

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 20-2911

COMMON CAUSE INDIANA and
INDIANA STATE CONFERENCE OF THE NAACP,

Plaintiffs/Appellees,

v.

CONNIE LAWSON, in her official capacity as
the Indiana Secretary of State, *et al.*,

Defendants/Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:20-cv-02007-SEB-TAB
The Honorable Sarah Evans Barker, Judge

MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

On September 29, 2020, the district court preliminarily enjoined Indiana's deadline for receiving mail-in absentee ballots, Ind. Code § 3-11.5-4-10. Ex. B. The State filed its notice of appeal on October 1, 2020, and the following day asked the district court to stay its injunction pending appeal, ECF 34. On October 6, 2020, the district court issued a stay "for one week to allow the Seventh Circuit to consider Defendants' appeal and determine whether an additional stay is warranted." Ex. C. The State now moves this Court to stay the preliminary injunction. *See* Fed. R. App. P. 8(a). Expedient resolution of this motion is necessary, as the current stay expires on October 13, 2020, and the Indiana Election Commission has called a meeting for October 19, 2020, to adopt rules, if necessary, to carry out the injunction.

INTRODUCTION

All deadlines “necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them.” *United States v. Locke*, 471 U.S. 84, 101 (1985). Yet deadlines “are often essential to accomplish necessary results.” *Prussner v. United States*, 896 F.2d 218, (7th Cir. 1990) (quoting *United States v. Boyle*, 469 U.S. 241, 249 (1985)). For the last 175 years, for example, the deadline for Americans to choose their President has been the first Tuesday after the first Monday in November. 5 Stat. 721 (1845) (codified as amended at 3 U.S.C. § 1).

This year that deadline falls on November 3, just three-and-a-half weeks from today. In Indiana, this means that *in-person* voters must either vote at their precinct polling place sometime between 6:00 a.m. to 6:00 p.m. on November 3, *see* Ind. Code § 3-11-8-8, or cast an in-person absentee ballot sometime during the 28 days ending on noon November 2, *see id.* §§ 3-11-4-1, 3-11-10-26. And Hoosiers who are eligible and choose to cast a *mail-in* ballot generally must ensure their ballots are received by noon on November 3, *see id.* § 3-11.5-4-10 (the State extends this deadline by ten days for the very small number of mail-in ballots from overseas voters, and then only if the ballots are postmarked by Election Day, *see id.* § 3-12-1-17).

The district court, however, concluded that Indiana’s ballot-receipt deadline is unconstitutional during the COVID-19 pandemic and issued a preliminary injunction extending that deadline ten days, to November 13, for *all* mail-in ballots postmarked by Election Day. This Court should stay that injunction. The district court’s answer to this precise constitutional question is foreclosed by multiple recent decisions of this

Court and other circuits, and its resolution of the remedial question contradicts the repeated admonition of both this Court and the Supreme Court—for both, as recently as this week—against making last-minute changes to election laws.

First, the district court applied the *Anderson/Burdick* test in a manner this Court has repeatedly rejected: It dismissed the notion that *Anderson/Burdick* “requires a plaintiff to show that the state's entire electoral system is too burdensome,” Ex. A 32, even though that is precisely what this Court has said the test requires, *see Luft v. Evers*, 963 F.3d 665, 671–72 (7th Cir. 2020) (“Judges must not evaluate each clause [of a state election code] in isolation,” but must weigh burdens imposed by a provision “against the state’s interests by looking at the whole electoral system.”); *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *6 (7th Cir. Oct. 6, 2020) (“[W]e cannot assess Indiana’s absentee voting provisions in isolation and instead must consider Indiana's electoral scheme as a whole.” (citing *Luft*, 963 F.3d at 671–72, 675)).

Indeed, in *Tully* this Court vetoed an *Anderson/Burdick* challenge to another aspect of Indiana’s mail-in voting law—the State’s refusal to authorize universal no-excuse mail-in voting, *see id.* § 3-11-10-24—because it rejected the theory that Indiana’s voting scheme “severely restricts the right to vote altogether.” *Id.* Neither Plaintiffs nor the district court attempted to show that Indiana’s voting rules are too burdensome on the whole; Plaintiffs’ *Anderson/Burdick* claim thus fails at the outset.

Furthermore, Indiana’s ballot-receipt deadline is reasonable even in isolation. As the Ninth Circuit recently observed, “[a]ll ballots must have *some* deadline,” and it is reasonable for a State “to make that deadline Election Day itself so as to promote

its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion.” *Ariz. Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020). For this reason, the Ninth and Eleventh Circuits have each recently stayed injunctions against similar ballot-receipt deadlines. *See id.*; *New Ga. Project v. Raffensperger*, 2020 WL 5877588 (11th Cir. 2020). A noon Election Day deadline is as reasonable as any other: It ensures that the vast majority of ballots cast are counted on Election Day, thereby promoting public confidence in elections by allowing most races to be called on Election Day, not days or weeks later.

Finally, the district court’s preliminary injunction runs afoul of the rule against “alter[ing] the election rules on the eve of an election,” for the election is *already* underway. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S.Ct. 1205, 1207 (2020) (per curiam). The State is thus likely to succeed on the merits, and a stay is therefore appropriate in light of the State’s—and the public’s—interest in administering the election according to Indiana’s longstanding rules. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (holding that preventing a State from running an election under a constitutional state law “would seriously and irreparably harm” the State).

Critically, “[w]ith the election only a few weeks away, the [Court’s] decision with respect to a stay will effectively decide the appeals on the merits.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5796311, at *1 (7th Cir. Sept. 29, 2020). The Court should resolve the confusion caused by the district court’s injunction and confirm that Indiana may enforce its ballot-receipt deadline as written.

STATEMENT OF FACTS

1. Election laws must inevitably strike a balance “between discouraging fraud and other abuses,’ on the one hand, and ‘encouraging turnout’ and voter safety, on the other.” *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *6 (7th Cir. Oct. 6, 2020) (quoting *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004)). Deciding how best to do so “is quintessentially a legislative judgment,” *id.* (quoting *Griffin*, 385 F.3d at 1131), and in exercising this judgment Indiana lawmakers have chosen to make in-person voting the predominant voting method in Indiana, *see id.* at *3 (observing that if mail-in voting “disappeared tomorrow, all Hoosiers could vote in person this November, or during Indiana’s twenty-eight-day early voting window, just the same”); Ind. Code §§ 3-11-8-2, 3-11-8-8 (authorizing all voters to vote in-person on Election Day); *id.* §§ 3-11-4-1, 3-11-10-26 (authorizing all voters to vote absentee in-person for the 28 days prior to Election Day). In addition, Indiana law provides thirteen separate circumstances under which Indiana residents may vote via mail-in absentee ballot, *see id.* § 3-11-10-24, and separately authorizes mail-in voting by voters who live overseas and voters who are absent from their places of residence by reason of active military duty, *see id.* § 3-11-4-5.7.

Indiana allows those eligible and inclined to vote absentee-by-mail to begin sending applications for General Election mail-in ballots on the first day after the Primary Election. *See* Ind. Code §§ 3-11-4-3(a), 3-11-4-6(b). And Indiana generally *requires* voters to submit applications for mail-in ballots by 11:59 p.m. on the twelfth day before the election (October 22, 2020); voters can do so online, by fax, by mail, by

hand delivery, or by emailing a photo of a completed application. *See id.* §§ 3-11-4-3(a), 3-11-4-6; Indiana Secretary of State, *Absentee Voting: Absentee Voting By Mail*, <https://www.in.gov/sos/elections/2402.htm>.

Indiana required county officials to begin *distributing* mail-in ballots by September 19, 2020: Ballots must be printed and delivered to each county “at least fifty (50) days before a general . . . election” (September 14, 2020), *see id.* § 3-11-4-15, and counties are then required to transmit ballots to eligible voters “on the day of the receipt of the voter’s application . . . [or] not more than five (5) days after the date of delivery of the ballots under section 15 . . . whichever is later,” *see id.* § 3-11-4-18(c)(2). Accordingly, on September 19 (five days after September 14) counties were required to begin sending a mail-in ballot to any eligible voter whose application they had already received; after that date they must send any eligible voter a mail-in ballot on the same day they receive the voter’s application.

Once a voter receives a mail-in ballot, the voter is responsible for ensuring the completed ballot arrives to the county election board by noon on Election Day, *see id.* §§ 3-11.5-4-3, 3-11.5-4-7, 3-11.5-4-10. Indiana makes it easy for voters to meet this deadline: The mail-in ballot includes prepaid postage to facilitate returning by mail, *see id.* § 3-11-4-18(a), and the voter—or a member of the voter’s household or the voter’s attorney—may instead return the ballot in-person to the county clerk or bring the ballot to the polls on Election Day, *see id.* §§ 3-11-10-1(a)(6), 3-11-10-24(c)–(d). A

mail-in voter can even track whether the county election board has received the ballot. *See* <https://indianavoters.in.gov>. And if a voter misses the ballot-receipt deadline, the voter can vote in-person on Election Day. *See id.* §§ 3-11.5-4-18, 3-11-10-31.

In light of common sense and federal-law requirements, *see, e.g.*, 52 U.S.C. § 20302, Indiana applies a slightly different set of rules to voters who live overseas and voters who are absent from their residence by reason of active military duty. *See* Ind. Code §§ 3-5-2-1.5, 3-5-2-34.5, 3-11-4-5.7, 3-11-4-6. Overseas and military voters can submit their mail-in ballots by mail, fax, or email. *See id.* § 3-11-4-6(h). If such a voter chooses to *mail* the ballot, the deadline by which it must be received turns on whether the voter is a *domestic* military voter or an *overseas* voter (whether military or civilian): Mail-in ballots from domestic military voters must meet the ordinary noon-on-Election-Day deadline, while mail-in ballots from overseas voters may be received any time before noon ten days after Election Day (November 13, 2020), so long as the ballot is postmarked on or before Election Day. *See id.* § 3-12-1-17. And if an overseas or military voter chooses to *fax or email* the ballot, it—like other mail-in absentee ballots—must be received by noon on Election Day. *See id.* § 3-11.5-4-10.

Beginning as early as 6:00 a.m. on Election Day, counters begin counting absentee ballots. ECF 24-2 ¶ 4(c). The counters evaluate ballots for compliance with state law, *see* Ind. Code §§ 3-11.5-4-13, 3-11.5-6-6, 3-11.5-8-1, and if they cannot agree whether to count a ballot, the county election board resolves the question, *see id.* § 3-11.5-6-7. The ballot counters and county election boards then tabulate the valid ballots and certify the results. *See id.* §§ 3-11.5-6-18, 3-11.5-6-19, 3-11.5-6-20, 3-11.5-8-

2, 3-11.5-8-3. Indiana requires an uninterrupted count of absentee ballots, which as a practical matter means all absentee ballots must be counted on Election Day. *See id.* §§ 3-11.5-5-5, 3-11.5-6-4. Meanwhile, precinct boards count in-person votes after the polls close and submit certified results to the county election board, which aggregates them with the totals from the absentee ballot count. ECF 24-2 ¶¶ 4(f), (g).

Most counties make the unofficial results—which include absentee votes—available to the public on the evening of Election Day. *Id.* ¶¶ 5–6. These unofficial results allow the “news media and other observers to identify election winners on the evening of Election Day” for the vast majority of races. *Id.* ¶ 7.

Indiana law provides an approximately two-week period to finalize the election results, which allows county election boards to double-check initial vote counts, resolve disputes, and process provisional ballots. *See* Ind. Code §§ 3-11-13-40, 3-11.7-5-1, 3-12-3.5-8, 3-12-4-16, 3-12-4-18. It also allows county election boards to process and count mail-in ballots from overseas voters, *see id.* § 3-12-1-17, which are processed and counted in the same manner as other mail-in ballots—they are opened, grouped together by precinct, checked for compliance with state law, and then counted and certified, *see id.* §§ 3-11.5-6-3, 3-11.5-6-5, 3-11.5-6-6, 3-11.5-6-18, 3-11.5-6-19.

Counties must transmit a final vote tally no later than noon on November 16, the second Monday following Election Day (one business day after the ten-day post-Election Day deadline for receipt of overseas ballots, which always falls on a Friday). *See id.* § 3-12-5-6. The Election Division then tabulates the votes, and the Secretary of State certifies the victors. *See* Ind. Code § 3-12-5-7.

2. Plaintiffs filed this lawsuit challenging Indiana’s ballot-receipt deadline on July 30, 2020, ECF 1, and filed their preliminary injunction motion on August 17, 2020, ECF 9. They argue that, at least during the COVID-19 pandemic, the Constitution requires Indiana to extend its ballot-receipt deadline by ten days. ECF 10 at 22–27. The district court agreed, and on September 29 it granted Plaintiffs’ motion. Ex. B. It concluded that, because of the pandemic, voters who wait to request or cast their mail-in ballots “face a significant likelihood that their ballots . . . will not be received . . . on or before the current deadline.” Ex. A 37. It further concluded that this burden outweighs the State’s interest in ensuring prompt election results and preventing election officials from being overwhelmed by late-arriving mail-in ballots. *Id.* at 40–42. It accordingly issued a preliminary injunction prohibits the State from “giving any effect to the noon Election Day receipt deadline for mail-in absentee ballots,” and ordering the Indiana Election Commission “to adopt rules, or emergency rules, requiring all county election boards . . . not to reject mail-in ballots postmarked on or before November 3, 2020 and received on or before November 13, 2020.” Ex. B.

Pursuant to 28 U.S.C. § 1292(a)(1), the State timely filed its notice of appeal on October 1, 2020. The following day, it asked the district court to stay its injunction pending appeal, ECF 34. On October 7, 2020, the district court did so “for one week to allow the Seventh Circuit to consider Defendants’ appeal and determine whether an additional stay is warranted.” Ex. C. The State now moves, under Federal Rule of Appellate Procedure 8, for this Court stay the district court’s preliminary injunction.

STANDARD OF REVIEW

Whether to stay an injunction pending appeal turns on “four factors”: (1) the likelihood the applicant will succeed on the merits of the appeal; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009). “The first two factors”—the applicant’s likelihood of success and irreparable injury—“are the most critical,” *id.* at 434, and once these two factors are satisfied the court considers “the harm to the opposing party and . . . the public interest”—factors that “merge when the Government is the opposing party,” *id.* at 435.

ARGUMENT

I. Multiple Precedents Foreclose Plaintiffs’ *Anderson/Burdick* Claim, Which Means the State Is Likely to Succeed on the Merits of Its Appeal and that a Stay of the Injunction Is Therefore Appropriate

Plaintiffs sought a preliminary injunction requiring Indiana to extend its ballot-receipt deadline on the ground that, in light of the COVID-19 pandemic, that ordinarily lawful deadline is now unconstitutional under the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). ECF 10 at 21–27. In granting the preliminary injunction, the district court misapplied *Anderson/Burdick* by refusing to consider Indiana’s election system *as a whole*—as this Court’s precedents expressly require—and failed even to show that, taken alone, the ballot-receipt deadline imposes an unreasonably severe burden on the right to vote. *See* Ex. A at 32–33, 37. The injunction accordingly should be stayed.

A. Plaintiffs' *Anderson/Burdick* claim fails because Indiana's election code as a whole imposes reasonable burdens on voting

Courts applying *Anderson/Burdick* “must not evaluate each [election law] clause in isolation.” *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). Instead, “[c]ourts weigh these burdens against the state’s interests by looking at the whole electoral system. Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules.” *Id.* at 671–72 (internal citations omitted). *Anderson/Burdick* is deferential to state legislative judgments: It does not “allow the judiciary to decide whether any given election law is necessary” on the theory that unnecessary laws are “by definition an excessive burden.” *Id.* at 671. This week, this Court reiterated that courts should consider the “electoral scheme as a whole” and not “assess Indiana’s absentee voting provisions in isolation.” *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325 at *6 (7th Cir. Oct. 6, 2020).

The district court, however, did exactly what this Court has forbidden: It said it did “not understand” this Court’s decisions to “require[] a plaintiff to show that the state’s entire electoral system is too burdensome,” Ex. A 32, and instead weighed its view of the deadline’s specific burdens against its view of the deadline’s specific benefits, *id.* at 33–42, and expressly refused to consider any part of Indiana’s electoral scheme that may require a voter to go outside. Ex. A at 34–35. Such fine-grained second-guessing of legislative decision-making is improper: “In isolation, any rule reducing” the number of opportunities to vote “seems like an unjustified burden. But electoral provisions cannot be assessed in isolation. . . . One less-convenient feature

does not an unconstitutional system make.” *Luft*, 963 F.3d at 675; *see also Tully*, 2020 WL 5905325 at *6.

In any case, this Court’s conclusion that “[t]aken together, the State’s voting scheme has a modest impact on Hoosiers in selecting their preferred manner of voting, but we cannot say it severely restricts the right to vote altogether,” *id.*, is sufficient to foreclose Plaintiffs’ *Anderson/Burdick* claim. Because this Court has determined that Indiana’s “election code *as a whole* impose[s] only reasonable burdens,” Plaintiffs’ claim fails. *Luft*, 963 F.3d at 671 (emphasis in original).

This Court’s *Tully* holding was proper. Indiana “allows for early in-person voting for twenty-eight days leading up to the election, one of the longer early-voting periods across all states.” *Tully*, 2020 WL 5905325 at *6 (citing Ind. Code § 3-11-10-26(f)). Indiana also authorizes counties to provide additional places to cast a ballot. *See id.* § 3-11-18.1-13. Indiana even enables online voter registration and provides assistance to voters with disabilities and those unable to understand English. *See id.* §§ 3-11-9-2; 3-7-26.7-5.

And if a voter is eligible and chooses to vote absentee-by-mail, Indiana offers multiple ways to ensure the ballot is timely received or, if not timely received, to vote in-person. Voters can request, receive, and return their ballots well in advance of the deadline, and can check whether their ballot have been received by visiting <https://indianavoters.in.gov/> or by calling the appropriate board. And if a voter is concerned about the ballot not arriving by the deadline, the voter may return the ballot in-per-

son to the county clerk, or bring the ballot to the appropriate polling location on Election Day and either cast it or simply vote in person. *See id.* §§ 3-11-10-1(a)(6), 3-11-10-31, 3-11.5-4-18, 3-11.5-4.13, 3-11.5-4-21. Alternatively, a member of the voter's household or the voter's attorney may return the ballot. *See id.* § 3-11-10-24(c)-(d).

The Constitution requires only that States provide voters a reasonable opportunity to cast a ballot. Because Indiana's voting system does so, it is constitutional.

B. Even in isolation, the Election Day Noon deadline is reasonable

Even if considered in isolation, the ballot-receipt deadline does not place a severe burden on Indiana voters. The Constitution applies only to burdens on the right to vote imposed by the State—not burdens imposed by the pandemic, by the United States Postal Service, or anyone else. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 n.6 (1969) (rejecting voting-rights claim because there was “nothing in the record to show that [the plaintiffs were] in fact absolutely prohibited from voting *by the State*” (emphasis added)); *Tully*, 2020 WL 5905325 at *1 (“[T]he court recognizes the difficulties that might accompany in-person voting during this time. But Indiana's absentee-voting laws are not to blame. It's the pandemic, not the State, that might affect Plaintiffs' determination to cast a ballot.”). Plaintiffs do not even try to demonstrate that Indiana's ballot-receipt deadline *itself* severely burdens anyone's right to vote, but argue only that it is too burdensome in light of the pandemic. They thus cannot establish that it is unconstitutional even in isolation.

Indiana must end the election at some point, which means some deadline for receiving ballots must exist. And for this reason, two of this Court's sister circuits

recently stayed preliminary injunctions—also purportedly justified by *Anderson/Burdick* and the pandemic—that similarly extended mail-in-ballot deadlines beyond Election Day. In *The New Georgia Project, et al. v. Raffensperger, et al.*, No. 20-13360, 2020 WL 5877588 at *2 (11th Cir. Oct. 2, 2020), the Eleventh Circuit held that Georgia’s “decades-old absentee ballot deadline [was] both reasonable and nondiscriminatory” and that Georgia’s “interests in maintaining that deadline (especially now that absentee voting has already begun) are at least ‘important’” and thus satisfy *Anderson/Burdick*. State interests include conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud. *Id.* at *3.

Similarly, in *Arizona Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488 (9th Cir. Oct. 6, 2020), the Ninth Circuit stayed a preliminary injunction that was considerably *less* expansive than the preliminary injunction at issue here: Rather than extend the ballot-receipt deadline by *ten days* for *all* mail-in ballots, there the district court extended Arizona’s Election-Day ballot-receipt deadline by just *five business days* and *only* for the purpose of curing otherwise-timely mail-in ballots that lacked the signature required by Arizona law. *Arizona Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5423898, at *14 (D. Ariz. Sept. 10, 2020). Nevertheless, the Ninth Circuit pointed out that “[a]ll ballots must have *some* deadline” and concluded that making that deadline Election Day is a “reasonable” way for the State “to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and count-

ing all of the votes in timely fashion.” *Hobbs*, 2020 WL 5903488 at *1. Requiring voters to comply with a clear Election-Day deadline is a “minimal” burden that does not outweigh the State’s weighty interest in enforcing its existing election laws. *Id.*

Indiana’s deadline serves the same interests the Eleventh and Ninth Circuits found compelling: It promotes public confidence in elections by ensuring unofficial results can be announced on Election Day, and it prevents county election boards from being overburdened with an onslaught of late-arriving ballots. *See* ECF 24 at 19–20, 24. Such deadlines are common: Thirty-one other States also refuse to count mail-in ballots that arrive after Election Day. *Id.* at 20–21. Indiana’s requirement that ballots be received by *noon* on Election Day is reasonable as well, for it accords with the State’s general approach to election deadlines, often set at noon the relevant day. *Id.* at 20 n.2.

Nor, contrary to the district court, Ex. A 39–40, is Indiana’s Election-Day deadline undermined by its minor exception for mail-in ballots returned by overseas voters. Ind. Code § 3-12-1-17. As a practical matter, Indiana election officials cannot print and deliver absentee ballots any earlier than mid-September, *see* ECF 24 at 7, and the limited 10-day exception for overseas voters accommodates the often-lengthy time foreign postal services take to deliver mail to the United States, consistent with the special protections federal law provides to military and overseas voters. *See, e.g.*, 52 U.S.C. § 20302(f); *id.* § 20304(b)(1). Federal law seeks to ensure that “overseas voters [have] sufficient time to vote.” *See* 52 U.S.C. § 20302(g)(1)(D)(ii). The State’s limited rule for overseas voters furthers this goal.

The district court also overstated the significance of this exception. In recent Indiana elections, overseas voters consistently accounted for a small fraction of all *mail-in* absentee ballots—much less *all* absentee ballots. *See* ECF 24 at 22–23. Allowing an extra ten days for this small number of ballots to arrive accommodates the special difficulties these voters might face without undermining Indiana’s general interest in promoting public confidence in elections. Perhaps for this reason, of the thirty-one other States that have Election Day deadlines for ballots, ten also have extended deadlines for military and overseas ballots. *Id.* at 24 n.4.

On the other hand, the district court’s order requiring counties to count *all* mail-in ballots if they are postmarked by Election Day and arrive by November 13 will run substantial risks of undermining the public’s confidence in election results and overburdening election officials. Indiana’s deadlines are a reasonable way to an array of competing interests in promoting participation, deterring and detecting fraud, and achieving finality at the earliest reasonable opportunity in the vast majority of races—interests this Court, the Ninth Circuit, and the Eleventh Circuit have recognized as reasonable. The State is thus likely to prevail in this appeal, and this Court should therefore stay the preliminary injunction.

II. The Supreme Court’s Repeated Admonitions Against Changing Election Rules on the Eve of Elections Establishes Both that the State Is Likely to Succeed on the Merits of Its Appeal and that the Public Interest Favors Staying the Preliminary Injunction

Finally, Plaintiffs would not be entitled to a preliminary injunction even if the Court were to conclude that Plaintiffs have somehow managed to show a reasonable likelihood of success on the merits. Courts considering whether to order last-minute

changes to election laws are “required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Injunctions altering elections rules implicate special concerns because “[c]ourt 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.” *Id.* at 4–5.

Accordingly, the Supreme Court “has repeatedly emphasized that lower federal courts should *ordinarily not alter the election rules on the eve of an election*.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S.Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct 9 (2014)) (emphasis added); *see also Jones v. Secretary of State*, No. 20A57 (U.S. Oct. 6, 2020), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a57.html> (Breyer, J., in chambers) (denying application for injunctive relief that asserted, in part, that the lower court erred in applying *Purcell* in denying stay); Ex. D, *Andino v. Middleton*, No. 20A55 (U.S. Oct 5, 2020) (Kavanaugh, J., concurring) (explaining that the Court stay an injunction against enforcement of a South Carolina election law because the Court “has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election”).

This Court has frequently underscored this point as well, recently reiterating that “federal courts should refrain from changing state election rules as an election

approaches.” *Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 at *4 (7th Cir. Sept. 3, 2020); *see also Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *7 (7th Cir. Oct. 6, 2020) (“Given that voting is already underway in Indiana, we have crossed *Purcell*’s warning threshold and are wary of turning the State in a new direction at this late stage.”).

Here, the district court disregarded these admonitions on the ground that “the primary concern addressed in *Purcell*, namely, that altering election rules . . . can create voter confusion and lead to decreased turnout at the polls (or, in this case, a disincentive to vote by absentee ballot), is not implicated.” Ex. A 47. There can be no doubt, however, that the district court’s election-eve order threatens to cause voter confusion. The order may instill in some voters a false sense of security about their ballot being counted. And if is counted pursuant to the district court’s injunction but is *not* otherwise valid—for example, if it is missing a signature on the outside envelope—the voters will not have the opportunity to cancel their absentee ballots and vote in person (whereas defective absentee ballots received before Election Day may be cured by the voter on Election Day). *See* Ind. Code § 3-11.5-4-13.

In addition, voters in Indiana are used to hearing unofficial election results on Election Day and generally have confidence in the finality of those results. With an unprecedented number of voters expected to vote absentee by mail in the general election, the district court’s injunction makes it more likely that many races will not be resolved on Election Day, leading to voter confusion and undermining the public’s faith in the electoral process.

Furthermore, the district court's injunction requires the Indiana Election Commission not merely to refrain from enforcing a state law, but to take the *affirmative act* of adopting new rules to carry out the district court's order. Ex. B. Such commandeering of the state lawmaking process contravenes constitutional limits on federal courts' authority. *See, e.g., Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *14 (11th Cir. Sept. 3, 2020) (noting that "an injunction ordering [a state official] to promulgate a rule requiring [county officials] to place candidates on the ballot in an order contrary to the ballot statute . . . would have raised serious federalism concerns, and it is doubtful that a federal court would have authority to order it"); *see also Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (explaining that the *Ex parte Young* exception to sovereign immunity "is limited to [the] precise situation" in which "a federal court commands a state official to do nothing more than refrain from violating federal law").

The district court's injunction is a solution in search of a problem. Mail-in voting is the exception in Indiana, not the rule. And "Indiana has exercised its judgment and taken steps to lighten COVID-19's burden on voters by, for example, allowing Hoosiers to vote early and implementing safety guidelines and procuring protective equipment for election day." *Tully*, 2020 WL 5905325 at *7; *see also* ECF 24-1 ¶¶ 8–9. The injunction upends long-established rules on the eve of an election, confusing voters and placing a significant strain on the system. Such results undermine, not

further, the public interest. And they clearly violate the *Purcell* principle. Accordingly, this Court should stay the injunction and allow the State to administer the election according to its longstanding rules.

CONCLUSION

For the foregoing reasons, this Court should stay the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 5,160 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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