Nos. 20-2835, 20-2844

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs-Appellees,

v.

WISCONSIN STATE LEGISLATURE, et al.,

***Intervenor-Defendants-Appellants*.**

GEAR V. BOSTELMANN PLAINTIFFS-APPELLEES' OPPOSITION TO INTERVENOR-DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO STAY DISTRICT COURT'S PRELIMINARY INJUNCTION

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
Consol. Case Nos. 3:20-cv-249, -278, -340, -459 The Honorable William M. Conley, Presiding

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DOUGLAS M. POLAND
JEFFREY A. MANDELL
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
Post Office Box 1784
Madison, Wisconsin 53701-1784
dpoland@staffordlaw.com
jmandell@staffordlaw.com
(608) 256-0226

JON SHERMAN
MICHELLE KANTER COHEN
CECILIA AGUILERA
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 450
Washington, DC 20006
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org
(202) 331-0114
Attorneys for Plaintiffs-Appellees

INTRODUCTION

The district court granted relief to the *Gear* Plaintiffs-Appellees in part (d) of the preliminary injunction order. *See* dkt. 539 at 3.[1] For two decades, Wisconsin election officials have emailed mail-in absentee ballots upon request. For the first decade, the statute gave clerks discretion to send *any* absentee voter their ballots by email when, in their judgment, there was insufficient time to receive the ballot by mail and timely cast it. Then, for about four-and-a-half years, the Legislature made email delivery non-discretionary but restricted it to military and overseas voters. In 2016, the district court struck down the statutory provision barring all but military and overseas voters from receiving their absentee ballots by email and fax delivery.[2] This Court denied a motion to stay that order[3] and, while that case was pending before this Court, municipal clerks delivered mail-in absentee ballots to voters by email—"without incident," as the district court found. *See* dkt. 538 at 54.[4] For the next four years, every election in Wisconsin was conducted with email delivery of mail-in absentee ballots available to all voters.

In late June, this Court reversed the district court's injunction and reinstated the ban on electronic transmission of ballots to domestic civilian voters,[5] but did so on a record developed long before Covid-19. Those consequences include a death toll now surpassing 200,000 Americans; the consequent, unprecedented demand for mail-in ballots; and a sclerotic U.S. Postal Service that has failed to deliver ballots to voters on time or at all. The district court found the

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[1] Unless otherwise indicated, citations to the district court docket in this brief ("dkt.") are to the docket under which the *Gear* case was consolidated, case number 20-cv-249-wmc.
[2] *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016).
[3] *One Wisconsin Inst., Inc. v. Thomsen*, No. 16-3083, at *1 (7th Cir. Aug. 22, 2016).
[4] Absentee voters *must* return these ballots by mail or drop them off at their municipal clerk's office, polling place, or dropbox. Wis. Stat. §§ 6.87(3)(d), 6.87(4). Plaintiffs' claims solely address the delivery of ballots *to* voters by electronic means, not the method by which voters return their ballots.
[5] *Luft v. Evers*, 963 F.3d 665, 676-77 (7th Cir. 2020).

record evidence on these points "overwhelming." Dkt. 538 at 53. Earlier this year, these forces disenfranchised voters, including five of the Plaintiffs-Appellees, who are at much higher risk from Covid-19. Given the health risks they face and the corresponding severe burden on their right to vote, no legitimate and rational, let alone compelling, state regulatory interest could justify forcing such voters to vote in person, if their absentee ballots cannot timely be received and cast by mail. Such voters need a fail-safe.

The district court issued limited relief for this specific group of voters who do not timely receive a timely-requested absentee ballot in the mail. From October 22-29, voters who have not yet received their ballot in the mail may do so by email or through myvote.wi.gov. The district court left the choice of electronic transmission method to the Wisconsin Elections Commission ("WEC" or "the Commission"). WEC has sufficient time to restore email delivery to domestic civilian voters, which it had done until two months ago. Municipal clerks know how to deliver mail-in absentee ballots by email; this requires no retraining of clerks and no involvement of poll workers. Voters are familiar with email delivery as an option, having used it for four years. This limited relief provides only a back-up option to receive ***replacement*** ballots within an eight-day period. Most voters will never need to learn of or use this fail-safe but, as the district court found, vulnerable voters' rights will depend on it. Accordingly, courts' usual concerns of voter confusion, voter suppression, and increased administrative burdens are significantly diminished.[6]

The Intervenor-Defendants-Appellants Wisconsin Legislature ("Legislature"), Republican National Committee ("RNC"), and Republican Party of Wisconsin's (RPW") have moved to stay the preliminary injunction. These motions should be denied because the movants lack standing to appeal and are unlikely to succeed on the merits anyway. While *Luft* commands a holistic review

[6] *See Purcell v. Gonzalez*, 549 U.S. 1 (2006).

of the election code, it also instructs that voters' rights are personal and must be protected through fail-safe options if they cannot vote through reasonable effort. The eight individual Plaintiffs-Appellees and the organizational Plaintiffs-Appellees League of Women Voters of Wisconsin ("LWVWI") and Wisconsin Alliance for Retired Americans ("WIARA") which divert resources, time, and money to assist and educate voters who do not receive ballots in the mail filed suit to ensure voters have a fail-safe option.

FACTUAL & PROCEDURAL BACKGROUND

Email delivery of mail-in absentee ballots has been an option for some or all of Wisconsin's absentee voters for two decades. The statute in question was created by 1999 Wis. Act 182, § 97 (May 24, 2000), went into effect in 2000, and permitted any voter—domestic civilian, military, and overseas—to request and receive a mail-in absentee ballot by email "*if, in the judgment of the clerk, the time required to send the ballot through the mail may not be sufficient to enable return of the ballot by the time provided under sub. (6).*" Wis. Stat. § 6.87(3)(d) (2000) (emphasis added), *amended by* 2001 Exec. Budget Act, § 9415, 2001-2002 Wis. Legis. Serv. Act 16. For ten years, clerks were given discretion to decide whether email delivery was necessary. In 2011, the language that made alternative delivery methods discretionary was dropped. Wis. Stat. § 6.87(3)(d) (June 10, 2011) ("A municipal clerk shall…transmit a facsimile or electronic copy of the absent elector's ballot to that elector in lieu of mailing under this subsection.").

The Wisconsin Legislature enacted 2011 Wis. Act 75 in December 2011, mandating that municipal clerks "transmit a facsimile or electronic copy of the elector's ballot to that elector in lieu of mailing" only to military and overseas voters who request delivery by this means. Wis. Stat. § 6.87(3)(d). Now the statute only permits military electors and overseas electors, both as defined in Wis. Stat. § 6.34(1), to request delivery of their absentee ballot by fax or email, or to access and

download their absentee ballot at myvote.wi.gov and return them by mail. *See* dkt. 247, Deposition of Meagan Wolfe ("Wolfe Tr.") at 130:21-131:14; 136:20-139:19.

In 2016, Act 75's ban on emailing or faxing mail-in absentee ballots to domestic civilian voters was struck down by the district court's decision in *One Wisconsin Institute,* 198 F. Supp. 3d at 946. WEC has construed the law to limit email or fax delivery to *replacement* mail-in absentee ballots and, therefore, has permitted requests for email or fax delivery of absentee ballots only until the regular deadline for mail-in absentee ballots (October 29). *See* dkt. 423, Sherman Decl., Ex. 23, WEC, Uniform Instructions for Absentee Voting, at 2 ("A voter may request that a *replacement* ballot be faxed or emailed to him or her."); Wis. Stat. § 6.86(5). In the 2016 presidential election, 9,619 mail-in absentee ballots were delivered by email to voters without incident.[7] 7,231 of these email-delivered ballots were ultimately returned by mail.[8] There was no documented incident with email delivery.

In June, the Seventh Circuit reversed the *One Wisconsin Institute* order invalidating the ban on electronic delivery of absentee ballots to domestic civilian voters. *Luft*, 963 F.3d at 676. The mandate issued at the end of July. Consequently, the pre-*One Wisconsin Institute* reach of Section 6.87(3)(d)'s restriction to overseas civilian and military voters has been restored.

The district court has preliminarily enjoined the ban reinstated by *Luft*. The injunction temporarily permits municipal clerks to issue replacement ballots via email or make them available at myvote.wi.gov to civilian Wisconsin voters who properly request absentee ballots but do not receive their ballots by mail. This fail-safe can be exercised from October 22-29. *See* dkt. 539 at 3. This decision was based on the high percentage of registered voters who have requested absentee

[7] *See* dkt. 423, Sherman Decl., Ex. 3, WEC, Absentee Ballot Report (Nov. 8, 2016).
[8] *Id*.

ballots for the November 3 election, account for the Covid-19 pandemic, which has prompted an unprecedented number of voters to choose not to vote in person, and potential U.S. Postal Service ("USPS") delivery delays or failures that may prevent registered voters from timely receiving ballots.

LEGAL STANDARD

"In deciding whether to stay a federal court decision (other than a money judgment) while review proceeds, on appeal or otherwise, courts consider the merits of the moving party's case, whether the moving party will suffer irreparable harm without a stay, whether a stay will injure other parties interested in the proceeding, and the public interest." *Venckiene v. United States*, 929 F.3d 843, 853 (7th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 428 (2009)). The movant must demonstrate the district court abused its discretion in denying a stay. *Nken*, 556 U.S. at 433.

This Court reviews findings of fact for clear error. *Venckiene*, 929 F.3d at 853.

ARGUMENT

I. The Intervenor-Defendants-Appellants lack standing to move for a stay.

Neither the Legislature nor the RNC has standing to appeal the district court's order. The *Gear* Plaintiffs-Appellees join and incorporate herein Plaintiffs-Appellees Democratic National Committee and Democratic Party of Wisconsin's arguments as to the Legislature's lack of standing, while further noting that the Supreme Court has held that state legislatures have no cognizable interest in cases challenging "the constitutionality of a concededly enacted" state statute and thus do not have standing to appeal rulings in such cases. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019); *Planned Parenthood of Wis.*, 942 F.3d 793, 798 (7th Cir. 2019). Here, because the *Gear* Plaintiffs-Appellees challenge the constitutionality of Wis.

Stat. § 6.87(3)'s electronic ballot delivery restrictions during the pandemic, the Legislature has no actionable interest in this case and, therefore, no standing to appeal.

The RNC and RPW equally lack standing to appeal. They identify no interests in their brief supporting their motion to stay that confer standing to appeal. Moreover, the Supreme Court has indicated that only states have an interest in enforcing state statutes, and that third parties lack standing to stay orders enjoining those statutes. *Hollingsworth v. Perry*, 570 U.S. at 701–02. The Court also recently rejected for lack of standing the RNC's attempt to stay a court order in another voting rights case, *Common Cause Rhode Island v. Gorbea*. There, the plaintiffs and state entered into a consent decree enjoining the state's requirement that mail-in ballots be signed by two witnesses or notarized, as it concerned ballots cast in the upcoming general election. *See* No. 1:20-cv-00318-MSM-LDA, 2020 WL 446091 (D.R.I. July 30, 2020). Subsequently, the RNC intervened and asked the Supreme Court to stay the decree. The Court denied that request because the RNC lacked standing: "[H]ere the state election officials support the challenged decree, and no state official has expressed opposition. Under this [*sic*] circumstances, the applicants lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws." No. 20A28, 2020 WL 4680151, at *1 (U.S. Sup. Ct. Aug. 13, 2020) (Mem). So too here.

WEC has neither appealed nor opposed the narrowly tailored relief granted below. Whatever interest Wisconsin holds in enforcing Section 6.87(3) rests solely with WEC.

II. The Intervenor-Defendants-Appellants are unlikely to succeed on the merits.

Sections 6.87(3)(a) and 6.87(3)(d) together provide that mail-in absentee ballots may *only* be delivered to regular civilian voters by mail. Wisconsin voters can request replacement mail-in absentee ballots if they spoil or fail to receive a ballot up until the ballot request deadline. Wis.

Stat. §§ 6.80(2)(c), 6.86(5); dkt. 247, Wolfe Tr. at 145:9-20. Plaintiffs filed an *Anderson-Burdick* challenge to this delivery method restriction.

The Seventh Circuit applies *Anderson-Burdick* "to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (emphasis in original); *Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017). The Supreme Court has developed the following test:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal citations omitted). "A court considering a challenge to a state election law must 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." *Id.* at 434.

Here, the district court applied *Anderson-Burdick* and correctly concluded that the confluence of the Covid-19 pandemic, USPS's delivery failures, and WEC's ongoing challenges with the unprecedented demand for mail-in absentee ballots necessitates limited relief to guarantee voters have a fail-safe option when their ballots do not arrive by mail on time or at all:

> [T]he evidence is nearly overwhelming that the pandemic does present a unique need for relief in light of: (1) the experience during the Spring election, (2) much greater projected numbers of absentee ballot requests and votes in November, and (3) ongoing concerns about the USPS's ability to process the delivery of absentee ballot applications and ballots timely. None of this was remotely contemplated by

> the Legislature in fashioning an election system based mainly [on] in person voting, nor addressed by the Seventh Circuit's recent decision in *Luft*.

See dkt. 538 at 53. The district court found that the record was "replete" with examples of voters not receiving their ballots on time or at all. *Id*. at 52-53. These factual findings are not clearly erroneous and point inexorably to one conclusion: under these exigent circumstances, the injunction is necessary to comply with this Court's instruction that because "'the right to vote is personal'…'the state must accommodate voters' who cannot meet the state's voting requirements 'with reasonable effort.'" Dkt. 538 at 34 (quoting *Luft*, 963 F.3d at 669). A voter who does not receive a timely-requested ballot in the mail and cannot safely vote in person is denied their right to vote without any justification—the *Anderson-Burdick* scales tip decisively in one direction. As the district court held, that voter must be provided with a fail-safe option to receive their mail-in absentee ballot. *See* dkt. 538 at 54. Noting that vulnerable voters' rights will depend on this fail-safe remedy, the district court held that, under this Court's precedent, judicial intervention is necessary to protect a narrow subset of voters from disenfranchisement. *See* dkt. 538 at 53.

Luft v. Evers—a case decided on a record developed long before the Covid-19 pandemic and USPS delivery breakdowns—neither changes this calculus nor forecloses this action. This "Courts weigh these burdens against the state's interests by looking at the whole electoral system." *Luft*, 963 F.3d at 671-72. But if the election code addresses a particular burden or denial of the right to vote, then unrelated provisions such as Election Day registration provide no defense to an *Anderson-Burdick* claim. When voters face disenfranchisement due to ballot delivery issues and a Covid-19 risk that makes in-person voting unduly dangerous, no part of the code mitigates this constitutional violation.

Absent the district court's injunctive relief, that voter's only recourse is to request a *replacement* mail-in absentee ballot, once again by mail delivery, and to hope it arrives faster than

the first ballot they requested but never received. Indeed, several Plaintiffs-Appellees tried just that, but the replacement ballot *also* failed to arrive in the mail on time. *See* dkt. 372, Declaration of Katherine Kohlbeck ¶¶ 7-9; dkt. 373, Declaration of Diane Fergot ¶¶ 5-7; dkt. 373, Declaration of Gary Fergot ¶¶ 5-7. Many voters would reasonably continue to wait for their initially-requested mail-in ballot's arrival until after the deadline to request a ballot and/or it is far too late to guarantee a ballot can arrive timely by mail. Voters will also reasonably conclude they cannot safely vote in person due to Covid-19. Dkt. 538 at 19. Because Wisconsin law fails to safeguard the right to vote safely during this pandemic, judicial intervention is necessary.

Intervenor-Defendants-Appellants nevertheless claim that "[t]he district court essentially overruled *Luft*." *See* R. 9-1 at 16.[9] This misrepresents both *Luft* and the limited, fact-specific nature of the district court's ruling here. *Luft* does not foreclose this action. The claim in *One Wisconsin Institute* attacking Section 6.87(3)(d)'s restriction of email delivery to military and overseas voters was based in large part on the disparate treatment of domestic civilian voters and did not consider the burdens of voting safely during a pandemic. 198 F. Supp. 3d at 946 ("Plaintiffs contend that this provision unjustifiably burdens voters who are traveling but who do not qualify as overseas electors."). *Luft* characterized that claim much the same way. 963 F.3d at 676-77. By contrast, the *Gear* action focuses on the burdens facing all voters trying to cast ballots safely during the pandemic but particularly those more vulnerable to Covid-19. This case was not based on the disparate availability of email delivery but on the unique challenges of voting during this pandemic and evidence of its impact election administration and USPS's operations.

Intervenor-Defendants-Appellants do not contest the district court's finding that the April 7 election was marred by absentee ballot processing and delivery problems or that the procedures

[9] Citations to the docket in this action are to "R.__."

at municipal clerks' offices and USPS will be insufficient to prevent "something go[ing] wrong with the processing or mailing of their absentee ballots" for a portion of voters once again. *See* R. 9-1 at 15. They also appear to have abandoned their longstanding argument that it is speculative Covid-19 transmission and mortality continue through Election Day. *See* dkt. 454 at 125. Instead, they press their argument that Plaintiff-Appellees can safely vote in person, R. 9-1 at 17, notwithstanding Covid-19's death toll, extremely serious clinical manifestations (including long-lasting health complications), and persistent transmission in Wisconsin. R. 9-1 at 17. But that argument is undermined by the record epidemiological evidence, *see infra*, and the evidence of unsafe conditions at polling places, *see, e.g.* dkt. 386, Declaration of Barbara Keresty ¶¶ 3- 7.

The Covid-19 pandemic poses a serious danger to in-person voters, particularly those at higher risk.[10] The threat of airborne transmission in indoor settings where people congregate is real, substantial, and not meaningfully mitigated by any available protective measures. *See* dkt. 370, Declaration of Dr. Megan Murray ("Murray Decl.") ¶¶ 6-20, 32-44. Forcing at-risk voters to take this risk is *per se* a severe burden on the right to vote. Due to pre-symptomatic and asymptomatic transmission of SARS-CoV-2, voters will cast their ballots in person at the polls not knowing that they are Covid-19-positive and further transmit viral particles in large respiratory droplets and much smaller aerosolized droplet nuclei that can stay suspended in the air for much longer. *Id.* ¶¶ 8-9, 32-42; *see also* dkt. 440, Murray Tr. at 122:15-123:11. Because these microdroplets stay aloft and travel farther, aerosolized transmission is the hardest to control via interventions like sanitization, masks other than N95s, or social distancing. *Id*. at 123:11-17, 124:2-6, 125:9-126:3, 126:15-127:22, 129:9-130:6, 133:1-6; *see* dkt. 370, Murray Decl. ¶ 36; *id*. ¶¶ 48-

[10] *See* dkt. 503, Sherman Reply Decl., Ex. 5, CDC, Coronavirus Disease 2019 (COVID-19), *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (updated July 30, 2020).

56; dkt. 490, Reply Declaration of Dr. Megan Murray ("Murray Reply. Decl.") ¶¶ 1-3; *id*., Ex. 1 (Dr. Murray Deposition Exhibit 4). If at-risk voters cannot vote safely absentee by mail, they cannot vote at all.

Moreover, COVID-19 transmission is *increasing* in Wisconsin. As the district court found, "with flu season yet to arrive, Wisconsin has already broken numerous new case records this month, with over 2,000 new cases reported on September 17, 2020, up from a daily average of 1,004 just one week prior." *See* dkt. 538 at 20. The district court correctly found that "[c]ertain individuals, such as those who are elderly, immunocompromised or suffer comorbidities, are at a greater risk for complications from COVID-19" and that in-person appearances pose too great a risk of Covid-19 exposure, therefore severely restricting their right to vote. Dkt. 538 at 10; *see also id*. at 40.

Intervenor-Defendants-Appellants posit that Plaintiffs-Appellees can bring an as-applied challenge should harm come to them. *See* R. 9-1 at 10-11. Such relief would be illusory. It would be absurd and infeasible to require voters to file individual constitutional lawsuits to secure a replacement absentee ballot when their initial request fails, just days before Election Day. The Constitution requires a fail-safe that can actually prevent the violation.

If state lawmakers and executive officials need not wait until electoral fraud actually occurs to create and enforce requirements they believe will prevent such crimes, *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 (2008) (finding state anti-fraud interest even given absence of "evidence of any such fraud actually occurring"), then voters need not wait until they suffer grievous injury to their right to vote or health before securing preliminary injunctive relief. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (granting motion for preliminary injunction because "Florida's signature-match scheme subjects vote-by-

mail and provisional electors to *the risk* of disenfranchisement") (emphasis added). To hold otherwise would privilege credible risks to the state's legitimate interest in protecting election integrity while dismissing credible risks to voters' rights to participate in their democracy. Such disparate treatment of these competing interests would run counter to the Supreme Court's precedent, which emphasizes that preliminary injunctive relief is warranted "to prevent a substantial risk of serious injury from ripening into actual harm." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

The burdens on voters are severe when a timely-requested absentee ballot does not arrive in the mail. As to the state's interest, the Intervenor-Defendants-Appellants raise third parties' interests, but actually *mis*represent them. The only evidence in the record from municipal clerks' offices are declarations noting that the duplication of electronically-delivered ballots is not an extreme hardship but is justified by its enfranchising effects, and that the October 29 cut-off for email delivery of replacement ballots under the preliminary injunction is sufficient time to ensure adequate staffing at polling places to remake or duplicate ballots. *See* dkt. 382, Declaration of Maribeth Witzel-Behl ("Witzel-Behl Decl.") ¶ 14; dkt. 383, Declaration of Tara Coolidge ("Coolidge Decl.") Decl. ¶¶ 9-10; Declaration of Debra Salas ("Salas Decl.") ¶ 16.

Any arguments that the injunctive relief could be exercised by voters who did not timely request their ballots, *see* R. 9-1 at 16-17, can be resolved by slightly modifying the injunction. Plaintiffs-Appellees suggested to the district court that voters exercising the fail-safe could be required to apply some number of days in advance of the fail-safe period. Dkt. 505 at 34.

III. The Intervenor-Defendants-Appellants will suffer no irreparable harm without a stay.

The movants have failed to articulate any interest that will be irreparably harmed absent a stay of the preliminary injunction. The RNC and RPW do not describe their interests or how they

would be irreparably harmed if the motion to stay were denied, and instead "simply adopt[ed] the Legislature's motion and incorporate[d] those arguments" into their brief in support of their motion to stay. R. 4 at 5. Accordingly, because the RNC/RPW have not identified any interests that will be irreparably harmed, their motion fails. *Nken*, 556 U.S. at 434.

The Legislature raises a general, abstract harm to the state's ability "to enforce its duly enacted" election laws. R. 9-1 at 20. It also claims, without evidence, that the electronic transmission of replacement ballots "will likewise sow needless confusion into Wisconsin's election" because "it will be difficult for local election officials statewide to determine which voters qualify for the district court's judicial bypass." *Id.* at 22. It also states that "processing faxed and mailed ballots creates serious practical problems." *Id.* These are of course third parties' purported administrative concerns, not the Legislature's or the RNC and RPW's.

"As the party invoking this Court's jurisdiction, [the Legislature] bears the burden of doing more than simply alleging a nonobvious harm." *Bethune-Hill*, 139 S. Ct. at 1955 (citation, quotation marks, alteration omitted). Yet, the Legislature's arguments as to how it will be irreparably harmed by the fail-safe remedy are speculative and in direct conflict with the record. Multiple clerks have submitted declarations explaining that election officials can determine which voters have been mailed a ballot by looking up the voter's record in MyVote, then cancel the mailed ballot in the system before emailing a replacement ballot. *See* dkt. 382, ¶ 11; dkt. 383, ¶ 11; dkt. 384, ¶ 14. Even if a voter receives, completes, and returns the initial ballot, it will not count because it bears a unique numerical code and will have been cancelled. Dkt. 384, ¶ 14. It is the professional opinion of these clerks—the officials responsible for issuing ballots to voters—that any administrative burdens caused by the fail-safe option constitute "minor inconveniences"

and do not render this remedy infeasible or impractical, much less irreparably harmful. *See* dkt. 383, ¶ 10; dkt. 384, ¶ 16.

IV. The balance of the equities and the public interest favor denying the Intervenor-Defendants-Appellants' motion for a stay.

Appellants argue *Purcell v. Gonzalez*, 549 U.S. 1 (2006) instructs this Court to stay its hand this close to an election. R.9-1 at 20-21. But that case did not create a *per se* rule requiring courts to reject any request for injunctive relief as to voting rules brought within a certain timeframe before an election. Appellants' argument is divorced from the animating concerns in the Supreme Court's original decision, which directed federal courts to weigh "considerations specific to election cases"—namely the risks of confusing voters, increasing administrative burdens, and suppressing voter turnout—amongst the normal equitable factors for issuance of an injunction. *Purcell*, 549 U.S. at 4-5.

First, a close review of *Purcell* and subsequent cases demonstrate that *Purcell* does not bar injunctive relief when the relief ordered would *vindicate* voters' rights and prevent disenfranchisement. The district court's preliminary injunction creates a fail-safe option for voters who do not receive a ballot in the mail. This will enable, not deter, voter participation and turnout. Circuit courts have upheld injunctions issued shortly before an election where the challenged law or rule would have the effect of disenfranchising voters. *See League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Obama for Am. v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012); *U.S. Student Ass'n Fdn. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008).

Second, Appellants cannot invoke the purported risk of voter confusion as support for rules that *disenfranchise and burden* voters. *Purcell* should be taken at its word; the Supreme Court was deeply concerned with the risk of suppressing turnout. 549 U.S. at 4-5 (citing the "consequent incentive to remain away from the polls"). But here, the requested injunction will *facilitate and*

increase voter turnout. Any confusion over an injunction that benefits voters and facilitates their participation hurts ***voters***, not Defendants. *Cf. Frank v. Walker*, No. 11-C-1128, slip op. at 38-39 (E.D. Wis. July 19, 2016).

The risk of voter confusion in this case approaches zero. There is still time to adjudicate this dispute before this relief takes effect on October 22. While it would be best to have this resolved some time in advance of October 22, it is most important that clerks offer it as an option for replacement ballot delivery during the fail-safe period. This case is clearly distinguishable from the recent order in *Common Cause v. Thomsen*, No. 3:19-cv-323, dkt. 51, at 3 (W.D. Wis. Sept. 23, 2020), in which the Court expressed concern that an "inevitable appeal" and potentially changing rulings would confuse college student voters as to which college IDs are valid. There is no such risk of voter confusion here, particularly because email delivery of absentee ballots has previously been available in Wisconsin for twenty years and available to *all* voters upon request over the last four years, minus the last two months. Voters would be much more confused if their ballot did not arrive in the mail and a replacement was also stalled. Further, unlike in *Common Cause*, there is no action the voter needs to take here, like procuring a compliant student ID; voters will simply learn what their options are when they contact their municipal clerks' office.

Third, Intervenor-Defendants-Appellants have no basis to claim that this remedy will increase WEC's or municipal clerks' burdens. In April, this Court and the U.S. Supreme Court issued rulings days before the April 7 election. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 20-1538 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). Despite the legal battles, WEC has continually and successfully issued new guidance, developed new policies, and updated its websites and materials throughout the Covid-19 pandemic. In the run-up to the April 7 election, WEC successfully issued over fifty communications and guidance documents to

clerks to keep pace with the unprecedented and rapidly-evolving pandemic. *See* dkt. 446, Declaration of Meagan Wolfe ¶ 23. Such extensive administrative responses to the pandemic proved manageable for the WEC and did not unduly confuse voters in either the April election or elections in past years.

Finally, the Supreme Court has soundly rejected arguments that increased administrative burdens and costs override First Amendment rights. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) ("[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights."). This principle should apply with maximum force in a case that concerns voters' rights and where the relief will not require any training of municipal clerks or poll workers. Poll workers are not involved in absentee ballot delivery, and municipal clerks already have experience with email delivery. Granted, remaking or duplicating ballots at polling places is necessary when a ballot is electronically transmitted so that the ballot can be scanned and tabulated, but the net result will overwhelmingly be less burdensome for administrators and voters alike. The Intervenor-Defendants-Appellants' arguments are self-defeating. They claim that absentee ballot preparation and delivery failures will be "extremely rare," dkt. 454 at 43, but then this fail-safe would be exercised by many fewer voters and impose a minimal burden. The only clerks who testified in this case have stated that this burden is a "minor inconvenience" and well worth safeguarding voters' rights.

Accordingly, the public interest strongly favors affirming this narrow relief to protect voters' rights.

CONCLUSION

Respectfully, the motion to stay should be denied.

DATED: September 25, 2020

Respectfully submitted,

/s/ Jon Sherman

JON SHERMAN
MICHELLE KANTER COHEN
CECILIA AGUILERA
FAIR ELECTIONS CENTER
1825 K St. NW, Suite 450
Washington, DC 20006
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org
(202) 331-0114

DOUGLAS M. POLAND
JEFFREY A. MANDELL
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
Post Office Box 1784
Madison, Wisconsin 53701-1784
dpoland@staffordlaw.com
jmandell@staffordlaw.com

(608) 256-0226

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because this brief contains 5,197 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with all typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 12-point font.

Dated: September 25, 2020

/s/ *Jon Sherman*
Jon Sherman

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further 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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/s/ *Jon Sherman*
Jon Sherman