IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

VOICE of the EXPERIENCED, on behalf of itself and its members; POWER COALITION for EQUITY and JUSTICE, on behalf of itself and its members; and LEAGUE of WOMEN VOTERS of LOUISIANA, on behalf of itself and its members

Case: 3:23-cv-00331-JWD-SDJ

v.

R. KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana

DEFENDANT'S REPLY BRIEF TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

MAY IT PLEASE THE COURT:

Defendant, R. Kyle Ardoin ("Ardoin"), in his official capacity as Secretary of State of Louisiana, submits this reply brief to *Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Preliminary Injunction* [R. Doc. 69].

As an initial matter, Ardoin wishes to point out that, while Plaintiffs were permitted to utilize the entirety of their supplemental brief addressing this Court's questions (predominantly those related to *Purcell*), Ardoin was instructed not only to address those same questions but also to include his opposition to the merits of Plaintiffs' motion for preliminary injunction within the strict confines of the same 20-page brief. While Plaintiffs were therefore able to devote the entirety of their brief addressing this Court's questions, Plaintiffs have stated very little to demonstrate that *Purcell* concerns have been alleviated here, even despite the fact the hearing on the preliminary injunction has been moved to October 25, 2023.

RESPONSE TO INTRODUCTION

Plaintiffs make several representations in the *Introduction* of their supplemental brief that warrant correction. For one, Plaintiffs indicate that the "voter registrants" whom they represent (*i.e.*, felons whose voting rights were suspended pursuant to La. R.S. 18:176.1) had their right to vote restored pursuant to Louisiana law but are being required to provide documentary proof of eligibility to re-register to vote.[1] In truth, Louisiana law requires that suspended felons provide documentary proof demonstrating their eligibility for reinstatement; thus, they are not otherwise "automatically restored" the right to vote, nor are they re-registering, as Plaintiffs claim.[2] Secondly, the National Voter Registration Act ("NVRA") does not apply to the area of felon reenfranchisement, which is a matter of state law.[3] The NVRA, among other things, requires that a state's voter registration rolls for elections for Federal office be "in compliance with the Voting Rights Act of 1965."[4] The Voting Rights Act has similarly been found not to apply to the area of felon disenfranchisement, which again is a matter reserved to the states.[5]

Plaintiffs represent that Ardoin "has conceded that he would be ready to implement changes similar to the relief Plaintiffs seek within two-and-a-half months of an election."[6] This assertion is false. Plaintiffs cite Defendant's Opposition to Motion for Expedited Consideration as support for this purported "concession."[7] Yet, nowhere does the Opposition, much less any other pleading filed by Defendant, contain an acknowledgement that "Defendant would have been ready to implement [the] changes [enacted by House Bill 396] on August 1, 2023, which would have been the bill's

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[1] R. Doc. 69, p. 1.
[2] *See* La. R.S. 18:177(A).
[3] *See American Civil Rights Union v. Philadelphia City Commissioners*, 2016 WL 472118 (E. D. Pa. 2016), citing *Lassiter v. Northhampton City Bd. Of Elections*, 360 U.S. 45, 51 (1959).
[4] 52 U.S.C. § 20507(b)(1).
[5] *See* argument, including citations, set forth at II(a) of R. Doc. 65, which is adopted herein by reference per Fed. R. Civ. P. 10(c).
[6] R. Doc. 69, p. 1.
[7] R. Doc. 24 at p. 8.

effective date," had HB 396 become law.[8] Plaintiffs' assertion of a concession by Defendant is a blatant misrepresentation, if not a fabrication, of Defendant's position.[9] As to the issue of how long implementation of any required changes may take, Ardoin relies upon the declarations of Brad Harris and Sherri Hadskey [R. Doc. 70-1 and 70-2, respectively] attached to his opposition brief previously filed in this matter.

RESPONSE TO ARGUMENT

I. *Purcell* Does Preclude Injunctive Relief in this Matter

Plaintiffs argue that "*Purcell* and its progeny counsel in *favor* of injunctive relief" in this matter.[10] Yet, "*Purcell* clearly instructs that a court considering significant judicial intervention 'on the eve of an election' is to proceed with caution." *Clark v. Edwards*, 468 F. Supp. 3d 725, 737 (M.D. La. 2020). Indeed, "the Supreme Court has warned … many times to tread carefully where preliminary relief would disrupt a state voting system on the eve of an election.") *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018). Ardoin does not suggest that *Purcell* is a magic wand or that it creates a bright line rule precluding injunctive relief in this matter; however, application of the *Purcell* doctrine is warranted here for the reasons set forth in Defendant's opposition brief and because the factors advanced by Justice Kavanaugh that might otherwise preclude application of the doctrine are not present.[11] A proper application of *Purcell* precludes injunctive relief being

[8] R. Doc. 69, p. 14. Plaintiffs also assume that the effective date of House Bill 396 would have been August 1, 2023. Since House Bill 396 never passed, it never became an Act and thus, was never given an effective date. Defendant notes that Act 636 of the 2018 Regular Session, which, *inter alia,* amended La. R.S. 18:177, was given an effective date of March 1, 2019, even though it was signed by the governor on May 31, 2018. Likewise, Act 127 of the 2021 Regular Session, another Act cited by Plaintiffs, was given an effective date of February 1, 2022, despite being signed by the governor on June 10, 2021.

[9] While Defendant maintains that HB 396 may have resulted in changes to the reinstatement process similar to the relief sought by Plaintiffs, the bill was still in committee when Defendant filed his Opposition to Motion for Expedited Consideration. Defendant could not have represented the length of time it would take to implement changes required by a bill that had yet to pass (and indeed, never passed), as the ultimate changes, if any, were unknown at the time.

[10] R. Doc. 69, p. 3.

[11] Notably, Justice Kavanaugh instructed that "the *Purcell* principle…might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes *at least the following* ..." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays). (Emphasis added). The preceding

issued between the October 25, 2023 hearing and the presidential preference primary scheduled for March 23, 2024.

A. Though *Purcell* Did Not Define a Particular Timeframe, Subsequent Cases Have Done So

Though Plaintiffs correctly note *Purcell* did not set forth a specific timeframe in which injunctive relief should not issue in close proximity to an election, 2-5 months appears to be the accepted period in this jurisdiction.[12] Thus, it is noteworthy that the March 23, 2024 federal election is within five months of the October 25, 2023 hearing in this matter. Thus, under the prevailing case law, this is already considered too close for federal courts to order changes that will impact the election.[13] The relevant period is even shorter (*i.e.*, less than four months) when one considers that, to the extent this case deals precisely with reinstatement of a felon's suspended registration to vote, the last date for registration prior to the next federal election is February 21, 2024.[14] Given that the Plaintiffs' requested relief (if granted by this Court) will require programmatic changes to be made as well as publication of new materials and the adequate training of personnel, the period of time between this Court's likely ruling and the potential implementation of any changes is even more contracted when one considers the *blackout periods* surrounding elections that Ardoin follows to ensure election integrity.[15] These practical considerations militate

statement in conjunction with the conjunctive "and" contained in the series that follows suggests that, at a minimum, a plaintiff must establish all four factors in order to overcome *Purcell*. Plaintiffs have not done so here.

[12] *See Singleton v. E. Baton Par. Sch. Bd.*, 621 F. Supp. 3d 618, 628 (M.D. La. 2022), in which this Court noted *two to four months as "too close." See also Robinson v. Ardoin*, 37 F.4th 208, 229 (5th Cir. 2022), noting that within five months of an election may be too close.

[13] Plaintiffs suggest that language in the Supreme Court's denial of writs on a request to vacate the Fifth Circuit's stay in *Veasey v. Abbott*, 578 U.S. 957 (2016) implicitly upholds judicial intervention as early as three months nineteen days prior to an election; however, there is no reference to *Purcell* in *Veasey* nor is the high court's seeming willingness to consider additional relief in that case (which is not a case concerning felon reenfranchisement) to be considered dispositive of the timeliness issues that are concerned here.

[14] Declaration of Sherri Hadskey, ¶19.

[15] See Declaration of Brad Harris, R. Doc. 70-1.

against implementation of changes to the reinstatement requirements they seek through an injunction.

The cases cited by Plaintiffs to suggest a much shorter period of time for an injunction to issue prior to an election under *Purcell* do not involve felon reenfranchisement and are inapposite, nor are they controlling here. In *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), the Eighth Circuit noted "[t]he *Purcell* principle is a presumption against disturbing the status quo" which it said had been set by the state legislature but was "upset" by Minnesota's Secretary of State.[16] Not without careful consideration of the impact last minute changes would have on the upcoming election, the Eighth Circuit issued injunctive relief just six days before an election noting it was "consistent with *Purcell*, to at least preserve the possibility of restoring [the status quo]."[17] That is not the same situation here where Plaintiffs effectively seek an injunction to change the status quo.

Plaintiffs cite another decision, *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039 (D.N.D. 2020), also for the proposition that *Purcell* does not prevent a court from issuing injunctive relief as early as six days prior to an election. In that case, there was a specific finding that the impact on election officials was less significant than the threat of deprivation of the fundamental right to vote.[18] However, this is not the situation presented here in which Plaintiffs have failed to identify *any felons* who will be disenfranchised from voting in the next federal election due to the paperwork requirement absent an injunction.[19] Likewise, there is ample evidence here that the impact on election officials will be significant should an injunction issue.[20]

[16] *Id*., at 1062.
[17] *Id*.
[18] *Id*., 1055.
[19] Of the VOTE members identified by Plaintiffs who had their voter registrations suspended for conviction of a felony, all have had their voter registrations reinstated, or in the case of Eric Demond Calvin, are not yet eligible for reinstatement, and thus, none would be entitled to the requested injunctive relief.
[20] *See* Declarations of Sherri Hadskey and Brad Harris, R. Doc. 70-2 and 70-1

Finally, Plaintiffs rely upon *Democratic Nat'l Comm. V. Bostelmann*, 447 F. Supp. 3d 757 (W.D. Wis. 2020), to suggest that a decision instituting injunctive relief on March 20 leading up to an election on April 7 also would not violate *Purcell*. Importantly, the district court in *Bostelmann* was only implementing a modest extension of the registration deadline as a means to balance the health care concerns of voters presented by COVID-19.[21] That relief is not as extensive as the changes that would be required should the Court grant Plaintiffs the injunctive relief requested herein.[22]

None of the cases cited by Plaintiffs dictate a specific time period to be applied under *Purcell*, nor do they demonstrate why the range of time indicated by *Singelton* and *Robinson* should not also be applied here.

B. *Purcell* and Its Progeny Preclude Injunctive Relief, Especially Given that Plaintiffs have Not Identified Any Eligible Voters Who Will Be Disenfranchised Absent Injunctive Relief

Plaintiffs have cited no case law that is on point with their representation that *Purcell* demands an injunction should issue here respecting their claim that suspended felons are disenfranchised by Louisiana's reinstatement process. Of the cases cited, none concern the specific issue of a claim of felon disenfranchisement under the NVRA. First, Plaintiffs refer to *Craig v. Simon*, 493 F. Supp. 3d 773 (D. Minn.), *aff'd*, 980 F.3d 614 (8th Cir. 2020), which concerned the postponement of an election due to the death of a candidate and has no bearing upon the issues before this Court. Contrary to Plaintiffs' argument, there are no clear parallels between *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008) (which concerned voters unfairly purged from the rolls after their voter ID cards had been returned as undeliverable) and the instant case concerning allegedly disenfranchised felons. Indeed, suspended felons are not considered to

[21] *Id*., 770.
[22] *See* Declarations of Sherri Hadskey and Brad Harris, R. Doc. 70-2 and 70-1.

be qualified voters until reinstated by fulfilling the requirements of La. R.S. 18:177(A). Likewise, *Action NC v. Strach*, 216 F. Supp. 3d 597, 611 (M.D.N.C. 2016), does not support Plaintiffs' claims that implementing changes in this case will not be unduly burdensome, especially in light of the statements of Sherri Hadskey and Brad Harris outlining the impact this Court's ruling could have upon the election process.

Additionally, Plaintiffs have failed to identify any members who would be eligible to vote in the next federal election but have been prevented from doing so because of the paperwork requirement of La. R.S. 18:177(A). All of the voters whom Plaintiffs rely on for associational standing are registered voters. Thus, contrary to their allegations, Plaintiffs have identified no eligible voters who will be disenfranchised absent injunctive relief.

C. Plaintiffs Do Not Satisfy Any of the Four Factors to Overcome *Purcell*

As discussed in Defendant's Opposition [R. Doc. 70], Plaintiffs do not satisfy any of the Kavanaugh factors necessary to overcome *Purcell*. As noted earlier, the NVRA has left it to the states to determine voter eligibility for those convicted of criminal offenses.[23] Plaintiffs ignore other portions of the NVRA that specifically note the duty of the state election official to ensure that voter registration rolls for elections for Federal office be in compliance with the Voting Rights Act of 1965 (which permits states to disenfranchise felons) and also to consider the impact of federal convictions.[24]

Plaintiffs also rely upon the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 133 S. Ct. 2247, 186 L. Ed. 2d 239 (2013) ["*ITCA*"] for the proposition that Louisiana registrars of voters may do no more than accept from suspended felons the federal

[23] 52 U.S.C.A. § 20507(a)(3)(B); *see also* 52 U.S.C.A. § 20507(c)(2)(B)(i) ("Subparagraph (A) shall not be construed to preclude the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a)", i.e. "as provided by state law, by reason of criminal conviction or mental incapacity.").
[24] 52 U.S.C.A. § 20510(d); 52 U.S.C.A. § 20507(g)(3).

form mandated by the NVRA. However, the NVRA "only requires a State to register an '*eligible* applicant' who submits a timely Federal Form."[25] As noted by the Supreme Court in *ITCA*, "while the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'"[26]

The voters at issue here are those who were suspended for felony conviction and thus, are considered ineligible to vote under Louisiana law (and may properly be denied reinstatement) unless and until they have submitted proper documentation of redeeming their eligibility pursuant to La. R.S. 18:177(A). This is not the same situation as Arizona requiring proof of citizenship to become registered to vote in the first place as was at issue in *ITCA*. Moreover, Plaintiffs' restrictive reading of *ITCA* is also contrary to the NVRA's express authorization of states' removal of a registered voter from the official list of eligible voters "*as provided by State law, by reason of criminal conviction …*"[27] It strains reason to suggest that the NVRA would expressly permit states to remove registered voters with criminal convictions from the official list of eligible voters but still regulate the reinstatement or re-enfranchisement of those suspended voters. Plaintiffs' interpretation would render nugatory the NVRA's provisions specifically acknowledging a state's ability to disenfranchise felons by removing them from the list of eligible voters. However, "the Court must, using principles of statutory interpretation, strive to give meaning to all parts of a statute without making any part superfluous or meaningless." *Chisom v. Jindal*, 890 F. Supp. 2d 696, 717 (E.D. La. 2012). Accordingly, Plaintiffs' narrow reading of the NVRA cannot stand.

[25] *Id*., 570 U.S. 1, 15, n. 7, 133 S. Ct. 2247, 2257. (Emphasis original.)
[26] *Id*., 570 U.S. 1, 15, 133 S. Ct. 2247, 2257.
[27] 52 U.S.C. § 20507(a)(3)(B) (Emphasis added.)

Plaintiffs contend that they have shown irreparable harm,[28] citing *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016), for the proposition that "restriction on the fundamental right to vote [] constitutes irreparable injury." However, the right of convicted felons to vote is not fundamental.[29] Therefore, irreparable harm cannot flow from the supposed restriction thereof caused by the reinstatement requirements of La. R.S. 18:177(A).[30] Most detrimentally, Plaintiffs do not identify any suspended felons who will be unable to be reinstated to vote in the next Federal election absent an injunction.

D. *Allen v. Milligan* Does Not Preclude Applying Purcell in this Matter

Plaintiffs contend that *Allen v. Milligan*, No. 21-1086, 2023 WL 3872517 (U.S. June 8, 2023) should be regarded as a cautionary tale because it demonstrates the dangers of the "aggressive application" of *Purcell*.[31] Essentially, Plaintiffs seem to take issue with the fact that the matter was stayed pursuant to *Purcell* because the Supreme Court ultimately affirmed the district court's decision, after having time to consider the matter carefully and in due course. It does not reasonably follow, however, that the matter should not have been stayed in the first place. Nothing in the *Allen* decision supports that outcome nor should that consideration dominate the other *Purcell* factors. Indeed, Plaintiffs brazenly second guess the wisdom of the high court in granting the stay pursuant to *Purcell*, which Ardoin will not deign to do. As the Kavanaugh factors were not satisfied in *Allen*, the Supreme Court properly stayed the matter.

[28] R. Doc. 69, p. 10.
[29] *See Owens v. Barnes,* 711 F.2d 25, 27 (3d Cir. 1983), wherein the Third Circuit interpreted the Supreme Court's decision in *Richardson v. Ramirez,* 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), as precisely rejecting the argument that the right of convicted felons to vote is "fundamental".
[30] *Johnson* is further inapposite to the present case. In *Johnson*, however, the district court had issued an injunction that merely maintained the status quo. The Sixth Circuit, in denying a stay of the injunction, specifically stated, "[t]his case does not involve the potential disruption of complicated election-administration procedures on the eve of Election Day." *Johnson*, 833 F.3d at 669. Inasmuch as the injunction Plaintiffs seek here effectively *will alter* the status quo and *will disrupt* the current administrative procedures, it is by no means the same as the injunction at issue in *Johnson*..
[31] Plaintiffs' Supplemental Brief [R. Doc. 69].

CONCLUSION

The *Purcell* doctrine dictates that this Court avoid consideration of Plaintiffs' Motion for Preliminary Injunction. Nevertheless, Plaintiffs are not entitled to preliminary injunctive relief. First, Plaintiffs will not prevail on the merits of their NVRA claims because state law preempts the NVRA as to felon disenfranchisement and re-enfranchisement. Second, Plaintiffs cannot clearly demonstrate that irreparable harm would result in the absence of a preliminary injunction. Plaintiffs have not identified a single eligible voter who will be prevented from voting in the next federal election due to the reinstatement requirements of La. R.S. 18:177(A). Finally, the balance of equities favors denial of Plaintiffs' Motion for Preliminary Injunction. As shown in the Declarations of Sherri Hadskey and Brad Harris, the relief sought by Plaintiffs could not be implemented without significant cost or hardship on the state.

WHEREFORE, for the foregoing reasons, Defendant, R. Kyle Ardoin, in his official capacity as Secretary of State of Louisiana, respectfully requests that this Honorable Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of August, 2023, a copy of the foregoing has on this date been served upon all counsel of record via CM/ECF system and has been filed electronically with the Clerk of Court using the CM/ECF system.

/s/ Caroline M. Tomeny
Caroline M. Tomeny