IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF OHIO, OHIO A. PHILIP RANDOLPH INSTITUTE, LASHUNDA LEE, MUNIA MOSTAFA, AUDRIANNA VICTORIAN RODRIGUEZ, and HANNAH TUVELL,	)	Case No. 2:20-cv-1638
	)	Judge Michael H. Watson
Plaintiffs,	)	
v.	)	
FRANK LAROSE, in his official capacity As Secretary of State of Ohio,	)	
Defendant.	)	

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

[1] On April 1, 2020 counsel for Amicus Curiae sought consent from counsel for Plaintiffs and the State for the filing of this Amicus Brief. Counsel for Plaintiffs indicated that they would not file any objection. Counsel for the State indicated that he did not have the opportunity to discuss it with his client.

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

Plaintiffs urge this Court to override duly enacted state election laws through judicial fiat at the eleventh hour before an election. Specifically, Plaintiffs seek to (1) reopen and extend the registration period for the 2020 primary election; (2) force election administrators to send to all registered electors who have not voted by 21 days before the primary election a ballot for each party, return postage pre-paid, and instructions; (3) permit any elector who has not received a mail absentee ballot at least 14 days prior to the close of polls to request one by phone; (4) allow electors who qualify for in-person voting but received an absentee ballot by mail, to vote in-person; (5) permit electors who do not cast an absentee ballot by the deadline to vote by in-person provisional ballot; (6) force election administrators to provide

opportunities to cure deficiencies in provisional ballots and absentee ballot identification envelopes by mail, phone, or email after the date of the primary election; and (7) implement other changes to the administration of Ohio's primary election, including potentially changing its timing (collectively, the "Challenged Provisions"). *See* Amended Complaint, ECF No. 5 (PageID#156-58); Emergency Motion for Temporary Restraining Order, ECF No. 4 (PageID#33-34).

This Court should not grant Plaintiffs' requested relief. Doing so, so close in time before an election and after the State has already made massive, emergency changes to their election procedures, 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 undoubtedly disenfranchise voters, or worse yet, provide disparate standards in some areas compared to others. The Supreme Court and the Sixth Circuit have repudiated this kind of last-minute disruption of election administration.

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[2] 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

[2] The Supreme Court has repeatedly recognized the important role States play in regulating elections—especially those designed to provide certainty and reliability in the election process and to protect those elections from any hint of fraud. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters [or in] orderly administration."); *Purcell*, 549 U.S. at 4 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, 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.'" (citation omitted). Indeed, the statutory policy of a Legislature "is in itself a declaration of public interest." Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937).

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.

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. The Sixth Circuit has also joined the Supreme Court in discouraging last-minute challenges of election procedures. *See SEIU Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012) ("last-minute

injunctions changing election procedures are strongly disfavored"); *Ne. Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of submission of absentee ballots."); *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("the State's interest in not having its voting processes interfered with, assuming that such processes are legal and constitutional, is great. It is particularly harmful to such interests to have the rules changed at the last minute.").

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.

Within the preceding weeks, a number of courts have rebuked eleventh-hour challenges to state election laws justified by COVID-19.

Only days ago, on March 30, 2020, the Eastern District of Arkansas denied an emergency motion for temporary restraining order and preliminary injunction which, similar to the Plaintiffs in the present case, sought to require state election officials to accept ballots that are postmarked before or on Election Day that arrive after Election Day and to provide adequate notice to voters and election officials of this extension and the absentee voting process. *Mays*, 2020 U.S. Dist. LEXIS 54498, *1-*2 (E.D. Ark. March 30, 2020). The court denied plaintiffs' motion because it held that the public interest laid with denying plaintiffs' motion because such "a last-minute restructuring of the state-absentee voting law, would add further confusion and uncertainty and impair the public's strong interest in the integrity of the electoral process." *Id*.

The Eastern District of Arkansas also found that plaintiffs were unlikely to succeed on the merits of their claims because plaintiffs failed to articulate any injury and therefore did not have standing. *Id*. at *4-*5. That case was triggered because the governor of Arkansas issued an executive order altering the structure of that state's absentee voting law. *Mays*, 2020 U.S. Dist. LEXIS 54498, *1-*2. Specifically, the executive order effectively permitted anyone to request an absentee ballot, regardless of whether they are unavoidably absent or unable to attend, and to allow them to request the absentee ballot by mail within seven days before the election. *Id*. When the Eastern District determined that plaintiffs lacked standing, it

did so because it held that plaintiffs failed to articulate an injury suffered at the hands of the governor, secretary of state or any other state official. *Id*. at 4. Specifically,

> [p]laintiffs' right to vote during this global pandemic have been made easier by the Governor's March 20 executive order suspending the normal prerequisites for requesting an absentee ballot. Plaintiffs complain that the Governor did not do enough. However, Plaintiffs' injury, if any, will occur only if they did not follow the absentee voting requirements as loosened by the Governor or if they do not show up to vote at a designated voting place exercising the social distancing and other protections suggested by the State and the federal government.

Id. Essentially, any injury plaintiffs might suffer by failing to take advantage of the available avenues to vote, is caused by the global pandemic, not by the actions of the state.

On March 20, 2020, the Western District of Wisconsin almost entirely denied a last-minute effort by the Democratic National Committee and the Democratic Party of Wisconsin to change Wisconsin's election laws because of COVID-19. *Democratic National Committee v. Bostelmann*, 2020 U.S. Dist. LEXIS 48394 (W.D. Wis. Mar. 20, 2020). Specifically, those plaintiffs sought to bar enforcement of (1) the electronic and mail-in voter registration deadline; (2) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted; and (3) the requirements of proof of residence and voter ID for electronic and mail-in registration and of photo identification for absentee ballot applications. *Id*. at *2. The plaintiffs filed the case on the day of the registration deadlines and less than three weeks before Wisconsin's primary election. *See generally id*. The Western

District granted the most minor of partial relief, only extending the deadline for registration 12 days (closing one week prior to the primary election) and denying all other relief. *Id*. at *24-27. The court noted that the narrowness of its remedy was due the fact that "last-minute changes to election laws may generate confusion and in turn undermine confidence in the electoral system." *Id*. at *25 (citing *Purcell*, 549 U.S. at 4).[3]

On March 17, 2020, 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

[3] In an unrelated separate action, the Supreme Court of Wisconsin, on March 31, 2020, ordered a county clerk to remove a Facebook post containing instructions on how individuals could avoid the state's voter ID requirements during the COVID-19 pandemic. *Jefferson v. Dane Cty.*, No. 2020AP557-OA at *1-2 (Mar. 31, 2020). Specifically, the Facebook post instructed voters to declare themselves to be "indefinitely confined due to illness" solely because the Wisconsin Department of Health Services had issued a "Safer at Home Order", allowing individuals to avoid the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot. *Id.* Such an interpretation differed from the Wisconsin Election Commission's guidance and the Wisconsin Supreme Court held the interpretation to be "legally incorrect." *Id.*

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, 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 request an absentee ballot, to actually vote by absentee ballot or in person. Plaintiffs and all other electors who cannot receive or, due to a disability cannot complete an absentee ballot, may still vote in person at a polling place. See H.B. 197 Section 32(D)(1). The hardships that the Plaintiffs assert are all but nonexistent or are caused by the global pandemic and not the State. *See Mays*, 2020 U.S. Dist. LEXIS 54498 at *4-5. For example, Plaintiffs argue that the subset of voters permitted to vote at polling places is too

narrow and that the absentee ballot laid out in H.B. 197 is too confusing for voters. Amended complaint at 12-14 (ECF no. 5) (March 31, 2020). However, this argument sidesteps the fact that the process for voting by absentee ballot has actually been made *easier* by H.B. 197, not more difficult. Registered voters are now sent a postcard outlining exactly how and when to request and submit their absentee ballots. H.B. 197 Section 32(C)(2). And while polling places will allow fewer voters to enter, that is necessary given the COVID-19 pandemic. Voters who might be prohibited from polling places are still able to vote by absentee ballot. Much like *Mays* case in the Eastern District of Arkansas, what relatively slight injury Plaintiffs can articulate is caused not by state action, which has made it easier to vote, but by the global pandemic. Plaintiffs are essentially arguing that state action did not go far enough.

The relatively slight burden on voters that Ohio's new voting procedures 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 county-based nature of the State's elections administration structure,[4] the technical requirements any changes to election

[4] https://www.sos.state.oh.us/elections/elections-officials/county-boards-of-elections-directory/.

administration would require, and the resulting potential for chaos and voter confusion. *See Purcell*, 549 U.S. at 4-5; *Reynolds*, 377 U.S. at 585. Further, there are deadlines following the April 28 primary election that election administrators must meet including the requirements that board of elections complete the official canvass of election ballots, certify the results, and report the results to the Secretary of State. 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.

Additionally, Plaintiffs' requested remedy leaves the door open to significant election integrity concerns. For example, Plaintiffs remedy would permit an individual to conceivably obtain three ballots during a single election. The Plaintiffs ask for all registered voters to be mailed an absentee ballot 21 days before the election. Amended Complaint at 23-24 (ECF No. 5). Plaintiffs also wish to permit any registered voter who claims to not have received an absentee ballot by 14 days before the primary election to request a second ballot. *Id*. at 24. Finally, Plaintiffs ask that anyone be permitted to vote in-person, provided they bring an unmarked absentee ballot with them to the polls or vote a provisional ballot. *Id*. This will not only overburden election administration with the need to provide up to three ballots for every elector, but it also leads to self-evident problems for election integrity. This

opens the door for allegations of fraud, which the State and public have a significant interest in avoiding.

All of the aforementioned difficulties would only be exaggerated exponentially given how close in time before the election these changes would be made and given that the requirements have already changed once. These changes are precisely the kind of disruptions to election administration and voting that the Supreme Court, the Sixth 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 is also not in the public interest because it would have a disparate impact on election administration throughout Ohio. Specifically, the previously discussed burdens that 11th hour changes would place on election administrators would cause a different impact depending on the particular county board of elections. Such an unequal impact, in the election administration context, could lead to confusion in some areas and not others, which could have severe and artificial electoral implications.

The election administrators that would have to shoulder the burden of implementing many of Plaintiffs' remedies do not receive equal resources across the state. Each of Ohio's 88 counties has a Board of Elections office that is responsible

for administering local elections.[5] Some of these Board of Elections offices enjoy much greater resources than others. For example Franklin County's Board of Elections enjoys an annual budget of $3,564,765,[6] while the Morgan County Board of Elections has an annual budget of approximately $162,220.[7] Similarly, Cuyahoga County budgets $8,333,929 for their Election Administration,[8] while Gallia County's Board of Elections budget is only $268,146.73.[9] It is predictable the counties with larger budgets tend to be those containing more densely populated urban and suburban areas while those with smaller budgets and more part-time staff tend to be those encompassing rural areas.

The fact that resources are allocated so unevenly across Ohio Boards of Elections means that it will be more difficult for some election officials to implement the changes the Plaintiffs seek, than others. Those counties with larger 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

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[5] https://www.sos.state.oh.us/elections/elections-officials/county-boards-of-elections-directory/.

[6] https://budget.franklincountyohio.gov/OMB-website/media/Documents/Budget/2020/2020-Approved-Budget-Summary-Tables.pdf.

[7] https://www.morganga.org/DocumentCenter/View/1387/DOC062217?bidId= (FY2018).

[8] http://council.cuyahogacounty.us/pdf_council/en-US/2020-2021Budget/OldChartsAccount.pdf.

[9] https://gallianet.net/images/Commissioners/Budget/2019%20general%20fund%20actual%20overview%20spreadsheet.pdf.

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 Boards 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.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests this Court deny the Plaintiffs' Motion for Temporary Restraining Order.

Dated: April 2, 2020

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed through the CM/ECF system which instantaneously sent a Notice of Electronic Filing (NEF) to all counsel required to be served.

/s/ Jason R. Stuckey

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