No. 20-1539

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.
PLAINTIFFS-APPELLEES,
v.
MARGE BOSTELMANN, ET AL.
DEFENDANTS,

APPEAL OF: WISCONSIN STATE LEGISLATURE.

SYLVIA GEAR, ET AL.
PLAINTIFFS-APPELLEES,
v.
DEAN KNUDSON, ET AL.
DEFENDANTS,

APPEAL OF: WISCONSIN STATE LEGISLATURE.

REVEREND GREG LEWIS, ET AL.
PLAINTIFFS -APPELLEES,
v.
DEAN KNUDSON, ET AL.
DEFENDANTS

APPEAL OF: WISCONSIN STATE LEGISLATURE.

On Appeal From The United States District Court
For The Western District of Wisconsin
Consol. Case Nos. 3:20-cv-249, -278, -284
The Honorable William M. Conley, Presiding

WISCONSIN LEGISLATURE'S EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY

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TABLE OF CONTENTS

INTRODUCTION

The district court changed the absentee-voting rules for Wisconsin's ongoing, statewide April 7 Election. And it ordered these significant changes *just five days* before election day. The Legislature moves for a stay of that order pending appeal and, further, asks for an ***administrative stay immediately, tonight if possible***, to avoid the confusion and chaos of having the rules of the present, ongoing election changed by the district court's erroneous order.[1]

This emergency motion involves two issues.[2]

First, most Wisconsinites are understandably choosing to vote in the April 7 Election by absentee ballot, using the State's generous, no-excuse-needed absentee-voting option, given the public-health crisis. *See* Wis. Stat. § 6.85(1). At the same time, Wisconsin understands that "[v]oting fraud is a serious problem in U.S. elections generally," and that fraud is especially "facilitated by absentee voting," *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004), because "voting by mail makes vote fraud much easier to commit," *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004).

That is why the State requires a voter to sign an absentee ballot "before one witness who is an adult U.S. Citizen," who must also sign the ballot. Wis. Stat.

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[1] Given the emergency nature of this situation, if this Motion is denied, the Legislature respectfully suggests that *sua sponte*, en banc reconsideration of this motion is warranted.

[2] The Legislature does not discuss here, and does not ask for a stay of, the portion of the court's order extending the deadline to request absentee ballots by one day, to April 3.

§ 6.87(4)(b)1; *see* Wis. Stat. § 6.87(2). The benefits of such a law are well-recognized. "[A]n absentee voter can be coerced or pressured into voting the ballot in a certain way, whether through intimidation, other undue influence, or outright vote buying." Principles of Election Law § 103, cmt. c. (Am. Law Inst. 2018). This law thus furthers the "indisputably . . . compelling interest in preserving the integrity of [the State's] election process," *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), by ensuring that "only the votes of eligible voters" are counted, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.).

The district court here re-wrote Wisconsin's signature requirement just *five* days before the election. The district court's judicially crafted bypass—one that had not even been suggested by any party, let alone subject to any adversarial testing—flouts powerful equitable considerations against federal-court interference with imminent and ongoing state elections.

Five judges on this Court previously explained that "[c]hanging the rules so soon before the election is contrary not just to the practical realities of an impending election, but it is inconsistent with the Supreme Court's approach" under the *Purcell* principle—and "that is true whatever one's view on the merits of the case." *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (citation omitted) (Williams, J., dissenting from denial of en banc reh'g). The Supreme Court has reaffirmed that principle time and again, *see infra*, Part I.A, including in *Frank v. Walker*, 574 U.S. 929 (2014),

itself, where the Court vacated a stay of an injunction that would have changed election rules shortly before an upcoming election.

Second, Wisconsin has set April 7 for election day, and requires all absentee ballots to be received by that day. *See* Wis. Stat. § 6.87(6). The district court rewrote that statute to *permit voters to vote after election day, so long as their ballots are received by April 13*. This remedy, too, was never requested by the parties. Further, the district court did not even consider that its unprecedented, post-election-day voting order will allow for unfair gamesmanship, where voters who sat on their absentee ballots can vote after seeing the results on election day. This would undermine Wisconsinites' belief in the integrity and fairness of the election.

This Court should stay the district court's injunction for several, independently sufficient reasons, as explained below: (1) The district court's decision to rewrite Wisconsin law violates the core principle that courts should not change the rules of ongoing elections. (2) The district court's bypass would render the signature requirement meaningless, while its decision to allow voters to vote after election day is entirely unprecedented and legally unjustified. (3) The district court violated basic principles of fairness with its inexplicable decision to deny the Legislature's motions to intervene. This meant that no party authorized to speak for the State was permitted to take part in yesterday's evidentiary hearing, which proved especially prejudicial because that is where the district court first raised its idea to add the bypass option, and because no party had previously asked to allowing voting by voters after election day.

STATEMENT OF THE CASE

Under Wisconsin law, a "[s]pring election" must be "held on the first Tuesday in April to elect judicial, educational and municipal officers, nonpartisan county officers and sewerage commissioners and to express preferences for the person to be the presidential candidate for each party" in a Presidential election year. Wis. Stat. § 5.02(21). All votes must be either received by election day (if by absentee ballot) or cast on election day. *See* Wis. Stat. § 6.87(6)

The voting in Wisconsin's April 7 Election has been in full swing for weeks. Under Wisconsin law, absentee ballots can be sent as soon as they are printed by the local clerk, which must begin "immediately upon receipt of the certified list of candidates' names from the commission," Wis. Stat. § 7.10(2), which certification occurred on March 3.[3] In the four weeks following that certification, more than 942,000 Wisconsinites received absentee ballots, and over 337,000 already returned them completed. R.(*Lewis*):89-1. So far as the record below reflects, the overwhelming majority of these absentee ballots complied with Wisconsin's long-standing witness-signature requirement. *See* Wis. Stat. § 6.87(2) (1965).

As relevant here, on March 18, the Democratic National Committee and Democratic Party of Wisconsin sued each of the Wisconsin Elections Commissioners, in the Western District of Wisconsin, seeking an injunction blocking Wisconsin's witness-signature requirements, as well seeking an extension of the statutory

[3] *See* Wisconsin Elections Commission, *Candidates on Ballot by Election* (rev. Mar. 3, 2020) available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Candidates%20on%20Ballot%20By%20Election_3_3_2020.pdf.

deadline for when absentee ballots must be received (without asking for voting after election day). R.1–2; R.55. Further, as relevant here, plaintiffs moved for a preliminary injunction to block the signature requirement and to extend the deadline for when absentee votes must be received. R.61. On March 26, another group of plaintiffs sued the Wisconsin Elections Commissioners and its Administrator in the Western District of Wisconsin (all defendants hereinafter, collectively, "Commission Officials"), also seeking a facial injunction against Wisconsin's signature requirement. R.(*Gear*)1, 8.

The Legislature repeatedly moved to intervene in these lawsuits to defend the State of Wisconsin's interests in the validity of state law. The Legislature filed its first intervention motion in *DNC* just days after plaintiffs' filing of their complaint, R.20, and renewed that motion the day after the Commission Officials refused to defend all of the challenged laws, R.118. The Legislature also moved to intervene in *Lewis*. R.137. The district court denied the Legislature's first intervention motion in *DNC* on the grounds that the Commission Officials adequately represented the State's interest. R.85:5. The court then "welcome[d]" the Legislature to "renew its motion" if "some new facts were to arise that established an actual conflict" with the Commission Officials' representation. R.85:11. Such "new facts" did "arise" two days later when the Officials disclosed that they were no longer willing to defend all of the challenged laws, but would only defend some. R.107:12–20. The Legislature renewed its motion to intervene, as the court had invited, R.85:7, but the court inexplicably denied this motion as well, *see* R.116; R.144:2; *see* R.163 at 2–3. The court did grant

the Republican National Committee and Republican Party of Wisconsin's (collectively "RNC") motion to intervene. R.85:12; R.122.

The district court held an evidentiary hearing on April 1, which the court barred the Legislature from taking part in. *See* R.144:2. It was at that hearing that the district court first raised its idea of creating a bypass to Wisconsin's longstanding signature requirement. The Court also briefly discussed allowing absentee votes cast after election day to be counted, even though no party had asked for this relief. The entirety of the adversarial process on these issues consisted of statements from RNC's counsel.

Earlier today, the district court entered a preliminary injunction order that mandates, as relevant here, that: (1) the State must allow any absentee voter to avoid Wisconsin's signature requirement by "provid[ing] a written affirmation or other statement that they [are] unable to safely obtain a witness certification despite reasonable efforts to do so." R.170:41–46; and (2) the State may no longer apply its 8:00 p.m. election-day deadline for the receipt of absentee ballots (moving the deadline to 4:00 p.m. on April 13), *meaning that voters can now send in their ballots after election day*. R.170:37–41. Thus, the State is now required to accept late-filed absentee ballots—cast after election day—and those ballots can lack one of the most important anti-fraud and anti-coercion measures that the State has maintained for such ballots. The district court denied a motion to stay its preliminary injunction.

JURISDICTION

The Legislature has standing to appeal from the district court's grant of a preliminary injunction under *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); *accord Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 393 (7th Cir. 2019), and it should have been permitted to intervene as of right, as explained below, *see infra* Part III.[4] As *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019), concluded, Sections 13.365(3) and 803.09(2m) of the Wisconsin Statutes, "give[ ] the Legislature standing as an agent of the State of Wisconsin," *id.* at 798. And an agent with authority to litigate for the State has standing to appeal. *See Bethune-Hill*, 139 S. Ct. at 1951. Finally, RNC has appealed, and it has Article III standing, meaning that this Court has jurisdiction over this emergency appeal on that basis alone. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *Bethune-Hill*, 139 S. Ct. at 1950–51.

LEGAL STANDARD

"The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *accord Nken v. Holder*, 556 U.S. 418 (2009). The Court "consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enters.*, 742 F.3d at 766 (citations omitted). "[A]

[4] Further, this Court should also permit the Legislature to appeal if the Commission Officials do not file an emergency appeal in time to prevent this action from becoming moot. See *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009).

sliding scale approach applies"—if the moving party shows a greater likelihood of success on the merits, "the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.* (citations omitted).

ARGUMENT

I. The Balance Of The Irreparable Harms, The Equities, And The Public Interest Require A Stay, Especially In Light Of The Principle That A Court Should Not Change The Rules Of An Ongoing Election, Particularly Days Before Election Day

A. Powerful equitable considerations counsel against federal-court interference with imminent and ongoing state elections. The Supreme Court has long cautioned against federal interference in impending state elections, *see Reynolds v. Sims*, 377 U.S. 533 (1964), and "has continued to look askance at changing election laws on the eve of an election," *Veasey v. Perry*, 769 F.3d 890, 894–95 (5th Cir. 2014) (citing *Frank*, 574 U.S. 929; *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014)). This is because "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," the risk of which "will increase" "[a]s an election draws closer." *Purcell*, 549 U.S. at 4–5. The courts of appeals have repeatedly denied relief or granted stays when faced with changing the rules of an imminent or ongoing election. *See, e.g.*, *Veasey*, 769 F.3d at 893–94; *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 376, 395 (9th Cir. 2016) (collecting cases). As the Sixth Circuit explained when granting Michigan's emergency motion to stay a preliminary injunction, "[t]iming is everything," and federal courts "will not disrupt imminent

elections" under the "*Purcell* principle[ ] or common sense." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

Here, the district court plainly violated this core principle. The changes that the district court ordered to Wisconsin's signature requirement and the voting deadline (allowing voting *after* election day) come as the April 7 Election is in full swing. The deadlines for electronic registration and registration by mail have passed, Wis. Stat. § 6.28(1), and the deadline to request absentee ballots is now tomorrow. All forms of absentee voting are well underway, and the district court's signature bypass was not available to the hundreds of thousands of Wisconsinites who have voted absentee in this election already. Further, Wisconsin election officials have never administered any such bypass before. And those officials have never, so far as the Legislature is aware, had to count votes cast *after* election day. In all, the district court's belated judicial rewrite of Wisconsin's voting laws—in the middle of an election—is reason enough to grant the stay here.

B. Even apart from the timing of the district court's decision, that decision is deeply inequitable, after considering the irreparable harms and the equities.

On one end of the balance, the State and the people of Wisconsin will suffer deep, irreparable harm from the district court's decision. Any time a State is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018). Given that the "State indisputably has a compelling interest in preserving the

integrity of its election process," *Eu*, 489 U.S. at 231, the irreparable harm to the State and the public from an injunction would be especially grave here.

First, the signature requirement is necessary to stave off the "serious problem" of "[v]oting fraud," which is exacerbated by "absentee voting," *Griffin*, 385 F.3d at 1130–31, given that "voting by mail makes vote fraud much easier to commit," *Nader*, 385 F.3d at 734. The district court's bypass renders the signature requirement a nullity. The witness requirement prevents voter fraud in multiple ways, such as by adding an additional layer of protection, ensuring that the person filling out the absentee ballot is the actual voter listed on the ballot, and preventing undue influence or coercion. *See Veasey v. Abbott*, 830 F.3d 216, 255–56 (5th Cir. 2016) (en banc) (recognizing examples of "people who harvest mail-in ballots from the elderly"). Yet, under the district court's bypass, the signature requirement serves none of these functions. A fraudster can simply commit fraud twice on the same absentee ballot, falsely using the elector's name twice: once on the absentee ballot, and once on the bypass. No longer will the State have the additional security of a second name and address on the absentee ballot—the signer/witness—to deter and detect this fraud.

Second, the State will also suffer grave harm from allowing voters to submit ballots after election day. Wisconsin's law requiring that all voters vote by election day—either by absentee ballots received by that date, or by voting in person—ensures the "orderly administration" of Wisconsin's elections, *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.), thereby advancing the State's "compelling interest in preserving the integrity of its election process," *Eu*, 489 U.S. at 231. The

district court's sweeping decision here goes beyond even what the plaintiffs asked for. Those parties asked to allow counting of votes postmarked by election day, while seeking relief from the requirement of election-day receipt of ballots because of concerns about the speed of the mail and voters sending ballots this upcoming weekend. R.55:19; R.(*Lewis*)1:66. The Legislature explained that this relief should await Election Day, as these concerns may prove illusory. R.90:24–26. The district court, however, went well beyond that and took the unprecedented, deeply disruptive step of allowing post-election day voting by federal-court order, which creates a new election day for certain voters.

On the other end of the equitable balance, the district court concluded that certain electors could not safely comply with the signature requirement, in light of the current public-health epidemic. As a threshold matter, plaintiffs entirely failed to prove that any meaningful number of such voters exist. As the district court properly concluded, the overwhelming majority of voters can satisfy this requirement easily, consistent with all public-health guidance. R.44. While the district court believed that there are some small number of people who lack such options, R.170:41–46, plaintiffs submitted no competent evidence to support this claim. *All* of the voters that plaintiffs pointed to could have obtained the needed signature safely, following all public-health guidelines, such as by: (1) "set[ting] the ballot down at a neighbor's door, knock[ing], stand[ing] six feet away, mak[ing] the request for the signature, and then hav[ing] the neighbor leave the now-signed ballot at the door," R.90:19; or (2) using readily available video-chat technology like Skype or Facetime—sliding the ballot to the

witness under the door for his signature, then collecting the ballot once the witness is six feet away, *see* R.63-16:6. Voters like plaintiffs' own declarants, R.69:1–2; *accord* R.75:2, are taking these easy steps, which can be accomplished in a couple of minutes. These minutes of effort, taken in full compliance with all public-health guidelines, require less time than the Supreme Court has said is permissible for getting a photo ID. *See Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.). And these steps are safer than actions that the vast majority of voters are taking every day—including plaintiffs' own declarants—such as going to a grocery store or bank. R.(*Gear*)9:¶ 4; R.(*Gear*)11:¶ 3.

And even if there is some voter who cannot, for special reasons, take even these steps, *equity does not justify putting into place a bypass option that renders the signature requirement an ineffective nullity for all absentee voters*. The district court's remedy is not, by its nature, limited to those "immunocompromised and self-quarantining to protect their health, or who ha[ve] contacted COVID-19 and [are] in quarantine to protect others." R.170:15 (citation omitted). Instead, it allows *any* individual to merely say that "he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so," R.170:46, while creating serious administrability problems, never subjected to adversarial briefing, by leaving it "to the individual discretion of clerks as to whether to accept a voter's excuse," *id.*

Nor did the district court offer anywhere near sufficient equitable reasons for its decision to allow voters to vote *after* election day. The court expressed concern that ballots diligently returned may not be counted, under the April 7 statutory deadline.

R.170:38–39. But plaintiffs submitted this evidence to support their point that it would be hard for voters to get their ballots to clerks by election day, due to the speed of the mail, even though the ballots would—in fact—be postmarked by election day. Plaintiffs did not argue, and did not provide any evidence to justify, allowing voters to mail in their ballots *after* election day. And even if such arguments were made in this case, these equities cannot possibly justify forcing the State to allow post-election-day voting, especially when the district court did not permit adversarial process on this core issue.

II. The Legislature Is Exceedingly Likely To Succeed On Appeal

On appeal, the Legislature will need to show that plaintiffs did not carry their burden to obtain the preliminary injunction that the district court issued, under the same factors at issue in the stay application. *In re A & F Enters., Inc. II*, 742 F.3d at 766 ("The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction."). As a threshold matter, plaintiffs' showing on the equitable factors fails for the same reasons outlined immediately above, *see supra* Part I.B, including that plaintiffs sought to change the rules of an ongoing election. Since plaintiffs would need to prevail on these equitable considerations to obtain a preliminary injunction in the first place, this point is also sufficient to establish the Legislature's likelihood of success on appeal against that injunction.

Further, even as a matter of substance, plaintiffs have no likelihood of success on their claims. Under *Anderson/Burdick*, *see Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the movants must satisfy a two-

step inquiry, bearing a heavy burden on both steps. First, they must establish both a cognizable burden on the right to vote from a challenged law and that burden's severity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Second, they must show that this burden outweighs the State's interest. *Id.* "If the burden on the plaintiffs' constitutional rights is 'severe,' a state's regulation must be narrowly drawn to advance a compelling state interest." *Stone v. Bd. of Election Comm'rs*, 750 F.3d 678, 681 (7th Cir. 2014) (citation omitted). But "[i]f the burden is merely 'reasonable' and 'nondiscriminatory,' by contrast, the government's legitimate regulatory interests will generally carry the day." *Id.* The sufficiency of a State's justification is generally a "legislative fact," accepted as true so long as it is reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) ("*Frank I*"); *see also Crawford*, 553 U.S. at 194–97 (controlling plurality of Stevens, J.). The Supreme Court has held that "making a trip to the [D]MV, gathering the required documents and posing for a photograph surely do not qualify as a substantial burden on the right to vote." *Crawford*, 553 U.S. at 198 (controlling plurality of Stevens, J.). And a plaintiff is entitled to as-applied relief only upon a showing that specific voters or a specific category of voters cannot cast their ballot after undertaking "reasonable effort[s]." *Frank v. Walker*, 819 F.3d 384, 386–87 (7th Cir. 2016) (*"Frank II*"). Most closely analogous, this Court has stayed a district court's decision to require Wisconsin to provide an affidavit-bypass option to its photo ID law. *See Frank v. Walker*, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016), *stayed by*, 2016 WL 4224616 (7th Cir. Aug. 10, 2016) ("*Frank III*").

Plaintiffs' arguments with regard to the signature requirement fail on the merits in several respects. First, as explained above, plaintiffs have not shown that any voters cannot obtain a witness signature after undergoing "reasonable effort[s]," *Frank II*, 819 F.3d at 386–87, no greater than those for obtaining photo ID, *see supra* pp. 11–12. Further, the district court's remedy here is available to anyone who wants to commit voter fraud, and thus is not tailored to only those voters with reasonable burdens, just like the affidavit bypass that this Court stayed in *Frank III*. After all, as explained above, anyone wanting to commit voter fraud under the district court's injunction will be able to fraudulently sign the elector's name twice, thereby defeating the core operation of the signature requirement—having a second name and address on every absentee ballot. *See supra* p. 10. Finally, under, the second *Anderson/Burdick* step, the State's interest here is paramount, especially given the well-recognized problems of absentee-voter fraud and the lack of confidence in election results that these problems can cause.

As for allowing voting after election day, plaintiffs failed to carry their burden under *Anderson/Burdick* as well—*indeed, they did not even try, as they never sought such a drastic remedy*. The district court did not explain, beyond mere speculation, that a significant number of diligent voters cannot put their ballots into the mail by election day. And the State's interest in not allowing post-election day voting is paramount, as explained above, *see supra* pp. 10–11, and that applies for the same reason under step two of *Anderson*/*Burdick*.

III. The District Court's Indefensible Decision To Block The Legislature's Intervention, Leaving No Party With Authority To Speak For The State's Interests In Defending Its Laws, Warrants A Stay Of The Injunction

The district court rewrote Wisconsin election law without ever giving any party with the authority to speak for the State and its sovereign interests in the validity of state law the opportunity even to be heard on the issue. This violated basic principles of fundamental fairness, which also justifies a stay of the district court's injunction.

A. The Legislature sought repeatedly to intervene below, to speak for the State's interests in the validity of state law, but the court denied that intervention.

The Legislature plainly satisfied the standard for mandatory intervention, speaking here for the State of Wisconsin, where no other party speaks for that interest. *Planned Parenthood*, 942 F.3d at 797. The Legislature timely moved to intervene, R.85; R.163; the Legislature has a state-law right to speak for the State's interest in the constitutionality of its laws under Wis. Stat. §§ 13.365, 803.09(2m), as this Court recognized in *Planned Parenthood*, *see* 942 F.3d at 797; *Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013); that sovereign interest would be impaired were plaintiffs to succeed in the district-court action, *Lopez-Aguilar*, 924 F.3d at 385; and that interest was not adequately represented by any of the existing parties because, unlike in *Planned Parenthood*, no other agent with the authority to speak for the State—such as the Attorney General—appeared here to defend state law, *Planned Parenthood*, 942 F.3d at 797–98.

The district court nevertheless denied the Legislature's intervention motions based on the fourth mandatory-intervention element alone—adequacy of representation—but that denial was erroneous and an inexplicable bait-and-switch.

To begin, no other state party in the action has the "same goal" as the Legislature: to vigorously defend "the constitutionality of" *all* the "challenged statutes" *on behalf of* "*the State's interest*." *Id.* at 799 (emphasis added). The Commission Officials are *not* represented by the Wisconsin Attorney General, R.85:12, and they lack the statutory authority "to litigate on *the State's* behalf," *Bethune-Hill*, 139 S. Ct. at 1951 (emphasis added), as opposed to, at most, on behalf of the independent agency that they head. Indeed, the Officials effectively conceded this by withdrawing their opposition to the Legislature's intervention after the Attorney General had withdrawn and the Legislature presented this argument. R.71; R.82; R.85. Unsurprisingly, since they do not speak for the State, the Commission Officials have no obligation to defend state law and thus *explicitly abandoned* defense of several of the state laws. *See* R.107:16.

And RNC does not represent the State, thus it does not adequately represent the State's sovereign interests here. As a private political party, the RNC is not a "designated . . . agent" of the State, *Bethune-Hill*, 139 S. Ct. at 1952 (citation omitted), "'charged by law' with protecting the State's interest," *Planned Parenthood*, 942 F.3d at 799, 801–03. It is a private entity representing its "particular interest," not "the public interest" of Wisconsin. *Coal. of Ariz./N.M. Ctys. for Stable Econ.*

Growth v. Dep't of Interior, 100 F.3d 837, 845 (10th Cir. 1996); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001).

The district court's denial of intervention was not only legally erroneous but contravened basic principles of fairness to litigants. In denying the Legislature's initial motion to intervene, the court "welcome[d]" the Legislature to "renew its motion" if "some new facts were to arise that established an actual conflict" between the Legislature and the Commission Officials. R.85:11. Yet, when those new facts developed—namely, the Officials *expressly refusing to defend several of the challenged laws*—the district court denied the Legislature's renewed motion. R.163.

B. The district court's denial of the Legislature's intervention motion left no state party to defend the State's sovereign interest in the validity of its law. This is fundamentally unfair and justifies an immediate stay and, after a full appeal, reversal of the district court's injunction. *See Scott v. Donald* 165 U.S. 107, 117 (1897) ("[W]e do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented[.]"); *see also Shields v. Barrow*, 58 U.S. 130, 141 (1854) (if an "indispensable party [is] not before the court," and may be joined, then the court cannot "adjudicate directly upon [that] person's right"); *U.S. ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996) (Rule 24 "tracks" Rule 19).

Importantly, the district court's decision to keep the State out of a case where its laws were challenged proved deeply prejudicial in the context of the particular injunction on appeal here. That denial prohibited the Legislature from being heard

at the all-important evidentiary hearing, when the district court, for the first time in this case, raised the possibility that it would create the affidavit bypass to the signature requirement and where the issue of post-election day voting was first discussed by the parties. *Put another way, the State—speaking through the Legislature, under state law—was never given a chance even to be heard on these core issues*. The Officials, again, do not speak for the State and have no interest in battling against a federal court order blocking state law. Indeed, they did not say a word against the district court's remedy at the evidentiary hearing.

CONCLUSION

This Court should stay the preliminary injunction.

Dated: April 2, 2020

Respectfully Submitted,

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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 5,035 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 April 2, 2020.

/s/ Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2020, I filed the foregoing Emergency Motion To Stay The Injunction Pending Appeal with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: April 2, 2020

/s/ Misha Tseytlin

MISHA TSEYTLIN