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“DEMOCRACY IS NOT A SPECTATOR SPORT”: A CASE FOR NECESSARY JUDICIAL INTERVENTION IN ELECTIONS

ZELPHA WILLIAMS*

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INTRODUCTION

Unquestionably, “the right of suffrage is a fundamental matter in a free and democratic society.”¹ As the Supreme Court described in *Yick v. Hopkins* over one hundred years ago, “[t]hough not regarded strictly as a natural right, but as a privilege . . . , nevertheless [the right to vote] is regarded as a fundamental political right, because preservative of all rights.”² However, the “equal right to vote” is not absolute, and states are empowered to regulate the voting process and impose qualifications.³ To prevent voter confusion and maximize voter turnout, “lower federal courts should ordinarily not alter the election rules on the eve of an election.”⁴ Although protecting against voter

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¹ *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

² 118 U.S. 356, 370 (1886).

³ *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Evans v. Cornman*, 398 U.S. 419, 425 (1970)).

⁴ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020); see *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

disenfranchisement by preventing judicial changes too near an election is a worthy goal under ordinary circumstances, the same standard should not be applied during unprecedented times, such as during a once-in-a-century global pandemic, natural disaster, or other such catastrophic event.

This note will evaluate the flawed decision reached by the Seventh Circuit. First, it will discuss the legal background of Supreme Court precedent regarding judicial changes to election procedures before an election. Next, it will discuss the procedural history of this particular case, from its original legal challenge in a Wisconsin federal district court, all the way up to the Supreme Court, back to the district court, and eventually to the final Seventh Circuit opinion, which is the subject of this note. Finally, it will discuss the flaws in the Seventh Circuit's *per curiam* opinion and the result it should have reached instead, as articulated by Justice Rovner in dissent.

Precedent Regarding Changes to Federal Elections

In *Anderson v. Celebrezze*, the Supreme Court outlined the framework that must be used to evaluate challenges to a state's election laws:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.⁵

⁵ 460 U.S. 780, 789 (1983).

On April 24, 1980, John Anderson announced his candidacy for President of the United States, running as an independent candidate.⁶ His supporters then gathered the requisite signatures of registered voters, filed required documentation, and paid filing fees, thereby meeting the substantive requirements to place his name on the ballot in all states as well as the District of Columbia.⁷ However, by the date of his announcement, the statutory deadline for filing a statement of candidacy had already passed in Ohio and several other states.⁸ The parties did not dispute the facts: Anderson's supporters provided a nominating petition containing about 14,500 signatures and a statement of candidacy to the Ohio Secretary of State on May 16, 1980—which would have entitled Anderson to a place on the ballot if filed by March 20, 1980.⁹ Given the tardiness of the filing, the Secretary of State refused to accept the petition; accordingly, Anderson and three voters (two registered in Ohio and one in New Jersey) challenged the constitutionality of Ohio's filing deadline.¹⁰ The case presented the question of “whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters.”¹¹

The District Court ordered the Secretary of State to list Anderson's name on the ballot for the general election and granted the petitioners' motion for summary judgment.¹² The Secretary of State appealed, but did not seek a stay of the district court's order.¹³ Because the request for expedited review was unsuccessful, both in the court of appeals and the Supreme Court, the election occurred while the appeal was pending.¹⁴ The court of appeals reversed, holding “that Ohio's

⁶ *Id.* at 782.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 782–83.

¹¹ *Id.* at 782.

¹² *Id.* at 783.

¹³ *Id.*

¹⁴ *Id.* (“In Ohio Anderson received 254,472 votes, or 5.9 percent of the votes cast; nationally, he received 5,720,060 votes or approximately 6.6 percent of the total.”).

early deadline ‘ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign.’”¹⁵

Applying the balancing framework, the Court noted the “significant” restriction Ohio’s filing deadline imposed on the national electoral process.¹⁶ The Court then evaluated the three interests Ohio alleged it furthered through its early filing deadline for independent Presidential candidates: “voter education, equal treatment for partisan and independent candidates, and political stability.”¹⁷ However, none of these interests could justify the burden imposed by the early filing deadline.¹⁸ The Court was concerned with the interests of voters who wished to associate collectively in support of Anderson: “[u]nder any realistic appraisal, the ‘extent and nature’ of the burdens Ohio has placed on the voters’ freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State’s minimal interest in imposing a March deadline.”¹⁹

Similarly, in *Burdick v. Takushi*, the Court applied the *Anderson* balancing test to a constitutional challenge of Hawaii’s voting laws.²⁰ In 1986, only one candidate filed paperwork to run for a Hawaii House of Representative seat in representing the petitioner’s district; the petitioner was registered to vote in the city and county of Honolulu.²¹ After inquiring about Hawaii’s write-in voting policy, the Hawaii Attorney General’s Office informed petitioner that Hawaii’s election laws had no write-in voting provision.²² Petitioner then brought suit, alleging the write-in prohibition unconstitutionally infringed upon his First and Fourteenth Amendment rights because he wanted to vote for candidates who had not filed nominating papers in the primary and

¹⁵ *Id.* at 784–86.

¹⁶ *Id.* at 795.

¹⁷ *Id.* at 796.

¹⁸ *Id.* at 806.

¹⁹ *Id.*

²⁰ 504 U.S. 428, 428 (1992).

²¹ *Id.* at 430.

²² *Id.*

general elections.²³ The United States District Court for the District of Hawaii entered a preliminary injunction to allow for casting of write-in votes and require their tallying in the November 1986 election, finding the write-in voting ban violated the petitioner's rights of expression and association under the First Amendment.²⁴

The court of appeals entered a stay and vacated the district court's judgment, finding "consideration of the federal constitutional question raised by petitioner was premature because 'neither the plain language of Hawaii statutes nor any definitive judicial interpretation of those statutes establishes that the Hawaii legislature has enacted a ban on write-in voting'" and instructed the district court to abstain, pending a decision from state courts about whether Hawaii's election laws permitted write-in voting.²⁵ The district court then certified three questions to Hawaii's Supreme Court; Hawaii's Supreme Court held Hawaii's election laws—which were consistent with Hawaii's constitution—prohibited write-in voting.²⁶ Then, the district court granted the petitioner's motion for summary judgment and an injunction, this time entering a stay pending appeal.²⁷ The Ninth Circuit found Hawaii did not have to enable write-in voting, reversing the decision of the district court.²⁸

Under the *Anderson* standard, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights."²⁹ Accordingly, "'severe' restrictions, . . . must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth

²³ *Id.*

²⁴ *Id.* at 430–31.

²⁵ *Id.* at 431.

²⁶ *Id.* at 431–32.

²⁷ *Id.* at 432.

²⁸ *Id.*

²⁹ *Id.* at 434.

Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”³⁰

Under Hawaii’s election laws, a candidate was required to participate in its “open primary, ‘in which all registered voters may choose in which party primary to vote,’” in order to receive a place on the November general election ballot.³¹ Hawaii’s election provided easy access to the ballot in advance of the registration deadline, two months before the primary election.³² As a result, only voters who wait until the days preceding the primary election to select a candidate experience any burden on their freedom of choice and association.³³ Under the *Anderson* standard for evaluating how much a state law burdens the right to vote, Hawaii’s write-in restriction provides only a limited burden.³⁴

In light of the limited burden, the state did not need to provide a compelling interest to outweigh the petitioner’s interests.³⁵ Hawaii’s asserted interests in “avoid[ing] the possibility of unrestrained factionalism at the general election”³⁶ and “guard[ing] against ‘party raiding’” in the primary sufficiently outweighed the limited burden placed on voters.³⁷ When a state’s ballot-access laws impose only reasonable burdens on First and Fourteenth Amendment rights, as was the case in *Burdick*, “a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one’s choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme.”³⁸

³⁰ *Id.* (internal citations omitted); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

³¹ *Burdick*, 504 U.S. at 435.

³² *Id.* at 436.

³³ *Id.* at 436–37.

³⁴ *Id.* at 438–39.

³⁵ *Id.* at 439.

³⁶ *Id.* (internal quotations omitted).

³⁷ *Id.* at 439–40.

³⁸ *Id.* at 441.

Purcell v. Gonzalez established the warning to federal judges not to intervene too near an election.³⁹ A two-judge motion panel from the Ninth Circuit Court of Appeals entered an interlocutory injunction from which county officials and the State of Arizona sought relief.⁴⁰ In 2004, voters in Arizona approved Proposition 200 which required voters to provide proof of citizenship at the time of voter registration and present identification when voting in an attempt to prevent voter fraud.⁴¹ Because Arizona was a covered jurisdiction under Section Five of the Voting Rights Act of 1965, Arizona was required to receive preclearance from the United States Attorney General or the District Court for the District of Columbia before adopting “any new voting ‘standard, practice, or procedure’ . . . to ensure its new voting policy did ‘not have the purpose [or] effect of denying or abridging the right to vote on account of race or color.’”⁴² On May 5, 2005, the United States Attorney General precleared Proposition 200.⁴³

In May of 2006, residents of Arizona, Indian tribes, and various community organizations challenged the identification requirements enacted under Proposition 200.⁴⁴ Without issuing findings of facts or conclusions of law, the district court denied plaintiffs’ request for a preliminary injunction on September 11, 2006.⁴⁵ Plaintiffs appealed, and the briefing schedule from the Court of Appeals was set to conclude on November 21—two weeks after the election on November 7.⁴⁶ Accordingly, plaintiffs sought an injunction pending appeal so the Court of Appeals assigned a two-judge motions/screening panel to hear the matter; written responses from the State and county officials were received but the panel did not hold oral arguments.⁴⁷ The panel issued an order on October 5—consisting of

³⁹ 549 U.S. 1 (2006).

⁴⁰ *Id.* at 2.

⁴¹ *Id.*

⁴² *Id.* at 2 (citing 42 U.S.C. § 1973c); *see also* *Georgia v. Ashcroft*, 539 U.S. 461, 461–62 (2003).

⁴³ *Purcell*, 549 U.S. at 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

just four sentences and no rationale—enjoining enforcement of Proposition 200 until the conclusion of the appeal, following full briefing.⁴⁸ Four days later—again with no explanation—the Court of Appeals denied a motion for reconsideration.⁴⁹

The District Court finally issued findings of fact and conclusions of law on October 12, concluding that despite an ability to demonstrate “a possibility of success on the merits of some of their arguments . . . the Court cannot say that at this stage [the plaintiffs] have shown a strong likelihood.”⁵⁰ Consequently, the District Court denied the injunction.⁵¹

The Supreme Court acknowledged the state’s compelling interest in preventing voter fraud and the “plaintiffs’ strong interest in exercising the ‘fundamental political right’ to vote.”⁵² While the effects of Proposition 200 were still debated, the Court noted that the potential for any qualified voter to be denied a vote “would caution any district judge to give careful consideration to the plaintiffs’ challenges.”⁵³ Required considerations included harm that would result from lack of action, institutional procedures, and election-specific concerns: “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.”⁵⁴ However, those considerations—including the delay if *en banc* review was sought—were not controlling here.⁵⁵ Procedurally, the court of appeals was required to give deference to the district court; consequently, it erred by failing to do so.⁵⁶ The Court vacated the order of the court of

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (internal quotations omitted).

⁵¹ *Id.* at 4.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 4–5.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.*

appeals because, without an explanation, it failed to indicate how the ruling and findings of the district court were incorrect.⁵⁷

The idea that “lower federal courts should ordinarily not alter the election rules on the eve of an election” comes from action taken in *Purcell*.⁵⁸ However, the Court did not go so far as to say that outright in *Purcell* and did not even use the word “ordinarily.” Rather, the Court provided a caution about not confusing voters as elections draw near. Ultimately, “[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, [the Court’s] action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.”⁵⁹

The Supreme Court then acted in accordance with the *Purcell* caution. In May 2011, the Wisconsin legislature enacted 2011 Wisconsin Act 23, which required residents to present photo identification to vote.⁶⁰ Voters and advocacy organizations challenged the law under both the Fourteenth Amendment and the Voting Rights Act.⁶¹ The United States District Court for the Eastern District of Wisconsin permanently enjoined enforcement of the photo identification requirements in April of 2014.⁶² Next, in September of 2014, the Seventh Circuit stayed the injunction issued by the district court, allowed Wisconsin to enforce the law in its upcoming elections.⁶³ However, the Supreme Court granted the application to vacate the Seventh Circuit’s stay in October of 2014 in a two-sentence order.⁶⁴ Justice Alito, in dissent, acknowledged the “colorable basis for the Court’s decision due to the proximity of the upcoming general election”⁶⁵—even though the application came almost two months in advance of the election.

⁵⁷ *Id.*

⁵⁸ *See* Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1207 (2020).

⁵⁹ *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006).

⁶⁰ *Frank v. Walker*, 17 F. Supp. 3d 837, 842 (E.D. Wis. 2014).

⁶¹ *Id.*

⁶² *Id.* at 880.

⁶³ *Frank v. Walker*, 766 F.3d 755, 756 (7th Cir. 2014).

⁶⁴ *Frank v. Walker*, 574 U.S. 929 (2014).

⁶⁵ *Id.*

Recent Supreme Court Action in Election Cases

The Supreme Court issued a shadow docket opinion in *Republican National Committee v. Democratic National Committee*, reversing a pandemic-related mail-in ballot deadline extension for Wisconsin’s April 2020 primary election.⁶⁶ That decision is discussed in more detail in the section detailing the history of this case.

In June 2020, the Fifth Circuit stayed “a sweeping preliminary injunction that require[d] state officials, *inter alia*, to distribute mail-in ballots to any eligible voter who want[ed] one,” reasoning that “the spread of the [COVID-19] Virus ha[d] not given “unelected federal jud[ges]” a roving commission to rewrite state election codes.”⁶⁷ The Supreme Court—without any explanation—denied an application to vacate the stay in *Texas Democratic Party v. Abbott*.⁶⁸

Several lawsuits challenged the constitutionality of a Florida law requiring citizens to pay to vote as it applies to convicted felons.⁶⁹ In an order consolidating the cases and setting out findings of fact and conclusions of law, the United States District Court for the Northern District of Florida entered a permanent injunction and directed the entry of judgement, holding Florida “*can* condition voting on payment of fines and restitution that a person is able to pay but *cannot* condition voting on payment of amounts a person is unable to pay or on payment of taxes, even those labeled fees or costs.”⁷⁰ The decision established “administrative procedures that comport[ed] with the Constitution and [were] less burdensome, on both the State and the citizens, than those the State [was] currently using to administer the unconstitutional pay-to-vote system.”⁷¹ In July, the Eleventh Circuit granted the defendants’ petition for a hearing *en banc* and stayed the

⁶⁶ 140 S. Ct. 1205 (2020).

⁶⁷ *Texas Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020).

⁶⁸ 140 S. Ct. 2015 (2020).

⁶⁹ *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1203 (N.D. Fla. 2020).

⁷⁰ *Id.* at 1203–05.

⁷¹ *Id.* at 1205.

permanent injunction pending appeal.⁷² Again, without explanation, the Supreme Court denied the application to vacate the stay.⁷³

On September 18, 2020, the United States District Court for the District of South Carolina granted plaintiffs' motion for a preliminary injunction and suspended the witness requirement for registered absentee voters during the November 2020 election.⁷⁴ The Supreme Court, without explaining its reasoning, stayed the district court's order but excepted any ballots cast prior to issuance of the Court's order and received within two days from compliance with the witness requirement.⁷⁵ For "two alternative and independent reasons," Justice Kavanaugh concurred with the opinion of the Court: "[f]irst, the Constitution 'principally entrusts the safety and the health of the people to the politically accountable officials of the States'" and, "[s]econd, for many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election."⁷⁶

On September 30, 2020, the United States District Court for the Northern District of Alabama found plaintiffs were entitled to injunctive relief preventing enforcement of Alabama's witness requirement, photo identification requirement, and ban on curbside voting during the November 2020 election in light of the pandemic.⁷⁷ In late October (after the disposition of the Seventh Circuit case discussed herein), the Court stayed the district court order granting a permanent injunction, again without explanation of its reasoning.⁷⁸

⁷² McCoy v. Governor of Fla., No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020).

⁷³ Raysor v. DeSantis, 140 S. Ct. 2600 (2020).

⁷⁴ Middleton v. Andino, 488 F. Supp. 3d 261, 307 (D.S.C. 2020).

⁷⁵ Andino v. Middleton, 141 S. Ct. 9, 10 (2020).

⁷⁶ *Id.* (Kavanaugh, J., concurring).

⁷⁷ People First of Alabama v. Merrill, 491 F. Supp. 3d 1076, 1180 (N.D. Ala. 2020).

⁷⁸ Merrill v. People First of Alabama, 141 S. Ct. 25 (2020).

THE IMPACT OF COVID-19 IN WISCONSIN

As of September 21, 2020, when the district court issued its opinion, the effects of the pandemic within Wisconsin intensified. Daily COVID-19 case counts in Wisconsin had doubled, jumping from 1,004 to over 2,000 cases reported just one week later, on September 17.⁷⁹ Wisconsin broke multiple case records in September, in advance of flu season.⁸⁰ The district court acknowledged the unknown nature of the COVID-19 pandemic's progression, but "the un rebutted public health evidence in the record demonstrates that COVID-19 will continue to persist, and may worsen, through November."⁸¹ Given the recent outbreak of cases among college students, concerns about infections from college campuses spreading to the community, and the impending flu season, the public health landscape in Wisconsin threatened to worsen.⁸²

By October, conditions in Wisconsin worsened, and the Governor of Wisconsin declared a public health emergency.⁸³ On October 6, Wisconsin reported a seven-day average of 2,346 new COVID-19 cases.⁸⁴ The White House Coronavirus Task Force

⁷⁹ Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 792 (W.D. Wis. 2020); see WPR Staff, *Wisconsin Sets New Daily Record with 2,034 Coronavirus Cases Reported Thursday*, WIS. PUBLIC RADIO (Sept. 17, 2020), <https://www.wpr.org/wisconsin-sets-new-daily-record-2-034-coronavirus-cases-reported-thursday>.

⁸⁰ Democratic Nat'l Comm., 488 F. Supp. 3d at 793.

⁸¹ *Id.*

⁸² *Id.*; see David Wahlberg, *UW-Madison Threatens 'More Drastic Action' as Experts Say COVID-19 Outbreak Impacting Broader Community*, WIS. STATE JOURNAL (Sept. 16, 2020), https://madison.com/wsj/news/local/education/university/uw-madison-threatens-more-drastic-action-as-experts-say-covid-19-outbreak-impacting-broader-community/article_dd00c9cc-5dc9-5924-99ca-40c94a0f6738.html.

⁸³ Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 650 (7th Cir. 2020); Wis. Exec. Order No. 90 (Sept. 22, 2020), <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx>.

⁸⁴ Democratic Nat'l Comm., 977 F.3d at 650; Wis. Dep't of Health Servs., *COVID-19: Wisconsin Cases*, <https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed> (as of October 6, 2020).

designated Wisconsin as a “red zone” for COVID-19 cases and detailed a “rapid worsening of the epidemic” in Wisconsin in a draft report issued the week before the Seventh Circuit’s opinion.⁸⁵ According to the Coronavirus Task Force, almost half of all Wisconsin counties had high levels of community transmission.⁸⁶ Wisconsin ranked third-highest in the nation for cases per 100,000 people and seventh-highest in positive test rates.⁸⁷ Wisconsin reached record-high hospitalization rates as hospitals in the northeast of the state neared capacity.⁸⁸ Wisconsin opened a field hospital in mid-October, which it announced earlier in the month, to combat the shortage of available hospital facilities.⁸⁹ Wisconsin experienced new and worsening conditions in the fall of 2020: “While the facility was never needed for patients over the spring and summer of 2020, rising hospitalization rates across the state in the fall have led to its opening.”⁹⁰

⁸⁵ Democratic Nat’l Comm., 977 F.3d at 650 (internal quotations omitted).

⁸⁶ Democratic Nat’l Comm., 977 F.3d at 650; Coronavirus Task Force, State Report—Wisconsin, at 1, WASHINGTON POST, <https://www.washingtonpost.com/context/white-house-coronavirus-task-force-report-warnsof-high-wisconsin-covid-19-spread-in-wisconsin/e5f16345-fcb4-4524-975e-8011379ef0da/> (Sept. 27, 2020).

⁸⁷ Democratic Nat’l Comm., 977 F.3d at 650.

⁸⁸ *Id.*; Mary Spicuzza, et al., *Some Hospitals Forced to Wait-List or Transfer Patients as Wisconsin’s Coronavirus Surge Continues*, MILWAUKEE JOURNAL SENTINEL, <https://www.jsonline.com/story/news/2020/09/30/wisconsin-hospitals-wait-list-patients-covid-19-surge-coronavirus-greenbay-fox-valley-wausau/3578202001/> (Sept. 30, 2020).

⁸⁹ Wisconsin Department of Health Services, *COVID-19: Alternate Care Facility at State Fair Park*, <https://www.dhs.wisconsin.gov/covid-19/alternate-care-facility.htm> (March 19, 2021); see Democratic Nat’l Comm., 977 F.3d at 650; 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, <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/> (October 7, 2020).

⁹⁰ Wisconsin Department of Health Services, *COVID-19: Alternate Care Facility at State Fair Park*, <https://www.dhs.wisconsin.gov/covid-19/alternate-care-facility.htm> (March 19, 2021).

Under this framework, during these unprecedented times, the *Purcell* guidance was inapplicable. Because this was not an ordinary circumstance, the Supreme Court’s warning to federal judges to not “ordinarily” make changes to federal election laws did not apply. The situation in Wisconsin approaching the November election—in terms of both public health and unprecedented societal shutdowns—was not ordinary because the public health context Wisconsin experienced would normally not be conceivable.

HISTORY OF THIS CASE

What Happened Below in Preceding Litigation

In three consolidated cases spanning throughout the last two weeks of March 2020, Plaintiffs—Democratic National Committee (DNC), Democratic Party of Wisconsin, and individual voters—filed lawsuits challenging a variety of statutory requirements for the April 7, 2020, primary election in light of concerns over COVID-19.⁹¹ Plaintiffs alleged violations of the fundamental right to vote, due process, and equal protection and sought to prevent enforcement of both statutory identification requirements and deadlines for electronic, mail-in, and absentee ballot receipt.⁹² The district court allowed the Wisconsin Legislature and Republican Party of Wisconsin to intervene as defendants and consolidated the cases.⁹³ Plaintiffs moved for reconsideration as well as a preliminary injunction “seeking postponement of election, extension of deadline for receipt of absentee ballots, and suspension of witness signature requirement on absentee ballots.”⁹⁴

⁹¹ Democratic Nat’l Comm. v. Bostelmann, 451 F. Supp. 3d 952, 957 (W.D. Wis. 2020).

⁹² *Id.* at 952.

⁹³ *Id.*; see Democratic Nat’l Comm. v. Bostelmann, 447 F. Supp. 3d 757 (W.D. Wis. 2020); Democratic Nat’l Comm. v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 1505640 (W.D. Wis. Mar. 28, 2020).

⁹⁴ Democratic Nat’l Comm., 451 F. Supp. 3d at 957.

To the credit of the Western District of Wisconsin, Judge Conley seriously considered the implications of the pandemic:

Contrary to the view of at least a dozen other states, as well as the consensus of medical experts across the country as to the gathering of large groups of people, the State of Wisconsin appears determined to proceed with an in-person election on April 7, 2020. In the weeks leading up to the election, the extent of the risk of holding that election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers. As a result, state election officials are confronting a huge backlog in requests for absentee ballots made online, by mail or in person, including an unprecedented number of questions regarding how to satisfy certain registration requirements, properly request an absentee ballot, and return a properly completed absentee ballot in time to be considered for the April 7 election. On top of the burdens this influx has created for the Wisconsin Election Commission, its Administrator, staff and local municipalities in the days leading up to the election, that same group has been improvising in real time a method to proceed safely and effectively with in-person voting in the face of increasing COVID-19 risks, loss of poll workers due to age, fears or sickness, the resulting consolidation of polling locations, and inadequate resources.⁹⁵

Acknowledging the three potential consequential outcomes the court could foresee resulting from the election, the court nonetheless maintained “the only role of a federal district court is to take steps that help avoid the impingement on citizens’ rights to exercise their voting franchise as protected by the United States Constitution and federal statutes.”⁹⁶ Accordingly, the court attempted to do just that,

⁹⁵ *Id.*

⁹⁶ *Id.* at 958 (“[T]he three most likely consequences of proceeding with the election on this basis are (1) a dramatic shortfall in the number of voters on election

“understanding that a consequence of these measures may be to further the public health crisis in this State.”⁹⁷ However, as the district court aptly noted, “[u]nfortunately, that is beyond the power of this court to control.”⁹⁸

As the court explained, the same standard is applied to determine whether a preliminary injunction or a temporary restraining order is appropriate: (1) irreparable harm will be suffered if no relief is granted, (2) inadequate remedies exist at law, (3) the plaintiff has a reasonable likelihood of success on the merits, and (4) the balance of equities weighs in favor of the moving party.⁹⁹

The court granted the plaintiffs’ motions in part.¹⁰⁰ However, the court rejected the plaintiff’s request to delay the April 7, 2020, election because it could not “say with confidence that the state’s asserted interests – although strong – [were] so compelling as to overcome the severe burdens that voters are sure to face in the upcoming election.”¹⁰¹ While the plaintiffs “demonstrated at least *some* likelihood of success on the merits of this claim,” plaintiffs needed to “further show that the balance of equities support[ed] their requested relief.”¹⁰² Importantly, “none of the cases cited by plaintiffs authorize what plaintiffs [asked] the court to do in this circumstance: delay the date of an impending, state-wide election.”¹⁰³ The court further found that the existing proof of identification requirement did not impose an undue burden on the right to vote and denied plaintiffs’ request for relief with respect to the identification requirement.¹⁰⁴ With

day as compared to recent primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19.”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 968–69.

¹⁰⁰ *Id.* at 952.

¹⁰¹ *Id.* at 972.

¹⁰² *Id.*

¹⁰³ *Id.* at 974.

¹⁰⁴ *Id.* at 981.

regard to the plaintiffs' requests for an extension of the mail-in registration deadline and relief from proof of residence provision, both were denied.¹⁰⁵ Given the timeline, the extension would only reopen the registration deadline for one day so the administrative burdens would outweigh any potential benefit.¹⁰⁶ Relief from the requirement to submit proof of residence with a mailed registration application was denied as moot because the mail-in registration deadline had passed.¹⁰⁷

The district court provided preliminary relief: (1) enjoining the statutory requirement that absentee ballots be received by 8pm on election day in order to be counted and extending the deadline until April 13, 2020, at 4pm; (2) enjoining enforcement of the statutory requirement that requests for absentee ballots must be received by April 2, 2020, and extending the deadline for requests until April 3, 2020 at 5pm; and (3) enjoining enforcement of the statutory requirement to obtain witness certification—for otherwise valid ballots—when voters attested to their inability to safely obtain certification despite reasonable efforts to do so.¹⁰⁸

Next, a three-judge panel from the Seventh Circuit reviewed the district court's opinion and issued an opinion on April 3, 2020.¹⁰⁹ First, the Seventh Circuit denied the Plaintiffs' motions for a stay of the district court's order regarding ballot request and receipt deadlines.¹¹⁰ Second, the court granted the plaintiffs' motions for a stay "as to that portion of the district court's order that enjoins the enforcement of Wis. Stat. § 6.87(2) for absentee voters who provide a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so" because it determined "the district court did not give adequate consideration to the state's interests in suspending this requirement," given the importance of preserving the integrity of elections and preventing

¹⁰⁵ *Id.* at 981–82.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 982.

¹⁰⁸ *Id.* at 959.

¹⁰⁹ *Democratic National Committee v. Bostelmann*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020).

¹¹⁰ *Id.* at *1.

voter fraud.¹¹¹ The Seventh Circuit was “concerned with the overbreadth of the district court’s order, which categorically eliminate[d] the witness requirement applicable to absentee ballots and [gave] no effect to the state’s substantial interest in combatting voter fraud.”¹¹² Finally, it concluded the Legislature had standing to appeal.¹¹³ “Notably, no aspect of these[sic] appeals challenge[d] the district court’s rejection of the plaintiffs’ request to enjoin live voting on April 7.”¹¹⁴

Then, in a *per curiam* order issued on April 6, the Supreme Court stayed the preliminary injunction of the district court “to the extent it require[d] the State to count absentee ballots postmarked after April 7, 2020.”¹¹⁵ The Court indicated that Wisconsin’s decision to hold the April 7 election as scheduled was not the subject of review; rather, the Court considered “a narrow, technical question about the absentee ballot process.”¹¹⁶ The Court noted agreement regarding the extension of the deadline for municipal clerks to receive absentee ballots from April 7 to April 13; the deadline for clerk receipt was not questioned in the Supreme Court.¹¹⁷ Rather, “[t]he sole question before the Court is whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13.”¹¹⁸ Importantly, the Court repeatedly emphasized the Plaintiffs did not ask the district court to count ballots mailed and postmarked after April 7; just five days before the election, the district court “unilaterally” ordered those ballots still be counted so long as received by the April 13 deadline.¹¹⁹

¹¹¹ *Id.* at *2.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *1.

¹¹⁵ *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206 (2020).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1206–07.

However, the Court declared that “[e]xtending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day *fundamentally alters the nature of the election*.”¹²⁰ Furthermore, the opinion stated “[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election”¹²¹ and by altering these election rules, the district court “contravened this Court’s precedents and erred by ordering such relief.”¹²²

Moreover, the Court emphasized that “unusual nature” of the district court order at issue was evidenced by the need for an order that followed enjoining release of election results to the public for six days following the election.¹²³ The Court indicated that, “[i]n doing so, the District Court in essence enjoined nonparties to this lawsuit.”¹²⁴ Further, the Court seriously doubted the success of the attempt to prevent public disclosure of the results.¹²⁵ Regardless, the Court reasoned a disclosure of any information during that six-day window “would gravely affect the integrity of the election process.”¹²⁶ But the Court remarked “all of that further underscore[d] the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.”¹²⁷

Notably, the Supreme Court issued its decision reversing the district court’s decision and staying the injunction in part on the day before the election. The dissenting opinion, authored by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan, acknowledged: “[t]he District Court, acting in view of the dramatically evolving COVID-19 pandemic, entered a preliminary injunction to safeguard the availability of absentee voting in Wisconsin’s spring

¹²⁰ *Id.* at 1207 (emphasis added).

¹²¹ *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct. 9 (2014)).

¹²² *Republican Nat’l Comm.*, 140 S. Ct. at 1207.

¹²³ *Id.* at 1207.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

election. This Court now intervene[d] at the eleventh hour to prevent voters who have timely requested absentee ballots from casting their votes.”¹²⁸ The dissenters “would not [have] disturb[ed] the District Court's disposition, which the Seventh Circuit allowed to stand.”¹²⁹

Despite the *Purcell* caution to avoid confusing voters, the Supreme Court reversed the decision—which, as the dissent poignantly points out, would have allowed more citizens to vote—just the day before the election. The Court, responding to the dissent’s concerns regarding the late date of intervention, stated it would prefer not to intervene at this time, “but when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error.”¹³⁰

What Happened Previously at This Stage of the Case

Concerned about the upcoming November general election, individuals and organizations in the four consolidated cases moved for preliminary injunctive relief; the WEC, Republican National Committee, and the Republican Party of Wisconsin opposed the motions. Defendants and intervening defendants also moved to dismiss three of the four cases.¹³¹ After full briefing on the motions, presentation of evidence, and a hearing on August 5, 2020, the District Court for the Western District of Wisconsin largely rejected defendants’ motions to dismiss.¹³²

The District Court for the Western District of Wisconsin entered a preliminary injunction which (1) extended the deadline for mail-in and online voter registration under the statute by one week; (2) directed the Wisconsin Election Commission (WEC) to include language explaining the “indefinitely confined” exception “does not require permanent or total inability to travel outside of the residence” on the

¹²⁸ *Id.* at 1208 (Ginsberg, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1207.

¹³¹ *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 783 (W.D. Wis. 2020).

¹³² *Id.* at 783–84.

MyVote and WisVote websites as well as any additional materials that might include the exception; (3) extended the Wisconsin statutory deadline for absentee ballot receipt until November 9, 2020, but required the ballots be postmarked or mailed by or on election day on November 3, 2020; (4) enjoined a Wisconsin statute which limited absentee ballot delivery only to mail for domestic civilian voters, allowing voters whose timely absentee ballot request was approved but had not received their mailed ballot online access or emailed replacement ballots from October 22 to October 29, 2020; and (5) enjoined a Wisconsin statute, allowing election officials to reside in other counties for the November 2020 election.¹³³

The district court, however, recognizing the likelihood of an appeal, stayed the order for one week and “join[ed] the WEC in urging especially new Wisconsin voters to register by mail on or before October 14, 2020, and all voters to do so by absentee ballot as soon as possible.”¹³⁴ Therefore, the court stated that unless finally upheld on appeal, no voter could rely on any deadline extension for mail-in or electronic registration nor receipt of absentee ballots.¹³⁵

On September 29, 2020, the Seventh Circuit issued an order denying the motions for a stay based on its belief that Wisconsin’s legislature was not authorized to represent the interest of the state of Wisconsin in defending its statutes.¹³⁶ In accordance with the Supreme Court’s decision in *Arizona Legislature v. Arizona Independent Redistricting Commission*, a state legislature has Article III standing to litigate in federal court “when it seeks to vindicate a uniquely legislative interest.”¹³⁷ Because the constitutional validity of a law does not concern a legislative interest, a state legislature is not permitted to litigate in federal court regarding the validity of a state statute.¹³⁸ However, Wis. Stat. §803.09(2m) provides:

¹³³ *Id.* at 784 (internal quotations omitted).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020).

¹³⁷ *Democratic Nat’l Comm. v. Bostelmann*, 976 F.3d 764, 767 (7th Cir. 2020) (citing *Ariz. Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787).

¹³⁸ *Id.*; *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene . . . at any time in the action as a matter of right by serving a motion upon the parties¹³⁹

In an earlier stage of the case, the Seventh Circuit determined that §803.09(2m) allowed the Wisconsin Legislature (“Legislature”) to act in a representative capacity—with the same rights as the Attorney General of Wisconsin.¹⁴⁰ However, three months after the Seventh Circuit reached this conclusion, “the Supreme Court of Wisconsin held that this statute, if taken as broadly as its language implies, violates the state’s constitution, which commits to the executive branch of government the protection of the state’s interest in litigation.”¹⁴¹

Upon request for reconsideration, on October 2, the Seventh Circuit certified a question to the Supreme Court of Wisconsin: “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.”¹⁴² The Wisconsin Supreme Court, looking to the plain language of the statute as well as its context, answered that the Legislature indeed has that power.¹⁴³

¹³⁹ Democratic Nat’l Comm., 976 F.3d at 767; Wis. Stat. § 803.09(2m) (West).

¹⁴⁰ Democratic Nat’l Comm., 976 F.3d at 767 (citing Democratic Nat’l Comm. v. Bostelmann, 2020 WL 3619499 (7th Cir. Apr. 3, 2020)).

¹⁴¹ *Id.* (citing Service Emps. Int’l Union, Local 1 v. Vos, 393 Wis.2d 38, 69–81 (2020)).

¹⁴² Democratic Nat’l Comm. v. Bostelmann, 977 F.3d at 641.

¹⁴³ Democratic Nat’l Comm. v. Bostelmann, 949 N.W.2d 423, 424 (Wis. 2020).

WHAT THE SEVENTH CIRCUIT DECIDED

Accordingly, the Seventh Circuit granted the petition for reconsideration and evaluated the merits of the Legislature's motion.¹⁴⁴ Only the Legislature sought reconsideration, so the court's order did not address the arguments of the other interveners.¹⁴⁵ The Legislature argued in support of a stay that (1) federal courts should not change election rules so close to the election date and (2) elected officials—rather than judges—should determine when a devastating event such as a pandemic justifies changing otherwise valid rules.¹⁴⁶ Circuit Judges Easterbrook, Rovner, and St. Eve heard the appeal. Agreeing with both of these arguments, the court's *per curiam* opinion granted the stay in light of the factors for a stay of appeal discussed in *Nken v. Holder*—the “traditional” standard for a stay of appeal: “(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.”¹⁴⁷

The Seventh Circuit explained that “[f]or many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date” and pointed to the earlier phase of this case and *Frank* in support.¹⁴⁸ It reasoned that if the orders in those instances were too late, then the district court's order here—issued six weeks before the election but less than four weeks before the first deadline it altered—must also be too late.¹⁴⁹ The Seventh Circuit remarked “it is not possible to describe COVID-19 as a last-minute event” because the pandemic was declared by the World Health Organization seven

¹⁴⁴ Democratic Nat'l Comm., 977 F.3d at 641.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; *Nken v. Holder*, 556 U.S. 418, 434 (2009).

¹⁴⁸ Democratic Nat'l Comm., 977 F.3d at 641; *see* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020); *Frank v. Walker*, 574 U.S. 929 (2014).

¹⁴⁹ Democratic Nat'l Comm., 977 F.3d at 641–42.

months before its opinion and Wisconsin held two elections during that time.¹⁵⁰

Furthermore, the Seventh Circuit, looking to Supreme Court precedent, explained that changing electoral procedures remains a legislative task even amidst a pandemic.¹⁵¹ The court reasoned the pandemic did not justify changes for this election because “[v]oters 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.”¹⁵² Because state law allows for alternatives to in-person voting on election day, the Seventh Circuit disagreed with the district court’s accommodations for those who failed to plan ahead, and “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.”¹⁵³ Moreover, the Seventh Circuit noted the Supreme Court’s refusal to allow federal judges to respond to the pandemic in ways that should be left to other branches of government.¹⁵⁴ Looking to actions taken by the Court, the Seventh Circuit likewise deferred to the judgment of elected officials.¹⁵⁵

Citing a case from 1905, the Seventh Circuit maintained that determinations about the best way to handle “difficulties caused by disease” must substantially be handled by elected officials.¹⁵⁶ The Seventh Circuit previously relied on the implications of *Jacobson v. Massachusetts* in a handful of other “decisions that have addressed

¹⁵⁰ *Id.* at 642.

¹⁵¹ *Id.* (“The Supreme Court has held that the design of electoral procedures is a legislative task.”); *see also* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2484 (2019) (holding “that partisan gerrymandering claims present political questions beyond the reach of the federal courts”).

¹⁵² *Democratic Nat’l Comm.*, 977 F.3d at 642.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (“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.”).

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* at 643; *see Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

requests for the Judicial Branch to supersede political officials' choices about how to deal with the pandemic."¹⁵⁷ Likewise, in this decision, the Seventh Circuit refused to take judicial action to mitigate the effects of the pandemic and therefore stayed the injunction issued by the district court.¹⁵⁸

WHY THE SEVENTH CIRCUIT WAS WRONG

The Seventh Circuit's October 8, 2020, opinion in *Democratic National Committee v. Bostelmann* failed the citizens of Wisconsin. Justice Rovner, dissenting, summarized it best: "This is a travesty."¹⁵⁹ The Seventh Circuit acknowledged that "[t]he Justices have deprecated but not forbidden all change close to an election. A last-minute event may require a last-minute reaction."¹⁶⁰ The Seventh Circuit erred in determining that by waiting until September to take action against the pandemic for the November election the district court acted too late.¹⁶¹ As Justice Rovner explained, "[t]he 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."¹⁶²

The framework developed through Supreme Court precedent allows for some judicial intervention in elections when citizens' rights

¹⁵⁷ *Democratic Nat'l Comm.*, 977 F.3d at 643; *see, e.g.*, *Tully v. Okeson*, No. 20-2605, 977 F.3d 608 (7th Cir. Oct. 6, 2020) (regarding universal entitlement to vote by mail during a pandemic); *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020) (regarding size limits on political gatherings during the pandemic); *Peterson v. Barr*, 965 F.3d 549 (7th Cir. 2020) (regarding execution procedures during the pandemic); *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020) (regarding rules for qualifying referenda for the ballot in light of social distancing considerations); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (regarding the size of religious gatherings during the pandemic).

¹⁵⁸ *Democratic Nat'l Comm.*, 977 F.3d at 643.

¹⁵⁹ *Id.* at 644 (Rovner, J., dissenting).

¹⁶⁰ *Id.* at 642.

¹⁶¹ *See id.*

¹⁶² *Id.* at 646 (Rovner, J., dissenting).

are burdened. The unprecedented nature of the COVID-19 pandemic added a layer of complexity here. Decisions regarding election protocols should not be left to the legislature in a time sensitive situation such as this one. While the legislature may have the institutional knowledge to shape elections, courts are reactive institutions, equipped to move more quickly. One purpose of the judicial branch and federal courts is to be able to intervene in situations where time is of the essence; preliminary injunctions and temporary restraining orders exist to provide relief for impending harm.

“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.”¹⁶³ As the public health situation worsened in Wisconsin as fall began, the district court took swift action to intervene, six weeks in advance of the election, in order to protect the health of Wisconsin voters. The district court thus relied upon a public health surveillance expert’s opinion “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.’”¹⁶⁴ He believed “[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.”¹⁶⁵

Looking back to the April 2020 election, many Wisconsin voters wished to vote absentee but, despite timely requests for absentee ballots, over 100,000 voters did not receive their ballots in time to return them by the election day deadline imposed by the Wisconsin election code.¹⁶⁶ Approximately “80,000 absentee ballots, their return delayed by an overwhelmed election apparatus and Postal Service,

¹⁶³ *Id.* at 643.

¹⁶⁴ *Id.* at 651–52 (internal citations omitted).

¹⁶⁵ *Id.* (internal quotations omitted).

¹⁶⁶ *Id.* at 643.

[were] rescued from the trash bin” solely because of judicial intervention.¹⁶⁷ Yet, thousands of other voters—those who never received ballots in the mail—had to risk their health to vote in-person on election day.¹⁶⁸

Nearly three-fourths of Wisconsin voters cast absentee ballots in the April 2020 election, but those voting in person faced significant challenges.¹⁶⁹ Given the severe shortage of poll workers, significantly fewer polling sites opened in some locations:

Milwaukee, with a population of 592,025, normally operates 180 polling sites. The city could manage to open only **five** on April 7. Green Bay, population 104,879, normally operates 31 polling sites. On April 7, just **two** were open. 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. 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. Those who stayed in line faced a discernible risk of becoming infected.¹⁷⁰

Those in-person voting complications were accompanied by health consequences: “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.”¹⁷¹

Especially in light of the April 2020 election impact, the district court appropriately weighed the burdens imposed on Wisconsinites’ voting rights and followed the *Anderson-Burdick* framework. As Justice Rovner articulated, the *Anderson-Burdick* “framework does

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 648–49.

¹⁷⁰ *Id.* at 649 (internal citations omitted).

¹⁷¹ *Id.*

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.”¹⁷² Justice Rovner took issue with the majority’s complete deference to state officials by failing to apply any degree of judicial scrutiny by declaring “that ‘the design of adjustments during a pandemic’ is a task for elected officials rather than the judiciary.”¹⁷³ When state officials fail to take action to prevent infringements on citizens’ ability to vote before an upcoming election, judicial intervention becomes necessary.

Judge Conley, at the district level, carefully considered (1) “the Wisconsin election rules in their totality in assessing the burdens that those rules, under the present circumstances, impose[d] on the right to vote,” (2) the *Purcell* caution to avoid disenfranchising voters by taking judicial action too near an election, (3) the Seventh Circuit’s April ruling which stayed all but two April modifications, and (4) the Supreme Court’s April intervention in the case.¹⁷⁴ Moreover, “[i]n 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 [was] not clear to [Justice Rovner] why the majority . . . decided to stay comparable modifications (effectively nullifying them) for the November election.”¹⁷⁵

“‘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.’ But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”¹⁷⁶ Whereas here, the severity of the pandemic placed serious burdens on Wisconsinites’ ability to exercise their right to vote, the district court appropriately modified election procedures.

¹⁷² *Id.* at 647.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 651.

¹⁷⁵ *Id.*

¹⁷⁶ *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (internal citations omitted).

As Justice Rovner noted, the WEC was represented in the litigation below.¹⁷⁷ The WEC (“whose members are appointed by the Legislature and the Governor and are charged with administering the State’s elections”) did not challenge the injunction nor complain about any risk of voter confusion; “[o]nly 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.”¹⁷⁸ In considering deference to state officials, the views of the WEC, “charged with enforcing Wisconsin’s election rules, ought to count for something.”¹⁷⁹ Division among state government officials should not interfere with the right to vote; “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.”¹⁸⁰

As Justice Rovner articulated, “[t]he 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.”¹⁸¹ Rather than intervene to protect the ability of Wisconsin citizens to participate in the election, “the court declare[d] itself powerless to do anything.”¹⁸² However, the court’s inaction was “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.”¹⁸³

The district court’s injunction complied with *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

¹⁷⁷ Democratic Nat’l Comm., 977 F.3d at 647 (Rovner, J., dissenting).

¹⁷⁸ *Id.* at 643–44.

¹⁷⁹ *Id.* at 647.

¹⁸⁰ *Id.* at 747–48.

¹⁸¹ *Id.* at 644.

¹⁸² *Id.*

¹⁸³ *Id.*

confused and discouraged from voting.”¹⁸⁴ But the Supreme Court’s recent shadow docket decisions have failed to flesh out the *Purcell* doctrine.¹⁸⁵ *Purcell*—and the subsequent line of Supreme Court shadow docket rulings that have followed—have created a presumption preventing judicial intervention near an election.¹⁸⁶ However, the so-called *Purcell* doctrine fails to address many important questions including “how near? As to what types of changes? Overcome by what showing?”¹⁸⁷ Moreover, “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.”¹⁸⁸ Unless and until the Supreme Court provides guidance beyond simply *Purcell*’s caution and “an occasional sentence or two in its stay rulings,” lower courts must “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.”¹⁸⁹

Justice Rovner advocated for consideration of five factors to determine whether courts should intervene to modify election rules.¹⁹⁰ Those factors supported the intervention undertaken here by the district court.¹⁹¹ First, voter confusion resulting from modifications must be considered.¹⁹² As Justice Rovner asserted, “[t]hat risk is minimal here” because “[o]nly 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

¹⁸⁴ *Id.*; *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

¹⁸⁵ Democratic Nat’l Comm., 977 F.3d at 644 (Rovner, J., dissenting); *e.g.*, *Andino v. Middleton*, 141 S. Ct. 9 (2020).

¹⁸⁶ Democratic Nat’l Comm., 977 F.3d at 644 (Rovner, J., dissenting).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 645.

¹⁹⁰ *Id.* at 646–47.

¹⁹¹ *Id.* at 645.

¹⁹² *Id.*

deadline for receipt of absentee ballots.”¹⁹³ Extending deadlines would hardly create confusion among voters, but any voter confused about a deadline could always comply with the earlier deadline without missing any opportunity to vote. Indeed, “[b]oth of these modifications redound to the benefit of voters, and certainly d[id] not lay a trap for the unwary.”

Second, courts must consider the possibility that changes to election rules will increase the likelihood of mistakes or burden election officials.¹⁹⁴ Judge Conley gave this factor careful consideration and rightly concluded adequate time existed to implement the modifications and “[t]he Wisconsin Election Commission signaled a preparedness and ability to comply with these modifications . . . , and the State Executive [was] not here to contend otherwise.”¹⁹⁵

Third, courts must weigh the likelihood of resulting voter disenfranchisement.¹⁹⁶ The actions taken by the district court in this case would not have resulted in voter disenfranchisement; they were taken precisely to prevent disenfranchisement.¹⁹⁷ On the contrary, failing to enact the proposed modifications would result in disenfranchisement, as indicated by the April election.¹⁹⁸

Fourth, the plaintiffs did not lack diligence in seeking relief.¹⁹⁹ The plaintiffs sought relief in April before the primary election and renewed their efforts following that election.²⁰⁰ Plaintiffs have diligently sought relief, beginning well in advance of the November election: “[a]fter they defeated the Legislature’s attempt to dismiss their claims, 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.”²⁰¹

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 646.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

Plaintiffs who seek intervention well before an election—especially in circumstances like a pandemic where further foresight was impossible—should not be barred from relief. As Justice Rovner underscored, “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.”²⁰²

The fifth and final consideration involves timing.²⁰³ Here, “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.”²⁰⁴ The virus had progressed since the Supreme Court decision in April²⁰⁵ and the district court provided different relief in this stage of the case. To say the same result should have followed here applied defunct reasoning, especially given that here the timeline was different than in April. In April, the district court’s injunction came on March 28, only eighteen days before the election, and was modified, granting additional relief, only five days in advance of the election.²⁰⁶ Here, the district court acted six weeks in advance of the election and four weeks in advance of the first deadline it changed.²⁰⁷ Importantly, “[n]othing 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.”²⁰⁸

CONCLUSION

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ *See* Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205 (2020).

²⁰⁶ Democratic Nat’l Comm., 977 F.3d at 644 (Rovner, J., dissenting).

²⁰⁷ *See id.*

²⁰⁸ *Id.*

The fundamental right to vote must be protected. Under the *Anderson-Burdick* framework created by the Supreme Court, burdens on the right to vote must be weighed against the state's interests supporting restrictions. In light of this precedent, judicial intervention was appropriate to protect Wisconsin citizens' right to vote given the worsening pandemic conditions leading up to the November election. Heeding *Purcell's* caution against confusing voters with judicial intervention too near an election, the district court acted carefully to ease the burdens placed on Wisconsinites by the pandemic weeks ahead of the election. The Seventh Circuit should not have prevented the necessary judicial intervention in the Wisconsin election. Justice Rovner's closing remarks highlighted the severity of the court's inaction: "[g]ood luck and G-d bless, Wisconsin. You are going to need it."²⁰⁹

²⁰⁹ *Id.* at 656.