

## **Voting Wars Reach the Supreme Court – RNC v. DNC (U.S. April 6, 2020)**

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The Supreme Court has waded into a state election controversy and, through a majority, has rendered its decision based on the time-honored principle that lower federal courts should ordinarily not alter the election rules on the eve of an election. This is an early effort to take a frank look at the Supreme Court's latest entry into last minute interference with state electoral processes. In this case the Court overturned a district court decision, affirmed by the Court of Appeals for the Seventh Circuit, which preserved the right to vote during the pandemic crisis. The net effect of the Supreme Court's decision was to force voters to choose between protecting their health or exercising the right to vote.

On March 24<sup>th</sup>, Wisconsin Governor Tony Evers issued an executive order that all Wisconsinites should stay home until at least April 24<sup>th</sup> to slow the spread of the COVID-19 virus. During that period, the state had a previously scheduled April 7<sup>th</sup> election which included a presidential primary, a seat on the state Supreme Court, three seats on the Court of Appeals, over 100 other judgeships, over 500 school board members, and several thousand other offices.

### **COURSE OF PROCEEDINGS:**

Unlike other states faced with a similar election during the height of the pandemic, Wisconsin had been reluctant to postpone the April 7<sup>th</sup> election. The Democratic National Committee, the Democratic Party of Wisconsin, and League of Women Voters, among others, requested the intervention of U.S. District Court Judge William Conley to postpone the state's April 7<sup>th</sup> election. They argued that by allowing the election to proceed as scheduled, hundreds of thousands of Wisconsin voters would be disenfranchised. Plaintiffs observed that Wisconsin residents would face "the extreme burden of literally risking their health and lives in order to cast a vote," and for those voters attempting to vote in person, many polling places would either be closed or have long lines because of limited available poll workers during the pandemic.

### **DISTRICT COURT'S EXTENSION OF DEADLINE FOR SUBMISSION OF ABSENTEE BALLOTS:**

The District Court denied the petition to postpone the election. On April 2<sup>nd</sup>, Judge Conley, however, issued a preliminary injunction extending the deadline for election officials to receive absentee ballots from April 7<sup>th</sup> (election day) to April 13<sup>th</sup> in order for voters to cast an absentee ballot. This changed the rule from requiring that an absentee

ballot be received or postmarked by the close of voting on April 7<sup>th</sup>. As Justice Ginsberg would later observe in her dissent to the U.S. Supreme Court's *per curiam* decision, the pandemic had caused a surge in absentee ballot requests that overwhelmed election officials. *RNC v. DNC*, 589 U.S. \_\_\_, Slip Op. at 4 (Ginsberg, J. dissent) ("A voter cannot deliver for postmarking a ballot she has not received." *Id.* at 3). In addition, the District Court issued a subsequent order enjoining the public release of any election results for six days after election day. The Seventh Circuit denied a stay of the district court's order.

Outside of the litigation, on Monday, April 6<sup>th</sup>, Governor Evers, a Democrat, issued an executive order moving the election to June 9<sup>th</sup>. Republicans in the state legislature attacked the Governor's order as "constitutional overreach," and immediately challenged it in state court. They also asked the Supreme Court to block the District Court order extending the deadline for absentee ballots. The legislators asserted that the extension fundamentally altered the nature of the election. Democrats urged the justices of the Supreme Court to stay out of the dispute and allow the District Court ruling to stay in place. Blocking the district court's order, they warned, "could exacerbate the unfolding COVID-19 public health disaster."

Hours after the executive order was issued, the state Supreme Court, at the request of the Republican-controlled legislature, overturned the Governor. Later, on the same day, the U.S. Supreme Court stayed the District Court's order extending the period to cast an absentee ballot.

#### ARGUMENTS IN THE SUPREME COURT:

Arguing that the District Court's order should remain in effect and voters should be allowed to return their absentee ballots through April 13<sup>th</sup>, Wisconsin Democrats asserted that if voters were "not confident their absentee ballots will be counted," more people would be driven to vote in-person on election day, "increasing the risks of community spread through polling places in cities and towns throughout Wisconsin." The District Court's order was narrowly tailored to dramatically reduce "the need for person-to-person contact."

The Republican National Committee and the Republican Party of Wisconsin asked the justices of the Supreme Court to block the District Court's order and instead make clear that the deadline was extended only for ballots that were postmarked (or otherwise delivered) by April 7<sup>th</sup>. The petition focused on the narrow question of whether absentee ballots must be mailed and postmarked by election day, or whether they may be mailed and postmarked after election day, so long as they were received by Monday, April 13<sup>th</sup>. The Supreme Court granted the application for stay.

#### SUPREME COURT'S GRANT OF A STAY:

In a 5-4 decision, released on the eve of the April 7<sup>th</sup> election, a majority of the Court stayed the District Court's order granting a preliminary injunction to the extent that it required the State of Wisconsin to count absentee ballots postmarked after April 7, 2020. In its *Per Curiam* decision, the Court said that the sole question before it was whether absentee ballots must be mailed and postmarked by election day, April 7<sup>th</sup>, as required by state law, rather than being mailed and postmarked after election day, as long as they are received by Monday, April 13<sup>th</sup>.

The Supreme Court majority, citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006), found that the District Court's order suppressing disclosure of election results, and allowing absentee ballots mailed and postmarked *after* election day to be counted, was unusual so close to the election "all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion." Slip Op. at 3. Further, the Supreme Court majority noted that the District Court's ordering of an additional extension, which would allow voters to mail their ballots after election day, was "extraordinary relief and would fundamentally alter the nature of the election by allowing voting for six additional days after the election." Slip Op. at 4.

Confining its ruling to what it perceived to be the "narrow, technical" question before it, the Court held that subject to any further alterations "that the State may make to state law, in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020 at 4:00 pm, or (ii) hand-delivered as provided under state law by April 7, 2020 at 8:00 pm." Slip Op. at 4.

Justice Ruth Bader Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, issued a dissenting opinion in which they would not disturb the District Court's order. This is the heart of Justice Ginsburg's dissent:

First, the District Court held an evidentiary hearing in which it "concluded the existing deadlines for absentee voting would unconstitutionally burden Wisconsin citizen's right to vote." citing *Burdick v. Takushi*, 504 U.S. 428, 434(1992); *Anderson v. Celebrezze* 460 U.S. 780, 789 (1983). (Under the *Anderson-Burdick* balancing tests the court balances the injury to voting rights under the First and Fourteenth Amendments against the interests put forward by the state. This balancing is not mentioned by the majority).

Second, the Supreme Court majority's intervention at this late hour was ill advised, since election officials had spent the last few days establishing procedures and informing voters in accordance with the District Court's deadline; moreover, the Supreme Court's upending of that process, a day before the April 7<sup>th</sup> postmark deadline, was sure to confound election officials. The Supreme Court majority's invocation of *Purcell* suggested that it was skeptical of the District Court's intervention shortly before an election. If proximity to the election was really a basis for hesitation, when the

District Court had acted several days earlier, then the Supreme Court's intervention on the day before the elections was all the more inappropriate.

Third, the concerns expressed by the majority and the Republican Party stay applicants were "election-distorting gamesmanship might occur if ballots could be cast after initial results are published. But, obviating that harm, the District Court enjoined the publication of election results before April 13<sup>th</sup>, the deadline for returning absentee ballots, and the Wisconsin Elections Commission directed election officials not to publish results before that date." Justice Ginsberg found that those concerns "pale in comparison to the risk that tens of thousands of voters will be disenfranchised," when the paramount concern should be ensuring an opportunity for the people of Wisconsin to exercise their right to vote. Slip Op. at 6.

Finally, rather than presenting a "narrow, technical question" as characterized by the majority, "[t]he questions here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic." ...

With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they lose their right to vote, through no fault of their own. That is matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this extraordinary time, the health of the Nation.

Id.

## CONCLUSION

Voter suppression comes in many forms and can sometimes be obscured, by "necessary" adherence technicalities, with no consideration of changes to current and normal circumstances, as it is playing out in Wisconsin. The choice given by the Supreme Court majority to Wisconsin voters – brave the polls in the midst of a deadly pandemic or forfeit their right to vote – is an unimaginable choice. It presents a callous disregard for human life and democracy. The District Court provided a remedy, after an evidentiary hearing, which constitutionally balanced voting rights and the burden on the state. The Supreme Court majority destroyed that balance. Moreover, as another court recently observed that when a court is confronted with a pending election, "there is also a public interest in the Court promoting certainty with elections and not entering orders that create "voter confusion and consequent incentive to remain away from the polls." *Gwinnet County NAACP v. Gwinnett County Board of Registration* (N.D. Ga. March 3, 2020) citing *Purcell*, 549 U.S. at 5., accessible online at <https://public.fastcase.com/ppbqSQpNDaJE%2F8PIIk0b8MR0yZhIhyzeSLNTiBs34RMc97IuAVz2qjcnImgyFZb%2F>

In our opinion, it is unreasonable to conclude, as the Supreme Court majority's did, that granting of a stay one day before the Wisconsin primary election day would not create voter confusion and a further public health hazard during the state of a current stay at home order for all Wisconsinites.

Rather than grounding its decision on a pragmatic assessment of reasonable efforts by state election officials to ameliorate the tremendous risks to safety and health during the COVID-19 pandemic, the majority retreated to a favorite trick in election cases of important immediate concern, which is to say that the decision involves a "narrow, technical question." This is a repeat of the 2000 Supreme Court's avoidance of the right of Florida votes to have all the votes counted by saying the decision only applies to that case. This does a great disservice to our democracy which is grounded in respect for the fundamental right to vote and the rule of law.

Wisconsin has been correctly identified as the first test case in what the Republican and Democratic national parties expect to be a long, protracted fight over changing election laws and the rules governing the right to vote during the pandemic. One commentator sees the majority decision as heralding "potentially the biggest voting rights battle since the passage of the Voting Rights Act of 1965." Astead W. Herndon and Jim Rutenberg, *Wisconsin Election Fight Heralds a National Battle Over Virus-Era Voting* (New York Times, April 6, 2020), accessible online at <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-voting-coronavirus.html>. [Part of this fight by necessity involves the role of vote-by-mail to ensure full participation in elections.](#)

Many Democrats, including the Speaker of the House, are advocating for a universal vote-by-mail system in November, at least as it applies to federal offices. That movement has become stronger as the COVID-19 pandemic has increasingly forced jurisdictions throughout the nation to issue stay-at-home or shelter-in-place orders. At the opposite end of the political spectrum, Republicans, in several states and President Trump himself, have pushed for as much in-person voting as possible, a move consistent with efforts to tighten voting restrictions.

We can no longer afford to be driven by politics as usual. We must come together and work to ensure that our electoral process is unassailable. Voting serves as a cornerstone of our democracy and is a core component of the rule of law in a democratic society. We know that states and localities are tasked with an almost insurmountable challenge, to change long-established processes, in a matter of days, weeks, or even months, in order to ensure that elections are conducted in the safest manner possible, for both the public and those administering our electoral process. Our democracy is at its most successful when our citizens can participate freely and without fear. We understand that postponing an election is always the course of last resort and that any decision to

postpone an election is borne of a desire to ensure maximum participation and safety for all involved.

We must throw partisanship to the wind and truly consider all sides of any solution. As an example, though all mail voting could be a solution during this national pandemic, there must be an acknowledgement that, historically, vote by mail has not been practical for all segments of the population. Elections are not always a one-size fits all situation. We should always consider methods of voting, that will not serve to further disenfranchise our most vulnerable populations, such as individuals with disabilities or lower income minority communities. Most importantly, we must ensure that any changes to our electoral process afford ample opportunities for communication, through timely and comprehensive education drives, from all media platforms to inform all voters of any changes and the options that are available to them.

As noted in the above New York Times article, and in which we agree, it is becoming clearer by the day that the warning voiced by former Attorney General Eric Holder will have to be answered: "It's a test of our democracy. And the question is, 'Are we up to passing that test?'" Id.

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