No. 20A64, 20A65, 20A66

IN THE

Supreme Court of the United States

JILL SWENSON, *et al.*,

Petitioners,

v.

WISCONSIN STATE LEGISLATURE, *et al.*,

Respondents.

SYLVIA GEAR, *et al.*,

Petitioners,

v.

WISCONSIN STATE LEGISLATURE, *et al.*,

Respondents.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

WISCONSIN STATE LEGISLATURE, *et al.*,

Respondents.

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

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION TO VACATE STAY

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RULE 29.6 STATEMENT

Respondent the Wisconsin State Legislature states that it has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

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INTRODUCTION

Over the last six months, this Court has made clear time and again that COVID-19 provides federal courts with no authority to re-write state election laws. *See, e.g.*, *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Merrill v. People First of Alabama*, No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020). In the most recent of these cases, Justice Kavanaugh concurred to explain the two "alternative and independent" reasons for this consistent approach. *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring). First, "a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* (citations omitted). Second, under the principle articulated in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), "federal courts should ordinarily not alter the election rules on the eve of an election." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring).

The Seventh Circuit here scrupulously followed this Court's guidance, staying the district court's injunction that had blocked multiple Wisconsin election laws, while relying upon the same two "alternative and independent" reasons that Justice Kavanaugh articulated. *Id.* Plaintiffs come to this Court not even purporting to satisfy this Court's standard for a stay, including that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant

certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Plaintiffs' failure even to attempt to satisfy this threshold for considering a stay is, of course, fatal to their requests.

In any event, the Seventh Circuit's stay of the district court's injunction here was entirely correct on both of the grounds that Justice Kavanaugh articulated.

The Legislature's decision not to change Wisconsin's exceedingly generous election laws for the November 2020 Election falls squarely within its broad authority "either to keep or to make changes to election rules to address COVID-19," and is thus not "subject to second-guessing by an unelected federal judiciary." *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (citations omitted). Most prominent to the Applications here, Wisconsin has chosen to retain its rule, adopted by more than 30 other States, that absentee ballots must be received by election day. *See* Nat'l Conference of State Legislatures, *Receipt and Postmark Deadlines for Absentee Ballots*, https://tinyurl.com/yy29hncg ("NCSL: Receipt and Postmark Deadlines"). Plaintiffs' arguments ask this Court to adopt the unprecedented rule that a State cannot set its absentee-ballot-request deadline close to election day, in a situation where there may be mailing delays, because voters somehow "rely" upon the deadline to wait until the last minute. But, as this Court explained, in the earlier iteration of this case: "even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots . . . will usually receive their ballots on the day before or day of the election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. And while Plaintiffs engage in overheated rhetoric claiming that these common election rules

will lead to "mass disenfranchisement," *Swenson* App. 1, it is undisputed (and undisputable) that Wisconsin law gives voters who may experience some mailing delays multiple avenues to cast their ballots—including two weeks of in-person absentee voting—more avenues than are available in most other States.

Turning to Justice Kavanaugh's second reason—lower "federal courts should ordinarily not alter the election rules on the eve of an election," *Andino*, 2020 WL 5887393, *1 (Kavanaugh, J., concurring) (citations omitted)—that rationale applies with particular force here. The November Election is not just rapidly approaching, *it is already ongoing*. Wisconsinites have already requested 1,384,184 absentee ballots, 1,371,557 have been sent, and 785,536 have already been returned. *See* Wis. Elections Comm'n, *Absentee Ballot Report - November 3, 2020 General Election* (Oct. 15, 2020).[1] This ongoing election is taking place under Wisconsin's generous rules that citizens and elections officials are familiar with—including because these rules governed the just-completed August Primary Election. Plaintiffs would have this Court re-impose the district court's last-minute changes to these rules, which would give Wisconsin voters and elections officials understandable whiplash. And whatever merits there were for limited judicially imposed changes in the Spring, when voters were scrambling to change their voting behaviors to respond to a newly emergent pandemic, there is no possible justification to impose judicially such last-minute

[1] Available at https://elections.wi.gov/index.php/node/7181.

changes now. Voters have had *many weeks* to request and return their ballots, all with full knowledge of COVID-19, and have more time still.

Notably, Plaintiffs have cynically sought to mislead this Court about the position of the Wisconsin Election Commission ("Commission") in this case, purporting to suggest that here—like in *Republican National Committee v. Common Cause Rhode Island*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020)—"state election officials *support[ ]* the challenged decree." *DNC* App. 21 (emphasis added); *see also Swenson* App. 12. Plaintiffs inexplicably failed to disclose to this Court that the Commission explained below why it would not oppose or appeal *any* injunction: the Commission told the district court in clear terms it lacks "authority to . . . oppose the injunctive relief requested" and has "no authority to appeal any such [injunctive] decision." App. 5. In fact, *the Wisconsin Legislature is the only party here with the authority to speak for the State of Wisconsin's interest in the validity of its election laws, and the Legislature has opposed this injunctive relief throughout*. The Seventh Circuit below certified this very question of state-law authority to the Wisconsin Supreme Court, which held that "the Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws under [Wis. Stat.] § 803.09(2m)." *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶ 1.[2]

[2] While the Governor now appears before this Court as amicus to support some aspects of the district court's injunction, Gov. Amicus Br. 2, after not filing anything as to this relief in the district court or the Seventh Circuit, his eleventh-hour litigation position is legally irrelevant under Wisconsin law. The Governor does not administer Wisconsin election laws; the only state-wide agency with authority in that area is the Commission, a wholly *independent*, bipartisan (by statutory design) six-member body, with four members appointed by legislative leadership, and the other two appointed through a joint legislative-

Finally, following Plaintiffs' suggested approach would throw the already ongoing November 2020 Election into chaos around the country, undoing the careful work that this Court has done in making clear to lower courts that COVID-19 provides them with no license to revise election laws, especially while an election is ongoing. To take just the most obvious example, the primary aspect of Wisconsin's election laws that most of the Plaintiffs challenge here—the conventional requirement that absentee ballots be received by election day—is a feature of the laws of more than 30 States. It takes little imagination to see how numerous litigants, and at least some lower courts, would respond to such an abrupt mixed signal from this Court, both as to these commonplace ballot-receipt laws and to numerous others.

This Court should deny the Stay Applications, permitting Wisconsin's generous voting system, as adopted by Wisconsin's democratically "accountable" "State legislature[ ]," to govern the rules of the already ongoing November Election. *Andino*, 2020 WL 5887393, *1 (Kavanaugh, J., concurring) (citations omitted).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a). As the Wisconsin Supreme Court held on certification below, Wisconsin law gives "the

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gubernatorial process. Wis. Stat. §§ 5.05; 15.02(2), 15.61(1)(a)1.-6. As for the Governor's false claims of litigation authority on behalf of the State in a case, such as this one, where the Attorney General is not taking part, Gov. Mot. To File Amicus Br. 2–5, the Governor made these very state-law arguments to the Wisconsin Supreme Court during the certification proceedings below. Wisconsin's highest court necessarily rejected those arguments in holding that Wisconsin law authorizes the Legislature "to represent the State of Wisconsin's interest in the validity of state laws." *Democratic Nat'l Comm.*, 2020 WI 80 ¶ 1.

Legislature . . . the authority to represent the State of Wisconsin's interest in the validity of state laws." *Democratic Nat'l Com.*, 2020 WI 80, ¶ 1; *accord id.* ¶ 13. In other words, a Wisconsin law "authorized the [Legislature] to litigate on the State's behalf" in defense of state laws. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019).

STATEMENT

A. Wisconsin has "lots of rules that make voting easier," even as compared to "the rules of many other states." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020).

Wisconsin's exceedingly generous, no-excuses-needed absentee-voting regime is easy to use. Wis. Stat. § 6.85; *Luft,* 963 F.3d at 672. To obtain an absentee ballot, Wisconsin voters need only submit a request by October 29, 2020, if requesting it by mail, fax, or online, Wis. Stat. § 6.86(1)(ac), (b); or by November 1, 2020, if requesting it in person, Wis. Stat. § 6.86(1)(b). Registered voters could have requested an absentee ballot for the ongoing election at any point *this entire* year, and voters who do not wish to vote in-person still have ample time to request and return their ballots. *See* Wis. Stat. §§ 7.10(1), (3); 7.15(1)(cm); App. 10. Voters must then return the ballot by 8:00 p.m. on election day, which they or their agent may do by mail, via a "drop box" where available, through hand delivery to the clerk's office or another designated site, or by delivering it to their polling place. Wis. Stat. § 6.87(6).

Wisconsin law provides a special additional accommodation for "military [and overseas] voters" only: municipal clerks can "fax or email" them absentee ballots after receiving a valid absentee-ballot request. Wis. Stat. § 6.87(3)(d).

Wisconsinites who choose not to vote absentee by mail may vote in person, with multiple options to do so for two weeks "in-person absentee" until November 1, 2020, Wis. Stat. § 6.86(1)(b), and on election day itself, Wis. Stat. §§ 6.76–78, 6.80.

Polling places on election day are staffed by election officials, who each must be "a qualified elector of a county in which the municipality where the official serves is located." Wis. Stat. § 7.30(1)-(2).

B. These Applications arise from a series of consolidated lawsuits mostly filed against the Commission (and, in one case, the Wisconsin Legislature). Several of these lawsuits first began during the leadup to Wisconsin's April 7, 2020 Election. The Wisconsin Attorney General withdrew from representing the Commission in the early stages. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 3:20-cv-249 *et al.*, Dkts. 56–58 (W.D. Wis. Mar. 26, 2020); *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 958 n.2 (W.D. Wis. 2020). Thereafter, the district court granted certain injunctive relief to the plaintiffs with respect to the April 7 Election, enjoining a series of Wisconsin election laws. *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 982–83. In particular, the court enjoined the Commission from enforcing the April 2 absentee-ballot-request deadline under Wis. Stat. § 6.86(1)(b), the 8:00 p.m. election day deadline for receipt of ballots under Wis. Stat. § 6.87(6), moving that deadline to 4:00 p.m., six days after the April 7 Election, and the witness-signature requirement for all absentee ballots under Wis. Stat. § 6.87(2). *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 983.

The Legislature, along with the Republican National Committee and Republican Party of Wisconsin, appealed to the Seventh Circuit, seeking a stay of various aspects of the district court's injunction. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 *et al.*, 2020 WL 3619499 (7th Cir. Apr. 3, 2020). The Seventh Circuit granted a stay as to the witness-signature requirement, but denied any relief from the district court's order on the ballot-receipt deadline extensions with regard to the April 7 Election. *Id.* at *1.

Out of respect for the fact that voters had already relied upon the district court's ballot-receipt-deadline injunction with Election Day just days away, the Legislature appealed to this Court seeking *only* limited relief against the "narrow" aspect of the district court's order requiring the State to accept post-election-day-cast votes. *See Republican Nat'l Comm.*, 140 S. Ct. at 1206, 1208. This Court granted the Legislature's requested stay in full and, in doing so, noted the "judicially created confusion" the injunction had sown, "underscor[ing] the wisdom of the *Purcell* principle." *Id.* at 1207. This Court also explained that mail delays were insufficient to merit this invasive injunctive relief, especially because dilatory "voters who request an absentee ballot at the deadline for requesting ballots . . . will *usually* receive their ballots on the day before or day of the election." *Id.* (emphasis added).

C. Wisconsin then successfully held its April 7 Election. That election experienced "extraordinarily high" voter turnout, App. 18—with 1,555,263 votes cast, constituting 34.3% of eligible Wisconsin voters, App. 24; App. 34. As for absentee voting, 1,157,599 voters cast such ballots by mail, representing an "unprecedented

level[ ]." App. 39–41, 60; App. 81. "[T]he final election data conclusively indicate[d] that the election did not produce an unusual number [of] unreturned or rejected [absentee] ballots." App. 496. Any known reported election-administration problems were limited to long lines on election day and arose from the ill-advised decisions of high-ranking local officials in Green Bay and Milwaukee. For example, Green Bay, like other municipalities, could have avoided long lines at the polls through proper staffing, but instead, it inexplicably declined the help of National Guard members and then drastically cut and consolidated its voting locations. App. 185; App. 269–70, R.198-1:¶36; App. 298; *see* App. 401; App.415–16; R.458-1:21. By way of contrast, other major municipalities, like Madison, Wisconsin, did not unreasonably close or limit the number of polling locations and, as a result, they did not experience such Election Day difficulties. *See* App. 407–15; App. 422; App. 333. And there was no evidence the April 7 Election caused an increase in COVID-19 cases in Wisconsin, with one study concluding that "voting in Wisconsin on April 7 was a low-risk activity." App. 429 (capitalization altered).

Post-April-Election events have confirmed both the safety and effectiveness of Wisconsin's election administration system during the time of COVID-19. Wisconsin's Seventh Congressional District successfully held a special election on May 12, 2020, with 94,007 voters voting absentee, App. 437—or over 22% of the district's registered voter population, *see* App. 440. Clerks received over 69,000 of those absentee ballots by May 8. App. 443. And almost every voter who requested an absentee ballot received one. App. 437. Even more recently, Wisconsin's partisan

primary election, held on August 11, 2020, was similarly successful. Over 712,000 absentee ballots were cast,[3] and nearly every voter who requested an absentee ballot received one.[4]

The Commission has made tremendous improvements to further enhance the State's readiness for the November 2020 Election. *See generally* App. 473–86; App. 86–88, 91. The Commission elected to mail absentee-ballot applications and informational materials to "all voters without an active absentee request on file," rendering it even easier for voters to vote via absentee ballot for the November 2020 Election. App. 501; App. 504; R.227:3–4; R.247:26–27. The Commission also implemented "intelligent mail barcodes into the existing [absentee-ballot-envelope] design" for the November 2020 Election, which has and will continue to facilitate more detailed absentee-ballot tracking. App. 501; R.227:6; R.247:54–60, 99, 105. The Commission is spending up to $4.1 million of a "CARES Act sub-grant [for] local election officials," R.458-28, "to help pay for increased election costs due to the COVID-19 pandemic," R.227:5; R.458-29; R.247:75. And the Commission has made numerous upgrades to the MyVote Website and WisVote system, including to "meet the needs of clerks experiencing a large increase in the demand for absentee ballots." R.227:8–9; R.247:70–73, 128–129; *see generally* R.227:2–14; R.247:75–78.

D. Now, in mostly the same consolidated cases, Plaintiffs have again challenged a host of Wisconsin election laws with respect to the upcoming November

[3] https://elections.wi.gov/index.php/node/7067.

[4] https://elections.wi.gov/index.php/node/7067.

Presidential Election. A35–A36.[5] On September 21, the district court granted to Plaintiffs various forms of injunctive relief, including, as relevant here: (1) enjoining enforcement of Wis. Stat. § 6.87(6), which requires that a voter's absentee ballot "shall be returned so it is delivered to the polling place no later than 8 p.m. on election day," extending that deadline by six days; (2) allowing access to replacement absentee ballots online or via email from October 22, through October 29, for any voters who timely requested an absentee ballot, which request was approved and the ballot was mailed but not received by the voter, contrary to Wis. Stat. § 6.87(3)(a); and (3) enjoining Wis. Stat. § 7.30(2)'s rule that each election official must be an elector of the county in which the municipality is located. A36.

The Legislature then sought a stay from the Seventh Circuit on September 23, 2020, and the Seventh Circuit initially granted a stay. App. 509. Less than a week later, however, on September 29, 2020, the Seventh Circuit vacated its stay, concluding that none of the movants had standing to appeal. A1–A2.

The Legislature then petitioned the Seventh Circuit for emergency en banc review, *see* A2, and the Seventh Circuit certified to the Supreme Court of Wisconsin the following question under state law: "whether, under Wis. Stat. § 803.09(2m), the Wisconsin Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws." *Democratic Nat'l Comm.*, 2020 WI 80, ¶ 1. The Wisconsin Supreme Court "answer[ed] that question in the affirmative," thereby

[5] Unless otherwise noted, the Legislature's cites to "A__" are to the *Gear* Plaintiff's Appendix.

recognizing the Legislature's authority to speak for the State's interest in the validity of its laws, including its election laws. *Id.*

The Seventh Circuit then granted the Legislature's petition for reconsideration and stayed the injunction in full. A2, A6. In concluding that the district court made two fatal errors requiring the stay, the Court took guidance from the two main considerations in Justice Kavanaugh's recent *Andino* concurrence: "first, that a federal court should not change the rules so close to an election; second, that political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid." A3, A4. On this first consideration, "the district court acted too close to the election" in entering an order only "six weeks before the election." A3–A4. Second, the Court noted that it was "doubtful" that "the design of adjustments during a pandemic is a judicial task," an assumption the district court had relied upon. A4. Because "[d]eciding how best to cope with difficulties caused by disease is primarily a task for the elected branches of government," this erroneous assumption offered an independent basis for staying the injunction. A5–A6.

REASONS FOR DENYING THE APPLICATION

I. Plaintiffs Do Not Claim To Satisfy The Threshold Standard For This Court To Grant Review Of A Lower Court Decision, Which Is Reason Enough To Deny Their Stay Applications

To obtain any relief from this Court in the stay posture, a plaintiff must always *first* show that it can satisfy the traditional factors for a stay, which is designed to determine if the underlying decision is one this Court would review: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant

certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. But that showing, standing alone, is not enough for an order from this Court lifting a stay issued by an appellate court. Instead, a plaintiff *also* needs to "show[ ] cause *so extraordinary* as to justify this Court's intervention" in a lower court's decision to stay an injunction. *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers) (emphasis added).

In this case, Plaintiffs do not even attempt to make the threshold showing necessary for any relief in the stay posture. In particular, they do not argue that there is a reasonable probably "that four Justices will consider [the Seventh Circuit's grant of a stay here] sufficiently meritorious to grant certiorari." *Hollingsworth*, 558 U.S. at 190. That failure, standing alone, justifies denial of their Stay Applications.

II. All Of Wisconsin's Challenged Laws Are Constitutional, And The District Court Was Wrong To Second Guess The Legislature's Decisions Not To Change These Laws Due To COVID-19

The principles that "a State legislature's decision either to keep or to make changes to election rules to address COVID-19 ordinarily should not be subject to second-guessing by an unelected federal judiciary," provides an "independent[ly]" sufficient basis for denying the Stay Applications here. *Andino*, 2020 WL 5887393, *1 (Kavanaugh, J., concurring) (citations omitted). That is a core reason why this Court has stayed multiple court-ordered injunctions, seeking to change state election laws to comport with judicial views of elections during COVID-19. *See, e.g.*, *Andino*, 2020 WL 5887393, at *1; *Merrill*, 2020 WL 3604049, at *1; *Republican Nat'l Comm.*,

140 S. Ct. at 1205, 1206. Here, all of the relevant statutes that the district court enjoined are entirely constitutional, and Plaintiffs offer no basis to second-guess the Legislature's decision not to alter these statutes in light of the COVID-19 pandemic.[6]

A. To prevail on a substantial vote-burden claim under *Anderson/Burdick*, *see Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), Plaintiffs must satisfy a two-step inquiry. First, they must establish both a cognizable burden on the right to vote from a challenged law and that burden's severity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Alleged hardships are measured against the baseline of "the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling opinion of Stevens, J.). And burdens are assessed by looking to the State's *whole* electoral system, not a challenged provision in isolation. *Burdick*, 504 U.S. at 434, 439; *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 808 (1969). Applying that standard, this Court has held that "making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely do[ ] not qualify as a substantial burden on the right to vote." *Crawford*, 553 U.S. at 198 (controlling

[6] Plaintiffs distort Justice Kavanaugh's concurrence in *Andino*, arguing that his concurrence concluded that Courts must defer to state legislatures only where those legislatures have affirmatively modified their laws to address COVID-19 concerns. *See Swenson* App. 23–25. But Justice Kavanaugh plainly explained that "an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people," should not be "second-guessing" the elected branches' decisions on such issues, whether that decision is to make changes or retain current law. *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring)).

opinion of Stevens, J.). Second, Plaintiffs must show that the alleged burden outweighs the State's interest. *Burdick*, 504 U.S. at 434. "[R]easonable" and "nondiscriminatory" burdens will not suffice to overcome the State's legitimate interests. *Id.* (citation omitted). Finally, for facial challenges seeking wholesale alteration, as Plaintiffs sought here, they must carry an additional "heavy burden of persuasion," which requires the Court to "consider only the statute's broad application to all [of the State's] voters"—where the "facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 200, 202–03 (controlling opinion of Stevens, J.) (citation omitted).

B. Applying those principles here, the Seventh Circuit's decision staying the district court's injunction is plainly correct on the merits.

1. First, looking to Wisconsin's *entire* electoral system, *Burdick*, 504 U.S. at 434, 439, "as a whole," *McDonald*, 394 U.S. at 808, Plaintiffs have established no meaningful burdens on their right to vote. Wisconsin law gives all eligible voters multiple avenues to vote. All voters have been able to request an absentee ballot for weeks, and has even weeks more to submit such requests. *See* Wis. Stat. § 7.15(1)(cm); App. 10; *supra* p. 6. And voters retain numerous methods to return their ballots—they can return the ballot by 8:00 p.m. on election day, which they or their agent may do by mail, via a "drop box" where available, through hand delivery to the clerk's office or another designated site, or by delivering it to their polling place. A39–A40; Wis. Stat. § 6.87(6). And Wisconsinites have multiple, entirely safe options to vote in person, both for two weeks in-person absentee, Wis. Stat. § 6.86(1)(b), and

on election day, Wis. Stat. §§ 6.76–78, 6.80. Such in-person voting was safe in April, *see supra* pp. 8–10, and will be safer still in November, *see* A92–A93.

Put another way, Wisconsin allows all voters to vote safely with no more effort than is required in "making a trip to the [D]MV, gathering the required documents, and posing for a photograph," *Crawford*, 553 U.S. at 198 (controlling opinion of Stevens, J.), thus guaranteeing their franchise with only "reasonable" and minimal burdens, *Burdick*, 504 U.S. at 434 (citation omitted).

2. Even addressing piecemeal the election-law provisions Plaintiffs continue to challenge before this Court (which, to be clear, is unnecessary, *see McDonald*, 394 U.S. at 808), the district court's injunction cannot survive review.

a. Extending The Deadline To Return Absentee Ballots, Even Though Voters Have Many Weeks To Deliver Their Ballots. Wisconsin's requirement that absentee ballots be "delivered to the polling place serving the elector's residence before 8 p.m." "on election day," Wis. Stat. § 6.87(6), is plainly constitutional. Requiring voters to meet this commonplace deadline—which more than 30 states have nationwide, NCSL: Receipt and Postmark Deadlines, *supra*—imposes no burden on the right to vote. For weeks now, registered voters have been able to request a ballot immediately, and clerks have delivered them to voters in large numbers. *Supra* p. 3. Thereafter, voters can return their ballots by the election-day deadline in multiple ways: mail; "drop box"; hand delivery to the clerk's office or another designated site; and at the polling place on election day itself. A40. None of these minimally burdensome options imposes an unconstitutional burden on voters. *Crawford*, 553

U.S. at 198 (controlling opinion of Stevens, J.). And, again, voters can also simply choose to vote in person during the two-week in-person absentee-voting period, or on election day.

The district court ordered an extension of the absentee-ballot-receipt deadline to November 9—six days after election day—for all voters, so long as "the ballots [are] mailed and postmarked on or before election day, November 3, 2020." A36. This was legally impermissible for four independently fatal reasons.

First, the district court's order is legally unjustified because voters concerned about voting in person due to COVID-19 have had many weeks to vote absentee, thereby allowing them to address any possible mailing delays that were the district court's worry here. The district court's core concerns here related to "unwary voters" who might wait until the last minute to mail their absentee requests or ballots, and then the mail would not get their ballots there on time for the election-day ballot return deadline. A81 ("so-called procrastinators"). But, as this Court concluded earlier in this very case, "even in an ordinary election," without COVID-19, "voters who request an absentee ballot at the deadline for requesting ballots . . . will usually receive their ballots on the day before or day of the election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. And *Anderson/Burdick* requires no accommodation for their unwariness because the Constitution gives "little weight to the interest [of voters] . . . in making a later rather than early decision." *Burdick*, 504 U.S. at 437 (citation omitted); *see Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (failure to "act"

according to "mere[ ] [ ] time limitation[s]" is a voter's "own failure to take timely steps").

Second, even for voters who experience some mailing delay issues, Wisconsin law provides generous in-person voting options, including two weeks of in-person absentee voting and election-day voting, as constitutionally adequate alternatives. The district court already acknowledged that Wisconsin's experience with its April and August Elections "suggest[s] that in-person voting can be conducted safely if the majority of votes are cast in advance, sufficient poll workers, polling places, and [personal protective equipment] are available, and social distancing and masking protocols are followed." A51. The Commission is taking further, comprehensive steps to provide greater safety for in-person voting in November, which is why the district court saw "no basis to *order*" the Commission to take any additional measures. A92–A93 (emphasis in original). Because Wisconsin voters have ample opportunity to safely vote in person, "[i]t is thus not the *right to vote* that is at stake here but a claimed *right to receive absentee ballots*," which this Court has rejected as a cognizable claim. *McDonald*, 394 U.S. at 807 (emphases added).

Third, the district court's relief is also overbroad even on its own terms. Even if the district court had identified a group of voters who could not safely vote in person *and* would experience some absentee-ballot-mailing issues—which, to be clear, the district court did not identify—the injunction here is not limited to such voters. Instead, the injunction makes the 6-day absentee-ballot-receipt deadline extension available to all voters, even those who everyone agrees can safely vote in person. *See*

Crawford, 553 U.S. at 203 (controlling plurality op. of Stevens, J.) ("[P]etitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute.").

Finally, the district court disregarded the State's interest in adopting a commonplace election-day-receipt deadline, A82, which is an effort to ensure the "orderly administration" of its elections, *see Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.). This interest is compelling in any election—but it is overwhelming when it comes to the State's ability to count ballots and certify election results for a *Presidential Election*. Although the district court wrongly asserted that this compelling interest "rings hollow during a pandemic," A82, a federal court is not permitted to merely "disagree[ ] with the State's decision to retain [the ballot-receipt] requirement during the COVID–19 pandemic" in order to enjoin duly enacted state law, *Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring).

In their Stay Applications, Plaintiffs primarily argue that the district court's extension was justified because a similar extension applied in April, after the Legislature chose not to seek a stay from this Court of the entire extension of the absentee-ballot-receipt deadline. As a threshold matter, the Legislature chose back in April not to seek a stay of the ballot receipt deadline before this Court—instead seeking a stay only regarding post-election-day voting—because it respected that election day was just days away and voters had relied upon the district court's injunction. In any event, even assuming *arguendo* that extending the ballot receipt deadline was warranted in March and April, that would *only* have been because, in

the Seventh Circuit's words below, voters were attempting to adjust to the "last-minute" emergence of the COVID-19 pandemic, which unexpectedly changed voter behavior. A4. Now, however, it has been "many months since March." *Id.* Unlike in the Spring, voters concerned about voting in person due to COVID-19 have now had many weeks to vote absentee, and they still have almost three weeks to do so, far longer than the extra few days they obtained from the portion of the injunction unchallenged in this Court back in April.

Plaintiffs also argue that voters who wait until the last statutory moment to request their absentee ballots and experience ballot mailing delays will suffer "disenfranchisement." *Swenson* App. 1, 28–29; *DNC* App. 11–12. But that is obviously false, as voters who experience mailing delays have multiple other voting options. *See supra* p. 6. Thus, Plaintiffs are not seeking to avoid "disenfranchisement," but asking this Court to adopt a novel rule, without any precedent: voters, Plaintiffs claim, have the constitutional right to wait until the last possible moment to seek an absentee ballot, unhindered by mail delays. Plaintiffs' unprecedented argument, if adopted by this Court, would penalize the State of Wisconsin for being *too* generous with its absentee voting regime. Presumably, under Plaintiffs' novel theory, if Wisconsin had set a *more restrictive*, earlier absentee ballot request deadline—say, two weeks before Election Day—there would be no constitutional violation since those two weeks could accommodate the mailing delays that Plaintiffs worry about. This is obviously not the law. Other states, like Texas and Indiana, have recently been sued (unsuccessfully) by individuals seeking such

generous absentee-voting rules in those states. *See Common Cause Ind. v. Lawson*, No. 20-2911, 2020 WL 6042121, at *1 (7th Cir. Oct. 13, 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020). Plaintiffs' attempt to now punish Wisconsin for its absentee-voting generosity is a constitutional nonstarter.

Plaintiffs also greatly overstate the effect of the district court's six-day extension back in April on voter participation. *See Swenson* App. 2, 8, 25, 28; *DNC* App. 2, 14, 22, 24. Meagan Wolfe, the Commission's Administrator, whom Plaintiffs repeatedly praise, testified that no direct connection could be made between the six-day extension and the additional votes that were counted because "voter behavior" is a largely "unknown" variable, and there was no telling how voters would have acted without those additional days. R.438:117. Even the district court itself acknowledged that the effects of its April injunction were at best "a mixed bag," and not so "clear." R.532:9. And, whatever the case may have been in April, every voter has ample time to plan for the November Election, just as voters are presumably planning in the 30-plus other states with the same election-day deadline. *See* NCSL: Receipt and Postmark Deadlines, *supra*.

b. Unnecessarily Creating A Confusing, Difficult-To-Administer Week Of Faxing And Emailing Absentee Ballots. The Legislature's decision to allow military or overseas electors a special accommodation of receiving faxed or emailed absentee ballots, Wis. Stat. § 6.87(3)(d), plainly poses no constitutional problem for other voters. As the Seventh Circuit held in upholding this provision in a different case this Summer, the Legislature can "reasonably conclude that members of the military

[and overseas voters] face special problems," such as the inability "to return to the state to use its regular voting methods[ ], which justify willingness on the state's part to accept the burdens that fax or email cause for the vote-counting process." *Luft*, 963 F.3d at 677. Again, providing this alternative voting method for these distinct (and distinguishable) groups of voters does not impose any undue burdens on other voters, who have numerous easy methods to cast their vote. *See Crawford*, 553 U.S. at 198 (controlling opinion of Stevens, J.).

The district court's injunction here—allowing access to replacement absentee ballots online or via email, from October 22 through October 29, for any voters who timely requested an absentee ballot that was mailed but not received by the voter—thus did not remedy any *Anderson/Burdick* violation. Further, the injunction was entirely overbroad.

Even if the record had reflected a limited group of voters who could not safely vote in person (after following all public-health protocols) if their absentee ballot is lost or seriously delayed, the district court's injunction is not limited to those unidentified voters. For example, any voter could request an absentee ballot next week, on October 21 or 22, the clerk could mail that ballot within one day of that request, *see* Wis. Stat. § 7.15(1)(cm), and the same voter could still request that the clerk email the ballot so that they "receive the ballot in time to vote," A86. And, more broadly, this relief is available to voters whom all agree can safely vote in person, including during two weeks of in-person, absentee voting, or on election day.

The district court also failed to adequately address the State's interest of avoiding the difficulty that election officials would face as a result of the district court's judicially created email-ballot regime. The district court did not explain how local election officials across Wisconsin should *consistently* determine which voters are eligible for this new judicially created bypass option to receive emailed or faxed absentee ballots. And even assuming that officials could correctly identify those who should receive ballots under the district court's bypass standard, broadening the availability of email-ballot access risks "errors arising from the fact that faxed or emailed ballots cannot be counted by machine." *Luft*, 963 F.3d at 677. These alternative delivery arrangements would burden elections officials, because returns of faxed/emailed absentee ballots come "on regular printer paper," not "official ballot stock," requiring the clerks to "remake the ballots [on official paper] so that [they] can be counted by the voting equipment on election day." R.247:153.

The *Gear* Plaintiffs attempt to justify the district court's injunction by claiming that it allows "vulnerable" voters who get unlucky with lost ballots to receive emailed ballots. *Gear* App. 31. But the district court's remedy is not limited to only those vulnerable voters, as this Court's decision in *Crawford* would require. Rather, the district court's injunction creates a complete bypass for *any* voter whose ballot is lost or seriously delayed in the mail during a certain time period, even those whom all agree can safely vote in person.

The *Gear* Plaintiffs also attempt to downplay the disruptive nature of the district court's injunction by explaining that the State has emailed absentee ballots

in the past. *See Gear* App. 23–26. This argument is contrary to the Seventh Circuit's recent decision upholding Wisconsin law on this point, which noted "errors arising from the fact that faxed or emailed ballots cannot be counted by machine." *Luft*, 963 F.3d at 677. In any event, the *Gear* Plaintiffs do not grapple with the fact that what the district court ordered here was fundamentally different from anything Wisconsin has administered in the past: an *ad hoc*, one-week emailing of absentee ballots only to those who qualify under a judicial bypass that Wisconsin elections officials have never administered, created out of whole cloth in the middle of an ongoing election.

c. Unnecessarily Lifting Rules For The Residency Of Election Officials. Wis. Stat. § 7.30(2), which provides that a polling-place inspector must "be a qualified elector of a county in which the municipality where the official serves is located," is plainly constitutional. This is yet another "reasonable" regulation of no constitutional moment, *Timmons*, 520 U.S. at 358, and it helps ensure that truly local officials administer their own polling places, in their own communities, *see* R.227-1:1; R.227-2:10.

Importantly, the district court did not identify what *constitutional violation*, if any, will arise with Section 7.30(2) in place. The court merely expressed concern that, in its view, Section 7.30(2) presented a "tricky and fluid barrier" to in-person voting, while also noting that allowing local election officials to "access[ ] National Guard members who reside outside of their community" would help them recruit additional poll workers. A91–A92. Even if Section 7.30(2) could make it slightly more difficult to *staff* polling places, the record conclusively shows that Section 7.30(2)(a) imposed

no barriers to properly staffing polling locations in jurisdictions that were willing to accept the help of the National Guard. R.227-1:8–9. "Municipalities who used [National Guard] personnel" in the April 7 Election "report[ed] the experience as a very positive one" and "hope[d] that the service members will continue to serve as volunteer poll workers in their home communities in the future." R.227-1:8.

Plaintiffs also present no record evidence to support their arguments about the necessity of enjoining the Section 7.30(2)(a) for the November Election, instead relying exclusively on difficulties experienced in limited jurisdictions during the April Election. *Swenson* App. 35. Plaintiffs fail to mention that the lead officials in those very municipalities testified in depositions below that they will have ample polling locations open in November, in full compliance with Section 7.30(2)(a). *See* R.480:73. These same officials also gave only the most tepid support, if any, for the district court's injunction on this point, despite repeatedly prodding from Plaintiffs' counsel during their depositions. These officials explained that, at most, lifting Section 7.30(2) would have "some value," R.470:113, and "maybe" there would be some additional poll workers, R.480:144. Plaintiffs are unable to point to any municipality that so much as suggested that it would be unable to safely staff its polls in November, with our without Section 7.30(2).

III. In Granting The Stay Application, The Seventh Circuit Followed This Court's Well-Established *Purcell* Principle

As this Court previously explained in this very case, "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican*

Nat'l Comm., 140 S. Ct. at 1207. This *Purcell* principle provides yet another powerful, "independent" basis for upholding the Seventh Circuit's stay decision. *See Andino*, 2020 WL 5887393, at *1 (Kavanaugh, J., concurring).

A. This Court has repeatedly stayed—or denied motions to vacate stays of—court orders overriding duly enacted election laws based on COVID-19 during or immediately before an ongoing election. *See Andino*, 2020 WL 5887393; *Merrill*, 2020 WL 3604049; *Clarno v. People Not Politicians Ore.*, No. 20A21, 2020 WL 4589742 (U.S. Aug. 11, 2020); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Thompson v. DeWine*, No. 19A1054, 2020 WL 3456705 (U.S. June 25, 2020).

Lower courts have generally been following this Court's lead. *See, e.g.*, *Common Cause Ind. v. Lawson*, No. 20-2911, 2020 WL 6042121 (7th Cir. Oct. 13, 2020); *Tex. League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 WL 6023310 (5th Cir. Oct. 12, 2020); *A. Philip Randolph Inst. of Ohio v. LaRose*, No. 20-4063, 2020 WL 6013117 (6th Cir. Oct. 9, 2020); *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325 (7th Cir. Oct. 6, 2020); *Ariz. Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488 (9th Cir. Oct. 6, 2020); *New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588 (11th Cir. Oct. 2, 2020); *Tex. All. for Retired Americans v. Hughs*, No. 20-40643, 2020 WL 5816887 (5th Cir. Sept. 30, 2020); *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917 (5th Cir. Sept. 10, 2020); *Miller v. Thurston*, No. 20-2095, 2020 WL 3240600 (8th Cir. June 15, 2020); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (per curiam).

As these cases illustrate, an injunction's proximity to an election "ordinarily," *Republican Nat'l Comm.*, 140 S. Ct. at 1207, justifies a stay of that injunction, and this principle only gains in strength "[a]s an election draws closer," *Purcell*, 549 U.S. at 5. This core of the *Purcell* principle has been on particularly robust display this year, as this Court has stayed (or refused to vacate stays of) COVID-19-related election law injunctions issued 30, 48, 59, and 114 days before an election. *See Andino*, 2020 WL 5887393, at *1; *Merrill*, 2020 WL 3604049, at *1; *Clarno*, 2020 WL 4589742, at *1; *Tex. Democratic Party*, 140 S. Ct. 2015. And before 2020, this Court stayed (or refused to vacate stays of) court orders overriding election laws entered 32, 33, and 61 days before an election. *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014); *Purcell*, 549 U.S. at 4–5.

Multiple considerations support *Purcell*'s rule that a district court should "ordinarily" not change rules close to an election, *Republican Nat'l Comm.*, 140 S. Ct. at 1207, without any one consideration being necessary for application of the *Purcell* principle. One consideration is that avoiding last-minute injunctions of election laws preserves election integrity, benefiting both voters and the State. For voters, stability in the law provides for the "[c]onfidence in the integrity of our electoral process" that "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. And for the State, maintaining the State's duly enacted election law furthers the State's interest in the "orderly administration" of the election. *Crawford*, 553 U.S. at 196 (controlling opinion of Stevens, J.), of its elections. Another consideration is

avoiding voter confusion: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. The *Purcell* principle also safeguards against the confusion that election *administrators* face with last-minute injunctions. *Id.* at 4 (directing courts to evaluate "considerations specific to election cases"); *accord Republican Nat'l Comm.*, 140 S. Ct. at 1207. If courts block or alter duly enacted election laws near an election, administrators will first need to understand the court's injunction, then devise plans to implement that last-minute injunction, and *then* figure out how to best inform voters at the last minute of these changes. Finally, courts should avoid resolving weighty constitutional or statutory issues through last-minute litigation, and *Purcell* properly disincentivizes last-minute litigation over election laws, in particular. *Purcell*, 549 U.S. at 5 (preventing injunction close to election before this Court could get "full briefing and argument" through the regular course of appeals). Rather than adjudicate constitutional questions through stay applications and responses filed on short deadlines, *Purcell* gives courts sufficient time to receive full briefing and argument on significant election issues through the regular course of litigation.

B. The *Purcell* principle applies here, just as it applied in the earlier iteration of this case, where this Court granted the Legislature's Stay Application in full, while explaining that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207. As the Seventh Circuit correctly explained below, because voting in Wisconsin has already been

underway for weeks, the ongoing election justifies a stay under *Purcell*'s proximity factor. A3–A5. Indeed, voters in Wisconsin have already requested 1,384,184 absentee ballots, and 785,536 have already returned those ballots, understanding that they are governed by duly enacted Wisconsin election law. *See supra* p. 3.

The *Purcell* considerations discussed above each provide additional, powerful support for application of the *Purcell* principle here.

The district court's changing multiple state election laws in the middle of an ongoing election presents the most acute risk for voter and administrator "confusion." *See Purcell*, 549 U.S. at 4–5. Wisconsin's August 2020 Partisan Primary Election operated under duly enacted state election laws, not under the district court's newly issued injunction. Under those legal rules, Wisconsinites know when they need to return their absentee ballots (whether by mail or in-person), understand that clerks can generally not email or fax out absentee ballots, and know the rules about who can serve as poll workers. Now, Plaintiffs ask this Court to upend all of these expectations, including causing unnecessary confusion as to when voters must return their ballots, whether they will be able to obtain an emailed absentee ballot, and under what circumstance they can get some judicially required accommodation.

Re-imposing the injunction here would be especially confusing to voters under *Purcell*, given the whipsaw-like course of this litigation. Until mid-September, voters all understood that Wisconsin's duly enacted elections laws applied, just as they did during the August primary election. The district court entered its injunction on September 21, but it stayed that injunction for one week. A100–A101. On September

27, the Seventh Circuit granted a temporary administrative stay. But then on September 29, the Seventh Circuit erroneously vacated that stay based upon a misunderstanding of state law, A1–A2, which the Wisconsin Supreme Court thereafter corrected on October 6, *Democratic Nat'l Comm.*, 2020 WI 80, ¶ 1. The Seventh Circuit thereafter granted its stay on October 8. A1, A6. Plaintiffs now want this Court to change Wisconsin election laws once again, even as voters continue to cast their absentee ballots in record numbers.

Further, the injunction here presents a real threat of administrative confusion and delay, in the middle of an ongoing election, thereby also undermining voter confidence in the electoral system. *See Purcell*, 549 U.S. at 4. Extending the ballot receipt deadline interferes with the State's "orderly administration" of its elections because, as explained above, it will delay the State's certification of the election results. *See Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.); *see also supra* pp. 18–19. And the district court's requirement that the elections officials email absentee ballots for one week, based upon a judicially created bypass process, will require elections officials across the State to make ad hoc judgments about who, exactly, qualifies for the district court's email ballot option. *See supra* p. 23.

Finally, this case confirms that weighty decisions adjudicating the constitutionality of state election law should not be made on the eve of an election, in an emergency appellate and stay posture. *Purcell*, 549 U.S. at 5 ("we express no opinion here on the correct disposition, after full briefing and argument, of the appeals . . . or on the ultimate resolution of these cases"). Following the district

court's issuance of its injunction on September 21, litigants have traded a flurry of emergency motions and briefs—in the Seventh Circuit, the Wisconsin Supreme Court, and now in this Court—all to determine whether this injunction entered while voting was underway would alter the State's duly enacted laws. After the Seventh Circuit properly stayed the district court's injunction, Plaintiffs filed approximately 100 pages of briefing across three separate Applications in this Court. The Legislature now has responded to that substantial amount of briefing within less than 48 hours of this Court's request for responses. These are significantly compressed deadlines compared to the regular course of review, and the enforceability of a State's election laws close to an election should not be judicially undermined in such rushed litigation.

C. Plaintiffs' responsive arguments are entirely unavailing.

Contrary to Plaintiffs' claims, *Swenson* App. 26; *DNC* App. 21, 23, this case is markedly different from the only case in which this Court has declined to stay a last-minute alteration of State election law this year: *Common Cause Rhode Island*, 2020 WL 4680151. In *Common Cause Rhode Island*, "[1] the state election officials support[ed] the challenged decree, and [2] no state official ha[d] expressed opposition." *Id.* at *1. Here, the Legislature has opposed the injunction, and the Wisconsin Supreme Court held that state law grants to the Legislature the sovereign authority to litigate on behalf of the State's interest in defense of state law. *Democratic Nat'l Comm.*, 2020 WI 80, ¶ 1. The Commission, for its part, took no position because, as the Commission itself explained below, it (1) "ha[s] no authority

to grant or oppose the injunctive relief requested" in these cases challenging state election laws; and (2) "has no authority to appeal any such decision[.]" App. 6–7 (capitalization altered). Further, in *Common Cause Rhode Island*, "[t]he status quo [was] one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief." *Common Cause R.I.*, 2020 WL 4680151, at *1. Here, the status quo is Wisconsin's duly enacted laws, which governed the just-completed August primary election, and continues to govern Wisconsin's currently ongoing election.

Plaintiffs likewise erroneously assert that the district court's order will alleviate voter confusion, *see Swenson* App. 3–4, and that the *Purcell* principle never applies when the district court's order expands opportunities to cast a ballot, *Gear* App. 19; *Swenson* App. 3. Plaintiffs made these *identical* arguments in support of the district court's injunction in April, *see* Opp. to Appl. for Stay at 3, 17–18, *Republican Nat'l Comm.*, No. 19A1016, and this Court properly rejected these claims in granting the Legislature's Stay Application in full, *see Republican Nat'l Comm.*, 140 S. Ct. at 1207. Further, these arguments are entirely incompatible with each of this Court's other COVID-19-related stay decisions, *see supra* p. 27, as each involved a district court deciding to enjoin election laws to make voting allegedly easier in light of COVID-19, no different in principle from the district court's injunction here.

Plaintiffs incorrectly suggest that *Veasey v. Perry*, 135 S. Ct. 9 (2014), and *Brakebill v. Jaeger*, 139 S. Ct. 10 (2018), undercut application of the *Purcell* principle here because those cases changed the status quo near an election. *Swenson* App. 19.

Veasey and *Brakebill* most naturally stand for the proposition that duly enacted state election statutes should be *restored* over an injunction close to an election, and that this can be a sufficient reason to change the status quo on the eve of an election even under Plaintiffs' definition of "status quo." *See Veasey*, 135 S. Ct. at 9–10; *Brakebill*, 139 S. Ct. at 10. To be sure, there may be cases in which, by the time the issue reaches this Court, the litigation is past the point of no return to restore state election law without affirmatively causing widespread confusion because the State has already complied with an injunction. *See Frank v. Walker*, 574 U.S. 929 (2014); *id.* (Alito, J., dissenting) ("It is particularly troubling that absentee ballots have been sent out without any notation that proof of photo identification must be submitted."). This is plainly not such a case, as Wisconsin law remains operative, just as it was in the immediately prior August primary election.

Finally, Plaintiffs unfairly accuse the Seventh Circuit of adopting and applying a "hard-and-fast rule" against ever issuing an injunction blocking election laws close to an election. *Swenson* App. 3; *accord Gear* App. 18; *DNC* App. 17. The Seventh Circuit correctly explained that *Purcell* applies to last-minute injunctions like this one *unless* they are required by unforeseen "last-minute" developments. *See* A4. That is consistent with this Court's instructions that lower courts should "*ordinarily* not alter the election rules on the eve of an election," which accounts for truly unforeseen, late-developing situations. *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (emphasis added).

IV. The Equities Supported The Seventh Circuit's Stay Decision

If this Court reaches the relative weight of the equities—beyond the equitable considerations inherent in the *Purcell* principle—this balance strongly favors the State's interest in the enforcement of its duly enacted election laws in the ongoing Presidential Election. Depriving the State of its "[ ]ability to enforce its duly enacted" election laws in the ongoing election, would "inflict[ ] irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Here, the district court enjoined multiple duly enacted Wisconsin election laws, necessarily imposing grave irreparable harm upon the State. *Id.*

The precise contours of the district court's injunction likewise harm other multiple core State interests, as explained in more detail above. Extending the absentee-ballot-receipt deadline harms the State's ability to canvass the election results, introducing unnecessary uncertainty and delay into "the democratic process." *Anderson*, 460 U.S. at 788 (citation omitted); *see supra* pp. 18–19. Creating out of whole cloth a difficult-to-administer, weeklong bypass option—where voters may request emailed or faxed absentee ballots, if those voters satisfy a judicially-invented bypass threshold inquiry—will likewise sow needless confusion into Wisconsin's election. *Anderson*, 460 U.S. at 788 (citation omitted); *see supra* p. 23. Finally, the district court lifted Wisconsin's rules that election officials must be electors of the counties in which they work, undermining the State's interest in local election administration, with no record evidence that lifting this requirement will make a meaningful difference in terms of election-day staffing. *See supra* pp. 24–25.

The alleged harms that Plaintiffs rely upon do not satisfy the "extraordin[arily]" high bar for overturning the Seventh Circuit's stay decision. *See Doe*, 546 U.S. at 1308 (Ginsburg, J., in chambers). As explained in detail above, *see supra* pp. 6, 16–18, Wisconsin law provides its citizens with multiple, safe options to cast their ballots during the November Election, including returning absentee ballots by mail, in drop-boxes, or at the polling place. *See supra* pp. 16–17. Further, eligible voters have multiple in-person voting options, including two-weeks of in-person absentee voting, and election-day voting. *See supra* pp. 17–18. These options are more generous than those offered by many other States. *Luft*, 963 F.3d at 672. As the Seventh Circuit correctly observed below, "[t]he district court did not find that any person who wants to avoid voting in person on Election Day would be unable to cast a ballot in Wisconsin by planning ahead and taking advantage of the opportunities allowed by state law." A4–A5. "The problem that concerned the district judge," and the equitable arguments that Plaintiffs raise here, all ultimate boil down to concerns about "the difficulty that could be encountered by voters who do not plan ahead and wait until the last day that state law allows for certain steps." A5. Respectfully, such difficulties, resulting from voters' own choices to not request and return their absentee ballots for many weeks, do not come close to overcoming the State's sovereign authority as to how best to handle voting with COVID-19.

CONCLUSION

This Court should deny the Applications.

Respectfully submitted,

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