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FILED in the TRIAL COURTS
STATE OF ALASKA, THIRD DISTRICT

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CLERK OF THE TRIAL COURTS

By _____ Deputy

ARCTIC VILLAGE COUNCIL,)
LEAGUE OF WOMEN VOTERS OF)
ALASKA, ELIZABETH L. JONES, and)
BARBARA CLARK,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as the Lieutenant Governor of the State of)
Alaska; GAIL FENUMIAI, in her official)
capacity as the Director of the Alaska)
Division of Elections; and ALASKA)
DIVISION OF ELECTIONS,)

Defendants.)

Case No.: 3AN-20-07858 CI

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY
(Alaska R. Civ. P. 77(l))

The defendants submit this notice of supplemental authority of additional appellate developments in cases referenced in the plaintiffs' notice of supplemental authority and cases cited at oral argument. The plaintiffs' notice of supplemental authority provided citations to the recent Fourth Circuit orders in *Andino v. Middleton*,¹ but failed inform the Court that the state defendants have made an emergency

¹ *Middleton v. Andino*, -- F.3d --, 2020 WL 5739010 (4th Cir. Sep 24, 2020);
Middleton v. Andino, -- F.3d --, 2020 WL 5752607 (4th Cir. Sept. 25, 2020).

application for stay to the Chief Justice of the United States Supreme Court.² Similarly, the plaintiffs' notice of supplemental authority referenced the recent Alabama district court decision in *People First of Alabama v. Merrill*,³ but failed to note that the decision has been appealed to the Eleventh Circuit.⁴ This is the same case in which the United States Supreme Court previously stayed effect of a prior injunction issued by the same court against enforcement of that state's absentee ballot witnessing requirement.⁵

Finally, this Court should be aware of the recent developments in the case of *Democratic National Committee v. Bostlemann*, in which a Wisconsin District Court recently denied an injunction against enforcement of that state's witnessing requirement.⁶ This case was cited at oral argument in the context of a request for a stay pending appeal of any injunction this Court might issue, due to the potential for conflicting court orders to disenfranchise voters.⁷ Three days ago the Seventh Circuit

² See Docket report attached as Exhibit A. A copy of the application for stay is available online at: <https://www.scotusblog.com/wp-content/uploads/2020/10/20A55-Stay-App.pdf>.

³ *People First of Alabama v. Merrill*, — F.Supp.3d —, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020).

⁴ See Docket report attached as Exhibit B.

⁵ *Merrill v. People First of Alabama*, — U.S. —, 2020 WL 3604049 (July 2, 2020).

⁶ *Democratic Nat'l Committee v. Bostelmann*, — F.Supp.3d —, 2020 WL 5627186 at 6 (W.D. Wis. Sept. 21, 2020).

⁷ *Id.* at *6 ("Relying on this court's preliminary injunction modifying the witness signature requirement in light of such issues, Swenson eventually mailed her ballot without a witness signature, only to find out later that this court's order was stayed on appeal").

issued an order suggesting that it would not hear an appeal of the District Court order because the only appellants to challenge the order lacked standing to do so.⁸

DATED October 2, 2020.

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⁸ *Democratic Nat'l Committee v. Bostelmann*, — F.3d —, 2020 WL 5796311 (11th Cir. September 29, 2020), attached as Exhibit C.

No. 20A55

Title: **Marci Andino, et al., Applicants**
v.
Kylon Middleton, et al.

Docketed: October 1, 2020

Lower Ct: United States Court of Appeals for the Fourth Circuit

Case Numbers: (20-2022)

DATE	PROCEEDINGS AND ORDERS
Oct 01 2020	Application (20A55) for a stay, submitted to The Chief Justice.
	<u>Main Document</u> <u>Proof of Service</u> <u>Lower Court Orders/Opinions</u>
Oct 01 2020	Response to application (20A55) requested by The Chief Justice, due Saturday, October 3, 2020, by 2 p.m. ET.

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This docket is current through 10/02/2020

Current Date: 10/2/2020

Source: US COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Court: US COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case Title: PEOPLE FIRST OF ALABAMA, ET AL v. SECRETARY OF STATE FOR THE STA, ET AL
Appeal From: NORTHERN DISTRICT OF ALABAMA
Date Filed: 10/01/2020

CASE INFORMATION

Case Number: 20-13695
Fee Status: FEE PAID
Case Type: APPEALS
Case Subtype: PRIVATE CIVIL, FEDERAL QUESTION
Nature of Suit: 3441 CIVIL RIGHTS VOTING
Key Nature of Suit: CIVIL RIGHTS; VOTING (110.50)

LOWER COURT INFORMATION

District: 1126-2
Lower Court Docket Number: 2:20-CV-00619-AKK
Trial Judge(s): ABDUL K. KALLON, U.S. DISTRICT JUDGE
Court Reporter(s): SABRINA LEWIS
UNKNOWN REPORTER
Date Filed: 05/01/2020
Date NOA Filed: 09/30/2020

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DOCKET PROCEEDINGS (1)

Entry #: **Date:**
 10/01/2020

Description:
CIVIL APPEAL DOCKETED.
NOTICE OF APPEAL FILED
BY APPELLANTS DON DAVIS,
JOJO SCHWARZAUER,
SECRETARY OF STATE FOR
THE STATE OF ALABAMA
AND STATE OF ALABAMA
ON 09/30/2020. FEE STATUS:
FEE PAID. AWAITING
APPELLANT'S CERTIFICATE
OF INTERESTED PERSONS
DUE ON OR BEFORE
10/15/2020 AS TO APPELLANT
SECRETARY OF STATE
FOR THE STATE OF
ALABAMA. AWAITING
APPELLEE'S CERTIFICATE OF
INTERESTED PERSONS DUE
ON OR BEFORE 10/29/2020 AS
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2020 WL 5796311

Only the Westlaw citation is currently available.
United States Court of Appeals, Seventh Circuit.

DEMOCRATIC NATIONAL
COMMITTEE, et al., Plaintiffs-Appellees,
v.

Marge BOSTELMANN, Secretary
of the Wisconsin Elections
Commission, et al., Defendants,
and
Wisconsin State Legislature,
Republican National Committee,
and Republican Party of Wisconsin,
Intervening Defendants-Appellants.

Nos. 20-2835 & 20-2844

Submitted September 26, 2020

Decided September 29, 2020

Appeals from the United States District Court for the Western
District of Wisconsin. Nos. 20-cv-249-wmc, *et al.* — **William
M. Conley, Judge.**

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Committee.

Before Easterbrook, Rovner, and St. Eve, Circuit Judges.

Opinion

Per Curiam.

*1 The Democratic National Committee and other plaintiffs
contend in this suit that statutes affecting the registration of
voters and the conduct of this November's election, although
constitutional in principle, see *Luft v. Evers*, 963 F.3d 665
(7th Cir. 2020), will abridge some voters' rights during the
SARS-CoV-2 pandemic. The state's legislative branch, plus
the Republican National Committee and the Republican Party
of Wisconsin, intervened to defend the statutes' application
to this fall's election.

A district judge held that many of the contested provisions may be used but that some deadlines must be extended and two smaller changes made. 2020 U.S. Dist. Lexis 172330 (W.D. Wis. Sept. 21, 2020). In particular, the court extended the deadline for online and mail-in registration from October 14 (see Wis. Stat. § 6.28(1)) to October 21, 2020; extended the deadline for delivery of absentee ballots by mail from October 22 (see Wis. Stat. § 6.87(3)) by allowing for online delivery and access by October 29; and extended the deadline for the receipt of mailed ballots from November 3 (Election Day) to November 9, provided that the ballots are postmarked on or before November 3. Two other provisions of the injunction (2020 U.S. Dist. Lexis 172330 at *98) need not be described. The three intervening defendants have appealed and asked us to issue a stay; the executive-branch defendants have not appealed. With the election only a few weeks away, the decision with respect to a stay will effectively decide the appeals on the merits.

We need not discuss the parties' arguments about the constitutional rules for voting or the criteria for stays laid out in *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), because none 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. See *Transamerica Insurance Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997). Appeal by the state itself, or someone with rights under the contested statute, is essential to appellate review of a decision concerning the validity of a state law. See, e.g., *Hollingsworth v. Perry*, 570 U.S. 693, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013); *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000). See also *1000 Friends of Wisconsin Inc. v. Department of Transportation*, 860 F.3d 480 (7th Cir. 2017) (same when the validity of an administrative decision is at stake).

That leaves the legislature. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015), shows that

a state legislature may litigate in federal court, consistent with Article III of the Constitution, when it seeks to vindicate a uniquely legislative interest. See also, e.g., *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797–98 (7th Cir. 2019). The interest at stake here, however, is not the power to legislate but the validity of rules established by legislation. All of the legislators' votes were counted; all of the statutes they passed appear in the state's code. Constitutional validity of a law does not concern any legislative interest, which is why the Supreme Court held in *Virginia House of Delegates v. Bethune-Hill*, — U.S. —, 139 S. Ct. 1945, 204 L.Ed.2d 305 (2019), that a state legislature is not entitled to litigate in federal court about the validity of a state statute, even when that statute concerns the apportionment of legislative districts. "This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Id.* at 1953. State legislatures must leave to the executive officials of the state, such as a governor or attorney general, the vindication of the state's interest in the validity of enacted legislation.

*2 The legislature contends that the situation is different in Wisconsin in light of Wis. Stat. § 803.09(2m), which provides:

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

In an earlier stage of this litigation, we concluded that § 803.09(2m) permits the legislature to act as a representative of the state itself, with the same rights as the Attorney General of Wisconsin. *Democratic National Committee v. Bostelmann*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), stayed in part by *Republican National Committee v. Democratic National Committee*, — U.S. —, 140 S. Ct. 1205, 206 L.Ed.2d 452 (2020). The legislature contends that our decision is the law of the case and that it may proceed as a representative of Wisconsin under § 803.09(2m).

Intervening authority can justify a departure from the law of the case, and just such an event has occurred. Three months after we concluded that § 803.09(2m) permits the legislature to represent the state, the Supreme Court of Wisconsin

held that this statute, if taken as broadly as its language implies, violates the state's constitution, which commits to the executive branch of government the protection of the state's interest in litigation. *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67 ¶¶ 50–73, 393 Wis.2d 38, 946 N.W.2d 35 (2020). Capacity to sue or be sued is a matter of state law, see Fed. R. Civ. P. 17(b)(3); *Bethune-Hill*, 139 S. Ct. at 1952, so a holding that, as a matter of Wisconsin law, the legislature cannot represent the state's interest, controls in federal court too. Under *Vos* the legislature may represent *its own* interest, see ¶¶ 63–72, which puts Wisconsin in agreement with federal decisions such as *Arizona Independent Redistricting Commission*, but that proviso does not allow the legislature to represent a general state interest in the validity of enacted legislation. That power belongs to Wisconsin's executive branch under the holding of *Vos*.

represent Wisconsin's interests as a polity. The suit in the district court presented a case or controversy because the plaintiffs wanted relief that the defendants were unwilling to provide in the absence of a judicial order. See *Hollingsworth*, 570 U.S. at 702, 705, 133 S.Ct. 2652; *United States v. Windsor*, 570 U.S. 744, 756, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). But the appeals by the intervenors do not present a case or controversy within the scope of Article III, and we deny the motions for a stay. Cf. *Republican National Committee v. Common Cause Rhode Island*, No. 20A28, 2020 WL 4680151 (S. Ct. Aug. 13, 2020) (denying a motion for a stay under similar circumstances). The interim stay previously entered is vacated. In addition to denying the motions, we give appellants one week to show cause why these appeals should not be dismissed for lack of appellate jurisdiction.

None of the appellants has suffered an injury to its own interests, and the state's legislative branch is not entitled to

All Citations

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ARCTIC VILLAGE COUNCIL,)
LEAGUE OF WOMEN VOTERS OF)
ALASKA, ELIZABETH L. JONES, and)
BARBARA CLARK,)

Plaintiffs,)

v.)

KEVIN MEYER, in his official capacity)
as the Lieutenant Governor of the State of)
Alaska; GAIL FENUMIAI, in her official)
capacity as the Director of the Alaska)
Division of Elections; and ALASKA)
DIVISION OF ELECTIONS,)

Defendants.)

Case No.: 3AN-20-07858 CI

CERTIFICATE OF SERVICE

I hereby certify, that on this date, true and correct copies of the **Defendants'**

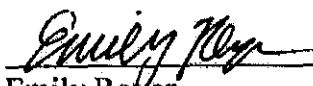
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