UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DISABILITY RIGHTS LOUISIANA	*	CIVIL ACTION NO.
	*	3:24-cv-554-JWD-SDJ
versus	*	
	*	JUDGE DeGRAVELLES
NANCY LANDRY, in her official capacity as Secretary of State of the State of Louisiana; and ELIZABETH MURRILL, in her official capacity as Attorney General of the State of Louisiana	*	MAG. JUDGE JOHNSON

MEMORANDUM BY ATTORNEY GENERAL ON THE IMPACT OF *PURCELL* ON THE PLEA TO ENJOIN LOUISIANA ELECTION LAWS

MAY IT PLEASE THE COURT:

Precipitous, last-minute orders by the federal courts imposing changes to state election rules without sufficient time to train election officials, advise candidates, and educate voters is likely to result in an uneven application of the rules. Some officials are likely to apply the rules one way and some another if the rules are changed too close to the election. Candidates have been advised about permissible conduct and are likely to be unable to adjust. Election officials have been trained and prepared to administer the election under one set of rules. An injunction would upset the apple cart and sow doubt about precisely how the election should be conducted. Plaintiffs argue that an injunction would make the rules easier to apply because registrars, parish boards, commissioners and candidates would not have to be as vigilent in assisting with ballots and determining the validity of a ballot. To the contrary an injunction is more likely to confuse election officials, candidates, nursing homes, commissioners, and others who are primed to carry out the election under existing rules and thereby risk the uneven application of the rules and skew the election

results.

To prevent such disruptions in the conduct of elections, the Courts have developed a doctrine called the *Purcell* doctrine that instructs federal courts that "they should ordinarily should not enjoin a state's election laws in the period close to an election, and [] has often stayed lower federal court injunctions that contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). This doctrine "not only prevents voter confusion but also prevents election administrator confusion," *DNC v. Wisconsin State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring), as state and local officials "need substantial time to plan for elections" and handle "significant logistical challenges." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

This Court points to its prior application of the *Purcell* principle in *Singleton v. E. Baton Par. Sch. Bd.*, 621 F. Supp. 3d 618 (M.D. La. 2022), where the Court counseled:

> That principle—known as the *Purcell* principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.

Singleton v. E. Baton Par. Sch. Bd., 621 F. Supp. 3d 618, 627–28 (M.D. La. 2022).

For good reason: "When an election is close at hand, the rules of the road must be clear and settled." *Merrill*, 142 S. Ct. at 880-881 (Kavanaugh, J., concurring in grants of applications for stays). at 880–81. "Late judicial tinkering" is a recipe for disaster. *Id.* at 881.

It is a bedrock principle of election law that federal courts should not muddy the electoral waters when an election is in close proximity. *See Merrill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring), *vacated*, 143 S. Ct. 2607 (2023). Louisiana "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). And "[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy." *Id.* *Purcell* has been consistently applied to avoid last-minute intrusions and second-guessing by federal courts when elections are imminent.

The Court correctly observes that *Robinson v. Ardoin*,[1] both at the Supreme Court and in the Fifth Circuit, clouded to a degree the proper application of *Purcell*. In a redistricting challenge to congressional districts, the Supreme Court initially granted certiorari and a stay before judgment to allow time to review the decision of the Middle District Court as a companion to *Milligan*. Upon the issuance of their decision in *Milligan*, the Supreme Court dismissed certiorari and stay of judgment to allow the Fifth Circuit to proceed. The Fifth Circuit took up the application for stay under *Purcell*. Despite the Secretary of State's attestation and without evidence from election officials to support its conclusion, the Fifth Circuit decided that Louisiana should be able to implement congressional election districts five months out from the 2022 congressional election with an "ordinary bureaucratic strain" and denied the stay

[1] *Ardoin v. Robinson*, 142 S. Ct. 2892, 213 L. Ed. 2d 1107 (2022), grant of certiorari and stay of judgment; *Ardoin v. Robinson*, 143 S. Ct. 2654, 216 L. Ed. 2d 1233 (2023), certiorari dismissed and stay vacated to allow the Fifth Circuit to proceed; *Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022), holding that a stay based on *Purcell* was not indicated five months prior to a congressional election.

request.

Both a more recent Supreme Court ruling and the facts of this case distinguish the Fifth Circuit's view in *Robinson v. Ardoin*. First, in *Robinson v. Callais*, 144 S. Ct. 1171 (2024), (Justice Jackson dissenting), the Supreme Court spoke more clearly about *Purcell* and the implementation of congressional election redistricting in Louisiana. The Court stayed an injunction against implementing November 2024 congressional elections because election officials could not administratively implement court ordered election districts after May 15, 2024. The Court granted a stay in a one-sentence ruling holding, "[t]he applications for stay presented to Justice Alito and by him referred to the Court are granted. See *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006)." *Callais* thus recognized that the administrative burden and complexities in preparing an election are more than an "ordinary bureaucratic strain" and carry the potential to impact the outcome of the election.

But the facts of this case are also different from those in *Robinson v. Ardoin*. The election at issue is set for November 5, 2024. However, this case is principally about absentee by mail ballots, how they are marked, how ballots and requests for ballots are transported between voters and election officials, and ultimately how the ballots are counted. For absentee ballots, the election is much closer than November 5, 2024.

As the Secretary of State's filing will show, the commencement of absentee balloting is a scant 49 days away. As early as September 9, 2024, some registrars of voters receive absentee by mail ballots for their parish under existing election rules, and can begin sending ballots to those who have made an absentee by mail ballot request or are in the over 65 or disability program or a military and overseas voter.

September 9 through September 20, 2024 absentee by mail ballots are provided to registrars of voters. Prior to September 21, 2024 all absentee by mail ballots for the November 5, 2024 election must be in the possession of all registrars of voters to be sent out to voters in order to meet a 45 day federally imposed deadline (La. R.S. 18:1308A(2)(a)). October 11 through October 29, 2024 voting can be conducted for nursing home program, including voting by disabled individuals in nursing homes or long term care facilities. Absentee by mail paper ballots are generally used for the nursing home program, although electronic voting machines are used in some instances. Once received, voters begin to mark and return their ballots to be processed, validated and counted.

The administration of absentee by mail balloting process is conducted by a number of election officials. The Secretary of State prepares and prints the paper ballots for distribution. The Secretary sends the ballots to the State's 64 registrars of voters. Registrars receive and process requests for ballots and are trained to do so pursuant to state law. Registrars then distribute absentee ballots to qualified requesters, persons in the over 65 voter program, voters in the nursing home program, and voters in the confidentiality program. At each stage, election laws govern the method of distribution and assistance with absentee ballots. The absentee ballots, once marked and received, are then reviewed for validity and counted by the 64 individual five-member parish board of election supervisors on election day. These officials have been trained to conduct their responsibilities under existing law as well as potential changes to the law as certain bills progressed through the legislative session. That training has been completed as the time for absentee ballots approaches.

Changing the rules at this late date is much more than a bureaucratic inconvenience. It would benefit neither election administrators nor voters to enjoin the election rules under which 64 parish registrars, 64 five-member parish boards, nursing homes, candidates, and voters have prepared to carry out the election.

Plaintiffs also suggest that voter confusion is the only basis for applying *Purcell*, but in one of the most recent cases on *Purcell*, the Sixth Circuit recounted the various settings in which the rule has been applied. *Tennessee Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Lee,* 105 F.4th 888 (6th Cir. 2024). The Sixth Circuit explained:

> Question One: Did the district court's injunction change an "election rule[ ]" within the meaning of *Purcell*? *Id.* Courts have characterized many election-related provisions as "election rules" subject to *Purcell*. *Id.* The principle has, for example, covered injunctions imposing new congressional maps. *See Robinson v. Callais*, —— U.S. ——, 144 S. Ct. 1171, 1171, —— L.Ed.2d —— (2024) (mem.). It has covered injunctions changing the rules for initiatives or candidates to get on the ballot. *See Kishore*, 972 F.3d at 751; *Thompson*, 959 F.3d at 813. It has covered injunctions compelling curbside voting. *See Merrill v. People First of Ala.*, —— U.S. ——, 141 S. Ct. 25, 25, 208 L.Ed.2d 244 (2020) (mem.). And it has covered injunctions changing the rules for submitting absentee ballots. *See Republican Nat'l Comm.*, 589 U.S. at 424, 140 S.Ct. 1205; *Democratic Nat'l Comm. v. Wis. State Legislature*, —— U.S. ——, 141 S. Ct. 28, 30–31, 208 L.Ed.2d 247 (2020) (mem.) (Kavanaugh, J., concurring); *Andino v. Middleton*, —— U.S. ——, 141 S. Ct. 9, 9–10, 208 L.Ed.2d 7 (2020) (mem.).

Id. 897.

The *Purcell* doctrine has been applied where intervention by the federal courts could realistically compromise the election process by last-minute election rule changes, including rule changes for absentee balloting.

Balancing the Equities

Plaintiffs can hardly argue that either election officials or voters would benefit from an injunction this close to the commencement of absentee balloting. The potential for the uneven application of court-imposed alteration of the process in a way that impacts the election outcome due to errors in applying the court alterations is too risky. Ballots improperly counted and ballots improperly excluded provide fertile ground for election contests and destabilize the election results.

Nor is plaintiff's right to an injunction clear; in fact, it is anything but. Plaintiff's chosen theory of conflicts preemption is a difficult one to prove. The doctrine of federal preemption inheres in the Constitution's federalist design and Supremacy Clause. Where a state law conflicts with federal law, the federal law takes precedence, and the state law is preempted. *See* U.S. CONST. art. VI, ¶ 2. But "[p]reemption is not lightly found," particularly where States and the federal government pursue common objectives as separate sovereigns (as here, with the integrity of elections). *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 668 F. Supp. 2d 831, 837 (W.D. La. 2009) (citing *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991)).

As a result of the general disinclination towards preemption, "[t]he party asserting federal preemption has the burden of persuasion." *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011). That burden is a heavy one. *See Wyeth v. Levine*, 555 U.S. 555, 565–69 (2009). When assessing preemption challenges to state laws where states traditionally regulate, federal courts *assume* that the traditional powers of the States were *not* to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added).

With respect to conflict preemption, "[u]nlike express preemption, conflict preemption begins with the presumption 'that Congress did *not* intend to displace state law.'" *Young Conservatives of Tex. Found. v. Smatresk*, 73 F.4th 304, 313 (5th Cir. 2023) (emphasis added) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Federal courts are to show a healthy respect for state laws in this area as well. "For a state law to be conflict preempted, 'a high threshold must be met.'" *Barrosse v. Huntington Ingalls, Inc.*, 70 F.4th 315, 323 (5th Cir. 2023) (quoting *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011)). Thus, "[c]ourts may not conduct 'a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives [because] such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law.'" *Id.* (second alteration in original) (quoting *Whiting*, 563 U.S. at 607).

Without advancing a fulsome argument on the merits of the preliminary injunction, it suffices that the plaintiff's preemption argument is uphill and difficult. On balance and taking into account the relevant factors in applying preemption, it cannot be said that the plaintiff's have clear entitlement to the relief they seek in this Court.

CONCLUSION

The *Purcell* doctrine finds application in this case. The election is too close to withstand last-minute changes by the Court that have the potential to compromise the integrity and outcome of an election for President as well as for state and local officials. Tampering with the election rules this close to the election is too risky. Accordingly, the Attorney General asks the Court to apply *Purcell* and dismiss the

request for a preliminary injunction.

By filing this memorandum by order of the Court, the Attorney General does not intend to waive but expressly reserves objections and defenses for future proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed with the Clerk of Court via the Court's CM/ECF system, which provides notification of such filing to all counsel of record by electronic means.

s/Carey T. Jones
CAREY T. JONES