

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

LEAGUE OF WOMEN VOTERS)
OF VIRGINIA;)
KATHERINE D. CROWLEY;)
ERIKKA GOFF; and SEIJRA TOOGOOD,)

Plaintiffs,)

v.)

CASE No. 6:20-cv-00024-NKM

VIRGINIA STATE BOARD OF)
ELECTIONS; ROBERT H. BRINK,)
JOHN O'BANNON, and)
JAMILAH D. LECRUISE, in their official)
capacities as Chairman, Vice-Chair, and)
Secretary of the Virginia State Board of)
Elections, respectively; and)
CHRISTOPHER E. PIPER, in his official)
capacity as Commissioner of the)
Virginia Department of Elections,)

Defendants.)

**MOTION OF THE HONEST ELECTIONS PROJECT FOR LEAVE TO
FILE AMICUS BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

The Honest Elections Project respectfully asks this Court for leave to file an amicus brief in opposition to Plaintiffs' Motion for Preliminary Injunction.¹

¹*Proposed Amicus Curiae* and its counsel state that none of the parties to this case, including the intervening parties, nor their counsel authored this brief in whole or in part, nor made any monetary contribution for the preparation or submission of this brief.

Plaintiffs have provided consent for *Amicus Curiae* to file their brief. Proposed Intervenor-Defendants have also provided consent. Defendants take no position.

INTEREST OF PROPOSED 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.

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 in the present case by Plaintiffs, 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.

ARGUMENT

The Honest Elections Project’s brief will be useful to the Court’s resolution of the important issues in this case. The brief highlights the Honest Elections

Project's unique perspective regarding the valid state interest of the State in preventing voter fraud and in protecting voter confidence in the integrity of elections. Also, the Honest elections Project will discuss the Supreme Court's *Purcell* doctrine and its application to the present case. Specifically, there is strong public interest in the orderly administration of elections. This disorder stems from the extreme proximity to the upcoming primary elections.

CONCLUSION

For the foregoing reasons, the Honest Elections Project respectfully requests this Court grant this motion for leave to file its Amicus Brief.

Dated: April 28, 2020

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District Court for the Western District
of Virginia, but admitted to the United
States Court for the Eastern District
of Virginia*

CERTIFICATE OF SERVICE

I, Jonathan P. Lienhard, hereby certify that on April 28, 2020, the foregoing Unopposed Motion for Leave to File Amicus Brief and the attached Proposed Order and Amicus Brief have been filed via the CM/ECF and electronically served on all parties herein:

/s/ Jonathan P. Lienhard
Jonathan P. Lienhard

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

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Virginia Department of Elections,)
)
Defendants.)

**[PROPOSED] ORDER GRANTING UNOPPOSED MOTION OF HONEST
ELECTIONS PROJECT FOR LEAVE TO FILE AMICUS BRIEF IN
OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

The Court has reviewed the Honest Election Project's Unopposed Motion for Leave to File Amicus Brief in Opposition of Plaintiffs' Motion for Preliminary Injunction. The Motion is **GRANTED** and the Amicus Brief attached to the Motion is **DEEMED FILED**.

Dated: _____, 2020

District Judge Moon
U.S. District Court for the Western District of
Virginia

**UNITED STATES DISTRICT COURT
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Lynchburg Division**

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**BRIEF OF THE HONEST ELECTIONS PROJECT AS *AMICUS CURIAE*
IN OPPOSITION OF PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION¹**

¹ Plaintiffs have provided consent for *Amicus Curiae* to file this Brief. Proposed Intervenor-Defendants have also provided consent. Defendants take no position.

INTEREST OF *AMICUS CURIAE*²

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.

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

This Court should deny Plaintiffs’ claims seeking to have this Court prohibit the Commonwealth of Virginia from enforcing duly enacted state election laws that

² *Amicus Curiae* and its counsel state that none of the parties to this case, including the intervening parties, nor their counsel authored this brief in whole or in part, nor made any monetary contribution for the preparation or submission of this brief.

prevent voter fraud and preserve voter confidence in the integrity of elections. Specifically, Plaintiffs seek to prohibit the Commonwealth from enforcing the absentee ballot witness requirement for the June 23, 2020, primaries “and for any and all subsequent elections in Virginia until such time as in-person voting interactions required by compliance with the witness requirement no longer pose a risk to public health and personal safety” by enjoining enforcement of Virginia Code sections 24.2-706 and 24.2-707 and as interpreted by 1 Virginia Administrative Code section 20-70-20(B) (collectively the “Challenged Provisions”). *See* Pls.’ Mot. for Prelim. Inj. 2 (Apr. 21, 2020), ECF No. 16.

This Court should not enjoin the Challenged Provisions because the Commonwealth has valid interests in preventing voter fraud and in protecting voter confidence in the integrity of its elections, and the U.S Constitution specifically delegates to state legislatures responsibility for determining the “times, places and manner” of federal elections. U.S. Const. art I, § 4, cl. 1; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-197 (2008). Further, 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. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006).

It is important during these uncertain times that the fundamental pillars of our form of government, such as separation of powers and honest elections, remain

intact. While *Amicus Curiae* recognize that adjustments have been made and may still need to be made for upcoming elections, Plaintiffs' requested injunction is not the proper way to protect the integrity of the electoral process. Judicial intervention and inappropriate and burdensome injunctions will only lead to confusion and chaos in upcoming elections when steadiness and adherence to proper procedures are needed now more than ever.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION BECAUSE THEY HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS AND IT IS CONTRARY TO THE PUBLIC INTEREST.

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movement, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (alteration in original) (citation omitted). Among other things, a movant requesting a preliminary injunction must prove the likelihood of success on the merits of their underlying claims and that granting their requested injunction is in the public interest. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). Here, Plaintiffs are not only unlikely to succeed on the merits of their underlying claims, but are also requesting an injunction that is contrary to the public interest.

A. The Commonwealth has a Valid Interest in Preventing Voter Fraud and in Protecting Voter Confidence in the Integrity of Elections.

When analyzing an alleged burden on the right to vote from a challenged law, the well-established *Anderson/Burdick* framework applies. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under *Anderson/Burdick*, “election laws generally are not subject to strict scrutiny, even though voting rights are fundamental under the Constitution.” *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605 (4th Cir. 2016); *see also Burdick*, 504 U.S. at 433. In reviewing a reasonable, nondiscriminatory restriction on voting rights, such as the Challenged Provisions here, the restriction is justified by a state’s “important regulatory interests.” *Lee*, 843 F.3d at 606 (quoting *Burdick*, 504 U.S. at 434). Further, as voting by absentee ballot is not a fundamental right, challenges to absentee voting laws would not be subject to a strict scrutiny analysis. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-09 (1969).

Courts across the country, including the United States Supreme Court and the Fourth Circuit, have routinely recognized that a state has important regulatory interests in preventing voter fraud and in protecting voter confidence in the integrity of elections. *See e.g., Crawford*, 553 U.S. at 194-197; *Lee*, 843 F.3d at 606-607; *Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991); *see also Griffin v. Roupas*, 385 F.3d 1128, 1130-32 (7th Cir. 2004). Here, just as in the above cited cases, the Challenged Provisions are easily justified by the Commonwealth’s important

regulatory interests in preventing voter fraud and in protecting voter confidence in the integrity of elections. For “[v]oting fraud is a serious problem in U.S. elections generally ... and it is facilitated by absentee voting.” *Griffin*, 385 F.3d at 1130-31.

Last month, a group of plaintiffs filed suit in the United States District Court for the Western District of Wisconsin (the “Wisconsin Case”) where, among other things, they challenged a nearly identical law which required a witness signature on Wisconsin absentee ballots due to COVID-19 related concerns. *See Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 57918, at *5 (W.D. Wis. Apr. 2, 2020). Despite acknowledging “the state’s asserted interests in the witness requirement as a tool against voter fraud,” the Wisconsin court enjoined the state’s ability to enforce their absentee ballot witness requirement as enacted by the Wisconsin Legislature. *Id.* at *64, 75-76. With the Wisconsin elections fast approaching, upon review of the district court’s order, the Seventh Circuit promptly stayed multiple provisions from the district court’s order—including the provisions which enjoined enforcement of the state’s absentee ballot witness requirement. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538 (7th Cir. Apr. 3, 2020) (enclosed as Appendix A).

In staying the district court’s injunction pertaining to the State’s absentee ballot witness requirement, the Seventh Circuit found “that the district court did not give adequate consideration to the state’s interests” in preventing voter fraud and in

protecting voter confidence in the integrity of elections. *Id.* at 3. The court went on to state that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,’ and ‘[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government.’” *Id.* (citing *Purcell*, 549 U.S. at 4). The Seventh Circuit stated that it was “concerned with the overbreadth of the district court’s order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state’s *substantial interest* in combatting voter fraud.” *Id.* (emphasis added). The Seventh Circuit noted that the Wisconsin Election Commission had issued guidance which contained “at least five concrete alternative suggestions for how voters can comply with the state’s witness and signature requirements in light of the extraordinary challenges presented by the COVID-19 crisis.” *Id.* at 4.

Specifically, the guidance provided some detailed suggestions for obtaining witness signatures to comply with the statutory requirement. The Election Commission explained:

Where direct interaction is being avoided due to COVID-19, we have suggested the following options:

- A family member, friend or neighbor may watch the voter mark their ballot through a window, open door or other physical barrier;
- Other options for witnesses in these situations include, mail delivery persons, grocery or food delivery persons, and medical professionals;
- Spouses or roommates can always witness each other’s ballots;

- This process can be done via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address after the fact. The ballot could even be mailed to the witness (who observed by video chat) after it is marked and sealed in the envelope so they can sign it;
- Voters may also be able to drive to a meet up spot to observe/witness through their vehicle windows.

Absentee Witness Signature Requirement Guidance, Wisconsin Elections Commission (March 29, 2020), <https://elections.wi.gov/index.php/node/6790>.

Amicus Curiae agree with the Seventh Circuit when it wisely stated that “[i]t is best to leave these decisions and any more particular prescriptions to the Commission, as it is better positioned to know what additional alternative suggestions are able to accommodate the many intersecting interests in play in the present circumstances.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538, at 4 (7th Cir. Apr. 3, 2020). “[S]triking [] the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which [] judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.” *Griffin*, 385 F.3d at 1131. It is inappropriate “for a federal district court to act as the state’s chief health official by taking [] step[s] for them.” *Democratic Nat’l Comm.*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 57918, at *52.

The Commonwealth’s interests in preventing voter fraud and in protecting voter confidence in the integrity of elections justify the existence and enforcement

of the Challenged Provisions under the *Anderson/Burdick* framework. Plaintiffs' underlying claims, therefore, will not succeed and their request for a preliminary injunction should be denied.³

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

The United States Supreme Court has repeatedly held that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell*, 549 U.S. at 4. 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. *Id.* at 4-5.

Recently, on April 6, 2020, in the Wisconsin Case discussed *supra* Section I.A, the United States Supreme Court stayed a district court order that permitted absentee ballots to be cast after the election deadline.⁴ *See Republican Nat'l Comm.*

³ Plaintiffs attempt to also bring a Section 2 claim, alleging that the Challenged Provisions will disproportionately affect African Americans due to an alleged greater likelihood of their being infected with COVID-19. Compl. for Inj. and Declaratory Relief 31-33 (Apr. 17, 2020), ECF No. 1. That claim also fails because the Challenged Provisions are nondiscriminatory, and the Commonwealth does not control the infection rates of COVID-19.

⁴ The Seventh Circuit had declined to stay this portion of the district court's order as they had done with the absentee ballot witness requirement provision discussed above. With this stay from the U.S. Supreme Court, the majority of the provisions from the Wisconsin district court's order have now been stayed. Additionally, just days after the U.S. Supreme Court stayed the order in the Wisconsin Case, after discussing the unique circumstances in which we find

v. Democratic Nat'l Comm., No. 19A1016, 589 U.S. ___, ___, 2020 U.S. LEXIS 2195, at *1-2 (Apr. 6, 2020) (per curiam). The Supreme Court admonished the district court for “changing the election rules so close to the election date,” noting that such action “contravened” Supreme Court precedent, which “has repeatedly emphasized that lower federal courts should ordinarily not alter the elections rules on the eve of the election.” *Id.* at *2-3 (citing *Purcell*, 549 U.S. 1). Here, with the June election, and the printing and mailing-out of ballots, just weeks away, and with the all-but-certain upcoming appeals of this Court’s decision, any action from this Court granting the requested relief is contrary to the public interest because it would likely result in “voter confusion and consequent incentive” not to vote. *Purcell*, 549 U.S. at 4-5. Therefore, given the United States Supreme Court’s decisions in *Purcell* and its progeny, including the recent decision regarding the judicial interference in the Wisconsin Case in the upcoming election and the Seventh Circuit’s reversal of the district court on this very issue, this Court should not grant the requested relief for the upcoming Virginia elections. Plaintiffs’ request for a preliminary injunction should be denied.

ourselves with COVID-19, a different Wisconsin U.S. District Court declined to adjust election procedures, citing the recent U.S. Supreme Court stay and *Purcell* as controlling. *Taylor v. Milwaukee Election Comm'n*, No. 20-cv-545-pp, 2020 U.S. Dist. LEXIS 60496 (E.D. Wis. Apr. 6, 2020).

CONCLUSION

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

Dated: April 28, 2020

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Appendix A

Nos. 20-1538, 20-1539, 20-1545 & 20-1546

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ADMINISTRATIVE STAY AND STAY PENDING APPEAL, filed on April 2, 2020, by counsel.

3. **GEAR PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR-DEFENDANTS-APPELLANTS' MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL**, filed on April 3, 2020, by counsel.
4. **LEWIS PLAINTIFFS' OPPOSITION TO MOTIONS TO STAY**, filed on April 3, 2020, by counsel.
5. **OPPOSITION OF PLAINTIFFS-APPELLEES DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN TO MOTIONS TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY IN NOS. 20-1538 AND 20-1539**, filed on April 3, 2020, by counsel.
6. **REPLY OF WISCONSIN LEGISLATURE IN SUPPORT OF EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY**, filed on April 3, 2020, by counsel.

The court is in receipt of these emergency appeals, which have been referred to a three-judge panel.

The Democratic National Committee and the Democratic Party of Wisconsin, individual voters, and various community groups (collectively, "plaintiffs") brought these three consolidated cases against Wisconsin election officials pursuant to 42 U.S.C. § 1983 challenging various aspects of the state's primary election scheduled for April 7, 2020. They alleged that in light of shelter-in-place orders issued by the governor due to the COVID-19 crisis, voters will rely very heavily on absentee voting, and in their view, certain provisions of Wisconsin law governing absentee voting pose severe obstacles to some voters that unduly burdens their right to vote. Among other relief, they sought injunctive relief in the form of an extension of the electronic registration deadline; a suspension of the requirement for documentation and/or photo identification; a suspension of the requirement that each absentee ballot be signed by a witness. The Wisconsin State Legislature sought to intervene in the case, but the district

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court denied this request. On April 2, 2020, following a hearing, the district court issued a lengthy order granting in part and denying in part the plaintiffs' request for injunctive relief. The court subsequently made two minor amendments to the order. The Wisconsin State Legislature filed an emergency notice of appeal of the order denying intervention, and the Republican National Committee, which was permitted to intervene below, filed an emergency notice of appeal of the court's preliminary injunction order. They both seek a stay of the court's order. Notably, no aspect of these appeals challenge the district court's rejection of the plaintiffs' request to enjoin live voting on April 7. Upon review of the parties' filings,

IT IS ORDERED that the motions for a stay are **DENIED** as to the portions of the district court's order that (1) enjoin the enforcement of the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted and extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020; and (2) enjoin the enforcement of the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020, and extend the deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) to 5:00 p.m. on April 3, 2020.

IT IS FURTHER ORDERED that the motions for a stay are **GRANTED** as to that portion of the district court's order that enjoins the enforcement of Wis. Stat. § 6.87(2) for absentee voters who provide a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so. The court concludes that the district court did not give adequate consideration to the state's interests in suspending this requirement. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," and "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The court is also cognizant of the Supreme Court's admonition that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4-5. This court is concerned with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest in combatting voter fraud. *Griffin*, 385 F.3d at 1130.

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On March 29, 2020, the Wisconsin Election Commission issued Absentee Witness Signature Requirement Guidance that contained suggested options for allowing absentee voters to meet the state's signature requirement. The guidance is available on the Commission's website at <https://elections.wi.gov/index.php/node/6790>. The guidance came out of a meeting the Commission held on March 27, 2020, and contains at least five concrete alternative suggestions for how voters can comply with the state's witness and signature requirements in light of the extraordinary challenges presented by the COVID-19 crisis. With the absentee ballot receipt date being extended to April 13, 2020, voters have more time to take advantage of one or another of the Commission's suggestions for obtaining a signature. So, too, do we have every reason to believe the Commission, in keeping with the forward-leaning action it has taken thus far to accommodate voters' interests while also striving to ensure their safety, will continue to consider yet other ways for voters to satisfy the statutory signature requirement (if possible, for example, by maintaining the statutory presence requirement but not requiring the witness's physical signature). It is best to leave these decisions and any more particular prescriptions to the Commission, as it is better positioned to know what additional alternative suggestions are able to accommodate the many intersecting interests in play in the present circumstances.

IT IS FINALLY ORDERED that the court concludes that the Wisconsin State Legislature has standing to pursue this appeal, and that the district court erred in refusing to permit the Legislature to intervene in the case below. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019).