No. 20A-_____

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.

EMERGENCY APPLICATION OF JILL SWENSON, MELODY MCCURTIS, MARIA NELSON, BLACK LEADERS ORGANIZING FOR COMMUNITIES, AND DISABILITY RIGHTS WISCONSIN TO VACATE STAY

DIRECTED 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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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

All of the parties to this suit are listed in the case caption. This suit was, however, consolidated with three other cases in the district court, each of which was brought by separate plaintiffs. Those cases are:

- *DNC v. Bostelmann*, 20-249 (W.D. Wis. Mar. 18, 2020). Plaintiffs in that case are the Democratic National Committee and the Democratic Party of Wisconsin. Defendants in that case are the same as in the above-captioned suit.

- *Gear v. Knudson*, 20-278 (W.D. Wis. Mar. 26, 2020). Plaintiffs in that case are Sylvia Gear, Malekeh K. Hakami, Patricia Ginter, Claire Whelan, Wisconsin Alliance for Retired Americans, League of Women Voters in Wisconsin, Bonibet Bahr Olsan, Sheila Jozwik, Katherine Kohlbec, Diane Fergot, Gary Fergot, and Gregg Jozwik. Defendants in that case are the same as in the above-captioned suit.

- *Edwards v. Vos*, 20-340 (W.D Wis. April 13, 2020). Plaintiffs in that case are Chrystal Edwards, Terron Edwards, John Jacobson, Kileigh Hannah, Kristopher Rowe, Katie Rowe, Jean Ackerman, William Laske, Jan Graveline, Todd Graveline, Angela West, and Douglas West. In addition to the defendants in the above-captioned suit, the defendants in *Edwards* include Robin Vos, in his official capacity as Speaker of the Wisconsin State Assembly; Scott Fitzgerald, in his official capacity as Majority Leader of the Wisconsin State Senate; the Wisconsin State Assembly; the Wisconsin State Senate; and the Wisconsin Elections Commission.

The other related proceeding is *DNC v. Bostelmann*, No. 2020AP1634-CQ, order entered, 2020 WL 5906141 (Wis. Oct. 6, 2020).

RULE 29.6 STATEMENT

Applicant Black Leaders Organizing for Communities is a fiscally-sponsored project of Tides Advocacy, a California non-profit corporation. Applicant Disability Rights Wisconsin does not have a parent corporation. No publicly held corporation holds ten percent or more of either organization's stock.

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APPLICATION TO VACATE THE SEVENTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

To: The Honorable Brett M. Kavanaugh, Circuit Justice for the Seventh Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court, Applicants Jill Swenson, Melody McCurtis, Maria Nelson, Black Leaders Organizing for Communities, and Disability Rights Wisconsin, plaintiffs-appellees in the courts below, respectfully apply for an order vacating the stay issued on October 8, 2020, by a panel of the United States Court of Appeals for the Seventh Circuit, *DNC v. Bostelmann*, 2020 WL 5951359 (7th Cir. 2020), a copy of which is appended to this application at App.1a-32a. The Seventh Circuit's order stayed a preliminary injunction issued in four consolidated cases on September 21, 2020, *DNC v. Bostelmann*, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020), appended to this application at App.33a-101a.

INTRODUCTION

In response to a once-in-a-century pandemic, and after extensive factual development and briefing, a full-day evidentiary hearing, and detailed factfinding, the district court concluded that mass disenfranchisement of Wisconsin voters would ensue in the absence of targeted relief, and enjoined discrete aspects of Wisconsin law. This Application concerns the two aspects of the district court's relief sought by the *Swenson* Plaintiffs (Applicants): (i) a six-day extension of the absentee-ballot receipt deadline for ballots postmarked by election day; and (ii) an injunction suspending a Wisconsin statute that precludes municipalities facing pollworker shortages from addressing those shortages by utilizing pollworkers from other counties.

This Court is familiar with the first item of relief: after the Court's decision on the day before Wisconsin's April primary in *RNC v. DNC*, 140 S. Ct. 1205 (2020), ballots arriving after election day could be counted so long as they were postmarked by election day. It is undisputed that this relief prevented 80,000 voters from being disenfranchised through no fault of their own in April and the same relief will likely prevent even more widespread disenfranchisement come November. And as to the second item of relief, the Wisconsin Elections Commission (WEC) Administrator testified that a shortage of pollworkers was her "biggest worry" concerning the November election, and that such relief would aid officials in ameliorating that problem.

Unsurprisingly, then, the WEC—the agency charged with administering Wisconsin's election laws—has neither appealed nor objected to either item of relief. But the Wisconsin Legislature and several Republican Party entities intervened in the district court, appealed its preliminary injunction, and sought a stay pending its appeal. A divided panel of the Seventh Circuit granted the stay, but as Judge Rovner's dissent makes clear, that decision was manifestly erroneous and based on a fundamental misunderstanding of several lines of this Court's precedent. The stay pending appeal should be vacated.

This Court has repeatedly explained that a stay pending appeal is appropriate only after considering the four equitable factors set forth in *Nken v. Holder*, 556 U.S. 418, 425-26 (2009): likelihood of success on the merits, irreparable harm to the movant, harm to other parties, and the public interest. The court of appeals stayed

the district court's injunction pending appeal without considering any of those factors. The court of appeals erred for three reasons.

First, the court of appeals badly misapplied this Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), reading that decision to create a hard-and-fast rule that any judicial alteration of election laws within several months of election day is improper. Obviously, that is not what *Purcell* (or any other precedent) holds. *Purcell* establishes the principle that courts should be wary of altering election rules close in time to elections when such changes *would cause voter confusion and make voters less likely to vote*. *Frank v. Walker*, 574 U.S. 929 (2014), on which the panel heavily relied, underscores the point. That case *lifted* a stay where the change in state law requiring photo ID would have resulted in voter confusion—"absentee ballots ha[d] been sent out without any notation that proof of photo identification must be submitted." *Id*. at 929 (Alito, J., dissenting). But here, the district court expressly considered, as a factual matter, whether its relief is likely to lead to voter confusion or disenfranchisement, and the court concluded it would not. *Purcell* requires appellate deference to that sort of factfinding, but the court of appeals completely ignored it.

There is, moreover, no reasonable likelihood of voter confusion from the relief at issue here. The district court's extension of the ballot *receipt* deadline cannot cause voter confusion or disenfranchisement because it has no effect on the deadlines applicable to voters—the district court found as a factual matter that the ballots of a substantial number of voters who follow all of Wisconsin's rules will arrive

after the current receipt deadline because of conditions caused by the pandemic, and the district court's relief will allow timely cast ballots slowed down by these substantial pandemic-related delays to be counted. The district court's injunction of the pollworker county-residence requirement, meanwhile, has no effect on voters at all, since voters do not know or care where the people who work at their polls live. Voters care only that the polls they were supposed to go to are open on election day and, during a pandemic, that social distancing is possible at those polls. The district court's order will help the WEC and local election officials achieve those goals, as the WEC Administrator, Wisconsin's chief election official, herself testified. The court of appeals, of course, examined none of this because it thought September was too close to November. That error is reason enough to vacate the stay.

Second, the court of appeals erroneously read this Court's cases—and, in particular, Justice Kavanaugh's concurring opinion in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020)—to require absolute deference to the Legislature on matters of election administration. But there is no such rule—if election rules will result in substantial disenfranchisement such that they fail the test established in this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), they must be declared unconstitutional even though they were enacted by a legislature. The point Justice Kavanaugh was making in *Andino* was that the South Carolina legislature had specifically considered how to respond to the COVID-19 pandemic—in that case, by extending absentee voting—and that courts should respect its legislative choices and compromis-

es about the particulars of the response. But the Wisconsin Legislature has never even considered how to ensure safe voting during the pandemic, so there is no choice or compromise requiring special judicial deference.

Third, the court of appeals simply failed to consider the *Nken* factors, such as the Legislature's likelihood of success on the merits on appeal and its irreparable harm. That failure is another independent reason for vacatur. And for the reasons explained below, application of those factors makes clear that the district court's limited injunction was entirely justified, and no stay is warranted. In fact, it's not even close.

The Application to vacate the stay should be granted.

STATEMENT OF THE CASE

In a split decision, a panel of the Seventh Circuit stayed a district court order enjoining several provisions of Wisconsin law that, the district court found, will severely burden the right to vote in the November General Election, as the COVID-19 pandemic surges in Wisconsin. Two aspects of the district court's now-stayed relief are at issue here: (i) an extension by six days of Wisconsin's absentee-ballot-receipt deadline, Wis. Stat. § 6.87(6), which (if not extended) is virtually certain to disenfranchise tens of thousands of voters who timely request and cast their ballots; and (ii) an injunction of Wisconsin's prohibition of inter-county sharing of pollworkers, Wis. Stat. § 7.30(2), which denies municipalities flexibility to address pollworker shortages and avoid mass polling place closures, as happened in April.

The district court's order was based on a voluminous record. The court had before it testimony from state and local election officials on the impact of COVID-19

on Wisconsin's election processes, numerous expert reports and depositions, well over a hundred declarations from voters and organizations, and direct experience with similar relief in April. The court heard argument and took testimony from the State's chief election officer—Administrator of the Wisconsin Elections Commission, Meagan Wolfe—at a day-long evidentiary hearing. And the court issued detailed findings of fact and conclusions of law after reviewing roughly 1,000 pages of briefing. Giving these findings the "deference" they are "owed," *Purcell*, 549 U.S. at 5, the facts relevant to the instant motion are as follows:

A. Wisconsin's April 7, 2020 Primary

COVID-19 is a novel respiratory illness that has now killed more than 200,000 Americans and nearly 1 million people globally. *See* App.41a-42a; *see also S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, J., concurring). Experts "agree that COVID-19 is mainly spread via person-to-person, respiratory droplets," largely "between people who are in close contact with one another." App.41a-42a. COVID-19 "first started to spread in Wisconsin in February and March," and the Governor declared a statewide emergency "within just a few weeks of Wisconsin's April 7, 2020, primary election." *Id.*

The emerging pandemic caused widespread "concern about the state's ability to conduct a fair and safe election," App.42a-43a, because Wisconsin's election system is "primarily designed to support polling place voting." App.47a. "Historically, the vast majority of Wisconsin voters have cast their ballots in person, and Wisconsin's election system has evolved against that backdrop, with provisions for absentee voting having served as a courtesy for the minority of voters whose

work, travel, or other individual circumstances presented an obstacle to voting in person on election day." App.16a (Rovner, J., dissenting). Thus, almost all ballots are cast in person, with absentee votes virtually "never compris[ing] more than 20% of all ballots" and "often … less than 10%," App.47a.

But the sudden emergence of COVID-19 "turn[ed] historic voter patterns on their head" in the April election, App.52a, causing demand for absentee ballots to skyrocket and in-person voting to plummet, *see* App.42a-45a, 47a. Indeed, almost immediately, "clerks reported they were running out of absentee ballot materials and felt overwhelmed by the volume of absentee ballot requests." App.42a-43a, 47a.

After the Legislature refused to postpone the April election, "three lawsuits were … filed with [the district] court requesting various relief relating to Wisconsin's impending primary." App.43a. Among other relief, the district court enjoined enforcement of Wis. Stat. § 6.87(6), which requires "that absentee ballots must be received by 8:00 p.m. on election day," and extended the absentee-ballot receipt deadline by six days. *DNC v. Bostelmann*, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020) ("*DNC*"). As here, the Legislature moved for an emergency stay. On April 3, 2020—just four days before Wisconsin's spring election—the Seventh Circuit refused to stay that portion of the district court's order "extend[ing] the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020." *DNC v. Bostelmann*, 2020 WL 3619499, at *1 (7th Cir. 2020) ("*DNC II*").

On April 6, 2020—the day before Wisconsin's spring primary—this Court modified the district court's order by requiring that late-arriving ballots be post-

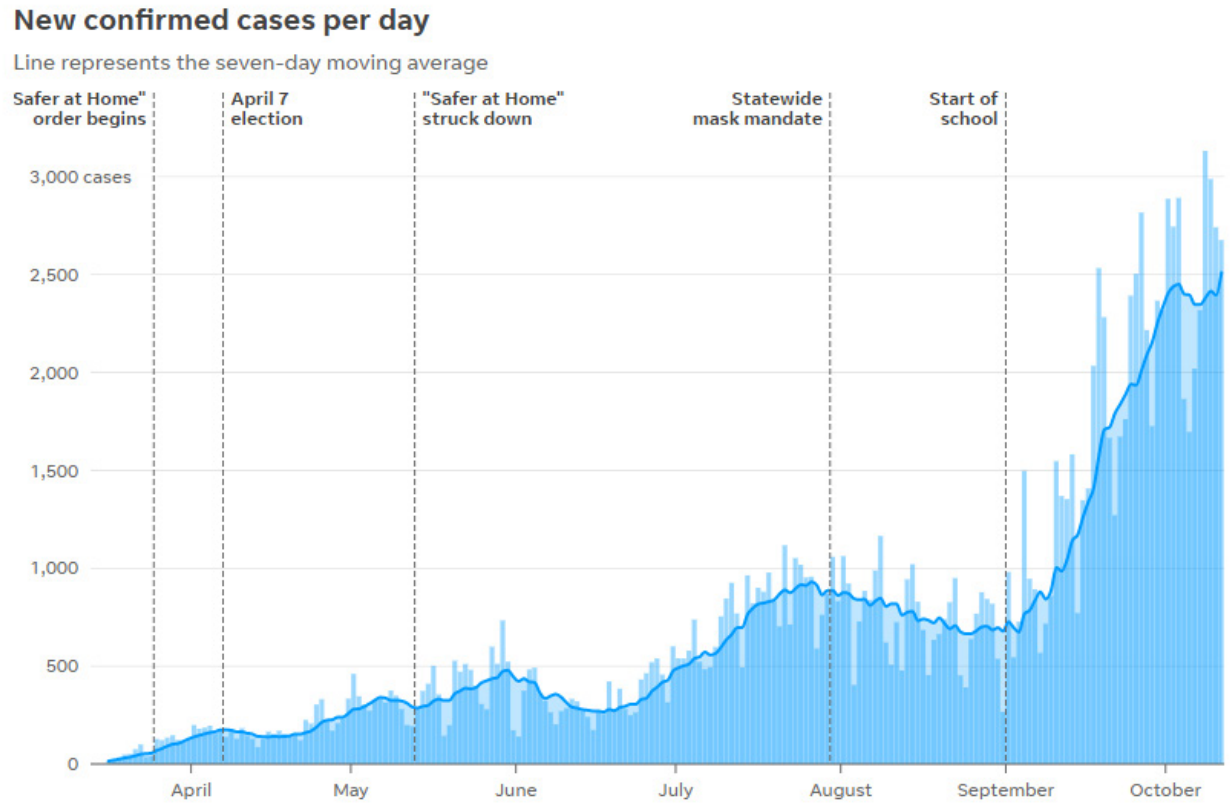
marked by election day, *RNC*, 140 S. Ct. at 120, but did not disturb the extended ballot-receipt deadline.

The district court's order extending the ballot-receipt deadline (as modified by this Court) was a massive success. It "resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely." App.49a. Undisputed testimony from Wisconsin's chief elections officer also establishes "that election officials were able to meet all post-election canvassing deadlines notwithstanding this court's six-day extension of the deadline in April, and the extension gave election officials time to tabulate and report election results more efficiently and accurately." App.82a-83a. The district court thus noted that the extension of the "election day receipt requirement actually furthered the state's interest in completing its canvass." App.82a.

But not every aspect of the spring election was so successful. In addition to "unprecedented" breakdowns in the absentee-voting process that were only partially remedied by the district court's order, *see* App.44a-51a, "severe" poll worker "shortages" forced last-minute polling-site closures in many jurisdictions, App.47a. "Milwaukee was only able to open *five* of its usual 180 polling sites, and Green bay reduced its usual 31 polling sites to just 2." App.48a. "[S]ome individuals had to wait in long lines, sometimes for hours before being allowed to vote," while others—"concerned about safety and confronted with long lines"—simply gave up and "did not cast their vote" at all, App.47a-49a.

B. The Worsening Pandemic and November 3, 2020 General Election

1. Since April, the pandemic has gotten worse—much worse, in fact. App.51a. Indeed, "it is only *now* that Wisconsin is facing crisis-level conditions." App.13a (Rovner, J., dissenting). "[N]ew infections are surging in Wisconsin and threatening to overwhelm the State's hospitals." *Id.* "Hospitalization rates are at record highs," and "the State is now proceeding with plans to open a field hospital to address the shortage of hospital beds." App.21a. This chart, from the Milwaukee Journal Sentinel,[1] says it all:



[1] Available at https://projects.jsonline.com/topics/coronavirus/tracking/covid-19-cases-testing-and-deaths-in-wisconsin.html (last accessed October 12, 2020).

2. Confronted with an accelerating pandemic, the *Swenson* Plaintiffs (Applicants here), asked the district court in June to enjoin certain requirements of Wisconsin law, and to require that Defendants implement a series of measures to ensure safe and effective voting. Three other plaintiff groups also sought relief. The district court granted Applicants' request in only two respects: (i) it extended the ballot-receipt deadline, as it had in April, but retained the existing "postmarked by" deadline as required by this Court; and (ii) it enjoined Wisconsin's county-residence requirement. As to those forms of relief, the district court made the following factual findings:

a. Not only was there "*no* evidence" that the problems plaguing absentee voting in the April election "have *or* will be resolved in advance of the November election," evidence of an even broader breakdown is mounting:

- roughly "2 million individuals" are expected to vote absentee in November, a million more than led to statewide dysfunction in April, App.79a;
- "the record establishes that the USPS's delivery of mail has slowed" since April and the carrier "will undoubtedly be overwhelmed" in November, App.80a; and
- the WEC itself "acknowledges that the unprecedented numbers of absentee voters" will be "very challenging" to manage without an extension, even "despite their best efforts to prepare" for the "record volume of absentee ballots," *id*.

Absent an extension of the ballot-receipt deadline identical to that in April, the court found, the number of voters who would be disenfranchised through no fault of their own "could well exceed 100,000." App.83a; *see DNC v. Bostelmann* ("*DNC* ECF"), No. 20-249 (W.D. Wis.), ECF No. 475:33-34 (WEC Commissioner Jacobs noting that "several hundred thousand voters" would be disenfranchised).

b. The district court separately enjoined enforcement of Wisconsin's county residence requirement, Wis. Stat. § 7.30(2), which requires election officials to be "qualified elector[s] of a county in which the municipality where the official serves is located." *See* App.91a-92a. In April, the requirement meant that "local municipalities struggled to recruit and retain sufficient poll workers," leaving in-person voting "severely limited." App.91a. And "even with substantially greater warning and opportunity to plan," shortages persisted in Wisconsin's recent and "much smaller" August Partisan Primary. *Id.* In fact, Wisconsin's chief election officer "testified that her *biggest worry* in the administration of the November election is a lack of poll workers for in-person voting on election day." *Id.* (emphasis added). Enjoining the county-resident requirement was necessary, the court found, to "provide greater flexibility across the state to meet unanticipated last-minute demands for staffing due to COVID-19 outbreaks or fear." *Id.* The injunction also would allow effective allocation of the National Guard, should the Governor elect to employ that option in November. *Id.*

c. Notably, the district court was "mindful" of *Purcell*, making specific findings as to "the risk that any of its actions may create confusion on the part of voters,

either directly or indirectly, by creating additional burdens on the WEC and local officials." App.67a. In particular, the district court found that issuing its decision six weeks before the election would "ameliorate" any risk of voter confusion and "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." *Id.*

3. Having acted so far in advance of the November election, the district court was able to stay its order for seven days to provide an opportunity for emergency appeal. App.101a. The WEC—the entity charged with the power to administer elections in the State—did not appeal or otherwise object to the district court's remedies. But the Legislature and two Republican Party entities that had intervened in the district court filed emergency stay motions in the Seventh Circuit. The Seventh Circuit initially held that both movants lacked standing to appeal, holding as to the Legislature that state law did not grant it authority to litigate as the State's agent and thus that it lacked standing under this Court's decision in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019). *See DNC v. Bostelmann*, 2020 WL 5796311 (7th Cir. 2020).

The Legislature filed a motion for certification, asking the Seventh Circuit to certify the standing question to the Wisconsin Supreme Court. When the panel denied the motion, the Legislature filed an en banc petition, requesting in part that the en banc court certify the same question. While its en banc petition was pending, the Legislature filed an original action in the Wisconsin Supreme Court (naming

only one of the parties in the federal proceedings as respondent) asking that court to issue an opinion reversing the Seventh Circuit panel's construction of state law. Treating the Legislature's en banc petition as a petition for panel rehearing, the Seventh Circuit certified the question to the Wisconsin Supreme Court, noting that the delay would not be prejudicial to either side because "[n]one of the district court's orders require[d] substantive action before October 15."[2] The Wisconsin Supreme Court held that the Legislature was authorized to act as the State's agent to defend the constitutionality of state law, *DNC v. Bostelmann*, 2020 WL 5906141 (Wis. Oct. 6, 2020), which meant in turn that the Legislature had Article III standing.

4. On return from the Wisconsin Supreme Court, the Seventh Circuit granted the Legislature's motion for a stay. The panel majority offered two reasons. *First*, although the court of appeals had refused to stay an extension of the ballot-receipt deadline just four days before Wisconsin's April election, the panel here felt bound by this Court's decision in *Purcell* because the district court entered its injunction "only" six weeks before the election. App.3a. *Second*, based largely on Justice Kavanaugh's concurrence in *Andino*, the panel held that the design of electoral procedures during the pandemic is exclusively "a legislative task." App.4a. The

[2] The closest-in-time relief that the district court ordered was a one-week extension of the October 14, 2020 deadline for online and mail-in registration, as sought by the DNC. App.2a. The Seventh Circuit stayed that relief, along with the rest of the district court's order, App.2a-3a, and the DNC does not intend to seek to vacate that portion of the Seventh Circuit's stay in this Court.

panel majority's short opinion did not address the district court's relief as to the county-residence requirement, calling it relief that "need not be described." App.2a.

Judge Rovner issued a lengthy dissent, lamenting the panel's decision as a "travesty" whose "inevitable result will be that many thousands of Wisconsin citizens will lose their right to vote despite doing everything they reasonably can to exercise it." App.8a (Rovner, J., dissenting). The majority's decision, Judge Rovner explained, was "inconsistent both with the stated rationale of *Purcell* and with the *Anderson-Burdick* framework." *Id.* As to *Purcell*, the panel majority failed to "evaluate all of the factors that bear on the prosperity of judicial intervention …, including in particular the possibility of voter confusion," which is entirely absent here. *Id.* at 8a-13a. Judge Rovner also criticized the majority's misapplication of *Andino*, explaining that "what the majority proposes is total deference to state officials in the context of pandemic, with no degree of judicial scrutiny at all." *Id.* at 14a. Such deference is particularly unwarranted here, Judge Rovner reasoned, because the officials "charged with enforcing Wisconsin's election rules" do not oppose the district court's order, *id.*, while the state Legislature has undertaken *no* efforts to accommodate voting during the pandemic, *id.* at 14a-16a, "leav[ing] voters at the mercy of overworked state and local election officials, a hamstrung Postal Service, and a merciless virus," *id.* at 27a. "Good luck and G-d bless, Wisconsin," Judge Rovner concluded. App.32a. "You are going to need it." *Id.*

STANDARD OF REVIEW

This Court may vacate a stay if the court below "demonstrably erred in its application of accepted standards." *Planned Parenthood of Greater Tx. Surgical*

Health Servs. v. Abbot, 571 U.S. 1061 (2013) (Scalia, J., concurring) (quotations omitted); *see also W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). The standards applicable to the Seventh Circuit's stay decision—which went unmentioned in the panel's opinion—are those set out in *Nken*: (1) whether the movant (here, the Legislature) made a strong showing that it was likely to succeed on the merits; (2) whether the movant would have been irreparably injured absent a stay; (3) whether a stay would substantially injure other parties; and (4) the public interest. 556 U.S. at 434. The first two factors are the "most critical." *Id.*

"[I]n addition to the harms attendant upon issuance or nonissuance of an injunction," this Court has also instructed courts of appeals in election-law cases to weigh "considerations specific to [those] cases and [their] own institutional procedures." *Purcell*, 549 U.S. at 4. Orders modifying state election laws must not "themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. And this Court has admonished courts of appeals to mind their own institutional limitations, and accord proper deference to district court factfinding and discretion. *Id.* at 5-6. In recent cases, moreover, at least one member of this Court has suggested exercising greater caution where the state legislature has specifically considered a question and exercised its legislative judgment as to the details of how to resolve it. *See Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring). In no case, however, has this Court ever set forth a hard-

and-fast rule against judicial action to protect the right to vote. *See, e.g.*, *RNC v. Common Cause R.I.*, 2020 WL 4680151 (U.S. Aug. 13, 2020).

REASONS FOR VACATING THE STAY

I. THE PANEL DEMONSTRABLY ERRED IN ITS APPLICATION OF THIS COURT'S ELECTION-LAW CASES.

The panel decision did not apply the traditional stay factors (which itself is demonstrable error). Instead, the panel overread this Court's cases to erect two independent barriers to judicial relief in advance of an election. First, the panel construed *Purcell* to mean that federal courts may never "change electoral rules close to an election." App.3a. Second, the panel held that addressing the problems posed by the COVID-19 pandemic is solely a legislative task—*even if*, in the absence of legislative action, the fundamental right to vote would be severely burdened. App.4a-6a. This Court has never endorsed either proposition, and the panel demonstrably erred in its application of this Court's cases.

A. The Panel's Decision Conflicts With *Purcell*.

Although the Seventh Circuit refused to stay identical relief just *four days* before Wisconsin's spring primary, *see DNC II*, 2020 WL 3619499, at *1, the panel here held that *Purcell* foreclosed relief outright. The sum and substance of the panel's reasoning was that the election is in November, and the district court issued its decision six weeks before election day. The panel did not acknowledge that Applicants sought a preliminary injunction on June 26. The panel did not acknowledge, let alone address, the district court's undisputed findings that the concerns animating *Purcell* are not present on this record—trial court findings that *Purcell* itself

held must be accorded deference. Nor did the panel consider the likelihood of voter confusion and any consequent incentive for voters to stay away from the polls. And for the reasons explained below, there is no such likelihood, particularly as to the two aspects of relief at issue in this Application. The panel's decision, in other words, conflicts directly with *Purcell*.

1. In *Purcell*, this Court reversed in part because the court of appeals' decision failed to "give deference to the discretion" and "factual findings" of the district court. 549 U.S. at 5. The panel majority made exactly the same error here.

The district court here specifically addressed *Purcell*'s concern regarding "the risk that any of its actions may create confusion on the part of voters," and found that issuing its decision six weeks "in advance" of the election would "ameliorate that risk" by giving the WEC and local election officials "sufficient time … to implement any modifications to existing election laws, and to communicate those changes to voters." App.67a. These factual findings are fully consistent with *Purcell*, which itself acknowledged that the farther away the election, the lower the risk. 549 U.S. at 5. "Of all" the judges in this case, "Judge Conley is the one judge who heard the evidence first-hand and is closest to the ground in Wisconsin." App.22a (Rovner, J., dissenting); *see id*. at 11a ("Judge Conley gave careful attention to whether state election officials would have the time and ability to implement the changes he ordered."). Under *Purcell*, the panel "owed deference" to his findings. 549 U.S. at 7. Yet the panel *ignored* them completely, finding for itself—based on *no supporting evidence*—that six weeks out was just "too close." App.4a.

Because "[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect," the panel clearly and demonstrably erred in its application of *Purcell*, 549 U.S. at 8.

2. The panel's failure to account for the district court's factual findings flowed from a broader legal error: the panel appears to have read *Purcell* to impose a hard stop on any relief in "close" proximity to an election, regardless the relief at issue. *Purcell* held no such thing. As Judge Rovner correctly observed, "*Purcell* articulated not a rule but a caution: take care with last-minute changes to a state's election rules, lest voters become confused and discouraged from voting." App.8a (Rovner, J., dissenting). Thus, as Judge Sutton has explained, while the imminence of an election will "often" counsel a federal court to stay its hand, "[t]hat will not always be the case. This generalization surely does not control many election-related disputes—keeping polls open past their established times *on* election day or *altering the rules for casting ballots … during election week*[.]" *Ohio Rep. Party v. Brunner*, 544 F.3d 711, 718 (6th Cir. 2008) (en banc) (opinion of Sutton, J.) (emphasis altered), *vacated on other grounds by* 555 U.S. 5 (2008). The question in any election-law case—as it was in *Purcell*—is simply whether the risk of "voter confusion" outweighs the public's "strong interest in exercising the fundamental political right to vote." *Purcell*, 549 U.S. at 3-5 (quotations omitted).

Nor have any of this Court's cases since *Purcell* suggested a strict two-months-before-election-day deadline for district court rulings changing voting requirements. The Seventh Circuit believed that *Frank* did so, but there was no sug-

gestion in *Frank* that the district court's injunction against Wisconsin's voter identification law—which issued well before Election Day—had come too late. *See Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014). If anything, it was the Seventh Circuit's *stay* of the district court's injunction that was too late in that case, not the district court's injunction itself, especially since the stay was likely to result in voter confusion. *See* 574 U.S. at 929 (Alito, J., dissenting). And this Court did not hesitate to *vacate* that stay, even in the second week of October. Since *Frank*, this Court has routinely altered the terms of an election far closer in time to election day than would be necessary in this case. A week after *Frank* was issued in 2014, this Court denied an application to vacate a stay of a permanent injunction against a Texas voter ID law. *Veasey v. Perry*, 135 S. Ct. 9, 9-10 (2014). Because the State had already taken steps to comply with the injunction, the effect of this Court's decision was to change an election procedure just 17 days before an election. *Id.* at 10-11 (Ginsburg, J., dissenting). Likewise in *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018), this Court denied an application to vacate an Eighth Circuit stay, the effect of which was to upend the status quo rules about voter identification that had been in place since the preceding primary election. *See Brakebill v. Jaeger*, 2018 WL 1612190 (D.N.D. Apr. 3, 2018).

And not one of those cases featured the sort of "last-minute event" that the Seventh Circuit suggested would be necessary to adjust voting rules within two months of election day. To the contrary: the ever-evolving COVID-19 pandemic and USPS crisis that motivated the district court's injunction in this case are far

closer to "last-minute event[s]" than any concerns about the voter ID requirements in *Frank*, *Veasey*, and *Brakebill*. This Court's cases thus make clear that the timing of relief in a voting-rights case is just one of several factors that bear on whether judicial intervention is necessary.

3. The panel majority, however, failed to "evaluate" any "of the factors that bear on the propriety of judicial intervention" close to an election, "including in particular the possibility of voter confusion." App.10a (Rovner, J., dissenting). As explained, *supra* at 13, 16, the panel's decision was based on timing alone. Had the panel addressed the concerns animating *Purcell* as to the two forms of relief at issue here, it would have had no trouble concluding that a stay was not warranted (exactly as it held in April).

Ballot-receipt deadline. While some court orders no doubt can result in voter confusion and disenfranchisement, it is difficult to comprehend how the *extension* of a ballot-*receipt* deadline—for ballots mailed in accordance with the deadlines set forth in Wisconsin law and unaltered by the district court—could possibly yield that result. *See* App.10a-11a (Rovner, J., dissenting). As with court orders keeping polls open, the *only* possible consequence of the district court's order is the enfranchisement of more Wisconsin voters who mark, sign, witness, and mail their ballots by election day. *Id*. Indeed, "the results of the April election in Wisconsin demonstrate that only in the absence of judicial intervention will voters be disenfranchised." App.11a-12a (Rovner, J., dissenting). And the conclusion that the district court's modest extension of the ballot-receipt deadline will not harm the election process is

further bolstered by the conduct of state election officials, who "signaled a preparedness and ability to comply with [this] modification[.]" App.11a (Rovner, J., dissenting); *see id.* at 7a (state election officials do not "complain[] of any undue burden imposed by the district court's decision or any risk of voter confusion"); *see also Common Cause*, 2020 WL 4680151, at *1 (refusing to grant a stay where "no state [election] official has expressed opposition").

County-residence requirement. There is no plausible *Purcell* concern with the district court's order enjoining the county-residence requirement, nor has one *ever* been articulated. It obviously will not confuse voters, who do not decide whether to vote based on pollworkers' counties of residence. *See* App.11a (Rovner, J., dissenting) (changes "directed to election officials and what they must do …. [b]y their nature … will not impact voter decisions"). *Purcell* considerations actually cut the other way: the injunction means that fewer polling places will be consolidated at the last minute, allowing designated polling places to open as they normally would and *alleviating* voter confusion. "Perhaps as a result, the [Legislature] make[s] no claim that" this aspect of the district court's order "will cause a decrease in election participation." *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020), *stay denied by Common Cause*, 2020 WL 4680151; *see also* App.31a (Rovner, J., dissenting) ("The Legislature has articulated no reason why this accommodation is either unnecessary or inappropriate.").

4. A final note about *Purcell*. In the scant few cases in which this Court has discussed *Purcell*, *see* App.8a-10a (Rovner, J., dissenting), it has always character-

ized the decision as holding that "federal courts should *ordinarily* not alter the election rules on the eve of an election." *RNC*, 140 S. Ct. at 1207 (emphasis added). But these are extraordinary circumstances. The world is in the midst of a once-in-a-lifetime pandemic caused by a virus that spreads most easily in the conditions in which we usually vote. As a consequence, millions of voters, at the encouragement of the State, have turned to voting by mail, even while the Postal Service is hampered by delays. Whatever the rule for ordinary circumstances, *Purcell* has precious little to say about the circumstances here. If anything, *Purcell*'s reasoning should *support* the relief ordered by the district court. As Judge Conley made clear in his opinion, and as Judge Rovner reiterated in her dissent, this relief is designed to *prevent* voter confusion and disenfranchisement caused by these extraordinary circumstances. It is thus entirely consistent with the reasoning of *Purcell*.

Perhaps recognizing as much, the panel suggested that *Purcell* might allow for judicial relief in response to a "last-minute event." App.4a. But *Purcell* plainly did not articulate such a rule, nor would one make sense. Why should federal courts be required to countenance widespread disenfranchisement simply because the conditions in Wisconsin giving rise to that disenfranchisement may have started a few months back? The precise timing of the onset of the virus is not what matters; it is how the virus is interacting with the electoral process in Wisconsin at the time of the election that does. After all, while the virus itself is not new, "neither is it a static phenomenon." App.13a (Rovner, J., dissenting). "[I]t is only *now* that Wisconsin is facing crisis-level conditions," *id.*, with thousands more new

daily cases than during the April election, *supra* at 9. Things have gotten so bad that the State is "open[ing] a field hospital to address the shortage of hospital beds," and yet in the face of legislative abdication, *see infra* at 23-25, the Seventh Circuit said that federal courts were powerless to act. And the circumstances surrounding the general election *are* new: "unprecedented numbers of absentee voters," App.80a, a hobbled Postal Service, and difficulty recruiting sufficient numbers of pollworkers to open enough polls to allow for safe voting. As Judge Rovner aptly summarized: "Nothing in *Purcell* or its progeny forecloses modifications of the kind the district court ordered as the election draws nigh. Otherwise, courts would never be able to order relief addressing late-developing circumstances that threaten interference with the right to vote." App.13a (Rovner, J., dissenting).

B. There Is No Principle Of Absolute Legislative Deference.

The panel also overread this Court's recent cases addressing the COVID-19 pandemic as precluding judicial intervention in deference to "the policymaking branches of government." App.5a. But as Judge Rovner rightly pointed out, this Court has never endorsed a policy of "total deference to state officials in the context of [the] pandemic, with no degree of scrutiny at all." App.14a (Rovner, J., dissenting). The panel misapplied this Court's cases.

1. This case has virtually nothing in common with *Andino*, on which the panel principally relied. In *Andino*, the South Carolina legislature had just concluded a legislative session in which it specifically modified the State's election laws in light of COVID-19, "most notably allowing all South Carolina voters to vote absentee." Emergency Application for Stay, *Andino v. Middleton*, No. 20A55 at 4-5

(U.S. Oct. 1, 2020). But while the legislature "debated eliminating the witness requirement," it ultimately declined to do so, exercising its legislative judgment that retaining the witness requirement was necessary to deter and police voter fraud. *Id.* at 5. Against *that* backdrop, Justice Kavanaugh reasoned that the "State legislature's decision either to keep or to make changes to election rules to address COVID-19" should be respected. *Andino*, 2020 WL 5887393, at *1.

Here, by contrast, none of the relief presents voter fraud concerns,[3] and the Legislature did not even consider making "accommodations in the election rules to account for the burdens created by the pandemic," App.7a-8a (Rovner, J., dissenting), even though "[t]he State itself purports to want people to vote absentee," *id.* at 28a. While *Andino* and many of this Court's other precedents suggest that the *exercise of legislative judgment* is due deference, no case or plausible legal principle counsels deference in the *absence* of such judgment: courts cannot "blindly defer to a state legislature that sits on its hands while a pandemic rages." *Id.* at 32a; *see also id.* at 27a.

It bears emphasizing as well that "South Carolina's entire government object[ed] to the district court's injunction" in *Andino*, *Andino* Stay Application at 23, providing further proof that the witness requirement at issue there really was the

[3] The Legislature has never argued that extending the ballot-receipt deadline or allowing cross-county sharing of pollworkers will lead to fraud, and the district court imposed a "postmarked by" requirement to address this Court's concerns in *RNC*.

product of reasoned judgment. Again, just the opposite is true here: no state election official opposes the modest relief ordered by the district court. *See infra* at 26.[4]

2. To the extent the panel believed any of this Court's other COVID-19 decisions required a stay, it was badly mistaken.

a. Although the question whether to stay the district court's extension of the ballot-receipt deadline was not before this Court in April, *see RNC*, 140 S. Ct. at 1206, that litigation provides a natural experiment against which to test the Legislature's (unsubstantiated) claims.[5] The district court found that a six-day extension of the ballot-receipt deadline, as modified by this Court's *RNC* decision, *enfranchised* 80,000 voters. It is undisputed that the November general election will have significantly higher turnout, so if April is any guide, a stay would effectively *disenfranchise* 100,000 voters or more, as the district court found. *Supra* at 11. By contrast, the Legislature adduced *no* evidence that the April extension caused "voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. One would expect the Legislature to have marshalled this evidence if it in fact existed, but throughout this litigation the Legislature has taken the opposite position—i.e., that the April election was a major success, with "unprecedented" and "extraordinarily high" voter turnout. *See DNC* ECF No. 454 at 13. The April election also refutes the Legislature's claim of administrative burden. In fact, the un-

[4] Many of these same features distinguish this case from *Merrill v. People First of Alabama*, 2020 WL 3604049 (U.S. July 2, 2020).

[5] As Judge Rovner observed, while this Court did not directly confront the question, "had there been a substantial risk of confusing voters," it is difficult to imagine that neither the Seventh Circuit nor this Court would have prevented the ballot-receipt-deadline extension from going into effect in April. App.11a (Rovner, J., dissenting).

disputed evidence showed that the April extension *relieved* burdens on overworked election officials. *Supra* at 8*; see Purcell*, 549 U.S. at 7.

b. *Common Cause* is also instructive. As in *Common Cause*, "no state [election] official has expressed opposition" to the district court's order. 2020 WL 4680151, at *1. That is a powerful reason to deny a stay. It is also a good reason to discount the Legislature's claim of administrative burdens, since the officials with actual experience administering Wisconsin elections do not share the Legislature's view. *Supra* at 12. Their unique perspective "ought to count for something." App.14a (Rovner, J., dissenting).

c. The Court's remaining COVID-19 election cases are much farther afield. Unlike in *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020), for instance, where the Plaintiffs sought universal absentee voting under the 26th Amendment, Plaintiffs here do not request sweeping relief or rely on novel theories. Consequently, Plaintiffs have a far greater likelihood of prevailing on the merits. *See infra* Part II. Indeed, Wisconsin already provides universal absentee voting; the relief here is simply designed to make that option effective and ensure that in-person voting is safe. *See id*. The same is true for this Court's cases regarding ballot initiatives and signature requirements: Applicants have a far greater likelihood of success on the merits. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Clarno v. People Not Politicians Ore.*, 2020 WL 4589742 (U.S. Aug. 11, 2020); *Thompson v. DeWine*, 2020 WL 3456705 (U.S. June 25, 2020).

II. THE LEGISLATURE FAILED TO MAKE A STRONG SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS.

To stay the district court's order, the Legislature was required to make a "strong showing that it was likely to succeed on the merits." *Planned Parenthood*, 571 U.S. at 506 (Scalia, J., concurring). Yet the panel barely mentioned the merits of Plaintiffs' claims at all, because it was laboring under the misimpression that the district court was powerless to remedy Plaintiffs' injuries, no matter how severe the burden on their fundamental right to vote. *Supra* Part I. Had the Seventh Circuit undertaken *any* serious analysis of the merits, it would have necessarily concluded that the Legislature came nowhere close to undermining the district court's thorough analysis under *Anderson-Burdick*.

That standard requires a court to weigh "the character and magnitude of the asserted injury to [voting] rights" against "the precise interests put forward by the State as justifications for the burden imposed." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Evaluating COVID-19's "unique challenges to Wisconsin's election system and burdens [on] Wisconsin voters," the district court correctly granted Applicants limited but crucial relief under the *Anderson-Burdick* framework, extending Wisconsin's absentee-ballot-receipt deadline by six days for ballots postmarked by election day and enjoining the county-residence requirement for pollworkers. App.67a.

A. The District Court Correctly Extended The Absentee-Ballot Receipt Deadline By Six Days For Ballots Postmarked By Election Day.

In April, the district court extended the absentee-ballot receipt deadline by six days, *DNC*, 2020 WL 1638374, at *20, *22, and the Seventh Circuit affirmed that relief and denied a stay, *DNC II*, 2020 WL 3619499, at *1. This Court added a requirement that ballots be postmarked before or on election day to be counted, *RNC*, 140 S. Ct. at 1206-08, but the receipt-deadline extension itself went into effect in Wisconsin for the April election. Again, "any objective view of the record" compels "the inevitable conclusion" that the April extension vindicated "as many as 80,000 voters' rights." App.35a, 49a, 83a; *see also* App.7a (Rovner, J. dissenting) ("Only as a result of judicial intervention … were some 80,000 absentee ballots, their return delayed by an overwhelmed election apparatus and Postal Service, rescued from the trash bin."). The district court issued *exactly* the same relief here, extending the November ballot-receipt deadline by six days for ballots postmarked by election day. App.79a.

A central difficulty is that Wisconsin law authorizes voters to request an absentee ballot by mail up until five days (Thursday) before election day, Wis. Stat. § 6.86(1)(b), but requires all ballots to arrive at the polling place by 8 PM on election day, Wis. Stat. § 6.87(6). However that scheme works in normal times, if election officials are flooded with absentee-ballot requests or if USPS is overwhelmed—as the district court found was "near certain"—many absentee ballots cannot be mailed out and received back by election day, *even though the voter complied with state law*. App.52a-53a, 80a-81a.

That is what happened in April, and "there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election." App.80a. For example, the "WEC is now projecting" that the millions of absentee ballot requests in November will exceed "the number of absentees by a factor of three for any prior general, presidential elections," and exceed "by as much as a million the number … that overwhelmed election officials during the April 2020 election." App.79a. The WEC explains that "the unprecedented numbers of absentee voters will again be very challenging for local election officials to manage." App.52a. Making matters worse, there will be severe USPS delays in November, App.80a, creating a "high risk" that Wisconsin voters' ballots will go uncounted—even if *requested far in advance* of the statutory deadline. App.53a; App.45a, n.10 ("Administrator Wolfe testified that it may 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.").

The Seventh Circuit failed to grapple with any of this, other than to suggest that "any person who wants to avoid voting in person on Election Day" can do so "by planning ahead," and that the "district court did not find" that anyone other than "voters who wait until the last minute" would face problems voting absentee. App.4a-5a. The Seventh Circuit's cursory analysis cannot be reconciled with the district court's plain-as-day factfinding, the fundamental nature of the right to vote, or the reality of the pandemic.

Contrary to the Seventh Circuit's assertion, the district court found that absent an extension, "tens of thousands" of "*prudent*"—not procrastinating—voters will not timely "receive [an absentee ballot], vote, and return it for receipt by mail before the election day deadline *despite acting well in advance of the [legal] deadline for requ[esting] a ballot*." App.81a (emphasis added). This is so because of "the sheer volume [of absentee ballots] expected this November," straining the resources of both local election officials and USPS, "despite their best efforts to prepare for and manage this influx." App.80a. And absentee ballot demand likely has only increased since the district court's decision in light of recent surge of the pandemic in Wisconsin. *See supra* at 9.

Further, Wisconsin cannot choose to provide mail-in voting—and strongly "urg[e]" "as many people as possible" to use that system during the pandemic, App.52a—but then allow thousands of law-abiding voters to be disenfranchised, despite perfect compliance with Wisconsin's statutory scheme. *See Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 110-12 (2d Cir. 2008). Voting rights are severely burdened when voters are disenfranchised despite "follow[ing] the ostensible deadline for their ballots only to discover that their votes would not be counted." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1324-25 (11th Cir. 2019). *If* a state provides a vote-by-mail option, *then* it must ensure that option is effective—a contrary rule would effectively allow a state to deceive voters and lead to wide-scale voter confusion and certain disenfranchisement. *See* App.26a (Rovner, J. dissenting) ("Voters do not run the State's election apparatus or the U.S. Postal Service;

they have no special insight into how quickly their timely requests … will be processed by election officials and how quickly the Postal Service will deliver their ballots. … It is not reasonable to insist that voters act more quickly than state deadlines require them to do in order to ensure that either the State or the Postal Service does not inadvertently disenfranchise them because they are overwhelmed.").

Moreover, voters who do not return their ballots a month in advance of the election are not, as the Seventh Circuit seemed to think, procrastinating without reason; as the district court explained, it is "unreasonable to expect undecided voters to exercise their voting franchise by absentee ballot well before the end of the presidential campaign, especially when Wisconsin's statutory deadline is giving them a false sense of confidence in timely receipt." App.81a-82a. Wisconsin's system unlawfully sets up these massive swaths of "reasonabl[e]" rule-following voters "for failure in light of the near certain impacts of this ongoing pandemic." App.81a. And the Seventh Circuit completely disregarded voters who submit *early* requests but whose ballots are delayed through no fault of their own. App.44a (finding that "numerous" voters timely—"often two or three weeks before the election"—"requested an absentee ballot but never received it *or* received it after election day").

The Seventh Circuit's suggestion that the Wisconsin statutory scheme has the same effect "with or without a pandemic," App.5a, perfectly captures its failure to come to terms with the record. It is "[t]he strain that the pandemic and the sudden, unprecedented preference for absentee voting place[s] on state and local offi-

cials" and USPS—not the ordinary operation of Wisconsin law—that is likely to cause systemic disenfranchisement in November, absent extension of the ballot-receipt deadline. App.17a (Rovner, J. dissenting). In normal circumstances, the vast majority of Wisconsin voters cast their ballots in person; the absentee system serves as a courtesy for a minority of voters who wish to make use of it. App.47a ("Absentee votes never comprised more 20% of all ballots in recent past elections, and often, they represented less than 10% of ballots cast."). But the COVID-19 pandemic upset this paradigm; as the district court found, absentee ballots comprised 73.8% of ballots in the April 2020 election, and the numbers for November are expected to be record-shattering. App.44a, 47a, 79a-80a. Making matters worse, COVID-19 has severely impacted USPS, causing significant mail slowdowns. App.44a, 53a. Thus, although the absentee-ballot receipt deadline "has worked for the most part during a normal election cycle" without creating a significant backlog, "the same statutory deadline is likely to disenfranchise a significant number of voters in the November election." App.80a.

The same erroneous logic infected the Legislature's suggestion below that voters who experience any absentee-voting mailing or processing problems can simply vote in person on election day. Sure—in ordinary times. But the Legislature's argument ignores the real risks (and legitimate fear) that a once-in-a-century pandemic, "which at present is surging in Wisconsin," creates for in-person voting. App.16a (Rovner, J. dissenting); *id.* at 25a ("[H]aving in mind the shortfalls with the April election and the current public health crisis posed by the pandemic, it is not

unreasonable for Wisconsin voters to view the option of in-person … voting as a form of Russian roulette."). Absentee voting is now a crucial aspect of ensuring that voting rights are not "severe[ly] restrict[ed]" on a widespread scale in the upcoming election, *Burdick*, 504 U.S. at 434—as *the State itself* has recognized by urging Wisconsin voters to vote absentee. App.52a. The Legislature further overlooks that, under Wisconsin law, once a voter mails in her absentee ballot, she cannot then spoil that ballot and vote in person on election day—even if her ballot will be delayed in returning to the clerk's office. Wis. Stat. § 6.86(6).

In the courts below, the Legislature principally argued that extending the deadline undermines the State's interest in promptly reporting election results. Legislature's Emergency Motion To Stay The Preliminary Injunction ("Leg. Emergency Mot."), *DNC v. Bostelmann*, No. 20-2835 (7th Cir.) at 13. As the district court found, an interest in reporting election results more quickly cannot justify arbitrarily disenfranchising tens of thousands of voters. App.83a; *see also* App.29a (Rovner, J. dissenting) (The Legislature's "wish to have the results of the election conclusively determined on election night," "weighed against the constitutional right to vote," "is thin gruel."). Rather, prioritizing speed over accuracy would harm Wisconsin's "valid interest in protecting the integrity and reliability of the electoral process." *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014) (quotation omitted).

The Legislature's argument, moreover, is directly refuted by the record. The evidence before the district court showed that the district court's relief in April "actually furthered the state's interest in completing its canvass." App.82a-83a. As

WEC Administrator Wolfe—who, unlike the Legislature, is the State's actual expert elections official—testified, "election officials were able to meet all post-election canvassing deadlines notwithstanding this court's six-day extension of the deadline in April, and the extension gave election officials time to tabulate and report election results more efficiently and accurately." *Id.* The Legislature offers no reason to expect a different result in November. The Legislature also ignores that fourteen other states count timely-postmarked ballots that arrive in the days following the election. App.82a.

Because Wisconsin's ballot-receipt deadline is likely to systemically disenfranchise voters in November—well over 100,000 voters, App.83a—and the State lacks any interest that could justify such massive disenfranchisement, the district court properly modified the statutory deadline. The Seventh Circuit clearly erred in staying that injunction despite the virtual certainty that doing so will result in thousands of voters being disenfranchised, through no fault of their own.

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

The district court also enjoined Wis. Stat. § 7.30(2), which requires that each pollworker be "a qualified elector of a county in which the municipality where the official serves is located." Yet the Seventh Circuit *entirely ignored* this relief in the opinion below, shrugging it off as a "smaller … provision[] of the injunction [that] need not be described." App.2a. That the Seventh Circuit would stay critical relief that the district court—after meticulous factfinding—held necessary to avoid disenfranchisement, and do so without even mentioning (let alone analyzing) the relief,

underscores the degree to which the Seventh Circuit erred. Again, had it undertaken any analysis at all, the Seventh Circuit necessarily would have found that the Legislature's objections to this relief are meritless. The undisputed record conclusively establishes that "the order that local officials be allowed to employ poll workers who are not electors in the county where they will serve is both necessary and reasonable." App.31a (Rovner, J. dissenting).

In an ordinary election, each Wisconsin municipality can open sufficient polling places to allow every eligible voter to vote in person safely. Not so during COVID-19, which (the district court found) has triggered serious difficulties in recruiting and retaining pollworkers. App.47a-48a, 91a. These "severe shortages" resulted "in some localities being severely limited in providing in-person voting opportunities" in Wisconsin's April election: for example, "Milwaukee was only able to open *five* of its usual 180 polling sites, and Green Bay reduced its usual 31 polling sites to just *two*." *Id.*

Such mass closures impose impossible burdens on voters (and pollworkers) during a pandemic because they ensure that the polling locations that do open will be overcrowded, thus exacerbating a substantial risk of disease transmission. As the district court found, safe and effective in-person voting during a highly contagious pandemic cannot occur absent a sufficient number of polling locations to spread out voting. App.51a; App.31a (Rovner, J. dissenting) ("Adequate staffing of the polls is essential to minimizing … public health risks.").

Yet Wisconsin's severe pollworker shortages are likely to continue through the November election. Despite having "greater warning and opportunity to plan, local election officials still had difficulty securing adequate people for Wisconsin's much smaller August 2020 election." App.91a. And the district court found—and the Legislature does not deny—that "[i]n-person voting in November is also likely to be strained by a shortage of pollworkers, despite more time to plan for that shortage than was available for the spring election." App.54a. Administrator Wolfe testified, for example, that "despite the advance warning [and] the greater time to plan … local municipalities are still having problems filling all their polling stations." App.53a-54a. Indeed, "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. The testimony from local election officials in Green Bay and Milwaukee is in accord. *See* DNC ECF Nos. 480:123; 470:111-112; 319:50. The surging pandemic in Wisconsin can only add to the strain. *See supra* at 9.

The Legislature argued in the Seventh Circuit that lifting the county-residence requirement will not alleviate these staffing issues. Leg. Emergency Mot. at 16, 19. That argument ignores both the undisputed record and the district court's extensive factfinding. The county-residence requirement prevents those municipalities experiencing shortages from recruiting pollworkers from other jurisdictions with no shortages, and the WEC from coordinating volunteer pollworkers to go where needed as shortages arise. App.91a-92a; *see Swenson v. Bostelmann*, No.

20-459 (W.D. Wis.), ECF No. 42:20, 21. And it prevents municipalities from accessing National Guard members who reside outside of their community, should the Governor choose again to activate the National Guard. App.91a-92a; App.31a (Rovner, J., dissenting).

Critically, the WEC *agrees* that the pool of pollworkers available to local officials would be larger absent the county-residence requirement. *DNC* ECF No. 518-2:13. And both Milwaukee and Green Bay testified that allowing inter-county sharing of pollworkers would help abate shortages in the November election. *DNC* ECF Nos. 470:111-113; 494:24; 480:143-144.

In its attempt to justify the stay, the Legislature pressed Wisconsin's interest in promoting a decentralized approach to election management. Leg. Emergency Mot. at 16. But that interest would not be harmed in any way by the district court's injunction. No municipality will be *forced* to hire pollworkers from outside the county; the district court's order simply allows them flexibility to do so if a particular municipality deems it necessary. And "if a county or municipality lacks sufficient pollworkers and wishes to recruit workers from other locations within the state," then "the municipality or county has already conceded its inability to maintain [the decentralized election-management] interest while still conducting a meaningful election." App.91a-92a. Regardless, the Legislature's amorphous interest in decentralized election management cannot justify restricting the ability to send resources where needed in the face of "expressed, local need" during an unprecedented pandemic. App.92a.

Remarkably, one of the Legislature's core premises in this case is that the availability of in-person voting renders fundamental failures in the absentee-voting process constitutional. The Legislature cannot credibly point to in-person voting as an independent and constitutionally adequate alternative, while opposing "a modest and entirely reasonable means" to ensure that in-person voting is safe, "one that poses no risk to the integrity of the election." App.31a (Rovner, J. dissenting). The district court's relief is critical to solving the most significant problem standing in the way of opening sufficient and safe polling places in Wisconsin. The district court committed no error in ordering that modest relief; the Seventh Circuit committed serious error in staying that relief with zero analysis.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST REQUIRE VACATING THE STAY.

Irreparable harm occurs where it "would be difficult—if not impossible—to reverse the harm," *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010), or where an applicant cannot "be afforded effective relief" even if she eventually prevails on the merits. *Nken*, 556 U.S. at 435. The panel here erred by failing even to consider "the harms attendant upon issuance or nonissuance of an injunction." *Purcell*, 549 U.S. at 4. That is especially so because the balance of harms unmistakably supports vacatur, as does the public interest: voters will suffer irreparable injury if this Court does not vacate the panel's stay, and the Legislature has not shown that the district court's modest relief would cause any harm at all, let alone irreparable injury.

The district court correctly found that, absent effective injunctive relief, tens of thousands of voters will likely be disenfranchised by Wisconsin's ballot-receipt

deadline, and countless others will be subject to polling-place closures and consolidation. That disenfranchisement is quintessential irreparable harm.

For the tens of thousands of voters who are prevented from casting ballots because of Wisconsin's absentee ballot-receipt deadline, the harm is irrefutable. "A restriction on the fundamental right to vote … constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Eligible citizens have a "strong interest in exercising the 'fundamental political right' to vote," and there is no relief that can compensate them for the harm of not being able to participate in the electoral process. *Purcell*, 549 U.S. at 4; *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) ("Because there can be no 'do-over' or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction."); *accord League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016). And voters who seek to avoid that harm by attempting to vote in person during the current public health crisis face a different type of irreparable injury: harm to their health, and potentially their lives. *See Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 62 (D.C. Cir. 2019) (finding that the fact that "[p]eople could be injured or die" as a result of challenged government action constituted irreparable harm). It should go without saying that no voter should be forced to risk her life in order to exercise the right to vote. It should also go without saying that the public interest favors safe and effective voting.

There is nothing on the other side of the ledger. First, as to the ballot-receipt deadline, the Legislature has claimed only that the district court's six-day extension would prevent the State from conclusively determining the results of the election on election night. *See* Leg. Emergency Mot. at 18. But it cited no authority—nor could it—holding that an amorphous (and unsubstantiated, *see supra* at 33-34) claim of "unnecessary uncertainty and delay" amounts to irreparable harm. *Id.* Nor could any such interest possibly outweigh the irreparable harm of disenfranchisement.

The Legislature also cannot show irreparable harm from the district court's order enjoining the county-residence requirement. The most the Legislature can muster is a contention that this relief undercuts "the State's desire to take a 'decentralized' approach to election administration." Leg. Emergency Mot. at 16. Even accepting the State's interest as a general matter, it has little purchase here, *see supra* at 37, and it cannot carry the day when the cost is disenfranchisement.

CONCLUSION

For these reasons, Applicants respectfully request that the stay of the district court's preliminary injunction be vacated.

Respectfully submitted,

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