No. 22-2918

In the United States Court of Appeals
for the Eighth Circuit

ARKANSAS UNITED, et al.,

Plaintiffs-Appellees,

v.

JOHN THURSTON, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:20-cv-05193-TLB

AMICUS BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF APPELLANTS & EMERGENCY STAY

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, the Honest Elections Project states it has no parent corporation, and no corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTEREST OF THE AMICUS CURIAE

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections and election-related litigation.

No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person (other than amicus or its counsel) contributed money to fund the brief's preparation or submission. No party opposed the filing of this brief.

SUMMARY OF THE ARGUMENT

The proximity of the upcoming election alone requires a stay of the district court's injunction. Under *Purcell v. Gonzalez*, 549 U.S. 1 (2006), it is "well established" that "federal courts should usually refrain from interfering with state election laws in the lead up to an election." *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020).

The district court disregarded this "bedrock tenet of election law." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurral). Despite this Court's and the Supreme Court's repeated emphasis on the importance of the *Purcell* principle and of respecting state laws in the run-up to an election, the district court's opinion relegated all such concerns to a single footnote. Without citation to any authority, it simply concluded that Plaintiffs' challenge was exempt from *Purcell*'s requirements. But *Purcell* applies with full force here and forecloses such late-arriving judicial interference with the state's administration of upcoming elections. And to the extent there is a limited exception to *Purcell*, Plaintiffs cannot meet its stringent requirements. This Court should therefore rein in the district court's overreaching injunction with a stay pending appeal.

ARGUMENT

I. *Purcell* requires a stay of the district court's judgment.

Purcell is a "bedrock tenet of election law." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurral). It holds that the "traditional test" for injunctive relief "does not apply" when a plaintiff seeks "an injunction of a state's election law in the period close to an election." *Id.* This principle reflects important equitable concerns with "voter

confusion, election administration issues, and public confidence in [] election[s]." *Carson*, 978 F.3d at 1062. "The public has an interest in the fair and orderly operation of elections." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (staying a district court injunction pending appeal). Injunctions of election laws ordered just before an election undermine "[c]onfidence in the integrity of our electoral processes" and "the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. They force election administrators to reorder their affairs and "grapple with a different set of rules." *Coalition for Good Governance v. Kemp* (*CGG*), 2021 WL 2826094, at *3 (N.D. Ga. July 7). And they "subject election officials and voters to whiplash from removal and swift reinstatement" of rules due to "[p]ossible reversal or stay" of a district court's ruling on appeal. *Walen v. Burgum*, 2022 WL 1688746, at *6 (D.N.D. May 26, 2022); *see also Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 2022 WL 633312, at *75 (N.D. Ga. Feb. 28). "Even seemingly innocuous late-in-the-day judicial alterations ... can interfere ... and cause unanticipated consequences." *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral).

Injunctions of state election laws also raise federalism concerns. "Our founding charter never contemplated that federal courts would dictate the manner of conducting elections." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1269 (11th Cir. 2020). Federal injunctions of state election laws inherently cause the "seriou[s] and irreparabl[e] harm" of preventing a State from "conducting [its] elections pursuant to a statute enacted by the Legislature." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020).

"[T]he Supreme Court has 'repeatedly emphasized'" the *Purcell* principle. *Ashcroft*, 978 F.3d at 609 (quoting *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020)). It has "often" stayed "lower federal court injunctions that contravened" *Purcell*. *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurral); *e.g.*, *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020); *Clarno v. People Not Politicians Or.*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *RNC v. DNC*, 140 S. Ct. 1205 (2020). So has this Court. *Ashcroft*, 978 F.3d 603; *Carson*, 978 F.3d 1051.

Purcell applies to the law challenged here, despite the district court's suggestion that non-"voter-facing" regulations do not implicate this principle. APP89, R. Doc. 179 at 38 n.16. Whatever the district court meant by a non-"voter-facing policy," *Purcell* still applies to such rules. The decision of a panel of the Eleventh Circuit in *League of Women Voters of Florida* illustrates the point. In that case, a district court permanently enjoined a Florida law that prohibited plaintiffs from engaging in "line warming activities," such as providing voters in line at polling places with things like "food, water, or umbrellas." *League of Women Voters of Fla, Inc. v. Lee*, 2022 WL 969538, at *64 (N.D. Fla. Mar. 31); *see also League of Women Voters of Fla., Inc. v. Fla. Sec'y of State* (*LWVF*), 32 F.4th 1363, 1374 (11th Cir. 2022) (challenged "Solicitation Provision" forbade "any 'person, political committee, or other group or organization' from 'solicit[ing] voters inside the polling place' or within 150 feet thereof"). That provision, like Arkansas' six-voter limit, directly regulated only activists and organizers, not voters themselves. The district court even

made post-trial findings that its injunction "would not have any impact" on state election administration and would in fact "improve election administration in Florida." 2022 WL 969538, at *102. Nevertheless, the Eleventh Circuit stayed the lower court's injunction and let the challenged law go back into effect. *LWVF*, 32 F. 4th 1363. Moreover, the court did so under *Purcell* alone: while "expressing no opinion on the merits," the Court reasoned, "[w]hatever *Purcell*'s outer bounds, we think that this case fits within them." *Id.* at 1371 (cleaned up). So too here.

To determine whether *Purcell* bars an injunction of a state election law, courts ask whether the election at issue is "sufficiently 'close at hand.'" *Id.* In *Milligan*, the Supreme Court stayed an injunction where the next election was "about four months away." 142 S. Ct. at 888 (Kagan, J., dissental). And in *League of Women Voters of Florida*, the Eleventh Circuit stayed an injunction where voting was "set to begin in less than four months." 32 F. 4th at 1371. Four months before voting, the Eleventh Circuit concluded, "*easily* falls within the time period that trigger[s] *Purcell*." *Id.* at 1371 n.6 (emphasis added). Even six months can be sufficient. *E.g. Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020), *application to vacate stay denied*, 2020 WL 3456705 (U.S. June 25).

The election here is more than sufficiently close at hand. Voting will begin in just a little more than a month, on October 24. *Cf. Purcell*, 549 U.S. at 4 (vacating an injunction issued "just weeks before an election"). The district court announced its order just 66 days before voting. APP3, R. Doc. 168. In addition to that late-breaking injunction; it also imposed additional burdens on the State Defendants in an amended

order a mere 47 days before voting. APP47, R. Doc. 178). And as the State's motion explains, these orders will generate significant confusion, with great potential for inconsistent application across the state. *See* Mot. at 20-25; APP44-46, R. Doc. 170-1 at 1-3. Because even a four-month window is too imminent for an injunction on voter-assistance rules, *LWVF*, 32 F. 4th at 1371 n.6, *Purcell* applies here, too.

Finally, Plaintiffs may try to argue that *Purcell* counsels leaving the district court's ruling in place, lest *this Court* change the applicable voting rules in Arkansas too close to an election. But that would get *Purcell* backwards. "Correcting an erroneous lower court injunction does not itself constitute a *Purcell* problem. Otherwise, appellate courts could never correct a late-breaking lower court injunction of a state election. That would be absurd and is not the law." *Milligan*, 142 S. Ct. at 882 n.3 (Kavanaugh, J., concurral).

II. None of the requirements for overcoming *Purcell* are met here.

Once *Purcell* applies, it is a sufficient basis on its own to deny or stay an injunction. The Supreme Court has invoked the *Purcell* principle while expressing "no opinion" on the merits, *Purcell*, 549 U.S. at 5—even where the plaintiffs had "a fair prospect of success," *Milligan*, 142 S. Ct. at 881 n.2 (Kavanaugh, J., concurral), and even where the challenged law was "invalid," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also LWVF*, 32 F. 4th at 1371. District courts, too, have often denied injunctions based on *Purcell* where all other factors would favor relief. *E.g.*, *League of Women Voters of Arkansas v. Thurston*, 2020 WL 6269598, at *5 (W.D. Ark. Oct. 26) (noting "[t]here appears to be much merit to Plaintiffs' arguments" but that "mandating [the requested]

changes by injunctive relief while absentee voting is ongoing seems likely to further disrupt county election processes ... and—rightly or wrongly—to undermine confidence in the electoral process"); *Alpha Phi Alpha*, 2022 WL 633312, at *76 (holding that plaintiffs were likely to succeed on the merits and suffer irreparable harm, but denying a preliminary injunction because "[t]he Court is unable to disregard the *Purcell* principle").

For plaintiffs to overcome *Purcell*, they must satisfy "at least" the following four factors:

1. the underlying merits are entirely clearcut in their favor;
2. they would suffer irreparable harm absent the injunction;
3. they have not caused undue delay; and
4. their requested changes are feasible before the election without significant cost, confusion or hardship.

Milligan, 142 S. Ct. at 881 (Kavanaugh, J., concurral). If any one of these four factors is not met, then their motion must be denied. *LWVF*, 32 F. 4th at 1372 n.8 ("Justice Kavanaugh provides three additional factors—*all* of which must be satisfied to justify an injunction under *Purcell*."). The plaintiffs here cannot satisfy any of these factors.

As to factor one, the merits of Plaintiffs' case are not "entirely clearcut." Indeed, far from it. As discussed in the State's motion, Mot. at 26-27, Plaintiffs lack standing to sue, since they assert only the voting rights of third parties, not their own rights or those of their members. Plaintiffs also have improperly sued officials without an enforcement

connection to the challenged laws and without showing an ongoing violation of federal law, so sovereign immunity bars their claims. *See Ex parte Young*, 209 U.S. 123 (1908). Moreover, Plaintiffs' claims are wrong on the merits. Arkansas' six-voter limit does not unduly burden the right to vote, and serves the State's "compelling interest in preserving the integrity of its election process." *Brnovich v. DNC*, 141 S. Ct. 2321, 2347 (2021). The Court ultimately should reverse the district court on any or all of these grounds. At present, though, as long as a single one of them is not "entirely clearcut in favor of the plaintiffs," *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), that alone defeats the trial court's injunction.

On the second factor, any suggestion of irreparable harm from the six-voter limit is undone by the length of time Plaintiffs have acquiesced to its enforcement. Arkansas has implemented this law in election after election for over a decade, including in primaries earlier this year while Plaintiffs' suit was pending. Yet besides an abortive TRO application in the literal eleventh hour before Election Day 2020, Plaintiffs have always let elections go by without seeking relief. Plaintiffs' "delay in objecting" therefore "belies any claim of irreparable injury." *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999); *see also Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) ("At a minimum, [Plaintiff's] failure to seek injunctive relief for a period of seventeen months ... 'vitiates much of the force of [Plaintiff's] allegations of irreparable harm.'"). Keeping in place the same voter-assistance rules that Arkansas has long enforced will not irreparably harm anyone.

Factor three independently forecloses relief because Plaintiffs here have not pursued their claims without undue delay. Plaintiffs failed on this count right out of the box: though challenging a law that has been on the books since 2009, APP57, R. Doc. 179 at 6, Plaintiffs waited until November 2, 2020—*less than two hours before Election Day*—before filing their complaint and TRO motion, APP97, R. Doc. 35 at 3. The district court denied that motion within hours; after that false start, Plaintiffs did not seek preliminary or permanent relief again until a motion for summary judgment filed in September 2021. R. Doc. 137. In the meantime, Plaintiffs twice joined motions to extend discovery. R. Docs. 109, 117. Plaintiffs then allowed the 2022 primaries and run-offs to pass by, including in the gubernatorial and senatorial races, without seeking any relief. In other words, the challenged provisions have been the law for years and have been implemented by election administrators before and after Plaintiffs' challenge. The State's history of applying these provisions only magnifies the harms caused by the district court's injunction and underscores the need to apply *Purcell* here.

Factor four also independently forecloses relief because an injunction would cause confusion and hardship. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurral). Many Arkansans, who can see that their written law forbids any individual from assisting more than six voters at the polls—and have voted with this antifraud measure in place in every election since 2009—would be confused, suspicious, and disenchanted if this activity suddenly reappeared. At the least, confused voters and groups are likely to inundate state and local officials with inquiries and calls. And state election officials

would have to "grapple with a different set of rules," forcing them to reeducate and retrain workers and volunteers throughout the State. *CGG*, 2021 WL 2826094, at *3. Even an injunction that "seem[s] innocuous" may well "interfere with administration of an election and cause unanticipated consequences." *LWVF*, 32 F.4th at 1371 (quoting *DNC v. Wis. State Leg.*, 141 S. Ct. at 31 (Kavanaugh, J., concurral)).

In sum, even if the district court's ruling had merit, its injunction must be stayed pending appeal because it interferes with Arkansas' elections laws shortly before voting begins. *Purcell* does not mean that Plaintiffs will ultimately *lose* their case. 549 U.S. at 5. But it does mean that their case must "proceed without an injunction suspending the [challenged election] rules." *Id.* at 6.

CONCLUSION

For all these reasons, this Court should stay the district court's judgment pending appeal.

Dated: September 12, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 2,494 words, excluding the parts exempted by Rule 32(f). This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

The electronic version of the brief and addendum have been scanned for viruses and are virus-free.

Dated: June 14, 2022 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

Dated: June 14, 2022 */s/ Cameron T. Norris*