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October 13, 2020

Mr. David J. Smith, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *People First of Ala. v. John H. Merrill, Sec. of State of Ala.*, No. 20-13695-B

Dear Mr. Smith:

Last Wednesday, October 7, Appellants filed their reply in support of their motion for stay of the district court's injunction. Since then, three Circuit Courts of Appeals have entered stays of similar injunctions that relied on COVID-19 to alter the election laws that will apply to the November 3 election.

First, on October 8, the Seventh Circuit stayed an injunction that extended Wisconsin's registration and receipt deadlines for the upcoming election. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359, at *3 (7th Cir. Oct. 8, 2020).

Second, on October 9, the Sixth Circuit stayed an injunction that enjoined the Ohio Secretary of State from enforcing his directive that absentee ballot drop boxes be placed only at the offices of the county boards of elections. *See A. Philip Randolph Inst. of Ohio v. LaRose*, No. 20-4063, 2020 WL 6013117, at *1 (6th Cir. Oct. 9, 2020).

Third, on October 12, the Fifth Circuit stayed an injunction enjoining part of a proclamation issued by the Governor of Texas in which he specified that mail-in ballots could only be hand-returned to one designated location per county. *See Texas League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 WL 6023310, at *2 (5th Cir. Oct. 12, 2020).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this document complies with the type-volume limitations set forth in Fed. R. App. P. 28(j) and 11th Cir. R. 28, I.O.P. 6. The document contains 208 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

2. In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Edmund G. LaCour Jr.
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CERTIFICATE OF INTERESTED PERSONS

In accordance with 11th Cir. R. 26.1-1(a)(3) and 26.1-2(b), undersigned counsel certifies that the persons and entities listed in the amended certificate of interested persons contained in Appellants' Reply Brief are all persons or entities known to undersigned counsel to have an interest in the outcome of this appeal.

/s/ Edmund G. LaCour Jr.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on October 13, 2020 using the CM/ECF Document Filing System, which will send notification of such filing to all noticed parties.

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Exhibit A

Democratic Nat'l Comm. v. Bostelmann, No. 20-2835, 2020 WL 5951359 (7th Cir. Oct. 8, 2020).

2020 WL 5951359
Only the Westlaw citation
is currently available.
United States Court of
Appeals, Seventh Circuit.

DEMOCRATIC NATIONAL COMMITTEE, et al., Plaintiffs-Appellees,
v.
Marge BOSTELMANN, Secretary of the Wisconsin Elections Commission, et al., Defendants,
and
Wisconsin State Legislature, Republican National Committee, and Republican Party of Wisconsin, Intervening Defendants-Appellants.

Nos. 20-2835
|
20-2844
|
Submitted October 6, 2020
|
Decided October 8, 2020

Appeals from the United States District Court for the Western District of Wisconsin. Nos. 20-cv-249-wmc, *et al*. — **William M. Conley**, *Judge*.

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Before Easterbrook, Rovner, and St. Eve, Circuit Judges.

Opinion

Per Curiam.

***1** On September 29, 2020, we issued an order denying the motions for a stay in these appeals, because we concluded that Wisconsin's legislative branch has not been authorized to represent the state's interest in defending its statutes. On October 2, in response to a request for reconsideration, we certified to the Supreme Court of Wisconsin the question "whether, under Wis. Stat. § 803.09(2m), the State Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws." That court accepted the certification and replied that the State Legislature indeed has that authority. *Democratic National Committee v. Bostelmann*, 2020 WI 80, —— N.W.2d —— (Oct. 6, 2020). In light of that conclusion, we grant the petition for reconsideration and now address the Legislature's motion on the merits. (The other intervenors have not sought reconsideration.)

As we explained last week, a district judge held that many provisions in the state's elections code may be used during the SARS-CoV-2 pandemic but that some deadlines must be extended, additional online options must be added, and two smaller changes made. —— Wis.2d ——, —— N.W.2d ——, 2020 WL 5627186, 2020 U.S. Dist. LEXIS 172330 (W.D. Wis. Sept. 21, 2020). In particular, the court extended the deadline for online and mail-in registration from October 14 (see Wis. Stat. § 6.28(1)) to October 21, 2020; enjoined for one week (October 22 to October 29) enforcement of the requirement that the clerk mail all ballots, but only for those voters who timely requested an absentee ballot but did not receive one, and authorized online delivery during this time; and extended the deadline for the receipt of mailed ballots from November 3 (Election Day) to November 9, provided that the ballots are postmarked on or before November 3. Two other provisions of the injunction (—— Wis.2d ——, ——, —— N.W.2d ——, 2020 WL 5627186 at *——, 2020 U.S. Dist. LEXIS 172330 at *98) need not be described.

The State Legislature offers two principal arguments in support of a stay: first, that a federal court should not change the rules so close to an election; second, that political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid. See *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020) (sustaining Wisconsin's rules after reviewing the elections code as a whole). We agree with both of those arguments, which means that a stay is appropriate under the factors discussed in *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

For many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date. One recent instance

came in an earlier phase of this case. After the district judge directed Wisconsin to change some of its rules close to the April 2020 election, the Supreme Court granted a stay (to the extent one had been requested) and observed that the change had come too late. *Republican National Committee v. Democratic National Committee*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020). One of the decisions cited in that opinion is another from Wisconsin: *Frank v. Walker*, 574 U.S. 929, 135 S.Ct. 7, 190 L.Ed.2d 245 (2014). In *Frank* this court had permitted Wisconsin to put its photo-ID law into effect, staying a district court's injunction. But the Supreme Court deemed that change (two months before the election) too late, even though it came at the state's behest. (*Frank* did not give reasons, but *Republican National Committee* treated *Frank* as an example of a change made too late.) Here the district court entered its injunction on September 21, only six weeks before the election and less than four weeks before October 14, the first of the deadlines that the district court altered. If the orders of last April, and in *Frank*, were too late, so is the district court's September order in this case. See also *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006).

***2** The Justices have deprecated but not forbidden all change close to an election. A last-minute event may require a last-minute reaction. But it is not possible to describe COVID-19 as a last-minute event. The World Health Organization declared a pandemic seven months ago, the State of Wisconsin closed many businesses and required social distancing last March, and the state has conducted two elections (April and August) during the pandemic. If the judge had issued an order in May based on April's experience, it could not be called untimely. By waiting until September, however, the district court acted too close to the election.

The district judge also assumed that the design of adjustments during a pandemic is a judicial task. This is doubtful, as Justice Kavanaugh observed in connection with the Supreme Court's recent stay of another injunction issued close to the upcoming election. *Andino v. Middleton*, No. 20A55, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 5887393 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring). The Supreme Court has held that the design of electoral procedures is a legislative task. See, e.g., *Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 204 L.Ed.2d 931 (2019); *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

Voters have had many months since March to register or obtain absentee ballots; reading the Constitution to extend deadlines near the election is difficult to justify when the voters have had a long time to cast ballots while preserving social distancing. The pandemic has had consequences (and appropriate governmental responses) that change with time, but the fundamental proposition that social distancing is necessary has not changed since March. The district court did not find that any person who wants to avoid voting in person on Election Day would be unable to cast a ballot in Wisconsin by planning ahead and taking advantage of the opportunities allowed by state law. The problem that concerned the district judge, rather, was the difficulty that could be

encountered by voters who do not plan ahead and wait until the last day that state law allows for certain steps. Yet, as the Supreme Court observed last April in this very case, voters who wait until the last minute face problems with or without a pandemic.

The Court has consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government. It has stayed judicial orders about elections, prison management, and the closure of businesses. We have already mentioned *Andino* and *Republican National Committee*. See also *Clarno v. People Not Politicians Oregon*, No. 20A21, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 4589742 (U.S. Aug. 11, 2020) (staying an injunction that had altered a state's signature and deadline requirements for placing initiatives on the ballot during the pandemic); *Merrill v. People First of Alabama*, No. 19A1063, —— U.S. ——, S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3604049 (U.S. July 2, 2020) (staying an injunction that had suspended some state anti-fraud rules for absentee voting during the pandemic); *Barnes v. Ahlman*, —— U.S. ——, 140 S. Ct. 2620, —— L.Ed.2d —— (2020) (staying an order that overrode a prison warden's decision about how to cope with the pandemic); *Little v. Reclaim Idaho*, —— U.S. ——, 140 S. Ct. 2616, —— L.Ed.2d —— (2020) (staying an injunction that changed the rules for ballot initiatives during the pandemic); *South Bay United Pentecostal Church v. Newsom*, —— U.S. ——, 140 S. Ct. 1613, 207 L.Ed.2d 154 (2020) (declining to suspend state rules limiting public gatherings during the pandemic).

Deciding how best to cope with difficulties caused by disease is principally a task for the elected branches of government. This is one implication of *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), and has been central to our own decisions that have addressed requests for the Judicial Branch to supersede political officials' choices about how to deal with the pandemic. See, e.g., *Tully v. Okeson*, No. 20-2605, —— F.3d ——, 2020 WL 5905325 (7th Cir. Oct. 6, 2020) (rejecting a contention that the Constitution entitles everyone to vote by mail during a pandemic); *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020) (rejecting a constitutional challenge to limits on the size of political gatherings during the pandemic); *Peterson v. Barr*, 965 F.3d 549 (7th Cir. 2020) (reversing an injunction that had altered procedures for executions during the pandemic); *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020) (social distancing during a pandemic does not require, as a constitutional matter, a change in the rules for qualifying referenda for the ballot); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (rejecting a constitutional challenge to limits on the size of religious gatherings during the pandemic). Cf. *Mays v. Dart*, No. 20-1792, —— F.3d ——, 2020 WL 5361651 (7th Cir. Sept. 8, 2020) (reversing, for legal errors, an injunction that specified how prisons must be managed during the pandemic).

***3** The injunction issued by the district court is stayed pending final disposition of these appeals.

Rovner, Circuit Judge, dissenting.

In the United States of America, a beacon of liberty founded on the right of the people to rule themselves, no citizen should have to choose between her health and her right to vote. An election system designed for in-person voting, coupled with an uncontrolled pandemic that is unprecedented in our lifetimes, confronts Wisconsin voters with that very choice. In the April 2020 election, Wisconsin voters sought overwhelmingly to protect themselves by voting absentee. Yet at least 100,000 of them, despite timely requests, did not receive their ballots in time to return them by election day, as the Wisconsin election code requires. Only as a result of judicial intervention in the April 2020 election were some 80,000 absentee ballots, their return delayed by an overwhelmed election apparatus and Postal Service, rescued from the trash bin. Thousands of additional voters who never received their ballots were forced to stand in line for hours on election day waiting to vote in person, risking their well-being by doing so.

For purposes of the upcoming November election, the district court ordered a limited, reasonable set of modifications to Wisconsin's election rules designed to address the very problems that manifested in the April election and to preserve the precious right of each Wisconsin citizen to vote. Its two most important provisions are comparable to those this very court sustained six months ago. The Wisconsin Election Commission, whose members are appointed by the Legislature and the Governor and are charged with administering the State's elections, has acceded to that injunction. It is not here complaining of any undue burden imposed by the district court's decision or any risk of voter confusion. Only the Wisconsin Legislature, which has chosen to make no accommodations in the election rules to account for the burdens created by the pandemic, seeks a stay of the injunction in furtherance of its own power.

Today, by granting that stay, the court adopts a hands-off approach to election governance that elevates legislative prerogative over a citizen's fundamental right to vote. It does so on two grounds: (1) the Supreme Court's *Purcell* doctrine, as exemplified by the Court's recent shadow-docket rulings, in the majority's view all but forbids alterations to election rules in the run-up to an election; and (2) in times of pandemic, revisions to election rules are the province of elected state officials rather than the judiciary. With respect, I am not convinced that either rationale justifies a stay of the district court's careful, thorough, and well-grounded injunction. At a time when judicial intervention is most needed to protect the fundamental right of Wisconsin citizens to choose their elected representatives, the court declares itself powerless to do anything. This is inconsistent both with the stated rationale of *Purcell* and with the *Anderson-Burdick* framework, which recognizes that courts can and must intervene to address unacceptable burdens on the fundamental right to vote. The inevitable result of the court's decision today will be that many thousands of Wisconsin citizens will lose their right to vote despite doing everything they reasonably can to exercise it.

***4** This is a travesty.

On the facts of the case, I see no deviation from *Purcell*. In all of two sentences, *Purcell* articulated not a rule but a caution: take

care with last-minute changes to a state's election rules, lest voters become confused and discouraged from voting. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S. Ct. 5, 7, 166 L.Ed.2d 1 (2006) (per curiam).[1] In a series of stay rulings on its shadow docket since that decision, the Supreme Court has evinced a pronounced skepticism of judicial intervention in the weeks prior to an election, *e.g. Andino v. Middleton*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 5887393 (U.S. Oct. 5, 2020), but has put little meat on the bones of what has become known as the *Purcell* doctrine. *See* Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, Election Law Blog (Sept. 27, 2020) (hereinafter, "*Freeing Purcell*") ("[d]espite all of this activity, the *Purcell* principle remains remarkably opaque")[2]. Perhaps we can say at this point that *Purcell* and its progeny establish a presumption against judicial intervention close in time to an election. *See id.* ("This is the reading most consistent with *Purcell*'s actual language."). But how near? As to what types of changes? Overcome by what showing? These and other questions remain unanswered.

1 "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5, 127 S. Ct. at 7.

2 Available at https://electionlawblog.org/?p=115834.

The Supreme Court's stay decision in this case regarding the April 2020 election did little to clear things up. This court had denied a stay as to two changes the district court ordered for purposes of that spring election: extending the deadline for requesting an absentee ballot, and extending the deadline for receipt of completed absentee ballots. *Dem. Nat'l Com. v. Bostelmann*, 2020 WL 3619499, at *1 (7th Cir. April 3, 2020). The Wisconsin Legislature appealed only the ballot-receipt deadline. Although the Court had critical things to say about the last-minute change in rules ordered by the district court's injunction (in part because the district court had ordered relief beyond what the plaintiffs themselves had requested), it then proceeded to impose one of its own, ordering that absentee ballots must either be delivered or postmarked on or before election day in order to be counted. *Repub. Nat'l Com. v. Dem. Nat'l Com.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 1208, 206 L.Ed.2d 452 (2020). The Court was also at pains to emphasize that it was reserving judgment as to "whether other reforms or modifications in election procedures in light of COVID-19 are appropriate." *Id.* at 1208. Apart from that, the Supreme Court's pattern of staying similar sorts of injunctions in recent months is long on signaling but short on concrete principles that lower courts can apply to the specific facts before them.

Until the Supreme Court gives us more guidance than *Purcell* and an occasional sentence or two in its stay rulings have provided, all that lower courts can do —and, I submit, must do—is carefully evaluate emergent circumstances that threaten to interfere with the right to vote and conscientiously evaluate all of the factors that bear on the propriety of judicial intervention to address those circumstances, including in particular the possibility of voter confusion.

***5** A variety of factors should inform a court's decision whether or not to modify election rules. *See Freeing Purcell*. On balance,

these factors support rather than undermine the district court's decision here.

The first consideration is whether the proposed modifications might confuse voters. That risk is minimal here. Only two of the five modifications that Judge Conley ordered alter what is expected of voters: the extension of the deadline to register online or by mail, and the extension of the deadline for receipt of absentee ballots. Both of these modifications redound to the benefit of voters, and certainly do not lay a trap for the unwary. **We upheld (*i.e.*, denied a stay as to) comparable changes for the April election, and the Supreme Court modified the latter only to the extent of requiring that an absentee ballot be delivered or postmarked on or before election day.**[3] Neither we nor our superiors would have done so had there been a substantial risk of confusing voters. The other three changes are directed to election officials and what they must do. By their nature, these changes will not impact voter decisions.

3 In its April decision, this court denied a stay as to an extension of the deadline to request an absentee ballot and the deadline for receipt of a completed absentee ballot. *Bostelmann*, 2020 WL 3619499, at *1. The district court had also ordered an extension of the deadline to register online for the April election, *see Dem. Nat'l Com. v. Bostelmann*, 447 F. Supp. 3d 757, 765–67 (W.D. Wis. Mar. 20, 2020), but a stay was not sought as to that extension.

A second consideration is whether the changes to election rules will burden election officials and increase the odds that they make mistakes. Judge Conley gave careful attention to whether state election officials would have the time and ability to implement the changes he ordered. The Wisconsin Election Commission signaled a preparedness and ability to comply with these modifications (more on these points below), and the State Executive is not here to contend otherwise.

We must consider, third, the likelihood that voter disenfranchisement will ensue from the changes Judge Conley ordered. The answer here is straightforward: it will not. On the contrary, his directives are aimed at preventing disenfranchisement. And as detailed below, the results of the April election in Wisconsin demonstrate that only in the absence of judicial intervention will voters be disenfranchised.

Fourth, there has been no lack of diligence on the part of the plaintiffs in seeking relief. They sought relief in advance of the April election, as the pandemic was heating up, succeeded in part as to that election, and promptly renewed their pursuit of relief in the immediate aftermath of that election. After they defeated the Legislature's attempt to dismiss their claims, *see Dem. Nat'l Com. v. Bostelmann*, —— F.Supp.3d ——, 2020 WL 3077047 (W.D. Wis. June 10, 2020), they proceeded with discovery, presented their case at an evidentiary hearing in August, and obtained a favorable ruling in September. There has been no dallying on the plaintiffs' part. For its part, the district judge responded with both alacrity and attention to detail. But according to this court, which has retroactively announced a May deadline for any changes to election rules, it was all for naught —their work was over before it began.

***6** Fifth and finally, although the election is drawing close, the district judge issued his injunction six weeks prior to the election, leaving ample time for Wisconsin election officials to alter election practices as ordered

and communicate the changes to the public, and for his judgment to be reviewed by this court and, if necessary, by the Supreme Court.[4] This is a far cry from April, when the court's injunction was issued just eighteen days prior to the election and was modified to grant additional relief just five days prior to the election. The Covid-19 pandemic is no longer new but neither is it a static phenomenon; infection rates have ebbed and surged in multiple waves around the country and it is only *now* that Wisconsin is facing crisis-level conditions. I suppose that the district court could have issued a preliminary injunction in May based on the experience with the April election, as my colleagues suggest, but the defendants no doubt would have argued that it was premature to deem modifications to the election code warranted so far in advance of the election,[5] and there is a fair chance that this court might have agreed with them. Wisconsin infection rates in early May were less than one quarter of what they are now. Nothing in *Purcell* or its progeny forecloses modifications of the kind the district court ordered in the worsening circumstances that confront Wisconsin as the election draws nigh. Otherwise, courts would never be able to order relief addressing late-developing circumstances that threaten interference with the right to vote.[6]

4 As the *Gear* plaintiffs point out, other circuit courts have upheld injunctions modifying state election procedures in the immediate run-up to elections when the courts deemed the modifications necessary to prevent voter disenfranchisement. *E.g.*, *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12–15 (D.C. Cir. 2016) (2-1 decision) (six weeks before election); *Obama for Am. v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012) (one month before election); *U.S. Student Ass'n Fdn. v. Land*, 546 F.3d 373, 387–89 (6th Cir. 2008) (2-1 decision) (six days before election).

5 In fact, the defendants did argue precisely that in moving to dismiss the DNC's complaint shortly after the April election took place. *See Dem. Nat'l Com. v. Bostelmann*, —— F.Supp.3d ——, 2020 WL 3077047 (W.D. Wis. June 10, 2020).

6 Professor Stephanopoulos cites the Bipartisan Campaign Reform Act's special restrictions on campaign ads imposed within 60 days of an election, and the Military and Overseas Voter Empowerment Act's requirement that absentee ballots be sent to certain voters at least 45 days prior to an election, as possible guideposts for determining when the eleventh hour has arrived for judicial intervention into an election. *Freeing Purcell*. Obviously, we are past both reference points here. But Stephanopoulos himself argues that this sort of deadline (which, of course, the Supreme Court has yet to adopt) should not be conclusive in assessing the propriety of judicial intervention.

The court's second rationale for granting a stay —that "the design of adjustments during a pandemic" is a task for elected officials rather than the judiciary—announces an ad hoc carve-out from the *Anderson-Burdick* framework for the review of state election rules. *See Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992). That framework does call for deference to state officials, *depending upon* the degree of restriction that state election rules impose on the right to vote: severe restrictions demand strict judicial scrutiny, whereas modest, unexceptional restrictions enjoy a presumption of validity. *Id.* at 434, 112 S. Ct. at 2063–64. But what the majority proposes is total deference to state officials in the context of pandemic, with no degree of judicial scrutiny at all. That I cannot endorse. Communicable diseases can impose real and substantial obstacles to voting, and voting rules that are unobjectionable in normal conditions may become unreasonable during a pandemic,

when leaving one's home and joining other voters at the polls carries with it a genuine risk of becoming seriously ill.

Notably, the Wisconsin Election Commission, whose members are appointed by two sets of elected officials—the Legislature and the Governor—was represented in the litigation below. As I noted at the outset, the Commission has acceded to the district court's injunction and has not sought a stay. As long as we are discussing deference to state officials, the views of the Commission, which is charged with enforcing Wisconsin's election rules, ought to count for something.

***7** Justice Kavanaugh's concurrence in *Andino* posits that a state legislature's decision whether or not to alter voting rules in response to the Covid-19 pandemic ordinarily should not be second-guessed by the judiciary, which lacks the legislature's presumed expertise in matters of public health and is not accountable to the people. —— U.S. at ——, —— S.Ct. at ——, 2020 WL 5887393, at *1. But state legislatures do not possess a monopoly on matters of public health, *see*, *e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (reviewing Governor's executive order restricting size of public assemblies in light of public health emergency), and when state government is divided as it is in Wisconsin, stalemates occur. When a state proves unwilling or unable to confront and adapt to external forces that pose a real impediment to voting, it places into jeopardy the most cherished right that its citizens enjoy. (The debacle that occurred with respect to in-person voting in Wisconsin on April 7, as I discuss below, makes that point all too clear.) The right to vote is a right of national citizenship. *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 999–1000, 31 L.Ed.2d 274 (1972). It is essential to the vitality of our democratic republic. *E.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L.Ed.2d 481 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").[7] And no citizen of Wisconsin should be forced to risk his or her life or well-being in order to exercise this invaluable right. Wholesale deference to a state legislature in this context essentially strips the right to vote of its constitutional protection.

7 Indeed, the irony of Justice Kavanaugh's rationale is that unchecked deference to the state legislature as to voting procedures during a pandemic may render legislators *un*accountable to voters wishing to exercise their franchise.

I submit that our foremost duty in this case is to protect the voting rights of Wisconsin citizens, which are seriously endangered, rather than discretionary action (or inaction) by one branch of state government, in the face of a pandemic. My evaluation of the district court's injunction proceeds on that understanding.

A central premise of the Legislature's request for a stay of the changes that Judge Conley ordered to Wisconsin's election rules is that the ability to register and/or vote in person remains a perfectly acceptable alternative to any Wisconsin voter who is unable to register in advance of the election and to return an absentee ballot prior to election day. Were these ordinary times, I would have no difficulty agreeing with the Legislature. But what the Legislature downplays—indeed, barely acknowledges in its briefs—is the

concrete risk that a 100-year pandemic, which at present is surging in Wisconsin, poses to anyone who must brave long lines, possibly for hours, in order to register and vote in person.

Historically, the vast majority of Wisconsin voters have cast their ballots in person, and Wisconsin's election system has evolved against that backdrop, with provisions for absentee voting having served as a courtesy for the minority of voters whose work, travel, or other individual circumstances presented an obstacle to voting in person on election day. D. Ct. Op. 15, 39. Absentee ballots have often constituted less than 10 percent of ballots cast in Wisconsin, and, until this year, never more than 20 percent. D. Ct. Op. 15. Voters have also relied heavily on the State's liberal provision for same-day voting registration, with some 80 percent of all Wisconsin voter records reflecting some use of this feature. D. Ct. Op. 39 (citing R. 532 at 58.) The Covid-19 pandemic has turned this in-person voting paradigm on its head, as Judge Conley emphasized. Whereas, in the April 2019 election, voters requested (and were sent) a total of 167,832 absentee ballots (D. Ct. Op. 12 n.9), one year later, that total increased nearly eight-fold to 1,282,762 (D. Ct. Op. 12), with absentee ballots comprising 73.8 percent of ballots counted in the April 2020 election (D. Ct. Op. 15).

The strain that the pandemic and the sudden, unprecedented preference for absentee voting placed on state and local officials had predictable results in the April 2020 election. Election officials scrambled to keep up with the overwhelming demand for absentee ballots. Between April 3 and April 6 (the day before the election), local officials were still in the process of mailing more than 92,000 absentee ballots, virtually all of which were sent too late for them to be filled out and mailed back by election day. D. Ct. Op. 13. Another 9,388 ballots were timely applied for but never sent. D. Ct. Op. 13. Approximately 80,000 absentee ballots were completed and postmarked on or before election day but were only received by election officials in the six days *after* the statutory deadline for such ballots. D. Ct. Op. 17. These ballots would not have been counted but for the district court's order, sustained by this court and modified by the Supreme Court, extending the deadline.

***8** Notwithstanding the fact that nearly three-quarters of the votes cast in the April 2020 election were via absentee ballots, in-person voting in that election presented challenges of its own. Poll workers were in short supply, as individuals who would normally have staffed the polls (many of them seniors[8]) stayed away in droves, particularly in urban locations. Milwaukee, with a population of 592,025, normally operates 180 polling sites. The city could manage to open only **five** on April 7. D. Ct. Op. 16. Green Bay, population 104,879, normally operates 31 polling sites. On April 7, just **two** were open. D. Ct. Op. 16. Lines of voters (thousands of whom had timely applied for absentee ballots but had not received them) stretched for blocks and people waited hours to vote.[9] Some were masked, many were not. Some number of voters (we do not know how many) showed up to vote in person after not receiving an absentee ballot prior to election day and, discouraged by the long lines and wait times, walked away without casting a vote. D. Ct. Op. 17

(citing voter declarations). Those who stayed in line faced a discernible risk of becoming infected. Although the evidence on this point is mixed, public health officials determined that 71 individuals contracted Covid-19 after voting in-person or working at the polls on April 7[10]; one analysis extrapolates from the available data to estimate that a ten percent increase in in-person voters per polling location is associated with an eighteen percent increase in Covid-19 cases two to three weeks later.[11]

8 *See* Michael Barthel and Galen Stocking, *Older people account for large shares of poll workers and voters in U.S. general elections*, Pew Research Center: Fact Tank, News in the Numbers (April 6, 2020), https://www.pewresearch.org/fact-tank /2020/04/06/older-people-ac-count-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/; Laurel White, *'It's Madness.' Wisconsin's election amid coronavirus sparks anger*, NPR (April 6, 2020), https://www.npr.org/2020/04/06/827122852/it-s-madness-wisconsin-s-election-amid-coronavirus-sparks-anger.

9 *See*, *e.g.*, Astead W. Herndon and Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, New York Times (April 7, 2020, updated May 12, 2020) ("The scenes that unfolded in Wisconsin showed an electoral system stretched to the breaking point by the same public health catastrophe that has killed thousands and brought the country's economic and social patterns to a virtual standstill in recent weeks."); Benjamin Swasey & Alana Wise, *Wisconsin vote ends as Trump blames governor for long lines*, NPR (April 7, 2020), https://www.npr.org/2020/04/07/828835153/long-lines-masks -and-plexi-glass-barriers-greet-wisconsin-voters-at-polls.

10 *See* David Wahlberg, *71 people who went to the polls on April 7 got Covid-19; tie to election uncertain*, Wis. State J. (May 16, 2020), https://madison.com/wsj/news/local/health-med-fit/71 -people-who-went-to-thepolls-on-april-7-got-covid-19-tie-to / article_ef5ab183-8e29-579a-a52b-1de069c320c7.html.

11 Chad Cotti, Ph.D., et al., *The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary*, Nat'l Bureau of Economic Research, Working Paper No. 27187 (May 2020, revised October 2020), available at https:// www.nber.org/papers/w27187.

The district court, presented with largely undisputed evidence that (1) the demand for absentee ballots in the forthcoming general election in November will be even greater than it was in April (as many as 2 million absentee ballot requests are anticipated), (2) recent cutbacks at the U.S. Postal Service and the resulting delays in mail delivery will present an even greater obstacle to registering and voting by mail than it did in the spring, and (3) persistent concerns about a shortage of poll workers on election day again raise the specter of long lines to vote in person, ordered a set of five limited modifications to Wisconsin election rules aimed at compensating for these conditions and ensuring, consistent with public health advice and voters' obvious preference for absentee voting, that voters who wish to vote by mail may do so. The two most significant of these conditions are comparable to those sustained by this court, as modified in one respect by the Supreme Court, for the April election. *None* are opposed here by the Wisconsin Executive, which is charged with administering the election. *See Repub. Nat'l Com. v. Common Cause Rhode Island*, —— U.S. ——, ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (noting, *inter alia*, in denying stay of judicially ordered modifications to state election law, that "here the state election officials support the challenged decree ..."). To the extent these modifications intrude modestly upon the State's ability to establish its own rules for conducting elections, they are more than justified by the present pandemic and

the unacceptable risks that in-person voting presents to the citizens of Wisconsin.

***9** The Legislature challenges Judge Conley's exercise of discretion in ordering these modifications as if the Covid-19 pandemic presented a quotidian problem in an otherwise routine election, where the options for voting in-person might represent an entirely adequate alternative to voting by mail. The State's experience with the April election and the current state of the pandemic in Wisconsin demonstrate the fallacy in this premise.

As I write this dissent, new infections are surging in Wisconsin and threatening to overwhelm the State's hospitals. Judge Conley noted that in the weeks prior to his decision, new infections had doubled from 1,000 to 2,000 per day. D. Ct. Op. 20. As of Tuesday, October 6, a seven-day average of 2,346 new cases of Covid-19 was reported.[12] The Governor has declared a public health emergency.[13] A draft report from the White House Coronavirus Task Force dated Monday of last week described a "rapid worsening of the epidemic" in Wisconsin and placed the State in the "red zone" for Covid-19 cases, with the third-highest number of such cases per 100,000 population in the country and seventh-highest test positivity rate. Nearly half of all Wisconsin counties now have high levels of community transmission. Coronavirus Task Force, State Report—Wisconsin, at 1 (Sept. 27, 2020).[14] Hospitalization rates are at record highs in the State, with facilities in northeast Wisconsin approaching capacity due to the surge in Covid-19 cases[15]; the State is now proceeding with plans to open a field hospital to address the shortage of hospital beds.[16] Against this worsening backdrop, the district court credited the opinion of a nationally recognized expert in public health surveillance, who opined that "[t]here is a significant risk to human health associated with in-person voting during the COVID-19 pandemic[;] [t]here will almost certainly be a significant risk of contracting and transmitting COVID-19 in Wisconsin on and around November 3, 2020[;] [t]he risk of contracting or transmitting COVID-19 will deter a substantial portion of Wisconsinites from voting in person on November 3, 2020[;] and [i]ncreasing the ease and availability of absentee-ballot voting options is critical to protecting public health during the November 3, 2020 election." D. Ct. Op. 23; Expert Report of Patrick Remington, M.D. at 1 (R. 44 in Case No. 3:20-cv-00459-wmc).

12 Wis. Dep't of Health Servs., COVID-19: Wisconsin Cases (as of October 6, 2020), https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed.

13 Executive Order No. 90, Office of Wisconsin Governor (Sept. 22, 2020), available at https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx.

14 Available at Washington Post website, https:// www.washingtonpost.com/context/white-house-coronavirus-task-force-report-warnsof-high-wisconsin-covid-19-spread-in-wisconsin/e5f16345-fcb4-4524-975e-8011379ef0da/.

15 Mary Spicuzza, et al., *Some hospitals forced to wait-list or transfer patients as Wisconsin's coronavirus surge continues*, Milwaukee Journal Sentinel (Sept. 30, 2020), https:// www.jsonline.com/story/news/2020/09/30/wisconsin-hospitals-wait-list-patients-covid-19-surge-coronavirus-greenbay-fox-valley-wausau/3578202001/.

16 Mary Spicuzza and Molly Beck, *Wisconsin to open field hospital at State Fair Park on October 14 as surge in coronavirus patients continues in Fox Valley, Green Bay*, Milwaukee Journal Sentinel (October 7, 2020), https://www.jsonline.com/ story/news/local/

wisconsin/2020/10/07/wisconsin-preparing-open-alternate-care-facility-state-fair-park-state-continues-face-surge-covid-1/5909769002/.

***10** Presented with the evidence as to what occurred in April and what is happening now with respect to the pandemic, Judge Conley reasonably concluded that (1) a substantial number of eligible Wisconsin voters will not meet the October 14 deadline to register online or by mail, leaving them with only in-person options to register, (2) of the 1.8 to 2 million registered voters who are expected to timely request absentee ballots (D. Ct. Op. 20, 47), as many as 100,000 will not be able to return those ballots by election day through no fault of their own (D. Ct. Op. 51), and (3) when faced with the risks associated with registering or voting in-person, and potentially having to wait in line for hours in order to do so, some number of voters will deem the risk too great. These conclusions explain why he ordered modest adjustments to Wisconsin's election rules in order to minimize that possibility.

Of all of us, Judge Conley is the one judge who heard the evidence first-hand and is closest to the ground in Wisconsin. We owe deference to his judgment. He considered the *Anderson*-*Burdick* factors for constitutional challenges to state election rules. Consistent with *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020), he considered the Wisconsin election rules in their totality in assessing the burdens that those rules, under the present circumstances, impose on the right to vote. He considered *Purcell's* admonition that judicial orders modifying election rules can result in voter confusion and an incentive not to vote, especially as an election draws closer. 549 U.S. at 4–5, 127 S. Ct. at 7. He considered this court's prior ruling in April granting a stay as to all but two of the modifications ordered for the April election. *Bostelmann*, 2020 WL 3619499. And he considered the Supreme Court's ruling, issued one day prior to the April election, which both chastised the district court for altering Wisconsin's election rules within days of the election but also modified the extension of the ballot-receipt deadline to require that mailed absentee ballots be delivered or postmarked on or before election day and accepted the deadline change as modified. *Republican Nat'l Com.*, 140 S. Ct. at 1207, 1208.

In view of the fact that this court allowed extensions of the ballot-request deadline and ballot-receipt deadline to be implemented in the April election, it is not clear to me why the majority has decided to stay comparable modifications (effectively nullifying them) for the November election. Yes, the Covid-19 virus is no longer a new menace and Wisconsin election officials have now had the experience of conducting two elections during the pandemic. But the Wisconsin election code remains one designed primarily for in-person voting, whereas the surge of Covid-19 cases in Wisconsin has only increased the risks associated with in-person voting since April. The logistical demands posed by absentee voting will if anything be greater for the November general election, with possibly a million additional absentee ballots to be sent and returned by mail; and with the recently-discovered cutbacks in Postal Service capacity,[17] there is even greater reason to be concerned about the ability of voters to both register and vote by mail. Registering and voting in person remain as alternatives, but no legislator, no election official, and certainly no judge can assure Wisconsin voters that there

is no risk associated with registering and/or voting in person as infection rates spike in their communities, especially in high-population urban areas. Election officials may *hope* that more polling places will be open in November than April, but they cannot guarantee that enough poll workers will show up on election day to avoid the sorts of long voter lines and waits that made headlines then. Nor, by the way, can anyone assure voters that they will not be waiting in line next to one or more unmasked voters, or one who is contagious with the coronavirus. Indeed, a lawsuit challenging the Governor's mask mandate is presently pending in the Wisconsin courts.[18]

17 *See, e.g.*, Jacob Bogage, *et al.*, *DeJoy pushes back on criticism of changes to Postal Service, says he won't restore sorting machines*, Washington Post (Aug. 24, 2020), https://www.washingtonpost.com/politics/2020/08/24/dejoy-testimony-usps-house /; Elise Viebeck and Jacob Bogage, *Federal judge temporarily blocks USPS operational changes amid concerns about mail slowdowns, election*, Washington Post (Sept. 17, 2020), https://www.washingtonpost.com/politics/federal-judge-iss-ues-temporary-injunction-against-usps-operational-changes-amid-concerns-aboutmail-slowdowns/2020/09/ 17/34fb85a0-f91e-11ea-a275-1a2c2d36e1f1_story.html.

18 *See* Scott Bauer, *Conservative law firm seeks to end Wisconsin mask order*, AP NEWS (Sept. 28, 2020), https://apnews.com/article/virus-outbreak-healthwisconsin-public-health-270d663b9411b33a17fc45fdf8ad2720; Molly Beck, *GOP leaders go to court in support of effort to strike down Tony Evers' mask mandate*, Wisconsin Journal Sentinel (Oct. 2, 2020), https://www.jsonline.com/story/news/politics/2020/10/02/ gop-goescourt-support-effort-strike-down-mask-mandate/ 3592966001/.

***11** Having in mind the shortfalls with the April election and the current public health crisis posed by the pandemic, it is not unreasonable for Wisconsin voters to view the option of in-person registration and voting as a form of Russian roulette. For eligible voters who are unable to register by mail by the statutory deadline (and for the April election, there were more than 57,000 people who registered after that deadline, thanks to the district court's extension of that deadline, D. Ct. Op. 17) and for voters who timely request an absentee ballot but who either do not receive it by election day or receive it too late to return it by election day (more than 120,000 absentee ballots were not returned by election, *see* D. Ct. Op. 15), the risks associated with in-person registration and voting amount to a concrete and unacceptable, and in my view, severe, restriction on the right to vote. *See Luft*, 963 F.3d at 672 (citing *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063; *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569–70; *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944 (7th Cir. 2019)). This is especially true of individuals who are 65 years of age or older (more than 900,000 people in Wisconsin[19]), obese (some 40 percent of Wisconsin adults[20]), or suffer from chronic health conditions that render them especially vulnerable to complications from a Covid-19 infection (some 45 percent of all adults nationwide[21]).

19 See Wis. Dep't of Health Servs., *Demographics of Aging in Wisconsin*, Am. Community Survey Statewide & Cnty. Aging Profiles, 2014-18, State of Wis. Profile of Persons Ages 65 & Older (Jan. 20, 2020), https://www.dhs.wisconsin.gov/aging/demographics.htm.

20 *See* Tala Salem, *Wisconsin obesity rate higher than previous estimates*, U.S. News & World Report (June 11, 2018), https://www.usnews.com/news/health-care-news/articles/ 2018-06-11/wisconsin-obesity-rate-higher-than-previous-estimates.

21 See Mary L. Adams, *et al.*, *Population-based estimates of chronic conditions affecting risk for complications from coronavirus disease, United States*, 26 Emerging

Infectious Diseases J. No. 8 (August 2020), https://wwwnc.cdc.gov/eid/article/26/8/20-0679 _article.

Of course it is true that voters have the ability to plan ahead, register early if need be, and request absentee ballots early in order to ensure that they have adequate time to complete and return their ballots prior to election day.[22] But voters may also reasonably rely on the State's own deadlines for advance registration and requesting an absentee ballot as a guide to the amount of time necessary for their registrations to be processed and their ballots to be issued, completed, and returned. Voters do not run the State's election apparatus or the U.S. Postal Service; they have no special insight into how quickly their timely requests to register and/or vote by mail will be processed by election officials and how quickly the Postal Service will deliver their ballots. It is not reasonable to insist that voters act more quickly than state deadlines require them to do in order to ensure that either the State or the Postal Service does not inadvertently disenfranchise them because they are overwhelmed with the volume of mail-in registrations and absentee ballots.

22 Completing an absentee ballot is not a matter of simply filling it out. Wisconsin requires absentee voters to have their ballots signed by a witness. *See* Wis. Stat. § 6.87(4)(b). Some 600,000 Wisconsin voters live alone (D. Ct. Op. 21), which means they must seek out someone outside of their household to sign their ballots. During a time of surging Covid-19 infections, that is not necessarily a simple task.

It is also true that voters who receive their ballots just prior to the election have the option of delivering their ballots to a dropbox or to the polls on election day. But significant numbers of Wisconsin voters lack a driver's license (including roughly half of African American and Hispanic residents) and therefore cannot drive themselves to a poll or dropbox.[23] Relying on public transportation, a taxi, a ride-sharing service, or a lift from a neighbor to make the trip presents difficulties and risks of its own, which cannot be justified if the voter has timely complied with existing deadlines and yet cannot meet existing deadlines through no fault of her own.

23 *See* John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, Employment and Training Institute, Univ. of Wis.-Milwaukee (June 2005), available at https://dc.uwm.edu/eti_pubs/68/.

***12** I recognize that the district court's decision to order modifications to Wisconsin's election practices represents an intrusion into the domain of state government, but in my view it is a necessary one. We are seven months-plus into this pandemic. The Legislature has had ample time to make modifications of its own to the election code and has declined to do so. The Wisconsin Elections Commission, divided 3-3 along party lines, concluded that it lacks the authority to order such modifications. This leaves voters at the mercy of overworked state and local election officials, a hamstrung Postal Service, and a merciless virus. What we must ask, as Judge Conley did, is whether Wisconsin's election rules, which were not drafted for pandemic conditions, effectively restrict a Wisconsin citizen's right to vote under current conditions. The answer, I submit, is yes. Based on the State's experience with the April election, we *know* it is likely that tens of thousands of voters will not meet the October 14 deadline to register online or by mail, especially if they are relying on the mail to complete that process. We *know* that tens of thousands of voters likely will not be able to return their ballots by mail before election day, through no fault of their own. We *know*

that registering or voting in person, especially on election day, will expose some number of voters to a concrete risk of Covid-19 infection. Collectively, these conditions pose a real and substantial impediment to the right to vote. Whether that obstacle is viewed as modest or severe, and whether viewed through the lens of rational basis review or strict scrutiny, it is unacceptable. The State itself purports to want people to vote absentee, and yet has done nothing to alter its election rules to make the necessary accommodations to ensure that voters are not needlessly disenfranchised by the overwhelming shift from in-person to absentee voting.

I conclude with a just a few words about each of the individual modifications that the district court ordered. Individually and collectively, these modifications, in my view, represent a reasonable, proportional response to current conditions aimed at preserving the right to vote.

Of these, the most important, and in my view, the most essential of these modifications is the six-day extension of the deadline for the return of absentee ballots by mail to November 9, 2020, so long as the ballots are postmarked on or before election day. Of the five modifications ordered by the district court, none is more directly aimed at protecting the right to vote, in that it seeks to ensure that ballots that have been timely cast by voters will be counted. The circumstances that warranted a similar extension in April are even more serious now: the Covid-19 pandemic makes it more imperative that as many voters as possible vote by absentee ballot; the demand for absentee ballots is virtually certain to be even greater (record-shattering) than it was in April, placing unprecedented demands on election officials and the U.S. Postal Service alike; and cutbacks implemented by the U.S. Postal Service this summer (not all of which have been suspended or reversed) threaten recurrent if not worse delays in the delivery and return of absentee ballots. The fact that some 80,000 ballots were received by mail after election day in April is all the proof necessary that an extension of the receipt deadline is vital as a means of protecting the voting rights of tens of thousands of Wisconsin voters—voters who, it cannot be said too often, will timely request and complete absentee ballots but are unable to return them by the election day deadline by no mistake or omission of their own. Against this, all that the Legislature offers is a wish to have the results of the election conclusively determined on election night. But weighed against the constitutional right to vote, this is thin gruel.

The one-week extension of the deadline to register online or by mail is reasonable in terms of both the worsening pandemic and the slowdown in mail service. As Judge Conley pointed out, Wisconsin voters are in the habit of using the State's same-day registration option to register or update their registration on election day. Only as Covid-19 infections surge in Wisconsin may voters now realize that in-person registration on election day poses unique risks, particularly if lines at the polls turn out to be as long as they were in April. At the same time, voters seeking to register by mail may run into the same problems that absentee voters encountered in April with delays in the U.S. Mail. A brief extension of the advance registration deadline is an appropriate response, and the Wisconsin Election Commission conceded that

the extension would still leave adequate time for election officials to update pollbooks with registration information in time for election day.

The directive to add language to the MyVote and WisVote websites (along with any relevant printed materials) regarding the "indefinitely confined" exception to the photo i.d. requirement is an extremely limited order aimed at eliminating voter confusion. Wisconsin law requires voters to present appropriate photographic identification in order to obtain a ballot, whether in-person or by mail. There is an exception to this requirement for a voter who is "indefinitely confined" due to age, infirmity, or disability; the signature of the voter's witness will be deemed sufficient in lieu of proof of i.d. The Commission's March 2020 guidance on this exception makes clear that a voter need not be permanently or totally disabled and wholly unable to leave one's residence in order to qualify for this exception, but this guidance is not easily available to voters and the district court found that there was a substantial risk of voter confusion as to the scope of the exception without further guidance. This was a reasonable order.

***13** The order to permit replacement absentee ballots to be transmitted electronically to domestic civilian voters who have not received their ballots by mail in the penultimate week prior to the election (October 22–29) addresses a concrete problem that emerged in the April election: not all absentee ballots will reach voters in time for the election even if they have been timely requested. Recall that tens of thousands of ballots were still being mailed out within a few days of the election, making it impossible for voters to return them by mail (if they received them at all) by election day. Wisconsin law prohibits election officials from sending ballots by electronic means to anyone but military or overseas voters. That restriction was modified by judicial order in 2016, *see One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946–48 (W.D. Wis. 2016), and until our June 2020 decision in *Luft* reversing that modification, election officials were making absentee ballots available online or by fax as necessary to domestic civilian voters. Restoring that practice for a limited window of time in advance of the November election makes eminent sense as a means of protecting the right to vote by voters who have timely requested an absentee ballot but have not received it in the mail as the election approaches.

Finally, in view of the severe shortages of poll workers that hobbled the April election with numerous poll closings and massive voting delays, the order that local officials be allowed to employ poll workers who are not electors in the county where they will serve is both necessary and reasonable. Adequate staffing of the polls is essential to minimizing voter wait times and, in turn, public health risks. Allowing poll workers (be they civilians or National Guard reservists) to work outside of their own counties is a modest and entirely reasonable means of achieving that end, one that poses no risk to the integrity of the election. The Legislature has articulated no reason why this accommodation is either unnecessary or inappropriate.

Given the great care that the district court took in issuing its preliminary injunction and the ample factual record supporting its decision, I

am dismayed to be dissenting. It is a virtual certainty that current conditions will result in many voters, possibly tens of thousands, being disenfranchised absent changes to an election code designed for in-person voting on election day. We cannot turn a blind eye to the present circumstances and treat this as an ordinary election. Nor can we blindly defer to a state legislature that sits on its hands while a pandemic rages. The district court ordered five modest changes to Wisconsin's election rules aimed at minimizing the number of voters who may be denied the right to vote. Today, in the midst of a pandemic and significantly slowed mail delivery, this court leaves voters to their own devices.

Good luck and G-d bless, Wisconsin. You are going to need it.

All Citations

--- F.3d ----, 2020 WL 5951359

Exhibit B

A. Philip Randolph Inst. of Ohio v. LaRose, No. 20-4063, 2020 WL 6013117 (6th Cir. Oct. 9, 2020).

2020 WL 6013117
Only the Westlaw citation
is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of
Appeals, Sixth Circuit.

A. PHILIP RANDOLPH INSTITUTE OF OHIO, et al., Plaintiffs-Appellees,
v.
FRANK LAROSE,
Defendant-Appellant.

No. 20-4063
|
October 09, 2020

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: GRIFFIN, WHITE, and THAPAR, Circuit Judges.

ORDER

GRIFFIN, Circuit Judge.

***1** The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter election rules on the eve of an election. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). Here, the district court went a step further and altered election rules *during* an election. The district court enjoined Ohio Secretary of State Frank LaRose from enforcing his directive that absentee ballot drop boxes be placed only at the offices of the county boards of elections. Secretary LaRose appealed to this Court, and now moves for an administrative stay and a stay of the district court's injunction pending appeal. Plaintiffs have responded. For the reasons set forth below, we grant the motion for a stay pending appeal and dismiss the motion for an administrative stay as moot.

I.

Plaintiffs, a collection of non-partisan civil rights organizations and individual voters, filed this challenge on August 26, 2020, to Directive 2020-16, which concerns the placement of drop boxes for the collection of absentee voters' ballots. They claimed that the Directive, which was promulgated by Ohio Secretary of State Frank LaRose, represented an unconstitutional infringement on Ohioans' right to vote. Shortly after filing their complaint, plaintiffs moved for a preliminary injunction asking the court to enjoin Directive 2020-16 "to the extent that it would limit county boards of elections to a single ballot drop box at the board office." In response, the district court enjoined Secretary LaRose from "enforcing that portion of Directive 2020-16 that prohibits a county board of elections from installing a secure drop box at a location other than the board of elections office," and from "prohibiting a board from deploying its staff for off-site ballot delivery." Secretary LaRose filed an interlocutory appeal of the district court's order the same day,

and the intervenor-defendants have also filed an interlocutory appeal. Secretary LaRose has filed an emergency motion in our court seeking an administrative stay and a stay pending appeal.

II.

This Court considers four factors when considering whether a stay pending appeal is appropriate: "(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." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When evaluating these factors for an alleged constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) ("In First Amendment cases, however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because ... the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." (internal quotation marks and alteration omitted).

***2** The merits of Plaintiffs' claims are analyzed under the "*Anderson Burdick*" framework. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court articulated a "flexible standard," *Burdick*, 504 U.S. at 434, for evaluating "[c]onstitutional challenges to specific provisions of a State's election laws." *Anderson*, 460 U.S. at 789. The first step of the *Anderson-Burdick* framework requires us to "determine the burden the State's regulation imposes on the plaintiffs' First Amendment rights." *Hawkins v. DeWine*, 968 F.3d 603, 606 (6th Cir. 2020) (citation omitted). "[W]hen those rights are subjected to 'severe' restrictions," the regulation is subject to strict scrutiny and "must be 'narrowly drawn to advance a state interest of compelling importance.' " *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But when those rights are subjected only to "reasonable, nondiscriminatory restrictions," the regulation is subject to rational-basis review and "the State's important regulatory interests are generally sufficient to justify" the restriction. *Id*. (quoting *Anderson*, 460 U.S. at 788). "For cases between these extremes, we weigh the burden imposed by the State's regulation 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." *Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) (internal quotations marks omitted) (quoting *Burdick*, 504 U.S. at 434).

Here, Directive 2020-16 prohibits county boards of elections from "installing a drop box at any other location other than the board of elections." Notably, Ohio voters are not required to use a ballot drop box to vote. And we have acknowledged that "Ohio is generous when it comes to absentee voting," even though "there is no constitutional right to an absentee

ballot." *Mays v. LaRose*, 951 F.3d 775, 779, 792 (6th Cir. 2020). Voters may (1) vote in person on election day, (2) vote in-person for more than four weeks before election day, (3) mail in an absentee ballot; or (4) drop off an absentee ballot at a drop box. Thus, a limitation on drop boxes poses at most an inconvenience to a subset of voters (those who choose to vote absentee *and* physically drop-off their absentee ballot). It surely does not impose a "severe restriction[ ] on the right to vote" and therefore does not trigger strict scrutiny. *Id*. at 784. Moreover, the State cannot be faulted for these voters' choice to not take advantage of the other avenues available to them to cast their ballot. *Id*. at 786 ("Plaintiffs' choice to not participate in the opportunities Ohio provides to vote ... was, at least in part, the cause of [plaintiffs'] inability to vote.")

In all, we conclude that Ohio's restrictions are reasonable and non-discriminatory and thus subject to rational basis review. *See Mays v. LaRose*, 951 F3d 775, 791-92 (6th Cir. 2020). But even if we subject them to mid-level scrutiny, they easily pass constitutional muster for the following reasons.

First, Directive 2020-16 promotes uniformity, which in turn promotes the fair administration of elections. Courts have consistently recognized a state's interest in the "orderly administration of elections." *Mays*, 951 F.3d at 787. Second, Directive 2020-16 promotes the state's efficiency interests in administering elections. "[T]he list of responsibilities of the board of elections is long and the staff and volunteers who prepare for and administer elections undoubtedly have much to accomplish during the final few days before the election." *Id*. (quoting *Obama for Am. v. Husted*, 697 F.3d at 432–33. This efficiency interest is particularly important where, as here, voting is already in progress. Third, limiting drop boxes to one location per county promotes the accuracy of the election. According to LaRose, voters who return a ballot to the wrong drop box run the risk of having their ballot rejected. (citing Ohio Rev. Code § 3509.05(A)). Fourth, the Directive 2020-16 promotes the security of the election. As noted by LaRose, Ohio has never before used off-site drop boxes. Implementing off-site drop boxes now would thus require on-the-fly implementation of new, untested security measures.

***3** All of LaRose's reasons for implementing and enforcing Directive 2020-16 concern important state interests. And these state interests, taken together, justify the burden that it places on this one method of voting in Ohio. Accordingly, we conclude that LaRose has made a strong showing that he is likely to succeed on appeal.

Moreover, the other three factors all support granting the motion for a stay pending appeal. First, not granting the stay could irreparably harm Ohio's election process. The resources (time, money, etc.) available for preparing for an election are finite and rivalrous. Without a stay, at least some instrumentalities of the state might spend resources setting up off-site drop boxes, which they may then be required to remove if LaRose prevails on appeal. Those are resources that state could have spent on other election "tasks necessary to preserving the integrity of the election process, maintaining a stable political system, preventing voter fraud,

and protecting public confidence." *Mays*, 951 F.3d at 787.

Second, the stay is unlikely to harm anyone. As discussed above, Ohio offers many ways to vote. Given all of those options—including on-site drop boxes, casting a vote by mail, and voting in-person weeks before election day—the absence of off-site drop boxes does not impose a material harm.

Third, granting the stay is in the public interest. Immediate implementation of the district court's injunction would facilitate a grave risk of voter confusion. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.") The public interest would be best served by consistent rules regarding how to vote during the pendency of this lawsuit.

III.

Federal courts are not "overseers and micromanagers" of "the minutiae of state election processes." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016). The district court in this case altered election rules during an election and in disregard for Ohio's important state interests. Because we conclude that a stay pending appeal is appropriate, we grant Secretary LaRose's motion for a stay pending appeal, dismiss the motion for an administrative stay as moot, and stay the district court's preliminary injunction.

HELENE N. WHITE, Circuit Judge, dissenting.

I would not stay the district court's order. It is true that the federal courts should ordinarily "not alter election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). This is because "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (Breyer, J., concurring).

Here, the legislature crafted a statute that neither "prescribes nor prohibits ballot drop boxes at locations other than the board of elections," *Ohio Democratic Party v. LaRose*, 2020-Ohio-4778 (Ohio Ct. App. 2020), and places primary responsibility for administering elections in bipartisan county boards of elections. These boards have the duty to oversee the administration of elections, including the duty to "[f]ix and provide the places for registration and for holding primaries and elections." Ohio Rev. Code Ann. § 3501.11. To be sure, the Secretary has the statutory authority to issue directives, but the Secretary's statutory authority is not at issue. Plaintiffs challenge the constitutionality of the directive, an issue squarely within the authority of the federal courts to determine.

***4** Although federal courts are instructed, in ordinary cases, to refrain from altering election rules close in time to an election,

this is not an ordinary case. Here, unlike the cases in which such rules were announced, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *Andino v. Middleton*, No. 20A55, 2020 U.S. Lexis 4832, *2–3 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring in grant of stay); *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (Roberts, C.J., concurring in the grant of stay), Plaintiffs are not challenging the application of a statute drafted and debated by a legislature, or an election rule determined by referendum. Nor are they challenging the application of a rule that has long applied to elections in Ohio. Instead, Plaintiffs ask the federal courts to determine the constitutionality of an eleventh-hour directive issued unilaterally by a single elected official to disrupt the established plans of bipartisan county boards of elections endeavoring to perform their duty to administer a fair and orderly election in their jurisdictions. The Secretary of State claims that he is seeking a stay in order to "preserve the status quo." But it was the Secretary's last-minute directive that disrupted the status quo by banning county boards of elections from exercising their discretion regarding the location and number of ballot drop boxes needed to facilitate orderly administration of the November election. The district court's order merely returns the administration of Ohio's elections to the status quo, enacted by the legislature, that existed prior to the Secretary's last-minute (and very recent) order, until the constitutionality of the Secretary's order can be adjudicated on the merits.

The Secretary initially took the position that the R.C. 3509.05(A) forbids election boards from having multiple, off-site ballot locations within a single county. *Ohio Democratic Party*, 2020-Ohio-4778 at *1. The Ohio courts determined that the Secretary's interpretation was incorrect and that such additional locations were neither prohibit nor mandated. Prior to the state-court decision, the Secretary stated that he would allow off-site drop boxes if a court determined they are permissible under the statute. The Secretary then changed his mind. The county elections boards are bipartisan, with of two Democrats and two Republicans. Although the Secretary has overall control of the election, and may promulgate directives, the individual county boards are granted the authority to control the local aspects of elections. *See* Ohio Rev. Code §§ 3501.04, 3501.05, and 3501.11. This makes sense; county populations, geographic dimensions, and infrastructure vary considerably throughout the state. Cuyahoga County has 850,000 voters: Noble County has under 10,000. R. 91, PID 2921.

Plaintiffs presented considerable evidence that voters in the largest counties will suffer significant burdens as a result of the Secretary's directive limiting the ability of the county boards to implement bipartisan plans tailored to best administer efficient, safe, and secure voting in their counties. *Id.* at 2920–22. The Secretary's asserted interests in uniformity, secure and orderly elections, avoidance of voter confusion and public confidence in the integrity of the electoral process, Appellant Motion at 17–20, are not served by the Secretary's directive.

The Secretary's asserted interest in uniformity ignores that each county has its own bipartisan election commission with knowledge of the county's needs. Uniformity in the number of ballot drop-off locations across counties with 850,00 voters and counties with less than 10,000 voters promotes unequal, rather than uniform, voting opportunities.

The Secretary has not shown that the proposed locations at the libraries staffed by elections officials will undermine the security and orderly of the election. R. 91, PID 2922–24. Nor has the Secretary shown that the plan will lead to voter confusion. *Id.* Any confusion is a result of the Secretary's changing positions. Finally, public confidence in the integrity of the electoral process is served by allowing Ohio citizens to have the best chance of having their votes safely cast and their ballots counted, subject to strict supervision by local bipartisan election commissions.

In sum, I would not find that the district court, after conducting evidentiary hearings with multiple witnesses, and analyzing significant briefing, abused its discretion in enjoining what it determined to likely be an unconstitutional directive issued by a single elected official, impacting the voting rights of thousands of citizens. Although last minute injunctions issued during an election are usually disfavored, the justifications for such a rule are not present in this case. The status quo, created by the legislature, will be preserved by the district court's injunction. Moreover, to hold that the constitutionality of a last-minute order by a single state official impacting the voting rights of thousands of citizens may not be adjudicated until after their right to vote has been disrupted applies Supreme Court precedent to an inappropriate context.

***5** For the foregoing reasons, I dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

All Citations

--- Fed.Appx. ----, 2020 WL 6013117

End of Document

Exhibit C

Texas League of United Latin Am. Citizens v. Hughs, No. 20-50867, 2020 WL 6023310 (5th Cir. Oct. 12, 2020).

2020 WL 6023310
Only the Westlaw citation
is currently available.
United States Court of
Appeals, Fifth Circuit.

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; National League of United Latin American Citizens; League of Women Voters of Texas; Ralph Edelbach; Barbara Mason; Mexican American Legislative Caucus, Texas House of Representatives; Texas Legislative Black Caucus, Plaintiffs—Appellees,
v.
Ruth HUGHS, in her official capacity as Texas Secretary of State, Defendant—Appellant.
Laurie-Jo Straty; Texas Alliance for Retired Americans; BigTent Creative, Plaintiffs—Appellees,
v.
Ruth Hughs, in her official capacity as Texas Secretary of State, Defendant—Appellant.

No. 20-50867
|
FILED October 12, 2020

Appeals from the United States District Court for the Western District of Texas, USDC No. 1:20-CV-1006, USDC No. 1:20-CV-1015, Robert L. Pitman, U.S. District Judge

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Before Willett, Ho, and Duncan, Circuit Judges.

Opinion

Stuart Kyle Duncan, Circuit Judge:

***1** In response to the coronavirus pandemic, Texas Governor Greg Abbott has issued various proclamations about the upcoming November election. Among other things, these measures have expanded the options for Texans to vote in-person early or to vote by absentee ballot. Take, for instance, early in-person voting. Normally, early voting would have started October 19. Now it will start October 13, six days earlier. Or take absentee ("mail-in") ballots. Normally, if a voter wanted to hand-deliver her mail-in ballot, she would have had only *one* day to do it—Election Day. Now, under the Governor's expanded policy, she can deliver the ballot anytime until Election Day. That effectively gives voters *forty* extra days to hand-deliver a marked mail-in ballot to an early voting clerk. And the voter still has the traditional option she has always had for casting a mail-in ballot: mailing it.

To make the situation clear, this chart compares what we will call "pre-COVID" early-voting and absentee-ballot rules and "COVID" rules:

Pre-COVID	COVID
Early voting starts October 19.	Early voting starts October 13 (six extra days).
Absentee ballots may be mailed.	Absentee ballots may be mailed.
Absentee ballots may be hand-delivered *only on Election Day*.	Absentee ballots may be hand-delivered *before and up to Election Day* (forty extra days).

The controversy we now face involves the rules for hand-delivering absentee ballots. As noted, the Governor's prior proclamation expanded the timeframe for doing that by forty days. But it happened that a few large Texas counties wanted to set up *multiple* delivery locations for these ballots. The Governor disagreed with this policy which, in his view, threatened election uniformity and security. Consequently, on October 1, the Governor issued a new proclamation. This proclamation, refining the previous one, specified that mail-in ballots could be delivered only to *one* designated location per county. But it left in place the previous forty-day expansion for delivering mail-in ballots and the always-available option of the U.S. mail.

A coalition of Plaintiffs sued, claiming the October 1 proclamation violated their right to vote by *restricting* absentee voting options. The district court agreed and enjoined the October 1 proclamation. The Texas Secretary of State appealed and now seeks an emergency stay. Among other things, the Secretary argues that the district court fundamentally misunderstood the context of the October 1 proclamation. She explains that the proclamation is part of the forty-day *expansion* of Texans' opportunities to hand-deliver absentee ballots beyond what state election rules normally permit. The proclamation refines that expanded voting period by specifying where ballots are to be

delivered. But it leaves the enlarged period in place, and also does nothing to prevent Texans from mailing in their absentee ballots, as they have done in the past in election after election. Properly understood, the Secretary tells us, the October 1 proclamation is part of an *expansion* of absentee voting in Texas, not a *restriction* of it.

***2** We agree with the Secretary and grant the stay.

I.

A.

Texas law allows eligible voters to vote early, either by mailing in a ballot or by personally appearing at an early voting place. Tex. Elec. Code §§ 81.001(a), 82.001–82.005. In response to the coronavirus pandemic, on July 27, 2020, Governor Abbott issued a proclamation (the "July 27 Proclamation") expanding early voting opportunities for the upcoming November 3 election beyond those provided in the Texas Election Code. Allegedly issued pursuant to authority granted the Governor by the Texas Disaster Act of 1975, *see* Tex. Gov't Code §§ 418.001–418.261, this measure was one of a series of pandemic-driven changes to Texas election effected taken since the Governor's March 13 coronavirus disaster declaration. *See In re Steven Hotze, et al.*, —— S.W.3d ——, ——– – ——, 2020 WL 5919726, at *1–2 (Tex. Oct. 7, 2020) (explaining "[t]he Governor has repeatedly asserted his authority under the [Texas Disaster] Act to modify election procedures beginning shortly after his March 13 disaster proclamation," and listing measures including the July 27 Proclamation).[1]

1 *See also* Tex. Gov't Code § 418.002(4) (purpose of Texas Disaster Act is, *inter alia*, to "clarify and strengthen the roles of the governor, state agencies, the judicial branch of state government, and local governments in prevention of, preparation for, response to, and recovery from disasters").

Among other things, the July 27 Proclamation authorized early in-person voting to begin on October 13, instead of October 19, thus allowing six extra days to vote in person.[2] The proclamation also expanded opportunities for delivering marked mail ballots in person to an early voting clerk's office. Previously, voters wishing to hand-deliver their mail ballots could do so "only while the polls are open on election day." Tex. Elec. Code § 86.006(a-1).[3] The July 27 Proclamation, however, suspended this requirement by "allow[ing] a voter to deliver a marked mail ballot to the early voting clerk's office *prior to and including on election day*" (emphasis added). This had the effect of extending the amount of time for a voter to hand-deliver a mail ballot: as the Texas Director of Elections explained in this case, "because counties began sending mail ballots on or before September 19, 2020, the proclamation increased the opportunities for voters to hand-deliver their marked mail ballots from only one day—election day—to over forty days." Additionally, of course, voters retained the ability to send in their mail ballots the traditional way—through the mail. *See id.* § 86.006(a)(1), (2).

2 The proclamation did this by suspending Texas Election Code § 85.001(a), which provides in relevant part that "[t]he period for early voting by personal appearance begins on the 17th day before election day and continues

through the fourth day before election day." Tex. Elec. Code § 85.001(a).

3 Section 86.006(a-1) provides as follows:

> The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by [Texas Election Code] Section 63.0101.

***3** Following the July 27 Proclamation, at least four Texas counties—Harris, Travis, Fort Bend, and Galveston—announced their intention to have multiple mail ballot delivery locations in their counties for the November election. In response to this development, Governor Abbott issued a second proclamation on October 1 (the "October 1 Proclamation") amending the previous one. This new proclamation first reiterated that early in-person voting would begin on October 13. It then clarified that the prior suspension of section 86.006(a-1), concerning hand-delivery of mail ballots, applied only under certain conditions. First, a voter must deliver the ballot "at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1) and this suspension." Second, the early voting clerk must "allow[ ] poll watchers the opportunity to observe" the ballot delivery. Finally, the proclamation specified that "[a]ny marked mail ballot delivered in person to the early voting clerk's office prior to October 2, 2020, shall remain subject to the July 27, 2020 proclamation."

B.

On October 2, 2020, three individuals and several organizations (collectively, "Plaintiffs")[4] challenged the October 1 Proclamation by filing two separate actions in federal district court against Governor Abbott, Texas Secretary of State Ruth Hughs, and four local election officials. They requested a preliminary injunction against the October 1 Proclamation on the grounds that it (1) places an undue burden on their right to vote under the First and Fourteenth Amendments and (2) violates the Equal Protection Clause of the Fourteenth Amendment. Consolidating the two cases for purposes of the preliminary injunction motion, on October 9, 2020, the district court granted the motion in part, enjoining Secretary Hughs and the local officials from enforcing the Proclamation's restriction on hand-delivering mail ballots to a single designated early voting clerk's office.

4 The individuals are Ralph Edelbach, Barbara Mason, and Laurie-Jo Straty. The organizations are the Texas League of United Latin American Citizens; the National League of United Latin American Citizens; the League of Women Voters of Texas; the Mexican American Legislative Caucus, Texas House of Representatives; the Texas Legislative Black Caucus; the Texas Alliance for Retired Americans; and BigTent Creative.

Initially, the court ruled that various threshold issues did not prevent it from deciding Plaintiffs' claims. First, the court found that both the individual and organizational plaintiffs had standing. Second, the court rejected Secretary Hughs' Eleventh Amendment argument, concluding she had sufficient connection to enforcing the proclamation for purposes of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The court did, however, dismiss Governor Abbott on Eleventh Amendment grounds based on our decision in

In re Abbott, 954 F.3d 772 (5th Cir. 2020). Additionally, the court declined to abstain under the *Pullman* doctrine, despite the fact that the October 1 Proclamation is currently being challenged in state litigation. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009). Finally, the court declined to stay its hand under the so-called *Purcell* principle that a federal court should avoid altering state election rules close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 6, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam). The court reasoned that it was the October 1 Proclamation, and not its injunction, that caused voter confusion and that therefore its "injunction supports the *Purcell* principle."

On the merits, the district court evaluated the Plaintiffs' voting claims under the *Anderson-Burdick* balancing framework. *See Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). It found that the proclamation's burden on Plaintiffs' voting rights was "somewhere between 'slight' and 'severe,'" because it forced absentee voters to "choose between risking exposure to coronavirus to deliver their ballots in-person or disenfranchisement if the [United States Postal Service] is unable to deliver their ballots on time." The court found this burden outweighed the State's professed interests in ballot security, election integrity, and voter safety. Consequently, the court found Plaintiffs were likely to succeed on their voting claims. The court also found likelihood of success on Plaintiffs' equal protection claims because the proclamation disproportionately burdened absentee voters in larger counties by subjecting them to "increased distance, increased wait time, and increased potential for exposure to the coronavirus," without any countervailing justification.

***4** On October 9, Secretary Hughs timely appealed and, the next day, sought an emergency stay and a temporary administrative stay. On October 10, we granted a temporary stay and requested a response to her emergency stay motion, which was timely filed earlier today on October 12.

II.

In deciding whether to grant a stay pending appeal, "[w]e evaluate '(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.' " *Texas Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020) (*TDP I*) (quoting *Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). The first two factors carry the most weight. *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016). The party seeking the stay bears the burden of showing its need. *Clinton v. Jones*, 520 U.S. 681, 708, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997).

III.

We first consider whether Secretary Hughs has made a strong showing she will likely succeed on the merits. We conclude she has done so on at least one ground: that the district court erred in analyzing the Plaintiffs' voting-rights and equal protection claims. We therefore need not address, and so express no opinion about, the Secretary's arguments concerning standing, *Ex parte Young*, *Purcell*, or *Pullman* abstention.[5]

5 *Cf., e.g., Texas All. for Retired Am. v. Hughs*, No. 20-40643, —— F.3d ——, ——, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) (observing that "[t]he Secretary's arguments as to standing ... [and] sovereign immunity ... are harder to decide on our necessarily expedited review, but we need not reach them because the Secretary has made a strong showing that she is likely to succeed on" one of her merits arguments).

A.

As to the Plaintiffs' voting-rights claims, the district court applied *Anderson-Burdick* balancing. Under this 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 by its rule." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387–88 (5th Cir. 2013) (quoting *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059; *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564) (cleaned up). A "severe burden" on voting can be justified only by state rules "narrowly drawn to advance a state interest of compelling importance." *Id.* at 388 (quoting *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059). "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interest' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' " *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997)).

The district court classified the burden on Plaintiffs' right to vote as "somewhere between 'slight' and 'severe' " because due to the order, "absentee voters must choose between risking exposure to coronavirus to deliver their ballots in-person or disenfranchisement if the USPS is unable to deliver their ballots on time." This burden, the court reasoned, outweighed the State's asserted interests in ballot security, uniformity, and lessening voter confusion. The court asserted the Governor's proclamation was "the true source of confusion and disparate treatment among voters." Further, it found the State had not introduced evidence of voter fraud or shown that the security measures at additional drop-off locations were subpar. Therefore, the State, "by merely asserting an interest in promoting ballot security," could not "establish that the interest outweighs a significant burden on voters." Finally, the court added that the Governor's authority to issue the orders was rooted in his emergency powers, which enable him to act to protect public health and safety, but the "justifications for the October 1 Order's limitation on ballot return centers bear no relationship to protecting public health and safety."

***5** Assuming *Anderson-Burdick* applies,[6] for at least two reasons we conclude the Secretary will likely show the district court erred in applying it.

6 The Secretary persuasively argues that, under *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), the October 1 Proclamation does not implicate the right to vote at all. *See id.* at 807, 89 S.Ct. 1404 (distinguishing "the right to vote" from "a claimed right to receive absentee ballots"); *see also TDP I*, 961 F.3d at 403–06 (discussing *McDonald*'s continuing viability); *Tully v. Okeson*, —— F.3d ——, ——, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) (observing that "[i]n *McDonald* ..., the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail"). Because the Secretary is likely to prevail under the relatively more stringent *Anderson-Burdick* framework, we need not assess *McDonald*'s impact. That said, we recognize there is force to the argument that *McDonald* applies with equal rigor to early voting as it does to absentee voting—after all, both forms of voting are affirmative accommodations offered by the state and "designed to make voting more available," *TDP I*, 961 F.3d at 403 (quoting *McDonald*, 394 U.S. at 807–08, 89 S.Ct. 1404), and are not laws that "*themselves* deny [voters] the exercise of the franchise." *Id.* at 415 (Ho, J., concurring) (quoting *McDonald*, 394 U.S. at 807–08, 89 S.Ct. 1404). For courts to intervene, a voter must show that the state "has in fact precluded [voters] from voting"—that the voter has been "prohibited from voting *by the State*." *Id.* (Ho, J., concurring) (quoting *McDonald*, 394 U.S. at 808 & n.7, 89 S.Ct. 1404) (emphasis added).

First, the district court vastly overstated the "character and magnitude" of the burden allegedly placed on voting rights by the October 1 Proclamation. *Steen*, 732 F.3d at 387 (quoting *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059). Indeed, one strains to see how it burdens voting at all. After all, the proclamation is part of the Governor's *expansion* of opportunities to cast an absentee ballot in Texas well beyond the stricter confines of the Election Code. Previously, as we have explained, mail ballots could be hand-delivered to the early voting clerk *only on Election Day*. *See* Tex. Elec. Code § 86.006(a-1). The Governor's July 27 Proclamation effectively extended that hand-delivery option by forty days, and the impact of the October 1 Proclamation can be measured only against that baseline. To be sure, the proclamation requires a single designated drop-off location per county during the expanded forty-day period. But that represents merely a partial refinement of the bounds of a still-existing expansion of absentee voting opportunities. In a related context, we have recently explained that to "abridg[e]" the right to vote means to "place a barrier or prerequisite to voting, or otherwise make it more difficult to vote." *Texas Democratic Party v. Abbott*, —— F.3d ——, ——, 2020 WL 5422917, at *15 (5th Cir. Sept. 10, 2020) (*TDP II*). By contrast, "a law that makes it *easier* for others to vote does not abridge any person's right to vote." *Id.* The July 27 and October 1 Proclamations—which must be read together to make sense—are beyond any doubt measures that "make[ ] it *easier*" for eligible Texans to vote absentee. *Id.* How this expansion of voting opportunities burdens anyone's right to vote is a mystery.[7]

7 As noted, Governor Abbott has taken unprecedented steps in the wake of COVID-19 to *expand* voting opportunities generally, and mail-in voting options specifically. In taking these (and other) pandemic-driven actions, the Governor has invoked his broad emergency powers under the Texas Disaster Act. No party questions the constitutional limits of that Act—unsurprisingly, as this case is about *loosening* restrictions during a public-health emergency, not *imposing* them. But a different case may require courts to confront head-on the constitutional extent of gubernatorial power under the Texas Disaster Act. Neither the United States nor Texas Constitution includes a pandemic exception. *See TDP I*, 961 F.3d at 413 (Ho, J., concurring) ("We do not suspend the Constitution during a pandemic."); *In re Salon a La Mode*, —— S.W.3d ——, ——, 2020 WL 2125844, at *1 (Tex. May 5, 2020) (Blacklock, J., concurring) ("When properly called upon, the judicial branch must not shrink from its duty to require the government's anti-virus orders to comply with the Constitution and the law, no matter the circumstances."). All public servants, no matter how well-intentioned, must heed federal and state constitutional constraints. While desperate times permit

desperate measures, we must resist defining desperation down.

***6** But even if we focused myopically on the voting options restricted by the October 1 Proclamation, as the district court did, we would still find no more than a *de minimis* burden on the right to vote. The district court emphasized that some absentee voters would have to travel farther to drop off mail ballots at a centralized location and that, as a result, would confront a higher risk of exposure to coronavirus. The court also warned that voters unwilling or unable to do so would "risk[ ] ... disenfranchisement if the USPS is unable to deliver their ballots on time." This drastic picture painted by the district court fails to account for the numerous ways Texans can vote early or absentee in the November 3 election. As we have recounted, under the Governor's expansion of voting opportunities, Texans can (1) vote early in-person for an expanded period starting on October 13 (as opposed to the previous early-voting period starting on October 19); (2) hand-deliver a marked mail ballot during a forty-day period starting on September 19 (as opposed to the previous *one day*—Election Day—on which this was permitted); or (3) drop an absentee ballot in the mail. In light of those options, the October 1 Proclamation's partial refinement of one avenue for absentee voting does not amount to a "severe restriction" on the right to vote. *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059; *see also A. Philip Randolph Inst. of Ohio v. LaRose*, —— F. App'x ——, 2020 WL 6013117 (6th Cir. Oct. 9, 2020) (unpublished) (concluding a similar drop-box restriction on absentee ballots "surely does not impose a 'severe restriction[ ] on the right to vote' ") (quoting *Mays v. LaRose*, 951 F.3d 775, 779 (6th Cir. 2020)).

We are especially unpersuaded by the district court's view that voters must have multiple drop-off locations in order to "avoid the delays involved with mailing their ballots through the U.S. Postal Service." The USPS recommends voters request absentee ballots at least fifteen days before election day to ensure timely arrival. Texas law, however, allows voters to request ballots up to eleven days before election day. Therefore, the district court concluded, a voter may legally request an absentee ballot that is not *guaranteed* to arrive on time. The court thus concluded that absentee voters face an insoluble choice between "risk[ing] infection with a deadly disease to return their ballots in person or disenfranchisement if the USPS is unable to deliver their ballots in time." This kind of speculation about late-arriving ballots comes nowhere close to rendering Texas's absentee ballot system constitutionally inadequate. Neither Plaintiffs nor the district court have cited any authority suggesting that a State must afford every voter multiple infallible ways to vote. As we explained in *TDP I*, mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect. 961 F.3d at 405. The principle holds true even if "circumstances beyond the state's control, such as the presence of the [coronavirus,]" or, here, possible postal delays, make voting difficult. *Id.*; *see also McDonald*, 394 U.S. at 810 & n.8, 89 S.Ct. 1404 (explaining that a State is not required to extend absentee voting privileges to all classes of citizens, even those for whom "voting may be extremely difficult, if not practically impossible," such as persons caring for sick relatives or businessmen called away on business). We cannot conclude that speculating

about postal delays for hypothetical absentee voters somehow renders Texas's absentee ballot system constitutionally flawed.

Second, the district court undervalued the state interests furthered by the October 1 Proclamation.[8] Even assuming the proclamation poses any burden on voting rights, that burden is minimal and would "trigger less exacting review," meaning that "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Steen*, 732 F.3d at 388 (internal quotations and citation omitted). The district court found that Texas's "vague interests" in ballot security, election uniformity, and avoiding voter confusion were insufficiently substantiated to outweigh the proclamation's "significant burden on voters." The Secretary is likely to show on appeal that the district court erred.

8 This analysis again assumes *arguendo* that Plaintiffs' claims are not subject to the Supreme Court's *McDonald* decision. *See TDP I*, 961 F.3d at 404 (observing that, "under *McDonald*, a state's refusal to provide a mail-in ballot does not violate equal protection unless ... the state has 'in fact absolutely prohibited' the plaintiff from voting") (quoting *McDonald*, 394 U.S. at 808 n.7, 89 S.Ct. 1404).

***7** States have critically important interests in the orderly administration of elections and in vigilantly reducing opportunities for voting fraud. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195–96, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters" and "in orderly administration and accurate recordkeeping[.]"). Indeed, both the Supreme Court and our court have recognized that "mail-in voting" is "far more vulnerable to fraud" than other forms of voting. *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (observing that, in contrast to in-person voting, record evidence showed "mail-in voting ... is far more vulnerable to fraud, particularly among the elderly"); *id.* (criticizing challenged law because it "does nothing to address the far more prevalent issue of fraudulent absentee ballots"); *see also Crawford*, 553 U.S. at 195–96 & n.12, 128 S.Ct. 1610 (discussing examples "in recent years" of "fraudulent voting ... perpetrated using absentee ballots and not in-person fraud ... demonstrat[ing] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"); *TDP I*, 961 F.3d at 414 (Ho, J., concurring) (observing that "courts have repeatedly found that mail-in ballots are particularly susceptible to fraud") (and collecting authorities). In sum, "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 196, 128 S.Ct. 1610.

It is therefore evident that Texas has an "important regulatory interest" in policing how its citizens' votes are collected and counted. *Steen*, 732 F.3d at 388. This interest is acute when it comes to mail-in ballots. *Crawford*, 553 U.S. at 195–96 & n.12, 128 S.Ct. 1610; *see also Veasey*, 830 F.3d at 239 (concluding "mail-in ballot fraud is a significant threat"). It is likely, then, that the Secretary will prevail on appeal in showing that the October 1 Proclamation was justified by the State's important interests in election integrity. As explained, that proclamation is part-and-

parcel of a sizable expansion of absentee voting options occasioned by the Governor's pandemic-related orders. *See In re Steven Hotze*, —— S.W.3d at —— – ——, 2020 WL 5919726, at *1–2. Opportunities for absentee voters to hand-deliver ballots ballooned from a pre-COVID *one* day (Election Day itself) to an in-COVID *forty* days. The evidence showed this expansion of absentee voting provoked an increase in drop-off locations in certain counties. While this reaction is understandable, also understandable is the Governor's goal of centralizing delivery locations, and deploying poll watchers there, in order to maximize ballot security. The Secretary is thus likely to show on appeal that the October 1 Proclamation was a "reasonable, nondiscriminatory" measure justified by Texas's important interests in election integrity. *Steen*, 732 F.3d at 388.

The Secretary is also likely to show that the district court erred in scrutinizing whether the proclamation furthered those interests. *Cf. id.* (requiring "less exacting review" for laws placing "[l]esser burdens" on voting rights). For example, the district court demanded evidence of "actual examples of voter fraud" justifying the centralization of mail ballot delivery locations. Such evidence has never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration. For instance, in *Crawford*, the Supreme Court upheld Indiana's voter identification law, despite the fact that "[t]he record contain[ed] no evidence of [in-person voter] fraud actually occurring in Indiana at any time in its history." 553 U.S. at 181, 128 S.Ct. 1610. "Here, as in *Crawford*, Texas need not show specific local evidence of fraud in order to justify preventive measures." *Steen*, 732 F.3d at 394; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable [voting regulations]."). Furthermore, the Secretary articulated other interests beyond fraud, such as uniformity across counties. The district court too quickly discounted the state's interest in promoting uniformity in how mail ballots are delivered. In doing so, the court appears to have overlooked evidence showing the unusual nature of the developing absentee ballot process. As the Director of Elections stated, following the July 27 Proclamation, only four of Texas's 254 counties announced their intention "to utilize more than one location for in-person delivery of mail ballots," and there were concerns about whether the additional locations complied with Texas election law.

***8** In sum, Secretary Hughs has shown she is likely to prevail on the merits of the Plaintiffs' voting-rights claims.

B.

We turn to Plaintiffs' equal protection claims.[9] Because the right to vote is fundamental, *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 665, 86 S.Ct. 1079, 16

L.Ed.2d 169 (1966); *Gray v. Sanders*, 372 U.S. 368, 379, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) ("[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in [the] geographical unit. This is required by the Equal Protection Clause."). The district court held the Plaintiffs were likely to show that the October 1 Proclamation violated these principles by imposing disproportionate burdens on voters based on where they live. Plaintiffs argued that the elimination of additional drop-off locations would force voters in large and populous counties to travel farther, wait longer, and risk increased exposure to the coronavirus. Meanwhile, voters in smaller and less populous counties would not face the same difficulties. Because the district court concluded that the proclamation resulted in disparate treatment of voters based on county of residence, it applied the *Anderson-Burdick* framework. It reasoned that absent evidence that drop-off locations have posed or will pose a threat of voter fraud, Texas's proffered interest in election integrity was not "sufficiently weighty" to justify the differential burdens on voters.

9 Once again we assume, for the sake of argument only, that the Supreme Court's *McDonald* decision does not apply here. *Cf. TDP I*, 961 F.3d at 403–05.

The Secretary is likely to show this analysis was mistaken. As with the voting-rights claim, the district court misconstrued the nature of the alleged burden imposed by the October 1 Proclamation. It is true that the Equal Protection Clause guarantees that "every voter is equal to every other voter in his State," regardless of race, sex, occupation, wealth, or residence. *Gray*, 372 U.S. at 380, 83 S.Ct. 801. But the district court accepted Plaintiffs' contention that the proclamation "dol[es] out electoral opportunity based on county lines." That is incorrect. The proclamation establishes a uniform rule for the entire State: each county may designate one early voting clerk's office at which voters may drop off mail ballots during the forty days leading up to the election. That voters who live further away from a drop-off location may find it inconvenient to take advantage of this particular, additional method to cast their ballots does not "limit[ ] electoral opportunity," as the district court thought. As we have explained, the October 1 Proclamation was part of an *expansion* of absentee voting opportunities beyond what the Texas Election Code provided. The fact that this expansion is not as broad as Plaintiffs would wish does not mean that it has illegally *limited* their voting rights.

Moreover, the cases relied on by the district court are easily distinguishable. The court cited *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), and *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, to support its conclusion that the October 1 Proclamation necessarily treats voters differently on the basis of county residence. But both *Moore* and *Gray* confronted state election laws that effectively gave more *weight* to the votes cast by voters in certain counties. The Illinois statute in *Moore* required independent candidates for the offices of electors to obtain a set number of voters' signatures from each of at least fifty counties. The Court invalidated the law because it gave voters in some counties "greater voting strength" than others, an idea "hostile to the one man, one vote basis of our representative

government." *Moore*, 394 U.S. at 819, 89 S.Ct. 1493. Similarly, *Gray* examined Georgia's county unit system of counting votes, under which the candidate who won each county was considered to have "carried the county" and received votes corresponding to that county's number of representatives. As a result of widely varying populations per county, one "unit vote" in one county represented less than 1,000 residents, while a unit vote in another county represented over 90,000 residents. Such a system "weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." *Gray*, 372 U.S. at 379, 83 S.Ct. 801.

***9** The effects of the October 1 Proclamation are nothing like the effects of the laws in *Moore* and *Gray*. As we have explained, *supra* III(A), the burden imposed by the proclamation is at most *de minimis*. More to the point, it applies a uniform rule to every Texas county and does not weight the votes of those in some counties more heavily than others.

Consequently, Secretary Hughs is likely to show that the October 1 Proclamation does not impermissibly classify voters based on county of residence. Moreover, a "state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory" voting regulations. *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. As we have explained, *supra* III(A), the Secretary has articulated important state interests in ensuring election uniformity and integrity that the October 1 Proclamation furthers.

IV.

Having concluded the Secretary will likely succeed on the merits, we address the remaining *Nken* factors: "whether [the Secretary] will be irreparably injured absent a stay," "whether issuance of the stay will substantially injure" other interested parties, and "where the public interest lies." *Nken*, 556 U.S. at 426, 129 S.Ct. 1749.

The Secretary has shown irreparable harm absent a stay. When a district court's injunction prevents a State from effectuating its own election procedures, put in place by elected officials, it suffers irreparable harm. *See TDP I*, 961 F.3d at 411 (holding an injunction that effectively required "Texas to institute [an absentee ballot] policy against its will presents significant, irreparable harm").

The remaining two factors are also met. Issuing a stay will not substantially injure Plaintiffs, who retain numerous avenues for casting their absentee ballots under the expanded voting opportunities afforded by the Governor's proclamations. What we said recently in *TDP I* applies equally here: "Given the great likelihood that the state officials will ultimately succeed on the merits, combined with the undeniable, irreparable harm that the injunction would inflict on them—factors that we consider 'the most critical,'—we hold that the balance of harms weighs in favor of the state officials." 961 F.3d at 412 (citation omitted). Finally, we conclude that public interest favors the Secretary. When a State is the party appealing an injunction, "its interest and harm merge with

that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam).

Because the Secretary has met her burden, we exercise our discretion to grant a stay pending appeal.

***

Leaving the Governor's October 1 Proclamation in place still gives Texas absentee voters many ways to cast their ballots in the November 3 election. These methods for remote voting outstrip what Texas law previously permitted in a pre-COVID world. The October 1 Proclamation abridges no one's right to vote.

The Secretary's emergency motion for stay pending appeal is GRANTED.

James C. Ho, Circuit Judge, concurring:
I concur fully in Judge Duncan's typically thoughtful opinion. But I also do so grudgingly. I firmly agree that the federal district court usurped the authority that our Constitution vests in state legislatures to set the rules governing federal elections. But so did the Governor of Texas—as Judge Duncan also cautions. *See supra* at —— n.7.

The district court was wrong to rewrite Texas law. But the distinguished judge who did so was simply following in the Governor's footsteps. It is surely just as offensive to the Constitution to rewrite Texas election law by executive fiat as it is to do so by judicial fiat. Yet that is what occurred here. Respected legislators and public leaders called on the Governor to call a special session so that legislators in both parties could consider and debate amendments to the state's election rules to accommodate voter concerns arising out of the pandemic. But the Governor rejected those calls, and instead issued a series of executive proclamations purporting to unilaterally "suspend" various Texas election laws.

***10** Those actions have generated significant controversy. Members of the Texas Supreme Court described the Governor's actions as "*a clear abuse of discretion of a public official*," *In re Hotze*, —— S.W.3d ——, ——, 2020 WL 5919726, at *7 (Tex. Oct. 7, 2020) (Devine, J., dissenting) (emphasis in original) (quotations omitted), that "raise[s] important questions about the constitutionality of government action during the coronavirus crisis," *id.* at ——, 2020 WL 5919726, at *3 (Blacklock, J., concurring).

Only the district court's rewriting of Texas law is before us today, however. And that leads us to an unfortunate irony: by setting aside only the district court's rewriting of Texas law, we must restore the Governor's rewriting of Texas law. It recalls the adage that sometimes it's only the guy who throws the second punch that gets caught. The Dictionary of Modern Proverbs 209 (2012). I grudgingly concur.

I.

Under the Constitution, it is the state legislature —not the governor *or* federal judges—that is authorized to establish the rules that govern the election of each state's Presidential electors, U.S. Senators, and U.S. Representatives. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places

and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ...."); U.S. Const. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [for President and Vice President]."). [1]

1 *See also Smiley v. Holm*, 285 U.S. 355, 367, 52 S.Ct. 397, 76 L.Ed. 795 (1932) ("[T]he exercise of the authority [to regulate Congressional elections] must be in accordance with the method which the state has prescribed for legislative enactments."); *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869 (1892) ("The constitution ... leaves it to the legislature exclusively to define the method of" appointment of Presidential electors).

But apparently that is not how federal elections will be administered in Texas this year.

If officials were following Texas law, "[t]he period for early voting by personal appearance" would "begin[ ] on the 17th day before election day"—or Monday, October 19, 2020. Tex. Elec. Code § 85.001(a). *See also* Tex. Elec. Code § 85.001(c) ("If the date prescribed ... for beginning the period is a Saturday, Sunday, or legal state holiday, the early voting period begins on the next regular business day."). But not this year. On July 27, 2020, the Governor of Texas proclaimed that, due to the COVID-19 pandemic, he will "suspend Section 85.001(a)" so that "early voting by personal appearance shall begin on Tuesday, October 13, 2020"—six days earlier than the date provided by the Texas Legislature.

Furthermore, Texas law ordinarily provides that, if qualified individuals elect to receive their ballots by mail but ultimately choose to deliver their marked ballots in person, they may do so "only while the polls are open on election day." Tex. Elec. Code § 86.006(a-1). But once again, not this year. In that same July 27 proclamation, the Governor of Texas announced that he would also "suspend Section 86.006(a-1)" and "allow a voter to deliver a marked mail ballot in person ... prior to ... election day"—again in direct conflict with the framework set forth by the Texas Legislature. And on October 1, 2020, the Governor amended his July 27 proclamation to make clear that he would suspend section 86.006(a-1) *unless* a county designates more than one location for qualified voters to deliver marked mail ballots, or offers a location that is not monitored by poll watchers—again without support in the Texas Election Code.

***11** It did not have to be this way. The Texas Constitution imposes strict limits on the number of days the Legislature can meet in regular session to consider legislation—once every two years for 140 days. *See* Tex. Const. art. 3, §§ 5, 24. But it also empowers the Governor to call the Legislature back for a special session to focus on any topic of his choosing. *See* Tex. Const. art. 3, § 40. So the Governor did not have to act unilaterally to amend Texas election law in the wake of the pandemic. He could have called a special session. Indeed, a number of respected legislators and public leaders urged him to do just that—to quote one particularly emphatic plea, "if ever a special session was justified, now is the time." [2]

2 Patrick Svitek, *Texas Republicans sue to stop Gov. Greg Abbott's extension of early voting period during the pandemic*, Texas Tribune (Sep. 23, 2020), https://www.texastribune.org/2020/09/23/texas-republicans-greg-abbott-early-voting/. *See also Editorial: Abbott must provide cure to voting in a pandemic*, San Antonio Express-News

(Apr. 14, 2020), https://www.expressnews.com/opinion/editorials/article/Editorial-Abbott-must-provide-cure-to-voting-in-15198980.php ("Gov. Greg Abbott would be remiss if he fails to call a special legislative session to address myriad concerns threatening the primary runoffs and November general election."); Patrick Svitek, *Ector County GOP censures Abbott over executive power amid coronavirus, state Sen. Charles Perry calls for special session*, Texas Tribune (July 4, 2020), https://www.texastribune.org/2020/07/04/ector-county-coronavirus-texas-censure-greg-abbott/ (noting calls for special session by various state senators and representatives).

But instead, the Governor concluded that a special session was unnecessary because the Texas Disaster Act of 1975 gives him the authority to legislate all by himself. That act, however, only gives the governor limited power to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business ... *if* strict compliance with [such requirements] would in any way prevent, hinder, or delay *necessary action in coping with a disaster*." Tex. Gov't Code § 418.016(a) (emphases added). Moreover, the Act, like any other Texas law, must be construed in light of the Texas Constitution. That includes the constitutional provision that "[n]o power of suspending laws in this State shall be exercised except by the Legislature." Tex. Const. art. I, § 28. *See also In re Hotze*, —— S.W.3d ——, ——, 2020 WL 4046034, at *2 (Tex. July 17, 2020) (Devine, J., concurring) ("I find it difficult to square [the Texas Disaster Act of 1975], and the orders made under it, with the Texas Constitution."). It also includes the Governor's constitutional authority to call special sessions of the Legislature. Tex. Const. art. 3, § 40.

It is difficult to see how it is "necessary ... in coping with a disaster" for the governor to suspend provisions of the Texas Election Code over *three months before* the November election. "[W]hen a crisis stops being temporary, and as days and weeks turn to months and years, the slack in the leash eventually runs out." *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710 (TNM), slip op. at 15, 2020 WL 5995126 (D.D.C. Oct. 9, 2020). And that is especially so considering that the Constitution expressly forbids anyone other than the Legislature from suspending Texas laws—and considering that members of the Legislature are not only willing and able but demanding to convene a special session to consider legislation in response to the pandemic.[3]

3 The Governor's proclamation was recently challenged in state court as invalid under Texas law. The Texas Supreme Court ultimately rejected the challenge on procedural grounds. *In re Hotze*, —— S.W.3d ——. But various members acknowledged the weight of the relator's objections. *See id.* at ——, 2020 WL 5919726, at *7 (Devine, J., dissenting) (describing "the Governor's actions in contravention of [the Secretary of State's] duties to carry out the Election Code's clear provisions on the timing and manner of early voting" as "potentially unconstitutional" under Texas law, and concluding that mandamus relief should be granted "*to correct a clear abuse of discretion of a public official*") (quotations omitted); *id.* at ——, 2020 WL 5919726, at *3 (Blacklock, J., concurring) (acknowledging that "[t]he petitioners raise important questions about the constitutionality of government action during the coronavirus crisis"). No member of the court defended the Governor, by contrast—and certainly not in response to the separate federal constitutional concerns identified here.

***12** But now that the Governor has paved the way for rewriting Texas election law based on personal policy disagreements over how elections should be run during the pandemic, it should surprise no one that a federal district court has seen fit to jump in as well, in response to the "*executive*-caused voter confusion" resulting from "Governor Abbott's unilateral

decision to reverse his July 27 Order." *Tex. League of United Latin American Citizens v. Abbott*, No. 1:20-cv-01006-RP, at 33, 2020 WL 5995969 (W.D. Tex. Oct. 9, 2020) (emphasis in original).

On October 9, a federal district court entered a preliminary injunction that effectively set aside a portion of the Governor's October 1 proclamation in favor of his July 27 proclamation. Under the preliminary injunction, state officials are enjoined from forbidding counties to establish more than a single location where qualified voters can deliver marked mail ballots.

In response, the Secretary of State seeks a stay of the preliminary injunction pending appeal. Tellingly, however, nowhere in her stay papers does the Secretary suggest that the preliminary injunction conflicts with Articles I and II of the U.S. Constitution—perhaps because she recognizes that the Governor's proclamations suffer from the same defect.

That said, no one is asking us to set aside the Governor's July 27 proclamation. To the contrary, the plaintiffs want that proclamation enforced as is—while the State of Texas wants the July 27 proclamation enforced, but only as amended by the Governor's October 1 proclamation. So we must take the July 27 proclamation as a given. The only question before us is whether the district court was correct to set aside a portion of the Governor's October 1 proclamation. I agree with my colleagues that the district court was wrong to do so, and that a stay should therefore be granted.

II.

None of this is to say, of course, that there are not valid *policy* reasons to support the conflicting judgments reached by the Governor and the federal district court. The ongoing global pandemic has already roiled the lives and livelihoods of millions of Texans. It is understandable that citizens have strong views on the myriad ways that election rules and procedures might be reformed to maximize voter access in these difficult and challenging times. After all, "[t]o lose the ability to vote in an upcoming election due to fear of the pandemic would be beyond heartbreaking for citizens who are already hurting, for it is a right they will *never* be able to recover." *Tex. Democratic Party v. Abbott*, 961 F.3d. 389, 413 (5th Cir. 2020) (Ho, J., concurring) (quotations omitted).

So the Governor may well believe sincerely that expanding the early voting period furthers the goal of maximizing voter access, and that limiting where mail ballots may be delivered in person will help maximize ballot integrity. On the other hand, the plaintiffs counter that the Governor's approach to mail ballots gets it backward—and that in fact there is a greater risk of fraud when ballots are returned by mail than when they are delivered in-person. To quote the plaintiffs: "the unrebutted evidence demonstrates that allowing voters to return their absentee ballots at the annexes is 'more secure than returning [ballots] by mail.' " Numerous courts agree. As a distinguished panel of the Seventh Circuit once observed: "Voting fraud is a serious problem in U.S. elections generally ... and it is facilitated by

absentee voting .... [A]bsentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) (collecting authorities). *See also Tex. Democratic Party*, 961 F.3d. at 414 (Ho, J., concurring) ("[C]ourts have repeatedly found that mail-in ballots are particularly susceptible to fraud.") (collecting cases).[4]

4 *See also* Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. Times (Oct. 6, 2012), https://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html ("[F]raud in voting by mail ... is vastly more prevalent than ... in-person voting fraud ..., election administrators say.") (collecting examples); *id.* (noting the "bipartisan consensus" that "voting by mail ... is more easily abused than other forms" of voting and that " '[a]bsentee ballots remain the largest source of potential voter fraud,' " which is " 'why all the evidence of stolen elections involves absentee ballots and the like' ") (quoting a 2005 report signed by President Jimmy Carter and James A. Baker III, and Yale Law School Dean Heather Gerken, respectively).

***13** But if changes to Texas election rules are warranted in response to the pandemic, they must be made consistent with the Constitution. And under our Constitution, it is for the Texas Legislature through the legislative process—and not for the Governor or the judiciary by executive or judicial fiat—to determine how best to maximize voter access as well as ballot security. *See*, *e.g.*, *Griffin*, 385 F.3d at 1131 (noting that "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment").

What's more, there may be special cause for concern when unilateral changes to election laws are made by a single elected official. As the Chief Justice once wrote, "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion). He made that observation in the context of a case involving campaign finance regulation. But the same principle readily applies to any area of election law. Indeed, skepticism about politicians regulating politics is "deeply engrained in our nation's DNA." *Stringer v. Whitley*, 942 F.3d 715, 725 (5th Cir. 2019) (Ho, J., concurring). "As Americans, we have never trusted the fox to guard the henhouse." *Id.*

So the Governor's actions in this case should trouble you regardless of whether you agree or disagree with any of his actions as a policy matter. For there is a more fundamental principle at stake: If a governor can unilaterally suspend early voting laws to reach policy outcomes that you prefer, it stands to reason that a governor can also unilaterally suspend other election laws to achieve policies that you oppose. Want to expand voting by mail? Too bad—the governor can suspend mail-in ballots all by himself, for the same reason restaurants have replaced paper menus with online ones in response to consumer concerns about the pandemic. Want to restrict voting by mail? Sorry—the governor can expand mail-in voting on his own, because some people fear going to the polls during the pandemic.

But that of course is not how our Constitution works. The Constitution vests control over federal election laws in state legislatures, and for good reason—that's where we expect the voice of the people to ring most loudly and effectively. Moreover, change by other means doesn't just undermine respect for legal process.

It threatens to undermine the very legitimacy of the election results—the last thing we need in these divisive and uncertain times.[5]

5 *See*, *e.g.*, *Editorial: Abbott must provide cure to voting in a pandemic*, San Antonio Express-News (Apr. 14, 2020) ("If more mail balloting is going to be encouraged ... there needs to be a legislative directive .... If the state is going to expand access to mail ballots ... it needs to do it right.").

I concur.

All Citations

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