Nos. 20-2835 & 28-2844

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, *et al.*,
Defendants,

WISCONSIN STATE LEGISLATURE,
Intervening Defendant-Appellant,

and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Intervening Defendant-Appellants.

SYLVIA GEAR, *et al.*,
Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, *et al.*,
Defendants,

WISCONSIN STATE LEGISLATURE,
Intervening Defendant-Appellant,

and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Intervening Defendant-Appellants.

CHRYSTAL EDWARDS, *et al.*,
Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, *et al.*,
Defendants,

WISCONSIN STATE LEGISLATURE, *et al.*,
Defendant-Appellants,

and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Intervening Defendant-Appellants.

JILL SWENSON, *et al.*,
Plaintiffs-Appellees,
v.
MARGE BOSTELMANN, *et al.*,
Defendants,

WISCONSIN STATE LEGISLATURE,
Intervening Defendant-Appellant,

and
REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Intervening Defendant-Appellants.

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

OPPOSITION OF PLAINTIFFS-APPELLEES DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN TO EMERGENCY MOTION FOR STAY OF THE DISTRICT COURT'S PRELIMINARY INJUNCTION

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Introduction

Plaintiffs-Appellees Democratic National Committee ("DNC") and Democratic Party of Wisconsin ("DPW') submit this opposition to the "Wisconsin Legislature's Emergency Motion to Stay the Preliminary Injunction" in No. 20-2835 ("Mot.") and the Republican National Committee's ("RNC") and Republican Party of Wisconsin's ("RPW") stay motion in No. 28-2844 (collectively, "Movants"). This opposition focuses on the stay requests relating to the District Court's Order that: (1) extends the receipt deadline for absentee ballots ("Receipt Deadline") under Wis. Stat. § 6.87(6) until November 9, 2020, but requiring that ballots be mailed and postmarked on or before Election Day to count; (2) extends the deadline under Wis. Stat. § 6.28(1) for online and mail-in registration from October 14 to October 21; and (3) directs the Wisconsin Election Commission ("WEC") to include language in voter-facing materials explaining—consistent with existing WEC guidance—that the "indefinitely confined" exception to the photo ID requirement for requesting an absentee ballot "does not require permanent or total inability to travel outside of the residence."

The DNC and DPW respectfully request that this Court expeditiously deny the stay motions so that Wisconsin voters and election officials have immediate certainty that the District Court's ordered relief will be in effect for the upcoming election.

As Americans awoke to the COVID-19 pandemic's harsh realities last March, Wisconsin election officials were preparing for the April 7 Spring Primary. In the weeks leading up to that election, Wisconsin voters requested absentee ballots at an unprecedented rate: 1,303,985 absentee ballots were issued, and absentee ballots

represented 73.8% of all ballots counted. In past elections, absentee votes often represented less than 10% of all ballots.

The extraordinary volume of absentee ballots issued and returned by mail overwhelmed election officials and the U.S. Postal Service ("USPS"), both of which were already struggling as a result of the pandemic's impacts in countless other ways. Election officials faced large backlogs of absentee-ballot requests, resulting in tens of thousands of voters receiving their ballots too late to return them by election day. Between April 3 and April 6, local officials mailed more than 92,000 absentee ballots to voters, all of which were too late to be mailed back by election day. Dist. Ct. Opinion ("Op.") at 13. As of April 7, more than 9,000 ballots *still* had not been sent to voters who had timely requested them. *Id.* Meanwhile, USPS lost track of thousands of ballots, a large percentage of which were *never* delivered to voters and election officials. *Id.* Adding to the chaos, election officials had to close hundreds of polling locations because of poll-worker and personal-protective-equipment shortages. Op.15–16.

As trying as these events were for voters and election workers, they would have been much worse without the District Court's limited relief extending the Receipt Deadline and the deadline for registering to vote by mail. Because this Court allowed the extended Receipt Deadline to stand for the Spring Primary, and the Supreme Court, in turn, upheld the extension, *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207–08 (2020) ("*RNC*"), approximately 80,000 lawful voters whose absentee ballots otherwise would have been rejected had their

votes counted.[1] Similarly, the District Court's 12-day extension of the online registration deadline permitted more than 57,000 citizens to register for the Primary. Those remedies came days before that election. On appeal, the Supreme Court, too, declined to undo the extension of the Receipt Deadline—by then the literal eve of the election.[2]

The issues necessitating relief in the Spring have grown worse. Now, though, the District Court's new order comes further out from Election Day. And the relief is narrower than before. The Court denied much of the relief that Plaintiffs requested; what it granted was necessary and compliant with *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), *Democratic National Committee v. Bostelmann*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), and *RNC*. Thus, while the Court's September 22nd Order again extends the Receipt Deadline, it does so exactly in the way the Supreme Court approved. And its registration-deadline extension is more modest than the relief issued in the Primary—extending the deadline for online and mail registration by only one week. The other relief this Court has not previously addressed is exceedingly narrow and well-supported by the evidentiary record. For instance: (1) a fail-safe for voters who timely request absentee ballots that fail to make it to the voter in time to be voted; and (2) modest measures to ensure voters are not unduly

[1] The Supreme Court modified the relief by ordering absentee ballots be postmarked by election day. 140 S. Ct. at 1208.

[2] The Supreme Court was not asked to, and did not consider, the registration-deadline extension.

burdened because they are unaware that they qualify for the "indefinitely confined status" exception to the photo ID requirement under WEC guidance.

Movants ignore the history of this case and the April Primary, as well as the much more robust evidentiary record that supports the District Court's Order. That record and the District Court's factual findings, which are reviewable under the deferential clear error standard, *Cook County, Ill. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020), amply support its decisions. Those findings establish that the pandemic will continue in Wisconsin into October and November; approximately one million more absentee ballots will be cast in November than in the Primary; USPS is experiencing service delays and has affirmatively warned Wisconsin officials that ballots lawfully requested within five days of Election Day are at "high risk" of arriving late and not being counted; and WEC has acknowledged it will be "very challenging" to manage the number of absentee voters in November. Tellingly, WEC neither appeals nor seeks to stay the Court's relief.

Movants are wrong to suggest the Order reflects nothing more than differing policy judgments. To the contrary, the District Court narrowly crafted its Order to address its factual findings that there is "*near certainty of disenfranchising tens of thousands of voters relying on the state's absentee ballot process,*" and that "there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election." Op.48 (emphasis partially added). Movants do not challenge any of the Court's detailed findings about the severe

burdens that the challenged laws are imposing on the right to vote. Instead, they simply ignore them.

Implicit in this Court's April ruling the first time it considered the extension of the Receipt Deadline was that Movants could not meet the stringent standard for a stay's issuance, including the requirement of a "strong showing" that they were likely to succeed on the merits. *Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 3421662, at *3 (7th Cir. June 21, 2020). This time around, where the record is more developed and the relief ordered more modest, it is even clearer Movants cannot satisfy this standard.

The questions this Court posed in its September 24 briefing Order also weigh strongly against granting the stay. *First*, as described below, both the Legislature and the RNC lack the authority to pursue this appeal. *Second*, this is not a situation where the relief is of such a nature and was entered so close to the election that it risks voter confusion that could lead to disenfranchisement. To the contrary, absent the relief, it is virtually certain that tens of thousands of lawful voters will be disenfranchised. And the Court's Order comes several weeks earlier than the similar order in the Spring, which this Court declined to stay, clearly concluding that it was not too late to extend the Receipt Deadline. *Third*, while the Legislature claims that "this Court and then the Supreme Court stayed most of the relief that the district court ordered," Mot. at 1, it ignores that none of the relief entered by the District Court in this most recent Order is of the type that the Court stayed. To the contrary,

the relief in the District Court's Order is consistent with this Court's and the Supreme Court's prior orders.

Argument

Movants cannot meet any of the requirements to justify a stay. In fact, based on an intervening decision since the last appeal, the Legislature cannot claim blanket authority to litigate simply to affirm the State's interest in the continuing validity of Wisconsin law. And the RNC's purported interests are not legally cognizable; they, too, represent nothing more than a general interest in upholding the law, an interest that the Supreme Court has long held insufficient to invoke the federal judiciary's jurisdiction.

Nor does the District Court's Order come too late under *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), in which the Supreme Court noted that some "[c]ourt orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." Federal courts must assess that risk based on the nature of the relief requested and the pendency of the specific election. Here, the District Court's relief neither confuses voters nor leads to disenfranchisement; it does the opposite—ensuring that lawful votes are counted. Moreover, this Court affirmed an order that granted even broader relief mere days before the Spring Primary, which was then affirmed by the Supreme Court. There is no reason to reverse course now.

Finally, Movants fail to show that the four requisite factors that this Court considers when determining whether to grant a stay weigh in their favor; in fact, *none* of them do.

I. The Legislature has neither the authority nor standing necessary to prosecute this appeal.

This Court lacks jurisdiction to hear the Legislature's appeal. "[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). *Bethune-Hill* advanced this proposition one step further for legislative intervenors: To defend state statutes on appeal, a legislative intervenor must have either (1) the legal authority "to represent the State's interests", or (2) standing in "its own right." 139 S. Ct. at 1951. The Legislature has neither.

Two months ago, the Wisconsin Supreme Court held that Wis. Stat. §§ 13.365 and 803.09(2m) do not give the Legislature limitless authority to litigate on behalf of the State—instead, those statutes gave authority to "three state legislative committees, each acting on behalf of a particular legislative entity—the assembly, the senate, and the whole legislature, respectively," to intervene when state statutes are challenged. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 51 ("*SEIU*"). The court held that those statutes could withstand a facial constitutional attack—and did not violate the separation of powers—*because* the court interpreted them to permit the Legislature to intervene and prosecute cases *only* when specific "institutional interests of the legislature" are at stake. *Id.* ¶¶68-72. Those "institutional interests" were implicated "in at least some cases" when state spending was at issue, or where the Attorney General was specifically representing "a legislative official, employee, or body." *Id.* ¶ 71.

In other words, the court construed those statutes narrowly to save them from constitutional invalidity. In so doing, the court *rejected* the Legislature's argument that it has broad authority to undertake "litigation on behalf of the State's interests - especially the State's sovereign interest in the continuing validity of Wisconsin law." *Br. of Legislative Defendants-Petitioners/Defendants-Appellants*, 2019 WL 4645561, at *32. Consequently, the Legislature can only prosecute this appeal if it has its own standing. *Bethune-Hill*, 139 S. Ct. at 1953. Notably, it has not argued that it seeks to protect legislature-specific interests in this litigation. It specifically told this Court in April that it sought intervention to "speak for the State" and "vigorously defend the constitutionality of all the challenged statutes *on behalf of the State's interest*." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1539, Doc. 4-1 at 5, 16, 17. While the Legislature and this Court may have assumed those were proper interests in April, the court has clarified they are not. Nor have any institutional interests emerged since April. The District Court did not order the Legislature to take any action or fund any measures. Instead, the Order enjoined *only* WEC and its Administrator from taking certain actions. Op. 68. The only interest the Legislature has here is its generalized interest in upholding state laws—insufficient to confer standing. *See Bethune-Hill*, 139 S. Ct. at 1953; *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015).

II. The District Court was not too late to order modest relief.

It is not too late for the relief that the District Court ordered. Notably, most of Movants' critiques of the Order seem to contend that, if anything, the relief was issued *too early*. *See, e.g.*, Mot. at 3, 8, 9. Then, at the end of their brief, Movants

sharply change their tune, arguing that, under the "*Purcell* principle," relief is too late. *See id.* at 17.

Movants appear to read *Purcell* to presume that, with *any* order impacting elections during a certain, vague timeframe, comes a "grave risk of 'voter confusion' and concomitant disenfranchisement." *Id.* That is inaccurate. The Supreme Court's approval of the six-day extension of the Receipt Deadline in April, the day before the election, demonstrates this. *RNC*, 140 S. Ct. at 1208. This Court's rejection of the stay motions came within *four days* of that election. *Bostelmann*, 2020 WL 3619499, at *1. Thus, this case demonstrates what was always true about *Purcell*: it is not a one-size-fits-all barrier for elections-related relief at some (unspecified) point. Rather, courts must consider specific facts and determine whether particular changes will "themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.

In April, both this Court and the Supreme Court properly concluded that the adjustment to the Receipt Deadline did *not* raise the risks of voter confusion that could lead to disenfranchisement with which *Purcell* is concerned. Instead, it did the opposite: ensuring that voters whose lives had been upended by the pandemic and who were unable to meet those deadlines for reasons out of their control could vote.

Those factors are still present. They include, unsurprisingly, COVID-19; since the Court issued its Order at least 20,000 more Wisconsinites have been infected. The Court found that not only will the pandemic "continue to persist, [it] may worsen, through November" with flu season's imminent arrival. Op.3, 19–20. The factors that

made the Court's order appropriate in April that pose an even more dangerous threat to voting now include overwhelmed elections officials, who are struggling to process the deluge of voter registration and absentee ballot requests and the continuing struggles of USPS. Although the USPS was already suffering from mail delays in April, they were not as significant as now. *See* Op.48 & n.20.

This information was unavailable in April when this Court and the Supreme Court nevertheless determined that a stay of the Receipt Deadline was unwarranted. The resulting thousands of voters who avoided disenfranchisement proved those decisions to be correct. The same is still true. Denying the stay will result in *more* Wisconsinites registering and having their votes count.

III. The Legislature fails to satisfy any of the requirements necessary to justify a stay.

Stays are "intrusion[s] into the ordinary processes of administration and judicial review,'" *Nken v. Holder*, 556 U.S. 418, 427, 433–34 (2009), and granting one is extraordinary relief. When deciding whether to enter a stay, this Court must consider: "(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." *Libertarian Party of Ill.,* 2020 WL 3421662, at *2 (citing *Nken,* 556 U.S. at 434). In considering these factors, this Court applies "the deferential abuse-of-discretion standard, reviewing legal issues de novo and factual findings for clear error." *Wolf*, 962 F.3d at 221. "Substantial deference is given to the district court's 'weighing of evidence and

balancing of the various equitable factors.'" *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citation omitted).

A. Movants are unlikely to succeed on the merits of their appeal.

1. Extension of Receipt Deadline.

The District Court rejected Plaintiffs' requests for a ten-day extension of the Receipt Deadline, instead extending the deadline exactly as approved of by the Supreme Court in *RNC*. Specifically, the Court extended the deadline from November 3 to November 9 and only for ballots "mailed and postmarked on or before election day." Op.68.

As described, the Order is based on a more robust record than was available in April and rests on the "undisputed record" establishing that many voters will "face a significant risk of being disenfranchised because their executed, mailed ballot will not be received by officials on or before the current deadline." Op.49. The foundation for this finding includes warnings from USPS that many Wisconsin voters who timely request absentee ballots under Wisconsin law are at "high risk" of not receiving them in time to return them by the Receipt Deadline. ECF Nos. 242 at 13; 243 ¶ 84. Because of the disenfranchisement that will result from the "vast, unprecedented number[s]" of absentee ballots, the District Court found that the burdens "outweigh[] any state interest *during this pandemic*." *Id*. at 50-51 (emphasis added).

Movants fail to show any error in the District Court's finding that the Deadline in these extraordinary circumstances fails the *Anderson-Burdick* review, which weighs "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate 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." *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 917 (7th Cir. 2015) (quotation marks omitted). *Luft* does not change the analysis in the least. Deadlines are extended if there are *systemic* crises that threaten to undermine the electoral process. *Luft* reminds us that "[c]ourts weigh [any individual] burdens against the state's interests by *looking at the whole electoral system*," and that when an analysis of that "whole" system, taken together, shows that citizens' voting rights are in danger of being "*severely restricted*" on a widespread basis, the State *must* have "compelling interests" for continuing to enforce its restrictions and ensure they are "narrowly tailored." 963 F.3d at 671-72. As April 7 already has shown, the challenged deadlines "severely restrict" voting activity on a broad scale, and they serve no "*compelling interests*," especially in the midst of the COVID-19 pandemic. *Id.*

The District Court considered the "significant number of voters" who are likely to be disenfranchised by the Receipt Deadline in light of the substantial, unrefuted evidence before it. Op.48. The Court found that, absent an injunction, disenfranchisement would be almost certain for "thousands of . . . voters", and that this burden "outweighs any state interest during this pandemic." *Id.* at 51. The Court also found "there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election." *Id.*

at 48. To the contrary, elections officials testified they were understaffed and highly challenged going into the election, in which "WEC expect[s] some 1.8 to 2 million voters to request an absentee ballot, again smashing all records and turning historic voting patterns on their head," all in a system "heavily reliant on the USPS, which . . . continues to face its own challenges." *Id.* at 20-21. The WEC Administrator acknowledged "'significant concerns about the performance of the postal service" in the April Primary. *Id.* at 21. She testified it may take *14 days* for an absentee ballot to make the round-trip through the mail, and even under ideal conditions with a two-day first class mail delivery time, a mailed ballot would take at least four to six days to turn around. Op.13 n.10. It is not surprising that USPS warned Wisconsin that voters who lawfully request their ballot up to 5 days before the election, Wis. Stat. § 6.86(1)(ac), (b)), are at "high risk" of being disenfranchised. Op.21.

As of today, nearly 1.1 million absentee ballots have already been sent to Wisconsin voters for the November election.[3] Thousands will arrive after the Receipt Deadline despite voters' best efforts. *See* Op.51 (noting "strong evidence that as many as 80,000 voters' rights were vindicated by the extension in the primary election, and a reasonable extrapolation for the general election could well exceed 100,000"); *see also* ECF No. 242 at 16–17. These are the voters who the Deadline disenfranchises—not just the "unwary." And for all their reliance on this Court's decisions in *Luft* and *Frank II*, Movants misunderstand its important: *Luft* not only reiterates that "voting rights are personal" and that "each eligible person must have a path to vote," it also

[3] https://elections.wi.gov/index.php/node/7133.

emphasizes that if voting rights are in danger of being "*severely restricted*" on a widespread scale, "looking at the whole electoral system," the State must have "compelling interests" for its restrictions and ensure they are "narrowly tailored" to help alleviate these widespread, systemic burdens. *Luft,* 63 F.3d at 671-72, 677-78 (emphasis added). Such an analysis confirms this Court should again extend the election-day receipt deadline and the online and mail-in voter registration deadline in order to alleviate these "severe" systemic problems.

The Court gave careful consideration to the State's proffered interests in the Deadline but found them insufficient to outweigh the burdens on voters. For instance, it considered the state's interest in completing its canvass, but cited the WEC Administrator's acknowledgment that "election officials were able to meet all post-election canvassing deadlines notwithstanding this court's six-day extension of the deadline in April." Op.50. The fact that many states have election day receipt deadlines is irrelevant. *See Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 547 n.7 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Courts regularly extend election deadlines when necessary to ensure that voters are not disenfranchised by the strict application of laws that are unreasonable as applied in extenuating circumstances. *See, e.*g., *RNC*, 140 S. Ct. at 1208; *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016); *Doe v. Walker*, 746 F. Supp. 2d 667, 681–83 (D. Md. 2010); *Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. of Claims Sept. 18, 2020); *Pa.*

Democratic Party v. Boockvar, No. 133 MM 2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020). This is not judicial policy-making; it is the appropriate discharge of courts' responsibility to safeguard voting rights.

2. Extension of deadline for voter registration

The Court extended the deadline to register online or by mail for one week, from October 14 to October 21. Op.41. In doing so, the Court rejected Plaintiffs' request that it extend the deadline to October 30, but nevertheless concluded that a narrow one-week extension was necessary because, among other things, including that "[c]utting off electronic and mail-in registrations three weeks before the election will not just thwart efforts to encourage Wisconsin voters to vote by mail via absentee ballots, but increase the burdens and risks on those choosing to vote in person." Op.39. People who miss the online/mail registration deadline must register *in person*, either at their municipal clerk's office up until October 30, Wis. Stat. § 6.29(1)-(2), or at their polling place on Election Day, *id.* § 6.55(2). The Court found that, in the unique circumstances of this election, tens of thousands of voters are likely to "miss[ ] the window" and many would "choos[e] not to vote in person" due to the risks of exposure to COVID-19. Op.40. And it noted that the extension of the mail-in deadline in April allowed an additional 57,187 people to register, Op.17, as well as by the fact that those who "miss[ ] the window" to register online or by mail will add to "longer lines" at polling places, heightening the public health risks. Op.39. "[P]laintiffs have demonstrated that discontinuing electronic and mail registration options precipitously on October 14 will likely restrict many Wisconsin citizens' freedom to exercise their right to vote, at least without having to take unnecessary risks of

COVID-19 exposure by registering in person, and for some significant minority of citizens, will severely restrict that right because of age, comorbidities or other health concerns." Op.40 (citing *Luft*, 963 F.3d at 671–72).

There was no sufficient state interest to justify these harms. The WEC Administrator emphasized that a modest extension would not compromise the State's interest in "providing sufficient time for election officials to prepare voter records." Op.40. Indeed, the "record reflect[ed]" that elections officials were able to accommodate the Court's longer April extension of the electronic registration deadline. Op.41. Accordingly, the Court found that the "balance of interests weighs heavily in favor of plaintiffs as to this narrow relief." *Id*.

Movants have not contested that the brief extension will allow tens of thousands of Wisconsinites to register while also decreasing public health risks in a state where the case count is rising by nearly 2,000 a day. Nor do they argue that the extension imposes any burden on the State. Instead, they contend that voters have "many weeks" to register online or by mail. Mot. at 8. But some voters inevitably will have just moved into the State or been displaced—they will not have had "weeks" to register, a process that requires proof of residence. *See Luft*, 963 F.3d at 669; *Frank II*, 819 F.3d at 386. Nor will registering in person be "eas[ ]y," particularly for voters with particular vulnerabilities to the virus.

The Legislature's citations to *Rosario v. Rockefeller* and *Burdick* are unavailing. The Court was clear in *Rosario* that, even where a voter arguably can meet a deadline, the State must demonstrate that the "particular deadline" is

sufficiently "justified" and "necessary" under the circumstances to promote "a particularized legitimate purpose." 410 U.S. 752, 760-62 (1973). Such deadlines *cannot* be enforced if "the asserted state interest can be attained by 'less drastic means,' which do not unnecessarily burden the exercise of constitutionally protected activity." *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973). Here, the Court reasonably concluded that the state would not suffer from a brief extension, which, during the pandemic, would safeguard Wisconsinites' right to vote. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (court must consider "the extent to which" the "precise interests put forward by the State as justification[ ]" "make it necessary to burden the plaintiff's rights").

3. Placing WEC's March 2020 guidance on definition of "indefinitely confined" on websites and printed material.

The Court identified the WEC's definition of "indefinitely confined" as a "fail-safe" or "safety net" for those "legitimately unable" to meet Wisconsin's requirement that voters submit copies of their photo identification when requesting an absentee ballot. That group of voters includes people "(1) not able to upload a photograph of their ID or obtain a copy and (2) avoiding public outings because of legitimate COVID-19 concerns." Op.57-58. Under Wis. Stat. § 6.87(4)(b)2, those who are "indefinitely confined" need not submit their photo ID when requesting an absentee ballot. WEC's March 2020 guidance clarified that the term "does not require permanent or total inability to travel outside of the residence." Op.58. The Court ordered WEC to include this guidance on the MyVote website and on printed materials explaining the "indefinitely confined" option. *Id.*

The Court did not abuse its discretion in ordering this relief. Movants' contrary arguments rely on the flawed assumption that "all Wisconsin voters" know about WEC's guidance because of a Wisconsin Supreme Court order that is not available on the court's public-access website[4] and a memorandum from the WEC *to local elections officials* that is on WEC's website under a section titled "Clerk Communication Archive."[5] Mot. at 15, 19. The Court properly explained, under the *Anderson-Burdick* framework as discussed in *Luft* and *Frank II*, why this safety net is necessary. Op.57. Finally, "the statute or regulation is adequate notice in and of itself *as long as it is clear*." *Cochran v. Ill. State Toll Highway Auth.*, 828 F.3d 597, 600 (7th Cir. 2016) (emphasis added). The "indefinitely confined" statute is not clear; even the Wisconsin Supreme Court "conclude[d] that clarification of … indefinitely confined status pursuant to Wis. Stat. § 6.86(2) … [was] warranted." *Jefferson v. Dane Cnty.*, 2020AP557-OA (Wis. Mar. 31, 2020).

B. The balance of potential harms and the public interest strongly disfavor a stay.

A stay will almost certainly cause widespread disenfranchisement. Op.48. "When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

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[4] Wis. Court System, Supreme Court and Court of Appeals Access, https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2020AP000557&cacheId=35001ACE5867FC4B7F61BD4CCF3C5F48&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC (last visited Sept. 25, 2020).

[5] https://elections.wi.gov/clerks/archive-communications. WEC's main absentee-voter page, https://elections.wi.gov/voters/absentee, is likewise silent.

Disenfranchisement is also never in the public's interest. "A stay [that] would disenfranchise many eligible electors whose ballots were rejected" by a process "due to no fault of the voter[]" is also "harmful to the public's perception of the election's legitimacy" because "the public interest is served when constitutional rights are protected." *Democratic Exec. Comm. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019). "The public interest … favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

A stay also could exacerbate the ongoing public-health crisis because, as discussed, the Court's narrow remedies reduce the need for person-to-person contact. Uncertainty about whether absentee ballots will be counted will lead more people to vote in-person, thereby increasing health risks for more vulnerable citizens. Thus, WEC "is already urging as many people as possible to vote absentee in the hopes of avoiding large lines, shortages *and attendant health risks on election day*." Op.20 (emphasis added).

Finally, as discussed *supra*, there is no countervailing harm that would outweigh these harms. To the contrary, the evidence shows the relief can be achieved with minimal burden and would even alleviate burdens on overwhelmed elections administrators.

Conclusion

Stays "are necessary to mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). A stay here will *exacerbate* a continuing public health crisis, prevent people from voting, and undermine public

confidence in the reliability of election results. This Court should deny the motions and provide voters and election officials with immediate certainty that the District Court's ordered relief will be in effect for the upcoming election.

DATED: September 25, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

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

This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,194 words, excluding the parts of the Motion exempted by Federal Rule of Appellate Procedure 32(f).

This Motion 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 25, 2020.

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