

**In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT**

DEMOCRATIC NATIONAL COMMITTEE, ET AL.
PLAINTIFFS-APPELLEES,

v.

MARGE BOSTELMANN, ET AL.
DEFENDANTS,

APPEAL OF: WISCONSIN STATE LEGISLATURE.

SYLVIA GEAR, ET AL.
PLAINTIFFS-APPELLEES,

v.

DEAN KNUDSON, ET AL.
DEFENDANTS,

APPEAL OF: WISCONSIN STATE LEGISLATURE.

REVEREND GREG LEWIS, ET AL.
PLAINTIFFS -APPELLEES,

v.

DEAN KNUDSON, ET AL.
DEFENDANTS

APPEAL OF: WISCONSIN STATE LEGISLATURE.

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

**REPLY OF WISCONSIN LEGISLATURE IN SUPPORT OF EMERGENCY
MOTION TO STAY THE PRELIMINARY INJUNCTION
AND FOR AN ADMINISTRATIVE STAY**

The press of time precludes a fulsome reply, so the Legislature here makes three brief points in response to the oppositions filed by the plaintiffs.

First, none of the plaintiffs dispute the fundamental point that the district court issued the two remedies at issue in this stay motion without *any* adversarial briefing, and without any request by any party for such remedies. This includes allowing voters to vote *after election day*, which—again—no plaintiff asked for.

Second, the plaintiffs claim that the *Purcell* principle does not apply—thereby permitting the district court to rewrite election laws during an ongoing election—because of the current public-health emergency. 7th Cir. 20-1538, Dkts.26:5–14, 27:3, 28:7–11. But if ever there were a case for application of the *Purcell* principle, it is this one, where the district court continues to change the rules of Wisconsin’s *ongoing* election, without any adversarial briefing. This is a sure recipe for “voter confusion” and election chaos. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam).

As if to illustrate this point, *just since Wisconsin filed its emergency appeal last night*, the district court *again* changed the rules of Wisconsin’s ongoing election. 7th Cir. 20-1538, Dkt.21, ex. 3.* Now, even voters who have submitted noncompliant absentee ballots *before* the district court’s injunction will apparently be able to send some sort of document to their clerk’s office to fix that shortfall until “tabulat[ion].” *Id.* This invents another complicated procedure with no parallel in Wisconsin law, which is only bound to cause more confusion and uneven administration by election officials throughout the State. Further, the district court has now purported to bind

* The Legislature and the RNC have filed protective notices of appeal from the district court’s amended injunction. This Court can give full relief by simply staying the injunction, thereby rendering moot any changes that the district court has purported to make to that injunction.

non-party clerks and municipalities from releasing election results on April 7, an edict that the court appears to have no power to enforce as to these non-parties. *Id.* This ensures chaos, as election results could be selectively released by non-party election officials across the State on April 7.

This situation—where the district court feels empowered to amend repeatedly state election law, in the middle of an election—is also a subversion of both the separation of powers and core federalism principles. Absent an immediate stay from this Court, Wisconsin’s April 7 Election will be run as the district court directs (and redirects), with no meaningful opportunity for appellate review for each unilateral change, each imposed without any adversarial process. It is anyone’s guess what other changes, absent a stay from this Court, the district court will consider itself empowered to order between now and April 7, causing precisely the type of chaos and confusion that the *Purcell* principle prohibits.

Third, the plaintiffs argue that there is evidence that certain voters “reasonably believe that finding someone to witness and sign their ballots will expose them to contracting COVID-19, and with it, severe illness or even death.” 7th Cir. 20-1538, Dkt.26:16. The Legislature respectfully submits that a fair review of the evidence that the plaintiffs actually submitted below does not show that the plaintiffs have identified any such voters, given the facility with which voters can obtain witnesses signatures while complying with all public-safety guidance. *See* Dkt.90:17–24.

But, in any event, even if some such specialized circumstances for some voters existed under the current public-health crisis, that cannot justify denying a stay here, as the injunction is not tailored to such voters. Rather, the remedy here is a bypass option that any voter can use to evade Wisconsin's signature requirement, no different than the affidavit bypass option that this Court stayed in *Frank v. Walker*, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016), *stayed by*, 2016 WL 4224616 (7th Cir. Aug. 10, 2016). The plaintiffs argue that the district court's bypass here is somehow different than the one in *Frank* because the *Frank* affidavit was "available to all voters by checking a box." 7th Cir. 20-1538, Dkt.28:16. But the bypass here is *also* available to all voters who simply complete the district court's bypass option. And the plaintiffs' claim about *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 916 (W.D. Wis. 2016), 7th Cir. 20-1538, Dkt.28 16–17, is false, as the district court there stayed much of its photo ID remedy pending appeal, *One Wis. Inst., Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4250508, at *6 (W.D. Wis. Aug. 11, 2016), and the remaining portion did not involve any affidavit or bypass option whatsoever.

Notably, had the district court permitted adversarial briefing on this issue, perhaps an appropriately tailored remedy could have been fashioned for the narrow subset of voters who truly cannot obtain a witness signature without unreasonable effort. But the district court decided to raise this limitless bypass out of the blue at the evidentiary hearing, and then ordered it without any adversarial testing. All that said, the COVID-19 pandemic does not decrease the importance of laws that protect ballot integrity. Exactly the opposite: because the pandemic (and the district court's

decision) will balloon the number of absentee voters, and because absentee voting presents the greatest risk of fraud, the need for ballot-integrity protections is higher than ever. *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

Dated: April 3, 2020.

Respectfully Submitted,

SCOTT A. KELLER
BAKER BOTTS LLP
700 K Street, N.W.
Washington, DC 20001
(202) 639-7837
(202) 585-1023 (fax)
scott.keller@bakerbotts.com

Counsel for Legislature in Gear

RYAN J. WALSH
AMY MILLER
EIMER STAHL LLP
10 East Doty Street
Suite 800
Madison, WI 53703
(608) 442-5798
(608) 441-5707 (fax)
rwalsh@eimerstahl.com
amiller@eimerstahl.com

Counsel for Legislature in Lewis

/s/ Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
TROUTMAN SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
kevin.leroy@troutman.com

*Counsel for Legislature in DNC, Gear,
and Lewis*

ERIC M. MCLEOD
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
(608) 255-4440
(608) 258-7138 (fax)
eric.mcleod@huschblackwell.com

LISA M. LAWLESS
HUSCH BLACKWELL LLP
555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
(414) 273-2100
(414) 223-5000 (fax)
lisa.lawless@huschblackwell.com

Counsel for Legislature in DNC

CERTIFICATE OF COMPLIANCE

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

This Reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 904 words, excluding the parts of the Reply exempted by Federal Rule of Appellate Procedure 32(f).

This Reply 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.

/s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020 I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: April 3, 2020.

/s/ Misha Tseytlin

MISHA TSEYTLIN