Nos. 20-2835, 20-2844

IN THE 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,
Intervening Defendant-Appellant.

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

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

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

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
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MARGE BOSTELMANN, *et al.*,
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and
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On Appeal From The United States District Court
For The Western District of Wisconsin
Consol. Case Nos. 3:20-cv-249, 3:20-cv-278, 3:20-cv-340, & 3:20-cv-459
The Honorable William M. Conley, Presiding

EDWARDS PLAINTIFFS' CONSOLIDATED OPPOSITION TO WISCONSIN LEGISLATURE'S EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION AND REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF WISCONSIN'S EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION

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INTRODUCTION

This voting rights appeal arises from lawsuits by four plaintiff groups seeking to reduce the threats to Wisconsin citizens' lives and health posed by the COVID-19 pandemic in a Presidential election year. The district court issued an injunction imposing limited remedies that for this election only lifted restrictions imposed by several Wisconsin statutes, each precisely tailored to alleviating the risks to voters' lives and health. It also denied several of the remedies plaintiffs sought.

The Wisconsin Legislature, along with the Republican National Committee and Republican Party of Wisconsin, now seeks an emergency stay of all of the injunctive relief ordered, contending that the district court exceeded its powers and that the relief comes so close to the November 3, 2020 election that voters are certain to be confused.[1] Yet, another defendant below, the Wisconsin Elections Commission, is the only party subjected to the injunction, and it has not joined in the motion for stay. For this and the other reasons presented in this opposition, Appellants' motion for stay should be denied.[2]

ARGUMENT

I. The Legislature Lacks Standing to Appeal.

This Court has asked the parties to address the Legislature's authority to pursue this appeal. There is none: the Legislature has failed to articulate any

[1] This is a consolidated opposition to the motions to stay of the Legislature and the RNC (collectively "Appellants").

[2] The Edwards Plaintiffs also adopt by reference all arguments advanced by the other plaintiff groups in their respective oppositions to the motion for stay.

particularized harm resulting from the district court's actions. Accordingly, it lacks standing to bring this appeal and it should be dismissed.

We acknowledge that this Court held that the Legislature had standing to appeal the April 2, 2020 order from the district court issued immediately prior to the Spring Election. *See Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, 20-1546, 20-1539, 20-1545, 2020 U.S. App. LEXIS 25831, at *11 (7th Cir. Apr. 3, 2020). The Legislature, in its motion, relies on this Court's earlier determination as the sole basis for its standing to bring this appeal. For the reasons explained below, the instant appeal is distinguishable from the April matter.

Although standing is often determined vis-à-vis the plaintiff's interests at filing, "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90-91 (2013)). Because an "actual controversy" must exist throughout the litigation, standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997).

The three long-settled elements of standing are: "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950-51 (2019) (quoting *Hollingsworth*, 570 U.S. at 704) (additional citation omitted).

The Legislature has not asserted a "concrete and particularized injury" that has befallen it as a result of the district court's order. The injunction requires nothing—either action or inaction—of the Legislature. Indeed, the order is not directed at the Legislature at all—only at the Commissioners and Administrator of the Wisconsin Elections Commission (collectively the "WEC") whose job it is to administer Wisconsin's elections. (DNC Case Dkt. No. 539, pp. 2-3.)

Under the order, the WEC, not the Legislature, is enjoined from enforcing certain statutes pertaining to registration deadlines, absentee ballot postmark and receipt deadlines, electronic ballots, and poll worker residency requirements. The WEC, not the Legislature, is directed to include language regarding the definition of "indefinitely confined" on the MyVote and WisVote websites that the WEC—not the Legislature—maintains. None of these modest requirements, designed to vindicate the right to vote during a global pandemic, impose burdens on the Legislature.

The Legislature articulates no actual interest harmed by the preliminary injunction, only disagreement with it, along with factually unsupported assertions that the injunction is or will be disruptive to the State. That is insufficient to create standing here. In recognition of this deficiency, the Legislature rests on this Court's earlier determination that it had standing to intervene and bring the appeal in April. *Democratic Nat'l Comm.*, 2020 U.S. App. LEXIS 25831 at *11.

But the issues raised in April were drastically different. For example, this Court determined then that the district court's order was overbroad, because it "categorically eliminates the witness requirement applicable to absentee ballots and

gives no effect to the state's substantial interest in combatting voter fraud." *Id.* at *9. Here, the witness requirements are not at issue and the injunction directed exclusively at the WEC is narrowly tailored and based on factual findings rooted in a once-in-a-lifetime event.

Similarly, the Legislature's unsupported assertion that it is the State (not the Legislature) that has been harmed due to the district court's invasion of "sovereignty" interests (Dkt. 9-1 at 19-21) is equally problematic. While wholly undeveloped in its brief and actually only referenced in its docketing statement, the Legislature looks to Wis. Stat. § 803.09(2m) (as it did in April), which permits the Legislature to intervene in lawsuits as a matter of right when the constitutionality of statutes has been challenged. However, while that statute reflects the State's "policy judgment[3] of how it wishes to litigate in federal court[,]" *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. Wis. November 7, 2019), it concerns intervention only (not relevant here) and "cannot supplant the Federal Rules of Civil Procedure." *Id.* Moreover, this Court upheld the district court's denial of the Legislature's motion to intervene, because Wisconsin's interests were already represented by the Attorney General, a party to the *Planned Parenthood* case. *Id.* at 804.

This Court also acknowledged in *Planned Parenthood* that states can "designate their agents, but federal courts must also be able to manage the scope of

[3] This "policy judgment" was clarified by the Wisconsin Supreme Court to mean that legislative committees, "each acting on behalf of a particular legislative entity—the assembly, the senate, and the whole legislature, respectively," may intervene when a statute is challenged. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 51. It does not give the Legislature the power to act on behalf of the State as a whole.

litigation before them." *Id.* Here, Wisconsin has already designated agents for matters related to elections—it has broadly delegated administration, implementation, and interpretation of election law to the WEC. *See* Wis. Stat. § 5.05. The WEC, as the statutorily designated agent of the State, adequately represents the interests of Wisconsin here.

In sum, the Legislature lacks both statutory authority to bring this appeal on behalf of "sovereign" interests and standing to bring this appeal, as it has not articulated any particularized harm it has suffered.[4] Absent standing, the stay should be denied and the appeal dismissed.

II. If The Legislature Has Standing, This Court Must Give Substantial Deference To The Factual Findings Of The District Court.

While the district court stayed enforcement of its order until September 28, 2020 to allow an immediate appeal (DNC Case Dkt. No. 337 ("Op.") at 4), an appellant's filing of a notice of appeal does not automatically stay the order. *See Employers Ins. of Wausau v. El Banco de Seguros del Estado*, 357 F.3d 666, 671-72 (7th Cir. 2004). To avoid enforcement of the district court's narrowly drawn injunction, Appellants must obtain a stay from this Court. For the reasons argued below, the Court should decline to stay enforcement.

[4] After this Court's briefing order (Dkt. No. 11), the Republican National Committee and Republican Party of Wisconsin (collectively "RNC") also appealed and then joined the Legislature's motion to stay. Needless to say, the RNC, as a private actor, lacks any cognizable interest in Wisconsin's sovereignty, and make no arguments of its own to suggest how it was harmed by the district court's order directed exclusively at the WEC. The RNC also lacks standing to seek a stay or to appeal this decision at all. *See Republican Nat'l Comm. v. Common Cause R.I.*, 2020 U.S. LEXIS 3632, *1 (U.S. August 13, 2020).

The standard for granting a stay pending appeal of an interlocutory order mirrors that for granting a preliminary injunction. *See In re A&F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (quoting *In re Forty-Eight Insulations*, Inc., 115 F.3d 1294, 1300 (7th Cir.1997)). "To determine whether to grant a stay, [the Court] consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *A&F*, 742 F.3d at 766 (citing *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir.1999); *In re Forty-Eight Insulations*, 115 F.3d at 1300). As with the underlying motion, a "sliding scale" approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa. *Cavel*, 500 F.3d at 547-48; *Sofinet*, 188 F.3d at 707. If the appeal "has some though not necessarily great merit," then movant must demonstrate that the balance of equities strongly favors granting the stay. *Cavel*, 500 F.3d at 546-547.

If this Court ultimately reviews the district court's order on its merits, it will look to the district court's decision "for the abuse of discretion, reviewing legal issues de novo." *Whitaker v. Kenosha Unified School Dist. No. 1 Board of Education*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir 2016)). In that setting, the district court's "factual findings are reviewed for clear error." *Fed. Trade Comm'n v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016). "Substantial deference is given to the district court's

'weighing of evidence and balancing of the various equitable factors.'" *Whitaker*, 858 F.3d at 1044 (citing *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)). These standards are important here because the narrowly drawn relief afforded in the order is grounded on a well-established factual record that went largely unrebutted by the Appellants below.

III. Appellants Have Little Likelihood Of Success On Their Appeal.

Appellants' motion to stay rests almost exclusively on this Court's recent decision in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). In an effort to falsely equate the plaintiffs' as-applied challenge to specified statutes with the facial challenge in *Luft*, Appellants demean the well-reasoned and narrowly-tailored injunction entered by the district court as "[o]ne federal judge's preference for a voting policy" over a "different approach" enacted by the Legislature. (Dkt. 9-1, pp. 1.) Of course, *Luft* provides no guidance on evaluating the application of state election laws during a novel public health crisis, because *Luft* was decided on a factual record that had nothing to do with a global pandemic. Nevertheless, Appellants persist in contending that the plaintiffs have facially attacked the constitutionality of the statutes at issue because they find it too difficult to overcome the district court's express ruling that "the court will focus solely on how the COVID-19 pandemic presents unique challenges to the Wisconsin election system and burdens Wisconsin voters." (Op. at 35.)

To be clear: the plaintiffs do not facially challenge the constitutionality of the various statutes affected by the district court's decision. But to argue a reasonable likelihood of success on the merits for the present motion, Appellants need *Luft* to assert that they are "exceedingly likely" to succeed on appeal "because all of the

challenged election laws *are* constitutional." (Dkt. 9-1, pp. 7-8; emphasis added.) This is beside the point: Plaintiffs do not assault the statutes upheld in *Luft* nor the power of the Legislature to have created them. Rather, Plaintiffs asserted below that COVID-19 is having, and will continue to have, an unprecedented impact on the November Election and in that factual context (largely unrebutted by Appellants in the district court) certain provisions of Wisconsin's election laws should be temporarily suspended to preserve the fundamental right to vote and avoid an unconstitutional application of the statutes at issue. And as we note above, the district court agreed. (Op. at 3, 35.)

Federal courts have sweeping powers to impose drastic remedies in order to do justice in extraordinary situations where substantial rights are at issue. So, for example, the Supreme Court required California to release prisoners before their sentences were over in order to remedy longstanding unconstitutional conditions of confinement. *Brown v. Plata*, 563 U.S. 493 (2011). Similarly, while education is historically a local issue, federal courts nevertheless regularly have taken over school districts engaged in persistent racial discrimination in order to bring life to the constitutional guarantee barring segregated schools. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

In this same vein, federal courts have served as constitutional gatekeepers over elections in an effort to protect the fundamental right to vote. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (when legislators fail to carry out reapportionment as required by Equal Protection Clause, "it becomes the 'unwelcome obligation' . . . of

the federal court to do so and impose a reapportionment plan pending later legislative action"); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (federal courts may order judicially supervised elections under federal law); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966); *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss. 1985) (shortening office term of unconstitutionally elected officials and ordering special election to replace them); *Ketchum v. City Council of City of Chicago*, 630 F. Supp. 551, 565 (N.D. Ill. 1985) ("Federal courts have often ordered special elections to remedy violations of voting rights"); *Donohoe v. Bd. of Elections*, 435 F.Supp. 957, 968 (S.D.N.Y. 1976) ("[F]ederal courts in the past have not hesitated to take jurisdiction over constitutional challenges to the validity of local elections and, where necessary, order new elections).

Deprivations of fundamental rights justify extraordinary remedies. COVID-19 has wreaked havoc on the United States, as Plaintiffs proved and the district court agreed. The appeal rests on the flawed assertion that the narrowly-tailored relief imposed by the district court somehow invades the province of the Legislature. It does not. In a 100-year occurrence of a global pandemic that has killed and injured millions of people around the world, the district court saw fit to protect the fundamental right to vote in a singular and modest alteration of specific statutory enactments for a single election, directed at the agents responsible for administering that election. This is a testament to judicial restraint—not free-wheeling judicial activism.

In choosing this narrow path, the district court determined its role was to ensure "a fair election by giving the overtaxed, small WEC staff and local election

officials what flexibility the law allows to vindicate the right to vote during a pandemic." (Op. at 4-5, n.2.) The remedies imposed by the district court are narrow and focused on practical ways to provide greater flexibility in the system while COVID-19 runs its course, to ensure that Wisconsin voters are not disenfranchised.

For example, by extending the deadline to register to vote electronically and by mail by a mere *seven days*, the district court ensured that there would be fewer people doing so in-person on election day, thus insulating against the risk of longer lines, increases in the amount of time individuals stay inside polling stations, and engagement in two separate processes to enable the franchise (registration and the vote itself) when health officials worldwide are insisting on social distancing and avoidance of person-to-person contact in confined spaces. (Op. at 38-41.) Similarly, by extending the deadline to count absentee ballots by *six days*, the district court allowed greater use of the absentee ballot mechanism as a means to allow voters concerned about in-person voting to have their votes counted—a concept that both this Court and the Supreme Court upheld in April and that resulted in approximately 80,000 additional votes being counted. (Op. at 47-51.) Finally, by disposing of the rule (for this election only) that pollworkers must come from the jurisdiction in which they reside, the voters again are protected from the ill effects of the pandemic by ensuring that all polling stations are adequately staffed to enable quicker processing and shorten the time voters are exposed to each other on election day. (Op. at 59-60.)

It is unlikely that Appellants will succeed in their appeal. For one, the argument that the district court order violates *Luft* ignores the reality that none of the

plaintiffs in any one of these cases seek (or have obtained) relief rendering any statute unconstitutional on its face. For another, by the Appellants' own admission, it is unconstitutional if the State "requires a voter to expend more than a 'reasonable effort' to vote." (Dkt. 9-1, pp. 7 (quoting *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*")). It is wholly unreasonable during a viral pandemic to impose upon voters a Hobson's choice: either vote or risk sickness or death. The district court's decision reflects modest, one-time adjustments to Wisconsin's voting regime to enable "reasonable efforts" consistent with constitutional mandates.

IV. The Balance Of Harms Favors Denying The Stay.

Voting is a fundamental right guaranteed by the U.S. Constitution as stated in *Reynolds v. Sims*, 477 U.S. 533 (1964):

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. . . . In *Mosley* the Court stated that it is 'as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.' 238 U.S., at 386, 35 S.Ct., at 905. . . . As the Court stated in *Classic*, 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . .' 313 U.S., at 315, 61 S.Ct., at 1037.
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> * * *
>
> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

In assessing Appellants' request for a stay, the Court must balance "the harm the plaintiff will suffer without an injunction against the harm the defendant will

suffer with one." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017). The "task . . . in deciding whether to grant or deny a motion for preliminary injunction is to minimize errors: the error of denying an injunction to one who will in fact (though no one can know for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose." *Roland Machinery Co. v. Dresser Ind., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984). Put another way: who is hurt worse by a mistake in this case? Is it more harmful to stay the injunction, denying Wisconsin voters simple but effective ways to maintain their health and safety in the face of COVID-19, or allow it to stand, and require the WEC to conduct one election under slightly modified rules during the greatest public health crisis in 100 years?

On one hand, there is irreparable harm when citizens lose the right to vote because they reasonably fear death or illness. The Appellants repeatedly conflate the "reasonably diligent" voter posited by *Luft* with a purely conjectural "perfect voter" who knows the election statutes and rules by heart. Expanding the mechanisms and processes to vote with the pandemic lurking about avoids that irreparable injury. On the other, the harm impacting Appellants is illusory. At best, their assertions reflect a pre-pandemic summary of the law that fails to consider the overwhelming (and now factually established) impact of COVID-19 on society and the choices voters will have to make, including staying home altogether, aggressively relying on absentee ballots, voting in certain locations that are understaffed, and so forth.

Appellants fail to explain from the record how a one-time modification to certain election rules results in harm that outweighs the disenfranchisement of voters.

For example, they provide no factual explanation for how the district court's decision to extend the voter registration deadline by *7 days* will "directly further the State's 'valid and sufficient interests in providing some period of time . . . to prepare adequate voter records and protect its electoral process from possible fraud.'" (Dkt. 9-1 at 8 (citing *Luft*, 963 F.3d at 676). Indeed, the argument ignores the district court's factual finding that "[c]utting off electronic and mail-in registrations three weeks before the election will not just thwart efforts to encourage Wisconsin voters to vote by mail via absentee ballots, but increase the burdens and risks on those choosing to vote in person." (Op. at 39.)

Similarly, with a record from the Spring Election demonstrating long lines and an abbreviated number of open polling locations (particularly in hard hit urban areas), Appellants' assertion that the district court's relaxation of the residency requirement undermines the State's interest in having a "decentralized" approach to election administration is a non-sequitur that rings hollow. This is especially true against facts showing that pollworker shortages actually led to longer lines and COVID-19 exposures, and for some fearing exposure, the resulting loss of their vote.

The Court must give "substantial deference" to the district court's "weighing of evidence and balancing of the various equitable factors.'" *Whitaker*, 858 F.3d at 1044. When considering this once in a lifetime situation, the balance of harms weighs in Plaintiffs' favor.

V. The Public Interest Is Served By Denying The Stay.

The "public interest . . . favors permitting as many qualified voters to vote as possible." *Obama for Am. v.* Husted, 597 F.3d 423, 437 (6th Cir. 2012). The public has

a "strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). "[U]pholding constitutional rights serves the public interest." *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Granting the stay undermines the public interest because the modest directives of the district court bolster these fundamental principles.

VI. Neither *Purcell* Nor The Supreme Court's Decision Involving Wisconsin's Spring Election Undermine The District Court's Order.

Appellants overreach when they assert that "the Supreme Court has made clear that COVID-19 is not a basis for judicially changing duly-enacted election laws." (Dkt. 9-1 at 2.) It has done no such thing. In fact, the Court's per curiam order in *Republican Nat'l Committee v. Democratic Nat'l Committee*, ___ U.S. ___, 140 S. Ct. 1205 (2020) ("*RNC*") expressly leaves the door open to such changes:

> The Court's decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or *whether other reforms or modifications in election procedures in light of COVID-19 are appropriate*. That point cannot be stressed enough.

Id. at 1208 (emphasis added). If the Court wanted to announce a bright-line rule barring judicial *intervention* to ameliorate the damage done to voting rights by the pandemic, it could have done so. It did not. Appellants' attempt to use the Court's unexplained denials or grants of stay applications to slam shut the door left open by *RNC* (Dkt. 9-1 at 2) is no more persuasive than arguing that the Court's denial of a petition for certiorari carries substantive weight. Parties and lower courts must heed what the Supreme Court says—not what is supposedly written between the lines of its orders.

Likewise, Appellants sweep too broadly when they contend that the district court's decision in *Common Cause v. Thomsen*, No. 3:19-cv-323, 2020 WL 5665475 at *2 (W.D. Wis., Sept. 23, 2020) means that when an election is five weeks away, "*any* injunction would sow" (Dkt. 9-1 at 18; emphasis added) the sort of "chaos and confusion" that *Purcell* is meant to prevent. The case itself does not establish an absolute bar to court orders that affect elections in the weeks leading up to the vote. If it did, there is no question that the Appellants in these consolidated cases, as well as the dozens of other lawsuits all over the country seeking modification of regular election procedures based on COVID-19, would have cited those dispositive passages and obtained outright dismissal.

Instead, *Purcell* cautions district courts to be mindful of the potential that court orders can adversely affect voter behavior, because of the "increasing risk" that such orders "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id*. at 5. More important for purposes of evaluating Appellants' request for a stay, *Purcell* directed that it is "necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court." *Id*. The appellate court's failure to do so is "error." *Id*.

Appellants' stay motion also gives no deference whatsoever to the extensive factual findings that support the district court's narrow and limited categories of injunctive relief. Indeed, Appellants barely discuss the district court's findings and how it applied those facts to the law and reached its decisions to grant *and deny* the relief requested by Plaintiffs. For example, Appellants present no detailed factual

argument resembling the *Common Cause* court's discussion of several specific instances of likely "chaos and confusion" that would attend the injunction sought by the plaintiffs in that case. 2020 WL 5665475 at *2. Their only arguments for "chaos and confusion" are purely conclusory.

The record establishes that none of the five categories of injunctive relief threaten voter confusion at all, let alone confusion so profound it would likely lead citizens to simply give up.

First, two of the forms of relief ordered—the extension of the deadline for counting absentee ballots, and the lifting of the statutory prohibition of poll workers serving in counties where they do not reside—do not invoke the "*Purcell* principle" at all, because they have nothing to do with voter behavior, but with the actions of third parties—namely, the local personnel who count absentee ballots, and public-spirited citizens who wish to help alleviate poll worker shortages in other counties. Therefore, with no threat of voter confusion, *Purcell* cannot serve as grounds for staying the district court's injunction on these points.

Second, Appellants provide no reason to question the district court's exercise of discretion in extending the voter registration deadline by one week. Indeed, in the district court, Appellants did not argue that this request was barred by *Purcell* confusion, but because it would be too burdensome on local officials' ability to prepare voter records. The district court relied on WEC Administrator Meghan Wolfe's testimony that those officials could still discharge their duties if a one-week extension were allowed. (Op. at 39-40.) In light of the "sheer number of new registrations" likely

to use mail registration, and the effect of the pandemic on increasing dramatically the number of people wishing to avoid same-day in-person registration (*id.*), the district court rightly concluded that a one-week extension of the registration deadline was not burdensome.

Third, although Appellants contend that the one-week window allowing e-mail or Internet-based balloting for citizens who timely request absentee ballots but do not timely receive them is "confusing" and "difficult to administer" (Dkt. 9-1 at 14-15), WEC—the agency that would have to oversee this process—has not joined in the Appellants' effort to stay the injunction. In fact, this aspect of the relief is likely to *relieve* voter confusion, not cause it. When voters contact local officials to express dismay that they have not received an absentee ballot timely requested (as some did in April), the officials will be able to offer the option of e-mail or Internet-based voting instead of telling them to hold out hope that the ballot will arrive. Of course, Appellants ignore the fact that reinstituting *for one election only*, and for a very specific and limited group of voters, a procedure that was in place for the entire state for four years (Op. at 54-55) is unlikely to confuse anyone.

Finally, Appellants advance no reason to believe that changing WEC's online advisory about the "indefinitely confined" exception to include the statement that the exception "does not require permanent or total inability to travel outside of the residence" will confuse any voters. Again, in fact, it is likely that more information will reduce voter confusion.

CONCLUSION

Based on the arguments set forth in this Opposition, the Court should deny the Emergency Motions to stay enforcement of the district court's preliminary injunction.

Dated this 25th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This Opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 4,868 words, excluding the parts of the Opposition exempted by Federal Rule of Appellate Procedure 32(f).

This Opposition complies with all typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)–(6), as it has been prepared in a proportionally spaced typeface using 12-point Century Schoolbook.

Dated this 25th day of September, 2020.

s/ *Joseph S. Goode*
Joseph S. Goode

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2020, I filed the foregoing *Edwards Plaintiffs' Consolidated Opposition To Wisconsin Legislature's Emergency Motion To Stay Preliminary Injunction And Republican National Committee And Republican Party Of Wisconsin's Emergency Motion To Stay The Preliminary Injunction* with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated this 25th day of September, 2020.

s/ *Joseph S. Goode*
Joseph S. Goode