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.

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

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Per Supreme Court Rule 29.6, no Respondent has a parent company or a publicly-held company with a 10 percent or greater ownership interest in it.

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INTRODUCTION

At issue is a constitutional challenge to a single provision of South Carolina law: the requirement that voters have a witness sign their absentee ballot return envelope (the "Witness Requirement"). Respondents presented overwhelming and unrefuted evidence that, as applied during the pandemic, the Witness Requirement increases the risk of COVID-19 infection and transmission and unconstitutionally burdens the right to vote. The district court's thorough, thoughtful order granting the injunction was not an abuse of discretion and should not be stayed. To do so at this point, moreover, when thousands of South Carolina voters have returned ballots since the district court's order was entered and when a similar injunction was in place in the statewide primary held earlier this year, would risk substantial voter confusion that would itself threaten the right to vote of lawful South Carolina voters. The application to stay should be denied.

There are several features of this case that make it particularly unique, each of which weighs strongly against issuing the stay requested by the Applicants. *First*, Applicant Marci Andino, the Executive Director of the South Carolina Election Commission ("SCEC"), "has repeatedly recommended *against* the witness requirement as being not only ineffective to deter fraud, but a barrier to lawful voting." Appendix to Emergency Application for Stay ("App.") 85 (emphasis added). She is on record stating that the Witness Requirement "offers no benefit to election officials as they have no ability to

verify the witness signature." App. 60 n.36. As a result, it does not serve the state interest in election security and integrity.

Second, as noted above, the district court enjoined the Witness Requirement for the June primary and runoff elections. The defendants did not appeal that decision, and no one presented *any* evidence that the suspension of the Requirement impacted the integrity of the primary or the runoff election, despite the fact that the use of absentee voting was higher in the primary than it had been in *any* previous South Carolina election.

Third, because the injunction was in place during the last two South Carolina elections, in which many voters cast their ballots absentee for the first time, many voters likely now reasonably believe that a ballot will not be rejected simply because the ballot envelope does not include a witness signature.[1] Thus, denying the stay would maintain the status quo and protect against voter disenfranchisement due to confusion over the late-breaking change.

Before the June primary and runoff elections, only a select group of individuals were permitted to vote absentee. But in June, all South Carolina voters were permitted to vote absentee, and they did so without the Witness Requirement. All South Carolina voters are again permitted to vote absentee in the November election, and the overwhelming number of those eligible

[1] Although the ballot envelopes sent to voters contain a place for a witness signature, the district court ordered the SCEC to notify voters that ballots without a witness signature would count during both the June and November elections.

voters have only known an absentee voting system *without* the Witness Requirement. Indeed, over 150,000 absentee ballots for the November election have been mailed to voters while the Witness Requirement has been enjoined. According to SCEC records, thousands of those ballots have already been returned.

Applicants' motion, moreover, rests on several mischaracterizations of the district court's decision and the extensive record that supported it. For example, Applicants fault the district court for providing inadequate weight to the state's asserted law enforcement interests. Mot. at 19. But the district court carefully considered those interests, and found that, in the present context, they could not outweigh the burden that enforcing the Witness Requirement in the November election would impose on thousands of South Carolinians' voting rights. The district court also considered and properly rejected Applicants' argument that absentee voting restrictions do not impact the fundamental right to vote. The district court's decision, moreover, was not lightly taken. It was well-considered and amply supported. The district court became intimately familiar with the issue over several months, considering it first on a preliminary injunction motion for the primary, and then again with the benefit of the record from that election, on a second motion in advance of the general election (which culminated in the order now at issue).

Applicants largely ignore this record and their arguments that this Court should issue a stay are meritless. If that stay granted, moreover, it will

likely cause no harm to Applicants but is certain to cause irreparable harm to Respondents and thousands of lawful South Carolina voters, particularly African American voters, whose communities have been hit disproportionately hard by COVID-19. Although African Americans make up only 27% of the State's population, they represent 35.3% of its deaths due to the virus. App. 11. They are also far more likely to live alone. App. 21. In addition, even voters who are COVID-19 positive are not exempted from the Witness Requirement. The Requirement would thus force voters to choose between participating in the democratic process and taking critical steps to safeguard their health and the health of their communities.

South Carolina's voters have already begun casting their absentee ballots while the Witness Requirement has been enjoined. Any voter who, to date, has returned their absentee ballot without a witness signature has done so lawfully. Thousands more are likely to cast their ballot before any news of a stay reaches them (if it ever does). South Carolina lacks a cure procedure to notify absentee voters of any fixable defect in their absentee ballot, so many of these voters face certain disenfranchisement through no fault of their own.

The district court's 71-page order was issued after extensive consideration of hundreds of pages of briefing, an ample evidentiary record, and hours of argument, and the court properly exercised her discretion to grant the injunction. Because Applicants cannot establish any of the prerequisites for securing a stay, the Court should reject the application.

STATEMENT OF THE CASE

South Carolina requires that a voter must have another person witness and sign their absentee ballot envelope for the vote to count (the "Witness Requirement"). S.C. Code Ann. § 7-15-380. Plaintiffs are political party committees and individual voters, whose right to vote (and, for the committees, the rights of their members and constituencies) will be unduly burdened by the application of this requirement during the present pandemic. The district court enjoined the Witness Requirement twice; first for the June primary (and the subsequent runoff) and then for the November election in an order issued on September 18. Applicants moved for an emergency stay of the district court's second preliminary injunction in the Fourth Circuit. On September 24, a panel voted 2-1 to stay the district court injunction. The very next day, the full Fourth Circuit vacated the panel's stay and granted rehearing en banc. App. 75.

The Fourth Circuit denied the Applicants' stay motion 9-5 on September 30. App. 82. Judge King, concurring in the denial of a stay, "emphasize[d] that . . . the district court has preserved the status quo in South Carolina . . . of *not* having a witness requirement during the COVID-19 pandemic." App. 83. "[T]o stay the injunction so close to the election would engender mass voter confusion and other problems that the Supreme Court warned against in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)." App. 83. The dissent, Judge King noted, "refuse[d] to acknowledge that the district court has preserved the electoral status quo in South Carolina for the November general election." App. 87. And

the risk "[t]hat voters in the November general election would be blindsided by the witness requirement is all the more probable because, since the Spring, the spread of COVID-19 has worsened in South Carolina." App. 84. Judge Wynn, also concurring in the decision, emphasized that denial of the stay "helps South Carolinians of all political persuasions exercise their constitutionally guaranteed right to vote." App. 88.

Since the district court issued its order and the en banc Fourth Circuit denied the Applicants' motion to stay, the interests that weigh in favor of leaving the injunction in place have only gotten stronger. South Carolinians have requested hundreds of thousands of absentee ballots, thousands of which have already been returned to elections officials by voters, with many more undoubtedly also on their way back to county election offices. Among the voters who have not yet cast their ballots and sent them back, many are unlikely to get the message that the Witness Requirement, which was not involved in recent elections nor during the first weeks of absentee voting for the November election, is now suddenly in force. Denying Applicants' motion for a stay will protect voters from being disenfranchised based on confusion about whether they need to get a witness. And, as the district court properly found based on the expansive evidentiary record presented to it, it will do so without risking injury—much less irreparable injury—to the State or any other interested

parties. For all of these reasons, Applicants' motion for a stay should be denied.[2]

ARGUMENT

To prevail, Applicants bear a heavy burden, which they repeatedly fail to carry. *See Winston–Salem/Forsyth Cty Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971). "A stay is an 'intrusion into the ordinary processes of administration and judicial review,'" and granting a stay pending appeal is "extraordinary relief." *Nken v. Holder*, 556 U.S. 418, 427 (2009); *id. at* 433–34. Applicants must show "(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). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Applicants fail to make *any* of the requisite showings to justify a stay.

I. The issue does not merit *certiorari* and the district court's order is unlikely to be overturned on appeal.

This case—and the district court's order—lacks novelty or general applicability that would warrant a grant of *certiorari*. The subject of Applicants' requested stay is a straightforward constitutional challenge.

[2] Although Respondents challenged several provisions of South Carolina law, the Witness Requirement is the only one before this Court.

COVID-19 did not convert this constitutional challenge into a political question, the district court's order does not implicate avoidance principles established to limit voter confusion, and the Witness Requirement is distinguishable from other signature-related cases in which courts have come to different conclusions. The district court weighed the evidence and applied the well-known and often used *Anderson-Burdick* framework. The result was a thoughtful and well-supported order that properly enjoined the challenged law.

a. This case does not raise a political question.

The question before the district court was whether the Witness Requirement unconstitutionally burdens the right to vote in violation of the U.S. Constitution; that is not a political question or a policy judgment. The *Anderson-Burdick* test provides a clear, judicially manageable standard for adjudication, which federal courts regularly apply to similar claims. Under this highly factual test, courts weigh the burden on the right to vote against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983). The standard of review is dictated by the weight of the burden, but "[h]owever slight the burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitations." *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 190–91 (2008) (plurality op.). The Court has been clear: this is no litmus test; in every case, federal courts must

balance these factors and make hard judgments. *Id.* Finally, "*Anderson/Burdick* balancing . . . should not be divorced from reality, and [] both the burden" on voters and the interest put forth by the state "should be evaluated in context." *Obama for Am. v. Husted*, 697 F.3d 423, 441 (6th Cir. 2012) (White, J., concurring); *see also Swanson v. Worley*, 490 F.3d 894, 909 (11th Cir. 2007). In other words, the district court applied a well-accepted legal test to Respondents' claims; it did not replace the legislature's "policy preferences" with its own, as Applicants incorrectly suggest.

None of the cases Applicants cite hold otherwise. In *South Bay United Pentecostal Church v. Newsom*, Chief Justice Roberts opined in a concurrence to a one-sentence order of the Court that denied an application for injunctive relief by a church that sought to be excluded from the California Governor's COVID-19-related Executive Order, that the restrictions at issue "appear[ed] to be consistent with" the Constitution, 140 S. Ct. 1613, 1613 (2020), and "[t]he precise question of when restrictions on particular *social activities* should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *Id.* (emphasis added). There is no suggestion that the application of *election laws* that make it more difficult for voters to exercise their right to vote—or require them to risk their health to exercise that right—during the pandemic involve nonjusticiable political questions. Every decision that is made by the State during COVID-19 is not automatically shielded from constitutional review. "The standards for resolving such claims are familiar

and manageable, and federal courts routinely entertain suits to vindicate voting rights." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 398 (5th Cir. 2020).

b. *Purcell* compels no stay.

Applicants' heavy reliance on *Purcell v. Gonzalez* and the doctrine it has engendered is misplaced. There, the Supreme Court cautioned that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." *Purcell*, 549 U.S. at 4–5. The purpose underlying *Purcell* is to avoid changing the electoral *status quo* just before an election, which would cause voter confusion and chaos.

In this case, the "electoral *status quo*" is no Witness Requirement. The Requirement was enjoined in the June primary and runoff elections, which were the last statewide elections in which South Carolina voters participated. Moreover, those elections were the first time that the overwhelming majority of South Carolina voters were eligible to vote absentee due to the General Assembly's temporary expansion of individuals who are able to vote absentee in order to ensure voter safety in the COVID-19 pandemic. All South Carolina voters are again eligible to vote absentee for the November election, R. 149 § 2, 2020 S.C. Acts No. ___, and the absence of a Witness Requirement is the only absentee voting system they have known. Granting the stay would, therefore, change the status quo. Thus, *Purcell* counsels against issuing Applicants'

requested stay, not in favor of it. *Accord Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 16 (1st Cir. 2020) (holding *Purcell* did not apply because a witness requirement was not enforced in recent election and "the status quo (indeed the only experience) for most recent voters is that no witnesses are required").

As Applicants note, more than 150,000 absentee ballots have been sent to voters since the district court enjoined the Witness Requirement. Mot. at 3. Applicants imply that the Fourth Circuit's *en banc* vacation of the divided panel's stay created confusion because "ballots had *already* gone out." Mot. at 1–2. But Applicants conveniently omit the fact that over 40,000 absentee ballots had *already* been sent to voters when the divided Fourth Circuit panel voted 2-1 to issue a stay of the district court's order. *Judge reinstates SC witness signature requirement for absentee ballots*, WLTX (Sep. 24, 2020 5:16 PM), *available at* https://bit.ly/34jiqmu. That stay remained in place only for one day before the Fourth Circuit issued an en banc order vacating it.

SCEC's records indicate that thousands of voters have already returned their ballots for the November election. To change the rules now would risk widespread confusion and threaten lawful voters with total disenfranchisement. Unlike many other states, South Carolina lacks a cure procedure to notify absentee voters that their ballots fail to comply with a technical requirement and provide them with an opportunity to cure the defect. Thus, if the Court were to issue the stay and the State were to treat a missing

witness signature as a defect, it is much more likely to *cause* significant voter confusion and disenfranchisement than leaving the preliminary injunction order in place. The same is true of the Court's concern in *Purcell* that last-minute changes to elections procedures may create a "consequent incentive to remain away from the polls." 549 U.S. at 5. Granting the stay would cause more ballots to be *rejected*; not facilitate voter access to the franchise. For all of these reasons, the Court should reject Applicants' arguments that *Purcell* justifies a stay.

c. The district court's order was well supported and not an abuse of discretion.

The district court properly applied the *Anderson-Burdick* framework, and the court's conclusion that Plaintiffs were likely to succeed on their challenge to the Witness Requirement was not an abuse of discretion. Applicants' arguments to the contrary are without merit.

In considering the nature of the burden imposed, the district court relied on overwhelming unrebutted evidence that the imposition of the Witness Requirement in the coming election would burden voters, both by making it more difficult for them to vote and forcing them to choose to risk their health in the present pandemic or forego their most fundamental right. App. 56. The district court found that these burdens could not be justified when weighed against the State's sole justification for applying the Witness Requirement in the pandemic—that is, to investigate *alleged* voter fraud. App. 58–59. The district court relied upon unrebutted data regarding the spread of COVID-19,

its harmful effects in addition to death, and its disproportionate impact on certain communities, as well as unrebutted expert conclusions. App. 53–56. And its conclusion was consistent with that of other district courts in finding that witness signature requirements in the time of COVID-19 is a substantial burden. App. 57 (citing *Common Cause R.I.*, 970 F.3d at 14–15; *League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020)).

Applicants assert that the district court made several errors in identifying this burden, but none rise to the level of clear error sufficient to overturn a finding of fact or legal error. *First*, contrary to Applicants' assertion that the district court relied on the wrong cases, there are no binding cases here. As discussed above, *Merrill* is procedurally distinct; absentee voting has begun, and the *status quo* for the majority of eligible voters is no Witness Requirement. And although Applicants lean heavily on Chief Justice Roberts's concurrence in the order in *South Bay United Pentecostal Church*, it does not stand for the proposition that federal courts must abdicate their authority and obligation to preside over challenges to the application of election laws during a pandemic.

Second, Applicants' citationless assertion that the Witness Requirement imposes "only reasonable, nondiscrimatory burdens on absentee voting," Mot. at 17, misapprehends the *Anderson-Burdick* framework. The Court is required to identify the burden—which Applicants appear to acknowledge exists—and

then weigh that burden against the *precise interests* articulated by the State. *Anderson*, 460 U.S. at 789; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). This is precisely what the district court did.

Third, the fact that Respondents Kylon Middleton and Deon Tedder, two candidates for elected office, desire to assist voters with their ballots is of no moment in analyzing the burden the Witness Requirement imposes on the right to vote. Their declarations regarding their willingness to assist other with returning their absentee ballots related to their standing to challenge a ban on the collection of absentee ballots by candidates—a challenge that the district court rejected below and is not at issue here. App. 66–69. Moreover, the challenges of these two laws are not inherently contradictory. Some individuals, like Respondents Middleton and Tedder, may be willing to voluntarily assume some risk of transmission or infection to help others participate in the franchise. They can do so in an interaction-free manner. The Witness Requirement, by contrast, forces voters—including those voters who have COVID-19—to risk transmission or infection, and also requires in many instances the back-and-forth exchange of documents and a pen.

Fourth, the fact that an individual *can* locate a witness does not mean that the Witness Requirement does not constitute a burden. Respondents do not—and need not—allege impossibility. *Anderson*, 460 U.S. at 791 n.12 (explaining that the ability of a few individuals to qualify as independent presidential candidates "d[id] not negate the burden imposed" by the

challenged regulation); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down poll tax as unconstitutional regardless of voter ability to pay).

Courts are required to weigh the burden against the *precise* interests identified by the state, not some constellation of possible interests or interests identified by state defendants in other cases. In the district court, Applicants identified only one state interest: they claimed that the Witness Requirement served an "important-law enforcement regulatory function." App. 58. Although Applicants reference additional state interests in their application for a stay, including deterring voter fraud, increasing confidence in the integrity of the electoral process, and promoting transparency and accountability in the electoral process, Mot. at 18, these interests were not presented to the district court in support of Applicants' opposition to the second motion for preliminary injunction. This is underscored by two facts. First, in making this argument in their motion to stay, Applicants notably rely on *other cases* instead of the arguments and evidence presented below to even identify the interests. Second, the district court noted that Applicants "shifted their argument" between the first and second motions for preliminary injunction to assert that the Witness Requirement "serves an important law-enforcement investigatory function" after "admit[ing] the Witness Requirement was *ineffective* to prevent absentee ballot fraud." App. 58; *id.* n.35 (emphasis added).

The district court analyzed the strength of evidence supporting the State's interest in investigating allegations of voter fraud (a nonspecific declaration from a law enforcement officer identifying the witness signature as providing a "significant" lead in fraud investigations) and juxtaposed it with the fact that the state elections director, an Applicant here, lauded the injunction of the Witness Requirement for the June primary and runoff elections, acknowledged that it formed a barrier to casting an absentee ballot, and recommended that it be suspended again for the general. App. 60; *id.* n.36. Andino is charged with ensuring fair and impartial administration of elections, the State's purported interest in the Witness Requirement, so the district court properly credited her previous statement that the Witness Requirement "offers no benefit to election officials as they have no ability to verify the witness signature." App. 61. And again, no one presented any evidence that the absence of the Witness Requirement during the June primary and runoff elections worked *any* mischief.

Against this record, the district court's conclusion that Plaintiffs were likely to succeed on their *Anderson-Burdick* claim was not an abuse of discretion.

d. This case is distinguishable from the witness signature cases Applicants cite.

Applicants cite several cases involving absentee ballot witness signatures to support their request for an injunction. Mot. at 13 (collecting cases). Each is readily distinguishable.

Applicants first assert that the Supreme Court's grant of a stay in *Merrill v. People First of Alabama*, 2020 WL 3604049 (U.S. July 2, 2020), supports a stay in this case, claiming that the two cases are "virtually identical." Mot. at 2. There are, however, several key differences.

In *Merrill*, the plaintiffs sought to enjoin, for the first time, a witness requirement for a runoff election, and the injunction was entered before voting in that election began. Here, as discussed above, the absence of the Witness Requirement is the status quo for most South Carolina voters because it was enjoined for the June primary and runoff elections, which were the first elections in which most South Carolina voters could vote absentee. In addition, mail-in absentee voting is already in full swing in South Carolina. The reasoning applied in granting that stay is inapplicable here, and the district court ultimately enjoined the witness requirement for the November election. *People First of Alabama v. Merrill*, No. 2:20-CV-00619-AKK, 2020 WL 5814455, at *51 (N.D. Ala. Sept. 30, 2020) (holding witness signature requirement unconstitutional "during the COVID-19 pandemic"); *id.* at *75 (holding plaintiffs were entitled to an order "enjoining the enforcement of the witness requirement" and doing so by separate order).

Applicants next highlight several lower court cases involving absentee ballot witness signatures to highlight the fact that some courts have either issued stays of witness requirement injunctions or declined to order witness requirement injunctions. Mot. at 13. Each of these cases are likewise

distinguishable. In *Democratic National Committee v. Bostelmann*, the court granted a motion to stay a witness requirement where the Wisconsin Election Commission took affirmative steps to provide voters with "at least five concrete alternative suggestions for how voters can comply with the state's witness and signature requirements in light of the extraordinary challenges presented by the COVID-19 crisis." 2020 WL 3619499 at *2 (7th Cir. Apr. 3, 2020). Here, by contrast, SCEC's Executive Director has twice recommended eliminating the Witness Requirement for voter safety because of COVID-19. App. 60, *id.* n.36.

Finally, Applicants cite two district court cases where the courts reached the merits and declined to enter injunctions against witness requirements. Mot. at 13 (citing *DCCC v. Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576 (N.D. Okla. Sept. 17, 2020); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020)). These cases are inapposite because each case presented a factually distinct scenario for the district court to analyze in the *Anderson-Burdick* framework. [3]

In *Democracy North Carolina*, the district court emphasized that its analysis and ultimate decision not to enjoin the witness requirement turned on "the specific facts presented." 2020 WL 4484063, at *25. It thoroughly reviewed the evidence and made factual findings regarding the burden on voters from COVID-19 and the witness requirement, *id.* at *25–34, and

[3] Applicants also identify a third case, *Clark v. Edwards*, No. CV 20-283-SDD-RLB, 2020 WL 3415376 (M.D. La. June 22, 2020) as "denying preliminary injunction," but the district court did not ultimately consider the plaintiffs' motion for a preliminary injunction in *Clark* because it dismissed the case on jurisdictional grounds. *Id.* at *15.

considered "all of the evidence submitted" in determining the weight of the North Carolina's interest in maintaining the witness signature, *id.* at *34–36. In *Democracy North Carolina*, the state asserted that the witness requirement played a role in absentee ballot verification. In this case, by contrast, Applicants admit and acknowledge that the Witness Requirement plays no role in absentee ballot verification.

In *DCCC v. Ziriax*, the district court was also faced with a different factual scenario in weighing the State's interest. There, "[t]he defendants argue[d] that notary or witness signatures help protect vulnerable voters by ensuring a known neutral observer prevented coercion of the absentee voter." 2020 WL 5569576, at *12. Here, Applicants made no such "protect vulnerable voters" argument.[4]

In sum, the procedural posture and facts of this case are unlike those in any witness signature case heard or likely to be heard by a federal court in 2020. A stay risks widespread disenfranchisement, and the district court properly considered the evidence and applied it to the *Anderson-Burdick* framework.

II. Granting the stay would irreparably harm Respondents.

As in the primary and runoff elections, the district court's order ensures that Respondents and their members and constituents are not deterred from

[4] Respondents do not concede that this would be a valid reason to require a witness requirement during the COVID-19 pandemic, they simply note that Applicants have not identified this as a government interest to weigh against the burden imposed by the Witness Requirement.

voting due to reasonable concerns about the threat that in-person interactions pose to their health in the present pandemic. The record was undisputed that this threat to Respondents and thousands of South Carolina voters' health is concrete, real, and imminent. In fact, as the district court and Judge King noted, "[s]trikingly, 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." App. 65, 84.

The risk of harm if a stay is issued is particularly acute for South Carolina's African American population, who have been contracting and dying of COVID-19 at disparately high numbers, as well as other voters among South Carolina's most vulnerable populations, including the elderly and those with preexisting conditions that make them dangerously susceptible to the worst possible outcomes from the virus. App. 84 (King, J., concurring). The reality is that, unless the injunction remains in place, the Witness Requirement will either cause voters to take unnecessary risks to their health or forego voting entirely constitutes textbook irreparable harm. And voters who believe, either based on their experience in the primary or even their neighbor's experience in this election that their ballot will be accepted even if they are unable to find a witness to sign it, will similarly be disenfranchised. Once the election is over (or the voter contracts or spreads the virus), there can be no adequate remedy

at law. *See* App. 62-63 (citing cases); *see also Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020).

In addition, because the district court previously enjoined the Requirement in the primary, the injunction protects the current status quo: throughout the pandemic, South Carolinians have not been required to satisfy the Witness Requirement. Issuing the stay would alter the present elections framework with which voters who participated in the primary are presently familiar (not the other way around). App. 83, 88 (King, J., and Wynn, J., both concurring).

Finally, a stay would undisputedly disenfranchise South Carolina voters. Thousands have already returned their ballots, many of whom likely reasonably believed that they did not need to obtain a witness. Nowhere in their petition do Applicants explain what they will do with the ballots that have come in without a witness signature, including those that were sent while the Witness Requirement was enjoined.

Applicants do not dispute that staying the district court's order would disenfranchise some South Carolinians, including those who have already sent in their ballots. Nor do they argue that catching COVID-19 is not irreparable harm. Rather, Applicants argue that the Witness Requirement will not "substantially injure any parties" because it is "likely constitutional." Mot. at 26. As the district court (twice) and the en banc Fourth Circuit determined, the Witness Requirement is likely *unconstitutional*. And even "likely

constitutional" laws can inflict irreparable harm. *See Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).

Applicants also argue that "any harm to Respondents" is their fault for "unnecessarily" "delay[ing]" their "pursuit of relief" since the Witness Requirement was passed in 1953. Mot. at 27 (citing *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring)). But this ignores the historical moment in which we find ourselves in which gave rise to this litigation months ago. Respondents' challenge to the Witness Requirement is based on the COVID-19 pandemic, which first became an evident issue in this country in early to mid-March of 2020. Respondents filed this action as quickly as they possibly could, in light of emerging issues and evidence. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("reasonable diligence"). Respondents obtained an injunction in the primary, which Applicants chose not to appeal. There is thus no legitimate comparison to the facts in the *Reclaim Idaho* case, where the plaintiffs did not pursue relief from Idaho's signature requirements to get initiatives on the ballot until "more than a month after the deadline for submitting signatures." *Reclaim Idaho*, 140 S. Ct. at 2617 (C.J., Roberts, concurring).

III. Applicants will not suffer irreparable harm if the stay is denied.

Applicants, on the other hand, make no showing that they will suffer injury absent a stay, much less irreparable harm. App. 64 ("[T]here is no evidence that Defendants will suffer any harm if Plaintiffs' Motion is

granted."); *see also* App. 86 (King, J., concurring). The State is not "harmed by 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." App. 64 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) and citing *Newsom v. Albemarle Cty. School Bd.*, 354 F.3d at 261 (4th Cir. 2003)).

This Court has never granted a stay simply because a district court's order prevented a state from "effectuating statutes enacted by representatives of its people." Mot. at 24 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The Applicants' quoted language comes from a case considering whether to stay an injunction that prevented Maryland from collecting DNA from people arrested for "violent felonies." *Maryland*, 567 U.S. at 1303 (Roberts, C.J., in chambers). That practice had resulted in 58 criminal prosecutions in the two prior years, giving rise to an "ongoing and concrete harm to Maryland's *law enforcement and public safety interests*," *id.* at 2–3 (emphasis added), not simply its interest in "effectuating statutes enacted by representatives of its people." No such interest is present here.

Applicants' baseless assertion that a stay is necessary to avoid "voter confusion, distrust in election results, and skepticism of the democratic process" is also easily rejected. Mot. at 24–25. There is no evidence that there was any voter confusion, distrust in election results, or skepticism of the democratic process in South Carolina's June primary and June runoff elections

as a result of the injunction of the Witness Requirement in those elections. In fact, after that election Applicant Andino, SCEC's Executive Director, again *affirmatively recommended* that the Witness Requirement be suspended for the November election as well. App. 60 & n.36. Applicants have no proof that the Witness Requirement is "an important means of deterring fraud and protecting the integrity of elections." Applicants' single example of fraud from 2008 had nothing to do with the Witness Requirement. Mot. at 19. And although it is true that a law enforcement officer testified that the Witness Requirement theoretically offers a *potential* lead in voter fraud cases, he could not cite an example in which the Witness Requirement actually proved useful in prosecuting voter fraud. *Middleton* ECF 93-8 at 2. Whatever minor deterrent, if any, getting a witness signature may entail to those who would seek to fraudulently participate in the voting process (and Applicants have shown no proof of deterrence) is well outweighed, as the district court and Fourth Circuit found, by the disenfranchisement and burden on the right to vote that imposing it in South Carolina's November election will cause in the context of the current circumstances. App. 58, App. 85 (King, J., concurring).

Applicants' efforts to distinguish their application from the one that this Court recently rejected in *Republican National Committee v. Common Cause Rhode Island* fall flat. 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020). Just as in *Rhode Island*, "voters may well" believe "[t]he status quo" still lacks a witness requirement. 2020 WL 4680151, at *1. During the most recent elections in

June, voters were not required to obtain a witness signature. And, again, Applicants conveniently ignore that Applicant Andino, the head of South Carolina's elections agency and a member of the executive branch, recommended that the Witness Requirement be eliminated for the November election. Finally, the South Carolina Supreme Court's dismissal of *Duggins v. Lucas*, 2020 WL 5651772 (S.C. Sept. 23, 2020), means nothing here since the court was not asked to decide whether the Witness Requirement violated the U.S. Constitution. *Duggins* petitioners broadly accused the General Assembly of failing to meet its state constitutional duties by not acting to address voting during the COVID-19 pandemic. When the General Assembly extended the option to vote absentee to everyone, the court dismissed the suit.

As discussed *supra* Part I.b, *Purcell* supports Respondents' position. South Carolinians have voted without the Witness Requirement for more than four months. This Court should avoid "late-breaking judicial interference with state elections," Mot. at 27. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

IV. The balance of the equities strongly favors denying the stay.

This factor, as well, strongly weighs against granting Applicants' motion for a stay. That the equities favor the district court's injunction is clear for multiple reasons, including that (1) the injunction prevented constitutional violations, *see* App. 63–64 (citing *Giovani Carandola*, 303 F.3d at 521 ("upholding constitutional rights surely serves the public interest")); (2) it

serves the public interest in safeguarding public health, *see* App. 64 (citing *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013); *Diretto v. Country Inn & Suites by Carlson*, No. 16-cv-1037, 2016 WL 4400498, at *4 (E.D. Va. Aug. 18, 2016) ("The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease.")); and (3) "the public interest 'favors permitting as many qualified voters to vote as possible.'" App. 65 (quoting *Obama for Am.*, 697 F.3d at 437). And now, as the Fourth Circuit concluded, denying a stay (4) "will minimize confusion among both voters and trained election officials—a goal patently within the public interest." *Texas Democratic Party*, 961 F.3d at 412.

Applicants do not dispute that preventing the spread of COVID-19 is in the public interest. Nor do they dispute that maximizing the number of qualified voters who can vote serves the public interest. Rather, Applicants argue that the public interest favors a stay because "the witness requirement is likely constitutional" and the public interest "lies in 'giving effect to the will of the people by enforcing the [election] laws they and their representatives enact.'" Mot. at 27. The Witness Requirement is likely *unconstitutional*, as both the district court and en banc Fourth Circuit found. Even if a majority of South Carolina's electorate favored keeping the Requirement in place (and there is no evidence whatsoever that that is true), "the Constitution [ ] confers certain specific rights upon individuals which the courts will protect with greater authority against the will of the majority." *Holman v. Hilton*, 542 F. Supp. 913,

921 (D.N.J. 1982); *see Thompson*, 959 F.3d at 813 ("the Constitution provides a backstop, as it must"). The public interest in enforcing the *law for the law's sake* is outweighed by preventing the spread of COVID-19, maximizing the number of qualified voters who can vote, and—perhaps most importantly—preventing confusion and chaos on the eve of the election. The situation here is in stark contrast to *Respect Maine PAC v. McKee* and *Phelps-Roper v. City of Manchester, Missouri*, where plaintiffs' public-interest showing rested entirely on their claims that the law violated their First Amendment rights. *Respect Maine*, 622 F.3d 13, 15 (1st Cir. 2010); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012).

CONCLUSION

For all the above reasons, Respondents respectfully ask this Court to deny Applicants' emergency application for a stay of the preliminary injunction pending disposition of their appeal in the Fourth Circuit and any petition for a writ of certiorari.

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Respectfully submitted,

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