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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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MATHEW HARLEY, et al., :  
 Plaintiffs, : 20-CV-4664(BMC)  
 -against- :  
 PETER KOSINSKI, et al., : United States Courthouse  
 Defendants. : Brooklyn, New York  
 : October 13, 2020  
 : 12:30 o'clock p.m.

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TRANSCRIPT OF ORAL ARGUMENT  
BEFORE THE HONORABLE BRIAN M. COGAN  
UNITED STATES DISTRICT JUDGE.

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24 Proceedings recorded by mechanical stenography, transcript  
25 produced by computer-aided transcription.

1 THE CLERK: Harley, et al. versus Kosinski, et al.,  
2 docket number 20-CV-4664.

3 Counsel, please state your appearances starting for  
4 the plaintiffs.

5 THE COURT: When you give me your appearances,  
6 please just give the people who you think might reasonably be  
7 talking, not everyone who's on the line. Okay? Otherwise it  
8 will take us all day.

9 MX. GREEN: Very good, Judge. This is Remy Green on  
10 behalf of the plaintiffs. I think I'm the only one who will  
11 be speaking. For the reporter, before my name, if you could  
12 use the honorific "Mx.," M-X, instead of "Ms." or "Mr."

13 THE COURT: Give me the honorific again, please?

14 MX. GREEN: "Mx.," pronounced like stirring.

15 THE COURT: How do you write it?

16 MX. GREEN: M-X.

17 THE COURT: Got it. Okay.

18 MX. GREEN: Thank you, Judge.

19 MS. GOLDBERG: Your Honor, Jane Goldberg from the  
20 New York State Office of the Attorney General for the New York  
21 State defendants, the Commissioners to the Board of Elections  
22 and the executive director.

23 THE COURT: Okay.

24 MR. WESTBERRY: Judge, Kent Westberry for Kentucky  
25 Secretary of State. Mike Adams and Ben Chandler who is chair

1 of the State Board of Elections. On the call with me is  
2 Taylor Brown who is general counsel with our Board of  
3 Elections but I'll be doing the call. Thank you.

4 THE COURT: Mr. Westberry, can you turn up your  
5 microphone a little bit? You're a little bit faint.

6 MR. WESTBERRY: Yes. Yes.

7 THE COURT: Thank you.

8 MR. WESTBERRY: Better, Judge?

9 THE COURT: Who's next?

10 Maybe I should call out the States' names.

11 THE COURT: I have New York. I have the plaintiff.  
12 Anyone for Pennsylvania?

13 Okay. Anyone for Ohio?

14 MS. BUCHANAN: Good afternoon, Your Honor. Heather  
15 Buchanan for Secretary of State Frank LaRose. Also present is  
16 my colleague Renata Staff but I will be doing the speaking.

17 THE COURT: Okay. And Texas?

18 MS. ROBINSON: Good morning, Your Honor. This is  
19 Tanya Robinson representing the Texas Secretary of State.

20 THE COURT: Okay. And I have Kentucky.  
21 How about Wisconsin?

22 MR. JOHNSON-KARP: Good afternoon, Your Honor.  
23 Assistant General Attorney Gabe Johnson-Karp for the Wisconsin  
24 Elections Commissioners.

25 THE COURT: Mr. Johnson-Karp, you are a little bit

1 faint as well. Perhaps if you can turn up your mic, I would  
2 appreciate it.

3 MR. JOHNSON-KARP: Is that better there?

4 THE COURT: Yes. Thank you.

5 Georgia?

6 MS. MCGOWAN: Good afternoon, Your Honor. This is  
7 Charlene McGowan for the Georgia Secretary of State.

8 THE COURT: Okay. Let me just go back and see if  
9 anyone from Pennsylvania has joined.

10 No Pennsylvania.

11 Okay. Just a couple of things before we start. The  
12 way we're going to proceed is this. I've got questions for  
13 both plaintiffs and defendants. I'll hear from the plaintiffs  
14 first. I will allocate 15 minutes for the plaintiffs to say  
15 whatever they have to say.

16 Mx. Green, I don't I don't want you to feel you have  
17 to use all 15 minutes. Okay? Use as much as you think you  
18 need but not more.

19 Each of the defendants, if they want to say  
20 anything, will have 5 minutes each. Same thing goes for you.  
21 Please don't feel you have to use all of it as defendants'  
22 positions are substantially overlapping.

23 It is very important for the court reporter that  
24 when you start to speak, you identify who you are, all right,  
25 so that she gets everything down accurately.

1 I also want to mention that under the rules of this  
2 court, it is strictly forbidden to make any recording of this  
3 argument. That goes for the people who are participating as  
4 lawyers for the parties. It also goes for the public who may  
5 be listening in on this. There are severe consequences for  
6 video or audio recording of this proceeding. If you want a  
7 copy of the transcript, that's certainly something that can be  
8 purchased by you so don't hesitate to contact the court  
9 reporter if you need that but do not make a recording of this.

10 Okay. Having said that, Ms. Mix, I'm sorry,  
11 Mx. Green, let me ask you, isn't it a stretch to say that  
12 there's a constitutional right to have overseas people vote  
13 electronically when both Amendments under which you're suing,  
14 at the time they were enacted, there was no such thing as  
15 electronic transmission?

16 MX. GREEN: I understand the point, Your Honor. I  
17 think largely the answer to that is in the O'Brien case which  
18 is when a state has the ability to provide something and not  
19 providing it will result in a complete absence of the right to  
20 vote, that there is some obligation to take those steps.

21 Now, the technology that exists now obviously is  
22 profoundly different than what it was at the time of the  
23 adoption of the Fourteenth Amendment, but that doesn't mean  
24 that states get out of the need to take reasonably available  
25 steps to ensure the right to vote. I think it's, in many

1 ways, it's no different than, for example, the obligation to  
2 provide notice online of changes in poll sites that I think  
3 some courts have found because that is now how people provide  
4 reasonable notice.

5 It's not a question of what technology existed.  
6 It's a question of what steps are reasonable under the  
7 circumstances.

8 THE COURT: Okay. I see your point on that but, of  
9 course, we have an expression from Congress as to how much  
10 states have to do with regard to overseas voters and that  
11 expression is treat them the same way you do as your domestic  
12 voters.

13 MX. GREEN: Well, it's not quite that. Right? If  
14 we talk about UOCAVA, there are obligations that go well  
15 beyond what states have to do for their domestic voters in  
16 UOCAVA. Right? So, for example, New York State does not  
17 provide absentee ballots to its domestic voters 45 days before  
18 the election. They provide them significantly later than  
19 that, but under UOCAVA, they have to provide them 45 days  
20 before the election to, to voters abroad.

21 To answer the question more directly, I think,  
22 obviously, what the federal government has done by statute  
23 doesn't limit what the constitutional obligation would be any  
24 more than what Congress has done by statute supersedes  
25 irrelevant state law or -- sorry, I don't know that I phrased

1 that perfectly -- but they haven't federalized the entire area  
2 just by passing UOCAVA. So, right, there are still other  
3 obligations and there's a reason we're not suing under UOCAVA.

4 THE COURT: Right, but you're seeking to federalize  
5 the entire area, are you not? Isn't that essentially what  
6 your claim is?

7 You figure the most progressive states in terms of  
8 their technological dissemination of ballots and you're saying  
9 that's the constitutional standard that all states have to  
10 meet.

11 MX. GREEN: Well, I think that perhaps overstates it  
12 a little bit. It's perhaps 30 states, but it's an as-applied  
13 challenge so it doesn't federalize it for future elections.  
14 It doesn't federalize it outside of a pandemic. It just says  
15 when the mail isn't running internationally and is otherwise  
16 completely unreliable, there might be some further steps and,  
17 in fact, the constitution requires you to take certain steps.

18 THE COURT: Have you given me sufficient proof for  
19 me to find that, in fact, the mail is not running  
20 internationally? I mean, we know as a matter of fact that  
21 with regard to the Kentucky plaintiffs, they got their  
22 ballots, they voted them and they're in.

23 MX. GREEN: Right.

24 THE COURT: So how do I find that the problem with  
25 the international mail is such that, in fact, they aren't

1 working and this will not work?

2 MX. GREEN: So let me address that in two parts.

3 The first part is I think we absolutely provided  
4 sufficient proof that there are places where the mail is  
5 simply not running. If you just go to United States Postal  
6 Service website which we noted in our papers, there are  
7 countries where no mail is coming in. And so for those states  
8 or, I'm sorry, for those countries, there is no mail. But --

9 THE COURT: Remind me which of those countries your  
10 plaintiffs reside in?

11 MX. GREEN: I think we have somebody from Thailand  
12 and I believe that was on the list, but I know that we did not  
13 achieve perfect coverage here.

14 THE COURT: So under your theory, the idea is that  
15 each state needs to accommodate the mail system of every  
16 foreign country?

17 MX. GREEN: If it can be done easily, securely and  
18 without too much burden, I think the answer is yes.

19 THE COURT: Okay.

20 MX. GREEN: But to the second point, to the extent  
21 there is, and I'm stepping a little outside the question here,  
22 but to the extent that there is a claim that perhaps has been  
23 mooted, the traditional rules in a class action would permit  
24 us to substitute a plaintiff if a claim has been mooted out  
25 and I would just ask for 24 hours so we can find somebody that

1 fits whatever criteria the Court needs a plaintiff with.

2 THE COURT: Well, okay. We're close enough to the  
3 election. I'm not sure how much time I can give you to start  
4 substituting plaintiffs as it is, right? I mean that's a  
5 problem.

6 MX. GREEN: Understood, Your Honor.

7 THE COURT: Okay. What else do you have to tell me?

8 MX. GREEN: So beyond that, I think, as the Court  
9 already hinted, there are really two questions in the case.  
10 There is a proximity question, kind of a Purcell question, are  
11 we too close to the election to act, and there's the  
12 constitutional question which is what obligations do states  
13 have during the pandemic to take steps to protect the right to  
14 vote.

15 To answer the first question, as I think we  
16 discussed in our papers, Purcell itself certainly doesn't say  
17 anything on this point. Purcell itself keys into voter  
18 confusion and the concomitant incentive to stay away from the  
19 polls that would come with such voter confusion and I don't  
20 think that there, there is any, there is any real confusion  
21 that would stem from allowing people to use a preexisting form  
22 that, the federal write-in absentee ballot form submitted by  
23 the pre-DoD fax system that's already interfaced with 30 other  
24 states.

25 THE COURT: Do we need the DoD's consent to use

1 their system?

2 MX. GREEN: I do not believe so.

3 THE COURT: It's available to anybody who wants to  
4 use it?

5 MX. GREEN: That is my understanding of it.

6 THE COURT: Okay.

7 MX. GREEN: That it's available to any state that is  
8 willing to accept ballots by fax.

9 THE COURT: Okay.

10 MX. GREEN: And, you know, it's really just a  
11 transmission, right? It takes an e-mail from a voter that  
12 attaches a ballot and they fax it to Boards of Elections.

13 THE COURT: But they don't fax it, right? I mean  
14 nobody faxes these days. You're talking about essentially an  
15 e-mail transmission of a fax.

16 MX. GREEN: I believe that's correct although I  
17 think one of -- to address the there-is-no-paper-trail  
18 objection that I think I've seen in some of the papers, I  
19 think that the right way to do this, receiving those faxes,  
20 might be to actually put a fax machine there and print things  
21 out.

22 THE COURT: You know, I don't even know the answer  
23 to this. Are fax machines still sold? If I go to Best Buy,  
24 can I get a fax machine? Nobody does that anymore because  
25 you've got your printer that is capable of scanning documents

1 and sending them by e-mail.

2 MX. GREEN: Right.

3 THE COURT: The last time I saw a fax machine, I  
4 don't know when it was. My faxes come into my Outlook box.  
5 That's how I get faxes.

6 MX. GREEN: I can tell you, when I was at a big  
7 firm, I had a partner who had a fax machine in his office. I  
8 don't know when he bought it, but he insisted on us checking  
9 the fax machine for him late at night.

10 THE COURT: I'm not asking you to date yourself but  
11 how long ago was that?

12 MX. GREEN: It was five, six years, not even that.

13 THE COURT: Five or six years?

14 MX. GREEN: You are right, Judge, but I think the  
15 machines do exist. Certainly, it is not difficult to set up a  
16 printer to automatically print things that come in a certain  
17 way. You could simulate a fax machine, at a minimum.

18 THE COURT: Yes.

19 MX. GREEN: But to the point, to get back to the  
20 point after I did not date myself too much, I hope, Purcell  
21 itself does not suggest that there is a hard and fast  
22 deadline. What does maybe suggest that is a series of rulings  
23 on the Supreme Court's stay docket often called the shadow  
24 docket that are entirely unreasoned and do not have opinions.  
25 I don't think that that's the right way to send guidance to

1 the lower courts and I think intentionally when they don't  
2 publish an opinion, they're not trying to send guidance to the  
3 lower courts.

4 THE COURT: Well, it's certainly not binding  
5 precedent but doesn't it suggest that Purcell has been moving  
6 in the direction of discouraging these kinds of motions so  
7 close to the election? Collectively, all those state denials  
8 or state grantings, depending on what's being done, doesn't it  
9 suggest that?

10 MX. GREEN: Well, I mean, it certainly suggests that  
11 there are a number of votes on the Supreme Court that we don't  
12 know that might feel that way, but I think when the Supreme  
13 Court wants to set precedent, it has to write a decision and  
14 until it does, it hasn't overruled the actual rule in Purcell,  
15 and I think that lower courts are required to apply the rule  
16 that the Supreme Court has actually articulated which keys to  
17 voter confusion and incentive to stay away from the polls.

18 THE COURT: You don't see possible confusion if I  
19 were to order today all six or seven of the states on this  
20 phone call within the next three weeks to implement some kind  
21 of procedure that allows for electronic voting?

22 I mean, they can barely do their absentee ballots by  
23 regular mail to their own people. There's been enough  
24 controversy over that, right, without bringing in the foreign  
25 citizens and say, Oh, we've got to have special rules for

1 them.

2 MX. GREEN: Well, Your Honor, I think that it's  
3 important then that the phrase in Purcell is not board of  
4 election confusion. It's voter confusion.

5 The fact that the Boards of Elections might not be  
6 able to do their jobs even without doing this I don't think  
7 has much relevance to what the constitutional rights are. It  
8 certainly suggests that perhaps we, the federal courts should  
9 be doing more as a policy matter regardless of the Purcell  
10 principle if we are seeing this kind of endemic failure that  
11 you're suggesting, but I don't think that Board of Election  
12 confusion is part of the test. At least --

13 THE COURT: No, I agree with you, I agree with you,  
14 but I can easily see voters being confused about the same  
15 things that are confusing the Board of Elections in the states  
16 that have had problems with absentee ballots. Right? I mean,  
17 where do I go? Is my drop box there? Is it over here?  
18 Voters can get confused by that.

19 MX. GREEN: Right. And I think that that, that  
20 ultimately speaks to the Court, if it issues relief, can  
21 address that kind of confusion by being precise in the relief  
22 it issues and, you know, could key it to, for example, a voter  
23 receiving a NEXIE from JFK is allowed to replace that ballot  
24 with a ballot by e-mail or a voter who in a country where the  
25 mail is not running is allowed to, but kind of keeping it

1 confined to voters that will not otherwise have any right to  
2 vote would, would certainly address any voter confusion.

3 Then also, on the constitutional question -- I think  
4 I've spoken for already longer than you've given me.

5 THE COURT: I'm going to give you another couple of  
6 minutes because I asked a lot of questions.

7 MX. GREEN: I had hoped to actually listen to your  
8 direction, but on the constitutional question, I think that we  
9 are very much in a world governed by O'Brien and O'Brien, as  
10 read through the decision in McDonald. So McDonald is a  
11 decision that basically says, absolutely, there is no  
12 constitutional right to an absentee ballot. And O'Brien and  
13 the other cases decided around O'Brien including Quesby,  
14 including -- there's another one that I'm not remembering the  
15 name of, but there's a series of decisions within five years  
16 of McDonald that say, yes, McDonald said that there's no right  
17 to an absentee ballot and the reason is because the plaintiffs  
18 there did not prove that they wouldn't be able to vote in the  
19 absence of an absentee ballot. So what O'Brien and the cases  
20 around it ultimately say, and these are still good law, is  
21 that if you can prove that there is a danger that voters will  
22 not be able to vote, the states have to do something about it.

23 And so with that, that's what I've got to say.  
24 Thanks, Judge.

25 THE COURT: Thank you.

1           Is it too much to expect that the defendants have  
2 talked among themselves and established some kind of priority  
3 as to who is going first? Is that too much?

4           MS. GOLDBERG: Probably.

5           MR. WESTBERRY: Yes, we didn't have enough time.

6           THE COURT: Okay. I understand.

7           Let me ask who wants to go first. Any volunteer can  
8 raise your hand in the picture and I'll see it.

9           MS. GOLDBERG: Your Honor, since I'm a New York  
10 native, I'm happy to go first.

11           THE COURT: It's not surprising the New York lawyer  
12 would be the most aggressive.

13           MS. GOLDBERG: First of all, I want to say that I'm  
14 joined in this conference by Commissioner Kellner and by  
15 counsel Brian Quail for New York State Board of Elections who  
16 can provide any technical expertise I do not have.

17           I would like to say in the first place that counsel  
18 for plaintiff has very narrowly interpreted Purcell and there  
19 are, in fact, two Circuit courts that have interpreted it so  
20 much more broadly and followed, and I'm sorry to look at my  
21 notes but, basically, I'll give two Georgia cases and one  
22 Eleventh Circuit case.

23           The New Georgia Project versus Raffensperger which  
24 was decided October 2nd talked about the Supreme Court's  
25 mantra around Purcell and that really, basically, had to do

1 with not just voter confusion, but much more broadly with the  
2 ability of the states to actually prepare for and do the  
3 election.

4           The second case came down yesterday or the day  
5 before, the 11th, I think, and that was Curling versus  
6 Raffensperger which was 147 pages. I did not read all of it  
7 but the end of it talks about following Purcell because the  
8 capacity of how the election systems and poll workers much  
9 less the Secretary of State's office turned on a dime and  
10 switched to a full scale hand-marked paper ballot system is  
11 contradicted by an entire messy electoral record of the past  
12 years.

13           Now, in that case, the voters had an electronic  
14 system or have one and wanted to switch back to a paper  
15 system. This case was decided October 11th and they said  
16 implementation would take long-term planning and advanced poll  
17 worker training. So the court denied the preliminary  
18 injunction on that. They did grant it as to some technical  
19 aspects of the computer.

20           Then there's an Arizona decision, DNC v. Hobbs,  
21 which had to do with deadlines for --

22           THE COURT: Ms. Goldberg, let me ask you something.  
23 If I enter the injunction the plaintiffs have asked for, if I  
24 tell to you do it, are you saying your clients are going to  
25 risk contempt because it simply physically can't be done?

1 MS. GOLDBERG: I would assume we would probably ask  
2 for a stay and take an appeal.

3 THE COURT: Okay. And then if they don't get the  
4 stay on the appeal, what are they going to do?

5 MS. GOLDBERG: I do not know. It's three weeks out.  
6 First of all, there's already voting going on in New York,  
7 there's absentee voting going on already. I might add just as  
8 an aside -- well, two asides. One is that our New York  
9 plaintiffs have had their ballots in hand since about  
10 September 17th. One of them lives in Thailand and from my  
11 research, my independent research as well as this declaration  
12 that we submitted, there has been mail going from Thailand to  
13 the United States since about the beginning of July of 2020.

14 THE COURT: Do you know if you got this citizen's  
15 ballot?

16 MS. GOLDBERG: We have not -- as of this morning,  
17 no, neither of them.

18 THE COURT: That would have been nice, right?

19 MS. GOLDBERG: I'm sorry, Your Honor?

20 THE COURT: That would have been a nice fact for  
21 you, for you to say to me you just got the ballot?

22 MS. GOLDBERG: One of them had mailed -- I mean, by  
23 the way, one of them, the man, Mr. Harley, actually, who lives  
24 in Ireland, we asked to have his ballot transmitted to him by  
25 mail and it was transmitted and received by him on

1 September 17th at which point he had nearly two months to mail  
2 it back.

3 Ms. Lahey asked for her ballot by e-mail and it's  
4 been sitting -- there are two ballots because she asked for a  
5 second one because she didn't think the first one came.  
6 They've been in her inbox since about September 18th, 17th or  
7 18th. So all she's had to do was download it and mail it  
8 back. It hasn't happened. It would have been a very nice  
9 fact for me.

10 So, anyway, I don't think Purcell should be capped  
11 in the way that the plaintiff is suggesting it is and, yes,  
12 there is impossibility. I don't know how many more plaintiffs  
13 at this point can be easily done. I think we submitted a  
14 sufficient number of declarations that talk about, no, this is  
15 not easily done. After Superstorm Sandy, New Jersey tried to  
16 implement it and it was a mess.

17 We not only provided the Court with the declaration  
18 to that effect but any number, hundreds of pages of documents  
19 attached to that declaration to show what a mess it was and  
20 what a disaster it was. Secure, no.

21 THE COURT: You need to wrap up, Ms. Goldberg,  
22 because I've given you your five minutes.

23 MS. GOLDBERG: I used my five minutes already?

24 THE COURT: You have, but I'll give you another  
25 minute to wrap up.

1 MS. GOLDBERG: Just simply that all of the testimony  
2 about how insecure internet voting is, including Your Honor's  
3 point about there's no fax machines, go to the point that  
4 there's nothing that can be done that won't jeopardize the  
5 security of the voting system in this country as well as the  
6 secrecy of the ballot which is a core value for New York.

7 Thank you, Your Honor.

8 THE COURT: You triggered one more question.

9 What about plaintiff's proposal to use the DoD  
10 system?

11 MS. GOLDBERG: Well, as I understand it from the  
12 declaration that was submitted, I can't remember which witness  
13 at this point, the DoD, and I did look this up, issued  
14 something about two years ago stating that they are limiting  
15 access to that, there was too much usage of it, and they have  
16 instructed voters who can vote otherwise to do so.

17 THE COURT: Okay. Thank you.

18 MS. GOLDBERG: You're welcome. Thank you.

19 THE COURT: All right. Who would like to go next?

20 Mr. Westberry.

21 MR. WESTBERRY: Thank you, Judge. Kent Westberry  
22 for the Kentucky defendants.

23 Judge Cogan, as you correctly pointed out just a  
24 little while ago, we learned on Friday afternoon that the  
25 Netherlands plaintiff who votes out of Kentucky, Ms. Roitman,

1 did, in fact, receive her ballot. Her ballot got back to the  
2 Fayette County Clerk. We wrote you a submission and submitted  
3 a declaration from the County Court Clerk to that effect. We  
4 simply think that that makes her claim moot at this point and  
5 we had some authority with it.

6 The only other thing, Judge Cogan, I wanted to say  
7 is something that we said in our brief that constitutionally,  
8 it's for the states to regulate the time, place and manner of  
9 their elections. That's express constitutional delegation and  
10 we said it in our brief and just wanted to reiterate that  
11 point again.

12 Then finally, on personal jurisdiction, it falls  
13 pretty far short, I think, what plaintiffs are trying to argue  
14 in this court starting with the old international issue and  
15 following through its progeny. Under that theory, we have a  
16 big UPS hub in Louisville. Any package that clears the  
17 worldwide hub out by the airport might confer jurisdiction,  
18 likewise, Fed Ex in Memphis and on and on. We think that's a  
19 real stretch and they don't satisfy minimum jurisdiction.

20 That's all I have, Judge.

21 THE COURT: Okay. Thank you very much.

22 Anyone else?

23 MR. JOHNSON-KARP: Your Honor, this is Gabe  
24 Johnson-Karp from Wisconsin. Can you hear me okay?

25 THE COURT: I can hear you. I can't see you but I

1 can hear you. I have a big circle with your initials in it.  
2 That's as much as I can see but I hear you fine.

3 MR. JOHNSON-KARP: Okay. Well, on an e-mail, I've  
4 been, I guess, nominated by some of my colleagues to address  
5 the jurisdictional issue which our colleague from Kentucky has  
6 generously said doesn't quite get us there. I think we don't  
7 even need to get anywhere else, Your Honor.

8 Jurisdiction is so plainly lacking here as to all of  
9 the out-of-state defendants. We don't have any even  
10 allegations, much less any evidence of any of these  
11 out-of-state defendants sending actively anything into  
12 New York.

13 Each of the cases that the plaintiffs had cited  
14 illustrate why jurisdiction is lacking here. This isn't a  
15 case where somebody is sending something into New York, to  
16 conduct business in New York or communicating with individuals  
17 in New York about something happening there. This is --

18 THE COURT: Don't your clients know when they drop  
19 something in the mailbox that's destined for Europe, that it's  
20 going to go through New York?

21 MR. JOHNSON-KARP: It might also, as my colleague  
22 said, go through Kentucky or it might go through any of the  
23 other states, Your Honor. We don't know and there's no  
24 evidence here.

25 I'll speak for Wisconsin, in particular. The

1 evidence here shows that our single voter requested an  
2 electronic, so there was absolutely no transmission through  
3 JFK from Wisconsin in this case, and I think that's the case  
4 for many of my colleagues and, certainly, there's no proof.  
5 I'll let each of them speak to the specific jurisdictional  
6 deficiencies, but I think we don't even need to get to any of  
7 these other questions that have been raised.

8           The Purcell doctrine of mootness, I'll just point  
9 out that the Wisconsin plaintiff has sent her ballot back and  
10 that's in Wisconsin right now. So there's no, there is no  
11 issue of mootness as to Wisconsin.

12           THE COURT: You're saying that the Wisconsin  
13 plaintiff's ballot has been received back in Wisconsin?

14           MR. JOHNSON-KARP: That's correct, Your Honor. The  
15 Town of Winneconne clerk has confirmed that the only Wisconsin  
16 plaintiff, that her ballot has been received.

17           THE COURT: Okay.

18           MR. JOHNSON-KARP: I would just briefly, if the  
19 Court were to move beyond the jurisdictional deficiencies,  
20 underscore what we've heard from our colleague in New York,  
21 that there are serious difficulties in implementing the sort  
22 of relief that the plaintiffs are asking for here.

23           In Wisconsin, there just is no system of accepting  
24 facts or e-mail ballots. Our elections administrator, Meagan  
25 Wolfe, submitted a declaration that's at Docket 37-1

1 explaining that we just do not have the infrastructure to  
2 simply turn on a switch and accept faxed or e-mailed ballots  
3 even with this DoD system in place.

4           So it's not matter of an injunction issuing and, all  
5 of a sudden, ballots can be transmitted via fax or e-mail.  
6 There would need to be testing, there would need to be  
7 security measures in place and as other people have noted  
8 today, we are in the midst of voting. This is not something  
9 that would have any roll-out time. We are three weeks away  
10 from absentee voting being finished, not starting, so the  
11 implementation would be almost impossible, I think.

12           Just one more point as to the specifics of  
13 Wisconsin. Here, the six Wisconsin elections commissioners  
14 have been sued, however, Wisconsin has an extremely  
15 decentralized voting system, election system with 1,850  
16 elections officials who are each responsible for the mailing  
17 and receiving of ballots within their jurisdiction. These are  
18 not --

19           THE COURT: That's almost as many brands of cheese  
20 that come out of Wisconsin.

21           MR. JOHNSON-KARP: I think there might be more  
22 cheese, Your Honor, but two things we take seriously,  
23 Your Honor.

24           The point being the implementation of any injunction  
25 would have to take place at this extremely local level and

1 that would increase the likelihood of uneven application on  
2 this timeline.

3 So if the Court were to reach this question of the  
4 balancing of the equities in the public interest, those would  
5 weigh strongly against an injunction here but as I said, I  
6 think we really don't need to get there. Jurisdiction is  
7 lacking, personal jurisdiction is lacking, and there are also  
8 the mootness issues and the standing issues that we've  
9 discussed in the briefs.

10 So we would just ask that the Wisconsin defendants  
11 be dismissed or, at the very least, that the injunction be  
12 denied as to them.

13 THE COURT: All right. Thank you, Mr. Johnson.

14 MR. JOHNSON-KARP: Thank you, Your Honor.

15 THE COURT: Anyone else?

16 MS. MCGOWAN: Your Honor, this is Charlene McGowan  
17 from the State of Georgia and the Georgia Secretary of State.

18 THE COURT: Yes.

19 MS. MCGOWAN: I would like to join in the  
20 jurisdictional arguments that my colleague from Wisconsin  
21 raised.

22 We concur with that, that personal jurisdiction is  
23 also lacking over the Georgia Secretary of State for the same  
24 reasons. He doesn't fall under the long arm statute.

25 Plaintiffs haven't set forth any fact that would fall under

1 the long arm statute nor would it comport with due process.

2 Even if the Court could enter an injunction here if  
3 it had personal jurisdiction, there are certain reasons that  
4 it should not enter the relief that the plaintiff requests and  
5 many of the other representatives from the state defendants  
6 have touched on these issues and the most important one is the  
7 Purcell principle and the fact that this would not be in the  
8 public interest.

9 I think this is one of those cases where the  
10 plaintiffs should be careful what they wish for because I  
11 think more harm than good could possibly come out of their  
12 requested relief. We are similar to Wisconsin in that Georgia  
13 does administer their elections at the county level. So  
14 everyone in Georgia, there's 159 counties who have to  
15 implement some sort of system. I do not know if they do have  
16 the technical capabilities to receive electronic ballot  
17 access.

18 I will note one unique feature of the Georgia  
19 system. We're implementing a new system of electronic voting  
20 here in our state which just adds to the challenges that we're  
21 already facing in this difficult year, but every ballot has to  
22 be scanned into a scanner, whether absentee or in person. I  
23 don't know whether a printed ballot that was e-mailed or faxed  
24 could even be read by our scanners. So there's a very real  
25 possibility that votes would not even be counted if they were

1 transmitted that way.

2 THE COURT: Okay. All right. Any other defendants?

3 MR. KORN: Your Honor, can you hear me?

4 THE COURT: I can hear you but all it says for you  
5 is "Guest," so I don't know who you are. Now I can see you.

6 MR. KORN: Okay.

7 THE COURT: But I still don't know who you are.

8 MR. KORN: Okay. My name is Alex Korn, K-O-R-N.  
9 I'm a Deputy Attorney General of the Pennsylvania Office of  
10 the Attorney General and I'm here on behalf of the  
11 Pennsylvania defendants.

12 THE COURT: You joined late.

13 MR. KORN: I attempted -- I was in the lobby for a  
14 while so, yes, I was unable to get in. My apologies.

15 THE COURT: Just in case you missed anything, you  
16 have five minutes.

17 MR. KORN: Thank you.

18 And Mx. Green, I would just like to say I think you  
19 and I were associates at the same law firm so I know the  
20 partner you were referring to about the fax. So I will just  
21 preface that.

22 MX. GREEN: It's good to see you.

23 MR. KORN: You as well. You as well.

24 On the issues, I just, again, Pennsylvania would  
25 also join in the argument regarding personal jurisdiction.

1           There is a point I'd like to emphasize as well with  
2 respect to standing but before that, there is mootness which  
3 is the ballot by the one Pennsylvania plaintiff, the plaintiff  
4 who is registered to vote in Pennsylvania, has been received  
5 in her county as well. So those claims would be moot for the  
6 same reasons in Pennsylvania.

7           On the issue of standing with respect to the  
8 Pennsylvania plaintiff, the Pennsylvania constitution states  
9 that absentee voting shall be provided in a manner determined  
10 by the legislature and this has all been done. The  
11 Pennsylvania absentee voting regime has been established  
12 pursuant to specific Pennsylvania statutes that say ballots  
13 must be provided by mail. The Pennsylvania named plaintiffs  
14 have nothing to do with writing those statutes and if the  
15 Court were --

16           THE COURT: What is the implication of that? The  
17 legislature can say here's what's required but if I were to  
18 find that doesn't comply with the constitution, what does it  
19 matter that that's what the legislature said?

20           MR. KORN: Well, I think that goes to the point,  
21 Your Honor, about the federalization of this which is these  
22 are voters living overseas and Congress has been the one who  
23 has been establishing or not establishing, but determining the  
24 absentee voting rules for these voters and the specific  
25 statute at issue that was drafted by Congress and used in

1 Ms. Green's brief, she said, leaves the decision of how  
2 overseas voters return their voted ballots up to the  
3 individual states to determine.

4           So it's circular, in essence. The Federal  
5 Government says, you know, has established the rules for  
6 absentee voting and they specifically say the state can  
7 determine how the ballots should be received and on that  
8 point, there is no constitutional right to an absentee ballot  
9 and there is absolutely no constitutional right to submit a  
10 ballot through electronic means.

11           And, Your Honor, to your point as well about what  
12 does that mean in terms of the statute, it also goes to  
13 redressability. If it is -- if the only three named  
14 defendants aren't the individuals who received these ballots,  
15 they have no authority to compel or order anyone to receive  
16 these ballots. All they can do is issue guidance and make  
17 sure that the counties are following the Pennsylvania laws.  
18 What the plaintiffs in this case are essentially asking  
19 Your Honor to do is rewrite those laws.

20           So that's the point on redressability. I see no  
21 case, certainly none cited by the plaintiffs, where a court  
22 has entered that type of relief.

23           THE COURT: Please wrap up, Mr. Korn.

24           MR. KORN: And then -- Your Honor, nothing further.  
25 Thank you.

1 THE COURT: Any other defendants?

2 MS. BUCHANAN: Your Honor, this is Heather Buchanan  
3 from Ohio representing Ohio Secretary of State Frank LaRose.  
4 Your Honor, I just wanted to make a quick point.

5 Your Honor, we filed a notice of supplemental  
6 authority I believe over the weekend --

7 THE COURT: I saw.

8 MS. BUCHANAN: -- regarding a case that came out  
9 Friday night. It unfortunately came out right after we filed  
10 our brief with the Court and I just wanted to bring that case  
11 to the Court's attention for two reasons briefly.

12 The first is that this court, the Sixth Circuit,  
13 applied Purcell specifically. Not only are we looking at  
14 cases for changing the rules on the eve of the election, we're  
15 looking at the consequences of changing the rules after voting  
16 has started and that's what we have here and the Court pointed  
17 that out specifically that there are dangers in that.

18 The second point from that case, quickly,  
19 Your Honor, is that the court pointed out the consequences and  
20 the dangers in mandating a new system that has never been  
21 used, never tested, it would require a complete change of  
22 process for the Boards of Elections and what the dangers are  
23 in mandating that so quickly before Election Day.

24 Your Honor has that case. I just wanted to make  
25 those points regarding that case that came in on Friday.

1 THE COURT: All right. Thank you.

2 And Texas, Ms. Robinson?

3 MS. ROBINSON: Thank you, Your Honor. This is Tanya  
4 Robinson, Assistant Attorney General for the State of Texas.

5 I'm just going to echo the arguments of all of these  
6 able counsel and we're happy to stand on the pleadings that we  
7 have submitted. If the Court has any specific questions that  
8 I can address or if I can otherwise be of assistance in this  
9 hearing, I'm happy to do that now. Otherwise, I will keep  
10 this hearing under an hour if I'm able to.

11 THE COURT: Okay. Thank you very much.

12 Have I heard from all defendants who want to speak?

13 Okay. Mx. Green, I'm going to give you five minutes  
14 to reply as I said I would. Maybe I'll give you a little more  
15 because I have some questions again.

16 First, what I'd like you to address is the mootness  
17 issue with regard to at least some of the defendants and, you  
18 know, you suggested an answer before. You said, well, you  
19 know, we can always find a new plaintiff, but more than  
20 whether there's actual mootness, I want you to address the  
21 fact that doesn't the fact that people in at least some of the  
22 defendant states have gotten and returned their ballots really  
23 undercut the case?

24 MX. GREEN: Absolutely, Your Honor.

25 So the answer to that is perhaps twofold. Right?

1 If we're talking pure standing, it's measured at the time of  
2 filing, not later. Mootness is a separate question and I  
3 think that there's an amount that the Purcell arguments and  
4 the mootness arguments really bump up into each other and  
5 possibly produce an answer that you can't litigate these cases  
6 at all which I don't think is quite right. But --

7 THE COURT: Let me ask you about that. I mean,  
8 COVID became a factor no later than last mid-April. Right?  
9 That's when the world shutdowns began at the latest and this  
10 case could have been brought earlier if there was going to be  
11 a problem.

12 MX. GREEN: I think that there's an amount that  
13 that's right although I mean, in April, no one thought we  
14 would be doing this in October and November.

15 THE COURT: That's right. Nobody expected the  
16 Spanish Inquisition.

17 MX. GREEN: Yes. Well, I should have included more  
18 Monty Python cites in my brief then but, you know, New York,  
19 for example, renews its statute of limitations suspension  
20 monthly. It's not -- right? We haven't predicted that this  
21 is going to go on. It's really been a month by month and day  
22 by day thing in terms of how people are viewing this.

23 So one thing that certainly was going on in the  
24 background is all the states were being lobbied very heavily  
25 and a number of states did go and switch their systems, but

1 Your Honor's point is taken that, theoretically, you know,  
2 this could have been filed probably in early August when we  
3 had a better sense of it.

4 At the same time, there are speculativeness and  
5 standing problems that exist at that point. Right? There  
6 were certainly arguments in the briefs that suggested you  
7 could not bring a case at all until you'd actually been  
8 prevented from voting and for the plaintiffs here, right, one  
9 of the issues is that they had no idea and that there was one  
10 plaintiff whose ballot was stuck at JFK and eventually broke  
11 free and moved forward.

12 To the other, you know, to the other point --

13 THE COURT: Yes. The other question I had, you  
14 didn't address it when you started out, not that you have to  
15 because it's a defense, is personal jurisdiction.

16 MX. GREEN: Right. As to personal jurisdiction -- I  
17 think the venue question is much harder, but for personal  
18 jurisdiction, I think that it would be -- JFK handles more  
19 than 50 percent of the international mail that comes out of  
20 this country and returns to this country. As many courts have  
21 observed across the United States in the Postal Service  
22 litigation that I've been part of, every state is in  
23 partnership with the Postal Service for returning absentee  
24 ballots. It is a critical part of their election  
25 infrastructure and it's part of how they think of things. So

1 the fact that their election partner transmits more than  
2 50 percent of their international mail through New York, I  
3 think, gives a sufficient context for jurisdiction.

4           Venue is a harder question, but I think that venue  
5 is appropriate here because if we were to -- and you have to  
6 do this in these cases. Imagine what litigating this case  
7 over three years what we would normally do would look like.  
8 You would take discovery, you would inspect the JFK facility,  
9 you would depose all the Postal Service workers who work at  
10 JFK and so in terms of the appropriate place to conduct a case  
11 like this, I think that JFK would be a central part of it and  
12 that's why venue would be appropriate.

13           If I have addressed the questions you have, I just  
14 want to point out one thing that's more in the nature of a  
15 reply which is about the federal right to absentee ballots.

16           One of my friends and I believe it was my friend  
17 from Georgia said something to the effect that we don't know  
18 if our scanners would handle ballots in this form. Under the  
19 federal statute that is UOCAVA, they are required to handle  
20 write-in, handwritten absentee ballots that contain certain  
21 content. So I think that that may be generally true, but  
22 states are certainly required to handle federal write-in  
23 absentee ballots separately from how they handle every other  
24 ballot.

25           I think that kind of goes to the redressability

1 point that I want to say my friend from Kentucky raised. No,  
2 my friend from Wisconsin raised.

3           Ultimately, you don't have to handle these votes  
4 exactly how you handle other votes because they are different  
5 and they are already subject to different rules. So you could  
6 easily set up a, right, a centralized fax number that all  
7 international voters subject to this injunction could send  
8 their ballots to and those could be distributed to local  
9 Boards of Elections and I don't think that that would actually  
10 be particularly difficult.

11           The last thing I'll say is I think there is some  
12 slighting that's going on here between, in the difference  
13 between electronic ballot transmission and electronic voting.

14           Electronic voting uses voting machines or portals  
15 where you have check boxes. That is insecure and there's a  
16 lot of data suggesting it's insecure. Notwithstanding that, a  
17 lot of states use it, but electronic voting has a lot of  
18 issues.

19           Electronic transmission of ballots, by contrast, has  
20 been done for more than a decade by some states and is  
21 currently done by more than, by 30 states and it's done  
22 securely and without issues. I think that there is a way to  
23 do it that is cabined in and is appropriate for this election.

24           So I think the real question is whether there is a  
25 constitutional right to have your vote counted or whether you,

1 a state can set up a system where there are some people who  
2 simply can't vote. I don't know that that's an obvious  
3 question but I think O'Brien provides the answer.

4 THE COURT: Okay. Thank you.

5 What I'd like to do is just have everyone turn off  
6 their video and audio for about five minutes. Don't leave the  
7 call. I want to think about whether I can give you a ruling  
8 now or whether there are questions I've got to research more  
9 in order to answer. So everyone stand by for what I promise  
10 will be no more than five minutes and then I'll be back to  
11 you.

12 MX. GREEN: Thank you, Judge.

13 THE COURT: Okay.

14 (Pause in the proceedings.)

15 THE COURT: Okay. I am prepared to rule on the  
16 motion now. My finding and conclusions are as follows.

17 First, I don't think any of the basic facts here are  
18 disputed. I'll just summarize them briefly for the record.

19 Plaintiffs are U.S. citizens who are living  
20 overseas. They are registered to vote in the defendant states  
21 and they're able to vote from overseas because under UOCAVA,  
22 if I'm pronouncing it nearly correctly, the Uniformed and  
23 Overseas Citizens Absentee Voting Act, that basically allows  
24 states to permit overseas voters to use the same registration  
25 procedures and vote by absentee ballot in any election the

1 same way their domestic residents can vote. The Act requires  
2 the states to send absentee ballots to overseas Americans at  
3 least 45 days before the federal elections.

4 Plaintiffs claim that the COVID-19 pandemic has  
5 effectively cut off or limited or made worrisome their ability  
6 to exercise their right to vote. The plaintiffs allege that  
7 the pandemic has slowed or stopped the mail services in  
8 various countries overseas and inhibiting their ability to  
9 receive and to return absentee ballots.

10 The plaintiffs also allege that some number, I think  
11 the plaintiffs referred to it as an unconscionable number, of  
12 absentee ballots move from abroad through JFK Airport and  
13 those ballots get a so-called NIXIE stamp, N-I-X-I-E, marking  
14 the ballots as "Return to Sender, Undeliverable as Addressed,"  
15 even though they are properly addressed.

16 The defendants are various officials in the states  
17 which plaintiffs are registered to vote. Although they have  
18 somewhat different laws among these states which is not at all  
19 surprising, they all require the absentee ballots to be sent  
20 by mail. That's in contrast to the other states, the  
21 plaintiff put the number at about 30, which allow absentee  
22 voting by fax or e-mail or some other electronic means. For  
23 instance, some states accept ballots e-mailed to the Board of  
24 Elections as scanned PDF documents.

25 Plaintiffs claim that the defendants have violated

1 their right to vote under the First and the  
2 Fourteenth Amendment by not having one of these alternative  
3 means of collecting votes that does not depend on the COVID  
4 sensitive snail-mail system.

5           So what relief I think I'm being asked to give here  
6 is either to accept and count those ballots when they're  
7 received by e-mail or some electronic means, or accepting  
8 those ballots through what's been referred to as the  
9 Department of Defense fax ballot system by which the  
10 Department of Defense will make available some fax  
11 capabilities for the purpose of voting.

12           The first line of defense for the non-New York  
13 defendants is that they're not subject to personal  
14 jurisdiction in New York. Now, I don't hear the plaintiffs  
15 contending and I don't think they could contend that the  
16 non-New York defendants are subject to general jurisdiction in  
17 New York. They're certainly not doing business on a regular  
18 basis in New York.

19           So I am looking at the New York statute and the only  
20 thing that I can find that might apply here is Civil Practice  
21 Law and Rules, Section 302(a)(1). That's part of the long arm  
22 statute and that requires a transaction of business in  
23 New York.

24           The plaintiffs argue that the New York defendants  
25 have transacted business because they sent and received

1 thousands of ballots through JFK. I really don't think that's  
2 enough for a whole bunch of reasons.

3 First of all, I don't think the defendants have  
4 transacted any business at all, whether in New York or  
5 elsewhere just as a statutory matter under the New York  
6 statute. Even assuming that the defendants have entered into  
7 a transaction in the broadest sense of that word, it's not a  
8 business transaction. They're just dropping envelopes in the  
9 mail in their home states and asking that the U.S. Post Office  
10 will empty the mailboxes and send them to their addresses.  
11 That's not business of any kind. That's the quintessentially  
12 sovereign function of running an election.

13 Secondly, even if I assume that was business, the  
14 defendants haven't done that under the statute and all of the  
15 cases construing it in New York. Their sole connection to  
16 New York is that the ballots traveled through New York. Now,  
17 I have a lot of doubt that a state official in the Midwest  
18 like Ohio or Kentucky sending a ballot to a voter in Asia  
19 would even know that the ballot would travel through New York.  
20 Maybe it would travel through a different international  
21 service center like maybe San Francisco.

22 I'm going to assume, although I don't think the  
23 plaintiffs have proven it to my satisfaction, that the ballots  
24 did travel through New York. I still don't think that would  
25 be enough. They're not being sued, the defendants, because it

1 was illegal for them to drop the ballots in their local post  
2 office box like they did for all their absentee voters.  
3 Plaintiffs' claim is that they omitted to do something else,  
4 like send an e-mail or establish a voting website.

5           Those omissions have nothing to do with New York.  
6 For specific personal jurisdiction under CPLR 302(a)(1), the  
7 plaintiffs' cause of action must have an articulable nexus or  
8 a substantial relationship with the defendant's transaction of  
9 business here in New York and I don't think these causes of  
10 action do.

11           The plaintiffs have cited me to the Second Circuit's  
12 decision in Grand River Enterprises Six Nations against Pryor,  
13 425 F.3d 158, I think that was 2005, but that case has nothing  
14 to do with this one. There the long arm jurisdiction turned  
15 on the fact that negotiations and discussions occurred in  
16 New York and we don't have anything like that.

17           For those reasons, I don't think New York's long arm  
18 statute would confer personal jurisdiction. If it did, then I  
19 don't think it would comport with due process. The Supreme  
20 Court has recently made it very clear that extraterritorial  
21 personal jurisdiction is subject to due process constraints.

22           None of the conditions for satisfying due process  
23 are met here. The defendants have not purposely availed  
24 themselves of the privilege of conducting business within the  
25 state. They just dropped the letters into their local

1 mailboxes. The Postal Service decides how to process those  
2 envelopes and, again, the defendants couldn't care less what  
3 the Postal Service decides about that.

4 This is not a case against the Postal Service. I  
5 know that Mx. Green referred to the fact that she, I'm sorry,  
6 that they were in that case, but that case really -- that's  
7 not what these defendants are being accused of. You know, the  
8 constitutional violation that's being claimed is that a right  
9 to vote was violated by not sending these ballots by  
10 electronic or fax means.

11 Every one of those failures happened outside of  
12 New York. So for the same reason that I said in rejecting  
13 statutory jurisdiction, I don't think that the defendants'  
14 acts arise out of or relate to their contacts in New York. In  
15 fact, I don't even think they have any deliberate contacts  
16 with New York.

17 Then finally, the Supreme Court has said, as is  
18 typical in due process analyses, that the exercise of  
19 jurisdiction has to be fundamentally reasonable and I just  
20 don't think it would be reasonable to make all of these out of  
21 state defendants answer in New York.

22 So the claims against the defendants from  
23 Pennsylvania, Ohio, Kentucky, Wisconsin, Georgia, I think I  
24 said Texas, those are going to have to be dismissed for  
25 personal jurisdiction. I'm not going to do that today but

1 when I come down to consider the wisdom of issuing an  
2 injunction, I've got to recognize that I really don't think I  
3 have personal jurisdiction over those states.

4 Mx. Green, if you want to argue somehow that these  
5 states ought to stay in or more properly their state officials  
6 want to stay in, I'll hear from you after this, but I really  
7 think they have to be dismissed. I'm just not going to do it  
8 now because I don't have the procedural mechanism in front of  
9 me.

10 I also want to note that the claims about the  
11 defendants whose ballots have been received and counted, I  
12 think those are clearly moot. It's not enough for you to say  
13 to me, Oh, we can find more plaintiffs. This is not a class  
14 action where you can do that sometimes and there's also not  
15 time to find those plaintiffs so I don't think that would work  
16 at all. As the case stands now, where the ballots have been  
17 received by the voting authorities in the states, those  
18 plaintiffs' claims are clearly moot.

19 So that leaves us with the New York defendants and  
20 let me turn to the preliminary injunction itself as to the  
21 New York defendants.

22 You know, this is the hardest kind of injunction,  
23 preliminary injunction for a plaintiff to get. It's a  
24 mandatory preliminary injunction. It would give the  
25 plaintiffs essentially all the relief they sought and if I

1 give them that relief, it can't be undone even if the  
2 defendants were to prevail at a trial on the merits or on  
3 appeal.

4           Because this is such a chaste ending kind of  
5 injunction, a special standard applies in the Second Circuit:  
6 The plaintiffs have to make a strong showing of irreparable  
7 harm and they have to demonstrate a clear or substantial  
8 likelihood of success on the merits in addition to the  
9 ordinary showing that the balance of equities and public  
10 interest favor an injunction.

11           Now, I'm not going to contrast that with the usual  
12 test for an injunction. I'll just tell you it's a lot more  
13 stringent than a plaintiff usually has to meet. I can't find  
14 that clear or substantial likelihood of success on the merits.

15           Let me just talk about the constitutional framework  
16 that I'm looking at here.

17           I have claims under the First and Fourteenth  
18 Amendments from the plaintiff, but there are reasons that  
19 cover both of these claims why I don't think the likelihood of  
20 success on the merits can be shown.

21           First, I don't think these New York plaintiffs have  
22 standing. I'm not really seeing an injury in fact. The  
23 plaintiffs acknowledge that they've got their overseas ballots  
24 and they sent them back to New York. They're merely concerned  
25 that because of the virus, maybe those ballots won't make it

1 back or they won't be counted or something like that, but the  
2 Supreme Court has held that plaintiffs lack standing when they  
3 haven't demonstrated that a potential future injury was  
4 certainly impending and they've said, the Supreme Court has  
5 said you can't have a speculative chain of possibilities.

6 I think really plaintiffs' concern here is  
7 speculative and insufficient to confer standing. The fact  
8 that so many or at least several of the defendants here, the  
9 groups of defendants have, in fact, received their ballots  
10 back from their voters overseas is enough to make the whole  
11 thing speculative to me.

12 Second, I really can't agree with Mx. Green on their  
13 construction of the Purcell principle. I really think it has  
14 come to be for better or worse that courts ought to be really  
15 cautious about messing with the election process so close to  
16 an election as we are.

17 I don't fault the plaintiffs for not bringing this  
18 claim sooner. I appreciate the justification that Mx. Green  
19 has offered for not doing that. There were problems whenever  
20 you brought this case but, you know, as someone has recently  
21 said in the United States Senate, that courts are not there to  
22 solve every problem, and this may be one of them they're not  
23 there to solve.

24 You know, looking at the ability, the physical  
25 ability to implement an injunction, I've heard argument from

1 both sides on it and I thought plaintiffs did a really good  
2 job in telling me, Oh, it wouldn't be that hard. I have  
3 observed the way states work and I just don't see it happening  
4 at all. I think it's utterly unrealistic to think that  
5 New York can come up with a viable, reliable and secure system  
6 the way plaintiffs demand them to do in this amount of time.

7           You know, the Supreme Court just cited Purcell the  
8 last term saying it has emphasized that lower federal courts  
9 should ordinarily not alter the election rules on the eve of  
10 an election. If we're not on the eve, we're at, like,  
11 5 o'clock in the afternoon. We're very close to the eve.

12           You know, the Supreme Court has stayed a number of  
13 injunctions like the one enjoining South Carolina's witness  
14 requirement for absentee ballots. And, by the way, that was a  
15 prohibitory injunction, not a mandatory injunction which is  
16 harder to get like we have here. I appreciate that that's not  
17 a precedential decision, but I think the trend and, really,  
18 the wisdom of it really is overwhelming. It just gives the  
19 states too much credit and my knowledge of voting procedures  
20 in New York gives them too much credit to think that this can  
21 be done as easily as the plaintiffs have suggested.

22           Thirdly, I have to tell you I'm not sure that the  
23 constitution guarantees plaintiffs the right to have overseas  
24 ballots counted on their preferred timetable at all. You  
25 know, as the plaintiffs have conceded, this isn't a statutory

1 case. They're not alleging that UOCAVA guarantees their right  
2 to a transmittal process that increases the likelihood of  
3 their votes being counted as opposed to transmitting them  
4 through the federal mail system.

5 As the plaintiffs have recognized, they can't do  
6 that because, really, all the statute does is to say that  
7 foreign ballots have to be submitted and processed in the  
8 manner provided by law for absentee ballots in the state  
9 involved. That, to me, is a pretty clear Congressional  
10 observation: Treat your foreign citizens the same way you  
11 treat your domestic citizens for absentee ballot purposes. I  
12 think that's really all that has to be done.

13 In addition, I don't think, as a constitutional  
14 matter, that an overseas citizen takes his right to vote with  
15 him when he goes overseas.

16 You know, there is a Second Circuit case, Romeu  
17 against Cohen, 265 F.3d at 118, where, you know, the facts are  
18 somewhat distinguishable but the court rejected the idea that  
19 a U.S. citizen residing in a U.S. territory, there, Puerto  
20 Rico, had a constitutional right to vote. You know, the  
21 Circuit said that that citizen did not, and if an American  
22 citizen living in Puerto Rico doesn't have the right to get  
23 his ballot counted by his state in a national election, I  
24 would think it's even less for a plaintiff who is an American  
25 citizen that's living abroad.

1           Now, let me just turn briefly to the two claims that  
2 plaintiff has raised.

3           The First Amendment claim just doesn't moot any of  
4 the factors that the Second Circuit has required for First  
5 Amendment claims in this context.

6           I'm referring specifically to Yang against Kosinski,  
7 ironically, K-0-S-I-N-S-K-I, 960 F.3d 119. On its face, the  
8 mailing requirement is reasonable and nondiscriminatory.  
9 That's why plaintiffs aren't making a facial challenge, but  
10 even if it became a severe restriction under the circumstances  
11 of the pandemic, it's far from clear that the restriction is  
12 unconstitutional given the state interest at stake.

13           You know, as the Supreme Court stated in Purcell:  
14 "A state indisputably has a compelling interest in preserving  
15 the integrity of its election process. Confidence in the  
16 integrity of our electoral processes is essential to the  
17 functioning of our participatory democracy. Voter fraud  
18 drives honest citizens out of the democratic process and  
19 breeds distrust of our government. Voters who fear their  
20 legitimate votes will be outweighed by fraudulent ones will  
21 feel disenfranchised."

22           I appreciate Mx. Green's point that, you know, it's  
23 not the Board of Elections that would get confused, it's the  
24 voters who have to have it straight, but I really think that  
25 my imposition of new voting procedures here is something that

1 would confuse a lot of people including voters both domestic  
2 and foreign.

3 I would also note that I appreciate the distinction  
4 between electronic voting and I agree there are more security  
5 problems with that, but I am not convinced that electronic  
6 ballot counting is that much more reliable and the states  
7 don't have to worry about fraud.

8 Here, you know, a court order, if I were to issue  
9 this injunction, it would implement a whole new system of  
10 voting right before a hotly contested election and that kind  
11 of change would undermine voters' confidence in the results, I  
12 think.

13 As to the equal protection claim, you know, the  
14 plaintiffs don't allege that the defendants are treating them  
15 any differently than any other voters in this case, the  
16 remaining case, New York. All voters in New York have to  
17 abide by the mailing requirement. What the plaintiffs, I  
18 think, are really claiming is that New York officials have  
19 violated the equal protection clause because they're not using  
20 the same electronic procedures that 30 other states have used,  
21 but equal protection doesn't apply between sovereigns. It  
22 applies over sovereigns.

23 So you can't say that just because 30 states are  
24 doing this, the other states have violated equal protection if  
25 they don't do it. I think that's a factor that's of some

1 weight in the equal protection analysis but here, because the  
2 citizens who are residents and the citizens who are  
3 non-residents are being treated exactly the same, I don't see  
4 a valid equal protection claim.

5 I am, therefore, denying the motion. I probably  
6 will issue a more detailed written decision after that and  
7 then what I want the parties to do is I want the parties to  
8 talk among themselves and decide what's left, if anything.  
9 Obviously, the plaintiffs have got to decide if they want to  
10 appeal. They have to decide if they want to consent with a  
11 reservation of rights on the personal jurisdiction issue the  
12 dismissal of the other defendants because, frankly, if I get a  
13 notice of motion from the non-New York defendants saying for  
14 the reasons you've said in your decision, Judge, you should  
15 dismiss, I'll probably grant that, but I want the parties to  
16 try to work it out and see how much, if any, of the case is  
17 left. Okay? Take a week, take ten days or so. Plaintiff may  
18 want to move faster than that if they're intent on pursuing  
19 this, but I'll wait to hear from you as to where we go next.

20 Okay. Anything else we need to talk about?

21 MX. GREEN: Your Honor, while we have everybody  
22 here --

23 THE COURT: Yes.

24 MX. GREEN: I will just say, you know, reserving  
25 everything on the appeal, we obviously believe that the Court

1 is not going to reach a different result on a different motion  
2 and jurisdiction means dismissal. So, you know, we're going  
3 to consent to that.

4 THE COURT: I appreciate your candor and also I want  
5 to tell you everyone's papers were really good. I was,  
6 frankly, apprehensive that I would be able to digest all of  
7 this in time for this hearing, but the papers really laid it  
8 out and I appreciate all the lawyers' efforts in doing that.

9 Okay. Thank you.

10 Yes, Mr. Westberry.

11 MR. WESTBERRY: Quickly, Kentucky did file a motion,  
12 Judge Cogan, in addition to the opposition to the injunction.  
13 We may have been the only state that did.

14 THE COURT: Yes. I don't recall seeing that but  
15 that's fine and Mx. Green has indicated, you know, it's not  
16 going to be a problem.

17 MX. GREEN: Yes.

18 THE COURT: Thank you all. I appreciate it. Take  
19 care.

20 MX. GREEN: Thanks, Judge.

21 MS. GOLDBERG: Thank you, Your Honor.

22 MR. JOHNSON-KARP: Thank you, Your Honor.

23 MS. BUCHANAN: Thank you, Your Honor.

24 (Matter concluded.)  
25