

Election Modifications in Wisconsin Because of a Pandemic

Democratic National Committee v. Bostelmann
(3:20-cv-249), *Gear v. Knudson* (3:20-cv-278), and *Lewis*
v. Knudson (3:20-cv-284) (William M. Conley, W.D. Wis.)
and *City of Green Bay v. Bostelmann* (William C. Griesbach,
1:20-cv-479) and *Taylor v. Milwaukee Election Commission*
(Pamela Pepper, 2:20-cv-545) (E.D. Wis.)

In light of a global infectious pandemic, federal litigation to modify election procedures for the April 2020 election in Wisconsin, which included a presidential primary election, began about three weeks before the election. Shortly after a complaint was filed, and again a few days before the election, a federal judge in the Western District of Wisconsin ordered some modifications to enable absentee voting by mail. The judge declined to order a delay in the election. The court of appeals reversed the district judge's modification to absentee-voter witness-certification requirements, and the Supreme Court reversed the district judge's extension of time to mail absentee ballots after election day. Suits in the Eastern District were unsuccessful. For the general election in November, the Western District judge again ordered modifications, but the court of appeals stayed the injunction. After the election, the court of appeals vacated the injunction.

Subject: Absentee and early voting. *Topics:* Covid-19; registration procedures; absentee ballots; enjoining elections; interlocutory appeal; voter identification; intervention; primary election; voting technology; attorney fees; case assignment; class action.

Federal courts gave Wisconsin voters limited relief to accommodate the Covid-19 pandemic in April 2020 voting.

Western District of Wisconsin

Twenty days before an April 7, 2020, election in Wisconsin that included a presidential primary election, at a time when the coronavirus that causes Covid-19 was in the first few months of a global infectious pandemic, the Democratic Party sought from the U.S. District Court for the Western District of Wisconsin injunctive relief that would make it easier to vote by mail.¹

1. Complaint, *Democratic Nat'l Comm. v. Bostelmann*, No. 3:20-cv-249 (W.D. Wis. Mar. 18, 2020), D.E. 1 (identifying the plaintiffs as the Democratic National Committee and the Democratic Party of Wisconsin); *Democratic Nat'l Comm. v. Bostelmann*, 466 F. Supp. 3d 957, 961 (W.D. Wis. 2020); *Democratic Nat'l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 761 (W.D. Wis. 2020); see Nick Corasaniti & Stephanie Saul, *Democrats Sue Wisconsin Over Early Voting*, N.Y. Times, Mar. 19, 2020, at A23. See generally *As Other States Look On, Wisconsin Plows Ahead with Troubled Election*, Milwaukee J. Sentinel, Apr. 4, 2020, at A8 (re-

With its complaint, the party filed a motion for a temporary restraining order and a preliminary injunction.²

On the following day, an attorney writing on behalf of the state’s legislature asked District Judge William M. Conley to delay ruling on the party’s motion until the legislature could intervene and oppose “changing election laws in the middle of an ongoing election.”³

Judge Conley heard arguments at a telephonic status conference on the case’s second day.⁴ He allowed the legislature to participate, and he ordered a response to the Democratic Party’s injunction motion.⁵ Members of the news media were invited to listen, and they were told that they were forbidden to record the proceeding.⁶

On the case’s third day, the Republican Party asked Judge Conley to delay any decision until the party could be heard,⁷ and the party filed a motion to intervene two days later.⁸

The case’s third day was March 20, and on that day, Judge Conley extended the deadline for online voter registration from March 18 to March 30.⁹ He declined to grant a similar extension for registration by mail, because of the lag in receipt of mail-in registrations by election officials.¹⁰

He decided to not yet rule on a request to extend the deadline for receipt of absentee ballots from the closing of the polls to a later time: “the court will not speculate about the need for this relief on the limited record before it.”¹¹ Nor did he provide relief from voter-identification requirements, although “obtaining [identification] documents may require individuals to venture out into the public,” because of the recognized state interest with respect to voter identification.¹²

On March 26, the Democratic Party filed an amended complaint seeking an extension until April 3 for registration by mail, suspension of identifica-

porting that Wisconsin was “holding not just a presidential primary but general election contests for state Supreme Court and hundreds of local offices, including mayor of Milwaukee”).

2. Motion, *Democratic Nat’l Comm.*, No. 3:20-cv-249 (W.D. Wis. Mar. 18, 2020), D.E. 2.

3. Letter, *id.* (Mar. 19, 2020), D.E. 8; *see* Intervention Motion, *id.* (Mar. 20, 2020), D.E. 20.

4. Transcript, *id.* (Mar. 19, 2020, filed Mar. 25, 2020), D.E. 47 [hereinafter Mar. 19, 2020, *Democratic Nat’l Comm.* Transcript]; Docket Sheet, *id.* (Mar. 18, 2020) [hereinafter *Democratic Nat’l Comm.* Docket Sheet].

Tim Reagan interviewed Judge Conley for this report by telephone on November 18, 2020.

5. *Democratic Nat’l Comm.*, 447 F. Supp. 3d at 761.

6. Mar. 19, 2020, *Democratic Nat’l Comm.* Transcript, *supra* note 4, at 3–4.

7. Letter, *Democratic Nat’l Comm.*, No. 3:20-cv-249 (W.D. Wis. Mar. 20, 2020), D.E. 34.

8. Intervention Motion, *id.* (Mar. 22, 2020), D.E. 41; *see also* Elise Viebeck, Amy Gardner & Michael Sherer, *GOP Fights Efforts to Ease Voting During Pandemic*, Wash. Post, Apr. 5, 2020, at A2.

9. *Democratic Nat’l Comm.*, 447 F. Supp. 3d 761.

10. *Id.* at 767.

11. *Id.* at 769.

12. *Id.* at 768; *see* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

tion requirements for voter registration and absentee-ballot applications, an extension of the deadline for receipt of cast absentee ballots to a postmark by election day rather than receipt by election day, and an injunction against a witness requirement for absentee ballots.¹³ Two other groups of plaintiffs filed related complaints:¹⁴ (1) plaintiffs advocating for voter participation, including among retired veterans, seeking an injunction against the witness requirement,¹⁵ and (2) plaintiffs advocating for minority voting rights seeking similar relief and a delay in the election.¹⁶

On March 28, Judge Conley granted intervention to the Republican Party, but denied it to the legislature, nevertheless permitting the legislature and other interested nonparties to participate as amici.¹⁷ He also consolidated the three cases.¹⁸

Three days later, he set a videoconference for later that day to test the technology, which had rapidly become widely used because of the pandemic.¹⁹ An evidentiary hearing was held on April 1.²⁰ The hearing was held by videoconference even more to accommodate the attorneys and witnesses on short notice than to accommodate Covid-19.²¹

On April 2, Judge Conley extended the deadline for receipt of absentee-ballot requests by mail, fax, or email to April 3; extended the deadline for receipt of cast absentee ballots to April 13; and allowed absentee voters to substitute for witness certifications a statement that they were unable to safely obtain one.²² Judge Conley declined to delay the election for insufficient clarity that that was an appropriate remedy.²³

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. . . . [S]tate election officials are confronting

13. Amended Complaint, *Democratic Nat'l Comm.*, No. 3:20-cv-249 (W.D. Wis. Mar. 26, 2020), D.E. 55; see Preliminary-Injunction Motion, *id.* (Mar. 27, 2020), D.E. 61.

14. See Haley BeMiller & Patrick Marley, *Judge Promises Quick Ruling on Suit That Seeks to Stall Election*, Milwaukee J. Sentinel, Mar. 27, 2020, at A4.

15. Complaint, *Gear v. Knudson*, No. 3:20-cv-278 (W.D. Wis. Mar. 26, 2020), D.E. 1 (“Disenfranchising mail-in absentee voters because they are self-quarantining . . . cannot be justified . . .”); see Motion, *id.* (Mar. 28, 2020), D.E. 8.

16. Complaint, *Lewis v. Knudson*, No. 3:20-cv-284 (W.D. Wis. Mar. 26, 2020), D.E. 1; see Motion, *id.* (Mar. 28, 2020), D.E. 17.

17. Opinion, *id.* (Mar. 28, 2020), D.E. 85, 2020 WL 1505640.

18. Order, *id.* (Mar. 28, 2020), D.E. 86.

19. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 4 (D.E. 116).

20. *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 958 (W.D. Wis. 2020).

21. Interview with Hon. William M. Conley, Nov. 19, 2020.

22. *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 959; *Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 787 (W.D. Wis. 2020); see Emily Bazelon, *Can Democracy Survive the Pandemic?*, N.Y. Times Magazine, May 10, 2020, at 26, 28; Amy Gardner, *Federal Judge Declines to Delay Wis. Primaries, Set for Tuesday*, Wash. Post, Apr. 3, 2020, at A2; Patrick Marley, *Judge Rips Officials for Not Stalling Election*, Milwaukee J. Sentinel, Apr. 2, 2020, at A10; Stephen Vladeck, *The Shadow Docket* 210 (2023).

23. *Democratic Nat'l Comm.*, 451 F. Supp. 3d at 970–75.

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.

...

However unlikely [an outcome of a successful election without dissemination of Covid-19] may be, or ill-advised in terms of the public health risks and the likelihood of a successful election, 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. That is what the court attempts to do in this opinion and the order below, understanding that a consequence of these measures may be to further the public health crisis in this State. Unfortunately, that is beyond the power of this court to control.²⁴

Judge Conley clarified his injunction on April 3 to forbid the reporting of election results until April 13.²⁵

Also on April 3, the court of appeals stayed Judge Conley's order on witness certification, leaving accommodation of witness issues to election officials.²⁶ And the court of appeals determined that the legislature should be permitted to intervene.²⁷ The court of appeals declined to stay other parts of Judge Conley's injunction pending appeal.²⁸ Judge Conley decided to regard the legislature as an intervening party as of the time of the appellate court's ruling.²⁹

On the evening before the April 7 election, the Supreme Court, over the dissent of four justices, stayed Judge Conley's order requiring Wisconsin to count ballots postmarked after election day.³⁰

Importantly, in their preliminary injunction motions, the plaintiffs did not ask that the District Court allow ballots mailed and postmarked after election day, April 7, to be counted. That is a critical point in the case. Nonetheless, five days before the scheduled election, the District Court unilaterally

24. *Id.* at 957–58.

25. Order, *Democratic Nat'l Comm. v. Bostelmann*, No. 3:20-cv-249 (W.D. Wis. Apr. 3, 2020), D.E. 179.

26. Stay Order, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1539 (7th Cir. Apr. 3, 2020), D.E. 30 [hereinafter Apr. 3, 2020, *Democratic Nat'l Comm. Stay Order*], 2020 WL 3619499.

On May 14, 2020, the court of appeals dismissed appeals filed in April as moot. Dismissal Order, *id.* (May 14, 2020), D.E. 43.

27. Apr. 3, 2020, *Democratic Nat'l Comm. Stay Order*, *supra* note 26.

28. *Id.*; *Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 788 (W.D. Wis. 2020).

29. *Democratic Nat'l Comm.* Docket Sheet, *supra* note 4 (D.E. 191).

30. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___, 140 S. Ct. 1205 (2020); *Democratic Nat'l Comm.*, 488 F. Supp. 3d at 788; see Bazelon, *supra* note 22, at 28; Steve Coll, Comment, *Pandemic Politics*, *New Yorker*, May 4, 2020, at 11; Adam Liptak, *Supreme Court Blocks Extended Voting*, *N.Y. Times*, Apr. 7, 2020, at A21; Vladeck, *supra* note 22, at 210–11.

ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13. Extending 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.³¹

Meanwhile, on the day before the election, the governor issued an executive order delaying it, but that order was vacated by the state's supreme court.³²

As Judge Conley determined later,

All told, absentee ballots represented 73.8% of all ballots counted. Approximately 61.8% of absentee ballots were mailed in, while the remaining 12% were cast in-person absentee or hand-delivered, meaning only roughly 26.2% were cast on election day. Absentee votes never comprised more [than] 20% of all ballots in recent past elections, and often, they represented less than 10% of ballots cast.³³

The *New York Times* reported problems with in-person voting:

Even before voting began, there were lines outside polling locations that stretched for several blocks. Some poll workers wore hazmat suits. Nearly every voter wore a face mask, removing it only to make small talk that reflected a combination of determination and grim humor about the extraordinary experience of voting amid a deadly pandemic.

...

In Milwaukee—where the number of polling stations was reduced from 180 to only five—voters tried to exercise proper social distancing as they waited, in some cases, for more than two hours. But in other areas of the state, including Madison, suburbs like Brookfield, and more rural areas like Beloit, the voting process was altered but not totally disrupted, with options that included curbside ballot access and poll locations that were more fully staffed.³⁴

On June 10, Judge Conley granted the plaintiffs permission to file an amended complaint.³⁵

31. *Republican Nat'l Comm.*, 589 U.S. at ___, 140 S. Ct. at 1206–07.

32. See Molly Beck & Patrick Marley, *Wisconsin Supreme Court Reinstates Tuesday Voting*, Milwaukee J. Sentinel, Apr. 7, 2020, at A6; Amy Gardner, Elise Viebeck & Dan Simmons, *In Wis., Election Whiplash Sows Confusion*, Wash. Post, Apr. 7, 2020, at A1; Astead W. Herndon & Jim Rutenberg, *In Wisconsin, a Voting Fight for a Virus Era*, N.Y. Times, Apr. 7, 2020, at A1.

33. *Democratic Nat'l Comm.*, 488 F. Supp. 3d at 790.

34. Astead W. Herndon & Alexander Burns, *In Wisconsin, Sense of Strain Shadows Vote*, N.Y. Times, Apr. 8, 2020, at A1; see also Nick Corasaniti & Stephanie Saul, *Wisconsin's Mail-in Mess Grows, with Thousands of Ballots Missing or Voided*, N.Y. Times, Apr. 10, 2020, at A25; Bill Glauber, Molly Beck & Mary Spicuzza, *An Election Day Unlike Any Other*, Milwaukee J. Sentinel, Apr. 8, 2020, at A5; John McCormick & Alexa Corse, *Wisconsin Signals Risk in November*, Wall St. J., Apr. 8, 2020, at A3; Elise Viebeck, Amy Gardner, Dan Simons & Jan M. Larson, *Anger and Fear as Wisconsin Votes*, Wash. Post, Apr. 8, 2020, at A1.

35. *Democratic Nat'l Comm. v. Bostelmann*, 466 F. Supp. 3d 957 (W.D. Wis. 2020).

Eastern District of Wisconsin

A federal complaint filed by Green Bay on Tuesday, March 24, in the Eastern District sought suspension of the April 7 election and various injunctive provisions protecting its city workers and poll workers from Covid-19 risks.³⁶ With its complaint, the city filed a motion for a temporary restraining order and a preliminary injunction.³⁷

Judge William C. Griesbach set a telephone conference for Thursday afternoon, encouraging settlement in the interim because even if the city was determined to not have standing to bring the suit others might.³⁸ The state legislature, the Republican Party, and the Wisconsin Counties Association requested permission to participate in the conference as possible intervenors.³⁹ At the conference, Judge Griesbach ordered briefing by 3:00 p.m. on Friday and expected a ruling by Monday.⁴⁰ After the conference, the City of Neenah sought intervention as a plaintiff.⁴¹

On Monday, March 27, Judge Griesbach dismissed the action for lack of jurisdiction: a political subdivision of the state cannot sue the state for equal protection.⁴² Judge Griesbach denied the intervention motions as moot.⁴³

An April 3 action required somewhat less court attention. Two candidates and an organization filed a federal complaint in the Eastern District's Milwaukee courthouse against Milwaukee and Wisconsin election officials alleging that encouraging online requests for absentee ballots disadvantaged voters without internet access.⁴⁴ Among the requested relief was a temporary restraining order and a preliminary injunction delaying the April 7 election to September.⁴⁵

Adjudging the plaintiffs' filing "a procedural muddle" at about 2:00 p.m. on Sunday, April 5, Judge Pamela Pepper denied the plaintiffs immediate injunctive relief and offered to reconsider the motion if the defendants were served by 10:30 a.m. on Monday.⁴⁶

36. Complaint, *City of Green Bay v. Bostelmann*, No. 1:20-cv-479 (E.D. Wis. Mar. 24, 2020), D.E. 1; *see* Amended Complaint, *id.* (Mar. 26, 2020), D.E. 26.

37. Motion, *id.* (Mar. 24, 2020), D.E. 2.

38. Order, *id.* (Mar. 25, 2020), D.E. 7; Notice, *id.* (Mar. 25, 2020), D.E. 8.

39. Letters, *id.* (Mar. 25, 2020), D.E. 13, 16, 19; *see* Intervention Motion, *id.* (Mar. 27, 2020), D.E. 41 (Wisconsin Legislature); Intervention Motion, *id.* (Mar. 27, 2020), D.E. 36 (Washington County and the Wisconsin Counties Association); Intervention Motion, *id.* (Mar. 26, 2020), D.E. 24 (Republican Party).

40. Minutes, *id.* (Mar. 26, 2020), D.E. 40.

41. Intervention Motion, *id.* (Mar. 27, 2020), D.E. 52.

42. Opinion, *id.* (Mar. 27, 2020), D.E. 53, 2020 WL 1492975.

43. *Id.* at 3.

44. Complaint, *Taylor v. Milwaukee Election Comm'n*, No. 2:20-cv-545 (E.D. Wis. Apr. 3, 2020), D.E. 1 [hereinafter *Taylor* Complaint]; *Taylor v. Milwaukee Election Comm'n*, 452 F. Supp. 3d 818, 819 (E.D. Wis. 2020).

45. *Taylor* Complaint, *supra* note 44, at 25, D.E. 1-15; *Taylor*, 452 F. Supp. 3d at 819-20, 827.

46. Opinion, *Taylor*, No. 2:20-cv-545 (E.D. Wis. Apr. 5, 2020), D.E. 4, 2020 WL 1676481; *Taylor*, 452 F. Supp. 3d at 820.

On April 6, the day before the election, Judge Pepper declined to order a postponement of the election, mindful of the Supreme Court’s and Judge Conley’s earlier decisions.⁴⁷

Despite all this, it appears that tomorrow morning, those who have not yet voted will face a grim choice: go to the polling places (the ones that are open) and risk being exposed to the virus or spreading it to their friends and neighbors, or forego one of the most sacred rights of citizenship—the right to have a say in the governance of their communities, the state and their nation.⁴⁸

Later, Judge Pepper granted the legislature’s April 6 motion to intervene.⁴⁹

Additional Cases

In April and May, the district court assigned to Judge Conley two additional cases as related to the first three: a class action to redo the April 7 election and establish better mail-in voting procedures for the upcoming elections in 2020⁵⁰ and an action to improve social distancing for in-person voting during upcoming elections.⁵¹

The General Election

Judge Conley issued an injunction on September 21 to cover the general election.⁵²

1. He extended the deadline for electronic and mail-in voter registration from three Wednesdays before the election to two.⁵³ “Cutting off electronic and mail-in registrations three weeks before the election will not just thwart efforts to encourage Wisconsin voters to vote by mail via absentee ballots, but increase the burdens and risks on those choosing to vote in person.”⁵⁴ Judge Conley relied on election-official testimony that the one-week exten-

47. *Taylor*, 452 F. Supp. 3d 818.

48. *Id.* at 830.

49. Order, *Taylor*, No. 2:20-cv-545 (E.D. Wis. May 12, 2020), D.E. 28; Intervention Motion, *id.* (Apr. 6, 2020), D.E. 16.

50. Complaint, *Edwards v. Vos*, No. 3:20-cv-340 (W.D. Wis. Apr. 13, 2020), D.E. 1; Docket Sheet, *id.* (Apr. 13, 2020); Amended Complaint, *id.* (May 4, 2020), D.E. 5; see Chris Rickert, *Some Voters Want a Do-Over*, Wis. State J., Apr. 14, 2020, at A1.

51. Complaint, *Swenson v. Bostelmann*, No. 3:20-cv-459 (W.D. Wis. May 18, 2020), D.E. 1; Docket Sheet, *id.* (May 18, 2020); see Patrick Marley, *Suit Seeks Ballot Requests Sent to All*, Milwaukee J. Sentinel, May 19, 2020, at A6.

52. *Democratic Nat’l Comm. v. Bostelmann*, 488 F. Supp. 3d 776 (W.D. Wis. 2020); see Alexa Corse, *Wisconsin Voters Get Mail-In Extension*, Wall St. J., Sept. 22, 2020, at A6; Patrick Marley, *What to Know About the Ruling Extending Election Deadlines*, Milwaukee J. Sentinel, Sept. 23, 2020, at A4.

53. *Democratic Nat’l Comm.*, 488 F. Supp. 3d at 784, 801–03.

54. *Id.* at 802; see *id.* at 803 (“discontinuing electronic and mail registration options precipitously on October 14 will likely restrict many Wisconsin citizens’ freedom to exercise their right to vote”).

sion would provide election officials with enough time to prepare poll books.⁵⁵

2. Election officials would count absentee ballots received by November 9 if mailed and postmarked by election day, November 3.⁵⁶

Regardless of cause, plaintiffs have established significant problems with fulfilling absentee ballot requests timely, and even greater problems in getting them back in time to be counted. Indeed, those problems would have resulted in the disenfranchisement of some 80,000 voters during the April election but for this court's entry of a preliminary injunction, and there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election.⁵⁷

3. Judge Conley authorized electronic absentee voting under certain circumstances, similar to what was permitted for overseas and military voters.⁵⁸

4. Poll workers did not have to be voters within the county.⁵⁹ “At minimum, eliminating the residence requirement would provide greater flexibility across the state to meet unanticipated last-minute demands for staffing due to COVID-19 outbreaks or fear.”⁶⁰

Judge Conley stayed his injunction for one week to permit appellate review.⁶¹ The court of appeals stayed the injunction six days later.⁶² But the court of appeals vacated its stay on September 29.⁶³

The three intervening defendants have appealed and asked us to issue a stay; the executive-branch defendants have not appealed. . . .

. . . [N]one of the three appellants has a legal interest in the outcome of this litigation.

This conclusion is straightforward with respect to the Republican National Committee and the Republican Party of Wisconsin. The district court did not order them to do something or forbid them from doing anything. Whether the deadline for online registration (for example) is October 14 or October 21 does not affect any legal interest of either organization. Neither group contends that the new deadlines established by the district court would violate the constitutional rights of any of their members. The political organizations themselves do not suffer any injury caused by the judgment. . . .

That leaves the legislature. . . . The interest at stake here, however, is not the power to legislate but the validity of rules established by legislation. All

55. *Id.* at 803.

56. *Id.* at 784, 806–08.

57. *Id.* at 807.

58. *Id.* at 784, 809–10.

59. *Id.* at 784, 812–13.

60. *Id.* at 812.

61. *Id.* at 784, 818.

62. Order, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 20-2844 (7th Cir. Sept. 27, 2020), D.E. 38; Order, Wis. State Legislature v. Bostelmann, No. 20-2835 (7th Cir. Sept. 27, 2020), D.E. 49.

63. Democratic Nat'l Comm. v. Bostelmann, 976 F.3d 764 (7th Cir. 2020); see Scott Bauer, *Judges Uphold State's Absentee Ballot Extension*, Wis. State J., Sept. 30, 2020, at A1.

of the legislators' votes were counted; all of the statutes they passed appear in the state's code.⁶⁴

On the following day, the legislature asked the court of appeals to certify to Wisconsin's supreme court the question of whether the legislature had standing under Wisconsin law to appeal an injunction blocking state law.⁶⁵ The court of appeals certified the question on October 2, and Wisconsin's supreme court answered on October 6.⁶⁶ By a vote of four to three, Wisconsin's court decided that its legislature could intervene to defend a state statute.⁶⁷

By a vote of two to one, the court of appeals stayed Judge Conley's injunction on October 8.⁶⁸ The court of appeals agreed with the legislature that "a federal court should not change the rules so close to an election," and "political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid."⁶⁹ "Voters 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."⁷⁰ The Supreme Court declined three requests to vacate the stay.⁷¹

On December 1, after the election, the court of appeals vacated Judge Conley's injunction and remanded the case for a mootness determination.⁷² Voluntary dismissals in the district court followed.⁷³

64. *Democratic Nat'l Comm.*, 976 F.3d at 766–67.

65. Motion, *Democratic Nat'l Comm.*, No. 20-2835 (7th Cir. Sept. 30, 2020), D.E. 52.

66. Answer to Certified Question, *id.* (Oct. 6, 2020), D.E. 69; Certification, *id.* (Oct. 2, 2020); see Patrick Marley, *High Court to Clarify Ruling Affecting Ballot Cases*, Milwaukee J. Sentinel, Oct. 3, 2020, at A4.

67. *Democratic Nat'l Comm. v. Bostelmann*, 394 Wis. 2d 33, 949 N.W.2d 423 (Wis. 2020); see *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020).

The court of appeals dismissed an appeal by the Republican Party, finding that it did not have standing to appeal an injunction that did not require it to do anything. Order, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2844 (7th Cir. Oct. 13, 2020), D.E. 68.

68. *Democratic Nat'l Comm.*, 977 F.3d 639; see Brent Kendall & Alexa Corse, *Court Rejects Longer Wisconsin Mail-In Vote*, Wall St. J., Oct. 9, 2020, at A4.

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

70. *Id.* at 642.

71. *Democratic Nat'l Comm. v. Wis. State Legislature*, 592 U.S. ___, 141 S. Ct. 28 (2020); *Gear v. WI State Legislature*, 592 U.S. ___, 141 S. Ct. 644 (2020); *Swenson v. WI State Legislature*, 592 U.S. ___, 141 S. Ct. 644 (2020); see Robert Barnes, *Justices Block Extension of Vote-Counting in Wisconsin*, Wash. Post, Oct. 27, 2020, at A1; Brent Kendall & Jess Bravin, *Justices Reject Pandemic-Tied Voting Changes in Wisconsin*, Wall St. J., Oct. 27, 2020, at A3; Adam Liptak, *Justices Deny Extension of Deadline in Wisconsin*, N.Y. Times, Oct. 27, 2020, at A23; Vladeck, *supra* note 22, at 215.

72. Order, *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835 (7th Cir. Dec. 1, 2020), D.E. 86.

73. Stipulated Dismissal, *Democratic Nat'l Comm. v. Bostelmann*, No. 3:20-cv-249 (Jan. 19, 2021), D.E. 560; Stipulated Dismissal, *Edwards v. Vos*, No. 3:20-cv-340 (Jan. 15, 2021), D.E. 359; Stipulated Dismissal, *Gear v. Knudson*, No. 3:20-cv-278 (Jan. 8, 2021), D.E. 491; Stipulated Dismissal, *Swenson v. Bostelmann*, No. 3:20-cv-459 (W.D. Wis. Dec. 22, 2020), D.E. 380.

Judge Conley denied an award of attorney fees to plaintiffs in the case primarily advocating for minority voting rights—which had not been voluntarily dismissed—on May 12, 2022.⁷⁴ “[T]he six-day extension of the ballot receipt deadline might have entitled [them] to attorney’s fees if they had been the primary party to achieve this victory,” but “they were largely along for the ride while the [Democratic Party and its] attorneys were in the driver’s seat.”⁷⁵

Case Management

For Judge Conley, the key to managing litigation with lots of moving parts and a tight time frame was managing expectations.⁷⁶ Employing active case management, Judge Conley focused the parties on what he needed to know to rule.⁷⁷

74. Opinion, *Lewis v. Bostelmann*, No. 3:20-cv-284 (W.D. Wis. May 12, 2022), D.E. 372, 2022 WL 1500287.

75. *Id.* at 6–7.

76. Interview with Hon. William M. Conley, Nov. 19, 2020.

77. *Id.*