No. 22-807

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

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

As part of the order under review in this Court, the three-judge panel below enjoined Appellants from holding Congressional elections in Enacted District 1 until the panel ordered otherwise. The panel also directed that any remedial proceedings would not take place 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. In the meantime, while this appeal remained ongoing, South Carolina's 2024 primary election cycle began on March 16 with the opening of the candidate-filing period. But rather than follow the proper course of "allow[ing] the [2024] election to proceed" while the appeal remains pending, *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006), the panel has yet to issue a stay. The panel's inaction at this late juncture has invited chaos and uncertainty into South Carolina's Congressional elections—all to the untenable result of "voter confusion[,] consequent incentive to remain away from the polls," and erosion of public "[c]onfidence in the integrity of [the State's] electoral processes." *Id.* at 4-5. 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.

The commencement of the 2024 election cycle and the imminent deadlines for candidates, election officials, and voters alone mandate a stay. *See id.*; *see also Merrill v. Milligan*, 142 S. Ct. 879 (2022). 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 is going to reverse the panel's liability finding. But even if this Court were to affirm that finding as early as today, a stay still should be granted because there is insufficient time to implement any remedy for the already-commenced 2024 election cycle. The General Assembly still would have 30 days after any affirmance to propose a remedial map, remedial proceedings to approve a new map would take significant time thereafter, and the State Election Commission Appellants would then need another "three to five months" to implement it. Stay.App.72. Yet candidates for all offices other than president have only 14 days from today to file to be on the ballot. Absentee ballots must be mailed to military and overseas voters within 40 days of today to comply with federal law. And the primary-election day itself is only 85 days away. In fact, the primary elections here are substantially more imminent than those in *Milligan*, where this Court stayed an order to redraw Alabama's Congressional districts issued 65 days before the start of absentee voting for the primary election and allowed Alabama to conduct the 2022 elections under the challenged map. *See* 142 S. Ct. 879; *id.* at 879-82 (Kavanaugh, J., concurring).

Even if the *Purcell* principle were somehow not enough on its own, a stay is also warranted because Appellees' claims of racial discrimination are groundless. The Enacted Plan is entirely lawful, so there is no legitimate reason to require South Carolina to adopt a different one—and certainly not at the eleventh hour.

Given that time is of the essence, Appellants ask the Court to enter a brief administrative stay, to set an expedited briefing schedule, and to issue a stay no later

than Monday, March 25, one week before the April 1 closing of the candidate-filing period.

OPINIONS BELOW

The panel's January 2023 injunction and order ("January 2023 Order") is available at 649 F. Supp. 3d 177 and JSA.9a. The panel's order modifying the injunction and denying a stay pending appeal, issued on February 4, 2023 ("February 2023 Order"), is available at JSA.1a.

JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. § 1253, *see Alexander v. S.C. State Conf. of the NAACP*, 143 S. Ct. 2456 (2023), and over this application under 28 U.S.C. §§ 1253 and 1651.

STATEMENT

A. On January 6, 2023, the three-judge panel ruled that Enacted District 1 violates the Fourteenth Amendment and "enjoined" elections in that District "until further order of this Court." JSA.48a. The panel also directed the General Assembly to submit a remedial map to the panel by March 31, 2023. *Id.* After filing a notice of appeal, Appellants moved to stay the January 2023 Order, arguing among other things that they would suffer irreparable harm from any remedial proceedings conducted while this Court's review of the liability finding remains pending. *See* JSA.2a; Dkt.495.

The panel denied Appellants' motion for a stay but modified its January 2023 Order on February 4, 2023. The February 2023 Order clarified that the panel "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." JSA.3a. 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.* The panel further expressed "every hope and expectation that the appeal process can be completed and a 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 general election schedule, the election for Congressional District No. 1 should not be conducted until a remedial plan is in place." JSA.7a.

This Court noted probable jurisdiction over the appeal, *Alexander*, 143 S. Ct. 2456, and the parties jointly requested that this Court issue a decision by January 1, 2024, *see, e.g.*, Letter Re: Argument and Briefing Schedule (May 25, 2023) ("May 25 Letter"). The Court heard argument on October 11, 2023. A final decision remains pending.

B. South Carolina's primary election cycle for all offices other than president is underway. The period for candidates to file a Statement of Intention of Candidacy opened on March 16 and closes on April 1. *See* S.C. Code Ann. § 7-11-15(A); Stay.App.15; S.C. Election Comm'n, *2024 Election Calendar*, https://perma.cc/VL26-5S47 (last visited Mar. 18, 2024). Once candidate filing is complete, the State Election Commission ("Commission") must create and send the election databases and ballots to each individual County Board of Voter Registration and Elections

("County Boards"). Stay.App.16. The County Boards must then mail absentee ballots to military and overseas voters by April 27 to comply with federal law, including the Uniform and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et seq.* *See* Stay.App.16; *2024 Election Calendar*, *supra.* The primary election is set for June 11. *See* Stay.App.16; *2024 Election Calendar*, *supra.* At least five major-party candidates have already declared their candidacies in Enacted District 1 and neighboring Enacted District 6.[1]

Even if left undisturbed, this is a tight schedule. The Commission needs "ample time to create, test, and deliver the election databases and ballots" to the County Boards. Stay.App.16. But there are only 26 days from the closing of candidate filing to the UOCAVA deadline. On some occasions, County Boards have missed the UOCAVA deadline even in ordinary election years. Stay.App.72. If this 26-day window is compressed because the panel's injunction is left unstayed, some County Boards may be unable to comply with UOCAVA.

Implementing a new map would present even greater challenges. For the Commission, "redistricting is not flipping a switch." *Id.* Adapting the process to a new map "has historically taken approximately six months or longer to fully accomplish." *Id.* Even moving with expedition to implement a remedial map would

[1] *See* Mace for Congress, https://nancymace.org/ (last visited Mar. 18, 2024); Templeton for Congress, https://templetonforcongress.com/ (last visited Mar. 18, 2024); Deford for Congress, https://www.defordforcongress.com/ (last visited Mar. 18, 2024); Michael B. Moore for U.S. Congress, https://www.michaelbmoore.com/ (last visited Mar. 18, 2024); Clyburn for Congress, https://clyburnforcongress.com/ (last visited Mar. 18, 2024).

still take "three to five months," according to the unrebutted testimony of the Commission's Executive Director. Stay.App.72.

C. In light of the then-imminent commencement of the primary-election cycle, on March 7, 2024, Appellants moved for a partial stay of the January 2023 Order pending appeal. Stay.App.1. Appellants explained that both the *Purcell* principle and the traditional stay standard warrant a partial stay to permit the 2024 Congressional elections to proceed under the General Assembly's Enacted Plan and election calendar. Stay.App.5-12. Appellants requested that the panel grant the stay no later than March 14, 2024, prior to the opening of the candidate-filing period. Stay.App.3. Appellees opposed a stay, *see* Stay.App.18, and Appellants filed a reply, *see* Stay.App.39. The panel has not ruled on the motion as of this filing.

REASONS FOR GRANTING THE APPLICATION

A stay is independently warranted under both the *Purcell* principle and the traditional stay standard. Either way, the Court should order that South Carolina's 2024 Congressional elections proceed under the General Assembly's Enacted Plan and election calendar.

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

The *Purcell* principle alone warrants a stay to allow the 2024 elections to proceed under the rules adopted by the General Assembly. The panel's failure to grant this relief both flatly contradicts this Court's precedents and brings about the very disorder the *Purcell* principle is meant to prevent.

Under *Purcell* and its progeny, 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 and leaving in place the State's duly enacted laws, regardless of the Court's "opinion [] on the correct disposition" of the State's "appeals," *Purcell*, 549 U.S. at 5.

The *Purcell* principle applies with full force to redistricting cases. This Court has repeatedly ruled that redistricting plans should not be enjoined or redrawn close to elections, without relying on States' likelihood of success in defending their plans' legality. In *Milligan*, this Court stayed an injunction of Alabama's Congressional districts issued 65 days before mail-in voting for the primary was due to begin without addressing Alabama's likelihood of success on the merits, 142 S. Ct. 879; *see also id.* at 882 (Kavanaugh, J., concurring), and even though it ultimately affirmed the district court's liability finding, *Allen v. Milligan*, 599 U.S. 1 (2023). Likewise, *Benisek v. Lamone* held that the challenged plan should remain in place even assuming it was unconstitutional because "the timely completion of a new districting scheme in advance of the [next] election season" was not feasible. 585 U.S. 155, 157-58, 160 (2018). And in *Reynolds v. Sims*, the Court commended the district court for "wisely … declining to stay the impending primary election" using a plan it had found unconstitutional. 377 U.S. 533, 586 (1964).

The panel's injunction should be stayed for the 2024 elections under *Purcell* alone. South Carolina's 2024 primary election cycle has *already* begun with the

March 16 opening of the candidate-filing period, *see supra* pp.4-5, and at least five major-party candidates have already declared their candidacies and begun campaigning in Districts 1 and 6, *supra* p.5 n.1. These candidates must file by the impending April 1 deadline, but as of right now, they "cannot be sure what district they need to file for" or "even know which district they live in." *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). This confusion will only be exacerbated if the panel's injunction is not stayed to allow use of the Enacted Districts in 2024.

Even more seriously, "state and local officials" simply will not have enough time to make the "enormous advance preparations" needed to run an orderly, on-time election if the State must adopt a new plan this cycle. *Id.* The deadline for County Boards to mail absentee ballots is only 40 days away—substantially sooner than the 65 days this Court viewed as insufficient to implement a remedy in *Milligan*. *See id.* at 879 (majority opinion). Further, primary-election day is only 85 days away. After accounting for the time needed for this Court to issue a decision, for the General Assembly to propose a new map, and for the panel to approve it, it is impossible to give the State Election Commission anything close to the "three to five months" it needs *after approval of the plan* to implement it. *Supra* pp.5-6. Refusing a stay and insisting on an eleventh-hour remedy would lead to precisely the sort of "judicially created confusion" that *Purcell* and this Court's many cases applying its principle forbid. *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020); *see, e.g.*, *Purcell*, 549 U.S. at 4-6; *Milligan*, 142 S. Ct. 879; *Benisek*, 585 U.S. at 157-58, 160; *Reynolds*, 377 U.S. at 586.

On the other side of the ledger, Appellees (who have sought no further relief

from the panel or this Court) have even *less* of an interest in denial of a stay than a plaintiff who prevails in district court in a typical *Purcell* case. After all, this Court will soon issue a decision on the constitutionality of Enacted District 1, and Appellees have *no* interest in denial of a stay if this Court reverses. But even if this Court affirms, Enacted District 1's unconstitutionality is, of course, not enough to defeat a stay of an injunction under *Purcell*. *See* 549 U.S. at 5-6. Furthermore, even in the event of an affirmance, the reasoning of this Court's opinion or its remand instructions may still be inconsistent with the remedial proceedings ordered by the panel. The only sure result of refusing a stay is creating 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.

Beyond asserting that this case somehow does not implicate *Purcell*, Appellees offered two main arguments below for denying a stay. Neither withstands scrutiny.

First, Appellees advanced a "heads I win, tails you lose" position, positing simultaneously that it is *too early* to issue a *Purcell* stay and that Appellants waited *too long* to seek a stay. Appellees thus contend both that a *Purcell* stay would be "premature" and that Appellants acted without diligence by waiting "more than a year" to file a second stay motion. Stay.App.19-20, 30.

Neither half of this inconsistent position is correct. As already explained, it is beyond dispute that *Purcell* mandates a stay at this late juncture. Moreover, Appellants have asserted their interests promptly and consistently throughout the appellate process. Appellants first sought a stay only three weeks after the January

2023 Order and more than two months before the panel's original deadline for the General Assembly to propose a remedial plan. Dkt. 495. When in response the panel modified the deadline to submit a remedial map to "30 days after a final decision of the United States Supreme Court," JSA.3a, there was no longer any exigency warranting a stay so long as the appeal was resolved with enough time to clarify which district lines would be used in the 2024 primary. To ensure a speedy resolution of the appeal, Appellants and Appellees jointly requested a decision by January 1, 2024. *See* May 25 Letter; *see also* Juris. Stat. at 5; Br.55.

Further, Appellants "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, (citing *Purcell*, 549 U.S. 1, and *Milligan*, 142 S. Ct. 879). Once it became clear the appeal would not be resolved in time to adopt a remedial map for the 2024 election cycle, Appellants promptly moved for a partial stay. *See* Stay.App.1. By seeking a stay only after their efforts to protect their interests by other means had failed, Appellants showed due regard for the equitable nature of stays, not a lack of diligence. *See Nken v. Holder*, 556 U.S. 418, 433 (2009).

Second, Appellees briefly suggested that the panel could order a special election for the primaries in District 1, District 6, and any other districts affected by the remedial plan to take place after the regularly scheduled June 11 primary. Stay.App.30-31. This suggestion flies in the face of *Purcell*, which calls for "allow[ing] the election to proceed without an injunction suspending" the challenged rule or plan, not rescheduling the election to better enable judicial tinkering. 549 U.S. at 6; *see*

also Milligan, 142 S. Ct. 879; *id.* at 880 (Kavanaugh, J., concurring) (collecting cases); *Benisek*, 585 U.S. at 160; *Reynolds*, 377 U.S. at 586. To make last-minute changes to imminent election deadlines *and* district lines after candidate filing has begun, election deadlines have been announced, and candidates have publicly declared would undoubtedly cause the confusion and disorder *Purcell* forbids. *See* Stay.App.74 (noting increased voter confusion in South Carolina when special elections occur). And on top of that, Appellees have not even tried to identify a date when a special election could be held, let alone "establish[]" that it would be "feasible" to conduct one "without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

And even setting aside *Purcell*, Appellees cannot show that a special election would be an appropriate remedy. This Court has "never addressed whether … a special election" can ever "be a proper remedy for a racial gerrymander." *North Carolina v. Covington*, 581 U.S. 486, 488 (2017). But at minimum, a plaintiff would be required to show that considerations beyond those present "in *every* racial-gerrymandering case" weigh in favor of that (hypothetical) remedy. *Id.* at 489. Here, however, Appellees have identified no harms to be remedied other than the supposed existence of racial gerrymandering. *See* Stay.App.30-31, 34-35. 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.

Under the traditional standard, a stay pending appeal is warranted when (1) there is "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; (2) "irreparable harm is likely to result from the denial of a stay"; and (3) the "balance" of the equities and the public interest favor a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *see Hollingsworth v. Perry*, 558 U.S. 183, 199 (2010). Appellants meet all three requirements here.

First, for the reasons explained in Appellants' briefs and oral argument, there is a fair prospect this Court will rule that the panel erred in concluding that Enacted District 1 is unlawful under the Fourteenth Amendment. *See* Br.; Reply.Br.; Tr. of Oral Arg.[2]

Second, absent a stay, Appellants 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). The same goes for South Carolina's candidate-filing deadlines, which are likewise required 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); Stay.App.15. And requiring a special election in any

[2] Because the State Election Commission Appellants have consistently taken no position on the merits of the litigation, they do not join this paragraph. However, they do believe that their co-appellants 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 State Election Commission Appellants join in the remainder of this motion because they strongly believe a stay should be granted for all of the other reasons discussed.

number of Congressional 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); *see* Stay.App.73-74.

Finally, the balance of equities and the public interest support a stay. Since "reapportionment is primarily the duty and responsibility of the State through its legislature," enforcing a constitutionally valid 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 Appellants' 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, Appellees have no interest in denying a stay, since enforcement of Enacted District 1 does not in fact violate their or their members' constitutional rights.

CONCLUSION

This Court should grant an administrative stay and, by March 25, 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 18, 2024

Respectfully submitted,

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