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

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

Plaintiffs' Opposition (Dkt. 521) ("Opp.") only confirms that the Court should grant Defendants' Motion For a Partial Stay (Dkt. 519) ("Mot."). On the *Purcell* principle, Plaintiffs take a "heads I win, tails you lose" approach, arguing that Defendants waited until *too late* to file the Motion but that it is somehow *too early* to grant a stay. They therefore ask the Court for an open-ended delay of South Carolina's Congressional primary elections, with no guarantee that an orderly, on-time primary can be conducted absent a stay. On the traditional stay standard, Plaintiffs' arguments all rest on the false premise that Defendants are not likely to prevail on appeal. All along the way, Plaintiffs ignore the operative terms of the Court's February 4 Order, the controlling Supreme Court precedents, and even the subsequent history of cases they cite. The Court should grant a partial stay and allow the 2024 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 partial stay under *Purcell* due to the imminence of the 2024 election cycle alone. *See* Mot. 5-11.

Plaintiffs' principal response is to ask the Court for open-ended delay and a status conference—but they neither offer specifics as to *how* the Court actually should proceed nor

come to terms with the untenable consequences of their request. Instead, Plaintiffs want the Court to halt South Carolina's Congressional primary elections and to "delay … the filing deadline" for Congressional candidates, so that they can later ask the Court to rush to impose a remedial plan in the middle of an election year on the off chance the Supreme Court affirms the liability finding "in the next month." Opp. 12, 15. Plaintiffs baldly assert that this course of action will leave open the possibility of imposing a remedial plan in time for the June 11 primary election. *See id.* at 9.

This assertion fails on multiple fronts. In the first place, at this juncture, any delay in the State's candidate-filing deadline alone violates *Purcell* and warrants a stay. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006); *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). Moreover, Plaintiffs gloss over the fact that this Court granted the General Assembly until "30 days after a final decision of the United States Supreme Court" to propose a remedial plan. Dkt. 501 at 3 (February 4 Order). Instead, their assertion contemplates that the Court will renege on this assurance, penalize the General Assembly for taking the Court at its word, and require the General Assembly to propose a remedial plan on a much shorter timeline. *See* Opp. 12. Indeed, Plaintiffs do not *attempt* to argue that it would be feasible to conduct the 2024 primary on time under a remedial plan if Defendants submit a remedial proposal on the 30-day deadline. *See* Opp. 8-11 (arguing instead that Defendants should submit a map sooner).

In all events, Plaintiffs offer no supporting facts, specifics, or explanation for their assertion that a remedial map could be imposed for the June 11 primary election even if the Supreme Court affirms the liability finding "in the next month" and the Court reneges on its assurance to the General Assembly. *Id.* Nor could they, had they tried. To point out just one failing, Plaintiffs do not account for the fact that candidate declarations must be finalized, and

absentee ballots must be prepared, reviewed, and printed, well in advance of the April 27 deadline for mailing ballots to military and other overseas voters under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). *See id.*; Knapp Aff. ¶ 6 (Dkt. 519-1).[1]

Plaintiffs, moreover, do not own up to what happens under their proposed open-ended delay if the Supreme Court does *not* affirm the liability finding "in the next month." *Id.* Of course, all of the disruption, voter confusion, and interference with the State's election machinery occasioned by Plaintiffs' proposal will be for naught if the Supreme Court reverses. Plaintiffs likewise do not suggest that a remedial map could be adopted if any Supreme Court affirmance comes later than "in the next month," *id.*, such as in May or June, as is eminently plausible. And Plaintiffs make no argument that denying a stay here would somehow be less disruptive than in *Milligan*, where the Supreme Court granted a stay even though there was substantially more time before the beginning of absentee voting than is present in this case. *See* 142 S. Ct. 879 (65 days before absentee voting); Mot. 2. Plaintiffs' Opposition thus proves that this case is a textbook example of precisely when and why a *Purcell* stay is warranted. *See* Mot. 5-11.

Plaintiffs' various other arguments against a *Purcell* stay uniformly fail.

First, Plaintiffs rehash their arguments on the merits, *see* Opp. 7-8, but a stay is warranted under *Purcell* even if Defendants are not likely to prevail on appeal, *see Milligan*, 142 S. Ct. at 882 (Kavanaugh, J., concurring); *Benisek v. Lamone*, 585 U.S. 155, 158, 160 (2018); *Purcell*, 549 U.S. at 5-6; Mot. 5-11.

[1] Plaintiffs' contention that they have not "had the opportunity to question" Defendant Knapp about the election administration tasks and deadlines described in his affidavit, *see* Opp. 11 n.6, is false. Plaintiffs deposed Defendant Knapp regarding those very topics earlier in the case. *See* Apr. 19, 2022 Deposition of Howard Knapp 21-28, 51-52, 55-93 (discussing UOCAVA deadlines, implementation of Congressional redistricting maps, processing of candidate filings, ballot preparation, and associated "time crunch"); *id.* at 93-96 (discussing costs

Second, Plaintiffs argue that *Purcell* is not triggered because Defendants should adopt a new map pending appeal or at least in less than 30 days after the Supreme Court rules. *See* Opp. 8-11. But regardless of what other courts have done in other cases, *see id.*, *this Court assured* the General Assembly *in this case* that it would have "30 days after a final decision of the United States Supreme Court" to submit a proposed remedial map. February 4 Order at 3. If it is infeasible or too disruptive to conduct the 2024 primary in accordance with the Court's assurance, Plaintiffs' issue is with this Court's February 4 Order, not Defendants' conduct. Yet Plaintiffs have not sought reconsideration or modification of the February 4 Order.

Nor could they. Even if this Court were to *sua sponte* order, contrary to its earlier assurances, Defendants to submit a new map right away, the start of absentee voting would still be too imminent to adopt a remedial map. As Plaintiffs note, in *Milligan*, 65 days before the onset of mail-in voting, the district court gave Alabama 14 days to submit a new Congressional map. *See* Opp. 8; *Singleton v. Merrill*, 582 F. Supp. 3d 924, 937 (N.D. Ala. 2022). But Plaintiffs nowhere mention that the Supreme Court *stayed* that order under *Purcell*. *Milligan*, 142 S. Ct. 879. And here, there are only 44 days until the start of absentee voting.

Third, Plaintiffs suggest that Defendants provided insufficient "supporting evidence" of disruption and voter confusion to meet their "extraordinary burden" of justifying a stay. *See* Opp. 12. This argument squarely contradicts governing law. The whole point of the *Purcell* principle is that, when voting is imminent, the ordinary presumption against stays flips to an all-but-conclusive presumption in favor of stays. Once "the eve of an election" approaches, "lower federal courts should ordinarily not alter the election rules." *RNC v. DNC*, 140 S. Ct. 1205, 1207

(continued…)
of special elections); *id.* at 98-102 (explaining that late changes in districting plans result in confusion amongst candidates and voters and undermine confidence in election results) (Ex. A).

(2020). 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*, 549 U.S. at 4-5. Any other approach would be unreasonable. After all, *Purcell* stay applications necessarily must be litigated on short timelines; it is not feasible to expect States to develop detailed factual records before seeking relief.

Accordingly, the Supreme Court has never conditioned *Purcell* stays on the kind of detailed evidence Plaintiffs demand. The defendants in *Milligan* did not identify any specific record evidence of voter confusion, reduced turnout, or erosion of public confidence. *See* Emergency App. 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 the Supreme 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 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.

In any event, here it is obvious that disruption and voter confusion will result absent a stay. Plaintiffs acknowledge that denial of a stay will likely force candidates to file their Statements of Intention of Candidacy before they even know the district lines. *See* Opp. 15. Candidates obviously have an interest in "know[ing] which district they live in" so they can run in that district, even if they are not required by the Constitution to do so. *Milligan*, 142 S. Ct. at

880 (Kavanaugh, J., concurring). And voters likewise have a corresponding interest in electing representatives who live in their districts.

Even more serious is the risk of disrupting the State's efforts to comply with UOCAVA. The State has a federal-law obligation to comply with the deadlines set by UOCAVA to ensure that South Carolinians in the military and overseas can exercise their right to vote. Plaintiffs do not dispute that the State cannot alter this deadline. *See* Opp. 4. Nor can the State comply with it instantaneously. Before ballots can be mailed out, the State Election Commission Defendants must have "ample time to create, test and deliver the [required] election databases and ballots to each of the 46 county boards." Knapp Aff. ¶ 6. They cannot begin this process—which takes weeks, not days—before a map is in place and candidates have declared, because the databases and ballots will vary depending on where the Congressional district lines fall. *Id.* ¶ 7. Since the UOCAVA deadline is only 44 days away, denying a stay will seriously imperil the State's ability to meet it.

Fourth, Plaintiffs fail to identify any case denying a *Purcell* stay under analogous circumstances. *See* Opp. 6 (citing cases). To begin, *Perez v. Texas*, 891 F. Supp. 2d 808 (W.D. Tex. 2012), *relied on* the *Purcell* principle to deny a stay. There, *the plaintiff* sought to stay the court's interim remedial map to replace it with yet another map, arguing an intervening decision made the interim map unlawful. *Id.* at 811. The court found "taking any action at this juncture is not feasible," that "[d]elaying the November election is simply not a viable option," and that "bifurcating the election" and holding a second redundant election "would lead to voter confusion and enormous expense to the counties." *Id.* It thus denied the stay without addressing the merits—indeed, even while expressing it "understands [the plaintiff's] current concerns"

about the intervening judicial decision. *Id.* *Perez* thus actually confirms that this Court should grant a partial stay here.

Plaintiffs' 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); *Harris v. McCrory*, 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016) (same); *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* Emergency Application for Stay, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 914 (2019) (No. 18A629 (18-281));[2] Mem. in Support of Intervenor-Defendants' Motion to Suspend, Dkt. 271, *Personhuballah*, 155 F. Supp. 3d 552 (No. 3:13-cv-678), 2015 WL 13158667; Defs.' Br. in Opposition, 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 Election Commission Defendants have *joined* the request for a stay.

[2] Available at https://www.supremecourt.gov/DocketPDF/18/18-281/76155/20181213171301115_2018-12-13%20Bethune%20Hill%20Emergency%20Stay%2018-281.pdf.

In contrast, Plaintiffs cannot evade the force of *Milligan*, which clearly calls for a stay here. *Milligan* granted a *Purcell* stay after the district court had ordered Alabama to redraw its Congressional district lines 65 days before the start of absentee voting. 142 S. Ct. 879; *see* Mot. 2. Plaintiffs do not identify any respect in which denying a stay would have been more disruptive there than in this case, where absentee voting is only 44 days away. Knapp Aff. ¶ 9. They instead argue that this is the exceptional case where a stay should be denied even though the *Purcell* principle applies. Opp. 12. In *Milligan*, Justice Kavanaugh hypothesized that "the *Purcell* principle [] *might* be overcome … if a plaintiff establishes *at least*" four points, including that "the underlying merits are entirely clearcut in favor of the plaintiff" and "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphases added). Plaintiffs claim they fit within this potential exception, which the Supreme Court has never to date actually invoked to deny a stay. Plaintiffs are wrong: By denying Plaintiffs' motion for summary affirmance, the Supreme Court has already found that the merits at minimum are not entirely clearcut in their favor. *See Alexander v. S.C. State Conf. of the NAACP*, 143 S. Ct. 2456 (2023). Nor, for the reasons already discussed, have Plaintiffs met their burden of showing that significant cost, confusion, or hardship *will not* occur. *Milligan* thus proves, rather than refutes, that the Court should grant a partial stay here.

Fifth, Plaintiffs suggest Defendants acted without proper diligence by not seeking a stay earlier, even though Plaintiffs inconsistently also suggest that it is too early to grant a *Purcell* stay here. Opp. 12. To the contrary, Defendants have asserted their interests consistently and promptly throughout the appellate process. Defendants first sought a stay only three weeks after the January 6 Order. Dkt. 495. When in response the Court modified the deadline to submit a

remedial map to "30 days after a final decision of the United States Supreme Court," February 4 Order at 3, there was no longer any exigency warranting a stay so long as the Supreme Court issued a decision with adequate time to adopt a new map before the 2024 primary. To ensure that would be the case, Defendants and Plaintiffs jointly requested a decision by January 1. *See* Mot. 1. Defendants also "reserve[d] the right to seek a stay of the district court's injunction if appellate proceedings remain pending in early 2024." Juris. Stat. at 5, *Alexander v. S.C. State Conf. of the NAACP*, No. 22-807 (U.S. Feb. 17, 2023) (citing *Purcell*, 549 U.S. 1, and *Milligan*, 142 S. Ct. 879). Once it became clear the Supreme Court would not rule in time to adopt a remedial map for the 2024 election cycle, Defendants promptly moved for a partial stay. *See* Mot. Defendants sought a stay only after their best efforts to protect their interests by other means had failed. That shows responsibility, not lack of diligence.

Finally, Plaintiffs have not shown that scheduling a special election is a viable option here. Plaintiffs do not even cite—much less try to distinguish—*North Carolina v. Covington*, 581 U.S. 486 (2017), which held that a court cannot order a special election based on factors that are present "in *every* racial-gerrymandering case," such as the harm inherent in being "represented by legislators elected pursuant to a racial gerrymander." *Id.* at 489. But that is the only harm they identify. *See* Opp. 12-13, 16-17. Nor do they address the point that ordering a special election at the eleventh hour would itself violate the *Purcell* principle. *See* Mot. 9-11. Indeed, given the uncertainty over when the Supreme Court will rule, Plaintiffs cannot even give a ballpark suggestion of when a special election could be scheduled, reinforcing that ordering a special election would be a recipe for electoral chaos, mass voter confusion, and erosion of public confidence in the State's elections. The Court should grant a partial stay.

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

Alternatively, the Court should grant a partial stay under the traditional standard. *See* Mot. 11-12. Although Plaintiffs contest each of the three factors, all their arguments fail.

First, as to likelihood of success, Plaintiffs make no argument that this Court should deny a stay *even if* the Supreme Court is likely to reverse. *See* Opp. 7-8. Indeed, all their arguments on irreparable harm and the equities assume that voters have been denied their rights and Defendants have no legitimate interest in implementing the Enacted Plan. *See id.* at 14-17. Thus, since Defendants are likely to prevail, *see* Mot. 11, they are entitled to a stay.

Second, Plaintiffs assert that Defendants have failed "to demonstrate any irreparable injury." Opp. 14. In doing so, they ignore the governing case law establishing, as a matter of law, that a State suffers irreparable injury from any "inability to enforce its duly enacted plans." *Abbott v. Perez*, 585 U.S. 579, 603 n.17 (2018); Mot. 11. Further, preventing the State from enforcing its candidate-filing deadline would on its own constitute "irreparable harm," since the deadline is compelled by "a duly enacted statute." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *see* S.C. Code § 7-11-15(A); Knapp Aff. ¶ 3. Plaintiffs also ignore the irrecoverable compliance costs involved in holding a special election. *See* Mot. 11.

Third, Plaintiffs contend that their harm from a stay outweighs any harm to the public interest because Plaintiffs will be "forced to continue to reside in and cast ballots in an unconstitutional district." Opp. 16. Again, that assumes the Enacted Plan is unconstitutional. Because Defendants are likely to prevail, the State's interest in "enforc[ing] its duly enacted plans" holds greater weight. *Abbott*, 585 U.S. at 603 n.17; *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) ("The first two factors of the traditional standard are the most critical."). And because the primary is imminent, the public interest in orderly elections necessitates a stay even if the Supreme Court is likely to affirm, as even the cases Plaintiffs cite confirm. *See* Mot. 5-11;

supra Part I; *Covington v. North Carolina*, 2018 WL 604732, at *1 (M.D.N.C. Jan. 26, 2018) (cited at Opp. 15) (noting that the district court "denied Plaintiffs' request for a special election and reluctantly permitted a third biennial general election (2012, 2014, 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. 16-17).

CONCLUSION

The Court should partially stay its January 6 Order and allow the 2024 elections to be conducted under the General Assembly's Enacted Plan and election calendar.

March 14, 2024
Columbia, South Carolina

Respectfully submitted,

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