Nos. 20-1538 and 20-1539

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants,
and
REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Movants.

SYLVIA GEAR, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants,
and
REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Movants.

REVEREND GREG LEWIS, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants,
and
REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Movants.

On Appeal From The United States District Court
For The Western District of Wisconsin, Case Nos. 3:20-249, 3:20-278 & 3:20-284
The Honorable Judge William M. Conley, Presiding

OPPOSITION OF PLAINTIFFS-APPELLEES DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN TO MOTIONS TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY IN NOS. 20-1538 AND 20-1539

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Introduction

Plaintiffs-Appellees Democratic National Committee (DNC) and Democratic Party of Wisconsin (DPW) respectfully submit this opposition to the "Emergency Motion of Republican National Committee and Republican Party of Wisconsin for Administrative Stay and Stay Pending Appeal" in No. 20-1538, and to the "Wisconsin Legislature's Emergency Motion to Stay the Preliminary Injunction and for an Administrative Stay" in No. 20-1539. The Republican National Committee (RNC), Republican Party of Wisconsin (RPW), and Wisconsin Legislature are referred to collectively as "Movants."

The RNC/RPW motion claims that the District Court "substantially rewrote the rules for Wisconsin's ongoing election," and that its "last-minute injunction substantially interferes with the integrity of Wisconsin's election." RNC/RPW Mot. at 1. The Legislature adds that the District Court's "belated judicial rewrite of Wisconsin's voting laws" will create "confusion and chaos," and "flouts powerful equitable considerations against federal-court interference with imminent and ongoing elections." Leg. Mot. at 1-2, 9.

These arguments are a caricature of what the District Court actually did. That court *denied* most of Plaintiffs' requested relief in the three consolidated cases, including requests that the April 7 election date be postponed because of the COVID-19 pandemic, that Wisconsin's requirement that a photo ID be submitted with an absentee ballot request be relaxed during the pandemic, that the statutory by-mail registration deadline be extended, and that the proof-of-residency requirement for mailed-in registration applications be suspended. Opinion (Op.) at 28-36, 47-50. And

the District Court repeatedly emphasized its limited role in reviewing Wisconsin's conduct of the election, observing that "the only role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting franchise as protected by the United States Constitution and federal statutes." Op. at 3-4; *see id.* at 36 ("Nor is it appropriate for a federal district court to act as the state's chief health official by taking" steps that should be taken by the Wisconsin Legislature and Governor).

Far from "substantially rewr[i]t[ing] the rules for Wisconsin's ongoing election," RNC/RPW Mot. at 1, the District Court granted relief only to the limited extent necessary to address (1) the "severe" burdens "faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of" the April 7 absentee ballot-receipt deadline, given that "even the most diligent voter may be unable to return his or her ballot in time to be counted," *id.* at 38-39; and (2) "the particularly high hurdles faced by" a "limited subset of voters" (particularly the immunocompromised or elderly) who "will likely not be able to secure a witness certification safely even with reasonable efforts, or at minimum have reasonable concerns about their ability to do so," *id.* at 45-46.[1]

Part I of this opposition responds to movants' lead argument based on the so-called "*Purcell* principle"—that courts should avoid "changing the rules of an

[1] The District Court also "extend[ed] slightly the receipt-deadline for absentee ballot requests." Op. 40; *see id.* at 52 ¶ 14(b). None of the movants has challenged that aspect of the court's preliminary injunction.

imminent or ongoing election." *Id.*at 8.[2] Part II demonstrates that movants are not likely to prevail on their challenges to the District Court's limited injunctive relief. Part III responds to the Wisconsin Legislature's argument that it should have been allowed to intervene as a defendant rather than being limited to the role of an (exceedingly active) *amicus curiae.*

Before turning to these arguments, the Court should take note of two striking characteristics of movants' arguments that speak volumes about the lack of merit in their motions.

First, movants barely acknowledge that the State if Wisconsin, unlike nearly a dozen other States, has decided to proceed with its election in the midst of the worst national health emergency since at least the Great Influenza of 1918-20. The RNC/RPW motion makes only a single reference to the "COVID-19 pandemic," RNC/RPW Mot. at 1, and the Legislature's motion refers only twice to the "public-health crisis" and "epidemic," Leg. Mot. at 1, 11. And neither movant mentions any of the District Court's findings of fact about the consequences of the pandemic on the orderly conduct, safety, and integrity of the forthcoming election. These include:

- "[S]tate election officials are confronting a huge backlog in requests for absentee ballots." Op. at 2. There has been an "unprecedented" and "extraordinary" number of requests for absentee ballots (in excess of 1.1 million, compared to a previous high of about a quarter-million in 2016). *Id.*

[2] The *Purcell* principle is the foundation of Part I of the Legislature's motion, *see* Mot. at 8-13, and the RNC/RPW "simply adopt the Legislature's motion (except for Part III) and incorporate those arguments here," *see* Mot. at 2.

at 9-11. This has led to a substantial backlog of request for absentee ballots and long delays in sending out ballots. *Id.* at 11, 20-22, 38-39.

- These delays are being compounded because the U.S. Postal Service "is operating more slowly" during the COVID-19 crisis. *Id.* at 12.
- These backlogs and delays *will* disenfranchise voters, in the absence of an extension of the April 7 receipt deadline. The City Clerks for Milwaukee and Madison have concluded there is "no practical way" that voters who have not yet received their absentee ballots will be able to vote and return their ballots by the deadline, which is now "completely unworkable." *Id.* The Director of the Wisconsin Election Commission (WEC} estimates that approximately 27,500 absentee ballots that were requested in a timely manner "will be received *after* the receipt deadline … and, therefore, will not be counted." *Id.*; *see also id.* at 38 ("the evidence … demonstrates that even the most diligent voter may be unable to return his or her ballot in time to be counted").
- Meanwhile, the WEC and local municipalities have been "improvising in real time a method to proceed safely and effectively with in-person voting in the face of increasing COVID-19 risks, loss of poll workers due to age, fears or sickness, the resulting consolidation of polling locations, and inadequate resources." *Id.* at 3. Nevertheless, 111 municipalities have reported they do not have "the capacity to staff *even one polling place.*" *Id.* at 19. The Milwaukee City Clerk has reported that his city "likely will be

unable to conduct in-person voting in its 327 wards on April 7." *Id.* at 20 (emphasis added); *see also id.* at 30.

- The crisis has been compounded even further because "[i]n-person absentee voting and pre-election, in-person registration has already been limited or even eliminated in some voting areas" because of fear of the COVID-19 virus, which has led to staffing shortages. *Id.* at 30.
- One of the "most likely consequences" of this situation will be "a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State." *Id.* at 3.
- "[T]here is no doubt that the rapidly approaching election date in the midst of the COVID-19 pandemic means that citizens will face serious, and arguably unprecedented, burdens in exercising their right to vote in person." *Id.* at 30.
- The evidence also shows that "at least some isolated voters, and in particular those who are immunocompromised or elderly, will likely not be able to secure a witness certification safely even with reasonable efforts, or at minimum have reasonable concerns about their ability to do so," which constitute "*unreasonably high burdens"* to their voting rights. *Id.* at 45.

The movants have done absolutely nothing to challenge the District Court's detailed findings about the numerous severe, and in some instances insurmountable

burdens that the challenged provisions are imposing on the right to vote in Wisconsin. Rather than disputing any of these detailed findings, movants simply ignore them.

Second, neither movant mentions the fundamental right that Plaintiffs-Appellees are seeking to vindicate here: the right to vote. The denial or abridgement of the constitutionally protected right to vote is, by definition, an irreparable injury that warrants injunctive relief. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "regarded as a fundamental political right, because preservative of all rights"). Courts repeatedly have found that the balance of the equities and the public interest are "best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012) (citation omitted); *see also U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [injunctive relief, which] eliminates a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process."). And this is precisely what the District Court did here. In light of the severe and unsurmountable burdens on the right to vote, the District Court took necessary and limited measures to ensure that qualified Wisconsin voters are able to safely and successfully exercise their right

to vote on April 7, 2020. This Court should deny movants request for a stay of those limited measures and ensure that as many qualified voters as possible will be able to successfully vote in the upcoming election.

Argument

"A stay 'is not a matter of right, even if irreparable injury might otherwise result.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citation omitted). Instead, it is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34 (internal quotation marks and citations omitted). This Court should not exercise its discretion in favor of a stay in these appeals, which would prevent large numbers of Wisconsin voters from casting their ballots and having those ballots counted through no fault of their own, seriously undermine public confidence in the integrity and fairness of the election results, and further endanger public health. In the emergency circumstances of this pandemic, and with the April 7 election less than 100 hours away, reasoned discretion strongly favors denial of the stay motions and avoidance of any further disruptions in the WEC's work.

I. The *Purcell* principle cuts against movants' requested relief, and the balance of harms and public interest strongly favor denial of the stay motions.

Movants rely heavily on *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), in which the Supreme Court cautioned that "[c]ourt orders affecting elections, …can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." The underlying

purpose of this so-called "*Purcell* principle" is to avoid "changing the electoral *status quo* just before the election," which would cause "voter confusion and electoral chaos." Richard L. Hasen, *Reining in the Purcell Principle,* 43 Fla. St. U. L. Rev. 427, 428 (2016).

But in this case, the "electoral *status quo*" *already* has been upended—not by any judicial order, but by COVID-19 and the "voter confusion and electoral chaos" it is causing. Until recent days, Wisconsin voters reasonably expected that they would be able either to vote safely in person on election day or through a reliable, well-functioning absentee ballot system. Now they cannot—and not because of any court order, but because of the pandemic.

Likewise, the Supreme Court in *Purcell* was concerned that pre-election judicial orders might create a "consequent incentive to remain away from the polls." 549 U.S. at 5. Here again, the "incentive to remain away from the polls" in these appeals results not from federal judicial action, but from a deadly pandemic. Voter confusion and abstention from voting are "consequent" of COVID-19, not of anything the District Court has done. The District Court's limited relief will result in *more* voters being able to cast their ballots and ensure those ballots *will* be counted, rather than threatening to keep voters from casting their ballots. The court's injunction, in other words, is an effort to mitigate the confusion and chaos caused by the pandemic that are interfering with voters' reasonable expectations and threatening to keep voters from voting.

Movants' reliance on *Purcell* is misplaced for yet another reason. It will be much less confusing and unfair if the District Court's order—which has received substantial public attention and is in the process of being implemented by the WEC and election clerks throughout Wisconsin[3]—simply remains in effect rather than being changed, leading to yet further confusion and uncertainty, as well as harm to voters who already have relied on the District Court's order. Granting a stay, in other words, would simply create *Purcell* problems of its own, including by harming voters who already have relied on the preliminary injunction by, for example, requesting absentee ballots today or mailing their absentee ballots in with a statement that they could not secure a witness, and further confusing what will already be a chaotic election.

Especially in light of these *Purcell* considerations, the balance of harms and public interest strongly favor denying the stay motions. As the District Court emphasized, the potential harms to voters are severe, if not catastrophic, and there are no adequate remedies at law. Op. at 24-25. "When constitutional rights are

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[3] *See, e.g., Federal Court Order Affects Spring Election – Absentee Ballot Request and Receipt Deadlines Extended; Witness Signature Requirement Modified COVID-19*, WIS. ELECTIONS COMM'N (Apr. 2, 2020), *available at* https://elections.wi.gov/node/6807; *see also* Patrick Marley, *Wisconsin's election is still April 7, but a federal judge has extended the deadline for absentee votes to be counted*, MILWAUKEE JOURNAL-SENTINEL (Apr. 2, 2020), *available at* https://www.jsonline.com/story/news/politics/elections/2020/04/02/wisconsin-election-judge-extends-absentee-voting-but-keeps-vote-date/5112276002/; Ed Trevelan, *'Ill-advised' election to go on amid COVID-19 pandemic, judge says, but some absentee ballot rules rolled back*, WIS. STATE JOURNAL, (Apr. 3, 2020), *available at* https://madison.com/wsj/news/local/crime-and-courts/ill-advised-election-to-go-on-judge-says-but-some-absentee-ballot-rules-rolled-back/article_8dd80672-af4b-5bc6-b25b-f29b92a78382.html; Shawn Johnson, *Despite COVID-19 Concerns, Federal Judge Won't Postpone Wisconsin's April 7 Election*, WIS. PUBLIC RADIO (Apr. 2, 2020), *available at* https://www.wpr.org/despite-covid-19-concerns-federal-judge-wont-postpone-wisconsins-april-7-election.

threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for Am.*, 697 F.3d at 436. Moreover, "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." *Id.*

A stay also could exacerbate the unfolding COVID-19 public health disaster. If voters are not confident their absentee ballots will be counted, this will drive more people to vote in-person on Election Day, thereby increasing the risks of community spread through polling places in cities and towns throughout Wisconsin. The District Court's narrow remedies dramatically reduce the need for person-to-person contact, easing the "severe" burdens that Wisconsin law places on absentee voters in the circumstances of the present pandemic. A stay would negate these reasonable remedies for the extreme, unprecedented circumstances that tens of thousands of Wisconsin voters are likely to face: either they venture out and risk their health and the health of others, or they forfeit the right to vote through no fault of their own.

There is no countervailing harm from extending the absentee-ballot receipt deadline that would outweigh these harms to voting rights and public health and safety. As the District Court repeatedly emphasized, the WEC itself advised the court that "[i]f the votes received by 4:00 p.m. on April 13, 2020, are counted it will not impact the ability to complete the canvass in a timely manner," and thus the Commission does *not* oppose an extension of the ballot-receipt deadline to April 13. Op. at 12-13. Movants argue that the extension "will allow for unfair gamesmanship" by allowing voters to "vote after seeing the results on election day," which would

undermine "the integrity and fairness of the election." Leg. Mot. at 3. That was not what the District Court said, and the court has amended its injunction order to make that clear—unofficial election results may not be released "until April 13, 2020, at 4:00 p.m. or as soon thereafter as votes can be tabulated." ECF No. 179. There will be no "gamesmanship" caused by the extension of the absentee receipt deadline to April 13.

As for the witnessing requirement, movants warn that the District Court's order increases the risk that a "fraudster" might be able to take advantage of the exception to commit voter fraud. Leg. Br. at 10. Movants present no evidence of such a risk, nor did they present any evidence of that risk in the proceedings before the District Court. The hypothetical risk of "fraudsters" abusing the exception to the witnessing requirement is vastly outweighed by the *actual* and substantial risks that quarantined and isolated voters will be unable to obtain witness signatures on their absentee ballots—which was supported through the sworn declarations of numerous voters and municipal clerks—thus disenfranchising them through no fault of their own.

II. Movants are unlikely to succeed on the merits of their appeals.

A. Extension of deadline for receipt of absentee ballots

The District Court rejected requests for a longer extension of time for receipt of absentee ballots, moving the deadline for receipt of absentee ballots back by only six days, from April 7 at 8:00 p.m. to April 13 at 4:00 p.m. The court found that "even the most diligent voter may be unable to return his or her ballot in time to be

counted." Op. at 38. The court also found that the Election-Day receipt deadline placed a "severe" burden on voters that the "state's general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law." *Id.* at 39. These holdings will likely be upheld.

Movants have failed to show any error in the District Court's finding that an Election-Day receipt deadline for absentees in these extraordinary circumstances fails the *Anderson-Burdick* test. Under that test, courts weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (internal quotation marks omitted). This is a "flexible standard," *id.*, under which most laws are subject to "ad hoc balancing," and "a regulation which imposes only moderate burdens could well fail … when the interests that it serves are minor, notwithstanding that the regulation is rational." *McLaughlin v. N.C. Bd. of Elecs.*, 65 F.3d 1215, 1221 & n.6 (4th Cir. 1995). "However slight [a] burden [on voting] may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181,191 (2008) (citation and quotation omitted).

And the question is not the extent to which the law burdens voters generally but rather the extent to which it burdens those impacted by it. *Id.* at 186, 191, 198, 201; *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 543-44 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (assessing burdens on "African American, lower-income, and homeless voters").[4]

Here, the District Court found the Election-Day absentee ballot-receipt deadline would impose "severe" burdens. Op. at 39. Indeed, the record demonstrates the unprecedented crush of absentee ballots that are being processed and the likelihood that many of them will arrive after 8:00 p.m. on Election Day. Movants do not challenge these findings. And the WEC *agrees* with them.

Movants' justifications for these restrictions do not hold up. While the court below acknowledged that deadlines *generally* "provide certainty and reliability, and protect the orderly administration of elections," here, where deadlines "have already been disrupted" and voters who have done everything right *still* will not be able to return their ballot by the April 7 deadline, the State's *legitimate* interest "surely also

[4] It is not necessary for a challenged election regulation to burden voters *generally,* as opposed to discrete pockets of voters, in order for it to violate the *Anderson/Burdick* test. *Anderson* itself disproves this. *See Anderson v. Celebrezze,* 460 U.S. 780, 784 (1983) (invalidating law that affected the approximately 6% of the electorate who supported Anderson). *Anderson-Burdick* is not a binary test that subjects election laws to either strict scrutiny or rational-basis review. Leg. Mot. 13–14. To the contrary, burdens on the fundamental right to vote must be justified by more than mere rational basis. *Crawford*, 553 U.S. at 191 (controlling op.); *McLaughlin*, 65 F.3d at 1221 & n.6.

extends to preserving the rights of those voters who themselves relied on those deadlines." *Id.*

B. Relief from requirement of witness signature for absentee ballots

The District Court reviewed the witness requirement for absentee ballots under the flexible *Anderson-Burdick* standard. It created a narrow exception to the requirement that a witness sign each absentee ballot—but only for those individuals unable to obtain a witness through reasonable efforts. The District Court concluded that the raging pandemic and orders to socially distance "will make it harder for some aspiring absentee voters to satisfy the witness requirement" but "may be overcome with some reasonable effort." Op. at 44. But for those voters who "will likely not be able to secure a witness certification safely even with reasonable efforts, or at a minimum have reasonable concerns about their ability to do so," the court carved a narrow exception in permitting these voters to provide a written affirmation that they cannot obtain a witness certification despite reasonable efforts to do so. Op. at 45.

The movants' argument that some voters can comply with the witness requirement with reasonable effort, Leg. Br. at 4 ("overwhelming majority" of 337,000 absentee ballots returned thus far have witness signatures); *id.* at 11-12, is meaningless. This is precisely why the District Court tailored relief to those voters unable to obtain a witness even with reasonable effort. *See* Op. at 44–46. Even more, a law's burdens must be judged in terms of the voters impacted by the law—i.e., those who cannot obtain a witness without risking their health—not those unaffected by it. *See Anderson*, 460 U.S. at 784; *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580,

593 (6th Cir. 2012); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at *36 (S.D. Ohio June 7, 2016) ("Although the *Crawford* Court rejected the plaintiffs' argument that the law should be enjoined on the basis of the burden to that smaller group of voters, it did so because the record in that case did not contain evidence of the specific burdens imposed on those vulnerable groups."). The court's "limited relief is therefore appropriate." Op. at 46.

Any "additional security" against voter fraud provided by the witness signature in the normal case, Leg. Br. at 10, cannot outweigh the risk to Wisconsin voters during this public health crisis. Absentee voters already subject themselves to the "penalties for false statements of Wis. Stat. § 12.60(1)(b)" when signing their ballot and, now, certifying that they cannot obtain a witness without reasonable effort. This is sufficient to protect the State's interest in preventing voter fraud, and the State will suffer no harm. Indeed, the only harm here would flow from the practical effects of a stay—forcing Wisconsin citizens to choose between not having their voices heard or risking their health to obtain a witness signature. The court's "remedy" does nothing more than "assur[e]" that the "rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Bush v. Gore*, 531 U.S. 98, 109 (2000). Specifically, the votes of those who would need to expend unreasonable effort, perhaps because they are one of the over 600,000 Wisconsinites who live in single-person households and are worried about contact with strangers, will be treated the same as those who happen to live with other people or are safely able to obtain a witness.

Movants contend that the District Court's narrow order providing a work-around for those voters who could not safely procure a witness for their absentee ballots violates the principles articulated by this Court in *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016). That is wrong. In *Frank*, this Court made clear that the right to vote is personal, and that even if a voting requirement burdened the right to vote of only 1% of the population, the court should fashion relief to protect the right to vote of the 1% notwithstanding that the regulation leaves the franchise of 99% of the voters unimpeded. *Id.* at 386-87. This is precisely what the District Court did here. The District Court ordered that the votes of those individuals who cannot safely obtain a witness for their absentee ballots—the population of which the District Court found likely to be small—may still have their ballots count if they certify that they do not have a means to obtain a witness under these circumstances. *See* Op. at 44–46. This does *not* violate the holding of *Frank*, because the district court made clear that this remedy is only available to those who need it to vote under the extraordinary circumstances in which we live. *See Frank v. Walker*, No. 16-3003, 2016 WL 4224616 (7th Cir. Aug. 10, 2016). It is not, as the affidavit of impediment ordered by the district court and reversed by this Court in *Frank*, available to all voters by checking a box and in ordinary times when most people presumably can overcome the burden. Rather, it is akin to the reform of the ID Petition Process ordered by the court in *One Wisconsin*—in which the court ordered the DMV to provide a temporary ID to all individuals who requested one who were unable to obtain a regular state ID. *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 916 (W.D. Wis. 2016). This Court declined to

stay that order. *One Wis. Inst., Inc. v. Thomsen*, No. 16-3083, Doc. 20 (7th Cir. Aug. 22, 2016); *see also One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 WL 4250508, at *6 (W.D. Wis. Aug. 11, 2016) (district court denying motion to stay).

III. The District Court did not err in denying the Legislature's motion to intervene and, in any event, the intervention issue does not warrant a stay pending appeal of the issue.

Contrary to the Legislature's arguments, the WEC vigorously defended the constitutionality of the challenged statues below and shared the Legislature's "same goal" of defeating the motions to enjoin the enforcement of those statutes. *Wis. Educ. Ass'n Council ("WEAC") v. Walker,* 705 F.3d 640, 659 (7th Cir. 2013). The presumption of adequate representation can be overcome only by a showing of "gross negligence," "bad faith," or a "conflict rendering the state's representation inadequate," *id.*, but the Legislature has made no such showing. If the WEC now fails to appeal, that might justify the Legislature's intervention *in these appeals*, but that does not mean the District Court erred in denying intervention below.

The Legislature's reliance on *Virginia House of Delegates v. Bethune-Hill,* 139 S. Ct. 1945 (2019), and *Planned Parenthood of Wisconsin, Inc. v. Kaul,* 942 F.3d 793 (7th Cir. 2019), is misplaced. As this Court emphasized in *Planned Parenthood*, "[t]he Supreme Court [in *Bethune-Hill*] was simply not addressing a situation, like this one, in which two state entities were trying to speak on behalf of the State *at the same time."* 942 F.3d at 800 (emphasis in original). "In fact, *every* decision the Legislature cites as favorable authority involves a situation in which a legislature intervened once the governmental defendant's default representative had dropped out of the case,"

including *Bethune-Hill*. *Id.* (emphasis in original). "The Legislature points us to no authority granting a state—or any party for that matter—the right to have two separate, independent representatives within the same suit." *Id.* All of these points apply with equal force here as in *Planned Parenthood*. The District Court was presented with a situation in which "two separate, independent representatives" were purporting to represent the State, and it reasonably declined to allow "two state entities … to speak on behalf of the State at the same time." *Id.*

Nor did the denial of intervention prevent the Legislature from being heard in the District Court—repeatedly. The Legislature vigorously opposed the motions for preliminary injunction in a 31-page *amicus* brief and other numerous other filings, *see* ECF Nos. 23, 25, 90, 143, 145-46, and the District Court carefully considered the arguments and evidence presented by the Legislature, *see* Op. at 3, 33, 38, 43-44, 48. This ameliorated any alleged need for the Legislature to intervene. *See*, *e.g.*, *WEAC v. Walker,* 824 F. Supp. 2d 856, 861 (W.D. Wis. 2012), *aff'd in relevant part,* 705 F.3d at 658-59; *Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (denial of motion to intervene of right or permissively "will not affect the proposed intervenors adversely"; "[t]heir views will be taken into consideration in deciding the [case] because I intend to rely on their briefs as the briefs of amici curiae").

CONCLUSION

This Court has explained that stays "are necessary to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its

merits." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). But a stay here would not mitigate damage—it would *exacerbate* a deepening public health crisis, prevent people from voting, and even further undermine public confidence in the fairness and reliability of the election results. In these circumstances, there is no reason for this Court to exercise its discretion to grant a stay, and every reason to allow the District Court's limited remedies to remain in place without further changes through the April 7 election. There will be time enough to assess the District Court's preliminary injunction through the normal appellate process. The motions to stay should be denied in their entirety.

DATED: April 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

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

This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,060 words, excluding the parts of the Motion exempted by Federal Rule of Appellate Procedure 32(f).

This Motion complies with all typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)–(6), because it has been prepared in a proportionally spaced typeface using the 2016 version of Microsoft Word in 12-point Century Schoolbook.

Dated: April 3, 2020.

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