to comply with federal law, including the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301, *et seq.* *See* Knapp Aff. ¶¶ 8-9; *2024 Election Calendar*, *supra*. The primary election is set for June 11. *See* Knapp Aff. ¶ 9; *2024 Election Calendar*, *supra*. And at least five major party candidates already have declared their candidacies in Enacted District 1 and neighboring Enacted District 6.[1]

At this juncture, the only appropriate course is to grant a partial stay and allow the 2024 elections to proceed in Enacted District 1, regardless of the Court's view of the merits of Defendants' appeal. *See Purcell v. Gonzales*, 549 U.S. 1 (2006); *Merrill v. Milligan*, 142 S. Ct. 879 (2022). The absentee voting period for the upcoming primary election begins in only 51 days—which is even *shorter* than the 65 days at issue in *Milligan*, a case in which the Supreme Court granted a stay due to the imminency of a primary election, permitted the 2022 Alabama Congressional elections to proceed under the challenged plan, and eventually *affirmed* the liability finding. *See Milligan*, 142 S. Ct. 879; *Allen v. Milligan*, 599 U.S. 1 (2023). Indeed, any other approach—such as postponing elections, *see* February 4 Order at 5—is unworkable and unduly burdensome on the State, would "result in voter confusion and consequent incentive to remain away from the polls," would undermine "[c]onfidence in the integrity of [South Carolina's] electoral process," and would all be for naught if the Supreme Court reverses this

[1] *See* Mace for Congress, https://nancymace.org/ (last visited Mar. 5, 2024); Templeton for Congress, https://templetonforcongress.com/ (last visited Mar. 5, 2024); Deford for Congress, https://www.defordforcongress.com/ (last visited Mar. 5, 2024); Michael B. Moore for U.S. Congress, https://www.michaelbmoore.com/ (last visited Mar. 5, 2024); Clyburn for Congress, https://clyburnforcongress.com/ (last visited Mar. 5, 2024).

Court's order. *Purcell*, 549 U.S. at 4-5. The Court should grant a partial stay and allow the 2024 elections to proceed in Enacted District 1 as scheduled.

To ensure a reasonable opportunity to seek any appropriate relief in the Supreme Court if necessary, Defendants respectfully request a ruling on this motion by March 14, 2024. Undersigned counsel for Defendants has consulted with counsel for Plaintiffs, *see* Loc. Civ. R. 7.02 (D.S.C.), who indicate that Plaintiffs oppose the requested relief.

BACKGROUND

On January 6, 2023, this Court ruled that Enacted District 1 violates the Fourteenth Amendment and "enjoined" elections in that District "until further order of this Court." *See* January 6 Order at 32. The Court also directed the General Assembly to submit a remedial map to the Court by March 31, 2023. *See id.* After filing a notice of appeal, Defendants moved to stay the January 6 Order pending appeal, arguing among other things that they would suffer irreparable harm from having to implement a remedial map before the Supreme Court had a chance to rule on Enacted District 1's constitutionality. Dkt. 495.

The Court denied Defendants' request for a stay but modified its January 6 Order in the February 4 Order. The Court clarified it "has no intention to proceed with consideration and adoption of a remedial plan during the pendency of any appeal before the United States Supreme Court." February 4 Order at 2. Accordingly, it modified the date by which the General Assembly must submit a remedial plan to "30 days after a final decision of the United States Supreme Court." *Id.* at 3. The Court further expressed "every hope and expectation that the appeal process can be completed and remedial plan adopted before the 2024 primary and general elections," but suggested that "on the outside chance the process is not completed in time for the 2024 primary and election schedule, the election for Congressional District No. 1 should not be

conducted until a remedial plan is in place." *Id.* at 5; *see id.* at 6 (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)).

The parties jointly asked the Supreme Court to resolve the appeal by January 1, 2024. *See* May 25 Letter. The Supreme Court, however, has not issued a decision or indicated the date by which it may do so. Plaintiffs have not asked this Court for further relief, such as a change to South Carolina's election calendar for Enacted District 1 or any other office. If the Supreme Court follows its historical practice, it will issue all decisions in cases argued this Term by the end of June 2024.

South Carolina's primary elections for all offices other than president are now imminent, *see* Knapp Aff. ¶¶ 3, 9; *2024 Election Calendar*, *supra*, and candidates already have publicly declared their candidacies in Enacted District 1 and neighboring Enacted District 6, *supra* at 2 n.1. Those candidacies—and the voters who support them—necessarily would be affected by any delay in the primary election schedule or change in the lines of Enacted Districts 1 and 6.

LEGAL STANDARD

Federal courts typically apply a four-part standard in determining whether to grant a stay pending appeal: "(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 v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). When, as here, a government is one of the parties, the third and fourth factors "merge." *Id.* at 435.

Under the *Purcell* principle, however, when "a lower court" alters "a state's election law in the period close to an election," the "traditional test for a stay does not apply." *Milligan*, 142

S. Ct. at 880 (Kavanaugh, J., concurring). To avoid "disruption" and "unanticipated and unfair consequences for candidates, political parties, and voters," *id.* at 881, the public interest in orderly elections alone justifies staying the injunction, regardless of the Court's "opinion [] on the correct disposition" of the State's "appeals," *Purcell*, 549 U.S. at 5.

ARGUMENT

The Court should grant a partial stay of the January 6 Order under the *Purcell* principle given the imminence of the primary election. Alternatively, the Court should grant a partial stay under the traditional standard because Defendants are likely to prevail on appeal.

I. A Partial Stay Is Warranted Under the *Purcell* Principle.

Purcell mandates a partial stay to allow the 2024 elections to proceed in Enacted District 1. Indeed, failing to grant a stay would impose extraordinary disruption on the State and its voters: it would require the State to make last-minute changes to its election rules either by rushing through a new districting map or upsetting the carefully calibrated primary date and attendant deadlines—or both. The imperative to avoid such disruption, and the attendant voter confusion, erosion of voter confidence, and disincentivizing of voter turnout, alone warrants a stay. *See, e.g.*, *Purcell*, 549 U.S. at 4-5; *Milligan*, 142 S. Ct. at 882 (Kavanaugh, J., concurring).

This Court has stated it "has no intention to proceed with consideration and adoption of a remedial plan during the pendency of any appeal before the United States Supreme Court." February 4 Order at 2. That decision not to proceed to a remedial phase during the pendency of Defendants' appeal is both sensible and correct as a matter of law. *See, e.g.*, *Milligan*, 142 S. Ct. 879 (granting stay of injunctions "pending further order of the Court" while expressing no opinion on the merits); *id.* at 882 (Kavanaugh, J., concurring); *Milligan*, 599 U.S. 1 (lifting earlier stay and affirming liability finding); *Benisek v. Lamone*, 585 U.S. 155, 157-58, 160 (2018) (holding that, even assuming challenged plan was unconstitutional, the district court

properly refused to enjoin its use because "the timely completion of a new districting scheme in advance of the [next] election season" was not feasible); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (commending district court for "wisely … declining to stay the impending primary election" using plan it had found unconstitutional).

Moreover, even if the Supreme Court were to issue a decision affirming this Court's order during its next public session on March 15[2]—or, obviously, even later in its Term, such as *after* the June 11 primary date—there *still* would not be enough time to adopt a remedial plan for the 2024 elections. After all, the General Assembly would at minimum remain entitled to at least 30 days to enact a remedial plan in the first instance, *see* February 4 Order at 3; any remedial proceedings in this Court would take significant time; and the primary election could not be conducted until *after* candidate filing and the mailing of absentee ballots. At this date, there is simply no realistic way that a remedial process could be completed in time for the 2024 election cycle, let alone by the March 16 opening of candidate filing, the April 27 commencement of absentee voting, or the June 11 primary election. *See* Knapp Aff. ¶¶ 3, 9; *2024 Election Calendar*, *supra*.

Indeed, the State Election Commission Defendants are required to implement the procedures, tasks, and timelines established in state law as well as the deadlines and procedures necessary to comply with UOCAVA and the National Voter Registration Act (NVRA), 52 U.S.C. § 20501, *et seq.*, for *both* the primary election and the general election. Knapp Aff. ¶¶ 2, 8. In conjunction with the various County Boards and counties that may be affected by a remedial reapportionment map, these tasks include, but are not limited to, identifying and

[2] *See* Supreme Court of the U.S., *Supreme Court Calendar: October Term 2023*, https://www.supremecourt.gov/oral_arguments/2023TermCourtCalendar.pdf (last visited Mar. 5, 2024).

reassigning voters to the proper Congressional district, opening candidate filing, conducting primary elections, including runoffs as necessary, and conducting the general election. Each of the election cycles requires the State Election Commission and affected County Boards to comply with the requirements (including mailing ballots not less than 45 days prior to the election) of UOCAVA. *Id.* ¶ 8. Any change to statutorily established election timelines and procedures can lead to voter and election administration confusion. Additionally, any changes in the statutory election schedule can create logistical and feasibility challenges for the State Election Commission Defendants and the affected County Boards. *See id.* ¶ 6.

To say that implementing a new plan for the 2024 elections "would require heroic efforts by [] state and local authorities" would be a serious understatement. *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). And denying a stay would also be "a prescription for chaos for candidates," "voters," and others. *Id.* At least five major party candidates have already declared their candidacy and begun campaigning in Districts 1 and 6. *Supra* at 2 n.1. These candidates must file their candidacies by April 1, but without a stay, they "cannot be sure what district they need to file for." *Id.* Indeed, they and their supporters "do not even know which district they live in" and who their opponents are. *Id.*

On the other side of the ledger, Plaintiffs (who have sought no further relief from this Court) have even *less* of an interest in denial of a stay than a prevailing plaintiff in a typical *Purcell* case. The Court's finding of a constitutional violation in Enacted District 1 is, of course, not enough to defeat a stay of an injunction under *Purcell*. *See* 549 U.S. at 5-6. Moreover, in this case, refusing a stay would not even provide Plaintiffs a durable form of relief: the Supreme Court is already resolving this case on the merits, so this Court's injunction may be reversed at any time. And even if the Supreme Court affirms, it may very well issue remand instructions

that supersede the January 6 Order as it applies to the 2024 election cycle. Thus, even if Plaintiffs' challenge to Enacted District 1 is meritorious, denying a stay is no guarantee of vindicating that challenge and providing them a remedy in time for 2024. All it is sure to establish is confusion and uncertainty over this year's elections. "[D]ue regard for the public interest in orderly elections" requires entering a partial stay for 2024. *Benisek*, 585 U.S. at 160.

Nor is it possible to avoid these problems and enter an effective remedy for 2024 by postponing the primary election, as this Court previously suggested as a possibility. *See* February 4 Order at 5. For the reasons explained above, such a postponement would not permit sufficient time to complete and implement any remedial plan for the 2024 elections in any event. Moreover, this Court has no authority to order a new date for the 2024 primary election. *See, e.g.*, *North Carolina v. Covington*, 581 U.S. 486, 488 (2017). And even if it did as a general matter, the *Purcell* principle would bar doing so at this point in time. Instead, "[g]iven the imminence of the election" at issue, the only proper course is to grant the partial stay and "allow the election to proceed without an injunction." *Purcell*, 549 U.S. at 6; *see also Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (collecting cases); *Benisek*, 585 U.S. at 160; *Reynolds*, 377 U.S. at 586.

First, this Court lacks any remedial authority to postpone the 2024 primary election dates and deadlines. At the threshold, this Court lacks authority to order postponement of the June 11 primary election for all offices—including the State Senate, State House, and Congressional districts that could not be affected by a remedial plan. Such a ballot-wide postponement would not "fit[]" the "remedy" to "the legal violation[] this Court has identified" in District 1. *Covington*, 581 U.S. at 488.

Furthermore, the Court lacks authority to postpone the primary election even in Enacted District 1 and any other district, such as District 6, that may be affected by a remedial plan that may or may not become necessary after the Supreme Court decides the appeal. The Supreme Court has not "addressed whether … a special election" can *ever* "be a proper remedy for a racial gerrymander." *Id.* It has made clear, however, that such a remedy could only ever be appropriate if "the severity and nature of the particular constitutional violation" established that the plaintiffs had special interests beyond those present "in *every* racial-gerrymandering case." *Id.* at 488-89. No such circumstances are present here. This Court has described the basis for a possible postponement of the primary election as its finding that Plaintiffs' "fundamental voting rights have been violated," February 4 Order at 5-6, but that is the *same* interest present "in *every* racial-gerrymandering case," *Covington*, 581 U.S. at 488-89.

Second, even if the Court had authority to postpone a primary election as a hypothetical matter, *Purcell* forecloses it from doing so in this case. The most the Court could even arguably do is order postponement of primary elections in a subset of Enacted Congressional Districts, such as Districts 1 and 6, that may eventually be affected by a remedial plan that may not even prove necessary after the appeal. *See id.* at 488. In other words, the outer limit of the Court's remedy would be to require the State to hold a *second* non-presidential primary election at some later date to be determined after the Supreme Court rules and after the conclusion of any remedial proceedings. *See id.*

Postponing any primary election—particularly at this late juncture and when Defendants' appeal remains pending—is a recipe for "voter confusion and consequent incentive to remain away from the polls" and an erosion in "[c]onfidence in the integrity of [South Carolina's] electoral process." *Purcell*, 549 U.S. at 4-5. After all, the imminent primary election

deadlines already have been publicized, *see 2024 Election Calendar*, *supra*, and candidates and voters have already begun campaigning and supporting their candidates of choice in reliance on those deadlines, *see supra* at 2 n.1. Moreover, until the Supreme Court issues a ruling—which could occur any time from March 15 to the end of June—this Court cannot even designate a new primary date, leaving the State's electoral process in limbo. And the duplicative costs to the State and South Carolina voters of running a *third* primary election cycle this year would be substantial. All of this voter confusion, erosion of confidence, and imposition of costs on the public fisc and State officials would be unrecoverable and for naught if the Supreme Court ultimately reverses this Court's injunction. Postponing any primary election now, including for the subset of voters in potentially affected Congressional districts, would inflict precisely the kind of last-minute disruption to the State's voters and election machinery that *Purcell* forbids. *See Purcell*, 549 U.S. at 6; *see also Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (collecting cases); *Benisek*, 585 U.S. at 160; *Reynolds*, 377 U.S. at 586.

The Fourth Circuit panel majority's decision in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, which the Court cited in its February 4 Order, *see* February 4 Order at 6, actually confirms this result. That case did not even involve a claim against a redistricting plan, let alone uphold postponement of an election or judicial imposition of a remedial plan on a compressed timeline. *See* 769 F.3d at 247. Instead, the panel majority affirmed a preliminary injunction against various North Carolina voting rules in the lead-up to the 2014 election on the view that such an injunction was necessary to prevent "irreparable injury" to "fundamental voting rights." *Id.* But just one week later, the Supreme Court *stayed that decision* and allowed North Carolina to implement the challenged rules in the imminent election, *see North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (Oct. 8, 2014),

even though it eventually *denied* review of the merits and left the liability finding in place, *see North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (Apr. 6, 2015). *League of Women Voters* thus underscores that the *Purcell* principle remains applicable, alive, and well in this case—*regardless* of the Court's view of the merits. The Court should grant a partial stay.

II. A Partial Stay Is Warranted Under the Traditional Standard.

Alternatively, Defendants are entitled to a partial stay under the traditional standard.

First, for the reasons explained in their briefs and oral argument at the Supreme Court, Defendants are likely to show on appeal that this Court erred in concluding that Enacted District 1 runs afoul of the Fourteenth Amendment. *See* Br. of Appellants, *Alexander*, No. 22-807 (U.S. July 7, 2023); Reply Br. of Appellants, *Alexander*, No. 22-807 (Sept. 11, 2023); Tr. of Oral Argument, *Alexander*, No. 22-807 (U.S. Oct. 11, 2023).[3]

Second, absent a stay, Defendants will suffer irreparable harm. South Carolina's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 585 U.S. 579, 603 n.17 (2018); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury"). Moreover, rescheduling the primary for Districts 1 and 6 (and potentially other districts) would impose compliance costs on the State and its taxpayers that the State cannot later "recover[]." *Ala. Ass'n of Realtors v. Dep't of HHS*, 141 S. Ct. 2485, 2489 (2021).

Finally, the balance of interests supports a stay. Since "reapportionment is primarily the duty and responsibility of the State through its legislature," enforcing a constitutionally valid

[3] Because the State Election Commission Defendants have consistently taken no position on the merits of the litigation, they do not join this paragraph. However, they do believe that their co-defendants have presented serious issues that may very well be meritorious and need to be resolved prior to the conduct of any other Congressional election in South Carolina. The

reapportionment plan is in the public interest. *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Further, as discussed in Part I, regardless of the merits of Defendants' appeal, "due regard for the public interest in orderly elections" weighs decisively against redrawing District 1 or rescheduling its primary at this late hour. *Benisek*, 585 U.S. at 160. In contrast, Plaintiffs have no interest in denying a stay, since enforcement of Enacted District 1 likely does not in fact violate their constitutional rights.

CONCLUSION

The Court should partially stay its January 6 Order and allow the 2024 elections to be conducted in Enacted District 1.

March 7, 2024
Columbia, South Carolina

Respectfully submitted,

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(continued…)
State Election Commission Defendants join in the remainder of this motion because they strongly believe a stay should be granted for all of the other reasons discussed.

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