STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN, et al.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

Case No. 21-CV-958

and

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, et al.,

Defendant-Intervenors.

PLAINTIFFS' RESPONSE TO THE NONPROFIT INTERVENORS' MOTION FOR A STAY

The nonprofit intervenors have asked this Court to stay its order for *three months*, until after the April 5 election. Dkt. 135. They rely entirely on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (and its progeny), but Purcell does not require a stay here for three reasons. First, *Purcell* applies only to federal courts, not state courts. Second, *Purcell* is designed to prevent federal courts from *changing* state laws, not to stop state courts from enforcing election laws when an unelected agency attempts to change them. Third, even if *Purcell* applied, it does not call for a stay here because there is no serious risk of voter confusion. And *Purcell* certainly does not call for a three-month stay. Such a request can only be an attempt to delay. Under Wisconsin's

usual test for a stay—which intervenors do not even try to apply—none of the factors favor a stay. This Court should deny the motion.

ARGUMENT

In a line of cases starting with *Purcell v. Gonzalez*, the United States Supreme Court has emphasized "that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1). *Purcell* does not require a stay here for several reasons.

First, as the Fourth Circuit recently held *en banc*, "*Purcell* is about *federal court* intervention" in state election rules, and does not apply to state courts. *Wise v. Circosta*, 978 F.3d 93, 99 (4th Cir. 2020).[1] *Purcell* itself emphasized that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4.

Justice Kavanaugh, for example, has repeatedly emphasized federalism concerns in *Purcell*-related stays. As he explained in *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring), "the Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States … It follows that a State legislature's decision either to keep or to make changes to

[1] The three dissenters in the Fourth Circuit argued that *Purcell* could apply when a state court or state agency unilaterally changes election rules on the eve of an election, but they emphasized that *state law* is the baseline and the goal is to avoid changes to those laws right before an election. 978 F.3d at 117 ("The status quo, properly understood, is an election run under the General Assembly's rules."). As explained further below, that is the second reason *Purcell* does not apply—this case is about *enforcing* Wisconsin's election laws, not altering them.

election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (citations omitted). *See also DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30–33 (2020) (Kavanaugh, J., concurring) ("In short, state legislatures, not federal courts, primarily decide whether and how to adjust election rules in light of the pandemic.").

Notably, the U.S. Supreme Court recently *denied* a stay after the Pennsylvania Supreme Court made certain changes to its election rules shortly before the 2020 election, while simultaneously granting a stay of a *federal court* injunction that modified Wisconsin's elections rules. *Compare DNC v. Wis. State Legislature*, 141 S. Ct. 28, *with Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020). Chief Justice Roberts explained the difference in a short concurrence: "While the Pennsylvania applications implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, J., concurring).[2]

[2] Three Justices wrote separately in the Pennsylvania case, but, like the *Wise* dissenters discussed in footnote 1 above, their concern was that a state court had *changed* a state *law*—which is the second reason *Purcell* does not apply here, *see infra*. *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020) (statement of Justice Alito, joined by Thomas and Gorsuch) ("The provisions of the Federal Constitution confer[ ] on state legislatures, not state courts, the authority to make rules governing federal elections.").

Nonprofit intervenors do not cite any Wisconsin cases—nor are there any—holding that *Purcell* or a similar principle applies in Wisconsin courts. And they do not even attempt to apply—nor would they meet—the usual test for a stay in Wisconsin courts. *See infra*.

Purcell also does not apply because its focus is on court orders that attempt to make *changes* to state law, whereas this Court's order simply requires upcoming elections to be conducted in *accordance* with Wisconsin's elections laws. Justice Kavanaugh has summarized the *Purcell* principle as follows: "Federal courts ordinarily should not *alter state election laws* in the period close to an election." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020). The Seventh Circuit, too, has recognized that "[t]here is a profound difference between compelling a state to depart from its rules close to the election (*Purcell*) and allowing a state to implement its own statutes (this case)." *Frank v. Walker*, 769 F.3d 494, 497 (7th Cir. 2014).[3]

And, as described above, those Judges and Justices who have argued that *Purcell* should apply to some state court decisions, *supra* nn. 1–2, have emphasized that the point is to *preserve state law* from last-minute changes by courts or agencies. *See Boockvar*, 141 S. Ct. at 2 (2020) (statement of Justice Alito, joined by Thomas and

[3] While the Supreme Court vacated the Seventh Circuit's stay in *Frank*, that decision was likely driven by unique circumstances that are not present here: the district court had enjoined Wisconsin's voter identification requirement for absentee voting in April; the Seventh Circuit's stay re-instated it in September, *after* "absentee ballots ha[d] been sent out without any notation that proof of photo identification must be submitted," and there was evidence that roughly 9% of registered voters did not have valid ID, and would not be able to get one in time, which even the dissenting Justices found "particularly troubling." *Frank v. Walker*, 574 U.S. 929 (2014) (Alito, J., dissenting); *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting) (describing the evidence).

Gorsuch) ("[T]here is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring *on state legislatures, not state courts*, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election."); *Wise*, 978 F.3d at 117 (Wilkinson, J., dissenting) ("Therefore, we conclude that *Purcell* requires granting an injunction pending appeal in this case. The status quo, properly understood, *is an election run under the General Assembly's rules*—the very rules that have been governing this election since it began in September. The Board and the North Carolina Superior Court for the County of Wake impermissibly departed from that status quo approving changes to the election rules in a consent decree in the middle of an election.")

Here, this Court's order *restores* state law, so *Purcell* is not applicable, even if it applied to state courts. It is WEC's memos that altered the election rules. This Court has confirmed, following extensive briefing and argument, that those directives were unlawful and in contravention of state law—and the Defendant-Intervenors now request that, despite that ruling, another statewide election be held under the illegal directives. Thus, the intervenors' argument "turn[s] *Purcell* on its head." *See DNC v. Wis. State Legislature*, 141 S. Ct. 28, 31–32 (Kavanaugh, J., concurring) (rejecting the argument that *Purcell* "precludes an appellate court … from

overturning a district court's injunction of a state election rule in the period close to an election.").[4]

Even if the *Purcell* principle applied here (and it does not), it would not warrant a stay in this case. The primary concern in *Purcell* is avoiding "voter confusion." 127 S. Ct. at *5. There is little risk of confusion here, for many reasons. There are two very easy options for returning an absentee ballot that are authorized under state law—mailing it, or delivering it in person to the municipal clerk. Clerks can easily respond to this Court's order by notifying voters of these options, removing any illegal drop boxes, and posting signs on drop boxes (or where they used to be) that ballots must be mailed or delivered in person to the clerk. Any voters who do not receive the notification and attempt to return a ballot to a drop box can simply read the sign and then drop it into a mailbox or deliver it to the clerk's office (or an alternate site under 6.855). This Court's decision has already been widely reported in the media. Clerks have well over a month to respond to it—and almost two weeks before absentee ballots are even sent out.

The test for a stay in Wisconsin Courts, which the nonprofit intervenors don't even attempt to apply, is set forth in *State v. Gudenschwager* 191 Wis. 2d 431 (1995). Wisconsin courts consider the movant's likelihood of success on appeal, the potential

[4] It is also worth noting that the delay is of the Defendant-Intervenors' own making. Plaintiffs filed this lawsuit in June of 2021 and noted their intent to file summary judgment immediately on the purely legal issues presented during the Court's initial status and scheduling conference on August 19, 2021. Dkt. 73:4. It was the Defendant-Intervenors who sought to intervene and then requested a discovery period for information that was neither necessary to nor relied upon in this Court's ruling, thus narrowing the timeframe between when summary judgment could be filed and heard and the upcoming elections.

for irreparable harm absent a stay, whether a stay will harm other interested parties, and whether a stay is in the public interest. 191 Wis. 2d at 440. All of these factors cut against a stay. Intervenors have little chance of success on appeal. As this Court has already recognized, the Wisconsin statutes at issue in this case are straightforward: an absentee ballot must be "mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)(1).

A stay would also cause irreparable harm and be against the public interest. Wisconsin voters have a strong interest in elections being conducted in accordance with state law, *see Jefferson v. Dane Cty.*, 2020 WI 90, ¶ 15, 394 Wis. 2d 602, 951 N.W.2d 556 ("[t]he erroneous interpretation and application of Wis. Stat. § 6.86(2)(a), [ ] affect matters of great public importance,"), and in "preserving the integrity of [the] election process," *Purcell*, 549 U.S. at 4. An election conducted in violation of state law cannot be undone. *See Trump v. Biden*, 2020 WI 91, ¶ 1, 394 Wis. 2d 629, 951 N.W.2d 568. On the other side, there is no harm or serious risk of "confusion" without a stay; voters can still easily return their absentee ballots by mailing them or returning them in person to the clerk's office or an alternate site under § 6.855.

The nonprofit intervenors have submitted various "statements" from voters alleging various challenges to casting an absentee ballot without a stay of this Court's order. These do not alter the analysis, for numerous reasons. First, and most importantly, they are irrelevant to the legal issue in this case, which is the proper interpretation of state law. To the extent that they suggest a reform of state law to make it easier for individuals with a disability to vote, that is a fair argument to make

to the Legislature, but it is not an appropriate argument to this Court to ask it create new law. That is a legislative and not a judicial power.

Second, the affidavits are also irrelevant to *Purcell* (to the extent it applies). None of the affidavits allege any "confusion" resulting from this Court's order.

Third, many of the affidavits are inappropriate or entirely irrelevant on their face. Multiple of the affidavits argue that drop boxes are necessary because they or other voters do not "trust the US Post Office." Dkt. 138:8, 10, 14, 18, 34, 56. An individual elector's personal distrust of the U.S. postal system obviously is not a valid basis for an exception to state law. Others contain little more than hearsay or generic references to unspecified "others" who might have difficulty. One, for example, says only that he "know[s] … persons" who "*may* be unable to go to the polls on election day." Dkt. 138:58. Another briefly references others in his "synagogue community" without describing any of their specific details. Dkt. 138:56. Yet another contains only a short policy argument, without specifics, arguing that eliminating drop boxes will cause an "undue burden" on other electors. Dkt. 138:16. Many more describe other electors only in broad strokes. Dkt. 138:12, 20, 28, 34, 46, 48, 50.

Fourth, while some of the affidavits allege that following state law will result in hardship for them or close relatives, the affidavits do not clearly establish even that point. There are numerous exceptions under state law for voters with disabilities to ensure their access to the ballot box, and neither the intervenors nor the affiants show that this Court's order alters those legislative exceptions, nor that these other exceptions would not otherwise apply to them. *E.g.*, Wis. Stat. §§ 6.82; 6.86(1)(ag);

6.86(2); 6.86(3); 6.87(5); 6.875. Several affiants, for example, describe voters in nursing homes or care facilities, who are covered by Wis. Stat. § 6.875, which is not at issue in this case. Dkt. 138:30, 40, 46. Some describe difficulties they or other voters may have delivering a ballot to the clerk's office, but do not explain why they cannot mail their ballot. *E.g.*, Dkt. 138:18, 54. Others allege they or a loved one will have difficulty placing a ballot into a mailbox *entirely alone*, but do not explain why they could not do so with someone's help. Dkt. 138:6, 8, 10, 14, 26, 28. The U.S. Postal Service also has a special door service for people who cannot get to their mailbox.[5]

Plaintiffs also have had no opportunity to test the accuracy of any of the claims made in these affidavits. Intervenors have been aware of Plaintiffs' position in this case, including the relief sought, since July. They could have submitted these affidavits during the summary judgment briefing, but chose not to. Intervenors appear to be attempting to pad the record for an appeal without giving Plaintiffs an opportunity to respond. This post-ruling submission is not appropriate at this late stage in the litigation.

Finally, as pointed out above, even if there is some gap under state law, such that some voters do not fit into any of the many exceptions and truly cannot vote in any way under the various methods authorized by state law, that would need to be resolved either by the Legislature or in a separate case where the facts and details of those particular voters could be tested and litigated. And the result would be, at most,

[5] *If I have Hardship or Medical Problems, how do I request Door Delivery?*, United States Postal Service (Apr. 7, 2020), https://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery.

an as-applied exception for those situations—not altering state law entirely for *all* voters, which is effectively what the intervenors ask for in their stay. Again, the question in this case is the default rule under state law for all voters. Intervenors ask this Court to retain a policy, *for all voters*, that this Court has already found conflicts with state law.

Two recent Wisconsin Supreme Court cases illustrate how that Court has (and this Court should) apply the stay analysis when faced with an ultra vires policy or law, as here. In *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 10, 391 Wis. 2d 497, 942 N.W.2d 900, the Wisconsin Legislature challenged Governor Evers' stay-at-home order as an unlawful, unpromulgated rule. Although the Legislature *itself* asked the Court to stay any injunction against the order "for at least six days," the Court declined to do so. *Id.* ¶ 56. Justice Kelly, joined by Justice Bradley, explained: "The petition requested a declaration of rights. Our opinion declares those rights ... today. What would it mean to stay that declaration? Would everyone have to act like they hadn't read our decision until the end of the stay? Would there be an embargo on reporting on our decision until that date?" *Id.* ¶ 120 n. 10.

Similarly, in *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, the Court considered a constitutional challenge to certain laws, in an appeal from a decision granting a temporary injunction. *Id.* ¶ 5. A majority of the Court found some of the laws unconstitutional and declared them so, without considering the remaining injunction factors: "[A]nalyz[ing] the remaining factors makes sense only if there are circumstances under which it would be appropriate to

continue enforcing a law we have already decided is unconstitutional. If we concluded that the movant would not suffer irreparable harm, would that make it acceptable for the executive to enforce an unconstitutional law? … If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not." *Id.* ¶ 117.

As in *Palm* and *SEIU*, WEC's memos are clearly illegal, and in direct conflict with state law. This Court should not allow additional statewide elections to take place with these unlawful directives in place.

Dated: January 20, 2022.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

/s/ *Electronically signed by Luke N. Berg*

Rick Esenberg (WI Bar No. 1005622)
Brian W. McGrath (WI Bar No. 1016840)
Luke N. Berg (WI Bar No. 1095644)
Katherine D. Spitz (WI Bar No. 1066375)
330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Brian@will-law.org
Luke@will-law.org
Kate@will-law.org

Attorneys for Plaintiffs