Nos. 20-2835, 20-2844

In the United States Court of Appeals

FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
PLAINTIFFS-APPELLEES,
v.
MARGE BOSTELMANN, ET AL.,
DEFENDANTS,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

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

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

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

On Appeal From The United States District Court
For The Western District of Wisconsin
Consol. Case Nos. 3:20-cv-249, -278, -340, & -459
The Honorable William M. Conley, Presiding

WISCONSIN LEGISLATURE'S REPLY TO EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION

[Attorneys for the Wisconsin Legislature listed on following page]

SCOTT A. KELLER
BAKER BOTTS LLP
700 K Street, N.W.
Washington, DC 20001
(202) 639-7837
(202) 585-1023 (fax)
scott.keller@bakerbotts.com

Counsel for Legislature in Gear

ERIC M. MCLEOD
LANE E. RUHLAND
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
(608) 255-4440
(608) 258-7138 (fax)
eric.mcleod@huschblackwell.com
lane.ruhland@huschblackwell.com

LISA M. LAWLESS
HUSCH BLACKWELL LLP
555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
(414) 273-2100
(414) 223-5000 (fax)
lisa.lawless@huschblackwell.com

Counsel for Legislature in DNC

MISHA TSEYTLIN
Counsel of Record
ROBERT E. BROWNE, JR.
KEVIN M. LEROY
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
robert.browne@troutman.com
kevin.leroy@troutman.com
sean.dutton@troutman.com

Counsel for Legislature in DNC, Gear, Swenson, and Edwards

TABLE OF CONTENTS

ARGUMENT

I. As This Court Already Held In This Very Case, "The Legislature Has Standing To Pursue This Appeal" Under *Bethune-Hill*

A. This Court *and* the Supreme Court already decided "expressly or by necessary implication" that the appellants here have standing to appeal, and those decisions are "*binding*" as "law-of-the-case." *Dobbs v. DePuy Orthopaedics, Inc.*, 885 F.3d 455, 458 (7th Cir. 2018) (citations omitted) (emphasis added). In April, this Court "expressly" decided this issue, *id.*, holding that the "Legislature has standing to pursue this appeal," citing both *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), and *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019). *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 *et. al*, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020). Thereafter, the Supreme Court decided by "necessary implication," *Dobbs*, 885 F.3d at 458, that the Legislature and/or Appellant Republican National Committee have standing to appeal in issuing relief in *Republican National Committee v. Democratic National Committee ("RNC")*, __ U.S. __, 140 S. Ct. 1205 (2020) (per curiam).

Plaintiffs' contrary arguments fail, not even addressing how their positions are consistent with *RNC*. The *Swenson* Plaintiffs claim that this Court only decided the Legislature's standing to appeal the denial of its intervention motion, *Swenson*.Resp.7–8. But that is wrong, most notably because this Court cited *Bethune-Hill* in support of that holding—and *Bethune-Hill* addressed when legislative entities can "litigate on the State's behalf," rather than intervention. 139 S. Ct. at 1952. The *Edwards* Plaintiffs do acknowledge this Court's standing holding,

Edwards.Resp.2–5, but then go on to misunderstand the basis of legislative standing under *Bethune-Hill*, *see infra* pp.2–3.

B. This Court was correct when it held the Legislature had standing to appeal.

Bethune-Hill held that the Virginia House of Delegates lacked appellate standing because it could point to *neither* a statute allowing it to defend state law *nor* to cases where state courts had allowed it to appeal. 139 S. Ct. at 1951–53. *First*, Virginia had not adopted a statute that permitted the House to defend state law. *Id.* at 1951–52. In contrast, other States, like Indiana, had adopted such statutes. *Id.* at 1952. *Second*, the House was unable to point to any decisions where the Virginia courts had permitted it to appeal, unlike the legislature in *Karcher v. May*, 484 U.S. 72 (1987), which showed a "record . . . of litigation by state legislative bodies in state court." *Bethune-Hill*, 139 S. Ct. at 1952.

The Wisconsin Legislature has *exactly* the authority that the Virginia House of Delegates lacked. Just like Indiana, Wisconsin has adopted explicit statutory authority that permits the Legislature to defend statutes in court, thereby vindicating the State's interest in the validity of its laws. *See* Wis. Stat. §§ 13.365(3), 803.09(2m). Looking at these very provisions, this Court in *Planned Parenthood* was "comfortable adopting the district court's assumption" that the Legislature has "standing as an agent of the State of Wisconsin" in defense of the constitutionality of state law. 942 F.3d at 798. Further, like in *Karcher*, the Wisconsin Supreme Court

has decided *multiple* cases where the Legislature[1] was the only appellant, with the Legislature successfully challenging orders blocking state law. *See, e.g.*, *Serv. Emps. Int'l Union (SEIU), Local 1 v. Vos*, 946 N.W.2d 35, 55 (Wis. 2020); *League of Women Voters of Wis. v. Evers*, 929 N.W. 2d 209, 215 (Wis. 2019).

Plaintiffs make the risible argument that one of these cases, *SEIU*, 946 N.W.2d 35, somehow supports a contrary conclusion, *even though that case involved a successful appeal brought only by the Legislature, against a lower court's decision blocking state laws*. Plaintiffs claim that a single, out-of-context sentence in *SEIU* decided the *Bethune-Hill* issue against the Legislature in a *sub silencio* narrowing construction. *Swenson*.Resp.8–9; *DNC*.Resp.7–8; *Edwards*.Resp.4.n.3. That argument is meritless. In *SEIU*, the Attorney General *conceded* that Wis. Stat. §§ 13.365(3), 803.09(2m) (as well as other litigation-related statutes) *constitutionally* permitted the Legislature to defend state laws as an agent of the State, even citing *Hollingsworth v. Perry*, 570 U.S. 693 (2013), for the proposition that a "state may provide officials to defend the validity of a state statute, if the state's attorney general declines to do so." 2019 WL 4645564, at *40. Given the Attorney General's concession, the Wisconsin Supreme Court only mentioned validity-of-state-law cases in a single sentence in *SEIU*, simply acknowledging the Legislature's authority to intervene in such cases. 946 N.W.2d at 51. The Court's holding was about the *other instances* where the Legislature could take part in making litigation decisions for the State *that*

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

were actually disputed between the Legislature and the Attorney General—primarily, where the State's public fisc was at issue—and the Court fully *upheld* the Legislature's authority in such cases against a facial challenge. *Id.* at 51–57.

Finally, following Plaintiffs' suggested approach would lead to absurd results. While the Attorney General once represented the Commission here, R.13–15, he withdrew long ago, R.56–58. The Commission—unlike the Attorney General or the Legislature—*has no state-law authority to litigate in defense of state law, which is why it has not uttered a word against the injunctive relief that Plaintiffs have sought and why it has not (and would never be able to) appeal the injunction*. Instead, the Commission correctly told the district court that it could *only* "investigate election law violations, file lawsuits, issue orders and promulgate administrative rules implementing Wisconsin's election laws." *Edwards* R.15:6 (No. 3:20-cv-340). Thus, if the Legislature could not appeal even when it is a party in the case, then no agent for the State would ever have the authority to appeal the validity of an injunction blocking a Wisconsin election law in any case—like this one—where the Attorney General is not representing the Commission. Avoiding that untenable situation is a core reason why the Legislature enacted Wis. Stat. §§ 13.365(3), 803.09(2m).

II. Controlling Caselaw—Including *RNC* And *Luft*—Makes Clear That The Legislature Is Likely To Prevail On Appeal

In terms of likelihood of success, the question under *RNC*, *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), and *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) ("*Frank II*"), is whether, after looking at "the state's election code as a whole," *Luft*, 963 F.3d at 671, the voters covered by the injunction needed that relief to be able to

vote with "reasonable effort," *Frank II*, 819 F.3d at 386. Plaintiffs are unable to show that any aspect of the injunction here satisfies this standard.

Registration Deadline. Wisconsin electors have weeks to register by mail or online, and thereafter have multiple in-person registration options, meaning that all eligible voters can register with "reasonable effort," under *Frank II*. Leg.Mot.8–9.

While the *Edwards* Plaintiffs argue that extending this registration deadline would lead to shorter lines, *Edwards*.Resp.10, that policy argument cannot justify judicial relief, *Luft*, 963 F.3d at 671. The *DNC* Plaintiffs, in turn, argue that extension of this deadline would be helpful to those who "just moved into the State or [have] been displaced." *DNC*.Resp.16. But these Plaintiffs do not claim that any such voters would be unable to register with "reasonable effort," *Frank II*, 819 F.3d at 386, and, in any event, the injunction is not limited to such voters, *id.* at 386–87.

Absentee Ballot-Receipt Deadline. The extension of the ballot-receipt deadline is unlawful for much the same reasons that the extension of the registration deadline is unlawful: voters have ample avenues to vote with "reasonable effort." *Frank II*, 819 F.3d at 386. If some voters know that they do not want to vote in person, they can and should return their absentee ballots as soon as possible, to avoid any mailing delays or processing time that could arise. And if other voters are comfortable voting in person, they can avoid taking those proactive steps, knowing that they can always vote safely in-person, including for two weeks before Election Day. Leg.Mot.9–13.

Plaintiffs' various arguments do not support a different conclusion.

First, Plaintiffs point to the fact that this Court declined to stay similar relief for the April Election, *Swenson*.Resp.1–2, 9; *DNC*.Resp.2–3, 9, which the Legislature did not thereafter ask the Supreme Court to stay in its *entirely* successful stay application. But the situation facing voters in the Spring was far different. Then, the COVID-19 pandemic was one that "no one saw" coming. R.181:127–28. The district court's injunction gave those voters six extra days to adjust to this new situation, allowing them less than an additional week to complete the absentee-voting process. Now, voters have *many weeks* to request and return their absentee ballots, given that everyone is aware of COVID-19—far more time than voters had in the Spring to adjust to COVID-19, even after the district court's extension. Indeed, Wisconsinites have just completed the August 2020 Partisan Primary Election, where the majority of voters voted by absentee ballots, returning their ballots by election day, under state law. *Compare* Wis. Elections Comm'n, *Absentee Ballot Report – August 11, 2020 Partisan Primary* (Aug. 10, 2020),[2] *with* Wis. Elections Comm'n, Wisconsin Voter Turnout Statistics (first link).[3] There is no plausible argument that Wisconsin voters cannot follow the same process to vote for the November Election, with the same "reasonable effort." *Frank II*, 819 F.3d at 386.

Second, Plaintiffs variously argue that the election-day-absentee-ballot-receipt deadline makes voting "more difficult," because ballot mailing delays could force some electors to vote in person, *Swenson*.Resp.13, or "disenfranchise[s]" voters,

[2] Available at https://elections.wi.gov/node/7019.

[3] Available at https://elections.wi.gov/elections-voting/statistics/turnout.

Swenson.Resp.13. The distinction between these two characterizations is critical. The State can ask voters to take "reasonable effort[s]," *Frank II*, 819 F.3d at 386, to vote. Plaintiffs do not argue that voting in-person, if something goes wrong with an absentee-ballot mailing or processing, is an unreasonable effort *for the vast majority of voters*, even in light of COVID-19. On the other hand, the State cannot "disenfranchise" voters, or even make them expend unreasonable efforts. But voters who wait until the last minute to request their absentee ballots, and thus do not get those ballots in time to complete and return them by election day (*which includes simply dropping the absentee ballots off at an authorized site/polling place before or on election day*, Op.7–8), are not "disenfranchised" because: (1) those voters freely decided to wait until the last minute; *and* (2) still have safe in-person voting options. In any event, even if this Court believes that as-applied relief could be warranted for some small subset of voters for whom in-person voting is more difficult—due to their health conditions—that could not possibly justify the district court's extension of the absentee-ballot-receipt deadline for *all* voters. *See Frank II*, 819 F.3d at 386–87.

Finally, Plaintiffs argue that some voters will request absentee ballots five days before election day, as state law allows, but may not be able to complete the whole absentee-ballot process in time. *See Swenson*.Resp.10; *DNC*.Resp.13. These Plaintiffs simply ignore the Legislature's argument answering this point, thereby admitting by silence that they have no answer to the Legislature's argument: "As the Supreme Court explained in the earlier round of this very case, 'even in an ordinary election, voters who request an absentee ballot at the deadline for requesting

ballots . . . will usually receive their ballots on the day before or day of the election,' *Republican Nat'l Comm.*, 140 S. Ct. at 1207, which, in turn, may not provide them with enough time to successfully mail the ballot back to the clerk by election day even before COVID-19. Yet, no one would argue that this previously rendered any State's voting laws unconstitutional before COVID-19." Leg.Mot.10–11.

Week Of Faxing And Emailing Absentee Ballots. The district court overturned *Luft*, in part, by judicially re-imposing a week of faxing and emailing of absentee ballots. That holding is unlikely to withstand review because that relief is not tailored to voters who cannot cast a ballot after using reasonable effort. Leg.Mot.13–15.

Plaintiffs tellingly frame their argument in favor of this relief as follows: this relief is needed, they claim, for "[a] voter who does not receive a timely-requested ballot in the mail *and cannot safely vote in person*." *Gear*.Resp.9 (emphasis added). This argument has two fundamental flaws. First, and *independently* fatal to this aspect of the injunction, the district court did not tailor this injunction to only those who "cannot safely vote in person." *Gear*.Resp.9. That plainly requires vacatur of the injunction under *Frank II*, 819 F.3d at 386–87. Second, in any event, the record contains overwhelming evidence that in-person voting in Wisconsin will be safe in November, including because the April Election proved safe and because election officials have spent the last half-year taking steps to ensure that November will be even safer. R.454:13–16 (Legislature's brief below, collecting evidence).

Duplicative Information About The Indefinitely Confined Exception. There was no constitutional warrant for the district court to order the Commission to re-publicize its guidance on the indefinitely confined exception. Leg.Mot.15–16.

No Plaintiff argues that, absent this duplicative publication, any aspect of Wisconsin law would be unconstitutional, which ends the analysis. While Plaintiffs argue that the meaning of "indefinitely confined" is not obvious from the face of the statute because the Wisconsin Supreme Court clarified that exception in the Spring, *DNC*.Resp.18, the critical point is that both the Commission and the Wisconsin Supreme Court have already provided voters all needed guidance.

Residency Rules For Election Officials. The district court had no constitutionally adequate justification for enjoining Wisconsin's requirement that election officials must live in their relevant municipality. Leg.Mot.16–17.

While Plaintiffs point to staffing shortages in Milwaukee and Green Bay in April, *Swenson*.Resp.14–15, those municipalities' lead officials testified in depositions below that they will have ample polling locations open in November, under current law. *See* R.474-1:5 (Legislature's brief below, collecting evidence); R.480:19. And while Plaintiffs cite testimony from these same officials, *Swenson*.Resp.15, that testimony merely said that lifting this law would, perhaps, have "some value," R.470:29, and "maybe" there would be some additional poll workers without this law, R.480:36.

III. Plaintiffs' *Purcell* Arguments Cannot Be Squared With *RNC*

In *RNC*, the Supreme Court granted the Legislature's stay application in whole, rejecting Plaintiffs' arguments, repeated here, that the *Purcell* principle is inapplicable if the injunction purports to expand voting rights. *See Gear*.Resp.15–16.

Plaintiffs' further suggestions, *Swenson*.Resp.19; *accord DNC*.Resp.9–10, that the district court's order here would not cause confusion under *Purcell*, similar to the injunction in *Republican National Committee v. Common Cause R.I.*, No. 20A28 (S. Ct. Aug. 13, 2020), are demonstrably wrong. In *Common Cause*, the *Purcell* "status quo [was] one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief." *Id.* But here, Wisconsin's immediately prior August 2020 Partisan Primary Election operated entirely under state law, not under the district court's newly issued injunction. Under those legal rules, Wisconsinites know when they must register online and when they need to return their absentee ballots (whether by mail or in-person). In turn, Wisconsin elections officials know that they cannot email ballots to most electors and cannot employ out-of-municipality poll workers. *Purcell* prohibits judicially changing these settled rules, in the middle of an ongoing election.

CONCLUSION

This Court should stay the district court's entire preliminary injunction pending appeal.

Dated: September 26, 2020

Respectfully Submitted,

/s/ Misha Tseytlin
MISHA TSEYTLIN
Counsel of Record
ROBERT E. BROWNE, JR.
KEVIN M. LEROY
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
robert.browne@troutman.com
kevin.leroy@troutman.com
sean.dutton@troutman.com

Counsel for Legislature in DNC, Gear, Swenson, and Edwards

SCOTT A. KELLER
BAKER BOTTS LLP
700 K Street, N.W.
Washington, DC 20001
(202) 639-7837
(202) 585-1023 (fax)
scott.keller@bakerbotts.com

Counsel for Legislature in Gear

ERIC M. MCLEOD
LANE E. RUHLAND
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
(608) 255-4440
(608) 258-7138 (fax)
eric.mcleod@huschblackwell.com
lane.ruhland@huschblackwell.com

LISA M. LAWLESS
HUSCH BLACKWELL LLP
555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
(414) 273-2100
(414) 223-5000 (fax)
lisa.lawless@huschblackwell.com

Counsel for Legislature in DNC

CERTIFICATE OF COMPLIANCE

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

This reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,592 words, excluding the parts of the reply exempted by Federal Rule of Appellate Procedure 32(f).

This reply complies with all typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)–(6), because it has been prepared in a proportionally spaced typeface using the 2016 version of Microsoft Word in 12-point Century Schoolbook.

Dated: September 26, 2020.

/s/ Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2020, I filed the foregoing Reply To Emergency Motion To Stay The Preliminary Injunction with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: September 26, 2020

/s/ Misha Tseytlin
MISHA TSEYTLIN