No. 22-2918

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-5193 (Hon. Timothy L. Brooks)

Reply in Support of Emergency Motion to Stay Injunction for the 2022 General Election

Plaintiffs' response describes a motion that the State did not file and defends an injunction the district court did not issue. In their effort to convince this Court that *Purcell* does not apply, Plaintiffs misstate the effect of the district court's order, Defendants' grounds for a stay, the case law, and the relief Defendants seek. Despite what Plaintiffs would have this Court believe, the district court's order is plainly intended to affect the election administration of all 75 Arkansas counties.

The district court's erroneous injunction will result in confusion, hardship, and uneven enforcement of the laws by poll workers across Arkansas. Therefore, both the *Purcell* principle and the traditional factors require staying the injunction for this General Election.

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The Court should stay the district court's injunction under the "*Purcell* principle," *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), which protects 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). Applying *Purcell*, courts routinely stay injunctions while "express[ing] no opinion" on the merits, *Purcell*, 549 U.S. at 5, and the "traditional test for a stay" does not apply. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Even on a "relaxed version" of the *Purcell* principle, Plaintiffs' response fails to establish the elements necessary to avoid a stay. *Id.* at 881. But on any test, a stay of the district court's injunction for this General Election is warranted. Therefore, Defendants respectfully request that the Court grant the limited relief of staying the district court's injunction for this General Election.

I. The Court should stay the injunction under *Purcell*.

Plaintiffs resort to numerous misrepresentations in opposing a stay under *Purcell*. Plaintiffs' response misrepresents, variously, the effect of the district court's order, the nature of the confusion and hardship that warrants a stay, the record below, this Court's case law, and the nature of the relief Defendants seek.

A. The district court enjoined all 75 counties from enforcing the six-voter limit.

After all was said and done below, it is plain that the district court intends for its injunction to affect all 75 Arkansas counties' administration of this General Election. But Plaintiffs' response repeatedly misrepresents the statewide effect of the injunction, asserting it is strictly limited to three counties.

Plaintiffs shamelessly pluck a statement describing Defendants' *pre-clarification* understanding of the district court's order and represent it as a "conce[ssion] that the district court's order does not enjoin the non-party counties." Pl.'s Brief at 12. That is egregiously false. Certainly, *before* the clarification order below, Defendants did not read the court's order to affect the 72 nonparty counties' election administration. But Defendants sought clarification precisely because the order left room for uncertainty on that point, and election administration cannot abide uncertainty. Defendants' initial understanding was overturned by the district court's clarification and amended order, which demonstrates that the court below intends its order to affect how all 75 Arkansas counties conduct this General Election. *See* APP49, R. Doc. 178 at 3; APP89, R. Doc. 179 at 38.

As more fully explained in Defendants' motion, the district court's clarification order reproached Defendants for not informing the nonparty counties of its ruling. *See* Def.'s Motion at 13. Far from concerning itself with only three counties, the district court ordered the State Board "to promptly send a

memorandum to *every county election board in Arkansas* stating that this Court has declared the six-voter limit invalid under federal law and enjoined the State from enforcing it." APP49, R. Doc. 178 at 3 (emphasis added). The fact that the district court ordered the State Board to inform all 75 county boards of its ruling demonstrates that it intends its order to impact their administration of this General Election. Otherwise, the district court would have neither a reason nor the authority to impose that condition on the State Board. *See St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 271 (8th Cir. 2011) ("Federal remedial powers can be exercised only on the basis of a violation of the law and can extend no farther than required by the nature and the extent of that violation." (quotation and brackets omitted)).

This understanding is confirmed by the fact that the clarification order goes on to discuss what might happen if "a *nonparty* county election board *chooses to ignore* both the Court's declaration and the State Board's forthcoming memorandum," stating that "county election officials are *required by law* to follow" such State Board-provided training and materials, APP49, R. Doc. 178 at 3 (emphases added). One simply cannot read the clarification order without understanding that the district court intends for its injunction to affect how the 72 nonparty counties conduct this General Election.

Indeed, contrary to Plaintiffs' assertion that "[t]he district court's injunction binds only three counties," Pl.'s Resp. at 6, the order also expressly enjoins the State Board, the Secretary of State, "their employees, agents, and successors in office, and all persons acting in concert with them." APP40, R. Doc. 168 at 38; *accord* APP89, R. Doc. 179 at 38 (amended order). As if anything more were needed to understand the district court's intent, its clarification order further declares that "to the extent *any nonparty* acts in concert with the State Defendants to enforce the six-voter limit, the Court *has already enjoined such behavior*," specifically mentioning those "third parties, *including county election boards*." APP49, R. Doc. 178 at 3 (emphases added). In light of this order, the conclusion is inescapable that the district court intends its injunction to affect all 75 counties' election administration.

B. The chaos and confusion caused by the district court's late-breaking injunction is grounds for a stay under *Purcell*.

Plaintiffs' response also misrepresents Defendants' grounds for seeking a stay under *Purcell*. Plaintiffs assert that Defendants "do not argue that a stay is warranted because of any confusion of voters or loss of voter confidence in the election," Pl.'s Resp at 12, suggesting that the State Board is concerned merely with being held in contempt for the county boards' post-election conduct. *Id.* at 14. That is false, and Plaintiffs have apparently misread large sections of Defendants' motion. *See, e.g.*, Def.'s Motion at 20-25.

It is precisely the confusion and turmoil created by the district court's order for poll workers and voters during this General Election that is the problem. *See id.* As explained more fully in Defendants' motion, the wheels of Arkansas's election machinery are in full rotation and have been for some time. *Id.* at 9-10. The State Board's training expressed the importance of enforcing Arkansas's six-voter limit as an election safeguard. *Id.* Given the respective roles of state and county officials in Arkansas's cooperative administration of elections, *id.*, it is impossible at this point for Defendants to communicate modifications to the voter-facing poll workers who enforce election procedures according to their training and established practices. And that is to say nothing of ensuring their compliance and uniform administration of a ruling that contradicts their prior training. The injunction will certainly create confusion, hardship, and "uneven and inconsistent enforcement of the six-voter limit and related laws by poll workers at the polling sites across the state." APP46, R. Doc. 170-1 at 3.

Despite Plaintiffs' claim to the contrary, the record evinces this enforcement of Arkansas's six-voter limit by poll workers during the voting process. For example, in 2018 poll workers stopped Carlon Henderson from entering the voting booth after he violated the law. APP58, R. Doc. 179 at 7. He was "informed by poll workers that [he] could not continue to assist voters and [he] complied with these instructions but at that time [he] had already assisted at least eight voters"

and had sought to assist at least four more. R. Doc. 139-18 at 2. Thousands of Arkansas poll workers, including volunteers, have been trained by the counties to enforce the six-voter limit and related laws in this way. Indeed, they have already put that training into practice during the Preferential and General Primary Election earlier this year. The district court's injunction confuses and unsettles the counties' election procedures precisely when "the rules of the road must be clear and settled." *Merrill*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring).

C. This Court's case law applying *Purcell* counsels in favor of a stay.

Neither Eighth Circuit case Plaintiffs point to supports their argument that a stay is unwarranted. First, Plaintiffs' selective quotation of *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018), fails to support Plaintiffs' opposition. In *Brakebill*, this Court was presented with the question of whether to stay a district court's injunction of a North Dakota election law. *Id.* It stayed the injunction in late September, stating that "there is no universal rule that forbids *a stay* after Labor Day." *Id.* at 560 (emphasis added). Plaintiffs' response quotes this same line but creatively replaces the italicized language with "judicial intervention," Pl. Resp. at 15, thus creating the misleading impression that *Brakebill* gave the Court's blessing to a post-Labor Day district-court injunction. But it did not, and rather than supporting Plaintiffs, *Brakebill* supports Defendants' request for a stay. So does the district court's initial order, which recognized that, given the proximity to

the General Election, its injunction was subject to the *Purcell* principle. *See* APP40, R. Doc. 168 at 38 n.15.

Plaintiffs' strained comparison of this case to a misleading description of *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), also fails to support their argument. *Carson* emphasized that "*Purcell* protects the status quo," which is set by "the state legislature." *Id.* at 1062. The status quo in that case "was disrupted by the Minnesota Secretary of State, *id.*, and this Court's preliminary injunction shortly before the election had the effect of staying that departure from the status quo. *Id.* As this Court explained, "the same rationale that works to prevent election interference by federal courts also works to prevent interference by other entities as well." *Id.* Therefore, far from being an exception to *Purcell*, *Carson* is a vindication of *Purcell*'s underlying principle of noninterference with election procedures as established by the state legislature.

D. Plaintiffs misrepresent the relief Defendants seek under *Purcell*.

Finally, Plaintiffs misrepresent the relief that Defendants' motion seeks. Plaintiffs inexplicably assert that Defendants seek a stay only of the district court's order to "send a memorandum." Pl.'s Resp. at 15. This completely ignores that Defendants expressly seek a stay of the injunction of the six-voter limit due to the confusion and hardship that will result from the law's being enjoined so close to this General Election. *See* Def.'s Motion at 2, 15, 31.

II. The Court need not analyze the merits, but even so, Plaintiffs have not shown that the merits are "entirely clearcut" in their favor.

The Court can and should stay the injunction for this General Election with no need to "express [an] opinion" on the merits. *Purcell*, 549. U.S. at 5. If the Court instead considers the merits under the "relaxed" version of *Purcell* put forth by Justice Kavanaugh in *Merrill*, it is incumbent upon Plaintiffs to show that the merits are not "entirely clearcut" in their favor. *Merrill*, 142 S. Ct. at 881. They cannot do that. As previously noted, the district court has already acknowledged at least two other district-court decisions that part ways with its analysis. APP101, R. Doc. 35 at 7 (citing *Ray v. Texas*, 2008 WL 3457021, at *2 (E.D. Tex. Aug. 7, 2008), and *Priorities USA v. Nessel*, 487 F. Supp. 3d 599 (E.D. Mich. 2020)).

Plaintiffs' efforts to distinguish these cases miss the point. Plaintiffs' only attempt to distinguish the reasoning of *Ray* is on the basis of a Fifth Circuit interpretation of the extent of Section 208 that this Court has not adopted. As for *Nessel*, Plaintiffs attempt to dismiss its reasoning on the grounds that the plaintiffs there did not come forward with any evidence that voters had been denied assistance. But this ignores the fact that *Plaintiffs themselves* are not voters and cannot name even a single person whose voting rights have been impaired. APP18-27, 31-33, R. Doc. 168 at 16-25, 29-31.

Indeed, Plaintiffs do not seriously address Defendants' argument that Section 208 protects the rights of *voters*—not *nonvoter assistors*. *See* 52 U.S.C.

10508. Thus, to the extent that the VRA may allow "'aggrieved persons,'" to sue, that is "a category that [the Eighth Circuit] hold[s] to be limited to persons whose *voting rights* have been denied or impaired." *Roberts v. Wamser*, 883 F.2d 617, 624 (8th Cir. 1989) (emphasis added); *see* 52 U.S.C. 10302(c); *id.* 10308(d). Plaintiffs therefore lack both standing and a private right of action to bring a Section 208 claim.[1]

As explained more fully in Defendants' motion, Def.'s Motion at 12, 28, among other errors, the district court also failed to apply the correct legal standard, refusing to effectuate Congress's intent that "[s]tate provisions would be preempted *only* to the extent that they *unduly burden* the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." Senate Rep. No. 97-417, 97th Cong., 2d Sess., at 63 (1982) (emphases added). Instead, the district court found the law to be preempted using an incorrect, strict conflict preemption analysis.

Finally, as already explained, Defendants and the people of Arkansas will be irreparably harmed if the district court's injunction is not stayed for this General Election. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n. 17 (2018) (The "inability

[1] The district court mistakenly stated that Defendants "agree that Plaintiffs have a cause of action under § 208." *See* APP73 n.12, R. Doc. 179 at 22 n.12. In fact, Defendants argued the contrary below. *See, e.g.*, R. Doc. 63 at 9-11; R. Doc. 135 at 19.

to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State."). Both the public interest and the balance of harms favor a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("The third and fourth factors, harm to the opposing party and the public interest, merge when the Government" is seeking a stay). The traditional injunction factors thus support a stay even outside the *Purcell* context.

CONCLUSION

For these reasons, Defendants respectfully request that the Court stay the district court's injunction for this General Election.

Dated: September 22, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2,430 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman font, using Microsoft Word.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Michael A. Cantrell
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CERTIFICATE OF SERVICE

I certify that on September 22, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ *Michael A. Cantrell*
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