Nos. 20-2835; 20-2844

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.
Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, ET AL.
Defendants-Appellants.

SYLVIA GEAR, ET AL.
Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, ET AL.
Defendants-Appellants.

CHRYSTAL EDWARDS, ET AL.
Plaintiffs-Appellees,

v.

ROBIN VOS, ET AL.
Defendants-Appellants.

JILL SWENSON, ET AL.
Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, ET AL.
Defendants-Appellants.

On Appeal From The United States District Court
For The Western District of Wisconsin
The Honorable William M. Conley
Cases No. 20-cv-249; 20-cv-278; 20-cv-340; 20-cv-459

OPPOSITION OF PLAINTIFFS-APPELLEES JILL SWENSON, MELODY MCCURTIS, MARIA NELSON, BLACK LEADERS ORGANIZING FOR COMMUNITIES, AND DISABILITY RIGHTS WISCONSIN TO MOTION TO STAY THE PRELIMINARY INJUNCTION IN CASES NO. 20-CV-249; 20-CV-278; 20-CV-340; AND 20-CV-459

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INTRODUCTION

Reading the Legislature's stay motion, one could forget that Wisconsin, the United States, and the world are in the midst of a once-in-a-century pandemic, fighting a virus that has already killed more than 200,000 Americans and infected millions more. It is true that Wisconsin makes it easy to vote in normal circumstances. But this year, the pandemic has already made voting hard—and it will be orders of magnitude harder in a high-turnout Presidential election. The district court correctly enjoined provisions that normally might not prevent votes from being cast with reasonable effort, but that under these unprecedented circumstances will severely burden the right to vote in the November election.

That is especially true of the two aspects of the district court's order sought by the *Swenson* Plaintiffs: (i) a six-day extension of the absentee-ballot receipt deadline for ballots postmarked by election day; and (ii) an injunction suspending a Wisconsin statute that precludes municipalities facing pollworker shortages from addressing them by staffing workers from other counties. The Legislature lacks standing to appeal that order, and its appeal of this relief is meritless in any event.

The first item should be familiar to this Court—the district court ordered this same relief just before the April election, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020) (hereinafter "*DNC*"), and this Court declined to stay that portion of the court's decision. *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 3619499 (7th Cir. 2020) (hereinafter "*DNC II*"). The Supreme Court modified the order slightly by requiring ballots to be postmarked by election day, but otherwise left it intact. *Republican Nat'l Comm. v. Democratic*

Nat'l Comm., 140 S. Ct. 1205 (2020) (hereinafter "*RNC*"). The result was wide-scale voter *enfranchisement*: the order "resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely." Op.17. The district court's order was necessary in April, and the district court's factual findings based on the undisputed record make clear that it is even more necessary now. The overwhelming demand for absentee ballots because of the pandemic and the Postal Service's inability to keep up will, the court found, necessarily result in voters who follow every absentee-ballot law having their votes discarded under the current deadline—a problem that is likely to be much worse in November than it was in April.

Nor is there any basis to stay the order enjoining the county-residence requirement for pollworkers. The April primary was plagued by severe pollworker shortages, which caused municipalities across the State to shutter polling locations on the eve of the election. The Wisconsin Elections Commission ("WEC") Administrator, Meagan Wolfe, testified that similar pollworker shortages are her "biggest worry" for November. The voter confusion and consequent disenfranchisement caused by last-minute closures is bad enough, but polling-location consolidation is especially dangerous during this pandemic—the fewer the polling locations, the more crowded and dangerous the remaining ones will be for pollworkers and voters alike. A major impediment to opening polling locations, the district court found, is Wis. Stat. § 7.30(2), which precludes municipalities from addressing staffing shortages by hiring pollworkers from other counties, even when

using members of the National Guard. The court's order lifts this impediment and gives municipalities the flexibility necessary to avoid mass polling-place closures.

The Legislature is thus unlikely to prevail on appeal, both for lack of standing and on the merits. But this is not the only reason to deny a stay. The Legislature is simply wrong that the injunction will cause voter confusion because it comes too close to the election. General principles of equity, moreover, foreclose a stay. The motion should be denied.

STATEMENT OF THE CASE

The district court based its order on a voluminous record, including testimony from Wisconsin election officials, numerous expert reports and depositions, and over one hundred voter and organizational declarations. The court heard testimony at a day-long hearing from Wisconsin's chief election officer, Administrator Wolfe. Wis. Stat. § 5.05(3g). And the court issued detailed findings after reviewing roughly 1,000 pages of briefing. Giving these findings the "deference" they are "owed," *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006), the relevant facts are as follows:

COVID-19 is a novel respiratory illness that has killed more than 200,000 Americans and nearly 1 million globally. Op.9-10. "COVID-19 is mainly spread via person-to-person, respiratory droplets," largely "between people who are in close contact." *Id.*

Wisconsin's election system is "primarily designed to support polling place voting"; almost all ballots are cast in person, with absentee votes virtually "never compris[ing] more than 20% of all ballots" and "often … less than 10%." Op.15. But the sudden emergence of COVID-19 "turn[ed] historic voter patterns on their head"

in Wisconsin's spring primary, Op.20, causing absentee ballot demand to skyrocket and in-person voting to plummet, Op.10-13, 15. Almost immediately, "clerks reported they were running out of absentee ballot materials and felt overwhelmed by the volume of absentee ballot requests." Op.10-11, 15.

After the Legislature refused to postpone Wisconsin's April election, "three lawsuits were … filed with [the district] court requesting various relief relating to Wisconsin's impending primary election." Op.11. Among other relief, the district court enjoined Wis. Stat. § 6.87(6), which requires "that absentee ballots must be received by 8:00 p.m. on election day," extending the deadline by six days. *DNC*, 2020 WL 1638374, at *17, *22. On April 3, 2020—just four days before Wisconsin's April election—this Court refused the Legislature's request to stay that portion of the district court's order. *DNC II*, 2020 WL 3619499, at *1. On April 6, 2020, the Supreme Court modified the extension slightly to require that ballots be postmarked by election day. *RNC*, 140 S. Ct. at 1206-08.

Extending the ballot-receipt deadline was a massive success, "result[ing] in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely." Op.17. But not every aspect of the April election was so successful. In addition to "unprecedented" breakdowns in the absentee-voting process, *see* Op.12-19, "severe" pollworker "shortages" forced last-minute polling-site closures in many jurisdictions, Op.15. "[S]ome individuals had to wait in long lines, sometimes for hours before being allowed to vote," while others simply gave up and did not vote at all. Op.16-17.

Since April, the pandemic has showed no sign of slowing. "The unrebutted public health evidence in the record demonstrates that COVID-19 will continue to persist, and may worsen, through November." Op.19. In fact, the New York Times reported *yesterday* that Wisconsin is experiencing by far its highest rate of infection since the pandemic's start.[1]

The *Swenson* Plaintiffs filed suit (alongside three other plaintiff groups), asking the district court to enjoin certain requirements of Wisconsin law to ensure safe and effective voting in November. "[M]indful" of *Purcell*, this Court's teachings in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), and the State's interest in the enforcement of its election laws, Op.35-37, the district court granted the *Swenson* Plaintiffs' request in two respects. It extended the ballot-receipt deadline by six days, as it had in April (with this Court's blessing). Op. 47-48. And it enjoined Wisconsin's county-residence requirement, Wis. Stat. § 7.30(2).

The court stayed its order for seven days to allow appeals. Op.69. The Legislature moved for an emergency stay to undo the district court's modest yet crucial relief. Several Republican Party entities joined the Legislature's stay motion in a one-page filing.

[1] Wisconsin Covid Map, N.Y.TIMES, https://www.nytimes.com/interactive/2020/us/wisconsin-coronavirus-cases.html (last visited Sept. 24, 2020).

The WEC commissioners—defendants here, who are charged with administering Wisconsin's election laws—have not objected to the district court's order.

LEGAL STANDARD

"A stay is an intrusion into the ordinary processes of administration and judicial review and accordingly is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). In deciding whether to issue a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434. All factors counsel strongly against an extended stay, as the district court correctly found. *See Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985).

ARGUMENT

I. THE LEGISLATURE LACKS STANDING TO APPEAL

This Court's September 24 order questioned "the Legislature's authority to pursue this appeal." The Court was right to do so, as the Legislature lacks appellate standing.

Under *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013), the Legislature lacks standing to pursue this appeal in its own right because it has "no role … in the enforcement of" Wisconsin's election laws. *Id.* at 707. Only the WEC—which does not object to the order below—has that power. Wis. Stat. § 5.05. The Legislature thus has "no 'personal stake' in defending its enforcement that is distinguishable

from the general interest of every citizen of" Wisconsin. *Hollingsworth*, 570 U.S. at 707. That is what this Court held in *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019), concluding that "the Legislature-as-legislature has no interest" in defending the constitutionality of state law. *Id.* at 798 (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019)).

Likely recognizing as much, the Legislature's argument appears to be that it can appeal on behalf of the State itself as "agent[] of the State." *Hollingsworth*, 570 U.S. at 710, 713. According to the Legislature's docketing statement, the State has authorized the Legislature to represent the State through "Sections 13.365(3) and 803.09(2m) of the Wisconsin Statutes." But those statutes only allow *intervention* in court actions, and even then only "on behalf of the legislature," not the State. Wis. Stat. § 13.365(3); *see infra* at 8-9. Thus, just as with the proposition proponents in *Hollingsworth* who were allowed to intervene in district court but lacked standing to appeal, state law authorizes the Legislature to "argue in defense of" the constitutionality of Wisconsin statutes in court because state law grants them "the authority to assert the State's interest in [challenged statutes'] validity." 570 U.S. at 712. But as with *Hollingsworth*, no Wisconsin law grants the Legislature the authority to represent the State itself *as an agent*.

This Court's April stay decision is not to the contrary. The issue there was whether the district court properly denied the Legislature the right to intervene, and whether the Legislature could appeal *that* decision. *DNC II*, 2020 WL 3619499, at *2. That state law authorizes the Legislature to intervene in federal court is

certainly a basis for the Legislature to appeal a ruling denying intervention rights. That does not mean that the Legislature is authorized to appeal on the State's behalf.

Nor does *Kaul* support the Legislature's position. That decision states in dicta that it was "comfortable adopting the district court's *assumption* that § 803.09(2m) gives the Legislature standing as an agent of the State of Wisconsin." 942 F.3d at 798 (emphasis added). But the question in that case was, again, not the Legislature's right to appeal an adverse ruling but rather to intervene in the district court in the first instance. *Hollingsworth* makes clear that the power of district court intervention does not translate into appellate standing on behalf of the State, even when "the Legislature … has its own independent statutory right to appear in court in defense of state laws." *Id.* at 806 (Sykes, J., concurring). And in any event, the Court never was required to determine the correctness of the district court's "assumption" that § 803.09(2m) creates an agency relationship because the Court *denied* the Legislature's ability to intervene as of right. *Id*. at 804.

Regardless, the Wisconsin Supreme Court has recently clarified that §§ 13.365 and 803.09(2m) only allow intervention "*on behalf of a particular legislative entity*," and even then only where the Legislature's "institutional interests are implicated" (e.g., an interest in the expenditure of state funds). *SEIU, Local 1 v. Vos*, 946 N.W.2d 35, 51-56 (Wis. 2020) (emphasis added). Obviously, this limitation cannot extend to the Legislature's right to defend any state statute, even when it does not implicate a particularized interest of the Legislature; otherwise it

would be no limitation at all. *SEIU* thus confirms that the intervention statutes on which the Legislature relies *do not* authorize the Legislature to represent the State in the general defense of legislative enactments.

The Legislature thus lacks standing to appeal the district court's preliminary injunction. The Republican Party entities also object to the order, but they obviously lack standing because they have no delegated authority to litigate on the State's behalf and no particularized interest of their own. *Common Cause*, 2020 WL 4680151, at *1. That is the end of the matter.

II. THE LEGISLATURE IS UNLIKELY TO SUCCEED ON THE MERITS

Even if it had standing, the Legislature would not prevail on appeal.

Under the *Anderson-Burdick* framework, a court must weigh "the character and magnitude of the asserted injury to [voting] rights" against "the precise interests put forward by the State as justifications for the burden imposed." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The district court correctly granted the *Swenson* Plaintiffs limited but crucial relief under that framework.

A. Absentee-Ballot Receipt Deadline

In April, the district court extended the absentee-ballot receipt deadline by six days, *DNC*, 2020 WL 1638374, at *20, *22, and this Court affirmed that relief and denied a stay, *DNC II*, 2020 WL 3619499, at *1. The Supreme Court added a requirement that ballots be postmarked before or on election day to be counted, *RNC*, 140 S. Ct. at 1206-08, but the receipt-deadline extension itself went into effect for the April election, vindicating "as many as 80,000 voters' rights." Op.17, 51.

The district court issued exactly the same relief here, extending the ballot-receipt deadline by six days for ballots postmarked by election day. Op.47.

One major problem is that Wisconsin law authorizes voters to request an absentee ballot by mail up until five days (Thursday) before election day, Wis. Stat. § 6.86(1)(b), but requires all ballots to arrive at the polling place by 8 PM on election day, Wis. Stat. § 6.87(6). However that scheme works in normal times, if election officials are flooded with absentee-ballot requests or if USPS is overwhelmed—as the district court found was likely—many absentee ballots cannot be mailed out and received back by election day, *even though the voter complied with state law*. Op.20-21, 48.

That is what happened in April, and "there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election." Op.48. For example, the "WEC is now projecting" that the millions of absentee ballot requests will exceed "the number of absentees by a factor of three for any prior general, presidential elections." Op.47. The WEC explains that "the unprecedented numbers of absentee voters will again be very challenging for local election officials to manage." Op.20. Making matters worse, there will be severe USPS delays in November, Op.48, which pose a "high risk" that Wisconsin voters' ballots will go uncounted. *See* Op.21.

The Legislature does not deny any of this, but nevertheless proposes three objections to the district court's relief. Each should be rejected.

First, the Legislature says that extending the deadline undermines the State's interest in promptly reporting election results, Mot.13, but that interest cannot justify arbitrarily disenfranchising tens of thousands of voters, Op.51. Rather, prioritizing speed over accuracy would *harm* Wisconsin's "valid interest in protecting the integrity and reliability of the electoral process." *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014) (quotation omitted).

The Legislature's argument, moreover, finds no support in the record. The evidence showed the court's relief in April "actually furthered the state's interest in completing its canvass." Op. 50-51. As Administrator Wolfe testified, "election officials were able to meet all post-election canvassing deadlines notwithstanding this court's six-day extension of the deadline in April, and the extension gave election officials time to tabulate and report election results more efficiently and accurately." *Id.* The Legislature offers no reason to expect a different result in November. The Legislature also ignores that fourteen other states count timely-postmarked ballots that arrive in the days following the election, Op.50, and that many courts have already authorized similar extensions in other jurisdictions during the pandemic.[2]

Second, the Legislature suggests that relief is unwarranted because absentee voters can request and return their ballots much earlier than the statutory deadline, or return their ballots by other methods. Mot.10-11. But voting rights are

[2] *See, e.g.*, *New Ga. Project v. Raffensperger*, 2020 WL 5200930, at *24-25 (N.D. Ga. Aug. 31, 2020); *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, at *17-18 (Pa. Sept. 17, 2020); *Mich. Alliance for Retired Americans v. Benson*, No. 20-0108-MM (Mich. Ct. of Cl. Sept. 18, 2020).

severely burdened when voters are disenfranchised despite "follow[ing] the ostensible deadline for their ballots only to discover that their votes would not be counted." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1324-25 (11th Cir. 2019). That is what would happen here: the district court found that absent an extension, "tens of thousands" of "prudent" voters "will not request an absentee ballot far enough in advance" to timely "receive it, vote, and return it for receipt by mail before the election day deadline despite acting well in advance of the [legal] deadline for requ[esting] a ballot." Op.49. The Legislature suggests that voters who wait to return their ballots are procrastinating without reason, but as the court explained, it is "unreasonable to expect undecided voters to exercise their voting franchise by absentee ballot well before the end of the presidential campaign, especially when Wisconsin's statutory deadline is giving them a false sense of confidence in timely receipt." Op.49-50. Wisconsin's system thus unlawfully sets massive swaths of "reasonabl[e]" rule-following voters "up for failure in light of the near certain impacts of this ongoing pandemic." Op.49. And the Legislature's argument disregards voters who submit early requests but whose ballots are delayed through no fault of their own.

Third, the Legislature errs in asserting that this relief is inconsistent with *Luft*. To start, the extension is as-applied (not facial) relief, extending the ballot-receipt deadline only for November due to a once-in-a-century pandemic. Regardless, Wisconsin cannot choose to provide mail-in voting—and strongly "urg[e]" "as many people as possible" to use that system during the pandemic,

Op.20—but then allow thousands of law-abiding voters to be disenfranchised. *See Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 110-12 (2d Cir. 2008). That is why courts routinely assess the burdens imposed by absentee-ballot laws under *Anderson-Burdick*. *See, e.g.*, *Mays v. LaRose*, 951 F.3d 775, 780 (6th Cir. 2020) (deadline to request absentee ballot). The Legislature's rule—that *Anderson-Burdick* does not apply to mail-in voting because mail-in voting need not be offered in the first place and in-person voting is a "constitutionally adequate option"—is illogical. *If* a state provides a vote-by-mail option, *then* it must ensure that option is effective—a contrary rule would effectively allow a state to deceive voters and lead to wide-scale voter confusion and certain disenfranchisement.

Moreover, the Legislature ignores the fact that the pandemic itself makes in-person voting more difficult, *see* Part II.B, *infra*, making absentee voting an especially crucial aspect of the "whole electoral system" in the upcoming election. *Luft*, 963 F.3d at 672.[3] *Luft* reaffirmed that if voting rights are in danger of being "*severely restricted*" on a widespread scale, the state must have "compelling interests" for its restrictions and ensure they are "narrowly tailored" to help alleviate these widespread, systemic burdens. *Id.* at 671-72 (emphasis added). Because Wisconsin's ballot-receipt deadline is likely to disenfranchise voters on a systemic level—well over 100,000 voters, Op.51—and the State lacks any interest

[3] That is one reason why the Legislature is wrong that "voters who experience any absentee-voting mailing or processing problems" can simply vote in person on election day. Mot.11. Another is that once a voter mails in her absentee ballot, she cannot then spoil that ballot and vote in person on election day—even if her ballot will be delayed in returning to the clerk's office. Wis. Stat. § 6.86(6).

that could justify such massive disenfranchisement, the district court properly modified the statutory deadline in line with this Court's and the Supreme Court's decisions in April.

B. County-Residence Requirement

The district court also enjoined Wis. Stat. § 7.30(2), which requires that each pollworker be "a qualified elector of a county in which the municipality where the official serves is located." The Legislature's objections to that relief are likewise misplaced.

In an ordinary election, each Wisconsin municipality can open sufficient polling places to allow every eligible voter to vote in person safely. Not so during COVID-19, which (the court found) has triggered serious difficulties in recruiting and retaining pollworkers. Op.15-16, 59. These "severe shortages" resulted "in some localities being severely limited in providing in-person voting opportunities" in Wisconsin's April election: for example, "Milwaukee was only able to open *five* of its usual 180 polling sites, and Green Bay reduced its usual 31 polling sites to just *two*." *Id.*

Such mass closures impose impossible burdens on voters (and pollworkers) during a pandemic because they ensure that the polling locations that do open will be overcrowded, thus presenting a substantial risk of disease transmission. As the district court found, safe and effective in-person voting during a highly contagious pandemic cannot occur absent a sufficient number of polling locations to spread out voting. Op.19.

Yet Wisconsin's severe pollworker shortages are likely to continue through the November election. Despite having "greater warning and opportunity to plan, local election officials still had difficulty securing adequate people for Wisconsin's much smaller August 2020 election." Op.59. And the district court found—and the Legislature does not deny—that "[i]n-person voting in November is also likely to be strained by a shortage of pollworkers, despite more time to plan for that shortage than was available for the spring election." Op.22. Administrator Wolfe testified, for example, that "despite the advance warning [and] the greater time to plan … local municipalities are still having problems filling all their polling stations." Op.21-22 (citing R.532:82). Indeed, "based on her past experience and unique perspective, Administrator Wolfe testified that her *biggest worry* in the administration of the November election is a lack of pollworkers for in-person voting on election day." Op. 59. The testimony from Green Bay and Milwaukee is in accord. *See* R.480:123; R.470:111-112; R.319:50.

The Legislature's suggestion that lifting the county-residence requirement will not alleviate these staffing issues, Mot.16, 19, ignores the undisputed record and district court findings. The county-residence requirement prevents municipalities experiencing shortages from recruiting pollworkers from other jurisdictions with no shortages, and the WEC from coordinating volunteer pollworkers to go where needed as shortages arise. Op.59-60; *Swenson* R.42:20, 21. And it prevents municipalities from accessing National Guard members who reside

outside of their community, should the Governor choose to again activate the National Guard. *Id.*

Critically, the WEC *agrees* that the pool of pollworkers available to local officials would be larger absent the county-residence requirement. R.518-2:13. And both Milwaukee and Green Bay testified that allowing inter-county sharing of pollworkers would help abate shortages in the November election. R.470:111-113; R.494:24; R.480:143-144.

The Legislature responds with the State's interest in promoting a decentralized approach to election management. Mot.16. But no municipality will be *forced* to hire pollworkers from outside the county. And "if a county or municipality lacks sufficient pollworkers and wishes to recruit workers from other locations within the state," then "the municipality or county has already conceded its inability to maintain [the decentralized election-management] interest while still conducting a meaningful election." Op.59-60. Regardless, Wisconsin's amorphous interest in decentralized election management cannot justify restricting the ability to send resources where needed in the face of "expressed, local need" during an unprecedented pandemic. Op.60.

Remarkably, while the Legislature contends that the availability of in-person voting renders fundamental failures in the absentee-voting process constitutional, *see* Part II.A, *supra*, it simultaneously contends that unsafe in-person voting is solved by the availability of absentee voting. Mot.14. The Legislature cannot have it both ways. Op.20-21. And as with absentee voting, Wisconsin cannot tell its

voters they can vote in person, but then abdicate its duty to ensure that voting in person is safe. The district court's relief will help solve the most important problem standing in the way of opening sufficient and safe polling places. The court committed no error in ordering that modest relief.

III. THE CONCERNS ANIMATING *PURCELL* DO NOT APPLY TO THE RELIEF ORDERED IN *SWENSON*

This Court asked the parties to address "the propriety of the district court's order this close to the election, and the bearing of [*RNC*]." None of the relief ordered in the *Swenson* case will "result in voter confusion and consequent incentive to remain away from the polls"—the principal concern animating *Purcell*, 549 U.S. at 4-5, and the *RNC* decision, 140 S. Ct. at 1207.

A. Absentee-Ballot Receipt Deadline

In April, this Court refused to stay identical relief just *four days* before Wisconsin's April election, *DNC II*, 2020 WL 3619499, at *1, and the Supreme Court relied on that relief in holding that absentee ballots "must be … postmarked by election day," *RNC*, 140 S. Ct. at 1206. We know for a fact that the result was not "voter confusion and concomitant disenfranchisement." Mot.17. Just the opposite: the extension *enfranchised* "some 80,000 voters." Op.48.

Unlike in April, moreover, the district court issued the order here *six weeks* before the election to ensure that "the WEC and local election officials" would have "sufficient time … to implement any modifications to existing election laws, and to communicate those changes to voters." Op.35. Indeed, the district court specifically addressed "the risk that any of its actions may create confusion on the part of

voters," and found that issuing its decision well "in advance" of the election would "ameliorate that risk." *Id*. The district court's factual findings are fully consistent with *Purcell*, which acknowledged that the farther away the election, the lower the risk. 549 U.S. at 5. Under *Purcell*, these findings are "owed deference." *Id.* The Legislature, moreover, identifies no facts undermining the district court's findings; indeed, it does not address the district court's findings *at all*.

The Legislature appears to think that *Purcell* categorically bars relief anywhere in the vicinity of an election. That is incorrect, as this Court's decision in April clearly demonstrates. Indeed, court orders enjoining unconstitutional voting restrictions are frequently implemented on shorter timelines than the six weeks at issue here. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1336 n.6 (N.D. Ga. 2018), *stay denied* 2018 WL 7822108 (11th Cir. Nov. 2, 2018). As Judge Sutton explained for a majority of the Sixth Circuit, while the imminence of an election will "often" counsel a federal court to stay its hand, "that will not always be the case. This generalization surely does not control many election-related disputes—keeping polls open past their established times *on* election day or *altering the rules for casting ballots during election week*[.]" *Ohio Rep. Party v. Brunner*, 544 F.3d 711, 718 (6th Cir. 2008) (en banc) (emphasis altered), *vacated on other grounds by* 555 U.S. 5 (2008). The question is simply whether the risk of voter confusion outweighs the public's "strong interest in exercising the fundamental political right to vote." *Purcell*, 549 U.S. at 4 (quotations omitted). Here, the district court found that the balance tips in favor of Wisconsin voters.

In fact, *Purcell*'s concern about voter confusion has little purchase here. *See, e.g.*, *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 16-17 (1st Cir. 2020), *stay denied by* 2020 WL 4680151 (U.S. Aug. 13, 2020). While some court orders can undoubtedly produce voter confusion and disenfranchisement, it is difficult to comprehend how the *extension* of a ballot-receipt deadline for ballots properly cast under existing rules could possibly yield that result. The *only* possible consequence of the district court's order is the enfranchisement of more Wisconsin voters who mail their ballots by the existing legal deadline—exactly as happened in April. Indeed, the deadline was already extended in April, so voters "may well" expect it to be extended in November's higher-turnout election; and they certainly would not be confused if it were. *Common Cause*, 2020 WL 4680151, at *1; *see also Frank v. Walker*, 574 U.S. 929 (2014).[4]

B. County-Residence Requirement

There is no plausible *Purcell* concern with the district court's order enjoining the county-residence requirement. It obviously will not confuse voters, who do not decide whether to vote based on pollworkers' counties of residence. *Purcell* considerations actually cut the other way: the injunction means that fewer polling places will be consolidated at the last minute, allowing designated polling places to

[4] As *Common Cause* illustrates, the Legislature is wrong that the Supreme Court will categorically deny relief in COVID-19-related voting litigation. Mot.1-2. And unlike here, there were actual *Purcell* issues in the Texas and Alabama cases. In Texas, petitioners waited nearly a month after the injunction was stayed before seeking extraordinary relief from the Supreme Court, immediately before the statewide primary. And Alabama was in the middle of a primary election runoff when the district court issued an injunction concerning the state's photo-ID and curbside-voting laws, both of which present different *Purcell* concerns.

open as they normally would and *alleviating* voter confusion. "Perhaps as a result, the [Legislature] make[s] no claim that" this aspect of the district court's order "will cause a decrease in election participation." *Common Cause*, 970 F.3d at 17.

IV. THE REMAINING FACTORS WEIGH HEAVILY AGAINST A STAY

In addition to the voter confusion that may result from a stay, this case shares another crucial feature with *Common Cause*: the state officials charged with administering Wisconsin election law do not oppose the district court's order. 2020 WL 4680151, at *1. That is a powerful reason to deny a stay. It is also a good reason to discount the Legislature's (unsubstantiated) claim of administrative burdens, since the officials with actual experience administering Wisconsin elections do not share the Legislature's view. *See* Part II.A, *supra*.

Moreover, "[a] restriction on the fundamental right to vote … constitutes irreparable injury." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Here, the district court correctly found that, absent effective injunctive relief, *tens of thousands* of voters will likely be disenfranchised by Wisconsin's ballot-receipt deadline and countless others will be subject to polling-place closures and consolidation. There is nothing on the other side of the ledger. The Legislature cites its abstract interest in continuing with its "duly enacted plan," Mot.17, but the Legislature's "plan" did not "remotely contemplate[]" voting during a pandemic. Op.53. In fact, the order below vindicates the Legislature's "duly enacted plan" by ensuring that local officials can open the polling places they promised and voters who elect to vote by mail can be sure that timely-cast ballots are counted.

CONCLUSION

The Court should deny the motion to stay.

Respectfully submitted,

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Dated: September 25, 2020

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 5,187 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 2016 in Century Schoolbook 12-point font.

Dated: September 25, 2020

/s/ *Anton Metlitsky*
Anton Metlitsky

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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