No. 20A55

In the
Supreme Court of the United States

MARCI ANDINO, ET AL.,

Applicants,

v.

KYLON MIDDLETON, ET AL.,

Respondents.

On Emergency Application for a Stay of Order Entering Preliminary Injunction Pending Appeal to the U.S. Court of Appeals for the Fourth Circuit

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF, MOTION FOR LEAVE TO FILE BRIEF ON 8-1/2 BY 11 INCH PAPER, *AMICUS CURIAE* BRIEF OF PLAINTIFFS IN *MARY T. THOMAS, ET AL. v. MARCI ANDINO, ET AL.*, NO. 3:20-CV-01552-JMC (D.S.C.) IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE

Movants *amici curiae* Mary T. Thomas, Nea Richard, the Family Unit, Inc., and the South Carolina State Conference of the NAACP, are Plaintiffs in *Thomas v. Andino*, No. 3:20-cv-01552-JMC (D.S.C.), a related challenge to South Carolina's witness requirement for absentee ballots.[1] Movants respectfully seek leave of Court to file the accompanying brief as *amici curiae* in opposition to Applicants' Emergency Application for Stay. Respondents have consented to this motion. Applicants take no position on this motion.

In *Thomas v. Andino*, No. 3:20-cv-01552-JMC, *amici* challenge the same South Carolina witness requirement at issue in this case. *See* S.C. Code Ann. § 380.

[1] Movants filed a timely motion to intervene on appeal in this case. *See Middleton v. Andino*, No. 20-2022, Dkt. 22 (4th Cir.), but the Court of Appeals has not yet ruled on that motion.

Thomas was scheduled to go to trial on September 22, 2020. On September 18, 2020, the district court in this action issued an order granting in part a motion for preliminary injunction, suspending the witness requirement for the upcoming November 2020 General Election. That same day, the district court in *Thomas* issued an order staying proceedings. The court reasoned that its decision in *Middleton* mooted *amici's* claims with respect to the witness requirement. *See* Order, *Thomas v. Andino*, No. 3:20-cv-01552-JMC, ECF No. 178 ("Stay Order").

The decision in this case will affect whether *amici* and their members can vote safely in the November elections. *Amici* and their members include voters who are elderly—one individual plaintiff is 87 years old—and who have disabilities and conditions that place them at high risk of becoming severely ill or dying if they contract COVID-19. They include individual plaintiffs and members of the plaintiff organizations who live alone and have taken significant precautions to avoid contact with others, including people who might otherwise serve as a ballot witness, to avoid the risk of contracting COVID-19. The decision in this case will have a direct impact on the voting rights of individual *amici* and *amici*'s members. Not only do *amici* stand to lose their voting rights, depending upon the Court's ultimate decision in this matter, but given the Stay Order in their action below, *amici* now lack a separate vehicle for vindicating their rights in court.

Amici therefore have direct and vital interests in the issues before the Court and respectfully request leave to file the accompanying *amicus curiae* brief in opposition to Applicants' Emergency Application for Stay.

Respectfully submitted on this 3rd day in October, 2020,

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MOTION FOR LEAVE TO FILE ON 8-1/2 BY 11 INCH FORMAT

Mary Thomas, Nea Richard, The Family Unit, Inc., and South Carolina State Conference of the NAACP respectfully move for leave of Court to file their amicus brief in opposition to Applicants' Emergency Application for Stay on 8½ by 11-inch paper rather than in booklet form.

In support of their motion, *amici* assert that the Emergency Application for Stay filed by Applicants in this matter was filed on Thursday, October 1, 2020. The expedited filing of the application and the resulting compressed deadline for any response prevented *amici* from being able to get this brief prepared for printing and filing in booklet form. Nonetheless, *amici* desire to be heard on the application and request that the Court grant this motion and accept the paper filing.

Respectfully submitted on this 3rd day of October, 2020,

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Amici curiae Mary Thomas, Nea Richard, The Family Unit, Inc., and South Carolina State Conference of the NAACP submit that the Circuit Justice (or the full Court, if the application is referred to the full Court) should deny the emergency stay sought by Applicants in this action.

ARGUMENT

The Application for a Stay should be denied for three reasons.

First, as was the case when this Court denied a stay earlier this year regarding a similar witness requirement for absentee voting in *Republican National Committee v. Common Cause Rhode Island*, No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (Mem.), a stay would *disrupt* rather than *preserve* the status quo. In both of the last two elections held in South Carolina—the June 9, 2020 primary and the June

23, 2020 runoff—the witness requirement at issue was not in effect. Those two elections also saw a substantial increase in absentee voting because of new state laws that allowed anyone to vote absentee due to the ongoing COVID-19 pandemic, which has only grown worse in the state since the June elections. *See* App.4, 55. As a result, a substantial number of South Carolina voters have voted by absentee ballot only under rules that did not require a witness, and all voters are likely to assume, based on their recent voting experience, that they do not need a witness this time. Thus, as in Rhode Island, "the status quo is one in which the challenged requirement has not been in effect, given the rules used in [South Carolina]'s last [two] election[s], and many [South Carolina] voters may well hold that belief." *Id.* at *1.

Second, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), which sets out a presumption against judicial intervention when an election is imminent, strongly compels denial of a stay here. Absentee voting is already underway in South Carolina *without the witness requirement*, and a stay would change the rules of the election not just immediately prior to the election, but midstream *during* the election. Voting had not started when the district court entered its preliminary injunction. But since then, over 8,000 South Carolina voters have already returned their absentee ballots without needing to comply with the witness requirement and thousands more are likely in the mail on the way back to elections officials right now. Staying the district court's order now could directly disenfranchise voters who have already cast their vote for the general election and will necessarily sow confusion regarding the applicable rules.

Third, the lead Applicant in this motion—Marci Andino, the Executive Director of the South Carolina Election Commission and the State's Chief Election Administrator—has repeatedly admitted and explained that the witness requirement does not serve any valid purpose for the State's election administration. App.11–14, 59–60. The State will therefore suffer no injury from maintaining the status quo.

I. THE CONSIDERATIONS OF *PURCELL V. GONZALEZ* FAVOR DENIAL OF A STAY

This Court has repeatedly made clear that rulings that cause confusion regarding electoral rules immediately prior to an election are disfavored, yet that is exactly what South Carolina seeks in its stay request. *Purcell v. Gonzalez*, 549 U.S. 1 (2006), therefore, strongly supports denying the stay request and maintaining the status quo, namely that a witness is not required for absentee ballots during the pandemic. *Purcell* is concerned with the risk of "voter confusion and consequent incentive to remain away from the polls." *Id*. at 5. Here, "the status quo is one in which the challenged requirement has not been in effect," and is the regime that most South Carolina voters who have voted by absentee ballot now know. *Common Cause R.I.*, 2020 WL 4680151 (Mem.), at *1. A stay now would abruptly alter the rules under which South Carolina voters most recently voted in the last two elections, after the election is already underway. Putting the enjoined requirement back in place carries a far greater risk of voter confusion than does allowing voters to vote under the same rules that governed in the last two elections.

Moreover, *Purcell*'s express concern is not merely with confusion, but with confusion that creates an "incentive to remain away from the polls." 549 U.S. at 5.

Here, *granting* a stay will necessarily create such an incentive, by adding a requirement now not in place. By contrast, leaving the injunction in place will encourage voting, by ensuring that an unnecessary requirement is not belatedly imposed on absentee balloting.

Denial of a stay is especially critical here because at least 8,103 South Carolina voters have *already* returned their absentee ballots for the November election without a witness requirement in place. *2020 General Election (Oct. 2, 2020)*, Fact Sheets, South Carolina Election Commission, https://www.scvotes.gov/fact-sheets (last updated Oct. 2, 2020). Staying the district court's order could directly disenfranchise voters who have already voted in accordance with the rules currently governing this election. At a minimum, a stay would certainly cause confusion, not only for voters who have already submitted ballots under the rule not requiring a witness signature, but for all those planning to vote by absentee in the coming weeks. If *Purcell* disfavors rule changes shortly before an election, surely an even stronger presumption should operate against efforts, like South Carolina's here, to change the rules after the contest *has already begun*.

This Court has previously vacated stay orders or denied applications for a stay that would have resulted in a *change* in the status quo close to an election in light of *Purcell* considerations. *See Common Cause R.I.*, 2020 WL 4680151 (Mem.); *Frank v. Walker,* 574 U.S. 929 (2014) (Mem.) (vacating stay of district court's injunction related to approaching election to maintain the status quo, where voters had already cast ballots in accordance with injunction); *N.C. State Conf. of NAACP v. McCrory*, 831

F.3d 204 (4th Cir. 2016), *stay denied*, 137 S. Ct. 27 (2016) (Mem.) (denying a stay with four Justices voting to deny the stay entirely and three additional Justices voting to deny it only as to the preregistration provision). By entering relief that preserved the status quo from the primary and runoff elections before voting began, the district court has reduced the likelihood of voter confusion and the "consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 5. *Purcell* thus weighs heavily in favor of leaving the injunction undisturbed.

Contrary to Applicants' contentions, this case is distinct from *Merrill v. People First of Alabama*, No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020) (Mem.). There, the Court stayed a district court's preliminary injunction suspending Alabama's witness and photo ID requirements before a primary runoff election. *See People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 506–08 (11th Cir. 2020). Unlike the instant case, where the two most recent elections just this year, with unprecedented numbers of absentee ballots, operated *without* the challenged burden, in Alabama, both requirements had been enforced in that state's prior elections. Thus, unlike here, the injunction in *Merrill* changed the status quo. And unlike here, in *Merrill*, the applicants had argued that there was a risk of voter confusion because the "injunction enjoin[ed] only three count[ies]" ahead of a statewide election, creating inconsistent rules across the state. *Id.* at 511. The district court's injunction in this case applies statewide.

Moreover, *Purcell* itself expressly counsels deference to the factual findings of the district court. *Purcell*, 549 U.S. at 5. The district court here expressly considered

and addressed the concerns identified in *Purcell*. It relied on *Purcell* to reject certain challenges, App.37–38; but as to the witness requirement—the only provision at issue here—it concluded that *Purcell* considerations weighed in favor of granting relief, App.39. And in denying a stay, the en banc Court of Appeals properly followed this Court's guidance to accord proper deference to the district court's factfinding.

More fundamentally, *Purcell* directed that, in contemplating injunctive relief, one factor that courts must weigh is the impact that such relief would have on the electorate. *Purcell*, 549 U.S. at 4. It did not, as Applicants would have it, impose a categorical mandate that constitutional violations go unremedied simply because it is close in time to an election. This Court's other decisions make this clear. *See Common Cause R.I.*, 2020 WL 4680151; *N.C. State Conf. of NAACP*, 137 S. Ct. 27; *Frank*, 574 U.S. 929.

Indeed, the proximity of the district court's injunction to the upcoming election is the result of Applicants' own conduct as Defendants in the *Thomas* litigation, and undercuts their attempted reliance on *Purcell* in seeking a stay. In *Thomas*, Applicants rejected an August trial date proposed by the plaintiffs (*amici* here), proposing trial begin September 21, later insisting that trial begin no earlier than September 16.[2] As the district court was not available on the 16th, the case was then

[2] E-mail correspondence between counsel for *amici* and for Applicants, (June 2, 2020 7:28 PM EDT; June 4, 2020 04:47 PM EDT; June 5, 2020 3:14 EDT) (on file with counsel for *amici*) (Upon a proposal from *amici* for trial to begin August 24 or for *amici* to pursue a preliminary injunction for the November election instead, counsel for Applicants rejected both offers as "unworkable," and counteroffered a trial to begin September 21.).

set for trial on September 22 by agreement of all parties.[3] Relief was thus entered by the district court as soon as possible given Applicants' objection to more expedited proceedings. In the course of *Thomas*, South Carolina represented to *amici* and to the district court that the state would not be prejudiced by scheduling the trial in mid-September with a ruling shortly thereafter. Having relied on that representation to resist expedition of trial on the factual issues, Applicants cannot now turn around and claim that relief should be precluded because it is too close to the election. Applicants should not be permitted to play "fast and loose" with the courts in this manner. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal citations omitted).

II. THE EQUITIES STRONGLY MILITATE AGAINST A STAY.

As this Court has insisted, "[a] stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and [t]he propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal citations and quotations omitted).

The party requesting a stay of a court injunction pending appeal bears the burden of showing that the circumstances of the case justify the exercise of the court's discretion. *Id.* at 433–34. Applicants' burden is especially heavy "[b]ecause this matter is pending before the Court of Appeals, and because the Court of Appeals denied the motion for a stay." *Packwood v. S. Select Comm. on Ethics*, 510 U.S. 1319,

[3] E-mail from counsel for Applicants to Hon. J. Michelle Childs (June 5, 2020 5:18 PM EDT) (on file with counsel for *amici*).

1320 (1994) (Rehnquist, C.J., in chambers); *accord Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers). An overriding stay is "rare and exceptional," granted only "upon the weightiest considerations." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 11691014 (1993) (O'Connor, J., concurring in chambers); *O'Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers) (denying stay despite view that lower court decisions were "inconsistent" with Court's precedent).

Applicants cannot satisfy the requirements for this extraordinary relief, namely: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). But even if Defendants could meet these criteria—which they cannot—"[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). "It is ultimately necessary, in other words, 'to balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (internal citation omitted). Applicants cannot satisfy these factors. This is especially the case because the district court's decision is reviewed for an abuse of discretion.

A. The District Court Properly Applied the *Anderson-Burdick* Standard to Determine that Respondents Were Likely to Succeed on the Merits.

Applicants maintain that restrictions on absentee voting can never raise constitutional concerns and are not subject to the *Anderson-Burdick* balancing test, relying on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). But Applicants conceded the opposite in *amici*'s *Thomas* action, acknowledging that South Carolina's absentee voting procedures are subject to scrutiny under the *Anderson-Burdick* framework this Court established after *McDonald*. *See* Official Tr., *Thomas v. Andino*, No. 3:20-cv-01552, ECF No. 155, at 14:8–12 (D.S.C. Sept. 3, 2020) (conceding that, where, as here, "once people are allowed to vote absentee, you have got to fall within the *Anderson-Burdick* . . . framework").[4]

McDonald predates this Court's formulation of the *Anderson-Burdick* test, which applies a balancing test to burdens on the means of voting. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). This Court has never held that restrictions on absentee voting are wholly exempt from the *Anderson-Burdick* balancing test.

[4] For this reason, Applicants are also wrong to rely on *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), which involved a challenge to Texas's absentee voting qualifications. *See id.* at 394 (injunction "require[d] state officials . . . to distribute mail-in ballots to any eligible voter who want[ed] one"). Moreover, Applicants cite only to the stay decision in that case. The merits panel in the same action expressly declined to hold that the stay panel's application of *McDonald* was proper. *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *17 (5th Cir. Sept. 10, 2020).

More fundamentally, *McDonald* is inapposite. *McDonald* holds that there is no absolute right to vote by absentee ballot, where individuals have fully available alternative means to cast a ballot. *McDonald*, 394 U.S. at 807. But even before this Court established the *Anderson-Burdick* framework, it held that the right to vote by absentee ballot is protected where meaningful alternative means are *unavailable* and absentee voting is the only realistic means of participation. This Court specifically so cabined *McDonald* three times shortly after it issued that decision. *See O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) (stressing that "the Court's disposition of the claims in *McDonald* rested on failure of proof" that alternative means of voting were unavailable); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (striking down discriminatory absentee ballot law); *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (permitting claim by Philadelphia pretrial detainees seeking absentee ballots to proceed).

Applicants' *McDonald* argument ignores that here there is no "failure of proof" as to the current absence of meaningful alternatives to absentee voting for many voters. *O'Brien*, 414 U.S. at 529. Indeed, South Carolina has "allow[ed] all . . . voters to vote absentee" for the November election, Emergency Application for Stay ("AFS") at 5 (internal citations omitted), precisely because in-person voting is not a safe option for many voters—like *amicus* Mary Thomas, an 87-year-old woman who is at high risk of severe health complications or death from COVID-19 and has self-isolated at

home since March.[5] South Carolina has made absentee voting available not because in-person voting is merely "less desirable," *id.* at 15, but—as the legislative debate Applicants cite underscored—because it is necessary to allow "South Carolinians to *safely* exercise their right to vote in November." S. Journal No. 47 (Sept. 2, 2020) (emphasis added).

This is not a case where a state has simply made absentee voting available to some voters as a gratuity, but denied the same benefit to others. AFS at 14 (quoting *McDonald*, 394 U.S. at 808 & n.6). Under normal circumstances, a State may have valid reasons for doing so, as in-person voting typically remains a meaningful option. But Applicants can hardly suggest that in-person voting during the COVID-19 pandemic is a meaningful alternative for all voters, particularly for voters with disabilities or those over 65, who potentially would risk serious illness, permanent injury, or even their very lives by voting in person.[6] *See, e.g.*, *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 200 (2d Cir. 2014) (affirming that voting systems must be accessible to voters with disabilities and declaring that "[t]he right to vote should not be contingent on the happenstance that others are available to help"); *Ocasio v. Comision Estatal de Elecciones*, No. 20-cv-1432, 2020 WL 5530274, at *4–6 (D.P.R. Sept. 14, 2020) ("Senior citizens should not be forced to choose between risking their health . . . or disenfranchisement."). Indeed, as the district

[5] Notice of Filing of Joint Stipulations ¶¶ 12–15, *Thomas*, No. 3:20-cv-01552-JMC, ECF No. 177.

[6] Indeed, such voters are always qualified to vote absentee in South Carolina, *see* S.C. Code Ann. § 7-15-320(B), precisely because, even under normal circumstances, in-person voting is not a meaningful option for many of them.

court found, the witness requirement "would still apply to voters who have already contracted COVID-19, therefore affirmatively mandating that an infected individual go 'find' someone to witness their absentee ballot and risk exposing the witness (and whoever comes in contact with the witness) to the virus. The asymptomatic COVID-19 voter would unknowingly place potential witnesses at risk and the symptomatic COVID-19 voter would have trouble finding a willing witness." App.65. Given that the State itself has recognized that absentee voting is the only safe option for many voters, restrictions on absentee balloting that force voters to risk their health or impose risks on the health of others to cast a ballot raise constitutional concerns and are subject to the *Anderson-Burdick* balancing test.

B. South Carolina's Witness Requirement Burdens Respondents' Constitutional Rights.

Applicants' objection to the district court's *Anderson-Burdick* analysis is premised on ignoring or rejecting the factual findings of the district court, yet they do not even argue, much less establish, that those findings are clearly erroneous. Applicants also mischaracterize the record in *amici*'s case; a record that only further supports the district court's conclusion that the witness requirement burdens the right to vote and is not justified by any countervailing state interest.

On the burden side, the district court rightly credited Respondents' expert testimony as to the risk of transmission of COVID-19. *See* App.54–55. In an ineffectual attempt to have this Court reach a different conclusion, Applicants cite to expert testimony "proffered" in *Thomas after* the district court entered its injunction in this action and stayed trial in *Thomas*, to assert that there is no health risk in

complying with the witness requirement. *See* AFS at 18 (citing Mot. for Reconsideration & Mot. to Lift Stay, *Thomas*, No. 3:20-cv-01552-JMC, ECF No. 182 (D.S.C. Sept. 22, 2020)). But Applicants ignore that same expert's testimony that "substantial community transmission" of COVID-19 continues in South Carolina, that the State has insufficient testing, and that transmission will continue until there is an "acceptable vaccine" in "widespread" use.[7] They also ignore the same expert's testimony that coming into contact with someone to have one's ballot witnessed carries a risk of transmission of the virus that causes COVID-19.[8] And the magnitude of the harm a voter faces if that risk materializes cannot be overstated, particularly given the number of individuals suffering extreme health consequences and death in South Carolina.

Thus, according to Applicants' *own expert*, Applicants are wrong when they insist that there is no burden to voters in obtaining a witness signature during the COVID-19 pandemic. That argument contradicts the factual record both in the instant case and in *amici*'s parallel case. And the Applicants' insistence that certain precautions might reduce the risk of transmission misses the point. "[E]ven with the available arsenal of conceivable precautions one could take to reduce risk of contracting the virus, many would be dissuaded from exercising their vote both because of the risk of illness and the efforts involved in mitigating that risk . . . ." *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-00024, 2020

[7] Salgado Dep. Tr. at 37:16–20; 41:15–25, 42:2–6, 58:21–25, 59:2–5, *Thomas*, No. 3:20-cv-01552-JMC, ECF No. 125-2 (D.S.C. Aug. 17, 2020).

[8] *Id.* at 57:19–23, 58:7–10.

WL 4927524, at *9 (W.D. Va. Aug. 21, 2020). Forcing a voter to come into contact with someone during an active pandemic, for any period of time, is a meaningful risk that will dissuade voters from voting. *See Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (concluding that "many voters may be deterred by the fear of contagion from interacting with witnesses"), *stay denied*, *Common Cause R.I.*, 2020 WL 4680151 (Mem.).

Applicants also mischaracterize the district court's assessment of the State's interests. The district court rightly held that "[w]hile states certainly have an interest in investigating absentee voter fraud and ensuring voter integrity, the interest will not suffice absent 'evidence that such an interest made it necessary to burden voters' rights.'" App.58 (quoting *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020)). The district court considered the very evidence Applicants point to here, but found that it did not establish that it was necessary to burden Respondents' rights by requiring a witness. *Id.* at 58–62. That is a straightforward application of longstanding federal precedent: an asserted state interest—even when legitimate—is not dispositive. Courts properly "weigh" the burdens on voters' rights "against the precise interests put forward by the State" and account for "the extent to which [they] make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

The proffered testimony in *Thomas* of Lt. Logan to which Applicants now point, AFS at 20, is no different than what the district court considered and found insufficient to justify "'burden[ing] the plaintiff's rights,'" App.50 (quoting *Anderson*,

460 U.S. at 789). And Applicants, in any event, cherry-pick from the records across cases. In more than thirty years of experience, Lt. Logan could recall only two convictions for voter fraud in South Carolina.[9] He also testified that most of the allegations of voter fraud that the South Carolina Law Enforcement Division ("SLED") investigates are made by losing candidates or their supporters, are not specific to absentee ballots, and are often proven "not to be true. . . . A lot of them are just allegations, period."[10] And nearly four months later, Lt. Logan and SLED have uncovered no indication of voting fraud in the June 2020 primary or runoff elections, when the witness requirement was suspended. That scant evidence does not outweigh the substantial burden placed on voters by the witness requirement.

C. A Stay Would Irreparably Harm Respondents, *Amici*, and All South Carolina Voters.

In the absence of a stay, Applicants will not suffer irreparable harm. Indeed, the State is "in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (citation omitted). After all, "upholding constitutional rights surely serves the public interest," of which the State is the custodian. *Id.*

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[9] Logan Dep. Tr. at 60:22–25; 61:2–10; 66:2–67:3, *Thomas*, No. 3:20-cv-01552-JMC, ECF No. 125-24 (D.S.C. Aug. 17, 2020).

[10] *Id.* at 66:24–35, 67:24–25, 70:13–17.

Critically, all of Applicants' alleged harms—voter confusion, distrust in the election results, and skepticism of the democratic process—would in fact be *exacerbated* by a stay, as set forth above in Point I. As both the district court and the en banc Fourth Circuit concluded, the status quo in South Carolina "is *not* having a witness requirement during the COVID-19 pandemic" and thus imposing the witness requirement would disturb that status quo and "confuse and deter voters who, based on the rules of the June primary, reasonably expect the witness requirement to be suspended for the November general election, too." App.83–84 (King, J., concurring) (internal citations omitted).

In stark contrast, if a stay is granted, *amici* and the more than 558,000 voting-age South Carolinians who live alone will be forced to choose between risking their health and voting. "[T]he right of suffrage is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). Denial of that right is irreparable, because once an election is over, there can be no adequate redress. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (holding that laws with the effect of "denying some citizens the right to vote . . . deprive them of a fundamental political right, . . . preservative of all rights") (internal citations omitted); *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016) (observing that voting rights cases are not situations "where failing to grant the requested relief would be a mere inconvenience to Plaintiff and its members"—an election "isn't golf: there are no mulligans").

CONCLUSION

For the foregoing reasons, the Court should deny Applicants' Emergency Motion for a Stay of the District Court's preliminary injunction.

Respectfully submitted,

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