No. _____

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.

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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Applicants are Marci Andino, in her official capacity as 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 the South Carolina Republican Party. Applicants were the defendants in the district court and appellants in the Fourth Circuit.

Respondents are Kylon Middleton, Deon Tedder, Amos Wells, Carlyle Dixon, Tonya Winbush, Ernestine Moore, the South Carolina Democratic Party, DNC Services Corporation/Democratic National Committee, and the DCCC. Respondents were the plaintiffs in the district court and the appellees in the Fourth Circuit.

The proceedings below were:

1. *Middleton v. Andino*, No. 20-2022 (4th Cir.) – stay granted September 24, 2020; grant of stay vacated by en banc court September 25, 2020; stay denied by en banc court September 30, 2020

2. *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C.) – judgment entered September 18, 2020

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, no Applicant has a parent company or a publicly held company with a 10 percent or greater ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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

Invoking *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), this Court has "repeatedly" instructed "lower federal courts" not to "alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (*RNC*). One reason for this rule is that "[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5 (emphasis added).

This case is a poster child for what *Purcell* says not to do. Days before South Carolina's June primary, the district court (before the Speaker and Senate President had intervened in the case) preliminarily enjoined the State's witness requirement for mail-in absentee voting. Instead of pursuing a costly appeal, South Carolina's elected officials decided to revisit the State's elections laws before the November general election, in light of the challenges presented by COVID-19. They passed overwhelmingly bipartisan legislation that substantially expands absentee voting, but they deliberately *refused* to suspend the witness requirement, deeming it an important tool for deterring fraud and promoting confidence in this unprecedented election. Two days after the legislation went into effect, however, the district court preliminarily enjoined the witness requirement again. The Fourth Circuit promptly stayed that injunction. But almost immediately after, the full Fourth Circuit sua sponte vacated the stay. The en banc court vacated the stay even though ballots had

already gone out, and even though this Court had entered a virtually *identical* stay in *Merrill v. People First of Alabama*, 2020 WL 3604049 (U.S. July 2, 2020).

In describing what happened in this case, Judge Wilkinson did not mince words: "The [en banc] majority's disregard for the Supreme Court is palpable." Appendix ("App.") 89 (Wilkinson, J., dissenting). Its decision to vacate the panel's earlier stay reinstated an injunction that "represents a stark interference with South Carolina's electoral process right in the middle of the election season." App. 89 (Wilkinson, J., dissenting). And the full Fourth Circuit went out of its way to vacate the panel's stay and review the matter en banc, even though Respondents' underlying claim is "legally unsupportable" and South Carolina's witness requirement is "commonplace and eminently sensible." App. 90 (Wilkinson, J., dissenting). The full Fourth Circuit then took five days to issue an order denying the stay itself—allowing five days of voting to go by with the witness requirement still suspended. Applicants now "seek to vindicate promptly their constitutional prerogatives before the only tribunal that can finally and definitively bring an end to this mischief: the United States Supreme Court." App. 94 (Wilkinson, J., dissenting).

This case is not like *Republican National Committee v. Common Cause Rhode Island*, which denied a stay sought by the Republican Party concerning another witness requirement. 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020). There the Republican Party acted alone: "the state election officials support[ed] the challenged decree, and no state official ha[d] expressed opposition." *Id.* But here, Applicants are South Carolina's election officials and legislative leaders, Applicants received amicus

support from South Carolina's attorney general, and the witness requirement has the support of "[a]ll three branches of South Carolina's government." App. 78 & n.* (Wilkinson, J., dissenting). In other words, this case is *Merrill*, not *Common Cause*.

The district court's injunction should be stayed. Applicants respectfully ask the Court to enter a stay as soon as possible. Over 150,000 absentee ballots have been mailed out already, and each passing day increases the risk that ballots will be returned that, in mistaken reliance on the district court's injunction, do not comply with the witness requirement. Applicants are willing to brief this application on as expedited a schedule as the Court deems appropriate, including over the weekend.

OPINIONS BELOW

The Fourth Circuit's en banc order denying the motion to stay is not yet reported, but is reproduced at App. 81-95. The Fourth Circuit's order granting rehearing en banc and vacating the stay is reported at *Middleton v. Andino*, 2020 WL 5752607 (4th Cir. Sept. 25, 2020), and is reproduced at App. 74-80. The Fourth Circuit's order granting a stay is reported at *Middleton v. Andino*, 2020 WL 5739010 (4th Cir. Sept. 24, 2020), and is reproduced at App. 72-73. The district court's opinion entering a preliminary injunction is reported at *Middleton v. Andino*, 2020 WL 5591590 (D.S.C. Sept. 18, 2020), and is reproduced at App. 1-71.

JURISDICTION

The district court granted a preliminary injunction. On interlocutory appeal, a panel of the Fourth Circuit stayed that injunction, but the full court sua sponte granted rehearing en banc and vacated the stay. The Fourth Circuit then denied the motion to stay the injunction pending appeal. This Court has jurisdiction to stay the

preliminary injunction pending appeal and certiorari. 28 U.S.C. §1254(1); §1651(a); §2101(f).

STATEMENT OF THE CASE

I. South Carolina law has required absentee voters to have a witness since 1953.

The Constitution gives states "broad power to prescribe the 'Time, Places, and Manner of holding Elections for Senators and Representatives.'" *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. Const. art. I, §4, cl. 1). In South Carolina, this power belongs to the General Assembly. S.C. Const. art. II, §10. The General Assembly has, accordingly, adopted the South Carolina Election Law. S.C. Code Ann. §7-1-10 *et seq*.

As part of the Election Law, the General Assembly requires that voters casting mail-in absentee ballots swear this oath, which appears on the return envelope:

> I hereby swear (or affirm) that I am duly qualified to vote at this election according to the Constitution of the State of South Carolina, that I have not voted during this election, that the ballot or ballots contained in this envelope is my ballot and that I have received no assistance in voting my ballot that I would not have been entitled to receive had I voted in person at my voting precinct.

S.C. Code Ann. §7-15-380. The oath must be witnessed by one other person, who must sign below the voter's signature and write his address. *Id.*; *see also Thomas* ECF 182-1 at 9 (example of envelope).[1]

[1] ECF citations are to the district court records in *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C.), and *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C.). The *Thomas* plaintiffs also challenged the State's witness requirement.

The State's original witness requirement (which, unlike the current version of the law, required a notary) was enacted in 1953. 1953 S.C. Acts No. 48. Since the witness requirement took its current form in 1982, 1982 S.C. Acts No. 280, §1, the General Assembly has made only two minor changes: in 1996 to account for voters with physical disabilities or illiteracy, 1996 S.C. Acts No. 416, §1, and in 2011 to account for military and overseas voters, 2011 S.C. Acts No. 43, §7.

In response to COVID-19, the General Assembly considered whether to change any parts of the Election Law for November's general election. The General Assembly made changes, most notably allowing all South Carolina voters to vote absentee. *See* R.149, §2, 2020 S.C. Acts No. 143. This bill passed with bipartisan support and only a single dissenting vote. *See* H.5305 History, S.C. Legislature, bit.ly/339dBNj. It was signed by the Governor on September 16, 2020.

The General Assembly debated eliminating the witness requirement. Both the Senate and the House (twice) rejected that idea. *See* Sen. Journal No. 47 (Sept. 2, 2020), bit.ly/3j7yluk; H. Journal No. 40 (Sept. 15, 2020), bit.ly/344DAEP; H. Journal No. 39 (June 24, 2020), bit.ly/2FYfmEq. During the debate on whether to keep the witness requirement in place while also expanding absentee voting for the upcoming election, two senators, including Senate majority leader Shane Massey, explained:

> We believe that keeping the witness requirement is important because courts have recognized that absentee voting is a likely source of voting fraud. The existence of the witness requirement has had a deterrent effect as is evidenced by a relative lack of absentee ballot fraud prosecutions. Finally, removing the witness requirement—aside from deterring fraud—would also take away from law enforcement an important tool for investigating election fraud allegations.

Sen. Journal No. 47 (remarks of Sens. Massey and Campsen following defeat of Amendment 7, which would have suspended the witness requirement for this election).

II. Respondents challenge multiple provisions of South Carolina's absentee-voting laws.

Respondents—six individuals and three organizations—sued the Election Commission's executive director and commissioners before the June primary, seeking to enjoin multiple provisions of the State's absentee-voting law. *Middleton* ECF 1, 69. Speaker Lucas, Senate President Peeler, and the S.C. Republican Party intervened as defendants. *See Middleton* ECF 27, 96.

Some challenges were mooted during the course of the litigation. With extra COVID-19 funds, the Election Commission is paying for postage for absentee ballots, mooting Respondents' claim that requiring postage is a poll tax. *See Middleton* ECF 58. And when R.149 was enacted, the challenges to who may vote absentee under S.C. Code Ann. §7-15-320 became moot. App. 39-40.

Other challenges were rejected by the district court. That court refused to extend the 7:00 P.M. Election Day deadline by which absentee ballots must be received to be counted. S.C. Code Ann. §7-15-420(B); *see* App. 37-38. That court likewise denied Respondents' motion to enjoin the prohibition on candidates and their campaigns collecting and returning absentee ballots. S.C. Code Ann. §7-15-385; *see* App. 66-69.

One challenge did prevail below: the claim that the witness requirement unduly burdens the right to vote. The witness requirement is the only subject of this application.

III. The district court enjoins the witness requirement.

The district court held that voters were burdened by the witness requirement because getting a witness signature "include[d] the risk of contracting COVID-19," pointing to Respondents' experts' assertions that the requirement was "particularly" burdensome if voters live alone. App. 53-54. The court also observed that some Respondents were in the CDC's high-risk category. App. 54. The court bolstered its burden analysis by noting that South Carolina takes COVID-19 seriously, pointing to the General Assembly's decision to open absentee voting to all voters for November's general election, and Governor McMaster's emergency declarations. App. 55.

Turning to the State's interest in the witness requirement, the district court said it did not have to take at "face value" the declaration from a sixty-year FBI and state law-enforcement veteran that the witness requirement helps the State combat voter fraud. App. 59. The district court insisted the witness requirement had limited utility to law enforcement, and reasoned that a lack of widespread voter fraud in South Carolina in recent years made the witness requirement less important. App. 59, 61-62.

Rather than crediting the declaration of an experienced law-enforcement officer or the General Assembly's decision to leave the witness requirement in effect, the district court relied heavily on two letters from the Election Commission's

executive director to the State's legislative leaders, in which she said that election administrators don't use the requirement other than ensuring voters comply with it. *See* App. 60. The district court put substantial weight on these letters despite the fact that the executive director offered only the perspective of individual "election officials," *Thomas* ECF 1-2 at 3, and readily admitted the Election Commission isn't an investigative or law-enforcement agency, *Middleton* ECF 93-3 at 396.

Based on this reasoning, the district court enjoined the witness requirement across the entire State. App. 70-71.

IV. Another lawsuit challenging the witness requirement was set for trial less than four days before the district court entered the preliminary injunction.

Shortly before Respondents filed this lawsuit, another group of plaintiffs challenged South Carolina's witness requirement in federal court. *See Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C.); *Thomas* ECF 76. The *Thomas* case was assigned to the same district judge, and, in fact, the district court enjoined the witness requirement for the June primary in both cases in the same order. *See Middleton* ECF 36, 37; *Thomas* ECF 65.

After the June primary, the two cases proceeded on different tracks. This case was set for trial in June 2021, and the scheduling order contemplated a second preliminary injunction motion before the general election in November. *Middleton* ECF 54. In *Thomas*, by contrast, trial was set for September 22, before the general election. *Thomas* ECF 70. The defendants there (who are Applicants here) moved for summary judgment, *Thomas* ECF 108, 109, and the district court held a hearing, *Thomas* ECF 148. The motions are still pending, and trial was set to begin less than

four days after this *Middleton* injunction was entered on September 18. Then, minutes after issuing the injunction, the district court stayed the *Thomas* trial. *Thomas* ECF 178.

V. The Fourth Circuit initially stays the injunction, then reverses course and refuses to stay it.

When the district court entered the preliminary injunction on Friday, September 18, Applicants immediately appealed and sought a stay. On the following Thursday, September 24, a panel of the Fourth Circuit stayed the injunction pending appeal. App. 73. South Carolina mailed out tens of thousands of ballots to voters who had requested them, with return envelopes that instruct voters to comply with the witness requirement.

But the next day, and entirely on its own motion, the full Fourth Circuit granted rehearing en banc and vacated the panel's stay. App. 75. Judges Wilkinson and Agee dissented from the en banc order. They explained why, in their view, Applicants were entitled to a stay. App. 73-80. The order from the en banc Fourth Circuit (which was issued on September 25 but reissued with ministerial changes on September 28) vacated the panel's stay, but it stated that "all filings relative to the motion for stay are referred to the en banc court for consideration." App. 75. Even though tens of thousands of additional ballots were being mailed out each day, the en banc court did not resolve the stay motion for another five days.

Ultimately, on a 9-5 vote, the full Fourth Circuit denied the stay motion. App. 82. Judge Wilkinson, joined by Judge Agee, authored a dissent. Judge Wilkinson took special issue with the majority's suggestion that "enjoining a state law plainly

in place for the election is somehow not disruptive." App. 90. This reasoning not only "equates primary voting with the far different and larger operation of a general election," which "presents much different questions" of election integrity "from those posed by an intra-party primary," but it also ignores "the district court's preliminary injunction." App. 90. The injunction acknowledged that the court "did in fact change the rules shortly before the election" because it "orders the State to launch a publicity campaign notifying voters that [the witness] requirement will not be enforced." App 90. "This hardly sounds … like some ordinary defense of the 'status quo.'" App. 90.

REASONS FOR GRANTING THE STAY

This Court's long-standing rule for when it will grant a stay pending appeal has three factors. An applicant must show there is "(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). Sometimes this Court will also "balance the equities and weigh the relative harms to the applicant[s] and to the respondent[s]." *Id*. Here, these factors all favor granting the application for a stay.

I. There is a reasonable probability that four Justices will vote to grant certiorari and a fair prospect that five Justices will vote to reverse.

This Court has already determined that it would likely review, and likely reverse, an injunction against Alabama's witness requirement. *Merrill*, 2020 WL 3604049, at *1. Applicants are raising the same two questions that Alabama raised in *Merrill*: whether witness requirements remain constitutional during COVID-19, and whether the district court's late-breaking injunction violates the *Purcell*

principle. *See Merrill* Stay App. 16-20. Because South Carolina's one-witness requirement is only less burdensome than Alabama's two-witness requirement and because the district court enjoined South Carolina's witness requirement with even less time before the next election, the Court should grant a stay here too.

A. Reasonable, nondiscriminatory regulations of absentee voting, like South Carolina's witness requirement, remain constitutional during COVID-19.

As Alabama explained in *Merrill*, "courts across the nation are facing a flood" of challenges to "States' election laws in light of COVID-19." *Merrill* Stay App. 18. By one count, over 250 COVID-19/election cases have been filed in more than 45 States. *See* Levitt, *The List of COVID-19 Election Cases*, bit.ly/33D1xoe (last updated Sept. 27, 2020). The Democratic Party alone has filed more cases in 2020 than it did in "2015, 2016, 2017, and 2018 combined." Debenedetti, *Vision 2020*, N.Y. Mag. (June 22, 2020), nym.ag/3gVdrOd. This Court has already seen several of these cases. *E.g.*, *Merrill*, 2020 WL 3604049 (granting stay); *Clarno v. People Not Politicians Ore.*, 2020 WL 4589742, at *1 (U.S. August 11, 2020) (granting stay); *RNC*, 140 S. Ct. 1205 (granting stay); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (declining to vacate stay); *Thompson v. DeWine*, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (declining to vacate stay).

The basic theory of these cases is that COVID-19 has made otherwise constitutional election laws unconstitutional: The burdens of complying with these laws are now too high, the argument goes, because people are staying home and socially distancing to avoid contracting the virus. In States that restrict absentee voting to certain classes of voters, plaintiffs have used this theory to press for no-

excuse absentee voting.[2] In States that already have no-excuse absentee voting, plaintiffs have used this theory to challenge many routine ballot-integrity measures intended to safeguard absentee voting. For example, plaintiffs have challenged measures that require absentee voters to provide copies of a photo ID,[3] have someone witness their signature,[4] return their own ballot,[5] match their signature to one already on file,[6] make sure their ballot arrives by election day,[7] pay for their own stamps,[8] and more. *See generally COVID-Related Election Litigation Tracker*, Stanford-MIT Healthy Elections Proj., stanford.io/3mYyeDG (searchable database).

[2] *E.g.*, *Tully v. Okeson*, No. 1:20-cv-01271 (S.D. Ind.); *Collins v. Adams*, No. 3:20-cv-00375 (W.D. Ky.); *Clark v. Edwards*, No. 20-cv-00308 (E.D. La.); *Conn. NAACP v. Merrill*, No. 20-cv-00909 (D. Conn.); *Tex. Democratic Party v. Abbott*, No. 20-cv-438 (W.D. Tex.).

[3] *E.g.*, *Collins*, No. 3:20-cv-00375; *DCCC v. Ziriax*, No. 4:20-cv-00211 (N.D. Okla); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249 (W.D. Wis.).

[4] *E.g.*, *Ziriax*, No. 4:20-cv-00211; *Clark*, No. 20-cv-00308; *Common Cause R.I. v. Gorbea*, No. 20-cv-00318 (D.R.I.); *People First of Ala. v. Merrill*, No. 20-cv-00619 (N.D. Ala.); *Bostelmann*, No. 20-cv-249.

[5] *E.g.*, *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986 (N.D. Ga.); *Democracy N.C. v. N.C. State Board of Elections*, No. 20-cv-457 (M.D.N.C.).

[6] *E.g.*, *Fugazi v. Padilla*, No. 20-cv-00970 (E.D. Cal.); *League of Women Voters Ohio v. LaRose*, No. 20-cv-03843 (S.D. Ohio); *Ariz. Democratic Party v. Hobbs*, 20-cv-01143 (D. Ariz.); *League of Women Voters v. Kosinski*, No. 20-cv-05238 (S.D.N.Y.); *League of Women Voters N.J. v. Way*, No. 20-cv-05990 (D.N.J.); *Self Advocacy Solutions N.D. v. Jaeger*, No. 20-cv-00071 (D.N.D.); *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 20-cv-00374 (M.D. Tenn.).

[7] *E.g.*, *Common Cause Ind. v. Lawson*, No. 20-cv-02007 (S.D. Ind.); *Mays v. Thurston*, No. 20-cv-00341 (E.D. Ark); *New Ga. Project*, No. 20-cv-01986; *Bostelmann*, No. 20-cv-249.

[8] *E.g.*, *Black Voters Matter Fund v. Raffensperger*, No. 20-cv-01489 (N.D. Ga.); *New Ga. Project*, No. 20-cv-01986; *Ziriax*, No. 20-cv-00211.

These claims have divided the lower courts. *See Merrill* Stay App. 19-20 (highlighting the disagreements). Consider witness requirements for absentee ballots. The Seventh Circuit found these requirements likely constitutional despite COVID-19, while the Eleventh Circuit and the First Circuit reached the opposite conclusion. *Compare Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020) (*DNC*) (granting stay), *with Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020) (denying stay), *and People First of Ala. v. Ala. Sec'y of State*, 815 F. App'x 505 (11th Cir. 2020) (denying stay). District courts, too, have split on these requirements. *Compare League of Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 2158249 (W.D. Va. May 5, 2020) (approving consent judgment), *and Thomas v. Andino*, 2020 WL 2617329 (D.S.C. May 25, 2020) (entering preliminary injunction), *with DCCC v. Ziriax*, 2020 WL 5569576 (N.D. Okla. Sept. 17, 2020) (denying injunction), *Clark v. Edwards*, 2020 WL 3415376 (M.D. La. June 22, 2020) (denying preliminary injunction), *and Democracy N.C. v. N.C. State Bd. of Elections*, 2020 WL 4484063, at *23–36 (M.D.N.C. Aug. 4, 2020) (denying preliminary injunction). Virus-based challenges to other in-person signature requirements have likewise divided the lower courts. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (Roberts, C.J., concurring) (highlighting the split that has arisen "[s]ince the onset of the pandemic" on "whether and to what extent States must adapt the initiative process to account for new obstacles to collecting signatures").[9]

[9] While these decisions are mostly interlocutory, that posture is inevitable in election-year litigation, when plaintiffs seek relief rapidly and cases quickly become moot on appeal. *See Purcell*, 549 U.S. at 5-6.

Most courts have rejected these virus-specific challenges to States' regulations of absentee voting. Those courts are correct. Even setting aside the *Purcell* principle, these cases have at least three independent flaws.

First, these cases ignore this Court's decision in *McDonald*, which held that limitations on absentee voting typically do not "impact … the fundamental right to vote." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). In *McDonald*, Illinois law allowed some classes of voters to cast absentee ballots, but not people in jail. *Id.* at 803-04. When inmates who couldn't post bail challenged the law, this Court held that "the right to vote" was not "at stake." *Id.* at 807. There is no "right to receive absentee ballots." *Id.* Illinois' rules on absentee voting "d[id] not themselves deny … the exercise of the franchise" because they only "ma[d]e voting more available to some groups." *Id.* at 807-08. And Illinois' election code "as a whole" did not "deny … the exercise of the franchise" either. *Id.* at 808. Illinois had not "precluded [the inmates] from voting" because the inmates had potential options to vote in person. *Id.* at 808 & n.6. In other words, the inmates' constitutional claims failed because they were not "absolutely prohibited from voting by the State." *Id.* at 808 n.7.

The decision below conflicts with *McDonald*, as well as the Fifth Circuit's decision in *Texas Democratic Party v. Abbott*. *See* 961 F.3d 389 (5th Cir. 2020) (rejecting a virus-based challenge to Texas's law limiting absentee voting to senior citizens). South Carolina's witness requirement affects only mail-in absentee voting. Even if it adds an element to that method of voting, South Carolinians are not

"absolutely prohibited from exercising the franchise," *McDonald*, 394 U.S. at 809, because they can still vote in person on election day or during the four weeks of in-person absentee voting (where the witness requirement does not apply). "[P]ermit[ting] the plaintiffs to vote in person … is the exact opposite of 'absolutely prohibit[ing]' them from doing so." *Tex. Democratic Party*, 961 F.3d at 404.

Although COVID-19 might make in-person voting less desirable, courts "cannot hold private citizens' decisions to stay home for their own safety against the State." *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020); *accord Tex. Democratic Party*, 961 F.3d at 405 (explaining that "the Virus" is "beyond the state's control"). And *the State of South Carolina* has determined that in-person voting can be done safely and consistent with CDC guidelines. When it comes to elections and this pandemic, States' judgments are due "double deference." *Tully*, 2020 WL 4926439, at *6. Beyond their "broad power" to regulate the time, place, and manner of elections, *see* U.S. Const. art. I, §4, cl. 1; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008), this pandemic is replete with "dynamic and fact-intensive matter subject to reasonable disagreement" and "fraught with medical and scientific uncertainties," *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). In such situations, the people's elected representatives have "especially broad" latitude that "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health." *Id.* at 1613-14.

Second, even if regulations of absentee voting implicated the constitutional right to vote, cases like this one wrongly assume that COVID-19 can make otherwise constitutional laws unconstitutional. Courts usually analyze laws that implicate voting rights under the *Anderson-Burdick* test, the balancing test from this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). This test asks courts to "weigh" the law's burden on voting rights against the state interests behind the law. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). "Reasonable, nondiscriminatory restrictions" on voting rights are almost always justified by the "State's important regulatory interests." *Id.* (cleaned up). After all, there is no right to be free from "the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (op. of Stevens, J.).

Laws like South Carolina's witness requirement are "only the most typical sort of neutral regulations" that, in normal times, would easily satisfy the *Anderson-Burdick* balancing test. *Reclaim Idaho*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring). "Just think of all the areas in which law requires witnesses and notaries to inspire trust in official documents and acts and to convey their authenticity." App. 91 (Wilkinson, J., dissenting). Indeed, South Carolina requires a witness in myriad situations. *E.g.*, S.C. Code Ann. §30-7-20 (liens on real property); §62-5-502(3) (wills). And at least ten other States have witness requirements for absentee ballots. *How States Verify Absentee Ballots*, NCSL, bit.ly/2EDvE4J (last visited Sept. 25, 2020). Respondents agree; they argue that the witness requirement is unconstitutional only "as applied only during the COVID-19 pandemic." App. 48. But

even assuming this restriction on absentee voting implicates the constitutional right to vote, the pandemic does not meaningfully alter the *Anderson-Burdick* balance.

On the burden side, witness requirements continue to impose only reasonable, nondiscriminatory burdens on absentee voting. South Carolina gives voters over a month to find one witness. That task is not unusually difficult. It is certainly no more difficult than getting a photo ID by "making a trip to the [D]MV, gathering the required documents, and posing for a photograph." *Crawford*, 553 U.S. at 198. Watching someone sign something takes no more than 60 seconds, and witnesses can be family, friends, coworkers, congregants, teachers, waiters, bartenders, gymgoers, neighbors, grocers, and more. Here, for example, most Respondents offered no evidence that they live alone and never interact with others. *E.g.*, App. 54. Two Respondents even said they wanted *more* interaction with voters (by collecting their absentee ballots). *Middleton* ECF 77-3 at 3-4; 77-4 at 4. And the only Respondent who lives alone recently conducted a television interview about this lawsuit sitting shoulder-to-shoulder with her adult son. *Federal Judge Says You Won't Need a Witness Signature for Your Absentee Ballot this November*, WIS-TV (Sept. 21, 2020), bit.ly/2S42nDs. If she can sit next to her son (who is a state legislator) for a television interview, then she can also sit next to her son while he witnesses her absentee ballot.

Again, courts are not equipped to second guess the health and safety determinations of South Carolina's elected representatives, including the determination that the witness requirement can be satisfied safely. Several courts have found that witnessing can be done safely during the pandemic by wearing masks, staying

outside, standing six feet apart, looking through glass, sterilizing documents and pens, and other commonsense measures. *See Thompson*, 959 F.3d at 810; *Miller v. Thurston*, 967 F.3d 727, 739-40 (8th Cir. 2020). Applicants' expert similarly explained that the witness requirement would not "pose a significant increased risk" because it took little time and could be done with face masks, social distancing, and good hygiene. *Middleton* ECF 93-4 at 8; *Thomas* ECF 182-2.[10]

On the state-interest side of the balance, witness requirements continue to serve the State's interests in deterring "voter fraud" and increasing "'[c]onfidence in the integrity of our electoral processes,'" as the Seventh Circuit explained when it stayed an injunction of Wisconsin's witness requirement, *DNC*, 2020 WL 3619499, at *2; *accord Thompson*, 959 F.3d at 811 ("witness … requirements help prevent fraud"); *Miller*, 2020 WL 4218245, at *8 (similar). These interests, as well as the related interest in "promoting transparency and accountability in the electoral process," are "particularly strong"—indeed, "essential to the proper functioning of a democracy.'" *John Doe No. 1 v. Reed*, 561 U.S. 186, 197-98 (2010). And these interests are even *stronger* during COVID-19, when South Carolina expects "a record number of absentee ballot requests" at the same time its "general election system [is] facing a

[10] In *Thomas*, the plaintiffs' expert admitted that, for more than two months, he has felt safe around other people outdoors, without face masks, ten feet apart. *See* Bernard J. Wolfson, *As California COVID-19 Cases Surge, Here's How to Safely Socialize if You Refuse to Stay Home*, Desert News (July 14, 2020), bit.ly/3mYlZXF. A voter could easily have someone be a witness under these same conditions, and the district court would have heard this evidence had it allowed the *Thomas* trial to proceed.

wide variety of challenges in the face of the pandemic." *Reclaim Idaho*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring).

The district court's attempt to nitpick these state interests is unpersuasive. Its assertion that South Carolina has prosecuted few voter-fraud cases is a non-sequitur. That South Carolina doesn't have massive voting fraud is a good thing and shows the State's election rules are working; it cannot be a reason to *suspend* those same requirements. Further, *Anderson-Burdick* review is not strict scrutiny, so the State is free to legislate prophylactically to prevent fraud and to enhance voters' confidence in the integrity of South Carolina elections. *See Crawford*, 553 U.S. at 194-95; *Timmons*, 520 U.S. at 364. In any event, Applicants "*did* present evidence of voter fraud, even though [they] did not need to." App. 92 n.2 (Wilkinson, J., dissenting); *see Thomas* ECF 146-1 at 7 (lieutenant's testimony that he was investigating allegations of fraud from the June 2020 primary); *Middleton* ECF 93-7 (2008 conviction of a mayor for absentee-voting fraud).

The district court also erred by discounting the General Assembly's judgment that the witness requirement is a worthwhile measure, myopically focusing on Andino's letters instead. As the Election Commission's executive director, Andino serves at the pleasure of the Commission. *See* S.C. Code Ann. §7-3-20(A). She wrote to the General Assembly offering her *individual* opinions; they were not even the opinions of the Commission. *Middleton* ECF 101-1 at 4; *Thomas* ECF 1-2 at 3.

Moreover, her opinions do not take into account law enforcement's use of the witness requirement—unsurprisingly, given that the Election Commission has no

investigatory or law-enforcement duties. *Middleton* ECF 93-3 at 3. Law enforcement at every level has explained that the witness requirement is important, so the State's interest encompasses more than just election administrators. South Carolina's lead investigator of voting fraud, Lt. Pete Logan of the South Carolina Law Enforcement Division, explained that the witness requirement "provides … a significant lead to pursue in [voter-fraud] cases because it provides another potential witness to interview in these cases. The absence of the witness requirement would remove even the possibility of this investigative lead on these cases." *Middleton* ECF 93-8 at 2; *see also Thomas* ECF 182-1 at 3. South Carolina's chief prosecutor agrees. In the Fourth Circuit, the State Attorney General filed an amicus brief affirming the witness requirement's deterrence and law-enforcement purposes and arguing that judicially suspending it "sets a precedent harmful to criminal prosecutions in South Carolina." Fourth Circuit ECF 23-1.

Ultimately, the General Assembly considered all of the information it had about the witness requirement and decided to keep it in place for this election. That legislative decision, not a letter from a state employee, expresses the State's interest. Even during COVID-19, laws that require in-person signatures remain "reasonable, nondiscretionary restrictions [that] are almost certainly justified by the [state's] important regulatory interest[] in combating fraud." *Reclaim Idaho*, 2020 WL 4360897, at *2 (Roberts, C.J., concurring). This Court would likely so hold.

Third, these COVID-19 cases ask courts to enjoin *entire* state laws based on burdens to *some* specific voters. The only people who cannot vote as a result of South

Carolina's witness requirement are individuals who do not live with a witness, will not interact with a witness outside of their home, will not have a witness visit their home, and cannot vote in person on any of the 30 available days leading up to the election. No Respondent satisfies these criteria, and Respondents have not quantified how many South Carolinians do. They simply cite how many South Carolinians live alone. But as the Respondent who did the television interview sitting beside her son illustrates, living alone does not equate to never seeing anyone.

This Court's "precedents refute the view that individual impacts" on only some voters "are relevant" under the *Anderson-Burdick* test. *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). The "proper remedy" for "an unjustified burden on some voters" is not "to invalidate the entire statute" for "all … voters." *Id.* at 202-03 (opinion of Stevens, J.). But that is precisely what the district court did, contrary to governing law. *Cf. League of Women Voters of Minn. Educ. Fund v. Simon*, Doc. 52, No. 20-cv-1205 (D. Minn. June 23, 2020) (rejecting a consent judgment as overbroad because it would have suspended a witness requirement for all voters, rather than particularly vulnerable groups).

B. Federal injunctions on the eve of elections violate the *Purcell* principle.

Relying on its decision in *Purcell*, "[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC*, 140 S. Ct. at 1207. The *Purcell* principle guards against judicial interference in approaching elections, ensuring that voters know and adhere to the same neutral rules. *See Thompson*, 959 F.3d at 813 ("[F]ederal courts are not

supposed to change state election rules as elections approach."). This principle of noninterference promotes "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see Benisek v. Lamone*, 138 S. Ct. 1942, 1944-45 (2018) (*Purcell* gives "due regard for the public interest in orderly elections."). And it protects against "voter confusion and [the] consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.

Importantly, *Purcell*'s noninterference principle is a *sufficient* basis to deny injunctive relief—one that warrants a stay even when the existing law is likely unconstitutional. *See id.* at 5 (vacating a lower court's injunction "[g]iven the imminence of the election" while "express[ing] no opinion here on the correct disposition" of the case). *Purcell* thus "allow[s] elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). Both this Court and the circuit courts routinely rely on *Purcell* to stay lower-court orders requiring States to change election laws shortly before elections. *See, e.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014); *Perry v. Perez*, 565 U.S. 1090 (2011).

This case has become a textbook example of the type of confusion that *Purcell* prohibits. First, the district court enjoined the witness requirement. App. 70-71. The Fourth Circuit rightly stayed that injunction. App. 73. Then, the next day, the Fourth Circuit sua sponte reversed course and reinstated the injunction without any explanation. App. 75. Hours after the Fourth Circuit changed its mind, a major

newspaper published a story with a headline that reflects the likely confusion South Carolina's voters are feeling: "On-again, off again." John Monk & Greg Hadley, *On-Again, Off Again: Court Nixes SC Witness Requirement on Absentee Ballots—For Now*, The State (Sept. 25, 2020 10:32 P.M.), bit.ly/3cyzI2S. Then, after five days of ballots being mailed out, the Fourth Circuit finally refused to stay the injunction.

This case is different from the one involving Rhode Island's witness requirement, where this Court refused to stay a consent judgment. In Rhode Island, the *governor* had suspended the witness requirement during the last election, leading this Court to conclude that "voters may well" believe "[t]he status quo" still lacks a witness requirement. 2020 WL 4680151, at *1. Here, by contrast, the *district court*—not an elected official—suspended South Carolina's witness requirement in the last election. A federal court cannot usurp a State's authority and violate *Purcell* and then, when the State (weighing a host of competing concerns) decides not to appeal, use the previous violation as a justification to usurp its authority and violate *Purcell* again. Further, this Court stressed in the Rhode Island case that "no state official ha[d] expressed opposition" to the consent judgment at issue. But here, South Carolina's entire government objects to the district court's injunction. They know better than any federal court (and are entrusted by the state constitution to assess) what South Carolinians believe is and isn't the status quo.

Plus, unlike in Rhode Island, where no envelopes had been mailed out, all voters in South Carolina who request an absentee ballot by mail will receive envelopes that *contain* the witness requirement—no matter what happens with the

district court's injunction. Some voters have received those envelopes already. As of September 30, 2020, over 157,000 absentee ballots have already been mailed out. *Recent Absentee Reports*, S.C. State Election Comm'n, scvotes.gov/fact-sheets. Because only one in four voters voted absentee in the last primary, *compare 2020 Statewide Primaries*, *Voter Turnout*, bit.ly/3ie7WtL (total voter turnout), *with Thomas* ECF No. 125-3 at 3 (absentee ballots cast), many voters will be voting absentee this November for the first time. Even the district court acknowledged that it was upending the status quo, as its injunction orders the State to "launch a publicity campaign notifying voters that [the witness] requirement will not be enforced." App 90 (Wilkinson, J., dissenting). Applicants are here seeking a stay (on behalf of the State) precisely because of the havoc that the district court's injunction is wreaking and will continue to wreak on South Carolina's elections.

II. Applicants will suffer irreparable harm without a stay.

Whenever "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). South Carolinians rely on the General Assembly to enact and suspend election laws. *See* S.C. Const. art. II, §10; art. I, §7. Yet the district court's injunction circumvents the General Assembly, suspends the witness requirement that South Carolinians have used for decades, and eliminates a protection that the State deems an important means of deterring fraud and protecting the integrity of elections. Enjoining a neutral, nondiscriminatory, easy-to-comply-

with law—especially in *this* election, with its expanded absentee voting in the midst of a global pandemic and turbulent political climate—serves only to increase the odds of voter confusion, distrust in election results, and skepticism of the democratic process.

This case is on the opposite end of the spectrum from the one in Rhode Island, in which this Court noted that "the state election officials support the challenged decree, and no state official has expressed opposition." 2020 WL 4680151, at *1. Applicants here include South Carolina's election officials and leaders of both houses of the General Assembly. The Attorney General also filed amicus briefs on Applicants' behalf in both the district court and the Fourth Circuit.

Indeed, "[a]ll three branches of South Carolina's government have" concluded that "absentee voters should be required to have a witness." App. 92 (Wilkinson, J., dissenting). The General Assembly—which is the only body to which the state and federal constitutions commit discretion on regulating elections—considered and adopted changes to the State Election Law. In doing so, the General Assembly expanded *who* could vote absentee and left the procedures on *how* to vote absentee the same. Indeed, each time an amendment was introduced to remove the witness requirement, the General Assembly rejected it. *See* Sen. Journal No. 47 (Sept. 2, 2020); H. Journal No. 40 (Sept. 15, 2020); H. Journal No. 39 (June 24, 2020). During the Senate debate, the Senate majority leader offered two reasons for keeping the witness requirement: it deters fraud, and it is a law-enforcement tool for investigating

fraud allegations. *See* S. Journal No. 47 (remarks of Sens. Massey and Campsen following defeat of Amendment 7).

The head of the Executive Branch, Governor Henry McMaster, also supports the witness requirement. He opposed enjoining the witness requirement in *Thomas* (in which he was originally a defendant), *see Thomas* ECF 52, and he stressed its importance when signing R.149 into law, *see Gov. McMaster Signs Bill That Expands Absentee Voting*, ABC4 News (Sept. 16, 2020), bit.ly/2S3OF3l (providing video of the Governor's press conference for signing R.149 during which the Governor said the State "still had to take some measures to see to it that we have a safe election that will be reliable where the integrity of the process will be protected").

The Judicial Branch has deferred to the State's elected officials on the witness requirement. The Supreme Court of South Carolina dismissed a case challenging the witness requirement, based on the General Assembly's enactment of R.149 about absentee voting in November. *See Duggins v. Lucas*, 2020 WL 5651772 (S.C. Sept. 23, 2020).

In short, the State of South Carolina is united on the question presented by this application. Enjoining the State's duly enacted law "clearly inflicts irreparable harm." *Abbott*, 138 S. Ct. at 2324 n.17.

III. The balance of harms and public interest favor a stay.

Because South Carolina's witness requirement is likely constitutional, a stay pending appeal will not substantially injure any parties. *See Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020). Respondents will simply have to comply with a requirement that furthers the State's compelling interests and

imposes a minimal burden on them. Any harm to Respondents, moreover, "is attributable at least in part to [them], wh[o] 'delayed unnecessarily' [their] pursuit of relief." *Reclaim Idaho*, 2020 WL 4360897, at *4 (C.J., Roberts, concurring). South Carolina's witness requirement has been on the books since 1953, yet Respondents did not challenge it until 2020, the district court did not enter a preliminary injunction until the end of September, and the en banc Fourth Circuit did not vacate the stay until *after* voting had begun. "[A] party requesting a preliminary injunction must generally show reasonable diligence—in election law cases as elsewhere." *Benisek*, 138 S. Ct. at 1944. Though COVID-19 presents new and unpredictable challenges, it does not eliminate the *Purcell* principle, which continues to counsel against late-breaking judicial interference with state elections. *See, e.g.*, *RNC*, 140 S. Ct. at 1206.

Because South Carolina's witness requirement is likely constitutional, "staying the [injunction] is 'where the public interest lies'" too. *Tex. Democratic Party*, 961 F.3d at 412; *accord Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Federal courts should not "lightly tamper with election regulations"; the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact." *Thompson*, 959 F.3d at 812-13. This is especially true in the context of an approaching election. *See id.* at 813; *Respect Maine PAC*, 622 F.3d at 16.

CONCLUSION

For all these reasons, 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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October 1, 2020