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,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

SYLVIA GEAR, ET AL.,
PLAINTIFFS-APPELLEES,
v.
MARGE BOSTELMANN, ET AL.,
DEFENDANTS,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

CHRYSTAL EDWARDS, ET AL.,
PLAINTIFFS -APPELLEES,
v.
WISCONSIN STATE LEGISLATURE,
DEFENDANT-APPELLANT.

JILL SWENSON, ET AL.,
PLAINTIFFS -APPELLEES,
v.
MARGE BOSTELMANN, ET AL.,
DEFENDANTS,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

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

WISCONSIN LEGISLATURE'S
EMERGENCY PETITION FOR REHEARING EN BANC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2835

Short Caption: Democratic National Committee et al. v. Marge Bostelmann, et al., and Wisconsin State Legislature

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Misha Tseytlin Date: 9/23/2020

Attorney's Printed Name: Misha Tseytlin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

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Attorney's Printed Name: Robert E. Browne Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Kevin M. LeRoy Date: 9/23/2020

Attorney's Printed Name: Kevin M. LeRoy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Sean T.H. Dutton Date: 9/23/2020

Attorney's Printed Name: Sean T.H. Dutton

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Wisconsin State Legislature (in Case No. 3:20-cv-278)

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Baker Botts LLP; Troutman Pepper Hamilton Sanders LLP (formerly Troutman Sanders LLP); Husch Blackwell LLP; Eimer Stahl LLP

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N/A

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N/A

Attorney's Signature: /s/ Scott A. Keller Date: 09/30/2020

Attorney's Printed Name: Scott A. Keller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Eric M. McLeod Date: September 23, 2020

Attorney's Printed Name: Eric M. McLeod

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Lane E. Ruhland Date: September 23, 2020

Attorney's Printed Name: Lane E. Ruhland

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Lisa M. Lawless Date: September 23, 2020

Attorney's Printed Name: Lisa M. Lawless

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

RULE 35(B)(1) STATEMENT AND INTRODUCTION

The Wisconsin Legislature respectfully requests rehearing en banc under Federal Rule of Appellate Procedure 35 for two main reasons. The Legislature requests that this Court **(1) immediately reimpose its temporary administrative stay of the district court's preliminary-injunction order pending resolution of this petition**; and **(2) grant the Legislature's stay motion by Tuesday, October 6**—after which time, the Legislature will seek relief in the U.S. Supreme Court**.**

First, the panel's decision holding that the Legislature lacks standing to appeal the district court's order conflicts with multiple decisions of the U.S. Supreme Court and this Court—including earlier decisions *in this very case*. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206-08 (2020) (per curiam) (necessarily concluding that the Legislature has standing earlier in this case) ("*RNC*"); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952-53 (2019); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020) (the "Legislature has standing to pursue this appeal" in this case) ("*DNC*"); *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (Legislature has "standing *as an agent of the State of Wisconsin*" in defending state law) (emphasis added); *see* Fed. R. App. P. 35(a)(1).

Second, the panel's decision presents a question of "exceptional importance," Fed. R. App. P. 35(a)(2), because its dispositive reasoning rests on a manifestly erroneous interpretation of Wisconsin state law that would deprive the State of any

entity with standing to defend the validity of the State's election laws—and "the inability to enforce its duly enacted [election laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Wisconsin state statutes expressly allow "the legislature" to defend against lawsuits where "a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute." Wis. Stat. § 803.09(2m); *see id.* § 13.365.

The panel decision misapplies multiple U.S. Supreme Court and Wisconsin Supreme Court precedents:

- The panel wrongly held that the "State legislatures must leave to the executive officials of the state . . . the vindication of the state's interest in the validity of enacted legislation." Dkt.51:4.
    - To the contrary, U.S. Supreme Court precedents provide two independent paths for state legislatures to defend state law: (1) under state statutes granting that authority or (2) under practice established by the state supreme court. *See Bethune-Hill*, 139 S. Ct. at 1952; *Hollingsworth v. Perry*, 570 U.S. 693, 709-10 (2013) (citing *Karcher v. May*, 484 U.S. 72 (1987)).
- The panel incorrectly stated, "the Supreme Court held in [*Bethune-Hill*] that a state legislature is not entitled to litigate in federal court about the validity of a state statute, even when that statute concerns the apportionment of legislative districts." Dkt.51:3-4.
    - The Supreme Court recognized situations in which a legislature *is* entitled to litigate in federal courts—as here, States can statutorily "authoriz[e] [a legislature] to litigate on the State's behalf." *Bethune-Hill*, 139 S. Ct. at 1952.
- The panel misstated the Wisconsin Supreme Court's holding in *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 946 N.W.2d 35 (Wis. 2020), by saying that "the state's constitution . . . *commits to the executive*

branch of government the protection of the state's interest in litigation." Dkt.51:5 (emphasis added).

- The panel ignored that *SEIU* held the "power to litigate on behalf of the State … is within those borderlands of *shared powers*" between Wisconsin's executive and legislative branches. 946 N.W.2d at 54 (emphasis added).

- The panel ignored that *SEIU* in fact *upheld* the facial validity of Wis. Stat. §§ 803.09(2m) and 13.365, which grant the Legislature authority to litigate to defend state law. *See id.* at 56.

- The panel ignored that *SEIU* itself *allowed* the Legislature *in that case* to appeal and defend state law where no other state actor would. *See id.*

- The panel did not even attempt to conduct the "shared powers" analysis required by *SEIU* for determining whether an as-applied state constitutional separation-of-powers problem is possibly implicated here. *Id.* at 47.

- So the panel did not address how the Legislature could possibly "burden" or "interfere" with the state executive branch's powers here, where the Attorney General and outside counsel do not defend the challenged state election laws. *Id.*

Worse yet, the panel refused to certify this dispositive state-law question to the Wisconsin Supreme Court, which would have allowed that Court to confirm what state law requires before depriving the State of a defense of its laws. *See* 7th Cir. R. 52 (permitting state-court certification when question of state law "will control the outcome of a case pending in the federal court").

Leaving the State's laws without a defense is especially harmful here because it comes in the middle on an ongoing election. The district court's order altering state election law, therefore, "can [] result in voter confusion and consequent incentive to remain away from the polls," under the Supreme Court's *Purcell* principle. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Indeed, earlier in this case facing a

similar last-minute injunction, the Supreme Court reiterated that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *RNC*, 140 S. Ct. at 1207 (collecting authorities). In all events, the Legislature is entitled to a stay on the merits—an issue the panel did not reach.

STATEMENT

A. As quoted above, Wisconsin state statutes permit "the legislature" to defend against lawsuits—like the instant lawsuits—challenging the "constitutionality of a statute, facially or as applied." Wis. Stat. § 803.09(2m); *see id.* § 13.365.

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

"Registering to vote is easy in Wisconsin." *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014) ("*Frank I*"). Wisconsin voters need only complete a registration form and, for most voters, provide "an identifying document that establishes proof of residence." Wis. Stat. § 6.34(2); R.538:5 (district court's order on preliminary injunction) ("Op."). Voters may register in person at the clerk's office, by mail, or online using the Wisconsin Elections Commission's ("Commission") website and, for the November Election, voters must either register by October 14, *see* Wis. Stat. §§ 6.28(1), 6.29(2)(a), or complete "[l]ate registration" in person at the clerk's office by October 30, 2020, *id.* § 6.29(1)-(2). Finally, a voter may register in person on election day, immediately before casting a ballot. *Id.* § 6.55(2).

Wisconsin also has no-excuses-needed absentee voting, making voting by mail easy. *Id.* § 6.85; *Luft*, 963 F.3d at 672. Notably, that by-mail voting for the November

Election has already begun. Op.55. To obtain an absentee ballot, voters need only submit a request by October 29, if requesting it by mail, fax, or online, or by November 1, 2020, if requesting it in person. Wis. Stat. §§ 6.86(1)(ac), 6.86(1)(b). Any registered voter may request a ballot immediately, so voters who do not wish to vote in-person still have many weeks to request and return their ballots. *Id.* § 7.15(1)(cm). Voters must then return the ballot by 8:00 p.m. on election day, which they may do by mail, via a "drop box" where available, through hand delivery to the clerk's office or another designated site, or by delivering it to their polling place. *Id.* § 6.87(6). For "military [and overseas] voters" requesting absentee ballots, Wisconsin law allows municipal clerks to "fax or email" them absentee ballots after receiving a valid absentee-ballot request. *Id.* § 6.87(3)(d).

Wisconsin law allows voters who are "indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period" to elect to "automatically" receive absentee ballots "for every election," without satisfying the photo-ID requirement. *Id.* §§ 6.86(2)(a), 6.87(4)(b)2. The Commission has clearly explained this exception to voters, noting that "[d]esignation of indefinitely confined status is for each individual voter to make based upon their current circumstance[s]," "[i]t does not require permanent or total inability to travel outside of the residence," and "shall not be used . . . simply as a means to avoid the photo ID requirement." R.458-12.[1]

[1] Available at https://elections.wi.gov/voters/absentee.

Finally, eligible Wisconsinites have multiple options to vote in person, both for two weeks in-person absentee until November 1, Wis. Stat. § 6.86(1)(b), and on election day, *id.* §§ 6.76-78, 6.80.

C. In these consolidated cases, Plaintiffs challenged myriad Wisconsin election laws under the federal constitutional *Anderson*/*Burdick* doctrine. Op.2-4. The Attorney General does not represent the defendants, after he withdrew earlier in the litigation. R.13-15, 56-58. The defendants—sued in their official capacities as members of the Commission—have no authority to litigate in defense of state law, so they did not say a word in defense of state law or oppose the requested injunctions, nor have they appealed the district court's order. R.2:3 (Commission asserting its limited litigation authority).

On September 21—and *while voting was already underway*, Op.55—the district court entered an order:

> (1) extending the deadline for online and mail-in registration;
>
> (2) directing the Commission to include certain language on its websites and other communications regarding the "indefinitely confined" option;
>
> (3) extending the receipt deadline for absentee ballots by one week;
>
> (4) allowing access to replacement absentee ballots online or via email from October 22, through October 29, for certain voters; and
>
> (5) enjoining the Wis. Stat. § 7.30(2)'s rule that each election official be an elector of the county in which the municipality is located.

Op.67-69.

The district court stayed its preliminary injunction order for seven days, to provide for emergency appellate proceedings. Op.69. This Court initially granted an

interim stay on September 24, Dkt.11, after the Legislature—as well as the Republican National Committee and Republican Party of Wisconsin—moved to stay the district court's injunction. Dkt.9, 15. A three-judge panel of this Court lifted the interim stay on September 29 after concluding that none of the movants had standing to appeal. Dkt.51. And that panel denied the Legislature's motion to certify the dispositive state-law standing question to the Wisconsin Supreme Court. Dkt.54.

ARGUMENT

I. The Panel Incorrectly Held That The Legislature Lacks Standing To Appeal The District Court's Erroneous Order, Contravening Supreme Court, Seventh Circuit, And Wisconsin Supreme Court Precedent—And Without First Certifying This Dispositive State-Law Issue To The Wisconsin Supreme Court.

A. The panel incorrectly held that the Legislature lacks standing to appeal the district court's order. This ignored directly controlling U.S. Supreme Court (*RNC*; *Bethune-Hill*) and circuit precedent (*DNC*; *Planned Parenthood*), and it erroneously interpreted the Wisconsin Supreme Court's decision in *SEIU*. "[A] State must be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U.S. at 710. Yet the panel wrongly concluded that as a matter of state law, the Wisconsin Legislature has no interest in the defense of state law—even where state statutes grant it that authority and the state executive branch declines to defend state law.

1. As an initial matter, the Supreme Court's decision in *RNC v. DNC* conclusively resolves any questions about the Legislature's standing in favor of the Legislature. The U.S. Supreme Court decided by "necessary implication," *Dobbs v. DePuy Orthopaedics, Inc.*, 885 F.3d 455, 458 (7th Cir. 2018), that the Legislature has

standing to appeal district court orders enjoining enforcement of state law in these lawsuits. *RNC*, 140 S. Ct. 1205. That is settled law of the case binding on this Court. Notably, the panel's order here does not even consider the Supreme Court's decision in *RNC*, only citing *RNC* to note that the Court granted a stay to the Legislature earlier in the litigation. Dkt.51:4.

The U.S. Supreme Court's decision in *RNC* is compelled by the Court's earlier decision in *Bethune-Hill*, in which the Court identified two independent paths for recognizing that a legislature has standing to bring an appeal on behalf of a State's interest in the validity of its own laws: (1) express statutory authorization, *Bethune-Hill*, 139 S. Ct. at 1952; or (2) practice in state court, *id.* (citing *Karcher*, 484 U.S. at 82). As the Court necessarily recognized in *RNC*, the Wisconsin Legislature satisfies both paths.

First, Wisconsin has expressly granted "the legislature" statutory authority to defend state statutes and vindicate the State's interest in the validity of its laws. *See* Wis. Stat. §§ 13.365(3), 803.09(2m). *Bethune-Hill* recognized that States can statutorily "authoriz[e] [a legislature] to litigate on the State's behalf," and *Bethune-Hill* discussed Indiana's law—permitting the Indiana Legislature "to defend any law enacted creating legislative or congressional districts," Ind. Code § 2-3-8-1—as a sufficient example. *Bethune-Hill*, 139 S. Ct. at 1952. Wisconsin's statutes provide that same thing for *all* constitutional challenges to state statutes. *See* Wis. Stat. §§ 13.365(3), 803.09(2m).

Second, and independently, Wisconsin's "noted [] record . . . of litigation by state legislative bodies in state court," *Bethune-Hill*, 139 S. Ct. at 1952, "to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment" is sufficient to confer standing under *Karcher*, 484 U.S. at 82—which the Supreme Court cited with approval in *Bethune-Hill*, 139 S. Ct. at 1952. Just in the last two years, the Wisconsin Supreme Court has decided multiple cases where the Legislature[2] was allowed to be the only appellant challenging a lower court order enjoining enforcement of state law—including in *SEIU* itself. *E.g.*, *SEIU*, 946 N.W.2d 35; *League of Women Voters of Wis. v. Evers*, 929 N.W. 2d 209, 215 (Wis. 2019).

2. Furthermore, this Court's own precedents—relying on *Bethune-Hill*—likewise demonstrate that the panel erred in concluding the Legislature lacks standing. In April in *this very case*, this Court held that the "Legislature has standing to pursue this appeal." *DNC*, 2020 WL 3619499, at *2 (citing *Bethune-Hill*, 139 S. Ct. 1945; *Planned Parenthood*, 942 F.3d 793). And in *Planned Parenthood*, this Court was "comfortable adopting the district court's assumption" that the Legislature has "standing *as an agent of the State of Wisconsin*" in defense of state law. 942 F.3d at 798 (emphasis added; discussing *Bethune-Hill*, 139 S. Ct. 1945).

3. The panel's reliance on the Wisconsin Supreme Court's decision in *SEIU* is drastically misplaced. As just mentioned, *SEIU* in fact *allowed* the Legislature in that case to defend state law when no other state actor would—including by filing an

[2] In some cases, the named appellant was the Legislature; in other cases, the named appellant was the Legislature's leaders, speaking on behalf of the Legislature.

appeal. *SEIU* also *upheld* Wis. Stat. §§ 13.365(3), 803.09(2m) against facial attack on state separation-of-powers grounds, issuing many important holdings that all cut against the panel's decision here:

1. the "power to litigate on behalf of the State . . . is within those borderlands of *shared powers*" between Wisconsin's executive and legislative branches, *SEIU*, 946 N.W.2d at 54 (emphasis added);

2. "the attorney general's power to litigate on behalf of the State is not, at least in all circumstances, within the exclusive zone of executive authority," *id.*; and

3. accordingly, "at least in some cases" there is "no constitutional violation in allowing the legislature to intervene in litigation concerning the validity of a statute," *id.* at 56.

Nowhere is that shared power more important than in cases in which the executive branch declines to exercise its authority to defend state law. *See Hollingsworth*, 570 U.S. at 710 ("To vindicate that interest [in the continued enforceability of its laws], a State must be able to designate agents to represent it in federal court.") (citation omitted).

The panel did not even attempt to conduct the state separation-of-powers analysis *SEIU* requires, "which *begins* by determining if the power in question is core or shared." 946 N.W.2d at 47 (emphasis added). Had the panel done so, it would have been compelled to follow *SEIU*'s holding that the "power to litigate on behalf of the State . . . is within those *borderlands of shared powers*" between Wisconsin's executive and legislative branches. *Id.* at 54 (emphasis added). And the Legislature "may exercise power within these borderlands" *provided* that "no branch may unduly burden or substantially interfere with another branch." *Id.* at 47 (quoting *State v. Horn*, 594 N.W.2d 772, 776 (Wis. 1999)). At bottom, the Legislature's defense of state

law in court cannot "interfere" with the state executive branch when the executive branch is not involved in the litigation.

The Wisconsin Attorney General agreed with this argument in *SEIU*, conceding that the Legislature "has [a] shared interest in the defense of statutes" and that the Wisconsin Supreme Court "has found that the legislative branch incurs judicially cognizable injury when a duly enacted state statute is invalidated." 2019 WL 4645564, at *39; *see id.* at *39-40 ("The U.S. Supreme Court has acknowledged that invalidating a statute without an executive-branch defense can give rise to separation of powers concerns, and that such concerns can be mitigated if the statute is defended by agents of the legislative branch or other suitable parties.") (citing, among other cases, *Hollingsworth*, 570 U.S. at 709-10). The Attorney General therefore broadly conceded the state constitutionality of Wis. Stat. §§ 13.365(3), 803.09(2m)—especially where the State's Attorney General declines to defend the validity of state law, as is true here. *Id.* at *40. In fact, *SEIU* itself is a successful appeal brought *only* by the Legislature, against a lower state court's decision enjoining enforcement of state law.

Contrary to the panel's decision, therefore, the Wisconsin Supreme Court's decision in *SEIU* did *not* hold, or even suggest, that the power to "represent a general state interest in the validity of enacted legislation … belongs [exclusively] to Wisconsin's executive branch[.]" Dkt.51:5; *see SEIU*, 946 N.W.2d at 57. Nor did *SEIU* conclude that the Legislature may assert only its own institutional interest as the

Legislature, rather than further the State's interest in defending duly enacted state laws. *See SEIU*, 946 N.W.2d at 57.

B. At an absolute minimum, if there is any doubt on this dispositive state-law issue, including as to the meaning of *SEIU*, this Court should certify this question to the Wisconsin Supreme Court. The Wisconsin Supreme Court can definitively resolve whether Wis. Stat. §§ 13.365(3), 803.09(2m) constitutionally grant the Legislature authority under state law to represent the State on appeal in defense of state law—especially where no other state actor is defending state law. This Court has the authority to certify such a question, *Winebow, Inc. v. Capitol-Husting Co.*, 867 F.3d 862, 870 (7th Cir. 2017) (citing Wis. Stat. § 821.01), and the Wisconsin Supreme Court twice this year decided election-related legal questions either in a matter of hours, *see Wis. Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020), or within two business days, *see Jefferson v. Dane Cty.*, No. 2020AP557-OA (Wis. Mar. 31, 2020).

II. A Stay Is Warranted Under the *Purcell* Principle And In Light Of The Legislature's Likelihood Of Success On The Merits.

The grounds for the Legislature's stay motion—which the panel did not reach—are fully recounted in the Legislature's motion and reply. But a summary here demonstrates why this Court should reimpose its temporary administrative stay while it considers this petition.

A. The Supreme Court's *Purcell* principle requires a stay of the district court's order—especially because voting *has already begun*. Federal-court intervention in elections "can [] result in voter confusion and consequent incentive to remain away

from the polls," especially "[a]s an election draws closer," *Purcell*, 549 U.S. at 4-5; *accord RNC*, 140 S. Ct. at 1207.

B. Moreover, the Legislature is likely to succeed on the merits because, after looking at "the state's election code as a whole," *Luft*, 963 F.3d at 671, the voters covered by the injunction did not need the district court's relief to be able to vote with "reasonable effort," *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*").

Registration Deadline Extension. Wisconsin's voter registration deadlines are plainly constitutional. Voters still have many weeks until the deadlines to register online, by mail, or in person at the clerk's office, and Wisconsin also has "generous . . . same-day registration" at the polls. *Luft*, 963 F.3d at 676. The State's reasonable deadlines satisfy *Anderson*/*Burdick* and directly further the State's "valid and sufficient interests in providing for some period of time . . . to prepare adequate voter records and protect its electoral process from possible fraud." *Id.* (citation omitted).

Absentee Ballot-Receipt Deadline Extension. Wisconsin's requirement that absentee ballots be "delivered to the polling place serving the elector's residence before 8 p.m. [on election day]," is also constitutional. Wis. Stat. § 6.87(6). This deadline requires only "reasonable effort" from voters, *Frank II*, 819 F.3d at 386, since voters who do not wish to vote in-person have weeks to request and return their absentee ballots, *see* Wis. Stat. § 7.15(1)(cm). Any registered voter may request a ballot immediately, and clerks have already begun to deliver them to voters. Op.55. Further, voters may return these ballots by the election-day deadline through a variety of methods. Op.8. These mild "[a]dministrative steps" require little of the

voter. *Luft*, 963 F.3d at 679 (citation omitted). And, other voters can choose to vote in person—including during the two-week in-person absentee-voting period.

Week-Of Faxing and Emailing Absentee Ballots. Wisconsin's decision to allow only military or overseas electors to receive faxed or emailed absentee ballots, Wis. Stat. § 6.87(3)(d), poses no constitutional issues under *Anderson*/*Burdick*—as this Court held in *Luft*, which forecloses the relief here. 963 F.3d at 677.

Duplicative Information About the Indefinitely Confined Exception. The district court erred in requiring the Commission to provide more guidance on the "indefinitely confined" option. Op.58. The court did not hold that Wisconsin's photo-ID law would be unconstitutional without providing this duplicative information to voters, Op.56-58, nor could it under *Frank I*, 768 F.3d at 749-51.

Residency Rules for Election Officials. Wis. Stat. § 7.30(2)—which provides that a polling-place inspector must "be a qualified elector of a county in which the municipality where the official serves is located"—is a "reasonable" regulation. *Stone v. Bd. of Election Comm'rs for City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2014). It ensures that officials who are truly local administer their own polling places, furthering the State's desire to take a "decentralized" approach to election administration. *See* R.227-1:1; R.227-2:10.

C. Under all the other equitable factors, a stay is appropriate.

Primarily, the "inability [of the State] to enforce its duly enacted [election laws] clearly inflicts irreparable harm on the State" by interfering with its sovereign decisions. *Abbott*, 138 S. Ct. at 2324 & n.17. While the changes that the district court

ordered vary in practical significance, each aspect of the order infringes upon Wisconsin's sovereignty by substituting "[o]ne federal judge's preference[s]" for those of the "state legislature." *Luft*, 963 F.3d at 679.

Moreover, a balance of harm and public interest analysis strongly favors a stay as explained in the Legislature's motion. Dkt.9-1:18-19.

CONCLUSION

The petition for rehearing en banc should be granted.

Dated: September 30, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3815 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f).

This petition complies with all typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Circuit Rule 32(b), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook.

Dated: September 30, 2020.

/s/ Scott A. Keller
SCOTT A. KELLER

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2020, I filed the foregoing Emergency Petition for Rehearing En Banc 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: September 30, 2020

/s/ Scott A. Keller
SCOTT A. KELLER