No. 24-2810

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

GET LOUD ARKANSAS, 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. 5:24-CV-5121 (Hon. Timothy L. Brooks)

# REPLY IN SUPPORT OF MOTION TO STAY


Graham Talley, Ark. Bar No. 2015159
**MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC**
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201
Phone: (501) 688-8800
Fax: (501) 688-8807
Email: gtalley@mwlaw.com


RETRIEVED FROM DEMOCRACYDOCKET.COM

# TABLE OF CONTENTS

TABLE OF AUTHORITIES .......... 2

REPLY ARGUMENT .......... 3

I. The Court Should Evaluate the Present Request Using the Test Articulated by Justice Kavanaugh in *Merrill* .......... 3

II. The SBEC Did Not Waive Its *Purcell* Argument .......... 5

III. A Stay is Warranted Under *Purcell* .......... 6

A. Plaintiffs Cannot Show That the Injunction Will Not Lead to Significant Confusion or Hardship .......... 7

B. Plaintiffs Cannot Show that the Merits Are Entirely Clear Cut in Their Favor .......... 9

IV. Traditional Factors Favor a Stay .......... 11

CONCLUSION .......... 12

CERTIFICATE OF COMPLIANCE .......... 13

CERTIFICATE OF SERVICE .......... 14

RETRIEVED FROM DEMOCRACYDOCKET.COM

## TABLE OF AUTHORITIES

### CASES

*Arkansas United v. Thurston, et al*, No. 22-2918 (8th Cir. 2022) ............................4

*Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011)...............................11

*Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) ......3

*Grace, Inc. v. City of Miami*, No. 23-12472 (11th Cir. 2023) .................................4

*Hilton v. Braunskill*, 481 U.S. 770 (1987) ...........................................................11

*League of Women Voters v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022) .....4

*Merrill v. Milligan*, 142 S. Ct. 879 (2022)........................................................ 3, 4, 7

*Purcell v. Gonzalez*, 549 U.S. 1 (2006) ...................................................... passim

*Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423 (2020) ...........5

*Rose v. Raffensperger*, 143 S. Ct. 58 (2022).......................................................5, 6

*Vote.org v. Byrd*, 700 F. Supp. 3d 1047 (N.D. Fla. 2023).......................................10

*Vote.org v. Callanen*, 89 F.4th 459 (5th Cir. 2023)...............................................10

### CONSTITUTIONAL PROVISIONS

Ark. Const. amend. 51, § 5 ......................................................................12

Ark. Const. art. 5, § 42 ..........................................................................10

RETRIEVED FROM DEMOCRACYDOCKET.COM

## REPLY ARGUMENT

The Supreme Court has long recognized the need for restraint when it comes to injunctions that alter existing rules on the eve of an election. *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). Such injunctions run the risk of confusing voters; they may decrease turnout. *Id.* at 4–5. By asking this Court to uphold the District Court's decision in this case, however, Plaintiffs ignore precedent.

Application of *Purcell* mandates a stay of the District Court's injunction here.

### I. The Court Should Evaluate the Present Request Using the Test Articulated by Justice Kavanaugh in *Merrill*.

Plaintiffs, seeking to evade *Purcell*, first argue in response to the Motion that the stay must be denied because the SBEC failed to make a showing of irreparable harm or public interest. Opp., at 21. The Court need not, as addressed in the SBEC's opening brief, even address the merits, as *Purcell*'s general rule requires a stay given that the District Court entered the inunction "on the eve of an election." Should this Court decide to apply a multi-factor test, the traditional stay factors (even though the SBEC meets them here) should not guide this Court's *Purcell* analysis as Plaintiffs suggest.

"When an election is close at hand, the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). *Purcell* instructs courts to avoid disrupting elections in the months leading up to election day. *Purcell*, 549 U.S. at 1. So in

RETRIEVED FROM DEMOCRACYDOCKET.COM

elections cases, courts have recently employed Justice Kavanaugh's "relaxed" test when deciding whether to issue a stay. *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (noting the "traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election"); *see also Grace, Inc. v. City of Miami*, No. 23-12472, 2023 WL 5286232, at *2 (11th Cir. Aug. 4, 2023) (using this relaxed test to decide whether the plaintiffs could "'overcome' the *Purcell* principle"); *Arkansas United v. Thurston, et al*, No. 22-2918 (8th Cir. Sept. 17, 2022) (granting motion to stay based on *Purcell* principle); *League of Women Voters v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (holding that "the traditional test for a stay . . . does not apply" based on the *Purcell* principle). In these situations, rather than employing the traditional factors, courts weigh "considerations specific to election cases." *Purcell*, 549 U.S. at 4.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Four factors should thus guide this Court's analysis, should it opt to engage on the merits: *First*, are "the underlying merits . . . entirely clearcut in favor of the plaintiff?"; *second*, will "the plaintiff . . . suffer irreparable harm absent the injunction?"; *third*, has "the plaintiff . . . unduly delayed bringing the complaint to court?"; and *fourth*, are "the changes in question . . . at least feasible before the election without significant cost, confusion, or hardship?" *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).



Appellate Case: 24-2810 Page: 5 Date Filed: 09/18/2024 Entry ID: 5437296

As explained in the SBEC's opening brief, Plaintiffs cannot make these showings here, particularly because the weight of authority addressing rules similar to the one adopted by the SBEC (and approved by the Arkansas legislature) holds that these rules do not violate the Materiality Provision.

## II. The SBEC Did Not Waive Its *Purcell* Argument.

In response to the Motion, Plaintiffs next contend that this Court may not consider the applicable *Purcell* framework because it was somehow waived before the District Court. Opp., at 12–13 (citing *Rose v. Raffensperger*, 143 S. Ct. 58 (2022)). Not so.

RETRIEVED FROM DEMOCRACYDOCKET.COM

During the August 24, 2024 case management hearing, both sides discussed the implications of a preliminary injunction on the election given the timing of the request. *See* APP 294, R. Doc. 65, at 2 (minutes from the bench ruling). Indeed, the District Court's September 9, 2024 Memorandum Opinion and Order addressed same concern issue and discussed the implications of *Purcell*. APP 294, R. Doc. 65, at 50, n.24. Clearly, the parties raised timing and stay issues before the District Court. And the District Court specifically addressed *Purcell* in its written ruling. The issue is plainly preserved for review.

Moreover, even if the District Court declined to evaluate *Purcell*, the doctrine still applies, as *Purcell* limits federal courts' exercise of their equitable authority. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423,

425 (2020) ("[W]hen a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error"). This Court, on this record, may "correct th[e] error" created by the injunction under *Purcell*. *See id.*

Plaintiffs' reliance on *Rose* is also misplaced. There, the Supreme Court rejected an application of *Purcell* when a party made "previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November elections should applicants win at trial." *Rose*, 143 S. Ct. at 59. Indeed, at the preliminary injunction hearing, that party expressly disclaimed a *Purcell* appeal, noting for the record, "we may appeal based on the merits, but we won't make an appeal based on *Purcell*." Tr. Preliminary Injunction Hr'g, at 125:5-6, *Rose v. Raffensperger*, 619 F. Supp. 3d 1241 (N.D. Ga. Feb. 25, 2022) (No. 1:20-CV-2921). Here, the SBEC made no such concession and moved for a stay of the preliminary injunction at the close of the hearing, which the court denied. APP 294, R. Doc. 65, at 2.

RETRIEVED FROM DEMOCRACYDOCKET.COM

As such, the SBEC's *Purcell* arguments are properly before this Court.

## III. A Stay is Warranted Under *Purcell*.

At this late hour—with voter registration closing in just over two weeks—further changes to Arkansas's voter registration rules would offend *Purcell*. In response to the Motion, Plaintiffs refuse to acknowledge that the "traditional test for

a stay does not apply." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). This is telling; Plaintiffs cannot show that "the changes in question are at least feasible before the election without significant cost, confusion or hardship," or that "the underlying merits are entirely clearcut in [their] favor." *Id.* at 881.

Accordingly, the Court should grant the Motion and issue a stay of the District Court's injunction.

### A. Plaintiffs Cannot Show That the Injunction Will Not Lead to Significant Confusion or Hardship.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs argue at length that the SBEC has not produced enough "evidence" of voter or election official confusion. Opp., at 19. This assertion misreads the law; when voting is imminent, the *Purcell* principle presumes a risk of voter confusion, and it falls on the "plaintiff" to "establish" that "the changes" it proposes "are at least feasible before the election without significant . . . confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Plaintiffs have failed to make this showing.

Arkansas has an unmistakable interest in preventing conduct that frustrates and inserts confusion into the operation of the electoral process. *See Purcell*, 549 U.S. at 4. Prior to implementing the "signature or mark" requirement, some county clerks permitted voters to sign voter registration applications using electronic means, while others required a handwritten signature. The SBEC received numerous inquiries from county clerks regarding whether they could accept applications

bearing an electronic signature. As such, the SBEC, pursuant to its constitutional charge, promulgated "the signature or mark" requirement to create statewide uniformity, ease confusion among voters and election officials, and ensure prospective voters are who they say they are. *See* SUPP ADD 1, Decl. Chris Madison ("Madison Decl."), ¶ 3.

This rule was in place for nearly four out of the five months leading up to the October 7, 2024 voter registration deadline. An eleventh-hour order altering the "signature or mark" rule on the eve of an election upends the process by creating a new system for voter registration. *See Purcell*, 549 U.S. at 5–6. In other words, an injunction only restores the confusion that the SBEC eliminated through the "signature or mark" requirement.

Indeed, in the two-week period following the District Court's issuance of the preliminary injunction, Plaintiffs acknowledge that over 150 voter registration applications across more than thirty counties have been submitted using an electronic signature. Opp., at 9. Processing of these applications is ongoing, and county clerks do not know how to handle them in light of the pending litigation.

And Plaintiffs' argument that "none of the clerk defendants . . . joins SBEC's motion" is unconvincing. Selectively naming three elected county clerks as party defendants who do not personally oppose the "signature or mark" rule fails to address the broader issue. Although confusion previously subsided after the SBEC

RETRIEVED FROM DEMOCRACYDOCKET.COM

established its "signature or mark" requirement, the influx of these 150 new applications with digital signatures following the injunction has created uncertainty which has not existed since the Rule Regarding Voter Registration was first issued in May 2024. Clerks are now contacting the SBEC for clarification on how to handle these submissions and what the law requires. *See* SUPP ADD 1, Madison Decl., ¶¶ 4-9. And in the past two weeks alone, the SBEC has received at least 20 inquiries from county clerks seeking guidance on the requirement given the ongoing litigation. *Id.*, ¶¶ 5-9.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The inevitable result of voter and county clerk confusion over conflicting rules is a "consequent incentive to remain away from the polls," a risk that only increases "[a]s an election draws closer." *Purcell*, 549 U.S. at 5. As such, a stay pending appeal of the District Court's ruling is appropriate.

**B. Plaintiffs Cannot Show That the Merits Are Entirely Clear Cut in Their Favor.**

The merits are also not entirely "clear cut" in Plaintiffs' favor. Instead, the SBEC is likely to succeed on the merits, as the "signature or mark" requirement does not violate the Materiality Provision. The SBEC's requirement comports with the Materiality Provision, as a signature is essential for determining voter eligibility, preventing fraud, and safeguarding the process of approving absentee ballots. A handwritten signature simply carries greater weight than a digital one does.

Two courts to date have found similar requirements compatible with the Materiality Provision, as handwritten signatures correspond to substantial state interests in promoting voter integrity. *See Vote.org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023) (holding that a handwritten signature "carries a solemn weight" and helps ensure "that those applying to vote are who they say they are"); *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1056 (N.D. Fla. 2023) (finding that handwritten signatures "carry different weight" and that "the acceptance of electronic signatures in certain circumstances does not render the wet signature requirement immaterial in this circumstance").

Plaintiffs' attempts to distinguish these two cases are unavailing. Plaintiffs contend that as opposed to the challenged requirements in *Callanen* and *Byrd*, the "signature or mark" requirement is "unsupported by any similar legislative judgement," as "it was adopted by unelected agency officials, not the Legislature." Opp., at 13. Plaintiffs are mistaken. Amendment 92 of the Arkansas Constitution created a process whereby rules promulgated by agencies, including the SBEC, are reviewed by the Arkansas legislature. Ark. Const. art. 5, § 42. The SBEC's "signature or mark" requirement only became effective after a legislative committee approved it. Such a process unambiguously makes the requirement a "legislative judgment."

RETRIEVED FROM DEMOCRACYDOCKET.COM

## IV. Traditional Factors Favor a Stay.

The SBEC's request also meets traditional stay criteria, even though those criteria do not apply here. Under traditional principles, courts consider four factors when assessing a stay request: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). A stay is granted where "the relative strength of the four factors" tips the balance of equities in favor of preserving the status quo. *See Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011). Even presuming, arguendo, that the traditional stay factors apply, Plaintiffs' position is without merit. All four factors weigh in favor of a stay here.

*First*, the SBEC is likely to succeed on the merits because Plaintiffs are unable to establish that the "signature or mark" requirement is immaterial as a matter of federal law. *See supra*, § II(B).

*Second*, there is a strong likelihood of irreparable injury absent a stay, as county clerks, without a stay, would be forced to again change the voter registration process which has existed for nearly four of the past five months. *See supra,* § II(A). A "necessary component for the verification of the voter's identity" would be eliminated, *see* Mot., at 13, and the SBEC would be unable to fulfill its constitutional

RETRIEVED FROM DEMOCRACYDOCKET.COM

mandate to adopt rules "necessary to secure uniform and efficient procedures in the administration" of voter registration "throughout the [s]tate." Ark. Const. amend. 51, § 5(e)(1). The inability to achieve its constitutional mandate is antithetical to Arkansas policy and is presumptively harmful to voters.

*Third*, balance of the equities also favors a stay. The SBEC will be irreparably harmed by the inability to prevent voter confusion and eliminate the risk of fraud. On the other hand, the harm that Plaintiffs will experience if the District Court's order is stayed is little to none. VDO and GLA may simply direct their outreach programs to facilitating voter registration in a way that complies with the "signature or mark" requirement, as both groups have (or could have) for the months preceding the injunction. Loper will certainly not be harmed, as she has successfully registered to vote. *See* Mot., at 12. And Pastor may similarly comply with Arkansas law by simply submitting a new voter registration application bearing a handwritten signature.

RETRIEVED FROM DEMOCRACYDOCKET.COM

*Finally*, because Arkansas has a significant interest in identity-verification, fraud-prevention, and maintaining a uniform voter registration process throughout the state, the public interest factor weighs heavily in favor of granting a stay.

**CONCLUSION**

For the foregoing reasons, the Court should grant the Motion.

Respectfully submitted,

Graham Talley (Ark. Bar No. 2015159)
**MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC**
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201
Phone: (501) 688-8800
Fax: (501) 688-8807
Email: gtalley@mwlaw.com

RETRIEVED FROM DEMOCRACYDOCKET.COM

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(a)(4) because it does not exceed ten pages.

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

/s/ Graham Talley
Graham Talley

RETRIEVED FROM DEMOCRACYDOCKET.COM

## CERTIFICATE OF SERVICE

I certify that on September 18, 2024, 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/ Graham Talley
Graham Talley

RETRIEVED FROM DEMOCRACYDOCKET.COM



Appellate Case: 24-2810 Page: 16 Date Filed: 09/18/2024 Entry ID: 5437296

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**GET LOUD ARKANSAS, et al.** **PLAINTIFFS-APPELLEES**

**v.** **NO. 24-2810**

**JOHN THURSTON et al.** **DEFENDANTS-APPELLANTS**

**DECLARATION OF CHRIS MADISON**

Declarant Chris Madison states the following:

1. I am over the age of eighteen and competent to make this declaration.

2. I have served as Director of the Arkansas State Board of Election Commissioners (the "SBEC") since November 2023.

3. The SBEC adopted the Rule Regarding Voter Registration for the reasons explained in my memorandum of July 15, 2024. These reasons included, among others, to create a uniform process for voter registration and to ensure the identities of those registering to vote.

4. Since the District Court's issuance of a preliminary injunction, the SBEC has received numerous inquiries from county clerks regarding voter registration applications.

5. On Wednesday, September 4, 2024, following a presentation at the Arkansas Association of Counties County Clerk meeting, the SBEC received approximately 15 questions from various county clerks regarding the injunction and its effect on registration applications.

6. On Sunday, September 15, 2024, the SBEC received an email from the Craighead County clerk regarding a voter's electronic signature not matching previous signatures from a voter.

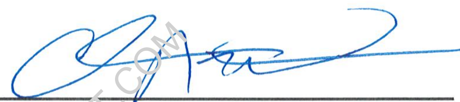
7. On Monday, September 16, 2024, the SBEC received emails from the Searcy County clerk and the Pope County clerk inquiring whether they may accept electronic signatures.

RETRIEVED FROM DEMOCRACYDOCKET.COM

8. On Monday, September 16, 2024, the SBEC received a telephone call from the Benton County clerk asking about the current status of the Rule Regarding Voter registration.

9. On Tuesday, September 17, 2024, the SBEC received a telephone call from the Sebastian County clerk seeking guidance on the Rule Regarding Voter Registration given the ongoing litigation.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



CHRIS MADISON

09/18/2024

DATE

RETRIEVED FROM DEMOCRACYDOCKET.COM