No. 19A1016

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.
APPLICANTS,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.

THE WISCONSIN STATE LEGISLATURE,
APPLICANTS,
v.
DEMOCRATIC NATIONAL COMMITTEE, ET AL.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Seventh Circuit

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Respondents do not deny that the order below permits *any* absentee voter to cast their ballot up to six days after election day, that this change to Wisconsin election law was imposed by the district court five days before the election, or that states have a legitimate interest in imposing voting deadlines to permit the orderly administration of their elections and to protect election integrity. Instead, they mischaracterize the record below, the reach of the district court's amended injunction, and this Court's decision in *Purcell*. A partial stay is warranted.

1. Respondents' assertion that they fairly raised the extraordinary request for post-election-day voting before the district court is refuted by their own filings. They cannot identify any sentence in their voluminous briefing below—including their four motions for preliminary injunctions/TROs—that sought this relief. Instead, they point to two fleeting suggestions to the court to "not worry about the postmark" made by counsel during closing arguments after the evidentiary hearing. Resp. Br. 8–10. That cursory reference, first made *after* briefing and the close of evidence, is plainly insufficient to fairly present it to the court, let alone for adversarial process. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011) (collecting cases); *Philbrook v. Glodgett*, 421 U.S. 707, 712 n.8 (1975) (district court was "unable" to consider an argument "raised . . . for the first time, at oral argument").

And because Respondents did not fairly raise this issue below, they are forced to mischaracterize the record actually before the district court. Respondents suggest that the Administrator of the Wisconsin Elections Commission (WEC) testified that

mail delivery was taking a full week in Wisconsin because of the pandemic. Resp. Br. 9–10. In fact, she testified that mailing "usually" takes "about two days," Resp. App. 18–19, *and that she had not been informed as to any "change" in the speed of postal delivery under current conditions*. Resp. App. 84. Although she acknowledged that the postal service had advised that mail can take "up to a week," that was a statement about what typically happens in *any* election. Resp. App. 19.

Respondents' other cited evidence from below does not support any conclusion about mail delays or absentee-ballot processing delays preventing voters from receiving ballots before election day.[1] It consists only of (1) two declarants merely worrying about the speed of mail service, based *entirely* upon subjective feelings or "local media reports," D. Ct. Doc. 75 ¶ 6; *accord* D. Ct. Doc. 72 ¶ 6–7; (2) one declarant discussing how many absentee ballots one city is expected to *receive* after April 7, not how many would be *mailed* after April 7, D. Ct. Doc. 77 ¶ 13; and (3) one declarant who heard that the post office was "operating more slowly." D. Ct. Doc. 106, ¶ 11. None of this could justify the extraordinary relief granted below.[2]

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[1] Respondents' newly submitted evidence to this Court has not been subject to cross-examination, relies on hearsay and speculation about an "indeterminate number of the voters who have been mailed absentee ballots but have still yet to receive their absentee ballots at home." Resp. App. Ex. 2 ¶ 6; *accord* Resp. App. Ex. 3 ¶ 5; Resp. App. Ex. 5 ¶ 12. That is too weak a peg to support the claim that "tens of thousands of voters" will "probably" not receive ballots in time to vote and mail (or otherwise deliver) them on Tuesday. Resp. 12. It also cannot justify the district court's facial remedy for all absentee voters. *See infra* 3.

[2] Respondents' argument also proves too much. If mail actually is taking a full week, then any ballots mailed by voters *after* election day won't arrive at the clerks' office by the district court's April 13 ballot-receipt deadline (which no one is seeking to stay).

2. Respondents do not even attempt to explain how the district court's *facial* remedy, which permits *anyone* to vote after election day, is consistent with this Court's remedies caselaw. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (controlling opinion of Stevens, J.). Even assuming Respondents are correct that some voters will miss the election day voting deadline by no fault of their own, *but see supra* 2–3, they would be limited, *at most*, to seeking as-applied relief for these faultless voters. Respondents never sought as-applied relief, and the district court's order allows *anyone* to vote after election day, even those who have had their absentee ballots in hand for days or weeks.

Turning to the *Anderson*/*Burdick* analysis itself, Respondents failed to submit evidence of burdens on voters caused by the standard prohibition of *post-election day voting*. *See supra* 1–2. As for the countervailing state interest, Respondents ask this Court to embrace the incredible proposition that a State has no sovereign interest in having a date-certain election day, after which no more votes can be cast. Resp. Br. 12–13. But Applicants have explained that having a voting deadline is core to the State's ability to determine when its election will end, to maintain orderly election administration and to instill public confidence in the process. Application 14–16.

Respondents ignore these vital sovereign interests, and, instead, focus narrowly on the possibility that election-day results will leak, which is but one reason that a date-certain election is so important. Respondents claim that the district court's amended injunction solved this problem, claiming to have identified certain "exceptions" to the "general rule against binding nonparties." Resp. Br. 13–14. This

misses the mark. The WEC can investigate misdeeds by clerks, but this gives the WEC no more "control" over those clerks than a prosecutor has over citizens within her jurisdiction. Respondents' citation of the provision authorizing the WEC to "administ[er]" election laws does not help them, Resp. Br. 14, as that statute does not empower the WEC to give direct orders to municipal clerks, except in limited, inapposite circumstances. *See, e.g.*, Wis. Stat. § 5.05(15) ("The commission shall require all municipalities to use [an official registration] list . . . ."). And Respondents cite no authority for their *ipse dixit* claim that municipal clerks are at least "identified with" the WEC "in interest" or "represented by them." Resp. Br. 14.

In any event, Respondents' assertion that the district court's gag-order stops *municipal clerks* from publicly announcing election results before all absentee ballots are cast simply misreads the order. Resp. Br. 13–14. The district court's order enjoins only "inspectors" from "*releasing*" results. Application 6. But inspectors in Wisconsin do not "release" results; they "*report* the returns of the election *to the municipal clerk*," who "*shall then make the returns public*." Wis. Stat. § 7.51(4)(b) (emphases added). The district court's order does not apply to municipal clerks. To the extent this was an oversight, it illustrates the danger in federal courts' attempting to change the rules of an ongoing election and issuing relief never subjected to adversarial testing.

3. Relying primarily on a law review article, Respondents wrongly contend that the "*Purcell* principle cuts strongly against applicants' requested relief." Resp. 16–17. That is not true. This Court—and many courts since—have recognized that

the risk that "[c]ourt orders affecting elections" might "result in voter confusion and consequent incentive to remain away from the polls" only *increases* "[a]s an election draws closer[.]" *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). *See* Application 9–12.

Respondents suggest that *Purcell* shouldn't apply because of the difficulties posed by COVID-19. Resp. 17–18. But that is a point in *Applicants'* favor. As the Seventh Circuit recognized elsewhere in its decision below, "[i]t is best to leave these decisions and any more particular prescriptions to the [WEC], as it is better positioned to know what additional alternative suggestions are able to accommodate the many intersecting interests in play in the present circumstances." App. 4.[3] Nothing in *Purcell* suggests that the voter confusion attendant in last-minute judicial orders is *lessened* in times of unprecedented challenges.

Finally, Respondents contend that *Purcell* somehow inhibits appellate review. Resp. 17–18. That is an attempt not to apply the *Purcell* principle, but to vitiate it. This Court certainly has not followed Respondents' path. *See, e.g., North Carolina v. League of Women Voters of N. Carolina*, 574 U.S. 927 (2014) (staying district court order); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (same).

CONCLUSION

This Court should issue the requested partial stay.

[3] Respondents assert that the WEC agrees with them. Resp. 3. But the district court opinion they cite noted only that the WEC "specifically averred that a *receipt deadline* of 4 p.m. on April 13, 2020" would be fine. App. 46 (emphasis added). In fact, the WEC stated that it did "not object to any absentee ballot *postmarked by* April 7[.]" App. 44 (emphasis added).

Respectfully submitted,

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