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IN THE FIRST JUDICIAL COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

DANIEL CORONA, an individual;
DARIN MAINS, an individual; BRIAN
MELENDEZ, an individual; TERESA
MELENDEZ, an individual, NEVADA
STATE DEMOCRATIC PARTY; DNC
SERVICES
CORPORATION/DEMOCRATIC
NATIONAL COMMITTEE, DCCC; and
PRIORITIES USA,

Plaintiffs,

v.

BARBARA CEGAVSKE, in her official
capacity as Nevada Secretary of State;
JOSEPH P. GLORIA, in his official
capacity as Registrar of Voters for Clark
County, Nevada; DEANNA SPIKULA, in
her official capacity as Registrar of Voters
for Washoe County, Nevada; KRISTINE
JAKEMAN, in her official capacity as the
Elko County Clerk; and AARON FORD, in
his official capacity as the Attorney
General of the State of Nevada,

Defendants.

CASE NO.: 20 OC 00064 1B

DEPT NO.: II

**BRIEF OF THE HONEST ELECTIONS PROJECT AS *AMICUS CURIAE*
ADDRESSING THE ISSUES IN PLAINTIFFS' COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF¹**

¹ Proposed Intervenor-Defendants have provided consent to *Amicus Curiae* filing their brief.

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 State of Nevada from enforcing duly enacted state election laws that prevent voter fraud and preserve voter confidence in the integrity of elections. In addition to challenging the already State-adjusted voting procedures for the upcoming June 9, 2020 primary election, Plaintiffs specifically request that the Court temporarily *and* permanently (not just during the present COVID-19 pandemic) enjoin State enforcement of laws that seek to limit fraud in absentee voting—namely, who can

Defendants Kristine Jakeman and Deanna Spikula have also consented. Plaintiffs have objected to *Amicus Curiae* filing their brief. As of filing, the other Defendants have taken no position.

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.

1 return a voter's absentee ballot and the requirement that a voter's signature on their ballot match
2 the signature on file with the State. *See* Nev. Rev. Stat. §§ 293.325, 293.330, 293.333, and
3 293.353. As will be discussed *infra* Section I.B., this Court should avoid *any* interference in the
4 upcoming elections. *Amicus Curiae* will, however, primarily focus on what Plaintiffs
5 euphemistically refer to as the "Voter Assistance Ban" under Nevada Revised Statutes sections
6 293.330 and 293.353 (the "Challenged Provisions").³

8 This Court should not enjoin the Challenged Provisions because the State has valid
9 interests in preventing voter fraud and in protecting voter confidence in the integrity of its
10 elections. Moreover, the U.S. Constitution specifically delegates to state legislatures
11 responsibility for determining the "times, places and manner" of elections. U.S. Const. art I, § 4,
12 cl. 1; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-197 (2008). Further, enjoining the
13 Challenged Provisions so close in time before an election would wreak havoc among election
14 administrators, who would have scant time and possibly very few resources to implement new
15 procedures. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006).

17 It is important during these uncertain times that the fundamental pillars of our form of
18 government, such as separation of powers and honest elections, remain intact. While *Amicus*
19 *Curiae* recognize that adjustments have been made and may still need to be made for upcoming
20 elections, Plaintiffs' requested injunction is not the proper way to protect the integrity of the
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22 ³ When challenges similar to Plaintiffs' challenge here (a constitutional challenge analyzed under
23 *Anderson/Burdick*) have been brought in state courts across the country, state courts routinely
24 uphold the laws citing the government's interest in preventing voter fraud. *See, e.g., Ray v. Texas*,
25 No. 2-06-CV-385 (TJW), 2008 U.S. Dist. LEXIS 59852 (E.D. Tex. Aug. 7, 2008); *Qualkinbush*
26 *v. Skubisz*, 826 N.E.2d 1181 (Ill. App. Ct. 2005); *DiPietrae v. City of Phila.*, 666 A.2d 1132 (Pa.
27 Commw. Ct. 1995). *Amicus Curiae* note that a law similar to the Challenged Provisions was
28 recently found to violate Section 2 of the Voting Rights Act by the Ninth Circuit. *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (A panel of the Ninth Circuit affirmed the district court's opinion upholding the challenged provisions, but an en banc panel, in a 6-5 ruling, reversed), *stayed pending cert. pending*, No. 18-15845, 2020 U.S. App. LEXIS 4208 (9th Cir. Feb. 11, 2020). Importantly, however, here Plaintiffs do not allege a Section 2 violation, but instead base their claim on a constitutional challenge (both State and Federal) decided under the *Anderson/Burdick* standard—which greatly differs from a Section 2 analysis.

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' REQUEST FOR AN INJUNCTION BECAUSE THEY HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS AND IT IS CONTRARY TO THE PUBLIC INTEREST.

Nevada Revised Statutes section 33.010 governs the issuance of injunctions in Nevada—both temporary and permanent. Because section 33.010, the associated case law interpreting it,⁴ and the constitutional matters at issue here are all very similar to their federal counterparts, “[f]ederal cases ... are strong persuasive authority” in this Court. *Exec. Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted); *see also Lawler v. Ginocchio*, 94 Nev. 623, 626, 584 P.2d 667, 668-69 (1978).

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *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); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Here,

⁴ *See Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (An injunction is authorized “when it appears from the complaint that the plaintiff is entitled to the relief requested and at least part of the relief consists of restraining the challenged act. ... [T]he applicant must show (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest.” (internal quotations omitted)).

1 Plaintiffs⁵ are not only unlikely to succeed on the merits of their underlying claims, but are also
2 requesting an injunction that is contrary to the public interest.

3 **A. The State has a Valid Interest in Preventing Voter Fraud and in Protecting Voter**
4 **Confidence in the Integrity of Elections.**

5 When analyzing an alleged burden on the right to vote from a challenged law, the well-
6 established *Anderson/Burdick* framework applies. *See Burdick v. Takushi*, 504 U.S. 428 (1992);
7 *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under *Anderson/Burdick*, “election laws generally
8 are not subject to strict scrutiny, even though voting rights are fundamental under the
9 Constitution.” *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605 (4th Cir. 2016); *see also*
10 *Burdick*, 504 U.S. at 433. In reviewing a reasonable, nondiscriminatory restriction on voting
11 rights, such as the Challenged Provisions here, the restriction is justified by a state’s “important
12 regulatory interests.” *Lee*, 843 F.3d at 606 (quoting *Burdick*, 504 U.S. at 434). Further, as voting
13 by absentee ballot is not a fundamental right, challenges to absentee voting laws are not subject to
14 a strict scrutiny analysis. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-09
15 (1969).

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18 Courts across the country, including the United States Supreme Court, have routinely
19 recognized that a state has important regulatory interests in preventing voter fraud and in
20 protecting voter confidence in the integrity of elections. *See e.g., Crawford*, 553 U.S. at 194-197
21 (2008); *Lee*, 843 F.3d at 606-607; *Hoffman v. Maryland*, 928 F.2d 646, 649 (4th Cir. 1991);
22 Order at 3, *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538 (7th Cir. Apr. 3, 2020), ECF
23 No. 30; *see also Griffin v. Roupas*, 385 F.3d 1128, 1130-32 (7th Cir. 2004). Here, just as in the
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25 ⁵ In accordance with the Nevada Supreme Court’s holding in *Heller v. Legislature of Nev.*, 120
26 Nev. 456, 460-62, 93 P.3d 746, 749-50 (2004), and the recent Eleventh Circuit opinion in
27 *Jacobson v. Fla. Sec’y*, No. 19-14552, 2020 U.S. App. LEXIS 13714 (11th Cir. Apr. 29, 2020), it
28 is important that this Court independently examine the standing of the individual plaintiffs and
the plaintiff organizations. Just as in *Jacobson*, none of the organizational plaintiffs here claim to
have members—and only individual citizens have a right to vote. The individual plaintiffs deserve
examination by this Court as well. None claim they need assistance to complete or return their
absentee ballots.

1 above cited cases, the Challenged Provisions are easily justified by the State's important
2 regulatory interests in preventing voter fraud and in protecting voter confidence in the integrity of
3 elections. For "[v]oting fraud is a serious problem in U.S. elections generally ... and it is
4 facilitated by absentee voting." *Griffin*, 385 F.3d at 1130-31.

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6 In attempting to enjoin enforcement of the Challenged Provisions, Plaintiffs hope to bring
7 to Nevada a controversial practice more commonly known as "ballot harvesting." With ballot
8 harvesting, groups typically organize drives where they go door-to-door and collect absentee
9 ballots then "deliver[] mail ballots to drop-off and in-person voting centers." *See* Compl. For
10 Declaratory and Injunctive Relief 18 (Apr. 16, 2020). The Challenged Provisions seek to prevent
11 ballot harvesting and the fraud often associated with it. In addition to Nevada, at least fifteen
12 other states have laws which prohibit ballot harvesting, and many others have laws which
13 discourage ballot harvesting. *See, e.g.*, Ariz. Rev. Stat. § 16-1005(H); Ind. Code Ann. § 3-14-2-
14 16(4); Conn. Gen. Stat. § 9-140b(a); N.M. Stat. Ann. § 1-6-10.1; Ga. Code Ann. § 21-2-385(a);
15 Mo. Rev. Stat. § 115.291(2); Ohio Rev. Code Ann. § 3509.05(A); Tex. Elec. Code § 86.006(a);
16 N.D. Cent. Code § 16.1-07-08(1); N.J. Stat. § 19:63-4(a); Minn. Stat. Ann. § 203B.08; Ark. Code
17 Ann. § 7-5-403(a)(1); Neb. Rev. Stat. Ann. § 32-943(2); W. Va. Code § 3-3-5(k); S.D. Codified
18 Laws § 12-19-2.2. As has been well documented recently, for example, a political party operative
19 in North Carolina is alleged to have engaged in a ballot harvesting scheme that resulted in the
20 invalidation of a Congressional general election. Order at 10, 44-45, *In re Investigation of*
21 *Election Irregularities Affecting Ctys. Within the 9th Cong. Dist.* (N.C. State Bd. of Elections
22 Mar. 13, 2019).⁶

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27 ⁶https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf
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1 Nevada and the fifteen other states mentioned above are not the only entities which
2 believe that discouraging and preventing ballot harvesting prevents voter fraud and protects voter
3 confidence in the integrity of elections. In 2005, The Commission on Federal Election Reform,
4 co-chaired by former President Jimmy Carter and former Secretary of State James Baker, found
5 the following:

7 Absentee ballots remain the largest source of potential voter fraud. ... Absentee
8 balloting is vulnerable to abuse in several ways: ... Citizens who vote at home, at
9 nursing homes, at the workplace, or in church are more susceptible to pressure,
10 overt and subtle, or to intimidation. Vote buying schemes are far more difficult to
11 detect when citizens vote by mail. States therefore should reduce the risks of fraud
12 and abuse in absentee voting by prohibiting "third-party" organizations,
13 candidates, and political party activists from handling absentee ballots.

14 Comm'n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005) ("Building
15 Confidence") (footnote omitted).⁷

16 The Carter-Baker Commission went on to make this formal recommendation: "State and
17 local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an
18 acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election
19 officials. The practice in some states of allowing candidates or party workers to pick up and
20 deliver absentee ballots should be eliminated." *Id.* at 47. Based on this recommendation, there is
21 little wonder why Nevada, and nearly 1/3 of all states, prohibit ballot harvesting programs.

22 The United States Supreme Court's ruling in *Crawford*, 553 U.S. 181, is informative here.
23 In *Crawford*, plaintiffs facially challenged an Indiana law requiring a photo ID to vote. *Crawford*,
24 553 U.S. at 185. For individuals who lacked a photo ID, they could obtain one free-of-charge at
25 the DMV. *Id.* at 198. Plaintiffs claimed this was an unlawful infringement on their right to vote—
26 primarily the elderly, poor, and minority voters. *Id.* at 187. Notwithstanding the increased burden
27 on certain segments of the population to vote, the Court found that the state's interest in

28 ⁷ <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

1 preventing election fraud justified the photo ID law. *Id.* at 194-97. The Court held that “[t]he need
2 to travel to a [D]MV branch will affect voters according to their circumstances ... Poor, old, and
3 disabled voters may find the trip prohibitive ... [the] burden of traveling to a more distant [D]MV
4 office rather than a conveniently located polling place is probably serious for many of the
5 individuals who lack photo identification. ” *Id.* at 212-14. However, even with the “serious”
6 burden, the Court still upheld the Indiana law because of the significant interest the state has in
7 preventing election fraud. *Id.* at 194-97. Here, just as in *Crawford*, there will be an additional
8 burden on those who must mail-in or otherwise deliver their absentee ballot on their own. But,
9 just as in *Crawford*, this Court should find that the State’s interest in preventing voter fraud and in
10 protecting voter confidence in the integrity of its elections justifies the existence of the
11 Challenged Provisions. “[U]navoidable inequalities in treatment, even if intended in the sense of
12 being known to follow ineluctably from a deliberate policy, do not violate equal protection.”
13 *Griffin*, 385 F.3d at 1132 (citing *Apache Bend Apartments, Ltd. v. United States*, 964 F.2d 1556,
14 1569 (5th Cir. 1992); *cf. Smith v. Boyle*, 144 F.3d 1060, 1064 (7th Cir. 1998); *Bell v. Duperrault*,
15 367 F.3d 703, 712 (7th Cir. 2004) (concurring opinion)).

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18 Last month, allegedly due to COVID-19 related concerns, a group of plaintiffs filed suit in
19 the United States District Court for the Western District of Wisconsin (the “Wisconsin Case”)
20 where, among other things, they challenged a law which sought to prevent voter fraud in absentee
21 ballots by requiring a witness signature on the absentee ballot. *See Democratic Nat’l Comm. v.*
22 *Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 57918, at *5 (W.D. Wis. Apr. 2, 2020).
23 Despite acknowledging “the state’s asserted interests in the witness requirement as a tool against
24 voter fraud,” the Wisconsin court enjoined the state’s ability to enforce their absentee ballot
25 witness requirement as enacted by the Wisconsin Legislature. *Id.* at *64, 75-76. With the
26 Wisconsin elections fast approaching, upon review of the district court’s order, the Seventh
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1 Circuit promptly stayed multiple provisions from the district court's order—including the
2 provisions which enjoined enforcement of the state's absentee ballot witness requirement. Order
3 at 3-4, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538 (7th Cir. Apr. 3, 2020), ECF No. 30.

4 In staying the district court's injunction pertaining to the State's absentee ballot witness
5 requirement, the Seventh Circuit found "that the district court did not give adequate consideration
6 to the state's interests" in preventing voter fraud and in protecting voter confidence in the
7 integrity of elections. *Id.* at 3. The court went on to state that "[c]onfidence in the integrity of our
8 electoral processes is essential to the functioning of our participatory democracy," and "[v]oter
9 fraud drives honest citizens out of the democratic process and breeds distrust of our
10 government." *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). The Seventh Circuit stated
11 that it was "concerned with the overbreadth of the district court's order, which categorically
12 eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's
13 substantial interest in combatting voter fraud." *Id.* (emphasis added).

14 *Amicus Curiae* agrees with the Seventh Circuit when it wisely stated that "[i]t is best to
15 leave these decisions and any more particular prescriptions to the [State], as it is better positioned
16 to know what additional alternative suggestions are able to accommodate the many intersecting
17 interests in play in the present circumstances." *Id.* at 4. "[S]triking [] the balance between
18 discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative
19 judgment with which [] judges should not interfere unless strongly convinced that the legislative
20 judgment is grossly awry." *Griffin*, 385 F.3d at 1131. It is inappropriate "for a [] court to act as
21 the state's chief health official by taking [] step[s] for them." *Democratic Nat'l Comm.*, No. 20-
22 cv-249-wmc, 2020 U.S. Dist. LEXIS 57918, at *52.

23 The State's interests in preventing voter fraud and in protecting voter confidence in the
24 integrity of elections justify the existence and enforcement of the Challenged Provisions.
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1 Plaintiffs' underlying claims, therefore, will not succeed and their request for preliminary and
2 permanent injunctions should be denied.

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

5 The United States Supreme Court has repeatedly held that judicial intrusion into elections
6 must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. at
7 4 (2006). These considerations include the fact that "[c]ourt orders affecting elections ... can
8 themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.*
9 at 4-5. "As an election draws closer, that risk will increase." *Id.* at 5. Courts must therefore weigh
10 such factors as the harms associated with judicial action or inaction, the proximity of the
11 upcoming election, the "possibility that the nonprevailing parties would want to seek" further
12 review, and the risk of "conflicting orders" from such review. *Id.* at 4-5.

14 Recently, on April 6, 2020, in the Wisconsin Case discussed *supra* Section I.A., the
15 United States Supreme Court stayed a district court order that permitted absentee ballots to be
16 cast after the election deadline.⁸ See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No.
17 19A1016, 589 U.S. __, __, 2020 U.S. LEXIS 2195, at *1-2 (Apr. 6, 2020) (per curiam). The
18 Supreme Court admonished the district court for "changing the election rules so close to the
19 election date," noting that such action "contravened" Supreme Court precedent, which "has
20 repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on
21 the eve of the election." *Id.* at *2-3 (citing *Purcell*, 549 U.S. 1). Here, with the June election, and
22 the printing and mailing-out of ballots, just days or weeks away from the scheduled hearing in
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25 ⁸ The Seventh Circuit had declined to stay this portion of the district court's order as they had
26 done with the absentee ballot witness requirement provision discussed above. With this stay from
27 the U.S. Supreme Court, the majority of the provisions from the Wisconsin district court's order
28 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 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. See *Taylor v. Milwaukee
Election Comm'n*, No. 20-cv-545-pp, 2020 U.S. Dist. LEXIS 60496 (E.D. Wis. Apr. 6, 2020).

1 this matter, and with the all-but-certain appeals of this Court's decision, any action from this
2 Court granting the requested relief is contrary to the public interest because it would likely result
3 in "voter confusion and consequent incentive" not to vote. *Purcell*, 549 U.S. at 4-5. Therefore,
4 given the United States Supreme Court's decisions in *Purcell* and its progeny,⁹ including the
5 recent decision regarding the judicial interference in the Wisconsin Case in the upcoming election
6 and the Seventh Circuit's reversal of the district court on this very issue, this Court should not
7 grant the requested relief for the upcoming Nevada elections. Plaintiffs' request for preliminary
8 and permanent injunctions should be denied.
9

10 CONCLUSION

11 For the foregoing reasons, *Amicus Curiae* respectfully requests this Court deny Plaintiffs'
12 request for preliminary and permanent injunctions.
13

14 Dated: May 4, 2020



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⁹ Although *Purcell* is a federal case, its principle has been applied by numerous state courts. See, e.g., *Chi. Bar Ass'n v. White*, 898 N.E.2d 1101, 1107-08 (Ill. App. Ct. 2008); *Liddy v. Lamone*, 919 A.2d 1276, 1287-91 (Md. 2007); see also *Milwaukee Branch of the NAACP v. Walker*, No. 11-CV-5492, 2012 Wisc. Cir. LEXIS 194, *20-21 (Wis. Cir. Ct. Mar. 12, 2012); *Dean v. Jepsen*, No. CV106015774, 2010 Conn. Super. LEXIS 2778, at *18-20 (Conn. Super. Ct. Nov. 3, 2010).