No. 20A55

In the Supreme Court of the United States

MARCI ANDINO, in her official capacity as the Executive Director of the South Carolina Election Commission; JOHN WELLS, in his official capacity as the chairman of the South Carolina Election Commission; CLIFFORD J. EDLER and SCOTT MOSELEY, in their official capacities as commissioners of the South Carolina Election Commission; JAMES H. LUCAS, JR., in his official capacity as the Speaker of the South Carolina House of Representatives; HARVEY PEELER, in his official capacity as President of the South Carolina Senate; and SOUTH CAROLINA REPUBLICAN PARTY,

Applicants,

v.

KYLON MIDDLETON, DEON TEDDER, AMOS WELLS, CARLYLE DIXON, TONYA WINBUSH, ERNESTINE MOORE, the SOUTH CAROLINA DEMOCRATIC PARTY, DNC SERVICES CORPORATION/DEMOCRATIC NATIONAL COMMITTEE, and DCCC,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Time is short. In-person absentee voting in South Carolina begins tomorrow, October 5, and mail-in absentee voting has been underway this whole time. Roughly 1,400 absentee ballots had been mailed out when the district court issued its preliminary injunction; 42,000 ballots had been mailed out when the Fourth Circuit initially stayed the injunction; 44,000 ballots had been mailed out when the en banc Fourth Circuit vacated the stay; and 148,000 ballots had been mailed out when the en banc Fourth Circuit denied a stay. *Recent Absentee Reports*, S.C. State Election Comm'n, scvotes.gov/fact-sheets. In 2020 alone, as a result of federal interference in South Carolina's elections, the State's witness requirement has been on, off, on again, off again, on again, and off again. Federal courts have made more changes to the witness requirement in the past 16 days than the State has made in the last 40 years. It is time for this federal interference (and resulting voter confusion) to end.

That absentee votes have been returned while the district court's injunction has been in place is unfortunate and an issue that Applicants might have to address. But Alabama faced the same issue after this Court granted a stay in *Merrill v. People First of Alabama*, 2020 WL 3604049 (U.S. July 2, 2020), where another district court had preliminarily enjoined another witness requirement in the middle of absentee voting. And to be sure, this problem is not of Applicants' making. It was created by the district court (by issuing a preliminary injunction after absentee voting had begun) and exacerbated by the en banc Fourth Circuit (by vacating the panel's stay and issuing no decision for another five days). The problem is a negative consequence of a *Purcell* violation, not a reason to deny a stay. The *Purcell* principle is not self-

defeating: This Court's concerns with voter confusion and federal interference cannot become, paradoxically, reasons to leave a violation of *Purcell* in place. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). A contrary holding would only invite more election-year "mischief." App. 94 (Wilkinson, J., dissenting).

Because time is of the essence, Applicants limit this reply to two main points. First, Respondents' insistence that the district court's injunction did not alter the status quo in South Carolina is plainly wrong. Second, Respondents' remaining arguments were necessarily considered and rejected in *Merrill*. This Court should stay the district court's preliminary injunction pending appeal and certiorari.

ARGUMENT

I. A stay would reinstate, not change, the status quo in South Carolina.

Respondents' main argument—indeed, the only argument they could make without contradicting *Merrill*—is that, due to the district court's preliminary injunction for June, "the 'electoral *status quo*' is no witness requirement." Stay Opp. 10. Respondents also note that "thousands" of voters have returned absentee ballots between now and when the district court entered its preliminary injunction. Stay Opp. 1. These arguments fail for four main reasons.

First, Respondents do not know whether any voters—let alone "thousands"—have returned a ballot without a witness signature in reliance on the district court's injunction. All anyone knows is that, as of Friday, October 2, voters had returned 8,103 absentee ballots (excluding military and overseas voters, who aren't subject to the witness requirement). *Recent Absentee Reports*, *supra*. Respondents do not know

how many of those ballots do not comply with the witness requirement. Even if some subset do not contain a witness signature, Respondents do not know how many were submitted while the Fourth Circuit's stay was in place or how many were submitted in reliance on the district court's injunction. There is good reason to believe the number is small. Even after the district court's injunction, South Carolina instructed voters that "[t]he safest practice at this time is to have your signature witnessed" because the district court's "ruling could change" again on appeal. *New Absentee Rules for the 2020 General Election*, S.C. State Election Comm'n, bit.ly/3jsrb4d (last accessed Oct. 4, 2020).

If South Carolina discovers that some ballots are missing a witness signature and were submitted while the district court's injunction was in place, the State will simply have a decision to make about what to do with those ballots (just like Alabama had to do after *Merrill*). Whatever it decides, the possibility that *some* people might have voted without complying with the witness requirement cannot be a reason to let *everyone* vote without complying with the witness requirement. Otherwise, this Court would not have issued a stay in *Merrill*. There, too, the plaintiffs and lower courts noted that "voters are already voting absentee" and so a stay would "disenfranchise[]" those who already cast ballots. *People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 515 (11th Cir. 2020). As this Court recognized in granting the stay, the fact that a district court issues an injunction after voting has already begun makes its violation of *Purcell* worse; it does not insulate the injunction from being stayed on appeal.

Second, Respondents' argument about what is and is not the status quo puts far too much emphasis on a single sentence from this Court's order in the Rhode Island case. All this Court said was that "many Rhode Island voters *may well* hold th[e] belief" that the witness requirement was still suspended because the governor had suspended it in the last election. *Republican Nat'l Comm. v. Common Cause R.I.*, 2020 WL 4680151, at *1 (Aug. 13, 2020) (emphasis added). The Court's language was reserved ("may well hold the belief") because this point was just one additional consideration that tipped the equities toward the respondents. The Court's main point was its first one: that "no state official" supported the stay application. *Id.*

That observation is not true here, as Respondents concede. Here, Applicants include "election officials" and other "state official[s]" who are speaking for "a State" and who want to "defend [the State's] own law." *Id.* True, Andino wrote *the General Assembly* (the entity actually empowered to change election laws) and asked it to suspend the witness requirement on *policy* grounds (grounds that the General Assembly ultimately deemed unpersuasive). But Andino is a state employee and an Applicant now. And she is joined by the other state-official defendants who were sued in the district court, as well as the leaders of South Carolina's General Assembly who intervened in the district court to assert and protect the legislature's authority over election law. The witness requirement also has the imprimatur of "[a]ll three branches of South Carolina's government," including the attorney general, the governor, and the state supreme court. App. 91-92 & n.2 (Wilkinson, J., dissenting). That fact is important because these state actors are constitutionally empowered—

and in a much better position—to determine what is and isn't the electoral status quo in South Carolina and what will and won't cause voter confusion. *Cf. Common Cause R.I. v. Gorbea*, 970 F.3d 11, 16 (1st Cir. 2020) (stressing that the state officials had "credibly explain[ed] how setting aside the consent judgment and decree would confuse voters"). Unlike the Rhode Island case, the State is here now, speaking with one voice and requesting a stay.

Third, it cannot be said that "*the rules* used in [South Carolina's] last election" had no witness requirement. *Common Cause R.I.*, 2020 WL 4680151, at *1 (emphasis added). Unlike in Rhode Island, where the governor used her emergency powers to formally suspend the witness requirement, no elected official suspended the witness requirement for South Carolina's June primary. The rule remained on the books. A federal district court preliminarily enjoined it two weeks before primary day.

That distinction matters. Unlike a governor or legislature, a federal court does not hold "an elected or appointed office of the State of South Carolina" and has no business "substituting its own policy choice for that of the representatives of the Palmetto State" or "rob[bing] South Carolina of its sovereign prerogative to determine the rules for its elections." App. 92 (Wilkinson, J., dissenting). Because the Elections Clause puts primary power for elections in the hands of States, U.S. Const. art. I, §4, cl. 1, only state officials can lawfully create a new electoral status quo.

Plus, a preliminary injunction is, by its very nature, temporary and tentative. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). As the district court stressed, its preliminary injunction applied "*only* during the June 2020 primaries and

resulting runoff elections." *Thomas v. Andino*, 2020 WL 2617329, at *30 (D.S.C. May 25, 2020) (emphasis in original). In other words, at the time the district court entered that injunction, even it did not believe it was changing the status quo for November. And its prior injunction was unlawful. The district court enjoined a perfectly constitutional witness requirement, and it did so merely 15 days before primary day. *Id.* at *1 & n.2. If the State had appealed, the injunction would have been stayed, as a similar injunction was stayed in *Merrill*.

The State should not be punished for exercising its discretion not to appeal. States must balance many competing considerations when deciding whether to pursue costly and time-consuming emergency appeals, particularly when resources are already tight during a global pandemic. While the State certainly has an interest in the rules governing an "intra-party primary," primaries present "different questions" in terms of size, stakes, and sovereignty. App. 90 (Wilkinson, J., dissenting). And because the district court's decision was so close to the June primary, many absentee voters had already submitted their ballots with the witness requirement in place. The State ultimately decided that South Carolinians would be better served if the State defended the witness requirement in litigation concerning the general election, rather than appealing a decision that by its terms applied "*only* during the June 2020 primaries." *Thomas*, 2020 WL 2617329, at *30. If the Court now holds that South Carolina's one-time litigation decision for the intra-party primaries locked it into a new electoral status quo for elections that actually award offices to the winners, States will be forced to pursue costly, emergency appeals in every one of these cases—

something that benefits no one. And States will be reluctant to adjust voting rules in response to unique challenges like the pandemic. App. 93 (Wilkinson, J., dissenting).

Fourth, the record about what voters "belie[ve]" about the status quo is much different here than in Rhode Island. *Common Cause R.I.*, 2020 WL 4680151, at *1. While Respondents assert that an "overwhelming number" of voters mistakenly believe the witness requirement was already suspended, *e.g.*, Stay Opp. 2-3, they do not cite a shred of evidence to support that assertion. The record reveals the opposite:

- In Rhode Island, because the State had agreed to suspend the witness requirement, it immediately posted "[i]nstructions omitting the two-witness or notary requirement" on its website. *Common Cause R.I.*, 970 F.3d at 16. But here, South Carolina has continued to instruct voters that they should "have [their] signature witnessed" because the district court's preliminary "ruling could change" again on appeal. *New Absentee Rules*, *supra*. Voters should not be confused because the State has been consistent all along.

- In Rhode Island, the State had not yet mailed out absentee ballots for the next elections. But here, South Carolina has already mailed out ballots, and the standard instructions in the envelopes still *contain* the witness requirement (with an additional insert informing voters about the injunction and the pending appeal). Granting a stay would thus resolve voter confusion by clarifying that the longstanding witness requirement applies.

- The district court acknowledged that the status quo is the witness requirement, not the opposite. It ordered "the State to launch a publicity campaign notifying voters that [the witness] requirement will not be enforced"—relief that "hardly sounds … like some ordinary defense of the 'status quo.'" App. 90 (Wilkinson, J., dissenting).

- In Rhode Island, 83% of voters had voted absentee in the prior primary with the witness requirement suspended. *Common Cause R.I.* Private Resps.' Stay Opp. 2. Here, however, less than a quarter of South Carolina's primary voters (about 174,000 total voters) voted absentee in the prior primary. Stay App. 24. That is a drop in the bucket compared to the more than one million absentee ballots that are expected to be cast in the general election. *See Thomas* ECF No.

> 125-3 at 3. And many more South Carolinians are used to the witness requirement. In the last presidential election, over 500,000 voters cast absentee ballots with the witness requirement in place. *Absentee Voting History (1998-2018)*, S.C. Election Comm'n, bit.ly/3neJmfV.

For all these reasons, granting a stay would eliminate voter confusion and restore the legitimate electoral status quo.

But even if voter confusion cut both ways, this Court should still grant a stay. Arguably, South Carolinians have no firm view of the electoral status quo anymore: they have already seen the witness requirement enjoined, the injunction stayed, the stay vacated, the stay denied, and the stay request renewed. The best bet at this point is to reinstate the law that has been on the books in South Carolina for decades. As one state representative put it, "[e]ven in the General Assembly, even in the Election Commission, there's a lot of confusion," so "I think we just need to simplify it and stick by our laws." Liu, *Changing Absentee Rules Leave South Carolina Voters Confused*, AP (Sept. 29, 2020), bit.ly/30y7kZX. The equities also favor a stay regardless of voter confusion. Even absent *Purcell*, the courts below decided an important question of federal law that has divided the circuits, and they erroneously enjoined South Carolina's duly enacted law. A stay would also deter this kind of judicial ping-pong in the future. The Court should grant one.

II. *Merrill* already determined that the stay factors warrant relief in these precise circumstances.

Respondents' remaining arguments about the likelihood of certiorari, the prospect of reversal, the presence of irreparable harm, and the balance of the equities all fail for the same simple reason: this Court necessarily rejected them in *Merrill*. There, Alabama asked this Court to stay a preliminary injunction against a two-

witness requirement that was entered "29 days before in-person voting" and after absentee voting "ha[d] already begun." *Merrill* Emerg. Stay App. 16, 1. Here, South Carolina asks this Court to stay a preliminary injunction against a one-witness requirement that was entered 17 days before in-person absentee voting and after absentee voting has already begun. Because the rule of law requires like cases to be treated alike, the Court should grant a stay here too. *See* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982) ("The jurisprudential rule of like treatment demands consistency not only between cases that are precisely alike but among those where the differences are not significant.").

Nothing has changed in Respondents' favor since *Merrill*. The questions presented are no less important now than they were in July, and the questions surrounding witness requirements and other neutral election laws during COVID-19 have only further divided the lower courts. Stay App. 13; *e.g.*, *New Ga. Project v. Raffensperger*, No. 20-13360, ___ F.3d ___ (11th Cir. Oct. 2, 2020), bit.ly/30sf4ML (staying yet another late-breaking injunction against a state election law in light of COVID-19). The critical importance of this case is illustrated by the pending motions to file amicus briefs by 24 amici, including 17 States.

The similarities between the district court's decision in *Merrill* and the district court's decision here are striking. Both invoked the *Anderson-Burdick* test to invalidate a witness requirement in light of COVID-19. *Compare People First of Ala. v. Merrill*, 2020 WL 3207824, at *13 (N.D. Ala. June 15, 2020), *with* App. 51-53. Both concluded that "some risk" of exposure to COVID-19 is a burden on voting rights that

outweighs the State's compelling interests.* *Compare Merrill*, 2020 WL 3207824, at *15, *with* App 53-54. And both discounted the State's compelling interests and ignored the testimony of the State's officials. *Compare Merrill*, 2020 WL 3207824, at *15-17, *with* App. 58-62. While the district court in *Merrill* also ruled on other laws and claims (not just an *Anderson-Burdick* challenge to a witness requirement), this Court stayed the *entire* preliminary injunction.

The main differences between this case and *Merrill* make a stay more warranted here, not less:

1. If witness requirements burden the right to vote at all, South Carolina's witness requirement is wholly less burdensome than Alabama's (and Rhode Island's). *See* App. 91 & n.2 (Wilkinson, J., dissenting). Alabama's law required voters to obtain the signatures of two witnesses or one notary. Ala. Code §17-11-7. South Carolina's witness requirement requires the signature of only one witness. S.C. Code Ann. §7-15-380.

2. South Carolina's interests here are stronger. The preliminary injunction in *Merrill* would have governed a mere intra-party primary, but the preliminary injunction here will govern a general election. In terms of election administration,

* Like the district court, Respondents incorrectly frame the burden analysis. When considering the burdens of finding a witness, courts should not imagine a hypothetical person who is perfectly self-isolated. They should measure the burdens of finding a witness against other things that reasonable people must do to vote and participate in society. Here, for example, Respondents did not allege or offer any evidence that they never interact with other people, even in the midst of COVID-19. The only Respondent who the district court thought had standing proved otherwise by, shortly after the injunction issued, appearing on television with her adult son. *See* Stay App. 17.

voting integrity, and state sovereignty, a general election is "far different," requires a "larger operation," and presents "much different questions from those posed by an intra-party primary." App. 90 (Wilkinson, J., dissenting). The State's interests in deterring and detecting fraud and protecting voter confidence are stronger for the general election, and Respondents' suggestion that Applicants did not argue or prove these interests below is incorrect. *See* App. 92 n.2 (Wilkinson, J., dissenting) (explaining that "[t]he Supreme Court has repeatedly held that a State 'indisputably has a compelling interest' in combatting voter fraud," that "South Carolina is not required to produce evidence of voter fraud," and that "South Carolina *did* present evidence of voter fraud").

3. The risks of COVID-19, though no doubt serious, have decreased since *Merrill* was decided in July. In South Carolina, the number of COVID-19 cases has decreased nearly 66% since then. *See Table 1, Observed & Projected SC COVID-19 Cases by Week: March 1 to October 17*, S.C. Dep't of Health & Envmtl. Control, bit.ly/2EVQVGX (reporting 11,962 cases for the week of July 2 and a projected 4,233 cases for the week of October 5).

4. The *Purcell* violation in this case was worse. In-person absentee voting starts in South Carolina on October 5, so the preliminary injunction here was entered nearly two weeks closer to in-person voting than the preliminary injunction in *Merrill*. Worse still, the en banc Fourth Circuit exacerbated the *Purcell* problem when it vacated the panel's earlier stay. *Purcell*'s concerns with voter confusion "especially"

apply in cases like this one, where courts issue "conflicting orders." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

In short, Respondents' arguments were all raised and rejected in *Merrill*, and those arguments are only weaker in this case. Like Alabama, South Carolina has necessarily demonstrated a likelihood that four Justices will vote to grant certiorari, a fair prospect that five Justices will vote to reverse, irreparable harm to its state interests, and no harm to South Carolinians from maintaining its valid law. This Court should therefore grant a stay.

CONCLUSION

Applicants respectfully ask this Court to stay the preliminary injunction pending disposition of Applicants' appeal in the Fourth Circuit and petition for a writ of certiorari in this Court.

Respectfully submitted,

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