No. 21A455

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE ET AL.,
Applicants,
v.
REBECCA HARPER ET AL.,
Respondents,

&

TIMOTHY K. MOORE ET AL.,
Applicants,
v.
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.,
Respondents,

&

COMMON CAUSE,
Intervenor-Respondent.

On Application for Stay Pending Petition for Writ of Certiorari
to the North Carolina Supreme Court

STATE RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI

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The State of North Carolina, the North Carolina State Board of Elections, and the State Board's Members and Executive Director in their official capacities respectfully file this memorandum in opposition to the application for an emergency stay pending a petition for certiorari.

INTRODUCTION

In a normal election cycle, "[r]unning elections state-wide is extraordinarily complicated and difficult." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). Elections officials must navigate "significant logistical challenges" that require "enormous advance preparations." *Id.* This election cycle, COVID-19 has exacerbated these ordinary challenges, delaying the results from the 2020 census and, in turn, redistricting efforts and ballot-preparation procedures across the country. *See, e.g.*, Nat'l Conference of State Legislatures, *2020 Census Delays and the Impact on Redistricting*, https://bit.ly/3MmBRAj. In North Carolina, the census delays also forced many municipalities—including many of the State's largest cities—to shift their municipal elections from the fall of 2021 to this year. *See* 2021 N.C. Sess. Laws 56; N.C. State Bd. of Elecs., *Elections Postponed in Several North Carolina Municipalities* (June 28, 2021), https://bit.ly/3tmMKcC.

State-court litigation over redistricting has caused further disruption, delaying the State's 2022 primary election. Since this litigation began roughly three-and-a-half months ago, the State Board has consistently highlighted the fact that the State's primary cannot be delayed indefinitely. Prior to conducting the general election on November 8, 2022, the State Board and county boards of

elections must conduct elections on two separate dates. They must hold a statewide primary, second elections in certain municipalities, and any state and federal run-offs that are legally required. The periods of time between these elections, moreover, must be long enough for elections officials to prepare and proof ballots, test elections equipment, comply with state and federal law on mailing absentee ballots, and canvass and certify the results.

Working backwards from the immovable general-election date, and taking into account these interlocking deadlines, the State Board's Executive Director told North Carolina's state courts that the statewide primary needed to occur by May 17, 2022. That meant that, by the State Board's calculation, the Board needed the State's revised voting districts to be settled by mid-February. *See* App. 13, ¶ 23. In identifying these proposed dates, the State Board sought to reduce as many buffers built into the standard election cycle as possible without hamstringing its ability to comply with its obligations under state and federal law. Even so, the State Board recognized that the proposed dates would require state and county staff to work late-night hours and to simultaneously perform certain election-preparation functions that are usually accomplished sequentially.

Consistent with the State Board's guidance, the North Carolina Supreme Court moved the statewide primary to May 17 and entered orders effectively finalizing the State's new districts on February 23.

The stay that Applicants request would jeopardize this carefully calibrated timeline. As soon as the North Carolina Supreme Court acted last week, state and

county elections officials began the technical work of ensuring that addresses throughout the State are assigned to the right voting jurisdictions in the State's system. This "geocoding" process ensures that voters receive the correct ballot in the primary election, for which absentee voting is scheduled to begin on March 28. N.C. Gen. Stat. § 163-227.10. Because the boards had already completed geocoding in 2021, after the General Assembly enacted the first set of maps, they had to remove the prior coding from the system and start over. A stay from this Court would require all of the congressional geocoding work to be undone and redone once more.

In addition, after the state supreme court entered its orders, the State's candidate-filing window reopened. Candidates who had filed to run for office in December 2021, but who found themselves in new districts after the state supreme court's orders, had the opportunity to withdraw and file in new districts or in entirely new contests. As of yesterday, March 1, the candidate-withdrawal deadline has passed. If this Court enters a stay and the State reverts back to the old congressional map, any number of candidates will find themselves registered to run in the wrong district or for an office they no longer wish to pursue.

Given this context, Applicants' stay request should be denied. It is a "bedrock tenet of election law" that courts should not interfere with a State's elections laws and procedures "in the period close to an election." *Milligan*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring in grant of applications for stays); *see*

also Purcell v. Gonzalez, 549 U.S. 1, 4-6 (2006) (per curiam). This case falls squarely in the heartland of the *Purcell* principle.

North Carolina's state courts, to be sure, also acted recently. But the state supreme court made the decision to move the State's primary from March to May months ago. *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021). And it is plain that that court very deliberately structured the schedule for resolving this litigation to accommodate an election-preparation timeline that the State Board had represented would be workable. *See id.* at 303; *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. 2022).

More to the point, recently, members of this Court have cast doubt on whether *Purcell* can even apply to state court action. These Justices have indicated, for example, that "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's elections laws in the period close to an election." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays); *see also, e.g.*, *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay) (explaining that while "federal intrusion on state lawmaking processes" required staying a federal-court injunction of state election laws, "the authority of state courts to apply their own constitutions to election regulations" required denying a stay application arising from a state high court (citing *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020)).

This Court's consistent practice bears this distinction out. In fact, in the nearly two decades since the Court decided *Purcell*, not once has it used the principle to override a state court's action. There is no reason to change the Court's settled approach here.

Finally, in addition to these dispositive equitable considerations, Applicants also cannot succeed on the merits of their Elections Clause claim. Applicants' arguments are inconsistent with this Court's precedents and would otherwise upend the administration of elections across the country.

For all these reasons, State Respondents respectfully submit that Applicants' request for an emergency stay should be denied.

STATEMENT OF THE CASE

A. North Carolina's primary election will take place on May 17, with certain elections to follow in July.

North Carolina's statewide primary election was originally scheduled for March 8, 2022. N.C. Gen. Stat. § 163-1(b). Because of this litigation, however, the primary was moved to May 17, 2022, eleven weeks from now. *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021). Contests on the ballot during this primary include the U.S. Senate and House of Representatives, the state General Assembly, state judges, district attorneys, and county offices. App. 5-6, ¶ 3. Roughly one-third of North Carolina's counties will also hold municipal races as part of the primary, including some of the State's largest municipalities. App. 6, ¶ 3; *supra* p. 1.

Many locations within the State will also hold July elections, some of which depend on the May primary results. For municipal races that use the primary-

and-election or election-and-runoff methods, the second election will take place on July 5 or 26, 2022, depending on whether a second primary for a federal office is simultaneously taking place. *See* N.C. Gen. Stat. § 163-111(e); 2021 N.C. Sess. Laws 56, § 1(e); *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. 2022). In non-municipal races where no candidate receives more than 30 percent of the vote, and where the second-place finisher requests a run-off, a second primary will also be held on July 5 or 26, depending on whether a second primary for a federal office is involved. *See* N.C. Gen. Stat. § 163-111. If the second primary is held on July 26, the county boards and State Board must sequentially canvass the votes and then certify the results of that second primary by August 23 in order to prepare ballots ahead of the September 9, 2022 absentee-ballot distribution deadline for the general election. App. 13, ¶ 23 & n.3.

B. Holding the election on May 17 is contingent on numerous interlocking administrative steps.

Before the May primary can take place, the State Board—and the 100 county boards of elections that it oversees—must carry out many administrative tasks. *See* N.C. Gen. Stat. § 163-22(a) ("The State Board of Elections shall have general supervision over the primaries and elections in the State . . . ."); *id.* § 163-30 (creating the 100 county boards). Just a handful of these tasks are detailed below.

First, the State Board must oversee the candidate-filing process. Before the North Carolina Supreme Court moved the primary election from March to May, candidates seeking a party primary nomination were required to file notice of

their candidacy with the State Board during a two-week period in December 2021. *Id.* § 163-106.2. Three days into this period, the state supreme court stayed candidate filing as a result of this litigation. *See Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021). When the state supreme court issued its stay, it made clear that candidates who had already filed were "deemed to have filed for the same office" for the rescheduled May 2022 primary unless they provided "timely notice of withdrawal" to the State Board. *Id.*

Candidate filings and withdrawals remained stayed until the remedial maps took effect on February 23, 2022. The next day, the window to withdraw or file as a candidate reopened. The State Board has overseen candidate filing for the last week. The candidate-withdrawal deadline was yesterday, March 1, 2022. *See* N.C. Gen. Stat. § 163-106.4. For that reason, any candidate who currently has a notice filed in a particular jurisdiction will appear on the primary ballot under the contest for which they filed, and any votes for that candidate will be counted. *Id.* In addition, because the withdrawal deadline has now passed, no current candidate may file a notice of candidacy for any other office. *Id.* § 163-106.6. The candidate-filing deadline for candidates who have not yet filed in any jurisdiction is March 4, 2022—two days from now. *See N.C. League of Conservation Voters, Inc. v. Hall*, 2022 WL 124616, at *115 (N.C. Super. Ct. Jan. 11, 2022).

Second, because the May primary follows redistricting, the state and county boards are currently updating their voter jurisdiction data. As soon as redistricting was complete and the State's maps were finalized on February 23,

2022, North Carolina elections officials began a weeks-long process called "geocoding." App. 6-7, ¶¶ 4-5. This technical process involves downloading state legislative and congressional district shapefiles, which contain the geographic data setting the boundaries for the State's electoral districts. App. 6, ¶ 5. Once the files are downloaded, State Board staff work with county board staff to update the voting jurisdictions that are assigned to specific addresses. App. 6-7, ¶ 5. After the assignment process is finished, but before the State begins printing ballots, the State Board conducts an audit to ensure total accuracy. App. 7, ¶ 5. In an affidavit filed with the state trial court, the State Board's Executive Director estimated that this process, which is now underway, would take roughly three weeks for all races in the 2022 primary. App. 7, ¶ 6.

Third, the State and county boards must prepare and proof ballots. This process begins as soon as geocoding is complete and candidate filing closes. App. 7, ¶ 7. Generating and proofing the ballots "involves multiple technical systems and quality-control checkpoints" and entails "proofing each ballot style for content." App. 7, ¶ 7. This part of the process also includes printing the ballots and delivering the necessary ballot materials to county boards. App. 7, ¶ 7. The Executive Director's affidavit estimated that the ballot-preparation processes for the 2022 primary would take 17 to 21 days.[1] App. 7, ¶ 7.

[1] Because the state supreme court did not act to finalize the voting districts until February 23, 2022, the time available for the State Board to complete this process is 17 days.

Fourth, North Carolina elections officials must distribute absentee ballots. Federal and state laws impose specific deadlines for mailing absentee ballots. Under federal law, absentee ballots must be sent to military and overseas voters at least 45 days before a primary election unless the State Board secures a waiver from the relevant presidential designee. 52 U.S.C. § 20302(a)(8), (g). Under state law, absentee ballots for all voters must be available at least 50 days before a primary election unless the State Board authorizes a reduction to 45 days or a court appeal is pending. *See* N.C. Gen. Stat. § 163-227.10(a).

Fifth, the State Board needs time to support county boards as they conduct necessary tasks to prepare for in-person voting. For example, the State Board works with county boards to prepare voting-tabulation machines, test equipment, and conduct a mock election to identify and remedy any technical problems. App. 9, ¶ 13. The State Board tries to allocate two weeks to prepare for the mock election and two weeks for any remedial steps that may need to occur after the mock election. App. 9, ¶ 13. In-person early voting begins on April 28—nineteen days before primary election day.[2] N.C. Gen. Stat. § 163-227.2(b).

In her affidavit, the Executive Director told the state trial court that to accommodate a May 17, 2022 statewide primary date, the State Board would need the State's voting districts—and accompanying shapefiles for geocoding—to be

[2] The need to complete these troubleshooting processes means that securing exemptions from the absentee-ballot-mailing deadlines is not an escape hatch for the State Board. Even if the State Board mails absentee ballots later than planned, it still needs ample time to complete all of the technical processes necessary to ensure that the election will run smoothly.

finalized by mid-February to allow her staff and the county boards to have absentee ballots prepared sufficiently in advance of the primary to comply with state and federal law. App. 13, ¶ 23.

C. Plaintiffs challenge the State's new maps, delaying elections preparations.

After every decennial census, the North Carolina General Assembly must revise the State's legislative districts and apportion representatives among those districts. N.C. Const. art. II, §§ 3, 5. On November 4, 2021, the General Assembly enacted congressional and state legislative reapportionment maps. *See* 2021 N.C. Sess. Laws 173 (N.C. Senate map); 2021 N.C. Sess. Laws 174 (congressional map); 2021 N.C. Sess. Laws 175 (N.C. House of Representatives map). The enacted maps were to apply in the 2022 elections, beginning with the State's primaries this spring.

Shortly after the General Assembly enacted the new maps, on November 16 and 18, 2021, two sets of plaintiffs sued in state trial court, alleging that the maps violated various provisions of the state constitution. At that time, the State's primary election was set for March 8, 2022. *See supra* p. 4; N.C. Gen. Stat. § 163-1(b). Candidates seeking a party primary nomination were required to file notice of their candidacy with the State Board during a two-week period in December 2021. *Id.* § 163-106.2.

With the candidate-filing deadline rapidly approaching, plaintiffs moved to preliminarily enjoin the enacted maps and stay the deadline. The trial court

denied the motion. *N.C. League of Conservation Voters, Inc. v. Hall*, 2021 WL 6883732, at *5 (N.C. Super. Ct. Dec. 3, 2021).

Plaintiffs bypassed the North Carolina Court of Appeals and sought relief in the North Carolina Supreme Court. In its filing to the state supreme court, the State Board took no position on the merits of plaintiffs' claims. State Def. Response to Pet. for Discretionary Review and Motion for Temporary Stay, No. 413P21 (N.C. Dec. 8, 2021), https://bit.ly/3hqtRjc. Instead, the State Board highlighted several administrative considerations. *Id.* at 4-9. Specifically, the State Board explained that staying the candidate-filing deadline beyond December 2021 would make a March 2022 primary infeasible. *Id.* at 3. The State Board noted that a delayed candidate-filing deadline could prevent county boards from meeting ballot-distribution deadlines and completing preparations for in-person voting. *Id.* Thus, the State Board advised the court that if it intended to stay the candidate-filing deadline beyond December 2021, the court should delay all contests scheduled for March 8. *Id.* at 9. The State Board then cross-referenced an affidavit from its Executive Director identifying May 17, 2022 as the latest date that the primary could occur without generating significant concerns. *Id.*

On December 8, 2021—after the candidate-filing period had been open for three days—the state supreme court stayed the remaining filing period and delayed all primary elections to May 17, 2022. *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021). The court preliminarily enjoined the new maps and remanded the case to the trial court. *Id.* at 302-03.

On remand, the trial court upheld the General Assembly's maps and entered final judgment for the legislative defendants. *N.C. League of Conservation Voters, Inc. v. Hall*, 2022 WL 124616, at *115 (N.C. Super. Ct. Jan. 11, 2022). Again, plaintiffs appealed directly to the North Carolina Supreme Court.

The State Board continued to take no position on the merits of the issues before the court and used its brief to identify certain administrative concerns. State Def. Br., No. 413PA21 (N.C. Jan. 28, 2022), https://bit.ly/3plzCmA. Specifically, the State Board explained how further delay of the primary election beyond May 2022 could cause disruption. For example, the State Board anticipated confusion over whether absentee ballot requests made for the May 2022 primary would remain valid if the primary were again delayed. *Id.* at 5; *see* N.C. Gen. Stat. § 163-230.2 (requiring voters who request absentee ballots to indicate the specific date of the election for which they are seeking a ballot); *id.* § 163-237(d7) (making it a felony for any election worker to "knowingly send[ ] or deliver[ ] an absentee ballot to any person who has not requested an absentee ballot"). The Board also reiterated that further delays could interfere with the timeline for administering the November general election. State Def. Br., *supra*, at 5-6.

The state supreme court held that the enacted maps violated numerous provisions of the state constitution, including the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause. *Harper v. Hall*, 867 S.E.2d 554 (N.C. 2022). The court therefore enjoined the maps

and set an expedited schedule for the parties to submit new districting plans to the trial court. *Id.* at 558. The court told State Respondents to anticipate new districting plans by February 23, 2022. *Id.* The court also ordered State Respondents "to take all necessary measures to ensure that the 17 May 2022 primary election and all subsequent elections occur as scheduled using the remedial districting plans." *Id.*

On February 23, 2022, the trial court on remand entered an order adopting remedial maps. That same day, the state supreme court denied requests from multiple parties for a temporary stay of the trial court's order.

D. State and county elections officials begin to carry out the 2022 primary election.

In the week since the trial court's order adopting remedial maps—and consistent with the state supreme court's directive to take "all necessary measures" to carry out the May 17, 2022, primary date—the State Board and North Carolina's 100 county boards have taken immediate action to begin administering the primary election.

First, the elections boards began the technical geocoding work of ensuring that voters throughout the State are assigned to the right voting jurisdictions in the State's electoral management system.

Second, the elections boards returned to conducting the candidate-filing process, which reopened on February 24, 2022. Candidates who filed to run for office in December 2021, but who found themselves in new districts after the state supreme court's orders, had the opportunity to withdraw and file in their new

districts. That withdrawal deadline passed yesterday, March 1, 2022. Two days remain for candidates seeking to file notice of their candidacy who have not yet filed for any office.

Third, after the filing window closes and geocoding is complete, state and county elections officials will immediately begin the ballot-preparation process. This process must be completed by March 28, 2022—26 days from now—so that absentee ballots may be distributed 50 days in advance of the primary to comply with state law. App. 23, ¶ 4. If the State Board authorizes a reduction from 50 to 45 days to make absentee ballots available, both state and federal law will require absentee ballots to be made available no later than April 1, 2022—30 days from now.[3] App. 23, ¶ 4.

As the State Board works to administer the 2022 primary, Applicants seek an emergency stay from this Court of the state-court orders holding the General Assembly's original congressional map unconstitutional and adopting a remedial map. Application at 2.

REASONS FOR DENYING THE STAY

I. The *Purcell* Principle Provides an Independent and Sufficient Reason to Deny the Stay Application.

Time and again over the last two decades, this Court has consistently cautioned courts not to alter States' elections laws and processes "in the period close to an election." *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J.,

[3] Because the 45-day federal deadline falls on April 2, 2022—a Saturday—the deadline is effectively the day before—Friday, April 1. App. 23, ¶ 4.

concurring in grant of application for stay); *see Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam). The Court has not yet resolved whether this rule—"the *Purcell* principle"—is "absolute" or rather "simply heightens the showing necessary" for a party challenging state election laws to "overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays). Regardless, the *Purcell* principle forecloses the relief that Applicants seek here.[4] A stay from this Court would significantly interfere with the State Board's ongoing efforts to prepare for and administer the May 2022 primary.

A. The *Purcell* principle bars federal intervention into state elections close to an election.

"[F]or many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election." *Andino*, 141 S. Ct. at 10 (Kavanaugh, J., concurring in grant of application for stay); *see also Milligan*, 142 S. Ct. at 879; *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Clarno v. People Not Politicians*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020);

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[4] If *Purcell* is not an absolute bar, the principle could perhaps be overcome when "(i) the underlying merits are entirely clearcut in favor of the [applicant]; (ii) the [applicant] would suffer irreparable harm absent the injunction; (iii) the [applicant] has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). Even assuming that Applicants can satisfy the second and third elements of this test, they cannot satisfy the first or fourth. *See infra* Parts I.B, II.

Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam); *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28 (2020) (declining to vacate stay); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam); *Veasey v. Perry*, 574 U.S. 951 (2014).

This "bedrock tenet of election law," *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stays), is grounded in the recognition that late-breaking judicial intervention risks impinging upon the right with the "most fundamental significance under our constitutional structure"—the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (cleaned up); *see also Purcell*, 549 U.S. at 4-5. When courts revise a State's elections rules or procedures too close to an election, their orders "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5; *see also Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 42 (2020) (*DNC*) (Kagan, J., dissenting) ("Last-minute changes to election processes may baffle and discourage voters; and when that is likely, a court has strong reason to stay its hand.").

But it is not just voters who may suffer because of a court's intercession. "Late judicial tinkering with election laws can lead to . . . unanticipated and unfair consequences for candidates [and] political parties, . . . among others." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). And it can impose significant administrative burdens on state and county elections staff.

While these adverse consequences can undoubtedly result from *any* judicial intervention—federal or state—members of this Court have recently implied that the *Purcell* principle bars only *federal* courts' intervention in a State's elections processes. *See, e.g.*, *id.* at 881 (Kavanaugh, J., concurring in grant of applications for stays) ("It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's elections laws in the period close to an election."); *DNC*, 141 S. Ct. at 28 (Roberts, C.J., concurring in denial of application to vacate stay) (similar); *see also Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stays) ("This Court has repeatedly stated that *federal* courts ordinarily should not enjoin a state's election laws in the period close to an election." (emphasis added)); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("*[F]ederal* courts should ordinarily not alter the election rules on the eve of an election." (emphasis added)). This federal-state distinction—which would seem to be grounded in the Court's abiding respect for state sovereignty—is certainly consistent with the Court's orders in the years since it decided *Purcell*. While the Court has repeatedly invoked *Purcell* in overriding decisions from the lower federal courts, it has never used the rule to stay or vacate a state court's action.

B. The *Purcell* principle applies here and precludes a stay.

Purcell forecloses the relief that Applicants seek from this Court. Their stay application is a straightforward request for a federal court to intervene in a state

election with the statewide primary just eleven weeks away. If granted, the stay would jeopardize state and county elections officials' efforts to prepare for and administer the primary and general elections as scheduled. And it would threaten precisely the "unanticipated and unfair consequences for candidates, political parties, and voters" that the *Purcell* principle seeks to avoid. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays); *see Purcell*, 549 U.S. at 5. For those reasons, the stay must be denied.

First, Applicants' stay request asks this Court to violate *Purcell*'s proscription on judicial intervention too close to a state election. North Carolina's primary is set for May 17—eleven weeks from now. Candidate filing will close in two days. The candidate-withdrawal deadline has already passed. And state and federal law require elections officials to begin mailing absentee ballots in less than a month. *See supra* p. 14; *compare with, e.g.*, *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurring in grant of applications for stay) (finding that *Purcell* weighed against federal-court intervention when primary elections began by absentee voting in seven weeks).

State Respondents recognize, of course, that judicial intervention now, eleven weeks before the statewide primary, would certainly be less prejudicial than intervention mere days before the statewide primary. But that is beside the point. In December of last year, the State Board informed North Carolina's state courts that redistricting needed to be completed by mid-February, and that the primary needed to be May 17, 2022, for elections officials to be ready for a second primary no

later than July 26, 2022, and a general election on November 8, 2022. App. 13, ¶ 23. A stay from this Court at this late date would jeopardize that orderly administration.

Second, *Purcell* warns that late-breaking intervention by federal courts can impose significant costs and create widespread confusion. *Purcell*, 549 U.S at 5; *see also Milligan*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring in grant of applications for stays). That would undoubtedly be the case here.

To begin, a stay would significantly burden the State's administration of the upcoming election. As explained above, a series of the State's election-preparation efforts for the upcoming primary are contingent on finalized maps. Since the state supreme court's orders last week, state and county elections officials have relied on the trial court's remedial maps to begin the technical work of ensuring that voters throughout the State are assigned to the right voting jurisdictions; begin advising voters about the May 2022 primary; and resume oversight of the candidate-filing process. A stay would require these officials to undo and redo much of this work. And, while the week between the state supreme court's orders and the filing of this response may seem insignificant to an outside observer, the current elections schedule for 2022 already requires the State Board to conduct all of its election-preparation efforts as rapidly and efficiently as can reasonably be expected.

Candidates in North Carolina's races may also suffer significant prejudice from a stay. The deadline for candidates to withdraw their notices of candidacy has already ended. And the time for candidates to declare their intent to run for

office based on the new congressional map will end in just two days. Thus, if this Court enters a stay and the State reverts back to the old map, any number of candidates may find themselves registered to run in the wrong district.

Finally, in addition to these known risks, a stay could create the potential for other unanticipated consequences. The 2022 election cycle has already been challenging. North Carolina elections officials have needed to navigate a global pandemic, widely publicized census delays, delayed municipal elections, and this litigation, all while trying to stay on track for a general election in November. Further changes to the State's election rules could cause delays or complications in ways that are impossible to foresee. *See DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring in denial of application to vacate stay) ("Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences.").

For all these reasons, the Court should deny the requested relief. As they are every election cycle, North Carolina's elections officials are committed to meeting the deadlines that have been imposed and to complying with all of their obligations under state and federal law. Nevertheless, when judicial intervention would impose serious administrative burdens, cause voter confusion, and prejudice candidates, *Purcell* forecloses emergency relief—particularly where, as here, those consequences would come at the hands of a *federal* court. *E.g.*, *Milligan*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring in grant of applications for stays).

II. Accepting Applicants' Merits Arguments Would Upend the Administration of Elections.

Applicants' Elections Clause claim also fails on the merits, undermining further their case for a stay. Applicants assert that the Clause forbids state courts from reviewing the state rules that govern congressional elections. Application at 12. Specifically, they claim that state legislatures are the sole state entity with any authority to establish and revise such rules. Application at 14. But this argument proves far too much. Not only is the argument contrary to this Court's precedent, but accepting it here would also upend settled elections procedures across the country.

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. This Court has already held that this Clause does not, as Applicants claim, exempt state redistricting laws from state constitutions. The Court made clear less than a decade ago that "[n]othing in [the Elections Clause] instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015).

But even taking Applicants' argument on its own terms, the claim that state legislatures are solely responsible for state rules governing federal elections—and,

thus, that they may ignore requirements imposed by the people of a State through their constitution—simply cannot be the law.

For one thing, a constitutional rule of that kind would raise serious administrability concerns. When a state legislature regulates the times, places, and manner of elections, it generally does so for all elections in the State—not just for congressional contests. For instance, if a legislature prohibits persons convicted of a felony from voting until they have served their full criminal sentences, that law will almost certainly apply, on its face, to every election in the State. *E.g.*, N.C. Gen. Stat. §§ 13-1, 163-55(a)(2). This approach to elections lawmaking makes sense. After all, congressional contests nearly always happen on the same day as other state and local races. Voters do not vote on separate days, under separate rules, or on separate ballots for federal contests.

But this reality gives rise to a problem under Applicants' view of the Constitution. If the Elections Clause forbids state courts from invalidating state laws insofar as those laws apply to congressional contests, elections officials will be left trying to puzzle through how to apply state court decisions that strike down state laws as applied to state, county, and municipal elections. An elections official can hardly permit someone on felony probation to register to vote exclusively in local contests or limit them to voting only on the state or local items on an elections ballot. Applicants' interpretation of the Clause would, as a practical matter, necessitate the complete severance of federal elections and voter registration systems from state and local elections and systems moving forward.

Taken to its logical conclusion, moreover, Applicants' argument could preclude state legislatures from delegating authority over elections rulemaking to state and local boards. In North Carolina, for example, the State Board has the authority to determine the "number and location of the early voting sites to be established in each county." *Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018); *see also* N.C. Gen. Stat. § 163-22(a) (granting the Board "authority to make . . . reasonable rules and regulations with respect to the conduct of primaries and elections . . . so long as they do not conflict" with state law). Yet rules instituting the Board's determinations are undoubtedly "Regulations" prescribing the "Times, Places and Manner" of a congressional election.

The Elections Clause does not forbid arrangements of this kind—nor could States administer orderly elections if it did. It would be utterly infeasible for state legislatures to enact legislation addressing all of the "interstitial policy decisions" inherent in overseeing elections. *See Cooper*, 809 S.E.2d at 112 n.11; *cf. Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, [the legislature] simply cannot do its job absent an ability to delegate power under broad general directives."). Applicants' understanding of the Elections Clause would threaten to invalidate the elections regimes in every State in the nation.

In sum, Applicants' merits arguments find no support in this Court's precedents and would upend how elections work in States across the country. This is another independent ground for denying Applicants' requested relief.

CONCLUSION

The application for an emergency stay should be denied.

Respectfully submitted,

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