Nos. 20-2835, 20-2844

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants-Appellees,
and
WISCONSIN STATE LEGISLATURE, *et al.*,
Intervening Defendant–Appellant.

SYLVIA GEAR, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants-Appellees,
and
WISCONSIN STATE LEGISLATURE, *et al.*,
Intervening Defendant–Appellant.

CRYSTAL EDWARDS, *et al.*,
Plaintiffs-Appellees,
v.
WISCONSIN STATE LEGISLATURE, *et al.*,
Intervening Defendant–Appellant.

JILL SWENSON, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants-Appellees,
and
WISCONSIN STATE LEGISLATURE, *et al.*,
Intervening Defendant–Appellant.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Plaintiffs-Appellees,
v.

MARGE BOSTELMANN, *et al.*,
Defendants-Appellees,
and
REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF WISCONSIN,
Intervening Defendants–Appellants.

SYLVIA GEAR, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants-Appellees,
and
REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF WISCONSIN, *et al.*,
Intervening Defendants–Appellants.

CRYSTAL EDWARDS, *et al.*,
Plaintiffs-Appellees,
v.
WISCONSIN STATE LEGISLATURE, *et al.*,
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and
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Intervening Defendants–Appellants.

JILL SWENSON, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants-Appellees,
and
REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF WISCONSIN, *et al.*,
Intervening Defendants–Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin (Conley, J.)

REPLY IN SUPPORT OF REPUBLICAN NATIONAL COMMITTEE'S AND REPUBLICAN PARTY OF WISCONSIN'S EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION

Movants adopt and incorporate the arguments in the Legislature's reply and make two additional points. First, although the Legislature plainly has authority to appeal and seek a stay, that question is irrelevant because Movants have Article III standing and seek the same relief. Second, the principle against last-minute changes to election rules from *Purcell v. Gonzalez*, 549 U.S. 1 (2006), squarely applies here. This Court, as it did in Movants' and the Legislature's last appeal, should stay the district court's preliminary injunction.

I. Movants have standing to appeal.

After the Legislature filed its stay motion, this Court entered an order asking the parties to brief "the Legislature's authority to pursue this appeal." CA7 Doc. 11, No. 20-2835. That question is now moot; Movants have since noticed their own appeal and filed their own stay motion, and this Court consolidated the two appeals. *See* CA7 Docs. 15, 16, No. 20-2835; CA7 Docs. 4, 5, No. 20-2844. "Because [Movants] clearly ha[ve] standing to challenge the lower court['s] decision[]," this Court "need not consider whether the Legislat[ure] also ha[s] standing to do so." *Horne v. Flores*, 557 U.S. 433, 446 (2009); *see also Carey v. Population Servs., Int'l*, 431 U.S. 678, 682 (1977) ("We conclude that [one] appellee … has the requisite standing and therefore have no occasion to decide the standing of the other appellees.").

In fact, two Plaintiffs—the Democratic National Committee and the Democratic Party of Wisconsin—do not challenge Movants' standing on appeal. That's because any holding that Movants lack standing would undermine their standing as well. As the

Democratic Parties alleged below, they have standing themselves and on behalf of their voter "members" and candidate "constituents." Compl. (Doc. 1) ¶¶17-18; 2d Am. Compl. (Doc. 198-1) ¶¶18-19. They "work to ensure that their members and constituents are able to effectively exercise their right to vote for their chosen candidates." 2d Am. Compl. ¶19; Compl. ¶18. And they are "directly harmed" when they must "expend additional resources assisting" their voters and constituents, including by encouraring supporters to "'get[] to the polls'" when they would "'otherwise be discouraged by [a] new law from bothering to vote.'" 2d Am. Compl. ¶19; Compl. ¶18 (quoting *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7 (2008); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 908-10 (W.D. Wis. 2016)).

Movants' motion to intervene carefully explained why they would suffer "equal" injuries if Plaintiffs prevailed. Mot. to Interv. (Doc. 19) 5-7. The district court agreed. It acknowledged that Movants and the Democratic Parties are "direct counterparts" and, thus, Movants' interests in this litigation are "'the mirror-image'" of the Democratic Parties'. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (quoting *Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996)). This Court likewise agreed. It stayed the district court's first preliminary injunction, even though Movants were the *only* appellants who had been "permitted to intervene below." *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 3619499, at *1-2 (7th Cir. Apr. 3, 2020). The Supreme Court—in a case notably titled *Republican*

National Committee v. Democratic National Committee—likewise granted a stay. 140 S. Ct. 1205 (2020). In short, Movants' standing has already been resolved.

No court or litigant questioned Movants' standing in the last appeal because Movants' standing is self-evident. Last-minute changes in election laws, like the ones Plaintiffs requested and the district court imposed, "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. "Thus the new law" created by the preliminary injunction "injures the [Republican] Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." *Crawford*, 472 F.3d at 951 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). These changes also require Movants to "devot[e] resources away from other tasks and toward researching, or educating voters about, the" new rules created by the preliminary injunction, which Movants believe "to be unlawful." *One Wis.*, 198 F. Supp. 3d at 910, *aff'd in part, vacated in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). And they require Movants "to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006). While these resource diversions are substantial given Wisconsin's electoral importance, they would suffice even if they "ha[ve] not been estimated and may be slight," since "standing … requires only a minimal showing of injury." *Crawford*, 472 F.3d at 951.

Indeed, courts "routinely" recognize that political parties are significantly interested in litigation over the rules governing the next election. After all, "the rights of their members to vote," "their overall electoral prospects," and "diver[sions] of their limited resources to educate their members" are at stake. *Issa v. Newsom*, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020); *see, e.g.*, *Ohio Democratic Party v. Blackwell*, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005) ("[T]here is no dispute that the Ohio Republican Party had an interest in the subject matter of this case, given the fact that changes in voting procedures could affect candidates running as Republicans and voters who were members of the Ohio Republican Party."); *Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (finding that the Illinois Republican Party had standing regarding the election rules).

The Supreme Court's unpublished, nonprecedential, four-sentence order in *Republican National Committee v. Common Cause Rhode Island* did not upend this consensus. 2020 WL 4680151 (U.S. Aug. 13, 2020). The order did not mention standing. Citing *Abbott v. Perez*, which discussed the "irreparable harm" requirement for equitable relief, 138 S. Ct. 2305 n.17 (2018), the Supreme Court thought the Republican Party could not assert the irreparable harm that occurs when a federal court prevents a State from "'enforc[ing] its duly enacted' laws"—at least where "no state official ha[d] expressed opposition" to the federal court's decision. 2020 WL 4680151, at *1. Of course, Movants' *standing* does not turn on that kind of harm, and here a state official (indeed, the entire Legislature) "has expressed opposition" to the preliminary injunction. *Id.* The

Supreme Court also stated that "[t]he status quo is one in which the challenged requirement has not been given effect," because there the challenged law had already been suspended "in Rhode Island's last election." *Id.* That logic does not apply here, where the rules that the district court enjoined were in place for Wisconsin's last statewide election in August. Unlike in Rhode Island, then, the preliminary injunction in this case upended the status quo shortly before a highly consequential election in a highly consequential State. That injures Movants, and reversing or vacating the preliminary injunction would redress those injuries.

Finally, in the unlikely event that neither Movants nor the Legislature has Article III standing, then the preliminary injunction must be vacated. If Movants and the Legislature have no concrete interests in this case, then the dispute below was really between Plaintiffs and the Wisconsin Elections Commission. But the WEC refused to take any position on the merits or defend the challenged laws. Courts can adjudicate the constitutionality of statutes "only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy." *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). Resolving cases where the defendant is an entity, like WEC, who "may be indifferent to the validity of the rule" is "beyond the power of the district court." *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116, 119 (7th Cir. 1982). Plaintiffs "cannot simply put to the district court the abstract question whether [Wisconsin's election laws are] valid, for [they] cannot receive an advisory opinion from a federal court." *Id.* And that's what Plaintiffs would be seeking if the only real

defendant were a "nonadversary" who "will not argue" against them. *Id.*; *accord Muskrat v. United States*, 219 U.S. 346, 361 (1911) ("[The] judicial power … is the right to determine actual controversies arising between adverse litigants."). Thus, unless the Legislature or Movants have standing, there was no case or controversy in the district court. This Court, as part of its jurisdiction to determine jurisdiction, would need to vacate the preliminary injunction. *See Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 387 (1884); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989). But both Movants have standing, so this Court should grant a stay.

II. The preliminary injunction violates the *Purcell* principle.

As this Court previously noted *in this very case*, "[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." 2020 WL 3619499, at *2. Because most Plaintiffs waited until July 10 to file their preliminary-injunction motions and the district court took more than *six weeks* after the hearing to issue its decision, this order came out when the election was already under way. *See* Legis. Emerg. Mot. (CA7 Doc. 9) 17-18. Moreover, the order below alters rules—including the absentee-ballot receipt deadline—that have applied in Wisconsin's last two elections. This case thus falls "well within the sensitive time frame" where any injunction would sow "exactly the chaos and confusion that the *Purcell* principle is meant to avoid." *Common Cause v. Thomsen*, Doc. 51 at 2–3, No. 3:19-cv-323 (W.D. Wis. Sept. 23, 2020).

Indeed, the Supreme Court has recently and repeatedly made clear that the *Purcell* principle is alive and well despite COVID-19 and the resulting election adjustments. That is why the Court has consistently rejected efforts like Plaintiffs' and the district court's to change the rules for imminent or ongoing elections. *See, e.g., Thompson v. DeWine*, 2020 WL 3456705, at *1 (U.S. June 25, 2020) (declining to vacate stay); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (June 26, 2020) (declining to vacate stay); *Merrill v. People First of Alabama*, 2020 WL 3604049, at *1 (U.S. July 2, 2020) (granting stay); *Little v. Reclaim Idaho*, 140 S.Ct. 2616 (July 30, 2020) (granting stay); *Clarno v. People Not Politicians Oregon*, 2020 WL 4589742, at *1 (U.S. August 11, 2020) (granting stay); *see also* Legis. Emerg. Mot. 2.

Plaintiffs' attempts to avoid *Purcell* all fail. The *Swenson* Plaintiffs contend (at 17-18) that this order comes "well 'in advance'" of the election and thus does not implicate *Purcell's* concerns. But absentee ballots are already being distributed and collected. *See* D.Ct. Op. 55. And courts—including the Supreme Court—routinely apply *Purcell* even when the election is farther away than this one. *See, e.g., Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying a lower-court order that changed election laws 61 days before election day); *Thompson v. Dewine*, 959 F.3d 804, 813 (6th Cir. 2020) (election day was "months away but important, interim deadlines … [we]re imminent" and "moving or changing a deadline or procedure now will have inevitable, other consequences"); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (32 days before election day).

Plaintiffs also argue that there is no possibility for voter confusion here. *See* Swenson Opp. 18-19; Edwards Opp. 16-17; Gear Opp. 15-16. But this ignores the fact that Wisconsin has held two elections, including a statewide primary, since the April primary. The district court's order, which in most respects provides general relief to *all* Wisconsin voters from legal deadlines, thus disrupts the existing status quo and is highly likely to leave voters unclear as to when they should act. If anything, extending deadlines may encourage further dilatory behavior, leaving more voters at risk that their votes may not count.

The *Gear* Plaintiffs miss the mark in arguing (at 15-16) that *Purcell* never applies when the relief granted would (in Plaintiffs' view) "help" voters. Setting aside the doubtfulness of this assumption[*] *Purcell* was equally concerned with giving proper consideration to election laws that foster "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4. Consistent deadlines for submitting voter-registration applications, ballot requests, and absentee ballots do just that, assuring voters that everyone plays under the same rules and that election officials will have adequate time and resources. And the Supreme Court has applied *Purcell* even when the proponents

[*] Although Plaintiffs contend that the April extension for absentee ballots "resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely," Edwards Opp. 2 (quoting D.Ct. Op. 17), Wisconsin's elections administrator testified it is "speculation" to assume these votes would not have been cast without the extension; "if the voters would have had a sooner deadline, we can't predict how their behavior may have changed based on the deadlines." Wolfe Depo. 49:9-12 (D.Ct. Doc. 247).

of last-minute relief contended it would avoid the disenfranchisement of votes. *Purcell* itself reinstated a voter I.D. rule despite "the possibility that qualified voters might be turned away from the polls." *Id.* at 4.

Finally, the DNC Plaintiffs' attempt to suggest (at 9-10) that the current situation is somehow *worse* than in April—making the district court's order *more* justified today—lacks credibility. As the Legislature has explained, the April court orders took place when the Wisconsin government had issued a stay-at-home order, many voters had naturally assumed they would vote in person and had put off requesting an absentee ballot, and some municipalities were drastically reducing their polling places. That is no longer the case. *See* Legis. Emerg. Mot. 1-11. *Purcell* applies here, as it applied in the last appeal and as it has applied in many similar cases across the country.

Dated: September 26, 2020

Respectfully submitted,

/s/ Patrick Strawbridge

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Rule 27(d)(2) because it contains 2,234 words, excluding the parts that can be excluded. This motion complies with all typeface requirements of Rules 27(d)(1)(E) and 32(a)(5)-(6), because it has been prepared in a proportionally spaced typeface using the 2016 version of Microsoft Word in 14-point Garamond.

Dated: September 26, 2020 */s/ Patrick Strawbridge*

CERTIFICATE OF SERVICE

I filed this motion with the Court via ECF, which will electronically notify all counsel requiring notice.

Dated: September 26, 2020 */s/ Patrick Strawbridge*