UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE and DEMOCRATIC PARTY OF WISCONSIN, Plaintiffs, v. MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as Wisconsin Elections Commissioners, Defendants.	)	CASE No. 3:20-cv-00249

BRIEF OF THE HONEST ELECTIONS PROJECT AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS

INTEREST OF AMICUS CURIAE[1]

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

[1] Plaintiffs gave blanket consent to the filing of all amicus briefs in their Response to Motion In Support of Leave to File Amicus Memorandum by the Cities of Milwaukee and Madison, Wisconsin (Mar. 24, 2020) (ECF No. 45). Counsel for Defendants consented to the filing of this Amicus Brief on March 27, 2020. Counsel for Intervenors, the Republican National Committee, and the Republican Party of Wisconsin consented to the filing of this Amicus Brief on March 27, 2020.

Honest Elections Project defends fair, reasonable, common sense measures that voters put in place to protect the integrity of the voting process.

As part of its mission in this challenging time, the Honest Elections Project seeks to ensure that elections are carried out using lawful methods while accounting for public health issues. Challenges to duly enacted election procedures, such as those brought by Plaintiffs in the present case, have the potential to damage the integrity and perceived legitimacy of the election results. After all, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The Honest Elections Project thus has a significant interest in this important case.

INTRODUCTION

The Plaintiffs urge this Court to override duly enacted state election laws through judicial fiat rather than defeat these laws through other measures that are too politically unpopular to be successful.[2] Specifically, Plaintiffs seek to (1) extend the

[2] Since the Wisconsin Legislature passed legislation adjusting Wisconsin's voter identification and residency requirements for voters in 2011, suit after suit has been filed attempting to overturn the laws. On multiple occasions, the Seventh Circuit and Wisconsin Supreme Court upheld the 2011 laws. *See, e.g., One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016) (An unsuccessful challenge to Wisconsin voter ID laws by organizations represented by the same undersigned counsel who represents Plaintiffs in the present case.). In making this current request, the Plaintiffs are simply attempting again to undo the 2011 laws—something they have been unsuccessful in doing on numerous other occasions.

deadline for receiving absentee ballots *past* election day; (2) terminate the requirement that proof of identification accompany absentee ballots; (3) remove the requirement that absentee ballots be signed by a witness; (4) dispense with the requirement that proof of residence accompany electronic and by-mail voter registration; and (5) further extend the by-mail registration deadline, by enjoining Wis. Stat. §§ 6.87(6), 6.86, 6.87(2), 6.34; 6.28(1) respectively (collectively, the "Challenged Provisions"). *See* Mot. for Recon. and Prelim. Inj., (Mar. 27, 2020) (ECF No. 62 at 1-2). They continue to seek such relief even after this Court extended the electronic and mail-in voter registration deadline, codified at Section 6.28(1), while denying Plaintiffs' remaining injunctive requests. *See* Opinion and Order (Mar. 20, 2020) (ECF No. 37).

This Court should not enjoin the Challenged Provisions. Enjoining the Challenged Provisions so close in time before an election would wreak havoc among election administrators, who would have scant time and possibly very few resources to implement new procedures. This would not only result in strains on election administration, but also potentially disenfranchise voters, or worse yet, provide disparate standards in some areas compared to others. The Supreme Court and the Seventh Circuit have repudiated this kind of last-minute disruption of election administration. The proposed disruption to the orderly election administration process is especially troubling because, far from benevolent, Plaintiffs are simply

using the COVID-19 pandemic to accomplish what they could not accomplish through legislation or litigation in better times.

ARGUMENT

I. GRANTING PLAINTIFFS' RELIEF WOULD COMPROMISE ELECTION ADMINISTRATION CONTRARY TO THE PUBLIC INTEREST.

A. The Supreme Court's *Purcell* Doctrine Counsels Against Granting the Plaintiffs' Injunction.

The United States Supreme Court repeatedly held that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). These considerations include the fact that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id*. at 4–5. "As an election draws closer, that risk will increase." *Id*. at 5. Courts must therefore weigh such factors as the harms associated with judicial action or inaction, the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id*. Other relevant factors that a Court must weigh when evaluating whether to grant extraordinary relief affecting impending elections include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint when intruding on state sovereignty." *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

In accordance with the hesitation to intrude into the conduct of elections, the Supreme Court has long rejected last-minute changes to elections, even when faced with potential constitutional violations. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming decision of district court permitting election to proceed under map with constitutional infirmities because "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121 (1967) (per curiam) (affirming district court's action permitting 1966 Texas election to continue under a "constitutionally infirm" plan due to the proximity of the election date). As the Supreme Court stated in *Reynolds v. Sims*:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, 377 U.S. 533, 585 (1964). Through *Purcell* and *Reynolds*, the Supreme Court made clear that, even when faced with potential constitutional issues, eleventh-hour disruptions to elections must be avoided. *Cf. Frank v. Walker*, 769 F.3d 494, 496-98 (7th Cir. 2014); *See also Frank v. Walker*, 769 F.3d at 498-99 (Williams, Circuit J., dissenting).

Indeed, *Purcell* itself dealt with an injunction of laws of a similar character to those in the present case. Specifically, that case reviewed a judicial order of the Ninth

Circuit, issued less than five weeks before an election, forbidding use of Arizona's voter ID requirement. *Purcell*, 549 U.S. at 2-4. By forbidding use of voter ID, the Ninth Circuit required a state to depart from procedures established by state law, which is not unlike the relief the Plaintiffs seek here. *Id*. The Supreme Court held such judicial intrusion to be improper given the, *inter alia*, looming election and necessity for clear guidance to the state. *Id*. at 5.

Only days ago, the Northern District of Florida denied a temporary restraining order to plaintiffs who cited COVID-19 as a reason for seeking fundamental alterations to the manner in which voting should be conducted in Florida. *Williams v. DeSantis*, Case No. 1:20-cv-67-RH-GRJ, Order Denying a Temporary Restraining Order (N.D. Fla. Mar. 17, 2020). The motion for temporary restraining order sought to alter vote-by-mail requirements by, *inter alia*, extending deadlines for requesting and returning vote-by-mail ballots, waiving the requirement to complete affidavits, allowing voters to designate other individuals to return their ballots, and mandating that election officials accept delivered ballots regardless of the precinct to which they are returned. *Williams v. DeSantis*, Case No. 1:20-cv-67-RH-GRJ, Plaintiffs' Emergency Mot. for a Temp. Restraining Order and Prelim. Inj. (N.D. Fla. Mar. 16, 2020). While the Northern District of Florida acknowledged that the COVID-19 emergency "will make it difficult or impossible for some to vote," it found that the temporary restraining order was not in the public interest due to the proximity to the

election. *Williams v. DeSantis*, Case No. 1:20-cv-67-RH-GRJ, Order Denying a Temp. Restraining Order. Specifically, the court stated:

> At this hour, with voting in progress, a temporary restraining order would be adverse to the public interest. At least until the polls close, and under all the circumstances, it will be in the public interest to allow the Governor, Secretary of State, and Supervisors of Elections to perform their respective roles. The national healthcare emergency is not a basis to cancel an election, and the plaintiffs do not assert it is.

Id. The same circumstances surround the present case due to the impending primary election.

Moreover, although the circumstances surrounding the Plaintiffs' claims—those of a viral pandemic—are otherwise novel in American election law jurisprudence, other courts have denied similar relief in cases concerning natural disasters such as hurricanes. For example, in *Bethea v. Deal*, Hurricane Matthew resulted in the governor of Georgia ordering mandatory evacuations for a number of counties in that state, which in turn resulted in the temporary closure of those counties' Board of Elections offices prior to the voter registration deadline. 2016 U.S. Dist. LEXIS 144861 at *1-3 (S.D. Ga. 2016). All of the Board of Elections offices at issue in *Bethea* opened at latest on the last day of registration. *Id*. Plaintiffs in that case, similar to the Plaintiffs in this case, sought to enjoin provisions of state election law because they asserted that individuals were prevented from registering (both in person and electronically) and voting due to Board of Elections office closures, power outages, transportation concerns, post office closures, the

suspension of mail services, evacuation, and other recovery efforts. *Id.* at *1-4. The State contended that to do so would create a significant burden for election officials because implementing such changes would be too difficult and would stretch resources, given the approaching election, and would force election officials to work from multiple voter lists, thus increasing the chances of human error and unnecessary provisional ballots. *Id*. at *4-5. The State also argued that the citizens of the affected counties were able to register at their local election offices in person for at least one day prior to the registration deadline, and that the impacts of Hurricane Matthew did not preclude individuals from registering electronically or by mail. *Id*. The court denied the plaintiffs' injunctive relief because it determined that there was no government action, *i.e.*, Georgia's decision not to extend the deadline was not an action that created an impediment to the right to vote. *Id*. at *6. The court went further and held that even assuming *Anderson-Burdick* applied, the minimal burdens imposed by refusing a registration extension did not outweigh Georgia's interest in conducting a smooth statewide election. *Id*. at *7-11.

Additionally, in *Florida Democratic Party v. Detzner*, Hurricane Michael resulted in the mandatory evacuation of some areas of the Florida gulf coast close in time to that state's voter registration deadline. 2018 U.S. Dist. LEXIS 174528, *1 (N.D. Fla. 2018). The Florida Secretary of State issued a directive to all Florida supervisors of elections authorizing them to extend in-person voter registration if

their office was closed on the last day of the registration deadline, but not extending mailed registration applications or online registration. *Id*. at *1-2. The Florida Democratic Party, represented by the same counsel as the Plaintiffs in the present case, sued, arguing that the directive did not go far enough and seeking a temporary restraining order mandating a statewide extension of one week for all forms of registration. *Id*. The District Court for the Northern District of Florida denied the Florida Democratic Party's motion because there was no justification for such a broad remedy, especially given there were avenues open for individuals to register to vote before and during the hurricane evacuations. *Id*. at *2-4.

Here, numerous options remain for individuals to register to vote, request an absentee ballot, and to actually vote by absentee ballot. The hardships that the Plaintiffs assert are all but nonexistent. For example, Plaintiffs argue that individuals cannot include copies of proof of residency and proof of identification with their absentee ballot applications and absentee ballot respectively because facilities where photocopies may be made, such as libraries and print shops, could potentially be shut down at some future point. Brief in Support of Mot. for Prelim. Inj. (Mar. 27, 2020) (ECF No. 62 at 14). However, this argument sidesteps the fact that individuals are able to use the mobile version of MyVote on any computer or smartphone, which "works especially well for absentee requests because a voter can take a photo of their photo ID document and upload it" or register to vote online with a valid driver

license or state ID card. Cover Letter Memo (Mar. 23, 2020) (ECF No. 43-1); Brief in Opposition of Temp. Restraining Order (Mar. 20, 2020) (ECF No. 26 at 9-12). Moreover, for proof of residency purposes, an individual need only send something such as a utility bill, which can be an original. *Id*. No photocopier is even necessary. Similarly, for the identification requirements for absentee ballots, many Wisconsin voters have access to printers in their homes or at their workplaces, to which friends or family have access, or at printer facilities that may still be open.

The relatively slight burden on voters that the residency and identification requirements place on individuals, even under current circumstances, is far outweighed by the interests the state has in continuing to utilize those requirements. The implementation of any of the Plaintiffs' requested remedies would complicate election administration in the state due to the decentralized nature of the State's elections administration structure, the part-time status of the vast majority of the State's municipal clerks, the technical requirements any changes to election administration would require, and the resulting potential for voter confusion. Brief in Opposition of Temp. Restraining Order (Mar. 20, 2020) (ECF No. 26 at 3). Further, there are deadlines following the April 7 primary election that election administrators must meet. These deadlines include: county clerks must post election results within two hours of receiving the returns, election results must be certified to the Counties by April 13, the results for municipal contests must be declared by the

third Tuesday of April (which is the date most of the terms for those offices begin), Counties must certify their results to the State by April 17, 2020, and the State must certify the election results by May 15, 2020. See *id.* at 13-14. Extending the deadlines for receipt of ballots would significantly interfere with this statutory schedule for election administration and would stretch the resources of many election boards. All of the aforementioned difficulties would only be exaggerated exponentially given how close in time before the election these changes would be made. These changes are precisely the kind of disruptions to election administration that the Supreme Court, the Seventh Circuit, and countless other courts have prevented through the *Purcell* doctrine. This Court should also refuse to countenance such disruption.

B. The Plaintiffs' Requested Relief Would Affect Some Areas More than Others.

The relief the Plaintiffs seek would have a disparate impact on election administration throughout Wisconsin. Specifically, the previously discussed burdens that 11th hour changes would place on election administrators would cause a different impact depending on the particular clerk office. Such an unequal impact, in the election administration context, could lead to confusion in some areas and not others, which could have electoral implications.

Election administrators in Wisconsin do not receive equal resources across the state. As Defendants have pointed out, there are 72 county clerks and 1,850

municipal clerks in Wisconsin responsible for administering elections. *Id.* at 2. Roughly two-thirds of Wisconsin's municipal clerks are part-time employees. *Id*. Furthermore, certain county clerk offices enjoy much greater resources than others. For example, in Milwaukee County, the Office of the County Clerk enjoys a budget of over $1.8 Million,[3] while in Menominee County, the County Clerk has a budget of $290,098.[4] Similarly, in Waukesha County, the County Clerk's has a budget of $697,855,[5] while in Eau County, the County Clerk's budget is only $335,304.[6] The counties with larger budgets tend to be those with more densely populated urban and suburban areas while those with smaller budgets and more part-time staff tend to be those with more rural areas.

The fact that resources are allocated so unevenly throughout Wisconsin county clerk offices means that it will be more difficult for some election officials to implement the changes the Plaintiffs seek, than others. Those counties with larger

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[3] Milwaukee Cty., Budget Summary, https://county.milwaukee.gov/files/county/administrative-services/PSB/BudgetsCopy-1/2020-Budget/2020-Adopted-Budget/2020-2020_3270-COUNTYCLERKELECTIONCOMMISSION.pdf.

[4] Menominee Cty. Bd. of Comm'rs, Menominee Cty. Budget, Sep. 10, 2019, https://www.menomineecounty.com/i_menominee/pu/da75613f0adc/2019-20_final_approved_budget_9.10.19.pdf.

[5] Waukesha Cty., 2020 Adapted Budget Book, https://www.waukeshacounty.gov/globalassets/administration/budget/2020-adopted-budget/9-button-pdfs/web_2020-adopted-budget-book.pdf.

[6] Eau Claire Cty., 2020 Adapted Budget, https://www.co.eau-claire.wi.us/home/showdocument?id=33779.

budgets and more permanent or full-time staff will enjoy more efficient and orderly administration of the changes to election regulation. Other counties, which have smaller budgets and more part-time staff, might suffer more confusing administration of the late changes to election law. Communicating the requested changes to those clerks and making necessary modifications to the computer hardware and software ensuring consistent implementation across the state would pose a significant challenge to election administrators, especially under such a compressed timeline. *See* Brief in Opposition of Temp. Restraining Order (Mar. 20, 2020) (ECF No. 26 at 3).

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests this Court deny the Plaintiffs' Motion for Preliminary Injunction and Reconsideration.

Dated: March 30, 2020

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