No. 20A64

IN THE SUPREME COURT OF THE UNITED STATES

JILL SWENSON, MELODY MCCURTIS, MARIA NELSON, BLACK LEADERS ORGANIZING FOR COMMUNITIES, AND DISABILITY RIGHTS WISCONSIN,
Applicants,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, Commissioners of the Wisconsin Elections Commission; MEAGAN WOLFE, Administrator of the Wisconsin Elections Commission,
Respondents,

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,
Intervenors.

REPLY IN SUPPORT OF APPLICATION TO VACATE 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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Reading the Legislature's opposition, one could forget that Wisconsin, the United States, and the world are in the midst of a once-in-a-century pandemic, fighting a virus that has already killed more than 200,000 Americans and infected millions more—and that has spiked in Wisconsin just in time for election day. The district court's targeted preliminary injunction—especially its ballot-receipt deadline extension and county-residence requirement relief—is necessary under these extreme circumstances to prevent mass voter disenfranchisement. The Seventh Circuit's stay of that decision, in contrast, was baseless, resulting from a complete misunderstanding of this Court's decisions in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and *Andino v. Middleton*, 2020 WL 5887393 (U.S. Oct. 5, 2020), not to mention a failure to apply the traditional stay factors as this Court requires.

The Legislature's defense of the decision below only highlights its errors. The Legislature barely attempts to defend the Seventh Circuit's reading of *Purcell—viz.*, that the preliminary injunction was inappropriate because September was too close to November. Indeed, the district court consciously issued its decision well in advance of the election; it is only the Legislature's frantic effort on appeal to undo the district court's targeted relief that has brought us within a month of election day. The Legislature thus twists itself in circles trying to explain how the actual *Purcell* considerations, including the risk of voter confusion and disenfranchisement, could possibly preclude a remedy (the ballot-receipt deadline extension) that *prevented* disenfranchisement of 80,000 voters in April, or a remedy (the county-resident re-

quirement injunction) that does not concern voters at all, except that it would help prevent the mass closing of polling places that occurred in April.

Nor can the Legislature explain how this case is anything like *Andino*, in which the South Carolina legislature actually convened and enacted legislation to ameliorate problems associated with voting during a pandemic. This Court deferred to the compromises that legislative solution reflects. But the Wisconsin Legislature not only failed to do anything to help solve pandemic-related voting problems; it failed even to try, having not even convened to consider the pandemic for months.

This Court should grant the Application and vacate the stay not only because the court below badly erred, but because this Application presents this Court with an ideal opportunity to clarify its important election-related precedents.

I. PLAINTIFFS SATISFY THE VACATUR STANDARD

The Legislature is wrong that this Application to *vacate* the Seventh Circuit's stay should be denied because the Application did not satisfy the criteria for the *imposition* of a stay. Opp. 13-14. The former is governed by a different standard than the latter. *See, e.g., Planned Parenthood of Greater Tx. Surgical Health Servs. v. Abbot*, 571 U.S. 1061, 1061-63 (2013) (Scalia, J., concurring); *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1302, 1308 (1976) (Rehnquist, C.J., in chambers); *Meredith v. Fair*, 83 S. Ct. 10 (1962) (Black, J., in chambers); Application 14-15.

Regardless, even the stay criteria are satisfied. There is a strong likelihood that the Court would grant certiorari and reverse, for several reasons. *First*, the panel decision conflicts directly with *Purcell*, reading that case to preclude outright any relief within *months* of an election, regardless of the relief sought, its impact on

voters and election administrators, or the number of people who would lose the right to vote absent judicial intervention. *See* Application Part I.A; *infra* at 4-7. That error, moreover, creates a conflict among the circuits. As the Legislature itself acknowledges, several courts of appeals have adopted the same erroneous interpretation of this Court's precedents, *see* Opp. 26, while "other circuit courts have upheld injunctions modifying state election procedures in the immediate run-up to elections when the courts deemed the modifications necessary to prevent voter disenfranchisement," App. 12a (Rovner, J., dissenting); *see* Application 18. Only this Court can resolve this conflict and clarify the proper interpretation of this crucially important yet under-explained line of cases. *See* App. 9a (Rovner, J., dissenting).

Second, the court of appeals misread Justice Kavanaugh's concurrence in *Andino* to establish a principle of special legislative deference even when the legislature (unlike in *Andino*) has not even convened to consider safeguarding the right to vote during a public health crisis. *See* Application Part I.B; *infra* at 7-8. This Court's review is required to correct that error and clarify its precedent.

Third, the court of appeals issued a stay without applying *any* of the four equitable stay factors. That decision is thus flatly inconsistent with this Court's clear directive in *Nken v. Holder*, 556 U.S. 418 (2009).

Finally, both the legal questions presented and practical effect of the decision are self-evidently important.

The dispute over the applicable legal standard thus makes no difference. Even the Legislature's standard is readily satisfied here. And for the reasons set forth in the Application and further below, the lower court's stay should be vacated.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH SEVERAL OF THIS COURT'S ELECTION LAW PRECEDENTS

A. The Legislature's defense of the court of appeals' application of *Purcell* does not resemble the actual decision below. The Seventh Circuit granted a stay because September was "too close" to November. App. 4a. Yet the Legislature (echoing Judge Rovner's *dissent*) now contends that *Purcell* embodies "[m]ultiple considerations," including the risk of voter confusion, the burden on election administrators, and the public interest. Opp. 30-33. The Legislature's retreat from the court of appeals' indefensible application of *Purcell* is understandable. But while the Legislature now acknowledges the relevant factors, its application of those factors not only fails to support a stay, but highlights why the stay below should be vacated.

1. For one thing, the Legislature (like the panel) altogether ignores the district court's factfinding that *Purcell*'s considerations fully support the grant of injunctive relief. Application 17 (citing App. 67a). *Purcell* itself squarely holds that such district court findings are "owed deference," 549 U.S. at 4-5, and the Legislature's decision to ignore those findings simply repeats the error below.

2. Nor does the Legislature offer any plausible account—much less identify any record evidence showing—that the relief *actually at issue here* is likely to result in any of the harms that *Purcell* is designed to avoid.

a. Like the court of appeals, the Legislature says nothing about the county-residence requirement. That is presumably because there is no chance that voters will be confused if their polling place is staffed by workers who live in a different county. Application 21. Voters *will* be confused, however, if their usual local polling place is not open, which the Wisconsin Elections Commission (WEC) Administrator testified is a serious concern given the difficulty of recruiting pollworkers during a pandemic—a difficulty that the district court's injunction will ameliorate.

b. As for the ballot-receipt deadline, history (not to mention the district court's detailed factfinding) demonstrates that this same relief in April did not result in voter confusion, administrative burdens, or compromise election integrity. To the contrary, it "furthered the state's interest in completing its canvass," App. 82a-83a, and enfranchised 80,000 voters, Application 8. The Legislature offers only one reason to believe November will be different: Wisconsin held a primary in August without an extension. Opp. 29. But the Legislature never explains why voters would be confused by having *more* time to put their ballots in the mail—at worst, a voter who thought the August rules were in place would mail her ballot early. So even if the Legislature were somehow right that this extension could create a risk of voter confusion, it would not create an incentive to remain away from the polls. In any case, the Legislature's voter confusion argument only bolsters the case for an extension here: as the district court explained, the August primary was "much smaller" than the April election, App. 91a, so many Wisconsinites who voted in April but not in August "may well hold [the] belief" that the deadline is or will be

extended. *RNC v. Common Cause R.I.*, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020).

3. The Legislature next attempts to salvage the court of appeals' stay by pitching an incomprehensible understanding of *Purcell* as a timing rule that "applies to last-minute injunctions like this one *unless* they are required by unforeseen 'last-minute' developments." Opp. 33. There is, of course, no last-minute exception to a last-minute-decision rule, whatever that is supposed to mean. The only rule is that courts must apply the "equitable considerations inherent in … *Purcell*," Opp. 34, which include timing, of course, but also include other factors that the court of appeals here failed to acknowledge, much less consider, *see Purcell*, 549 U.S. at 4-5.

The Legislature's last-minute-exception-to-the-last-minute-decision-rule argument also mischaracterizes both the district court's injunction and the facts on the ground in Wisconsin. The injunction was not last-minute: the district court ordered relief six weeks before the general election, finding that this would "provide sufficient time for the WEC and local election officials to implement any modifications to existing election laws, and to communicate those changes to voters." App. 67a. It is the Legislature's frantic effort to reverse the district court's modest relief that has delayed resolution of this issue for a month. Moreover, even if some sort of last-minute developments were required to support the district court's injunction, such developments exist here: the Legislature seems not to have noticed, but Wisconsin is now experiencing "one of the Nation's worst COVID-19 outbreaks," *Amicus*

Curiae Brief of Tony Evers (Evers Br.) at 9-12 (capitalization omitted), with daily new infections *more than 20 times higher* than in April, Application 9.

4. Finally, the Legislature asserts that this Court should not consider election disputes outside the "regular course of review." Opp. 30-31. But the Court has of course done just that on numerous occasions in recent months to ensure that lower courts are properly applying the *Purcell* principle. The court of appeals' indefensible misapplication of *Purcell* warrants the same attention.

B. The Legislature also cites the court of appeals' legislative-deference rationale under *Andino*. But special deference was warranted in *Andino* because the South Carolina legislature had just crafted a detailed response to the COVID-19 pandemic—including extending absentee voting but retaining a witness requirement—and this Court rightly recognized that federal courts are ill-suited to second guess such legislative compromises. Application 4-5, 23-24. Nothing of the sort happened here. "In fact, the Legislature has not enacted legislation of any kind since April 14." Evers Br. 6. Indeed, the Legislature has not even *convened to consider* whether to amend the State's general election laws in light of the pandemic. *Id*. at 5-6. There was nothing for the district court to "second guess," Opp. 13, and a federal court cannot "blindly defer to a state legislature that sits on its hands" when *federal rights* are at stake. App. 32a (Rovner, J., dissenting). That is not to say courts should lightly set aside legislative enactments. But absent a showing (as in *Andino*) that the legislature grappled with the actual problem at issue, legislation is

owed no less but no more deference than *Anderson-Burdick* provides. That is the precise framework that the district court properly applied.

Unlike in *Andino*, moreover, "no state [election] official has expressed opposition" to the district court's order. *Common Cause*, 2020 WL 4680151, at *1. The Legislature attributes the WEC's non-opposition to its institutional limitations, Opp. 31-32, but the argument is meritless for at least three reasons. First, the district court's injunction—and, certainly the two aspects of relief that Applicants here sought—were tailored to the testimony of Wisconsin's election officials in this case, including undisputed testimony from Wisconsin's chief elections officer, Administrator Wolfe, and from local clerks. *Infra* at 9, 13-14. Second, the Legislature is simply wrong about the WEC's authority. The WEC can and will "vigorously defend[]" state election law, Non-Party Brief of the Office of the Attorney General, *DNC v. Bostelmann*, No. 2020AP1634-CQ (Wis. 2020) at 14, as it did in the spring litigation, *see DNC v. Bostelmann* ("*DNC* ECF"), No. 20-249 (W.D. Wis.), ECF No. 107. Tellingly, however, the WEC *does not object* to extending the ballot-receipt-deadline. To the contrary, after meeting to consider the issue in March, the WEC told the district court that it "d[id] not object" to a six-day extension of the ballot receipt deadline and that the extension "w[ould] not impact the ability to complete the canvass in a timely manner." *DNC* ECF No. 152. Third, regardless of the WEC's authority, "[t]he district court's injunction … carries the endorsement of the branch of Wisconsin's government that *has* the background, competence, and expertise to assess public health and is accountable to the people: the Executive." Evers Br. 15.

III. THE LEGISLATURE'S ARGUMENTS ABOUT THE MERITS OF THE DISTRICT COURT'S RELIEF ARE WRONG

A. The District Court Correctly Extended The Absentee-Ballot Receipt Deadline

1. The Legislature characterizes the extension of the ballot-receipt deadline as targeted toward procrastinators, suggesting that only voters who fail to "plan ahead" will be disenfranchised absent relief. Opp. 16-17, 35. That is flat wrong—the district court found as a factual matter that absent relief, vast swaths of "prudent," "reasonable[]" voters will be disenfranchised "*despite acting well in advance of the deadline[s].*" App. 80-82a (emphasis added). Thousands of voters who seek to vote early will still be disenfranchised absent a receipt-deadline extension, including (i) voters who request an absentee ballot early but do not receive one until right before the election through no fault of their own, App. 44a, 881a; and (ii) voters who place their ballots in the mail early, and who cannot, under Wisconsin law, spoil that ballot and vote in person even if outbound mail is delayed, Wis. Stat. § 6.86(6).

The Legislature does not dispute the facts that make this injunction necessary. There is an unprecedented surge in absentee-ballot requests, far outpacing the numbers in April and overwhelming local officials, as well as deteriorating Postal Service mail delivery. App. 47a-48a, 79a-81a. Indeed, WEC Administrator Wolfe testified that it will often take 14 days "for an absentee ballot to make its way through the mail from a clerk's office to a voter and back again," App. 45a—meaning that even voters who act over a week in advance of the statutory deadline, and multiple weeks before the election, will be at serious risk of disenfranchisement, to say nothing of those whose ballots are delayed longer than average. *See*

App. 53a (July 2020 USPS Inspector General's Office Report warns of "high risk" of severe election mail delays); App. 44a (many voters who requested ballots even "two or three weeks before the [April] election" did not timely receive their ballots).

The Legislature's claim that Wisconsin voters harmed by absentee-ballot breakdowns could simply shift to voting by alternative methods is likewise refuted by the record. Opp. 15-16. As the district court found, the pandemic—which is orders of magnitude worse in Wisconsin now than it was in April—makes in-person voting severely burdensome for elderly, high-risk, and immunocompromised voters, App. 42a-44a, which is why they are being urged *by the State* to vote absentee, App. 52a. The Legislature also ignores that drop boxes are not available in many Wisconsin jurisdictions. *See Swenson v. Bostelmann*, No. 20-459 (W.D. Wis.), ECF No. 42:13. And it is illegal for Wisconsin voters who have already put absentee ballots in the mail to attempt to vote in person, even if their ballots may, through no fault of their own, arrive after election. *See* Wis. Stat. § 6.86(6).

Even those voters who choose not to cast their ballots weeks in advance of election day, moreover, are not "procrastinators." Opp. 17. As the district court found, many "prudent" voters have not cast their absentee ballots weeks before the election because they are genuinely undecided—and because the statutory deadline tells them they are entitled to that time to decide. App. 81a-82a. Moreover, many Wisconsin voters may reasonably have been planning to vote in person before the recent COVID-19 surge and "rapid worsening of the epidemic." App. 20a-21a (Rovner, J., dissenting). There will likely be thousands of voters who contract COVID-19

within 14 days of the election—or were in close contact with someone who did—and must therefore self-isolate; 4,000 Wisconsinites were diagnosed with COVID-19 just yesterday, which will place them and all of their close contacts into isolation. Wisconsin offers them the opportunity to vote by mail. They should not be disenfranchised for taking the State up on its offer, particularly when the alternative (voting in person) requires them to either put themselves and others at severe risk or lose their vote.

2. The Legislature also makes the remarkable argument that the Constitution has nothing to say about voters who are disenfranchised by the operation of state absentee-voting laws. Opp. 17-18. Applicants have never asserted an abstract constitutional right to vote absentee. But *Wisconsin*—through its Legislature—has provided that option to its voters, and that option has obviously become especially valuable in the midst of a deadly pandemic. If a state provides a vote-by-mail option (and then repeatedly urges voters to use it), then the state must ensure that option is effective because if it is not, voters who choose that option *will* lose their fundamental right to vote. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-08 (1969) (recognizing that "absentee statutes" would pose constitutional difficulty if they "themselves den[ied] appellants the exercise of the franchise"). A contrary rule would allow a state to deceive voters and cause wide-scale voter confusion and certain disenfranchisement. That is not "penaliz[ing] the State of Wisconsin for being *too* generous with its absentee voting regime," Opp. 20; it is

merely ensuring that whatever voting regime the State chooses to provide does not disenfranchise large swaths of the electorate.

The Legislature cannot escape that straightforward conclusion by suggesting that Wisconsin's absentee-ballot deadline might create one-off difficulties during ordinary times. Opp. 17. As Applicants already explained, Application 31-33, they are not challenging Wisconsin's voting rules as they apply in ordinary times. It is the strain of the coronavirus pandemic—causing an "unprecedented number of absentee voters" and mail delivery issues, App. 80a—that is creating a severe and unprecedented absentee-ballot backlog in Wisconsin. It is that "near certainty of disenfranchising tens of thousands of voters relying on the state's absentee ballot process," App. 35a, 83a, that justifies the district court's extension of the deadline.

For the same reason, the Legislature's suggestion that the district court should have cabined the extension to "voters who could not safely vote in person *and* would experience some absentee-ballot-mailing issues," Opp. 18, makes no sense. Not only would it be impossible as a practical matter to extend the deadline on a case-by-case basis, the entire premise of the district court's ruling is "the systemic issues that will arise in a system never meant to accommodate massive mail-in voting." App. 80a. It is that wholesale failure, affecting enormous numbers of voters, that necessitates this critical six-day extension.

B. The District Court Correctly Enjoined The County-Residence Requirement For Pollworkers

1. The Legislature's claim that the district court did not identify a constitutional violation justifying its injunction of Wis. Stat. § 7.30(2), Opp. 24-25, is absurd.

As the district court expressly found, this relief is necessary to prevent mass polling-place closures on election day—closures that crippled in-person voting in Wisconsin in April, and that would severely burden the right to vote throughout Wisconsin were they to recur in November. Specifically, after examining an extensive record—including testimony from Wisconsin election officials—the district court determined that (i) the severe "shortage[s] of poll workers" that hobbled the April election are likely to "strain[]" "[i]n-person voting in November," creating a serious risk of polling place closures on election day; and (ii) enjoining § 7.30(2) to allow local officials to employ out-of-county poll workers is necessary to alleviate these staffing issues and corresponding "burden" on the "right to vote." App. 47a-51a, 54a-55a, 91a-92a. These findings are entitled to "deference." *Purcell*, 549 U.S. at 5.

2. The Legislature's record-based objections fare no better. The Legislature's claim that Wisconsin officials are not concerned about pollworker shortages for the November election, Opp. 25, is extraordinary. The district court highlighted the fact that, "based on her past experience and unique perspective, Administrator Wolfe testified that her *biggest worry* in the administration of the November election is a lack of pollworkers for in-person voting on election day." App. 91a. Green Bay's representative likewise testified that "the biggest obstacle [Green Bay is] facing as [it] prepare[s] for the November election" is "the pollworkers," *DNC* ECF No. 480:123, and Milwaukee's representative testified that "given the ongoing crisis," Milwaukee expects significant pollworker shortages for the November election. *Id.*, No. 470:111-112. Moreover, both the WEC and the local officials agreed that enjoin-

ing § 7.30(2) would alleviate these shortages. *See, e.g.*, *id.*, No. 518-2:13 (WEC explaining that shortages would be alleviated "if there was no county-residence requirement"); *id.*, 470:111-113 (Milwaukee representative "sure" that enjoining § 7.30(2) would allow city to recruit more pollworkers and keep polling places open).

The Legislature's argument that any polling place closures are solely attributable to localities "inexplicably" refusing National Guard assistance, Opp. 9, is seriously misleading. For one thing, the county-residence rule applies to the National Guard as well. Moreover, localities were not told they could utilize National Guard members until the Sunday before the April election—giving localities only two days' notice. *DNC* ECF No. 480:42-48; 113, 137-38. By then, as the Green Bay representative testified, it already had to make the final determination to close most of its polling places due to pollworker shortages. *Id.* And Milwaukee utilized the National Guard yet nonetheless needed to close 175 of 180 polling places. *Id.*, No. 470:40-45. This is precisely why the relief the district court ordered here is so critical: to allow municipalities to access out-of-county pollworkers (and the National Guard, if made available) *before* needing to decide whether to close polling places.

IV. THE EQUITIES REQUIRE VACATUR

The Legislature's equitable argument is largely a repeat of its arguments on the merits. It asserts that the injunction will hamper local officials' ability to complete the canvass and undermine the State's interest in local election administration, Opp. 34, neither of which is true, *supra* at 5, 8, 13; Application 33-34, 37. And while a state may, in some intangible way, be harmed by its "inability to enforce its duly enacted plans," *Abbot v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), the whole

point of this lawsuit is that the Legislature made no plans for voting during the pandemic. In any event, a state's interest in the validity of its laws cannot outweigh the serious harm that the Seventh Circuit's stay will inflict—i.e., the disenfranchisement of hundreds of thousands of diligent voters and threats to the health of countless more. *Supra* Part III. Mass disenfranchisement as a result of legislative and judicial inaction, not the district court's modest injunction, is the real threat to public "confidence in the electoral system." Opp. 30.

The Legislature also suggests that vacatur here would "throw" the "2020 [e]lection into chaos" by allowing *other* hypothetical injunctions to take effect. Opp. 5. That is obviously not true. While *Purcell* and *Andino* are not a *per se* bar to relief, neither will an injunction always be warranted. *Purcell* and *Andino* still articulate important constraints on federal judicial action, and an injunction always has to satisfy the traditional requirements—ignored by the court of appeals—including most importantly a likelihood of success on the merits. *See* Application 26. That this relief, on this record, with the April election as a reference point, happens to thread these needles is by no means an open invitation for lower courts to issue voting-related injunctive relief. But unless this Court vacates the Seventh Circuit's stay, lower courts will continue to misread this Court's precedents, as the Seventh Circuit did, to preclude judicial relief even when the state's legislature fails to act and tens (if not hundreds) of thousands of voters are likely to be disenfranchised. That would be a "travesty." App. 8a (Rovner, J., dissenting).

CONCLUSION

The stay of the district court's preliminary injunction should be vacated.

Respectfully submitted,

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