ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 8, 2016

No. 16-5196

IN THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF ALABAMA, LEAGUE OF WOMEN VOTERS OF GEORGIA, LEAGUE OF WOMEN VOTERS OF KANSAS, GEORGIA STATE CONFERENCE OF THE NAACP, GEORGIA COALITION FOR THE PEOPLE'S AGENDA, MARVIN BROWN, JOANN BROWN, and PROJECT VOTE,

Plaintiff-Appellants,

v.

BRIAN D. NEWBY, in his capacity as the Executive Director of The United States Election Assistance Commission; and THE UNITED STATES ELECTION ASSISTANCE COMMISSION,

Defendant-Appellees,

and

KANSAS SECRETARY OF STATE KRIS W. KOBACH and PUBLIC INTEREST LEGAL FOUNDATION,

Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia
Case No. 16-cv-236(RJL)

BRIEF OF *AMICUS CURIAE* FAIR ELECTIONS LEGAL NETWORK IN SUPPORT OF PLAINTIFF-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S ORDER

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RULE 29(c)(5) STATEMENT

In accordance with FED. R. APP. P. 29(c)(5), I, Jon Sherman, counsel with *Amicus Curiae* Fair Elections Legal Network, certify that a party's counsel did not author any portion of this brief; a party or party's counsel did not contribute money that was intended to fund preparing or submitting this brief; and no person—other than *Amicus Curiae* Fair Elections Legal Network, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

/s/ Jon Sherman
Jon Sherman

CIRCUIT RULE 29(d) CERTIFICATE

Counsel for *Amicus Curiae* Fair Elections Legal Network certify that a separate brief is necessary because, as far as Counsel for *Amicus Curiae* is aware, neither the Brief of Plaintiff-Appellants nor another amicus brief will argue that the Supreme Court's 2006 decision in *Purcell v. Gonzalez* does not require this Court to preserve the documentary proof of citizenship requirements on the Federal Form simply because the next election is near.

To the best of knowledge of counsel for *Amicus Curiae* Fair Elections Legal Network, one other amicus brief will be filed in support of Plaintiff-Appellants by Asian Americans Advancing Justice | AAJC. That amicus brief will focus on the impact the proof of citizenship requirement will have on eligible voters, particularly those in traditionally disenfranchised and disadvantaged communities. That brief focuses on social science data and seeks to measure and describe the different burdens such registration requirements impose on voters. In light of the distinct and complex issues presented in these briefs, counsel for *Amicus Curiae* Fair Elections Legal Network certify that filing a joint brief is not practicable and thus it is necessary to file separate briefs.

/s/ Jon Sherman
Jon Sherman

INTEREST OF *AMICUS CURIAE* FAIR ELECTIONS LEGAL NETWORK

Pursuant to Rule 29(c)(4) of this Court, *Amicus Curiae* Fair Elections Legal Network respectfully files this brief in support of Plaintiff-Appellants. This brief is submitted in support of reversing the district court's order and this Court's granting preliminary injunctive relief. Fair Elections Legal Network is a national, non-partisan voting rights, legal support, and election reform organization. Fair Elections Legal Network's mission is to remove barriers to registration and voting for traditionally underrepresented communities. Fair Elections Legal Network works to improve overall election administration by administrative, legal, and legislative reform efforts and strives to make the processes of voter registration, voting, and election administration as accessible as possible for every American, with a particular focus on students, youth, immigrant communities, and minority voters.

Since its founding in 2006, Fair Elections Legal Network has provided guidance and technical assistance to organizations seeking to provide voter registration services to eligible voters from these constituencies. Fair Elections Legal Network has an interest in this case because the decision being challenged impacts a number of organizations who often use the National Mail Voter Registration Form (the "Federal Form") to register voters. Fair Elections Legal Network sees firsthand the value of the Federal Form in fulfilling one of the key

purposes of the Help America Vote Act and the establishment of the Election Assistance Commission ("EAC") – to facilitate the registration and voting of eligible citizens.

Fair Elections Legal Network also expends resources to provide information, technical assistance, and training to organizations around the country, many of which use the Federal Form. For example, organizations that register students on college campuses or individuals at large concerts and events often must register eligible voters who live in many different states. The Federal Form is the only practical way to register people from multiple states in those circumstances, and Fair Elections Legal Network provides written guidance and training on how to do that.

Due to our focus on the importance of the Federal Form in these situations, among others, Fair Elections Legal Network has been involved in several efforts to preserve the Federal Form's value in furthering the intent of the Help America Vote Act. Fair Elections Legal Network wrote to the EAC in March of 2008 asking that the commissioners direct their staff to post changes to the state instructions on the Federal Form in a timely fashion. In May of 2008, Fair Elections Legal Network formally objected to changes to the state instructions on the Federal Form proposed by the State of Michigan that would have burdened third parties conducting voter registration by requiring them to submit the Federal

Form to the applicable county or local jurisdiction for each voter, instead of directly to the Secretary of State's office. In December of 2010, Fair Elections Legal Network filed comments in EAC Docket #EAC-2010-0025, suggesting changes to the Federal Form to take advantage of technological advances that would make the Federal Form more voter-friendly and better facilitate voter registration. *Amicus Curiae* Fair Elections Legal Network fully supports the arguments that Plaintiff-Appellants make on the merits as to why the actions of the EAC's Executive Director should be enjoined. Fair Elections Legal Network submits this brief for the specific purpose of assisting the court in its understanding as to why injunctive relief will not conflict with Supreme Court precedent regarding the timing of such relief, will not increase the burdens of election administration, and will reduce voter confusion.

SUMMARY OF ARGUMENT

If this Court decides to reverse the district court's order and grant Plaintiff-Appellants' request for preliminary injunctive relief, *Amicus Curiae* Fair Elections Legal Network anticipates that Defendant-Appellees and Intervenor-Appellees will argue for staying that relief until after the November 8, 2016 general election. This Court should not automatically conclude that it must preserve proof of citizenship on the Federal Form instructions for Kansas, Alabama and Georgia simply because the November general election is approaching. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) does not stand for the proposition that an injunction affecting elections should not or cannot issue close to Election Day. In fact, no such rule has been created by the Supreme Court. *Purcell* stands for the idea that unique election considerations should be taken into consideration when applying the equitable factors already utilized for determining whether to issue an injunction. Specifically, these unique election considerations – administrative burdens, the potential for voter confusion and the risk of a decline in voter turnout – are relevant in deciding whether issuing an injunction is in the public interest.

If this Court orders Defendant-Appellees U.S. Election Assistance Commission and its Executive Director Brian Newby to immediately remove the proof of citizenship requirements from the Federal Form, state and local election officials in Kansas, Alabama and Georgia will only need to make minor

adjustments to address the change. They will not face difficult administrative burdens. Kansas officials will revert to procedures that were in place for years before the February 1, 2016 changes to the Federal Form, circulate notice of the legal change, and register any individuals who were rejected because they did not provide proof of citizenship when they applied. Alabama and Georgia, which have not been enforcing their proof of citizenship laws, will experience no change in the status quo whatsoever. Additionally, if the proof of citizenship requirements are removed from the Federal Form's instructions, voter registration will return to the rules that were in place since the creation of the Federal Form over two decades ago. Removing proof of citizenship will reduce the potential for voter confusion and allow as many qualified citizens to register and vote as possible.

ARGUMENT

I. The Supreme Court's Decision in *Purcell v. Gonzalez* Does Not Stand for the Proposition That an Injunction Affecting Election Laws May Never Issue Close to an Election.

If this Court decides to reverse the district court's order and grant Plaintiff-Appellants' request for preliminary injunctive relief, Defendant-Appellees and Intervenor-Appellees will likely argue for staying that relief until after the November 8, 2016 general election and cite to *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *Purcell* considered Arizona's newly-implemented voter identification and proof of citizenship laws. The district court had denied the plaintiffs' request for a preliminary injunction but did not at that time issue its findings of fact or conclusions of law. *Id*. at 3. The plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit and sought an injunction pending appeal. *Id*. In a "four-sentence order," the Ninth Circuit enjoined Arizona from enforcing the voter identification and proof of citizenship laws but "offered no explanation or justification for its order." *Id*. In a short *per curiam* order, the Supreme Court vacated the Ninth Circuit injunction. *Id*. at 4-6. The Court appeared to rely on the fact that Election Day was imminent and its belief—which it speculated the Ninth Circuit panel might have shared—that court orders affecting elections can cause administrative burdens, voter confusion and turnout decline:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action.

Id. at 4-5; *see id*. at 5 (referencing "the necessity for clear guidance" for election administrators). The Court "underscore[d]" in closing that it was "express[ing] no opinion here on the correct disposition, after full briefing and argument of the appeals . . . or on the ultimate resolution of these cases." *Id*. at 5. *Purcell* did not hold that injunctions affecting election laws may never issue close to an election; rather, it merely said that election cases bear unique considerations and the sensitivity of and risks involved in these cases increase as Election Day draws closer.

II. The Court Should Apply the *Winter* Equitable Factors to Review the Denial of a Request for a Preliminary Injunction, and Election-Related Considerations Referenced in *Purcell* Should Be Analyzed Under *Winter*'s Public Interest Factor.

The Court should not automatically conclude – based on *Purcell* – that it must refrain from ordering a change in election rules, simply because an election is approaching. When reviewing requests for preliminary injunctions involving elections, courts must still consider such requests under *Winter v. Natural*

Resources Defense Council, 555 U.S. 7 (2008).[1] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. *Purcell* itself instructs courts to consider all the equitable factors set out in a standard such as that in *Winter*, stating that "the Court of Appeals was required to weigh, *in addition to the harms attendant upon issuance or nonissuance of an injunction*, considerations specific to election cases and its own institutional procedures." 549 U.S. at 4 (emphasis added). Therefore, if the Court agrees that the *Winter* analysis militates in favor of Plaintiff-Appellants, *Purcell* is not an obstacle to striking Kansas, Alabama and Georgia's proof of citizenship requirements[2] from the National Mail Voter Registration Form ("Federal Form") and enjoining their enforcement as to the Federal Form.

Amicus Curiae Fair Elections Legal Network is in full support of the arguments made in the Appellants' Brief that they are likely to succeed on the

[1] Some judges have read *Winter* to cast doubt on the sliding scale approach to analyzing requests for preliminary injunctions; others disagree. *Compare, e.g. Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., joined by Henderson, J., concurring) *with Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). That question is beyond the scope of this brief and therefore *Amicus Curiae* Fair Elections Legal Network expresses no opinion on that issue.

[2] *See* ALA. CODE § 31-13-28(c); GA. CODE ANN. § 21-2-216(g); KAN. STAT. ANN. § 25-2309.

merits of their Administrative Procedure Act claims, that they will suffer three distinct irreparable harms in the absence of preliminary relief, that the balance of equities tips in their favor, and that the injunction is in the public interest. Brief of Appellants at 31-59. *Amicus Curiae* Fair Elections Legal Network has submitted this amicus brief to advance the additional argument that any *Purcell*-related considerations should be analyzed under the public interest factor and weigh in favor of reversing the district court's denial of the preliminary injunction. *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, VOL. 43 NO. 2 FLA. ST. UNIV. L. R. 1, 3 (forthcoming 2016) ("[T]he *Purcell* principle should properly be understood not as a stand-alone rule but instead as relevant to one of the factors (the public interest) the Court usually considers.").[3]

As dictated by *Purcell*, "considerations specific to election cases" must be weighed in conjunction with – not to the exclusion of – the other equitable factors for injunctive relief. 549 U.S. at 4. These considerations include but are not limited to the risk of late-breaking rule changes increasing administrative burdens, exacerbating voter confusion and suppressing turnout. However, each of these negative consequences might also result from the challenged registration or voting law itself, such that changing the rules close to an election would in fact reverse

[3] This forthcoming article is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545676 (last visited July 19, 2016).

these harms in a timely manner and allow for an election under lawful procedures. Therefore, the public interest factor under *Winter* forces courts to analyze these competing election considerations carefully, since elections are themselves irreversible and the harm to voters cannot be undone. Courts have routinely ruled that there is a clear public interest in the ability of qualified citizens to exercise their fundamental right to vote, which does not begin at the ballot box, but rather begins at voter registration. *See Obama for America v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) ("The public interest . . . favors permitting as many qualified voters to vote as possible."); *see also Purcell*, 549 U.S. at 4 (noting that the public has a "strong interest in exercising the fundamental political right to vote" (citations omitted)).

III. Applying the *Winter* Public Interest Factor In Light of *Purcell* Strongly Favors the Issuance of a Preliminary Injunction Against the Proof of Citizenship Requirements Contained in the Federal Form's State Instructions for Kansas, Alabama and Georgia.

A. Election Law Changes Must Be Assessed Against the Legal Status Quo, and For Over Two Decades Until the Recent Changes During This Election Cycle, the Federal Form's Status Quo Has Been the Absence of Any State Documentary Proof of Citizenship Requirement.

Purcell was ultimately concerned with potentially disruptive rule changes, but deciding what constitutes a "change" in election laws necessarily requires determining what the legal status quo is—both in terms of official policy and public awareness. Significantly, for over two decades, the Federal Form's

longstanding status quo was the absence of any documentary proof of citizenship requirement.

In the National Voter Registration Act ("NVRA") of 1993, 52 U.S.C. §§ 20501 *et seq.*, Congress mandated the creation of a National Mail Voter Registration Form ("Federal Form") in a simple format to increase voter registration. *See* 11 C.F.R. § 9428.4; NVRA, 59 Fed. Reg. 32,311 (June 23, 1994).[4] States are required to "accept and use" the Federal Form to register voters, 52 U.S.C. § 20505(a)(1), and the NVRA states that it "may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 52 U.S.C. § 20508(b)(1). The Federal Form asks if the applicant is a U.S. citizen at the top; its general instructions remind the applicant that U.S. citizenship is mandatory and registration as a non-citizen is unlawful; and its sworn attestation again reiterates that U.S. citizenship is required for voting eligibility and repeats the criminal and immigration penalties for violating the rules. Congress passed the NVRA with the belief that the above safeguards were sufficient to prevent ineligible individuals from registering to vote.

[4] *See* National Mail Voter Registration Form, *available at* http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited July 18, 2016); 11 C.F.R. § 9428.3.

Notwithstanding the decade of litigation over proof of citizenship requirements, at no time in the Federal Form's history – up to February 1, 2016 – did it ever contain or command compliance with a state documentary proof of citizenship requirement. Therefore, in analyzing the propriety of issuing an injunction before the November general election, while this Court will surely focus on the requested *removal* of the documentary proof of citizenship requirements, *adding* these same requirements to the Federal Form was itself a rule change that broke with over two decades of law and practice and did so heading into a presidential primary and caucus calendar and general election.

B. Immediately Ordering the Removal of the Proof of Citizenship Requirement from the Federal Form's State-Specific Instructions for Kansas, Georgia and Alabama Will Not Impose an Administrative Burden on State and Local Election Officials Because Voter Registration Changes are Fundamentally Different From Changes that Affect the Administration of Voting Processes.

As to *Purcell*'s attention to the risk of adding to the state's administrative burden in running elections, if this Court orders the removal of the proof of citizenship requirements from the Federal Form's state-specific instructions for Kansas, Georgia and Alabama, any administrative burden will be negligible or non-existent.

1. No Administrative Burden Will Result from Ordering Immediate Relief as to Kansas.

Documentary proof of citizenship requirements regulate voter registration and do not affect the administration of early or Election Day voting. Registration rule changes do not impinge upon the mechanics and administration of voting. The only way in which a documentary proof of citizenship requirement can affect the administration of voting during the early voting period or on Election Day is if a state imposes an unlawful dual registration scheme, by which Federal Form registrants who fail to produce proof of citizenship will be registered for federal elections *only*.

Kansas is the only one of these three states that has used such a system. Since January 2013, Kansas has imposed its documentary proof of citizenship requirement for voter registration. *Fish v. Kobach*, No. 16-2105, 2016 WL 2866195, at *5 (D. Kan. May 17, 2016). Following the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013), which rejected as preempted the addition of the Arizona proof of citizenship requirement to the Federal Form, the Kansas Secretary of State's office directed county election officers to exclude Federal Form registrants who failed to supply evidence of citizenship from state and local elections and register these individuals for federal races only.[5] This scheme was declared unlawful by a Kansas state court earlier this

[5] Letter of Kansas Sec'y of State Kris Kobach to EAC Acting Executive Director Alice Miller (Aug. 2, 2013), *with attachment* E-mail from Kansas State Election Director Brad Bryant to County Election Officers Re: Supreme Court decision and

year, and Intervenor-Appellee Secretary of State Kris Kobach stated he would appeal the decision but did not intend to seek statutory authorization for the dual registration system.[6] Just weeks after the state court's ruling, Appellee Brian Newby acted to change the Federal Form's instructions for Kansas and issued a letter to that effect.[7] Kansas subsequently asked the state court to vacate its prior

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Kansas voter registration (July 30, 2013) ("Bryant E-mail"), *available at* http://www.eac.gov/assets/1/Documents/KWK%20to%20EAC%20%20(8%202%2013)-with-Kansas-to-Counties-OCR.pdf (last visited July 19, 2016). According to the Bryant E-mail, state and Federal Form registrants can vote in all elections if they provide proof of citizenship. State form registrants cannot vote in any elections whatsoever if they fail to provide proof of citizenship. Intervenor-Appellee Secretary Kobach brought suit seeking to compel the U.S. Election Assistance Commission to add Kansas's proof of citizenship requirement to the Federal Form but that effort ultimately failed. *See Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied* 135 S. Ct. 2891 (2015).

[6] *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cnty. Dist. Ct. Aug. 21, 2015), *available at* https://www.aclu.org/legal-document/belenky-v-kobach-defendant-summary-judgment-motion-denied (last visited July 19, 2016); *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cnty. Dist. Ct. Jan. 15, 2016) (granted summary judgment for plaintiffs and declaratory relief), *available at* https://www.aclu.org/legal-document/belenky-v-kobach-summary-judgment (last visited July 19, 2016); Roxana Hegeman, *Kris Kobach: No plans to ask lawmakers for dual-registration law*, THE TOPEKA CAPITAL-JOURNAL, Jan. 20, 2016, *available at* http://cjonline.com/news/2016-01-20/kris-kobach-no-plans-ask-lawmakers-dual-registration-law# (last visited July 19, 2016).

[7] *See* Letter of EAC Executive Director Brian Newby to Kansas Election Director Brian Caskey Re: Changes made to the Kansas State Instructions on the Federal Form (Jan. 29, 2016) ("Newby Letter to Kansas") *available at:* http://www.eac.gov/assets/1/Documents/KS.Elec.Dir.NVRA.1.29.16.OCR.Today.pdf (last visited July 19, 2016).

judgment, arguing the Federal Form changes mooted the challenge to dual registration, but that motion was denied.[8]

Separately, in *Fish v. Kobach*, a federal district judge in Kansas issued an order requiring the registration of applicants at the state Department of Motor Vehicles ("DMV") even if they had not satisfied the documentary proof of citizenship requirement. 2016 WL 2866195 at *22-24, 32. In response, Secretary Kobach sought and obtained the adoption of a new regulation extending dual registration and federal-only voting to DMV registrants who failed to comply with the documentary proof of citizenship requirement. KAN. ADMIN. REGS. § 7-23-16 (July 12, 2016), *available at* http://www.sos.ks.gov/pubs/KAR/2016/7_23_16_TEMPORARY_effective_July_12_2016.pdf (last visited July 20, 2016). Under this rule, such DMV applicants who did not produce evidence of citizenship may only vote a provisional ballot which "shall be counted for federal offices only." *Id*. § 7-23-16(b). This new emergency rule has just this week been challenged in Kansas state court as a violation of the prior state court judgment in *Belenky*, finding that the Kansas

[8] *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cnty. Dist. Ct. June 14, 2016), *available at* https://www.aclu.org/legal-document/belenky-v-kobach-order-denying-defendants-motion-dismiss (last visited July 19, 2016).

Secretary of State's office lacked the legal authority to implement a dual registration system.[9]

The upshot of this tortured procedural history is that not only does Kansas appear to still maintain dual registration and federal-only voting for Federal Form registrants who registered without evidence of citizenship *prior to February 1, 2016* (when the Federal Form was changed) but also is seeking to extend this scheme to DMV applicants who failed to meet the proof of citizenship requirement. To the extent Kansas state and local election officials have incurred any additional burdens whatsoever from this unnecessary and unlawful procedure, the wound is self-inflicted. *See Fish*, 2016 WL 2866195, at *30 ("[T]he Secretary of State complains that the proposed injunction would create a two-tiered election regime in Kansas that would create separate requirements for registering to vote for federal and state elections. But . . . this two-tiered system is a problem of the State's own making.").

But there is a more basic flaw in the administrative burden argument. Since July 30, 2013, Kansas has continually enforced a dual registration system, such that even today there is still a procedure in place to allow Federal Form users who registered without proof of citizenship *prior to* the February 1, 2016 changes to the

[9] *See Brown v. Kobach* Petition (Shawnee Cnty. Dist. Ct. July 19, 2016), *available at* https://www.aclu.org/legal-document/brown-v-kobach-petition (last visited July 19, 2016).

Federal Form to vote in federal elections only.[10] Intervenor-Appellee Secretary Kobach admitted to the continued use of dual registration and federal-only voting during the hearing on the temporary restraining order motion before the district court:

> [O]nce you have federal form registrants from [February 1, 2016 to the date any order issues], we would then go in and change the record back to incomplete or active. Presumably, what you'd ask us to do, if you granted their wishes, is you would say, we want them to be treated like federal form applicants prior to February 1, which means they are entitled to vote in federal elections only if they don't provide proof of citizenship. If they do provide proof of citizenship, they can vote in all the elections.

Joint Appendix ("JA") 373; JA-394-95 (referring to "bifurcated election" system). Consequently, Appellees and Intervenor-Appellees have no basis to claim that eliminating the proof of citizenship requirement from Kansas's Federal Form instructions will force an 11th hour change in their procedures. Rather, such relief would simply include more federal-only voters in the *existing* procedure and force the state to register any individuals who were previously rejected because they did not provide proof of citizenship when they applied.

To the extent Appellees and Intervenor-Appellees might contend that merely designating Federal Form registrants who lack proof of citizenship as federal-only

[10] Intervenor-Appellee Secretary Kobach represented to the district court that the February 1, 2016 changes to the Federal Form are non-retroactive, in arguing that Plaintiff-Appellees Marvin Brown and Joann Brown were registered to vote because they submitted their Federal Forms on January 28, 2016. Joint Appendix ("JA")1669 n.9.

voters in their system would constitute an undue burden, that argument fails as well since the state already has procedures for designating voters as such. *See supra* n.4, Bryant E-Mail (describing procedure for tracking all federal forms processed by county offices and informing local officials that "[o]ne of the Statuses or Reasons in [the statewide voter registration system named] ELVIS [had been] changed to assist in tracking those who use the federal form"). The statewide voter registration system already has this capability and the tracking procedure would simply be resumed.

2. Retraining and New Instructional Materials Would Be Minimal and Solely Restricted to Informing Kansas State and County Election Officials.

Ordering the immediate removal of the proof of citizenship requirement from the Federal Form also will not require Kansas election officials to undergo extensive retraining of its state and county election officers and poll workers or to create new instructional materials or procedures for early voting and Election Day. Since the elimination of the proof of citizenship requirement in Kansas only affects voter registration, *i.e.* the processing of registration forms and the designation of registrations in the statewide system, a simple notice to state staff and county election officers will suffice to inform them of the legal change and the need to register Federal Form applicants, even in the absence of documentary proof of citizenship. As explained above, restoring the Federal Form to its pre-February 1st

status quo will not alter Election Day or early voting procedures, so there will be no need to retrain poll workers or create new materials or procedures. Poll workers will simply note the federal-only designation and undertake the same procedures that already exist.

3. Beyond the Minimal Cost of Printing Notices, These States Will Not Incur Substantial Costs As a Result of Immediate Injunctive Relief.

Ordering immediate injunctive relief would not meaningfully increase the cost of running elections in Kansas, Georgia or Alabama. Such relief would merely restore the status quo from prior years and the budgetary requirements of running elections in 2013, 2014 and 2015. Any costs associated with dual registration and federal-only voting are attributable to a scheme that has been found unlawful (and is being challenged yet again in state court) and in any event will still be in effect for certain classes[11] of voters this year, regardless of what this Court orders. Moreover, the U.S. Supreme Court has explicitly stated that constitutional rights do not bend to administrative convenience and financial considerations. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) (striking down Connecticut's closed primary law on First Amendment associational rights grounds) ("Costs of administration would likewise

[11] Subject to ongoing litigation, these classes will at least include DMV applicants who did not provide documentary proof of citizenship and pre-February 1, 2016 Federal Form registrants who did not provide documentary proof of citizenship.

increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major party primary. Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford.").

4. There Would Be No Change in the Status Quo for Alabama and Georgia and Therefore No Administrative Burden.

Finally, as to Alabama and Georgia, eliminating the Federal Form instructions' references to these states' proof of citizenship requirements will effect no change in the status quo, as those states have never enforced and are not currently enforcing these laws. The district court stated: "On the record before this Court, Alabama and Georgia are not currently enforcing their proof of citizenship requirements as to Federal Form applicants." JA-1667 n.7. Judge Leon's finding of fact is entitled to deference and may only be challenged on appeal for clear error. *See* FED. R. CIV. P. 52(a)(6); *Boca Investerings P'ship v. U.S.*, 314 F.3d 625, 629 (D.C. Cir. 2003) ("We review the findings of fact of the district court under the "clear error" standard."); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed.") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

C. Immediately Ordering the Removal of the Proof of Citizenship Requirement from the Federal Form's State-Specific Instructions for Kansas, Georgia and Alabama Will Not Cause Voter Confusion, Disenfranchise Voters or Reduce Voter Turnout.

Ordering the EAC and its Executive Director Brian Newby to immediately remove the proof of citizenship requirement from the Federal Form instructions for these three states and to cease enforcement of these requirements as to the Federal Form will not cause voter confusion. If anything, Kansas voters' confusion is directly attributable to their Secretary of State's endless series of new registration and voting requirements and his subsequent maneuvers when a court rules against the State. *See Veasey v. Perry*, 135 S. Ct. 9, 11 (2014) (mem.) (Ginsburg, J., dissenting) ("[A]ny voter confusion or lack of public confidence in Texas' electoral processes is in this case largely attributable to the State itself."). In contrast, this case seeks to lend some clarity and finality to the disputed Federal Form.

Supreme Court precedents following *Purcell* have noted that state officials in their zeal to enforce identification requirements have sown confusion in the electorate. In the 2014 general election, Wisconsin's photo ID law was enjoined by a district court and then less than two months before the midterm elections, the U.S. Court of Appeals for the Seventh Circuit reversed and stayed the district

court's permanent injunction. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd by* 768 F.3d 744 (7th Cir. 2014). The plaintiffs immediately sought emergency relief at the U.S. Supreme Court. While the Supreme Court's order was sparse, the 6-3 majority's grant of the application to vacate the stay and thus leave the photo ID law enjoined for the election appears to have been based on concerns for voter confusion and the risk of disenfranchisement due to voters' detrimental reliance on official instructions. *Frank v. Walker*, 135 S. Ct. 1551 (2015) (mem.). Even the dissent was compelled to acknowledge that it was "particularly troubling that absentee ballots [had] been sent out without any notation that proof of photo identification must be submitted." *Id*.

Here too, since early 2013, when the proof of citizenship law took effect, the public has tried to follow the changes in Kansas election law in the press and in official announcements by the Kansas Secretary of State's office and, for the overwhelming majority of that three-and-a-half-year period, the public was told that Federal Form registrants may vote in federal elections, *even if* they fail to submit documentary proof of citizenship. On the eve of a presidential election, Kansas state election officials have changed the rules once again. Ordering immediate injunctive relief will reset the clock by less than six months and restore

clarity to elections in Kansas.[12] It is worth underscoring that the only voters who could be confused by a rule change are those who stand to benefit the most from immediate injunctive relief—those Federal Form registrants who failed to provide or simply do not have documentary proof of citizenship. *See*, *e.g.*, *Frank v. Walker*, No. 11-C-1128, slip op. at 38-39 (E.D. Wis. July 19, 2016) (ordering implementation of affidavit alternative to voter identification requirement) ("[A]ny confusion that arises will likely only affect those voters who would be unable to vote without the affidavit option. . . . [D]isenfranchising those voters while this litigation is pending would be worse than causing them to be confused after trial, when they would likely be unable to vote anyway due to their inability to obtain ID with reasonable effort.").

As to Alabama and Georgia, Appellee Newby's changes to the Federal Form sowed voter confusion, where these laws have never been enforced. *See supra* at 20-21. Immediately removing the proof of citizenship requirement from and enjoining its enforcement as to the Federal Form will clarify the state of the law and assure voters both that their registrations will be processed and that they will be added to the rolls in keeping with current policy and practice in Alabama and Georgia. As of now, Federal Form registrants in those two states are being misled

[12] And of course, such relief would increase voter participation in the upcoming general election and neutralize the risk of unlawfully disenfranchising a Federal Form registrant due to a documentation requirement which is still being challenged in court.

into thinking that proof of citizenship is in fact required and thus are ultimately deterred from using the Federal Form. Therefore, immediate relief will eliminate rather than exacerbate voter confusion.

IV. Conclusion

Any argument that the Court may not issue immediate injunctive relief in advance of the November 8, 2016 general election because of *Purcell* must fail. The Supreme Court never created a rule that bars election law changes close to an election; the Court merely advised that unique election considerations be taken into account in applying the equitable factors for the issuance of an injunction. In each of these three states, this Court can order immediate injunctive relief and state election officials can immediately circulate notice of the legal change. This can be accomplished without creating any new registration procedures, without adding to the burdens of election administration during early voting and on Election Day, and without confusing, disenfranchising or deterring voters.

Amicus Curiae Fair Elections Legal Network fully supports the Plaintiff-Appellants' request that this Court reverse the district court's judgment and grant immediate injunctive relief. Alternatively, if the Court were ultimately inclined to stay any preliminary injunctive relief as to Kansas, it should not stay corresponding relief as to Alabama and Georgia, where the proof of citizenship laws have never been enforced.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 5,534 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 Point Times New Roman.

/s/ Jon Sherman
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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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