No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Applicants,

v.

THE WISCONSIN STATE LEGISLATURE, ET AL.,
Respondents.

EMERGENCY APPLICATION OF DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN TO VACATE STAY

DIRECTED TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicants Democratic National Committee and the Democratic Party of Wisconsin were plaintiffs in the district court and appellees in the court of appeals.

Defendants below, Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, are the members of the Wisconsin Election Commission. None has appealed the district court's injunction.

Respondent Wisconsin Legislature was an intervenor-defendant in the district court and an appellant in the court of appeals.

Respondents Republican National Committee and the Republican Party of Wisconsin were intervenor defendants in the district court. They pursued their own appeal from the district court's injunction, but the court of appeals denied their motion to stay the injunction and dismissed their appeal, finding they were not entitled to appeal because the judgment did not aggrieve them.

The related proceedings are:

1. *Swenson, et al. v. Wisconsin State Legislature, et al.*, No. 20A64 (U.S.) – Application to vacate stay docketed October 13, 2020;
2. *Gear, et al. v. Wisconsin State Legislature, et al.*, No. 20A65 (U.S.) – Application to vacate stay docketed October 13, 2020;
3. *Democratic National Committee, et al. v. Bostelmann, et al.*, No. 20-2844 (7th Cir.) – Order entered October 13, 2020;
4. *Democratic National Committee, et al. v. Bostelmann, et al.*, Nos. 20-2835 and 20-2844 (7th Cir.) – Order entered October 8, 2020;

5. *Democratic National Committee, et al. v. Bostelmann, et al.*, No. 2020AP1634-CQ (Wis.) – Order entered October 6, 2020;

6. *Gear, et al. v. Dean Knudson, et al.*, No. 3:20-cv-278 (W.D. Wis.) – Order entered September 21, 2020;

7. *Edwards, et al. v. Vos, et al.*, No. 3:20-cv-340 (W.D. Wis.) – Order entered September 21, 2020; and

8. *Swenson, et al. v. Bostelmann, et al.*, No. 3:20-cv-459 (W.D. Wis.) – Order entered September 21, 2020.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Per Supreme Court Rule 29.6, Applicants Democratic National Committee and Democratic Party of Wisconsin have no parent companies or publicly held companies with a 10% or greater ownership interest in them.

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Applicants Democratic National Committee (DNC) and Democratic Party of Wisconsin (DPW), plaintiffs-appellees below, respectfully apply under this Court's Rules 22 and 23 for an order vacating the stay issued October 8, 2020, by a panel of the United States Court of Appeals for the Seventh Circuit, a copy of which is attached as Appendix ("App.") 1-32. That order stayed a September 21, 2020 preliminary injunction opinion and order issued by the United States District Court for the Western District of Wisconsin, attached as App. 33-101.

INTRODUCTION

The last time this case was before this Court in April, just prior to Wisconsin's spring primary, the Court ordered that, "to be counted in this election a voter's absentee ballot must be either (i) **postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m**., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8 p.m." *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1208 (2020) (emphasis added). As the Court noted, the Wisconsin Legislature and other applicants had decided *not* to challenge the six-day extension ordered by the district court and approved by the Seventh Circuit, but instead to ask for an election-day postmark requirement *as part of* that extension. *Id.* at 1206. But the underlying extension was nevertheless an

important part of this Court's order in *RNC*. The Court relied on it in rejecting additional relief, emphasizing "that the deadline for receiving ballots was already extended to accommodate Wisconsin voters ... to ensure [they] can cast their ballots and have their votes count." *Id.* The Court expressed no concerns about "afford[ing] Wisconsin voters several extra days in which to mail their absentee ballots," so long as those ballots were "postmarked by election day." *Id.* at 1206. And while the Court reiterated that federal judges "should *ordinarily* not alter the election rules on the eve of an election" so as to avoid "judicially created confusion," the final result was to let stand the district court's deadline extension entered just five days prior to the April 7 election, as modified by this Court's postmark rule adopted the day before the election. *Id.* at 1207 (emphasis added).

The Wisconsin Elections Commission (WEC) determined after the spring election that the six-day extension (as modified by this Court's election-day postmark requirement) had prevented the disqualification of nearly 80,000 valid ballots that had been timely cast on or before election day but not received until after election day. App. 49. The WEC Administrator testified that "election officials were able to meet all post-election canvassing deadlines notwithstanding [the] six-day extension of the deadline in April, and the extension gave election officials time to tabulate and report election results more efficiently and accurately." App. 82-83. There is no evidence the extension led to any suspected voter fraud or other systemic problems.

Now, about half a year later, the district court has determined after extensive further evidentiary proceedings that this same relief is needed again, and that the situation today even more clearly supports this relief. Thus, the district court on September 21 ordered an extension of the Wis. Stat. § 6.87(6) election-day receipt deadline "until November 9, 2020, for all ballots mailed and postmarked on or before election day, November 3, 2020." App. 104.

The district court's decision underscored the many ways in which the situation today even more clearly supports awarding the same relief as in April. These include (1) a continued surge in absentee voting, with potentially *twice* as many absentee ballots in November as in April, which "will again overwhelm the WEC and local officials despite their best efforts to prepare"; (2) a continued deterioration in mail service in Wisconsin; (3) the continued partisan gridlock that has prevented the resolution of any of the "fundamental causes" of April's election breakdown; and (4) a spiraling deterioration in Wisconsin's public health situation, with the State breaking "numerous new case records" in September and no end in sight. App. 35, 45, 52-56, 79-83. And in the three weeks since the district court's preliminary injunction, Wisconsin has become one of the Nation's COVID-19 "red zones," with "high levels of community transmission" in nearly half of Wisconsin's counties. App. 21 (Rovner, J., dissenting).

A divided Seventh Circuit panel issued a *per curiam* order on October 8 staying the district court's preliminary injunction in its entirety. The *per*

curiam described *RNC* as granting a stay because "the change had come too late," even though the result of *RNC* was that "the change" (*i.e.,* the six-day ballot-receipt extension) *did* go into effect, modified by this Court's requirement that ballots be postmarked by election day. App. 3. The *per curiam* nowhere acknowledged that the district court simply entered the identical ballot-receipt deadline extension that emerged from *RNC* in April or explained why the district court's relief here came "too late" (six weeks before the election) even though the *same* relief was not "too late" when imposed just days before the April election.

Applicants DNC and DPW respectfully ask this Court to vacate the Seventh Circuit's stay of the district court's preliminary injunction extending the ballot-receipt deadline "until November 9, 2020, for all ballots mailed and postmarked on or before election day, November 3, 2020," App. 100—the same six-day extension ordered in *RNC*.

OPINIONS BELOW

The district court has issued multiple opinions in this case since March 2020, but the two most pertinent to this application are a June 10 opinion on *Purcell* and ripeness issues, *see* App. 105-124, and the court's September 21 preliminary injunction opinion and order, App. 33-104. The Seventh Circuit's decision staying the district court's injunction is at App. 1-32; its earlier decision on the Legislature's standing is at App. 125-129.

JURISDICTION

This Court has jurisdiction over this application under 28 U.S.C. §§ 1254(1) and 1651(a). The DNC and DPW challenged Wisconsin's election-day absentee ballot receipt deadline in an action filed in the United States District Court for the Western District of Wisconsin on March 18, 2020. That action is one of four consolidated cases subject to the district court's September 21 injunction and the Seventh Circuit's October 8 stay.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution, Wis. Stats. §§ 6.28(1) and 6.87(6), and Sections 1983 and 1988 of Chapter 42 of the United States Code. All are reproduced in the Appendix beginning at App. 130.

STATEMENT OF THE CASE

This Court needs little introduction to this case, last before the Court in early April as *RNC v. DNC*. Following remand, the district court eventually consolidated four related cases involving the upcoming November 3 election. ECF No. 234.[1]

The Legislature moved on remand to dismiss the consolidated cases on the theory that claims involving the November election, then six months away, were not yet ripe because they were "speculative" and "premature." App. 110. That is relevant here because the Seventh Circuit panel held last week that,

[1] Unless otherwise noted, all citations to ECF No. ___ are to the docket entries in *DNC v. Bostelmann,* No. 20-cv-249-wmc (W.D. Wis.).

under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), "[i]f the judge [in this case] had issued an order in May based on April's experience, it could not be called untimely. By waiting until September, however, the district court acted too close to the election." App. 4. But in May it was the *Legislature* asking for delay, arguing that DNC and the other plaintiffs "will suffer no hardship if the court requires a later challenge" closer to November 3. App. 111. The district court rejected that argument in part because of *Purcell*: "As was amply demonstrated in the fire drill leading up to the April election, the longer this court delays, the less likely constitutional relief to voters is going to be effective *and* the more likely that relief may cause voter confusion and burden election officials charged with its administration." App. 112-13 (emphasis in original). Following discovery, extensive motion practice and proposed findings, and an evidentiary hearing, the district court on September 21 ordered, as relevant here, the same six-day extension ordered in *RNC*.[2] The court relied on a new record focused on the upcoming November 3 election, with detailed findings regarding the current on-the-ground realities in Wisconsin. Although both major parties have been involved from the opening days of this litigation, the court emphasized it did not know what the partisan consequences might be and did not care (App. 37 n.2):

[2] DNC and the other plaintiffs in the consolidated cases requested a variety of additional relief, nearly all of which the district court rejected. *See* App. 35, 62-63, 65-66 & n.18, 73-79, 86-90, 92-99. The court ordered limited relief on several additional matters, but DNC and DPW will seek *certiorari* review only of the election-day ballot receipt question presented here.

> [L]et me stress … the limited relief awarded today is without regard to (or even knowledge of) who may be helped, except the average Wisconsin voter, be they party-affiliated or independent. Having grown up in Northern Wisconsin with friends across the political spectrum (and in some cases back again), my only interest, as it should be for all citizens, is ensuring a fair election by giving the overtaxed, small WEC staff and local election officials what flexibility the law allows to vindicate the right to vote during a pandemic.

The Legislature and RNC/RPW filed notices of appeal and emergency motions to stay the district court's preliminary injunction. The Seventh Circuit panel initially questioned the Legislature's standing to appeal, *see* App. 125-29, but after the Wisconsin Supreme Court answered a Certified Question, the panel held the Legislature has standing and turned to the merits, *see* App. 1-32. Two of the judges joined a six-page *per curiam* order staying the injunction. App. 1-6. The third prepared a detailed 25-page dissent cataloguing the panel's many errors—first and foremost, its unexplained decision to stay the same deadline extension ordered six months ago in *RNC*. App. 7-32 (Rovner, J., dissenting).

REASONS FOR GRANTING THE APPLICATION

The standards for granting or vacating a stay are set forth in *Nken v. Holder*, 556 U.S. 418, 426 (2009). Point I below addresses likelihood of success on the merits. Point II addresses the remaining *Nken* factors, including irreparable harm to the movant, harm to other parties, and the public interest. These factors demonstrate this Court should vacate the Seventh Circuit's stay of the district court's preliminary injunction requiring a six-day extension of

the ballot-receipt deadline for all absentee ballots postmarked by election day.

I. There is a reasonable probability that four Justices would vote to grant review and a fair prospect that this Court would reverse, since the district court simply ordered the *identical* injunctive relief ordered in April.

A. The law has not changed since *RNC v. DNC*.

Certiorari review is appropriate when the decision below "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). There is such a conflict here. The panel *per curiam* did not even acknowledge that the district court had simply adopted the identical relief ordered in *RNC* six months ago. But the district court and Judge Rovner saw the obvious connections. The district court fashioned "a similar extension this time" based on "the guidance of the United States Supreme Court" in its April 6 order, hewing closely to that order. App. 82.

Judge Rovner thought the point so dispositive that she put an entire sentence in bold type lest it escape notice: "**We upheld (*i.e.,* denied a stay as to) comparable changes for the April election, and the Supreme Court modified the latter only to the extent of requiring that an absentee ballot be delivered or postmarked on or before election day**." App. 11 (Rover, J., dissenting) (emphasis added).

The Legislature argues that the district court's September 21 extension of the ballot-receipt deadline, modeled on the relief in *RNC v. DNC* last April, nevertheless violates *RNC*. It is hard to see how that could be. While emphasizing that federal courts "should ordinarily not alter the election rules

on the eve of an election," 140 S. Ct. at 1207, the result of *RNC* was to allow the six-day extension of the ballot-receipt deadline to remain in effect even though issued only five days before the election, as modified by this Court's postmark requirement ordered literally the day before the election.

The *per curiam* panel decision likewise misreads *RNC*. It claims that *RNC* stayed a "change" to "electoral rules" because "the change had come too late." App. 3. But this Court modified the six-day extension with the election-day postmark requirement not because the extension was otherwise "too late," but because the Court believed the absence of such a requirement "would fundamentally alter the nature of the election by allowing voting for six additional days after the election." 140 S. Ct. at 1208. *RNC* thus stands for both judicial restraint and judicial action where necessary.

B. The on-the-ground facts in Wisconsin today even more clearly support the identical relief ordered in *RNC*.

Rather than arguing the law has changed since *RNC,* the Legislature and Seventh Circuit argue the *facts* are materially different now because "[v]oters have had many months since March to register or obtain absentee ballots," and can avoid any problems simply "by planning ahead and taking advantage of the opportunities allowed by state law." App. 4-5. According to the two-judge *per curiam,* "the problem that concerned the district judge … was the difficulty that could be encountered by voters who do not plan ahead and wait until the last day that state law allows for certain steps." App. 5.

That is a caricature of what the district court actually wrote. The court

"whole-heartedly agree[d]" with the Legislature that all Wisconsin voters should vote "*now* (or as soon as possible thereafter)." App. 81 (emphasis in original). "*Everyone* … should be advocating for and to a large extent are advocating for such action." App. 81 (emphasis in original). Protecting those who fail to plan ahead was not the focus of the court's concern.[3]

Instead, the court's central focus, repeated throughout its 69-page decision, was on the "overtaxed, small WEC staff and local election officials," App. 37 n.5, and their ability to do their jobs and get ballots to voters in time for them to be voted and returned under the timeframes dictated by Wisconsin law, which the United States Postal Service (USPS) has repeatedly warned are incompatible with postal delivery standards, *see* n.4 *infra.* Wisconsin has the most decentralized election system of any State in the Nation. "With 1,850 municipal clerks and 72 county clerks responsible for administering elections, Wisconsin has more local election officials than any other state." ECF No. 45 at 5 ¶ 17. When there is a tidal wave of absentee voting in Wisconsin, the impacts are felt not by a single state election agency but by nearly 2,000 local election jurisdictions. Many of these local jurisdictions were "nearly overwhelmed" by the volume of absentee voting. App. 44. Looking ahead to the November 3 election, the district court evaluated "the systemic issues that

[3] The district court found that "so-called procrastinators" are not the only ones at risk of being disenfranchised. App. 81. "[T]here remains little doubt that tens of thousands of seemingly prudent, if unwary, would-be voters will not request an absentee ballot far enough in advance to allow them to receive it, vote, and return it for receipt by mail before the election day deadline despite acting well in advance of the deadline for requiring a ballot." App. 81.

will arise in a system never meant to accommodate massive mail-in voting." App. 80 n.20.

Greatly expanded surge in absentee voting. The district court found that "an unprecedented number of absentee ballots, which turned the predominance of in-person voting on its head in April, will again overwhelm the WEC and local officials despite their best efforts to prepare." App. 35. "The WEC is now projecting 1.8 to 2 million individuals will vote via absentee ballot, … exceeding by as much as a million the number of absentee voters that overwhelmed election officials during the April 2020 election." App. 79.

Continued deterioration in Wisconsin mail service. The serious "mail delivery issues" that plagued Wisconsin election officials and voters in April have not improved in the past six months. App. 45. In response to a bipartisan request from Wisconsin's Senators, the USPS Office of the Inspector General (OIG) conducted an extensive audit of mail delivery problems in Wisconsin's April election. The results revealed a postal system that was overwhelmed by the volume of absentee ballots requested and returned by mail in March and April. The OIG warned of a potential repeat in November.[4] The

[4] *See* USPS Office of Inspector General, Management Alert: Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area (Report Number 20-235-R20, July 7, 2020), https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf; *see also* USPS Office of Inspector General, Audit Report: Processing Readiness of Election and Political Mail During the 2020 General Elections (Report Number 20-225-R20, August 31, 2020), https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-225-R20.pdf.

district court also detailed budget shortfalls, recent "major operational changes," and the toll that COVID-19 has taken on postal workers themselves. App. 53. The WEC itself has reported "significant concerns about the performance of the postal service in connection with the April 7 election," and "ha[s] no reason to expect any better performance" this time around. App. 53, 80. The district court found that "the USPS's delivery of mail … will undoubtedly be overwhelmed again with ballots in November." App. 80.

Political stalemate. Wisconsin's continuing partisan gridlock has prevented the elected branches from making the changes necessary to avoid a repeat of the many systemic breakdowns that occurred in the April 7 primary. The continuing stalemate between the Governor and Legislature has prevented any hope of legislative resolution, and the WEC's 3-3 partisan split has blocked most regulatory action. And the nearly 2,000 local election jurisdictions in Wisconsin have been unable to take effective action on their own.

As a result, the district court found, "there is *no* evidence to suggest that the fundamental causes of the[ ] problems" with the April election "have resolved *or* will be resolved in advance of the November election." App. 80 (emphasis in original); *see* App. 69. The WEC reports the situation is dire; "the unprecedented numbers of absentee voters will again be very challenging for local election officials to manage in the compressed time frame under current law despite their best efforts to prepare for and manage this influx." App. 80.

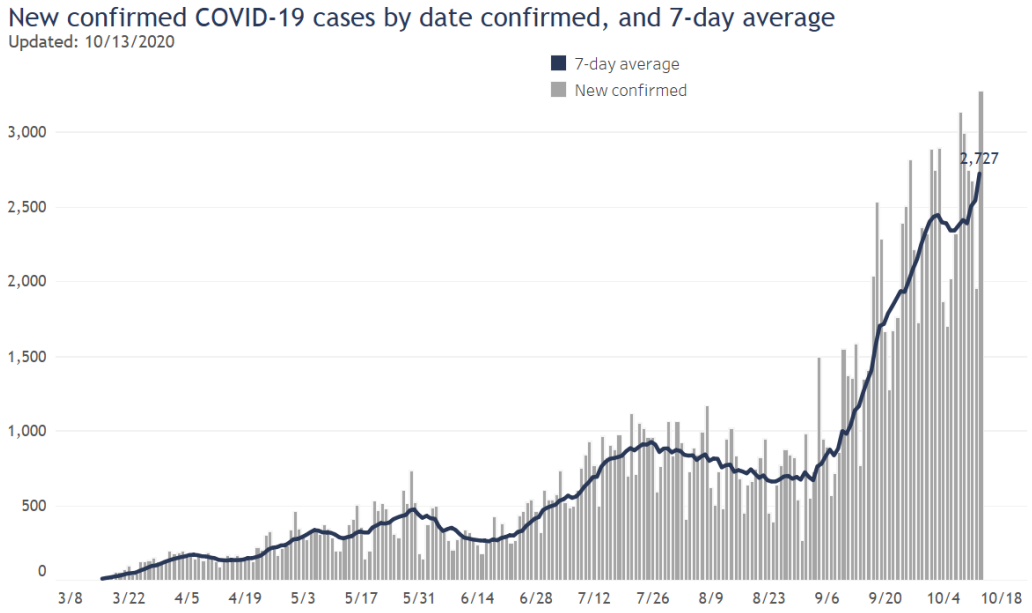
The district court found there is a "*near certainty* of disenfranchising tens of thousands of voters relying on the state's absentee ballot process" in the November 3 election, a number that could exceed 100,000 voters in November. App. 35, 83 (emphasis added).

Wisconsin's escalating public health emergency. The district court found in its September 21 opinion that there has been a surge in COVID-19 cases in Wisconsin in recent weeks. App. 52. The court noted that, "with flu season yet to arrive, Wisconsin has already broken numerous new case records this month." App. 52. Judge Rovner's October 8 dissent describes what has happened in the weeks since the district court's September 21 preliminary injunction (App. 20-21):

> As I write this dissent, new infections are surging in Wisconsin and threatening to overwhelm the State's hospitals. Judge Conley noted that in the weeks prior to his decision, new infections had doubled from 1,000 to 2,000 per day. As of Tuesday, October 6, a seven-day average of 2,346 new cases of Covid-19 was reported. The Governor has declared a public health emergency. A draft report from the White House Coronavirus Task Force dated Monday of last week described a "rapid worsening of the epidemic" in Wisconsin and placed the State in the "red zone" for Covid-19 cases, with the third-highest number of such cases per 100,000 population in the country and seventh-highest test positivity rate. Nearly half of all Wisconsin counties now have high levels of community transmission. Hospitalization rates are at record highs in the State, with facilities in northeast Wisconsin approaching capacity due to the surge in Covid-19 cases; the State is now proceeding with plans to open a field hospital to address the shortage of hospital beds.

Thus, the November 3 election in Wisconsin is not simply taking place against the general backdrop of an eight-month-old pandemic that has ebbed and flowed in different parts of the country. Instead, it is proceeding in the

midst of a five alarm fire. Consider the difference between living in an area prone to forest fires and actually being trapped by one of them, or the difference between living an an area that is vulnerable to hurricanes and actually being caught inside a Category 5 storm. The deteriorating situation is best captured in this graph of new confirmed COVID-19 cases in Wisconsin:[5]



The obviously deepening crisis in Wisconsin would seem to require, at the very least, the same relief the federal judiciary ordered last April—relief that prevented the rejection of nearly 80,000 ballots then in an election with only half the absentee ballots projected in this election *and* when the pandemic was in its infancy in this State.

The district court's extensive factual findings about the numerous

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[5] *See* Wis. Dep't of Health Servs., *COVID-19: Wisconsin Cases* (Oct. 12, 2020), https://www.dhs.wisconsin.gov/covid-19/cases.htm.

reasons to adopt the relief ordered in *RNC* again were entirely ignored in the panel decision. Those findings not only deserve deference but, respectfully, even more clearly support the relief ordered in *RNC* now than in April.[6]

C. The *Purcell* principle cuts strongly in favor of the district court's limited injunctive relief.

The district court emphasized the importance of the *Purcell* principle from the outset of this litigation, repeatedly turning to and relying on it. *See, e.g.,* ECF No. 27 at 20; ECF No. 170 at 30, 36; App. 67, 112-13. The panel *per curiam* purports to apply *Purcell* but gets the lessons of that case wrong in several respects. The panel observes that the district court's September 21 preliminary injunction came about six weeks before the November 3 election, and compared that six-week window with other two other decisions in which this Court supposedly determined that an electoral change came "too late," *i.e.*, was too close to an upcoming election. One of the two cases was *RNC,* in which this Court supposedly granted a stay because "the change had come too late."

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[6] The Legislature also has argued there was no need for prompt results in the April 7 election, which was just a presidential primary and various state and local races, whereas November 3 is a Presidential election in which Wisconsin is a key swing state. This, the Legislature argues, dictates "having prompt election results" that are "conclusively determined on election night." App. 29, 82. This argument is "thin gruel", App. 29 (Rovner, J., dissenting), and is no reason to risk rejection of tens if not hundreds of thousands of ballots. Moreover, fourteen other States and the District of Columbia "follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election, so long as they are timely postmarked." App. 82. These include numerous other "swing" states. *See generally* Nat'l Conference of State Legislatures, Voting Outside the Polling Place: *Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, (June 15, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

App. 3. But the only stay granted was with respect to the extension of the ballot-receipt deadline—not because it came "too late," but because it did not include an election-day postmark requirement. Far from staying the deadline extension as 'too late,' this Court ordered ballots postmarked on or before Election Day to count so long as they arrived within six days of Election Day.

The panel also cited to this Court's stay order in *Frank v. Walker*, 574 U.S. 929 (2014), addressing the question of how soon Wisconsin's sweeping voter ID law could take effect once approved by the courts. After being enacted in mid-2011, the voter ID law was enjoined until September 2014 and never put into effect during this time. The Seventh Circuit stayed that injunction on September 12, 2014, inviting Wisconsin to "enforce the photo ID requirement in this November's elections," then less than two months away. *Frank v. Walker*, 766 F.3d 755, 756 (7th Cir. 2014). On September 26, the *en banc* Seventh Circuit divided equally (5-5) over whether to vacate the panel's stay of the injunction, so the panel's stay remained in effect. *Frank v. Walker*, 769 F.3d 494 (7th Cir. 2014). But this Court on October 9 vacated the Seventh Circuit panel's stay, allowing the long-standing injunction of the voter ID system to remain in effect at least through the imminent election. *See* 574 U.S. at 929.

The panel *per curiam* reasoned that, "[i]f the orders of last April [in *RNC*], and in *Frank,* were too late, so is the district court's September order in this case." App. 3-4. That does not follow at all. To begin, this Court in *RNC*

did not hold the deadline extension came "too late," but modified it to include the election-day postmark requirement. And the fact that this Court decided that two months before a major federal midterm election was "too late" to implement a new and unfamiliar voter ID system says nothing about whether the modest six-day extension of a deadline in a well-established, long-functioning absentee voting system could be ordered six weeks before this election. Unlike *Frank* there is nothing for the WEC or local election officials to "implement," simply an existing deadline to extend. And the WEC Administrator emphasized that the extension had caused no collateral harms and in fact had *helped* local election officials by giving them extra time to "tabulate and report election results more efficiently and accurately." App. 83.

The panel's quest for a bright-line rule about when it is "too late" also conflicts with *Purcell* itself, which emphasizes that courts are "required to weigh" numerous factors, including whether a change might increase or decrease "voter confusion," create or eliminate "incentive[s] to remain away from the polls," and promote or undermine "clear guidance" to voters and election officials. 549 U.S. at 4-5. Because *Purcell* involves an equitable weighing of various factors, "[t]his Court has repeatedly emphasized that lower federal courts should *ordinarily* not alter the election rules on the eve of an election," while recognizing exceptions to the general rule where warranted. *RNC,* 140 S. Ct. at 1207; *see also Andino v. Middleton,* No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring) ("federal courts

ordinarily should not alter state election rules in the period close to an election") (emphasis added). Central to this analysis is determining which course best maintains "[c]onfidence in the integrity of our electoral processes," which is "essential to the functioning of our participatory democracy." *Purcell,* 127 U.S. at 4.

Any "incentive to remain away from the polls" in this case has been the result of a deadly pandemic and its numerous impacts to Wisconsin's election system, not of anything done by the district court. Voter confusion and abstention from voting have been "consequent" of the pandemic and its many impacts on voting, not of anything ordered by the court. The judicial relief that emerged from *RNC v. DNC* demonstrated that a slight extension of the ballot-receipt deadline can in appropriate circumstances ensure that voters who cast their ballots in advance of the election but whose ballots are delayed in transit will not have their ballots rejected out of hand. To allow an opposite result now could only undermine public confidence in the integrity of the election and discourage voters from participating in the future.

It is telling that the WEC—the body responsible for administering elections in Wisconsin—has not opposed adoption of the six-day extension, does not believe the extension will harm the election system or cause disruption in any way, and believes an extension may once again assist WEC and local election officials throughout the State in completing their tasks and meeting all deadlines. App. 26, 82-83.

Nor can the Legislature credibly claim that *Purcell* required the DNC and other plaintiffs to move last *May* for injunctive relief in the November election—a six-month lead time. *See* App. 4. As discussed in the Statement of the Case, the Legislature in May was arguing not that November 3 was too *close*, but that it was so far away that any decision *now* would require "premature speculation as to the state of the COVID-19 situation and Wisconsin's election administration." ECF No. 200 at 9.

The district court rejected this argument in part on *Purcell* grounds; "any delay may ultimately preclude relief under the *Purcell* doctrine, which cautions against court intervention in imminent elections." App. 113. Thus, while the Legislature argued last May that claims about November 3 were so distant that they were "premature speculation" and unripe, *now* the Legislature argues that the claims not only were *ripe* back in May but were *barred* under *Purcell* because they had not been brought and decided by then. The Legislature appears to seek a rule in which it is always either "too soon" or "too late" when it comes to the enforcement of constitutionally protected voting rights—where voting rights claims are either not yet ripe or barred under *Purcell*.

D. The district court did not attempt to "displace the decisions of the policymaking branches of government."

The panel *per curiam* asserts that "[t]he district judge also assumed that the design of adjustments during a pandemic is a judicial task," and that he

had attempted "to displace the decisions of the policymaking branches of government." App. 4, 5. That is not a fair criticism and does not bear up under analysis. From the outset of this litigation in March, the district court repeatedly emphasized its limited role and its strong deference to elected officials and Wisconsin election regulators. And the court warned plaintiffs it would not "act as the state's chief health official." ECF No. 170 at 36. Following these deferential standards of federal judicial review, the district court rejected most of the DNC and other plaintiffs' claims, emphasizing the narrow and limited nature of the relief it was ordering. *See* App. 35, 62-63, 65-66 & n.18, 73-79, 86-90, 92-99.

The district court emphasized in particular "the special role assigned the Wisconsin Election Commission in preparing for" the upcoming elections, and promised "certainly [to] take into consideration [the WEC's] actions in determining what steps, if any, a federal court should or may undertake in protecting the right of Wisconsin voters." App. 122. The court relied heavily on the expertise of the WEC Administrator, and repeatedly considered problems from the perspectives of the WEC staff and local election officials and volunteers in the State's nearly 2,000 local election jurisdictions. And it extended the election-day ballot receipt deadline a second time only after being advised that, from an election administration standpoint, the six-day extension ordered in *RNC* had not caused problems and in fact had helped the WEC and local election officials in their work. App. 82–83. The WEC Administrator also

emphasized that election officials will be "able to meet all post-election canvassing deadlines" if the same extension ordered in *RNC* is ordered again. App. 82.

This may explain why the defendants in this case, the six members of the WEC, have not appealed the injunction or otherwise criticized it. Nor has Wisconsin's Executive Branch challenged the injunction or otherwise suggested dissatisfaction with it. In this important respect, this case is similar to *Republican National Committee v. Common Cause Rhode Island*, No. 20A28, 2020 WL 4680151, *1 (U.S. Aug. 13, 2020), which denied a motion to stay the injunction where "state election officials support[ed] the challenged decree" (emphasis added). The DNC and DPW acknowledge that the injunction in *Common Cause Rhode Island* was not only supported by "state election officials" but was not opposed by any other "state official." Here, of course, the Legislature has intervened to challenge the injunction (based not on a vote of the whole deliberative body but rather the decision of a committee of 10 representatives), but the more important point is that the WEC's acquiescence in the court-ordered extension of the ballot-receipt deadline is another factor that warrants vacating the Seventh Circuit's stay of the district court's injunction.

The agreement of Wisconsin's executive branch also distinguishes this case from this Court's recent decision in *Andino v. Middleton*. *See* 2020 WL 5887393. *Andino* should not control the outcome here. There the Court stayed

a district court order enjoining South Carolina's witness requirement for absentee ballots. The record in that case included evidence that law enforcement viewed the requirement as a useful investigatory tool in the event of voter fraud. And the South Carolina Election Commission ("SCEC") strongly opposed the district court's order. Here, by contrast, there has been no hint of potential voter fraud resulting from the six-day extension last April and no reason to believe the result might be different if the relief ordered in *RNC* is ordered again. The problem here, instead, involves *valid* ballots that satisfy this Court's election-day postmark requirement but are received by local election officials in the first several days following the election. We know from the WEC that nearly 80,000 ballots fell into this category last April, that there will be twice as many absentee ballots cast in November than were cast in April, and that even with advance planning the number of ballots falling into this category in November could exceed 100,000.

The citizens who cast these valid ballots cannot and must not all be dismissed as "procrastinators." The record demonstrates that many voters who mailed their absentee ballots well in advance of the April 7 primary were nevertheless disenfranchised because their ballots were not received by local election officials until after the election for reasons beyond those voters' control. The burden on voters—outright disenfranchisement—is thus of the highest magnitude and voters have less ability to avoid that burden than the South Carolina voters subject to the witness requirement. Indeed, the district

court here *rejected* all challenges to Wisconsin's statutory witness requirement *precisely* because it understood that the factual and legal contexts are entirely different. App. 75-79. As noted above, the district court rejected nearly all of plaintiffs' challenges and granted only limited relief that, as relevant here, tracked the relief ordered in *RNC*.

Moreover, the SCEC, the state election agency responsible for administering election laws in South Carolina, strongly opposed any relaxation of the state witness certification requirement and pointed to a variety of potential adverse consequences. The circumstances here are completely different. The SCEC's counterpart, the WEC, has affirmed that the six-day extension of the ballot receipt deadline in *RNC* did *not* prevent the WEC or local election officials from meeting all relevant post-election deadlines. App. 82–83. The WEC is similarly confident that it and local election officials can meet those deadlines again if the same relief is ordered for the November election. *See Common Cause Rhode Island*, 2020 WL 4680151, *1 (denying stay where "state election officials support[ed] the challenged decree").

Enforcing the election day receipt deadline in the current circumstances, where a once-in-a-century pandemic is rapidly infecting thousands more Wisconsinites daily, and elections administrators and the USPS have made clear that, unless the deadline is extended, thousands of lawful voters will have their ballots rejected due to no fault of their own, clearly "has no real or substantial relation" to protecting the health and safety of the people of

Wisconsin. To the contrary, it threatens those interests. And, at the same time, it also threatens to abridge—and for thousands of voters, effectively deny—the right to vote. As such, "it is the duty of the courts to so adjudge," to protect those voters' federal rights, "and thereby give effect to the Constitution." *Id*. Here, the district court did not overstep its bounds, it faithfully executed its duty. It carefully considered the evidence before it and entered narrow relief to protect the voting rights of thousands of lawful Wisconsin voters in the November election.

II. The balance of potential harms and the public interest strongly favor granting the application and vacating the stay.

The balance of harms and the public interest also strongly favor granting this application to vacate the Seventh Circuit's stay. The extension ordered in *RNC* (as modified by this Court's postmark rule) did not undermine election administration, but in many respects assisted the WEC and local election officials. *See supra* at 2, 20. Based on extensive evidence (including the testimony of the WEC's Administrator), the district court found this same relief was necessary and appropriate again and would not in any way interfere with post-election deadlines. *See supra* at 3, 10–15, 18, 20–21. And the relief prevented the rejection of nearly 80,000 valid ballots postmarked on or before election day, often long before election day. *See supra* at 2, 14, 22, 24; *see also Purcell,* 549 U.S. at 4 (emphasizing "plaintiffs' strong interest in exercising the 'fundamental political right' to vote") (emphasis added).

Moreover, "[c]onfidence in the integrity of our electoral processes is

essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. That confidence in Wisconsin's electoral process will be shattered if tens of thousands of valid, timely cast absentee ballots are not counted because they arrived two or three days after the election due to mail delays and other factors beyond the voters' control. The district court's modest six-day extension of the ballot-receipt deadline will best promote voter confidence and the integrity of the election system, without burdening WEC staff or local election officials. It is the contrary result that will undermine "[c]onfidence in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4.

CONCLUSION

For these reasons, the Emergency Application of Democratic National Committee and Democratic Party of Wisconsin to Vacate Stay should be granted.

Dated this 14th day of October, 2020.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Applicants,

v.

THE WISCONSIN STATE LEGISLATURE, ET AL.,

Respondents.

DIRECTED TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

I, John Devaney, a member of the Supreme Court Bar, hereby certify that the a copy of the forgoing Emergency Application of Democratic National Committee and Democratic Party of Wisconsin to Vacate Stay was filed by email with the Clerk's Office of the Supreme Court of the United States, and was served via email on the following parties listed below on this 14th day of October, 2020:

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Applicants,

v.

THE WISCONSIN STATE LEGISLATURE, ET AL.,
Respondents.

APPENDIX TO EMERGENCY APPLICATION OF DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN TO VACATE STAY

DIRECTED TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

Nos. 20-2835 & 20-2844

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.

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

SUBMITTED OCTOBER 6, 2020 — DECIDED OCTOBER 8, 2020

Before EASTERBROOK, ROVNER, and ST. EVE, *Circuit Judges*.

PER CURIAM. On September 29, 2020, we issued an order denying the motions for a stay in these appeals, because we

concluded that Wisconsin's legislative branch has not been authorized to represent the state's interest in defending its statutes. On October 2, in response to a request for reconsideration, we certified to the Supreme Court of Wisconsin the question "whether, under Wis. Stat. §803.09(2m), the State Legislature has the authority to represent the State of Wisconsin's interest in the validity of state laws." That court accepted the certification and replied that the State Legislature indeed has that authority. *Democratic National Committee v. Bostelmann*, 2020 WI 80 (Oct. 6, 2020). In light of that conclusion, we grant the petition for reconsideration and now address the Legislature's motion on the merits. (The other intervenors have not sought reconsideration.)

As we explained last week, a district judge held that many provisions in the state's elections code may be used during the SARS-CoV-2 pandemic but that some deadlines must be extended, additional online options must be added, 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; enjoined for one week (October 22 to October 29) enforcement of the requirement that the clerk mail all ballots, but only for those voters who timely requested an absentee ballot but did not receive one, and authorized online delivery during this time; 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 State Legislature offers two principal arguments in support of a stay: first, that a federal court should not change the rules so close to an election; second, that political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid. See *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020) (sustaining Wisconsin's rules after reviewing the elections code as a whole). We agree with both of those arguments, which means that a stay is appropriate under the factors discussed in *Nken v. Holder*, 556 U.S. 418, 434 (2009).

For many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date. One recent instance came in an earlier phase of this case. After the district judge directed Wisconsin to change some of its rules close to the April 2020 election, the Supreme Court granted a stay (to the extent one had been requested) and observed that the change had come too late. *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020). One of the decisions cited in that opinion is another from Wisconsin: *Frank v. Walker*, 574 U.S. 929 (2014). In *Frank* this court had permitted Wisconsin to put its photo-ID law into effect, staying a district court's injunction. But the Supreme Court deemed that change (two months before the election) too late, even though it came at the state's behest. (*Frank* did not give reasons, but *Republican National Committee* treated *Frank* as an example of a change made too late.) Here the district court entered its injunction on September 21, only six weeks before the election and less than four weeks before October 14, the first of the deadlines that the district court altered. If the orders of last April, and in *Frank*, were too late, so is the district court's September

order in this case. See also *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The Justices have deprecated but not forbidden all change close to an election. A last-minute event may require a last-minute reaction. But it is not possible to describe COVID-19 as a last-minute event. The World Health Organization declared a pandemic seven months ago, the State of Wisconsin closed many businesses and required social distancing last March, and the state has conducted two elections (April and August) during the pandemic. If the judge had issued an order in May based on April's experience, it could not be called untimely. By waiting until September, however, the district court acted too close to the election.

The district judge also assumed that the design of adjustments during a pandemic is a judicial task. This is doubtful, as Justice Kavanaugh observed in connection with the Supreme Court's recent stay of another injunction issued close to the upcoming election. *Andino v. Middleton*, No. 20A55 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring). The Supreme Court has held that the design of electoral procedures is a legislative task. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Burdick v. Takushi*, 504 U.S. 428 (1992).

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. The pandemic has had consequences (and appropriate governmental responses) that change with time, but the fundamental proposition that social distancing is necessary has not changed since March. The district court did not find that any person who wants to avoid voting in

person on Election Day would be unable to cast a ballot in Wisconsin by planning ahead and taking advantage of the opportunities allowed by state law. The problem that concerned the district judge, rather, was the difficulty that could be encountered by voters who do not plan ahead and wait until the last day that state law allows for certain steps. Yet, as the Supreme Court observed last April in this very case, voters who wait until the last minute face problems with or without a pandemic.

The Court has consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government. It has stayed judicial orders about elections, prison management, and the closure of businesses. We have already mentioned *Andino* and *Republican National Committee*. See also *Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S. Aug. 11, 2020) (staying an injunction that had altered a state's signature and deadline requirements for placing initiatives on the ballot during the pandemic); *Merrill v. People First of Alabama*, No. 19A1063 (U.S. July 2, 2020) (staying an injunction that had suspended some state anti-fraud rules for absentee voting during the pandemic); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (staying an order that overrode a prison warden's decision about how to cope with the pandemic); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (staying an injunction that changed the rules for ballot initiatives during the pandemic); *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (declining to suspend state rules limiting public gatherings during the pandemic).

Deciding how best to cope with difficulties caused by disease is principally a task for the elected branches of gov-

ernment. This is one implication of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and has been central to our own decisions that have addressed requests for the Judicial Branch to supersede political officials' choices about how to deal with the pandemic. See, e.g., *Tully v. Okeson*, No. 20-2605 (7th Cir. Oct. 6, 2020) (rejecting a contention that the Constitution entitles everyone to vote by mail during a pandemic); *Illinois Republican Party v. Pritzker*, No. 20-2175 (7th Cir. Sept. 3, 2020) (rejecting a constitutional challenge to limits on the size of political gatherings during the pandemic); *Peterson v. Barr*, 965 F.3d 549 (7th Cir. 2020) (reversing an injunction that had altered procedures for executions during the pandemic); *Morgan v. White*, 964 F.3d 649 (7th Cir. 2020) (social distancing during a pandemic does not require, as a constitutional matter, a change in the rules for qualifying referenda for the ballot); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (rejecting a constitutional challenge to limits on the size of religious gatherings during the pandemic). Cf. *Mays v. Dart*, No. 20-1792 (7th Cir. Sept. 8, 2020) (reversing, for legal errors, an injunction that specified how prisons must be managed during the pandemic).

The injunction issued by the district court is stayed pending final disposition of these appeals.

ROVNER, *Circuit Judge*, dissenting. In the United States of America, a beacon of liberty founded on the right of the people to rule themselves, no citizen should have to choose between her health and her right to vote. An election system designed for in-person voting, coupled with an uncontrolled pandemic that is unprecedented in our lifetimes, confronts Wisconsin voters with that very choice. In the April 2020 election, Wisconsin voters sought overwhelmingly to protect themselves by voting absentee. Yet at least 100,000 of them, despite timely requests, did not receive their ballots in time to return them by election day, as the Wisconsin election code requires. Only as a result of judicial intervention in the April 2020 election were some 80,000 absentee ballots, their return delayed by an overwhelmed election apparatus and Postal Service, rescued from the trash bin. Thousands of additional voters who never received their ballots were forced to stand in line for hours on election day waiting to vote in person, risking their well-being by doing so.

For purposes of the upcoming November election, the district court ordered a limited, reasonable set of modifications to Wisconsin's election rules designed to address the very problems that manifested in the April election and to preserve the precious right of each Wisconsin citizen to vote. Its two most important provisions are comparable to those this very court sustained six months ago. The Wisconsin Election Commission, whose members are appointed by the Legislature and the Governor and are charged with administering the State's elections, has acceded to that injunction. It is not here complaining of any undue burden imposed by the district court's decision or any risk of voter confusion. Only the Wisconsin Legislature, which has chosen to make no accommodations in the election rules to account for the burdens created

by the pandemic, seeks a stay of the injunction in furtherance of its own power.

Today, by granting that stay, the court adopts a hands-off approach to election governance that elevates legislative prerogative over a citizen's fundamental right to vote. It does so on two grounds: (1) the Supreme Court's *Purcell* doctrine, as exemplified by the Court's recent shadow-docket rulings, in the majority's view all but forbids alterations to election rules in the run-up to an election; and (2) in times of pandemic, revisions to election rules are the province of elected state officials rather than the judiciary. With respect, I am not convinced that either rationale justifies a stay of the district court's careful, thorough, and well-grounded injunction. At a time when judicial intervention is most needed to protect the fundamental right of Wisconsin citizens to choose their elected representatives, the court declares itself powerless to do anything. This is inconsistent both with the stated rationale of *Purcell* and with the *Anderson-Burdick* framework, which recognizes that courts can and must intervene to address unacceptable burdens on the fundamental right to vote. The inevitable result of the court's decision today will be that many thousands of Wisconsin citizens will lose their right to vote despite doing everything they reasonably can to exercise it.

This is a travesty.

On the facts of the case, I see no deviation from *Purcell*. In all of two sentences, *Purcell* articulated not a rule but a caution: take care with last-minute changes to a state's election rules, lest voters become confused and discouraged from voting. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S. Ct. 5, 7 (2006)

(per curiam).[1] In a series of stay rulings on its shadow docket since that decision, the Supreme Court has evinced a pronounced skepticism of judicial intervention in the weeks prior to an election, *e.g. Andino v. Middleton*, — S. Ct. —, 2020 WL 5887393 (U.S. Oct. 5, 2020), but has put little meat on the bones of what has become known as the *Purcell* doctrine. *See* Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, Election Law Blog (Sept. 27, 2020) (hereinafter, "*Freeing Purcell*") ("[d]espite all of this activity, the *Purcell* principle remains remarkably opaque")[2]. Perhaps we can say at this point that *Purcell* and its progeny establish a presumption against judicial intervention close in time to an election. *See id.* ("This is the reading most consistent with *Purcell*'s actual language."). But how near? As to what types of changes? Overcome by what showing? These and other questions remain unanswered.

The Supreme Court's stay decision in this case regarding the April 2020 election did little to clear things up. This court had denied a stay as to two changes the district court ordered for purposes of that spring election: extending the deadline for requesting an absentee ballot, and extending the deadline for receipt of completed absentee ballots. *Dem. Nat'l Com. v. Bostelmann*, 2020 WL 3619499, at *1 (7th Cir. April 3, 2020). The Wisconsin Legislature appealed only the ballot-receipt deadline. Although the Court had critical things to say about the

[1] "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5, 127 S. Ct. at 7.

[2] Available at https://electionlawblog.org/?p=115834.

last-minute change in rules ordered by the district court's injunction (in part because the district court had ordered relief beyond what the plaintiffs themselves had requested), it then proceeded to impose one of its own, ordering that absentee ballots must either be delivered or postmarked on or before election day in order to be counted. *Repub. Nat'l Com. v. Dem. Nat'l Com.*, 140 S. Ct. 1205, 1207, 1208 (2020). The Court was also at pains to emphasize that it was reserving judgment as to "whether other reforms or modifications in election procedures in light of COVID-19 are appropriate." *Id.* at 1208. Apart from that, the Supreme Court's pattern of staying similar sorts of injunctions in recent months is long on signaling but short on concrete principles that lower courts can apply to the specific facts before them.

Until the Supreme Court gives us more guidance than *Purcell* and an occasional sentence or two in its stay rulings have provided, all that lower courts can do—and, I submit, must do—is carefully evaluate emergent circumstances that threaten to interfere with the right to vote and conscientiously evaluate all of the factors that bear on the propriety of judicial intervention to address those circumstances, including in particular the possibility of voter confusion.

A variety of factors should inform a court's decision whether or not to modify election rules. *See Freeing Purcell*. On balance, these factors support rather than undermine the district court's decision here.

The first consideration is whether the proposed modifications might confuse voters. That risk is minimal here. Only two of the five modifications that Judge Conley ordered alter what is expected of voters: the extension of the deadline to register online or by mail, and the extension of the deadline

for receipt of absentee ballots. Both of these modifications redound to the benefit of voters, and certainly do not lay a trap for the unwary. **We upheld (*i.e.*, denied a stay as to) comparable changes for the April election, and the Supreme Court modified the latter only to the extent of requiring that an absentee ballot be delivered or postmarked on or before election day.**[3] Neither we nor our superiors would have done so had there been a substantial risk of confusing voters. The other three changes are directed to election officials and what they must do. By their nature, these changes will not impact voter decisions.

A second consideration is whether the changes to election rules will burden election officials and increase the odds that they make mistakes. Judge Conley gave careful attention to whether state election officials would have the time and ability to implement the changes he ordered. The Wisconsin Election Commission signaled a preparedness and ability to comply with these modifications (more on these points below), and the State Executive is not here to contend otherwise.

We must consider, third, the likelihood that voter disenfranchisement will ensue from the changes Judge Conley ordered. The answer here is straightforward: it will not. On the contrary, his directives are aimed at preventing disenfranchisement. And as detailed below, the results of the April

[3] In its April decision, this court denied a stay as to an extension of the deadline to request an absentee ballot and the deadline for receipt of a completed absentee ballot. *Bostelmann*, 2020 WL 3619499, at *1. The district court had also ordered an extension of the deadline to register online for the April election, *see Dem. Nat'l Com. v. Bostelmann*, 447 F. Supp. 3d 757, 765–67 (W.D. Wis. Mar. 20, 2020), but a stay was not sought as to that extension.

election in Wisconsin demonstrate that only in the absence of judicial intervention will voters be disenfranchised.

Fourth, there has been no lack of diligence on the part of the plaintiffs in seeking relief. They sought relief in advance of the April election, as the pandemic was heating up, succeeded in part as to that election, and promptly renewed their pursuit of relief in the immediate aftermath of that election. After they defeated the Legislature's attempt to dismiss their claims, *see Dem. Nat'l Com. v. Bostelmann*, 2020 WL 3077047 (W.D. Wis. June 10, 2020), they proceeded with discovery, presented their case at an evidentiary hearing in August, and obtained a favorable ruling in September. There has been no dallying on the plaintiffs' part. For its part, the district judge responded with both alacrity and attention to detail. But according to this court, which has retroactively announced a May deadline for any changes to election rules, it was all for naught—their work was over before it began.

Fifth and finally, although the election is drawing close, the district judge issued his injunction six weeks prior to the election, leaving ample time for Wisconsin election officials to alter election practices as ordered and communicate the changes to the public, and for his judgment to be reviewed by this court and, if necessary, by the Supreme Court.[4] This is a

[4] As the *Gear* plaintiffs point out, other circuit courts have upheld injunctions modifying state election procedures in the immediate run-up to elections when the courts deemed the modifications necessary to prevent voter disenfranchisement. *E.g.*, *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12–15 (D.C. Cir. 2016) (2-1 decision) (six weeks before election); *Obama for Am. v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012) (one month before election); *U.S. Student Ass'n Fdn. v. Land*, 546 F.3d 373, 387–89 (6th Cir. 2008) (2-1 decision) (six days before election).

far cry from April, when the court's injunction was issued just eighteen days prior to the election and was modified to grant additional relief just five days prior to the election. The Covid-19 pandemic is no longer new but neither is it a static phenomenon; infection rates have ebbed and surged in multiple waves around the country and it is only *now* that Wisconsin is facing crisis-level conditions. I suppose that the district court could have issued a preliminary injunction in May based on the experience with the April election, as my colleagues suggest, but the defendants no doubt would have argued that it was premature to deem modifications to the election code warranted so far in advance of the election,[5] and there is a fair chance that this court might have agreed with them. Wisconsin infection rates in early May were less than one quarter of what they are now. Nothing in *Purcell* or its progeny forecloses modifications of the kind the district court ordered in the worsening circumstances that confront Wisconsin as the election draws nigh. Otherwise, courts would never be able to order relief addressing late-developing circumstances that threaten interference with the right to vote.[6]

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[5] In fact, the defendants did argue precisely that in moving to dismiss the DNC's complaint shortly after the April election took place. *See Dem. Nat'l Com. v. Bostelmann*, 2020 WL 3077047 (W.D. Wis. June 9, 2020).

[6] Professor Stephanopoulos cites the Bipartisan Campaign Reform Act's special restrictions on campaign ads imposed within 60 days of an election, and the Military and Overseas Voter Empowerment Act's requirement that absentee ballots be sent to certain voters at least 45 days prior to an election, as possible guideposts for determining when the eleventh hour has arrived for judicial intervention into an election. *Freeing Purcell*. Obviously, we are past both reference points here. But Stephanopoulos himself argues that this sort of deadline (which, of course, the Supreme

The court's second rationale for granting a stay—that "the design of adjustments during a pandemic" is a task for elected officials rather than the judiciary—announces an ad hoc carve-out from the *Anderson-Burdick* framework for the review of state election rules. *See Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983); *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992). That framework does call for deference to state officials, *depending upon* the degree of restriction that state election rules impose on the right to vote: severe restrictions demand strict judicial scrutiny, whereas modest, unexceptional restrictions enjoy a presumption of validity. *Id.* at 434, 112 S. Ct. at 2063–64. But what the majority proposes is total deference to state officials in the context of pandemic, with no degree of judicial scrutiny at all. That I cannot endorse. Communicable diseases can impose real and substantial obstacles to voting, and voting rules that are unobjectionable in normal conditions may become unreasonable during a pandemic, when leaving one's home and joining other voters at the polls carries with it a genuine risk of becoming seriously ill.

Notably, the Wisconsin Election Commission, whose members are appointed by two sets of elected officials—the Legislature and the Governor—was represented in the litigation below. As I noted at the outset, the Commission has acceded to the district court's injunction and has not sought a stay. As long as we are discussing deference to state officials, the views of the Commission, which is charged with enforcing Wisconsin's election rules, ought to count for something.

Court has yet to adopt) should not be conclusive in assessing the propriety of judicial intervention.

Justice Kavanaugh's concurrence in *Andino* posits that a state legislature's decision whether or not to alter voting rules in response to the Covid-19 pandemic ordinarily should not be second-guessed by the judiciary, which lacks the legislature's presumed expertise in matters of public health and is not accountable to the people. 2020 WL 5887393, at *1. But state legislatures do not possess a monopoly on matters of public health, *see*, *e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (reviewing Governor's executive order restricting size of public assemblies in light of public health emergency), and when state government is divided as it is in Wisconsin, stalemates occur. When a state proves unwilling or unable to confront and adapt to external forces that pose a real impediment to voting, it places into jeopardy the most cherished right that its citizens enjoy. (The debacle that occurred with respect to in-person voting in Wisconsin on April 7, as I discuss below, makes that point all too clear.) The right to vote is a right of national citizenship. *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 999–1000 (1972). It is essential to the vitality of our democratic republic. *E.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").[7] And no citizen of Wisconsin should be forced to risk his or her life or well-being in order to exercise this invaluable right. Wholesale deference

[7] Indeed, the irony of Justice Kavanaugh's rationale is that unchecked deference to the state legislature as to voting procedures during a pandemic may render legislators *un*accountable to voters wishing to exercise their franchise.

to a state legislature in this context essentially strips the right to vote of its constitutional protection.

I submit that our foremost duty in this case is to protect the voting rights of Wisconsin citizens, which are seriously endangered, rather than discretionary action (or inaction) by one branch of state government, in the face of a pandemic. My evaluation of the district court's injunction proceeds on that understanding.

A central premise of the Legislature's request for a stay of the changes that Judge Conley ordered to Wisconsin's election rules is that the ability to register and/or vote in person remains a perfectly acceptable alternative to any Wisconsin voter who is unable to register in advance of the election and to return an absentee ballot prior to election day. Were these ordinary times, I would have no difficulty agreeing with the Legislature. But what the Legislature downplays—indeed, barely acknowledges in its briefs—is the concrete risk that a 100-year pandemic, which at present is surging in Wisconsin, poses to anyone who must brave long lines, possibly for hours, in order to register and vote in person.

Historically, the vast majority of Wisconsin voters have cast their ballots in person, and Wisconsin's election system has evolved against that backdrop, with provisions for absentee voting having served as a courtesy for the minority of voters whose work, travel, or other individual circumstances presented an obstacle to voting in person on election day. D. Ct. Op. 15, 39. Absentee ballots have often constituted less than 10 percent of ballots cast in Wisconsin, and, until this year, never more than 20 percent. D. Ct. Op. 15. Voters have also relied heavily on the State's liberal provision for same-day voting registration, with some 80 percent of all Wisconsin

voter records reflecting some use of this feature. D. Ct. Op. 39 (citing R. 532 at 58.) The Covid-19 pandemic has turned this in-person voting paradigm on its head, as Judge Conley emphasized. Whereas, in the April 2019 election, voters requested (and were sent) a total of 167,832 absentee ballots (D. Ct. Op. 12 n.9), one year later, that total increased nearly eight-fold to 1,282,762 (D. Ct. Op. 12), with absentee ballots comprising 73.8 percent of ballots counted in the April 2020 election (D. Ct. Op. 15).

The strain that the pandemic and the sudden, unprecedented preference for absentee voting placed on state and local officials had predictable results in the April 2020 election. Election officials scrambled to keep up with the overwhelming demand for absentee ballots. Between April 3 and April 6 (the day before the election), local officials were still in the process of mailing more than 92,000 absentee ballots, virtually all of which were sent too late for them to be filled out and mailed back by election day. D. Ct. Op. 13. Another 9,388 ballots were timely applied for but never sent. D. Ct. Op. 13. Approximately 80,000 absentee ballots were completed and postmarked on or before election day but were only received by election officials in the six days *after* the statutory deadline for such ballots. D. Ct. Op. 17. These ballots would not have been counted but for the district court's order, sustained by this court and modified by the Supreme Court, extending the deadline.

Notwithstanding the fact that nearly three-quarters of the votes cast in the April 2020 election were via absentee ballots, in-person voting in that election presented challenges of its own. Poll workers were in short supply, as individuals who would normally have staffed the polls (many of them

seniors[8]) stayed away in droves, particularly in urban locations. Milwaukee, with a population of 592,025, normally operates 180 polling sites. The city could manage to open only **five** on April 7. D. Ct. Op. 16. Green Bay, population 104,879, normally operates 31 polling sites. On April 7, just **two** were open. D. Ct. Op. 16. Lines of voters (thousands of whom had timely applied for absentee ballots but had not received them) stretched for blocks and people waited hours to vote.[9] Some were masked, many were not. Some number of voters (we do not know how many) showed up to vote in person after not receiving an absentee ballot prior to election day and, discouraged by the long lines and wait times, walked away without casting a vote. D. Ct. Op. 17 (citing voter declarations). Those who stayed in line faced a discernible risk of becoming

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[8] *See* Michael Barthel and Galen Stocking, *Older people account for large shares of poll workers and voters in U.S. general elections*, PEW RESEARCH CENTER: FACT TANK, NEWS IN THE NUMBERS (April 6, 2020), https://www.pewresearch.org/fact-tank /2020/04/06/older-people-account-for-large-shares-of-poll-workers-and-voters-in-u-s-general-elections/; Laurel White, *'It's Madness.' Wisconsin's election amid coronavirus sparks anger*, NPR (April 6, 2020), https://www.npr.org/2020/04/06/827122852/it-s-madness-wisconsin-s-election-amid-coronavirus-sparks-anger.

[9] *See*, *e.g.*, Astead W. Herndon and Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, NEW YORK TIMES (April 7, 2020, updated May 12, 2020) ("The scenes that unfolded in Wisconsin showed an electoral system stretched to the breaking point by the same public health catastrophe that has killed thousands and brought the country's economic and social patterns to a virtual standstill in recent weeks."); Benjamin Swasey & Alana Wise, *Wisconsin vote ends as Trump blames governor for long lines*, NPR (April 7, 2020), https://www.npr.org/2020/04/07/828835153/long-lines-masks -and-plexiglass-barriers-greet-wisconsin-voters-at-polls.

infected. Although the evidence on this point is mixed, public health officials determined that 71 individuals contracted Covid-19 after voting in-person or working at the polls on April 7[10]; one analysis extrapolates from the available data to estimate that a ten percent increase in in-person voters per polling location is associated with an eighteen percent increase in Covid-19 cases two to three weeks later.[11]

The district court, presented with largely undisputed evidence that (1) the demand for absentee ballots in the forthcoming general election in November will be even greater than it was in April (as many as 2 million absentee ballot requests are anticipated), (2) recent cutbacks at the U.S. Postal Service and the resulting delays in mail delivery will present an even greater obstacle to registering and voting by mail than it did in the spring, and (3) persistent concerns about a shortage of poll workers on election day again raise the specter of long lines to vote in person, ordered a set of five limited modifications to Wisconsin election rules aimed at compensating for these conditions and ensuring, consistent with public health advice and voters' obvious preference for absentee voting, that voters who wish to vote by mail may do so. The two most significant of these conditions are comparable to

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[10] *See* David Wahlberg, *71 people who went to the polls on April 7 got Covid-19; tie to election uncertain*, WIS. STATE J. (May 16, 2020), https://madison.com/wsj/news/local/health-med-fit/71 -people-who-went-to-the-polls-on-april-7-got-covid-19-tie-to /article_ef5ab183-8e29-579a-a52b-1de069c320c7.html.

[11] Chad Cotti, Ph.D., et al., *The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary*, Nat'l Bureau of Economic Research, Working Paper No. 27187 (May 2020, revised October 2020), available at https:// www.nber.org/papers/w27187.

those sustained by this court, as modified in one respect by the Supreme Court, for the April election. *None* are opposed here by the Wisconsin Executive, which is charged with administering the election. *See Repub. Nat'l Com. v. Common Cause Rhode Island*, — S. Ct. —, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (noting, *inter alia*, in denying stay of judicially ordered modifications to state election law, that "here the state election officials support the challenged decree …"). To the extent these modifications intrude modestly upon the State's ability to establish its own rules for conducting elections, they are more than justified by the present pandemic and the unacceptable risks that in-person voting presents to the citizens of Wisconsin.

The Legislature challenges Judge Conley's exercise of discretion in ordering these modifications as if the Covid-19 pandemic presented a quotidian problem in an otherwise routine election, where the options for voting in-person might represent an entirely adequate alternative to voting by mail. The State's experience with the April election and the current state of the pandemic in Wisconsin demonstrate the fallacy in this premise.

As I write this dissent, new infections are surging in Wisconsin and threatening to overwhelm the State's hospitals. Judge Conley noted that in the weeks prior to his decision, new infections had doubled from 1,000 to 2,000 per day. D. Ct. Op. 20. As of Tuesday, October 6, a seven-day average of 2,346 new cases of Covid-19 was reported.[12] The Governor

[12] Wis. Dep't of Health Servs., COVID-19: Wisconsin Cases (as of October 6, 2020), https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed.

has declared a public health emergency.[13] A draft report from the White House Coronavirus Task Force dated Monday of last week described a "rapid worsening of the epidemic" in Wisconsin and placed the State in the "red zone" for Covid-19 cases, with the third-highest number of such cases per 100,000 population in the country and seventh-highest test positivity rate. Nearly half of all Wisconsin counties now have high levels of community transmission. Coronavirus Task Force, State Report—Wisconsin, at 1 (Sept. 27, 2020).[14] Hospitalization rates are at record highs in the State, with facilities in northeast Wisconsin approaching capacity due to the surge in Covid-19 cases[15]; the State is now proceeding with plans to open a field hospital to address the shortage of hospital beds.[16] Against this worsening backdrop, the district court credited

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[13] Executive Order No. 90, Office of Wisconsin Governor (Sept. 22, 2020), available at https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx.

[14] Available at WASHINGTON POST website, https:// www.washingtonpost.com/context/white-house-coronavirus-task-force-report-warns-of-high-wisconsin-covid-19-spread-in-wisconsin/e5f16345-fcb4-4524-975e-8011379ef0da/.

[15] Mary Spicuzza, et al., *Some hospitals forced to wait-list or transfer patients as Wisconsin's coronavirus surge continues*, MILWAUKEE JOURNAL SENTINEL (Sept. 30, 2020), https:// www.jsonline.com/story/news/2020/09/30/wisconsin-hospitals-wait-list-patients-covid-19-surge-coronavirus-green-bay-fox-valley-wausau/3578202001/.

[16] Mary Spicuzza and Molly Beck, *Wisconsin to open field hospital at State Fair Park on October 14 as surge in coronavirus patients continues in Fox Valley, Green Bay*, MILWAUKEE JOURNAL SENTINEL (October 7, 2020), https://www.jsonline.com/ story/news/local/wisconsin/2020/10/07/wisconsin-preparing-open-alternate-care-facility-state-fair-park-state-continues-face-surge-covid-1/5909769002/.

the opinion of a nationally recognized expert in public health surveillance, who opined that "[t]here is a significant risk to human health associated with in-person voting during the COVID-19 pandemic[;] [t]here will almost certainly be a significant risk of contracting and transmitting COVID-19 in Wisconsin on and around November 3, 2020[;] [t]he risk of contracting or transmitting COVID-19 will deter a substantial portion of Wisconsinites from voting in person on November 3, 2020[;] and [i]ncreasing the ease and availability of absentee-ballot voting options is critical to protecting public health during the November 3, 2020 election." D. Ct. Op. 23; Expert Report of Patrick Remington, M.D. at 1 (R. 44 in Case No. 3:20-cv-00459-wmc).

Presented with the evidence as to what occurred in April and what is happening now with respect to the pandemic, Judge Conley reasonably concluded that (1) a substantial number of eligible Wisconsin voters will not meet the October 14 deadline to register online or by mail, leaving them with only in-person options to register, (2) of the 1.8 to 2 million registered voters who are expected to timely request absentee ballots (D. Ct. Op. 20, 47), as many as 100,000 will not be able to return those ballots by election day through no fault of their own (D. Ct. Op. 51), and (3) when faced with the risks associated with registering or voting in-person, and potentially having to wait in line for hours in order to do so, some number of voters will deem the risk too great. These conclusions explain why he ordered modest adjustments to Wisconsin's election rules in order to minimize that possibility.

Of all of us, Judge Conley is the one judge who heard the evidence first-hand and is closest to the ground in Wisconsin. We owe deference to his judgment. He considered the

Anderson-Burdick factors for constitutional challenges to state election rules. Consistent with *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020), he considered the Wisconsin election rules in their totality in assessing the burdens that those rules, under the present circumstances, impose on the right to vote. He considered *Purcell's* admonition that judicial orders modifying election rules can result in voter confusion and an incentive not to vote, especially as an election draws closer. 549 U.S. at 4–5, 127 S. Ct. at 7. He considered this court's prior ruling in April granting a stay as to all but two of the modifications ordered for the April election. *Bostelmann*, 2020 WL 3619499. And he considered the Supreme Court's ruling, issued one day prior to the April election, which both chastised the district court for altering Wisconsin's election rules within days of the election but also modified the extension of the ballot-receipt deadline to require that mailed absentee ballots be delivered or postmarked on or before election day and accepted the deadline change as modified. *Republican Nat'l Com.*, 140 S. Ct. at 1207, 1208.

In view of the fact that this court allowed extensions of the ballot-request deadline and ballot-receipt deadline to be implemented in the April election, it is not clear to me why the majority has decided to stay comparable modifications (effectively nullifying them) for the November election. Yes, the Covid-19 virus is no longer a new menace and Wisconsin election officials have now had the experience of conducting two elections during the pandemic. But the Wisconsin election code remains one designed primarily for in-person voting, whereas the surge of Covid-19 cases in Wisconsin has only increased the risks associated with in-person voting since April. The logistical demands posed by absentee voting will if anything be greater for the November general election,

with possibly a million additional absentee ballots to be sent and returned by mail; and with the recently-discovered cutbacks in Postal Service capacity,[17] there is even greater reason to be concerned about the ability of voters to both register and vote by mail. Registering and voting in person remain as alternatives, but no legislator, no election official, and certainly no judge can assure Wisconsin voters that there is no risk associated with registering and/or voting in person as infection rates spike in their communities, especially in high-population urban areas. Election officials may *hope* that more polling places will be open in November than April, but they cannot guarantee that enough poll workers will show up on election day to avoid the sorts of long voter lines and waits that made headlines then. Nor, by the way, can anyone assure voters that they will not be waiting in line next to one or more unmasked voters, or one who is contagious with the coronavirus. Indeed, a lawsuit challenging the Governor's mask mandate is presently pending in the Wisconsin courts.[18]

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[17] *See, e.g.*, Jacob Bogage, *et al.*, *DeJoy pushes back on criticism of changes to Postal Service, says he won't restore sorting machines*, WASHINGTON POST (Aug. 24, 2020), https://www.washingtonpost.com/politics/2020/08/24/dejoy-testimony-usps-house /; Elise Viebeck and Jacob Bogage, *Federal judge temporarily blocks USPS operational changes amid concerns about mail slowdowns, election*, WASHINGTON POST (Sept. 17, 2020), https://www.washingtonpost.com/politics/federal-judge-iss-ues-temporary-injunction-against-usps-operational-changes-amid-concerns-about-mail-slowdowns/2020/09/ 17/34fb85a0-f91e-11ea-a275-1a2c2d36e1f1_story.html.

[18] *See* Scott Bauer, *Conservative law firm seeks to end Wisconsin mask order*, AP NEWS (Sept. 28, 2020), https://apnews.com/article/virus-outbreak-health-wisconsin-public-health-270d663b9411b33a17fc45fdf8ad2720; Molly Beck, *GOP leaders go to court in support of effort to strike down Tony Evers' mask mandate*, WISCONSIN JOURNAL SENTINEL (Oct. 2, 2020),

Having in mind the shortfalls with the April election and the current public health crisis posed by the pandemic, it is not unreasonable for Wisconsin voters to view the option of in-person registration and voting as a form of Russian roulette. For eligible voters who are unable to register by mail by the statutory deadline (and for the April election, there were more than 57,000 people who registered after that deadline, thanks to the district court's extension of that deadline, D. Ct. Op. 17) and for voters who timely request an absentee ballot but who either do not receive it by election day or receive it too late to return it by election day (more than 120,000 absentee ballots were not returned by election, *see* D. Ct. Op. 15), the risks associated with in-person registration and voting amount to a concrete and unacceptable, and in my view, severe, restriction on the right to vote. *See Luft*, 963 F.3d at 672 (citing *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063; *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569–70; *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944 (7th Cir. 2019)). This is especially true of individuals who are 65 years of age or older (more than 900,000 people in Wisconsin[19]), obese (some 40 percent of Wisconsin adults[20]), or suffer from chronic health conditions that render them especially vulnerable to complications from a

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https://www.jsonline.com/story/news/politics/2020/10/02/ gop-goes-court-support-effort-strike-down-mask-mandate/ 3592966001/.

[19] See Wis. Dep't of Health Servs., *Demographics of Aging in Wisconsin*, Am. Community Survey Statewide & Cnty. Aging Profiles, 2014-18, State of Wis. Profile of Persons Ages 65 & Older (Jan. 20, 2020), https://www.dhs.wisconsin.gov/aging/demographics.htm.

[20] *See* Tala Salem, *Wisconsin obesity rate higher than previous estimates*, U.S. NEWS & WORLD REPORT (June 11, 2018), https://www.us-news.com/news/health-care-news/articles/ 2018-06-11/wisconsin-obesity-rate-higher-than-previous-estimates.

Covid-19 infection (some 45 percent of all adults nationwide[21]).

Of course it is true that voters have the ability to plan ahead, register early if need be, and request absentee ballots early in order to ensure that they have adequate time to complete and return their ballots prior to election day.[22] But voters may also reasonably rely on the State's own deadlines for advance registration and requesting an absentee ballot as a guide to the amount of time necessary for their registrations to be processed and their ballots to be issued, completed, and returned. Voters do not run the State's election apparatus or the U.S. Postal Service; they have no special insight into how quickly their timely requests to register and/or vote by mail will be processed by election officials and how quickly the Postal Service will deliver their ballots. It is not reasonable to insist that voters act more quickly than state deadlines require them to do in order to ensure that either the State or the Postal Service does not inadvertently disenfranchise them because they are overwhelmed with the volume of mail-in registrations and absentee ballots.

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[21] See Mary L. Adams, *et al.*, *Population-based estimates of chronic conditions affecting risk for complications from coronavirus disease, United States*, 26 EMERGING INFECTIOUS DISEASES J. No. 8 (August 2020), https://wwwnc.cdc.gov/eid/article/26/8/20-0679 _article.

[22] Completing an absentee ballot is not a matter of simply filling it out. Wisconsin requires absentee voters to have their ballots signed by a witness. *See* Wis. Stat. § 6.87(4)(b). Some 600,000 Wisconsin voters live alone (D. Ct. Op. 21), which means they must seek out someone outside of their household to sign their ballots. During a time of surging Covid-19 infections, that is not necessarily a simple task.

It is also true that voters who receive their ballots just prior to the election have the option of delivering their ballots to a dropbox or to the polls on election day. But significant numbers of Wisconsin voters lack a driver's license (including roughly half of African American and Hispanic residents) and therefore cannot drive themselves to a poll or dropbox.[23] Relying on public transportation, a taxi, a ride-sharing service, or a lift from a neighbor to make the trip presents difficulties and risks of its own, which cannot be justified if the voter has timely complied with existing deadlines and yet cannot meet existing deadlines through no fault of her own.

I recognize that the district court's decision to order modifications to Wisconsin's election practices represents an intrusion into the domain of state government, but in my view it is a necessary one. We are seven months-plus into this pandemic. The Legislature has had ample time to make modifications of its own to the election code and has declined to do so. The Wisconsin Elections Commission, divided 3-3 along party lines, concluded that it lacks the authority to order such modifications. This leaves voters at the mercy of overworked state and local election officials, a hamstrung Postal Service, and a merciless virus. What we must ask, as Judge Conley did, is whether Wisconsin's election rules, which were not drafted for pandemic conditions, effectively restrict a Wisconsin citizen's right to vote under current conditions. The answer, I submit, is yes. Based on the State's experience with the April election, we *know* it is likely that tens of thousands of

[23] *See* John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin*, Employment and Training Institute, Univ. of Wis.-Milwaukee (June 2005), available at https://dc.uwm.edu/eti_pubs/68/.

voters will not meet the October 14 deadline to register online or by mail, especially if they are relying on the mail to complete that process. We *know* that tens of thousands of voters likely will not be able to return their ballots by mail before election day, through no fault of their own. We *know* that registering or voting in person, especially on election day, will expose some number of voters to a concrete risk of Covid-19 infection. Collectively, these conditions pose a real and substantial impediment to the right to vote. Whether that obstacle is viewed as modest or severe, and whether viewed through the lens of rational basis review or strict scrutiny, it is unacceptable. The State itself purports to want people to vote absentee, and yet has done nothing to alter its election rules to make the necessary accommodations to ensure that voters are not needlessly disenfranchised by the overwhelming shift from in-person to absentee voting.

I conclude with a just a few words about each of the individual modifications that the district court ordered. Individually and collectively, these modifications, in my view, represent a reasonable, proportional response to current conditions aimed at preserving the right to vote.

Of these, the most important, and in my view, the most essential of these modifications is the six-day extension of the deadline for the return of absentee ballots by mail to November 9, 2020, so long as the ballots are postmarked on or before election day. Of the five modifications ordered by the district court, none is more directly aimed at protecting the right to vote, in that it seeks to ensure that ballots that have been timely cast by voters will be counted. The circumstances that warranted a similar extension in April are even more serious now: the Covid-19 pandemic makes it more imperative that

as many voters as possible vote by absentee ballot; the demand for absentee ballots is virtually certain to be even greater (record-shattering) than it was in April, placing unprecedented demands on election officials and the U.S. Postal Service alike; and cutbacks implemented by the U.S. Postal Service this summer (not all of which have been suspended or reversed) threaten recurrent if not worse delays in the delivery and return of absentee ballots. The fact that some 80,000 ballots were received by mail after election day in April is all the proof necessary that an extension of the receipt deadline is vital as a means of protecting the voting rights of tens of thousands of Wisconsin voters—voters who, it cannot be said too often, will timely request and complete absentee ballots but are unable to return them by the election day deadline by no mistake or omission of their own. Against this, all that the Legislature offers is a wish to have the results of the election conclusively determined on election night. But weighed against the constitutional right to vote, this is thin gruel.

The one-week extension of the deadline to register online or by mail is reasonable in terms of both the worsening pandemic and the slowdown in mail service. As Judge Conley pointed out, Wisconsin voters are in the habit of using the State's same-day registration option to register or update their registration on election day. Only as Covid-19 infections surge in Wisconsin may voters now realize that in-person registration on election day poses unique risks, particularly if lines at the polls turn out to be as long as they were in April. At the same time, voters seeking to register by mail may run into the same problems that absentee voters encountered in April with delays in the U.S. Mail. A brief extension of the advance registration deadline is an appropriate response, and the Wisconsin Election Commission conceded that the

extension would still leave adequate time for election officials to update pollbooks with registration information in time for election day.

The directive to add language to the MyVote and WisVote websites (along with any relevant printed materials) regarding the "indefinitely confined" exception to the photo i.d. requirement is an extremely limited order aimed at eliminating voter confusion. Wisconsin law requires voters to present appropriate photographic identification in order to obtain a ballot, whether in-person or by mail. There is an exception to this requirement for a voter who is "indefinitely confined" due to age, infirmity, or disability; the signature of the voter's witness will be deemed sufficient in lieu of proof of i.d. The Commission's March 2020 guidance on this exception makes clear that a voter need not be permanently or totally disabled and wholly unable to leave one's residence in order to qualify for this exception, but this guidance is not easily available to voters and the district court found that there was a substantial risk of voter confusion as to the scope of the exception without further guidance. This was a reasonable order.

The order to permit replacement absentee ballots to be transmitted electronically to domestic civilian voters who have not received their ballots by mail in the penultimate week prior to the election (October 22–29) addresses a concrete problem that emerged in the April election: not all absentee ballots will reach voters in time for the election even if they have been timely requested. Recall that tens of thousands of ballots were still being mailed out within a few days of the election, making it impossible for voters to return them by mail (if they received them at all) by election day. Wisconsin law prohibits election officials from sending ballots by

electronic means to anyone but military or overseas voters. That restriction was modified by judicial order in 2016, *see One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946–48 (W.D. Wis. 2016), and until our June 2020 decision in *Luft* reversing that modification, election officials were making absentee ballots available online or by fax as necessary to domestic civilian voters. Restoring that practice for a limited window of time in advance of the November election makes eminent sense as a means of protecting the right to vote by voters who have timely requested an absentee ballot but have not received it in the mail as the election approaches.

Finally, in view of the severe shortages of poll workers that hobbled the April election with numerous poll closings and massive voting delays, the order that local officials be allowed to employ poll workers who are not electors in the county where they will serve is both necessary and reasonable. Adequate staffing of the polls is essential to minimizing voter wait times and, in turn, public health risks. Allowing poll workers (be they civilians or National Guard reservists) to work outside of their own counties is a modest and entirely reasonable means of achieving that end, one that poses no risk to the integrity of the election. The Legislature has articulated no reason why this accommodation is either unnecessary or inappropriate.

Given the great care that the district court took in issuing its preliminary injunction and the ample factual record supporting its decision, I am dismayed to be dissenting. It is a virtual certainty that current conditions will result in many voters, possibly tens of thousands, being disenfranchised absent changes to an election code designed for in-person voting on election day. We cannot turn a blind eye to the present

circumstances and treat this as an ordinary election. Nor can we blindly defer to a state legislature that sits on its hands while a pandemic rages. The district court ordered five modest changes to Wisconsin's election rules aimed at minimizing the number of voters who may be denied the right to vote. Today, in the midst of a pandemic and significantly slowed mail delivery, this court leaves voters to their own devices.

Good luck and G-d bless, Wisconsin. You are going to need it.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

OPINION AND ORDER

20-cv-249-wmc

SYLVIA GEAR, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

20-cv-278-wmc

CHRYSTAL EDWARDS, et al.,

Plaintiffs,

v.

20-cv-340-wmc

ROBIN VOS, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

JILL SWENSON, et al.,

Plaintiffs,

v.

20-cv-459-wmc

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE,
REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

In these four, consolidated lawsuits, various organizations and individuals have moved for preliminary injunctive relief concerning the conduct of the Wisconsin general election on November 3, 2020. While the Commissioners and Administrator of the Wisconsin Election Commission ("WEC") oppose the motions only to the extent the requested relief would exceed the WEC's statutory authority, the Wisconsin Legislature,

the Republican National Committee and the Republican Party of Wisconsin have intervened to offer a more robust opposition to those motions.[1] In addition to these pending motions for preliminary injunction, defendants and intervening defendants have also moved to dismiss three of the four cases.

For the reasons that follow, the court will largely reject defendants' grounds to dismiss. As for the requests for preliminary relief, election workers' and voters' experiences during Wisconsin's primary election in April, which took place at the outset of the COVID-19 crisis, have convinced the court that some, limited relief from statutory deadlines for mail-in registration and absentee voting is again necessary to avoid an untenable impingement on Wisconsin citizens' right to vote, including the near certainty of disenfranchising tens of thousands of voters relying on the state's absentee ballot process. Indeed, any objective view of the record before this court leads to the inevitable conclusion that: (1) an unprecedented number of absentee ballots, which turned the predominance of in-person voting on its head in April, will again overwhelm the WEC and local officials despite their best efforts to prepare; (2) but for an extension of the deadlines for registering to vote electronically and for receipt of absentee ballots, tens of thousands of Wisconsin voters would have been disenfranchised in April; and (3) absent similar relief, will be again in November. Consistent with the fully briefed motions, evidence presented, and the hearing held on August 5, 2020, therefore, the court will grant in part and deny in part the

[1] In the *Edwards* case, the Wisconsin State Assembly, Senate and members of the Wisconsin Legislature were also named as direct defendants along with the WEC Commissioners.

parties' motions for reasons more fully explained below, including entering a preliminary injunction providing the following relief:

- extending the deadline under Wisconsin Statute § 6.28(1), for online and mail-in registration from October 14, to October 21, 2020;
- directing the WEC to include on the MyVote and WisVote websites (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence";
- extending the receipt deadline for absentee ballots under Wisconsin Statute § 6.87(6) until November 9, 2020, but requiring that the ballots be mailed and postmarked on or before election day, November 3, 2020;
- enjoining Wisconsin Statute § 6.87(3)(a), which limits delivery of absentee ballots to mail only for domestic civilian voters, allowing online access to replacement absentee ballots or emailing replacement ballots for the period from October 22 to October 29, 2020, as to those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot; and
- enjoining Wisconsin Statute § 7.30(2), which requires that each election official be an elector of the county in which the municipality is located, allowing election officials to be residents of other counties within Wisconsin for the upcoming November 2020 election.

In recognition of the likelihood of appellate review, however, this order is STAYED for one week, and NO voter can depend on any extension of deadlines for electronic and mail-in registration and for receipt of absentee ballots unless finally upheld on appeal. In the meantime, lest they effectively lose their right to do so by the vagaries of COVID-19, mail processing or other, unforeseen developments leading up to the November election, the court joins the WEC in urging especially new Wisconsin voters to register by mail on or before October 14, 2020, and all voters to do so by absentee ballot as soon as possible.[2]

[2] In a vain effort (in both senses of that word) at forestalling the inevitable judge-appointment and

FACTS

A. Election Laws in Wisconsin

1. Registering to vote

A citizen wishing to vote in Wisconsin must first register in the ward or district in which they reside. To do so, the voter must complete a registration form and provide "an identifying document that establishes proof of residence."[3] Wis. Stat. § 6.34(2). The deadline for registering by mail or online is the third Wednesday preceding the election, Wis. Stat. § 6.28, which for the upcoming November 2020 election is October 14, 2020. A voter may also register in person at their local municipal clerk's office up to the Friday before the election, Wis. Stat. § 6.29(1)-(2), which for the November election is October 30. Finally, a voter may register in person on election day itself at their designated polling place. Wis. Stat. § 6.55(2).

2. Voting by mail

Absentee voting in Wisconsin is available to any registered voter who "for any reason is unable or unwilling to appear" at the polls. Wis. Stat. § 6.85. To obtain an

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bias dialogue so prevalent in what remains of the independent press, among commentators and on the internet, let me stress, as I did with the parties during the August hearing, the limited relief awarded today is without regard to (or even knowledge of) who may be helped, except the average Wisconsin voter, be they party-affiliated or independent. Having grown up in Northern Wisconsin with friends across the political spectrum (and in some cases back again), my only interest, as it should be for all citizens, is ensuring a fair election by giving the overtaxed, small WEC staff and local election officials what flexibility the law allows to vindicate the right to vote during a pandemic.

[3] Military and overseas voters are exempt from this proof of residence requirement. Wis. Stat. § 6.34(2). Also, proof of residence is not required if the voter registers online *and* provides the number of a current and valid Wisconsin operator's license or state ID card, together with his or her name and date of birth, provided this information is verified. Wis. Stat. § 6.34(2m).

absentee ballot, a registered voter must submit an absentee ballot request form, along with a copy of an acceptable photo ID. Wis. Stat. § 6.86.[4] Voters who are "indefinitely confined because of age, physical illness or infirmity" are exempt from this photo ID requirement, but such a voter must still provide a signed statement by the individual who witnesses and certifies the voter's ballot "in lieu of providing proof of identification." Wis. Stat. § 6.87(4)(b)2.

On March 29, 2020, the WEC issued guidance on the proper use of indefinitely confined status, explaining that: "Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence." Wisconsin Election Commission, *Guidance for Indefinitely Confined Electors COVID-19* (Mar. 29, 2020), https://elections.wi.gov/node/6788. Two days later, the Wisconsin Supreme Court issued a decision that preliminarily endorsed the WEC guidance, finding that it "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Jefferson v. Dane Cty*, No. 2020AP557-OA (Wis. Mar. 31, 2020).[5]

Whether submitted online, by fax or by mail, an absentee ballot application must

[4] For certain voters without an acceptable photo ID, there is also an "ID Petition Process" that has been the subject of substantial litigation unrelated to the current pandemic. *See Luft v. Evers*, 963 F.3d 665, 678 (7th Cir. 2020).

[5] However, litigation on that issue is ongoing, with oral argument before the Wisconsin Supreme Court scheduled for September 29, 2020. *See* Wis. Supreme Court Pending Cases (last accessed Sept. 3, 2020), https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=285226. Because all of the issues certified for review by the Wisconsin Supreme Court in *Jefferson* relate exclusively to Wisconsin law, none overlap or conflict with the federal constitutional and statutory claims at issue in the instant case.

be received *no* later than 5 p.m. on the fifth day immediately preceding the election, Wis. Stat. § 6.86(1)(ac), (b), which means for the November election on or before 5 p.m. on October 29, 2020. Clerks must begin to send out absentee ballots no later than the 47th day before a general election, at which point the absentee ballot itself must be mailed to a qualified voter within one business day of the receipt of an absentee ballot request. Wis. Stat. § 7.15(1)(cm).

If a clerk is "reliably informed" that the absentee requester is a *military or overseas voter*, the clerk may also fax or transmit an electronic copy of the ballot in lieu of mailing it. Wis. Stat. § 6.87(3)(d). Indeed, up until very recently, due to a 2016 injunction by this court, clerks had the discretion to email ballots to *all* voters. *See One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946-48 (W.D. Wis. 2016) (enjoining "the provision prohibiting municipal clerks from sending absentee ballots by fax or email [because it] violates the First and Fourteenth Amendments"). On June 29, 2020, however, the Seventh Circuit vacated this injunction, meaning that non-military/overseas voters may now receive an absentee ballot only by mail. *See Luft v. Evers*, 963 F.3d 665, 676-77 (7th Cir. 2020).

Once received, to cast an absentee ballot by mail, the voter must (1) complete the ballot in the presence of a witness, (2) enclose the ballot in the envelope provided, (3) sign the envelope and obtain a signature from the witness and (4) return the ballot for actual receipt no later than 8 p.m. on election day. Wis. Stat. § 6.87(2), (4)(b), (6). In light of the COVID-19 pandemic, the WEC further issued guidance on March 29, suggesting several options for voters to meet the witness signature requirement safely. *See* WEC, "Absentee Witness Signature Requirement Guidance" (Mar. 29, 2020),

https://elections.wi.gov/node/6790. This guide outlines a multi-step process to acquire a signature while observing social distancing and other best health practices. *Id.* For example, the guide suggests that a voter could recruit a friend or neighbor to watch the voter mark their ballot through a window or over video chat, with the voter then placing the ballot outside for the witness to sign as well. *Id.* To return an absentee ballot, a voter may then mail it, hand deliver it to the clerk's office or other designated site, *or* bring it to their polling place on election day. Some, though not all, localities also offer absentee ballot "drop boxes." *See* WEC, "Absentee Ballot Return Options - COVID-19" (Mar. 31, 2020), https://elections.wi.gov/node/6798. In that instance, another person may deliver the ballot on behalf of the voter. *Id.* Finally, "[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot." Wis. Stat. § 6.87(9).[6]

3. Voting in person

A registered voter may also vote absentee in-person, by simultaneously requesting and casting an absentee ballot at the clerk's office or other designated location beginning two weeks before election day through the Sunday preceding that election, in this election meaning Sunday, November 1. Wis. Stat. §§ 6.85(1)(a)2, 6.855, 6.86(1)(b). Once an absentee ballot is received by a clerk, the ballot is sealed in a carrier envelope until election

[6] Wisconsin law also permits a voter to receive up to *three* replacement ballots if they spoil or erroneously prepare their ballot, provided they return the defective ballot. Wis. Stat. §§ 6.80(2)(c), 6.86(5).

day, at which point the ballots are canvassed like any other absentee ballot. Wis. Stat. §§ 6.88, 7.51-52.

Of course, on election day, a voter may cast a regular ballot in person at their designated, local polling station. *See* Wis. Stat. §§ 6.77, 6.79. These polls are staffed by various election officials and poll workers, all of whom are required by Wisconsin law to be "qualified elector[s] of a county in which the municipality where the official serves is located." Wis. Stat. § 7.30(2)(a). As noted above, Wisconsin also offers same-day registration, so an unregistered voter or a voter who needs to change their registration may arrive, register and cast a ballot at the polls in person, all on election day. Wis. Stat. § 6.55(2).

Historically, Wisconsin voters have relied heavily on this election day registration process. For example, between 2008 and 2016, 10 to 15% of all registrations took place on election day. As Administrator Wolfe testified, Wisconsin has a "cultural tradition" of same-day registration, with approximately 80% of voter records having been impacted in some way by same-day registration. (8/5/20 Hr'g Tr. (dkt. #532) 57-58.)[7]

B. The COVID-19 Pandemic's Impacts on Wisconsin's April and August Elections

1. Growing problem and related litigation

Since early 2020, Wisconsin and most of the rest of the world has been impacted

[7] Unless otherwise noted, the docket entries are to the 20-cv-249 docket.

to varying degrees by the novel coronavirus.[8] On February 6, the first case of COVID-19 was diagnosed in Wisconsin, and as of September 17, 94,746 confirmed cases have been recorded in the state. Much is still unknown about the virus and the COVID-19 illness that it causes, but experts appear to agree that COVID-19 is mainly spread via person-to-person, respiratory droplets, and it is more likely to spread between people who are in close contact with one another for a sustained period. A person may also become infected by "touching a surface or object that has the virus on it and then touching their own nose, mouth, or possibly their eyes." (Edwards Pls.' PFOFs (dkt. #417) ¶ 27 (quoting Goode Decl., Ex. I (CDC, Targeting COVID-19's Spread) (dkt. #415-9).) Certain individuals, such as those who are elderly, immunocompromised or suffer comorbidities, are at a greater risk for complications from COVID-19.

As the virus first started to spread in Wisconsin in February and March, even greater uncertainty surrounded the extent, seriousness and nature of COVID-19. By March 12, Governor Evers had issued a statewide health emergency; and on March 24, the Secretary of Wisconsin's Department of Health Services had issued a "Safer at Home" order, which banned all public and private gatherings, closed nonessential businesses, and required that everyone maintain social distancing of at least six feet from any other person.

Obviously, all this occurred within just a few weeks of Wisconsin's April 7, 2020, primary election. In mid-March, certain WEC Commissioners began expressing concern about the state's ability to conduct a fair and safe election; local clerks reported that they

[8] Technically, SARS-CoV-2 is the name of what has become known as the "coronavirus," while COVID-19 is the name of the illness caused by that virus.

were running out of absentee ballot materials and felt overwhelmed by the volume of absentee ballot requests; and various mayors urged that the election be delayed. Between March 18 and March 26, three lawsuits were also filed with this court requesting various relief relating to Wisconsin's impending primary election.

Shortly after, this court granted the following narrow, preliminary relief: (1) extending the online registration deadline by 12 days to March 30; (2) extending by one day the window to request an absentee ballot; (3) adjusting the witness certification requirement under Wis. Stat. § 6.87(2); and (4) extending the absentee ballot receipt deadline by six days to April 13 at 4 p.m. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249 (W.D. Wis. Mar. 20, 2020); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249 (W.D. Wis. April 2, 2020). Most of this relief was challenged by emergency appeal to the Seventh Circuit (extension of the registration deadline being the exception). That court declined to stay relief granted as to the extension of absentee-ballot-requests and receipt deadlines by mail, but granted a stay as to the adjustment to the witness signature requirement. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1546, -1545, at * 3-4 (7th Cir. April 3, 2020). A further, emergency appeal was accepted by the U.S. Supreme Court, which sought a stay of this court's injunction only to the extent that it permitted ballots postmarked after election day (April 7) to be counted if actually received by April 13. Brief of Petitioner, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U. S. ____ (2020) (No. ___). The Supreme Court granted the stay, ordering that a voter's absentee ballot must be either postmarked by election day and received by April 13 or hand-delivered by election day. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ____

(2020) (per curiam).

2. Effort to fulfill absentee ballot applications

Meanwhile, the WEC and local clerks were undertaking admirable (and in some cases, heroic) efforts to administer absentee voting and prepare the polls for in-person voting on April 7 in the midst of the pandemic. Despite these efforts, unprecedented challenges confronted clerks and poll workers before and on election day. To begin, clerks received a flood of absentee ballot requests, ultimately receiving a total of 1,282,762 absentee ballot applications.[9] A post-election report by the WEC explained that some inadequately staffed offices were "nearly overwhelmed" by this number of applications. (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 56 (citing Goodman Decl., Ex. 18 (WEC May 20 Meeting Materials) ('459 dkt. #43-18) 6).) At one point, clerks even ran out of absentee certificate envelopes, although this shortage was ultimately rectified. Plaintiffs have produced numerous declarations from voters who testified that they timely -- often two or three weeks before the election -- requested an absentee ballot but never received it *or* received it after election day; some of these voters chose to vote in person, but others were unwilling or unable to go to the polls due to safety concerns with COVID-19, long lines or other problems. (*See* Swenson Pls.' PFOFs ('459, dkt. #42) ¶¶ 51, 164, 176 (citing declarations); DNC Pls.' PFOFs (dkt. #419) ¶ 73 (citing declarations); Edwards Pls.' PFOFs (dkt. #417) ¶¶ 67-162, 177-81) (citing declarations); Gear Pls.' PFOFs (dkt. #422) ¶¶ 37, 43, 81, 157-677 (citing declarations).)

[9] In comparison, only 167,832 absentee ballots were sent in the April 2019 election.

Moreover, between April 3 and April 6 (the day before the election), local officials were still in the process of mailing more than 92,000 absentee ballots to voters, virtually all of which the WEC acknowledges were sent too late to be filled out and mailed back by election day.[10] On top of this group, data from the WEC as of April 7 indicates that at least an additional 9,388 ballots were applied for timely but were never even sent out. The WEC advises that due to a reporting lag this number was lower, but does not indicate by how much.

At least some of these problems were rooted in mail delivery issues, which led to some absentee ballots reaching voters or clerks late or not at all. For example, a WEC staff member received a call from a United States Postal Service ("USPS") official in Chicago on April 8, who reported that "three tubs" of absentee ballots from the Appleton/Oshkosh area had been found undelivered in a post office in Chicago, although the Legislative defendants and the RNC/RPC point out that these tubs were dropped off at USPS at the end of the day on April 7 (*see* Leg. Defs.' & RNC/RPW Resp. to DNC Pls.' PFOFs (dkt. #450) ¶ 84). Similarly, in Fox Point, a bin containing about 175 unopened and undelivered ballots was inexplicably returned to the clerk's office on the morning of election day.

Voters also reported problems with satisfying the requirements for requesting and

[10] Administrator Wolfe testified that it may take 14 days for an absentee ballot to make its way through the mail from a clerk's office to a voter and back again, and even under ideal conditions with a two-day first class mail delivery time, a mailed ballot would take at least four to six days to turn around. (Swenson Pls.' Supp. PFOFs (dkt. #494) ¶ 62 (citing Wolfe Dep. (dkt. #247) 51:1-21).)

casting their absentee ballots. For example, some voters testified that they had difficulties uploading their photo ID to the online system or otherwise providing the required ID needed to request an absentee ballot.[11] (DNC Pls.' PFOFs (dkt. #419) ¶ 68 (citing declarations).)

3. Efforts to count absentee ballots

Further, while the WEC issued guidance regarding the safe execution of the witness signature requirement before voting and returning an absentee ballot itself, plaintiffs' expert opined that this complicated advice was not easy to follow. (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 81 (citing Remington Expert Report ('459 dkt. #44)).) For example, plaintiff Jill Swenson testified that she spent two weeks trying to find someone to witness her ballot in a safe manner, ultimately to no avail. (*See* Swenson Decl. ('459 dkt. #47) ¶¶ 11-13.) 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. (*Id.*) Other voters also testified that they did not cast their absentee ballot, or they cast their ballot without the proper certification, due to COVID-19-related safety concerns regarding the witness requirement. (*See* DNC Pls.' PFOFs (dkt. #419) ¶¶ 157-60 (citing declarations).)[12] In addition, although many ballots arrived with no postmarks, two postmarks or unclear

[11] Defendants do not dispute that *some* voters testified to difficulties with uploading their photo ID to the online system (or could otherwise not provide the required ID needed to request an absentee ballot), but as discussed further in the opinion below, none of the declarations persuasively establish that the ID requirement was or will be difficult to satisfy for most desiring to vote absentee.

[12] As was conceded in the hearing, none of the plaintiffs produced any evidence of a voter who was ultimately unable to meet the proof of residence requirement.

postmarks, on this issue, the guidance issued by the WEC simply left it up to each municipality to determine whether a ballot was timely.

In the end, 120,989 voters who requested absentee ballots did not return them as of election day, although what portion of these voters ended up voting in-person on election day or why they did not is unknown. Even for those absentee ballots that did reach clerks' offices, more than 14,000 ballots were rejected due to an "insufficient" witness certification and "thousands" were rejected for other reasons. (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 90.) However, the WEC maintains that "the final election data conclusively indicate[d] that the election did not produce an unusual number [of] unreturned or rejected [absentee] ballots," adjusting for the larger number of absentee votes submitted. (WEC Resp. to Swenson Pls.' PFOFs (dkt. #439) ¶ 74.)

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 20% of all ballots in recent past elections, and often, they represented less than 10% of ballots cast. The WEC itself stated in a report that the increase in absentee voting "created resource issues for a system primarily designed to support polling place voting." (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 50 (quoting Goodman Decl., Ex. 18 (WEC May 20 Meeting Materials) ('459, dkt. #43-18) 19-21).)

4. Election day voting

As for voting on the actual election day itself, April 7, 2020, severe shortages of poll workers caused significant problems in some jurisdictions. In particular, because of the age

and health concerns of poll workers who declined to volunteer, Milwaukee was only able to open *five* of its usual 180 polling sites, and Green Bay reduced its usual 31 polling sites to just *two*. In part due to this consolidation, some individuals had to wait in long lines, sometimes for hours before being allowed to vote. While Governor Evers authorized the Wisconsin National Guard to serve as poll workers, he only did so on April 2, less than one week before the election. In addition, while the WEC was able to send sanitation and personal protective equipment ("PPE") to all polling sites, some supplies were limited or inadequate. Some poll workers even reported that they had to rely on vodka as a sanitizer. Moreover, the WEC did not issue any particular mandate requiring specific public health measures to be taken by clerks or poll workers. Finally, voters and poll workers reported various perceived safety problems, including: (1) cramped polling locations that made it difficult to maintain social distancing; (2) no enforcement of social distancing by poll workers; (3) a lack of or improper mask-wearing by voters and poll workers; (4) poll workers' reuse of paper towels to clean voter booths between voters; (5) a lack of sanitized pens; and (6) poll set-ups requiring poll workers to sit approximately two feet from each other.

Plaintiffs also cite to various declarations to highlight the difficulties faced by some citizens who sought to vote in-person in the April election. (*See* DNC Pls.' PFOFs (dkt. #419) ¶¶ 62-66 (citing declarations).) For example, although Jeannie Berry-Matos requested and received an absentee ballot, it was for the wrong ward; unable to correct the error in time, she then was forced to vote in person on April 7 at Washington High School in Milwaukee. (DNC Pls.' PFOFs (dkt. #419) ¶ 62 (citing Berry-Matos Decl. (dkt.

#263)).) When Berry-Matos arrived, she found a line stretching several blocks, no available close parking, no poll workers enforcing social distancing, and no way to sanitize her pen or her photo ID. (*Id.*) All in all, it took her an hour and thirty-five minutes to vote in person. (*Id.*) Other voters who requested but did not receive absentee ballots similarly showed up at the polls to vote, but concerned about safety and confronted with long lines, they ultimately did not cast their vote. (DNC Pls.' PFOFs (dkt. #419) ¶¶ 63-66 (citing Wortham Decl. (dkt. #367); Moore Decl. (dkt. #330); Washington Decl. (dkt. #363)); *see also* Gear Pls.' PFOFs (dkt. #422) ¶¶ 236-38, 468-70, 599-602, 627 (citing declarations).)

Overall, 1,555,263 votes were cast in the April election. This court's injunction extending the absentee ballot physical receipt deadline from April 7 to April 13 appears to have resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely. (DNC Pls.' PFOFs (dkt. #419) ¶ 10.) In addition, the court's injunction extending the registration deadline arguably resulted in an estimated 57,187 voters successfully registering in advance. (*Id.* ¶ 197.) Of course, absent the court's injunction some portion of those voters may have opted to register to vote in person on election day just before voting, rather than sending their absentee ballot by mail.

Plaintiffs point to expert reports concluding that COVID-19 and its effects reduced voter turnout in the election. (*See* Swenson Pls.' PFOFs ('459 dkt. #41) ¶ 131 (citing Fowler Expert Report ('459 dkt. #46)); DNC Pls.' PFOFs (dkt. #419) ¶ 111 (citing Burden Decl. (dkt. #418)).) Still, 34.3% of eligible voters cast a ballot in the April election; in comparison, the turnout for previous spring primary elections was 27.2% (2019), 22.3%

(2018), 15.9% (2017), 47.4% (2016), 26.1% (2012), and 34.9% (2008).

5. COVID-19 impacts on in-person voting

As for the relationship between Wisconsin's April election and COVID-19 transmission in the state, the parties point to arguably conflicting reports on this subject. Plaintiffs note that a Wisconsin Department of Health Services analysis traced 71 cases of COVID-19 to in-person voting in April. (Edwards Pls.' PFOFs (dkt. #417) ¶ 4; DNC Pls.' PFOFs (dkt. #419) ¶ 6.) Similarly, expert witness Meagan Murry, M.D., an epidemiologist at Harvard School of Public Health, reported "71 confirmed cases of Covid-19 among people who may have been infected during the election." (Swenson Pls.' Supp. PFOFs (dkt. #494) ¶ 5 (quoting Murry Decl. (dkt. #370) ¶ 60).) They also reference a working paper, which concludes that in-person voting led to approximately 700 additional COVID-19 cases in Wisconsin. (Edwards Pls.' PFOFs (dkt. #417) ¶ 4.)

The Legislative defendants and the RNC/RPW, for their part, point to two reports concluding that the April election was *not* associated with an increase in COVID-19 infection rates. (Leg. Defs.' & RNC/RPC's Resp. to Swenson Pls.' PFOFs (dkt. #451) ¶¶ 7, 36 (citing Tseytlin Decl., Exs. 18, 19 (dkt. ##458-18, -19).)[13] The Legislative

[13] In particular, defendants cite to a report authored in part by two individuals affiliated with the World Health Organization Collaborating Centre for Infectious Disease Epidemiology and Control, which purported to analyze confirmed COVID-19 cases in the weeks surrounding the April 7 election, and found that the election was not associated with an increase in COVID-19 infection rates. (Tseytlin Decl., Ex. 18 (dkt. #458-18).) They also cite to a second report authored by individuals affiliated with the Larkin Community Hospitals in Miami, the Department of Math and Statistics at the University of South Alabama, and the Froedtert & The Medical College of Wisconsin in Milwaukee. (Tseytlin Decl., Ex. 19 (dkt. #458-19).) This report concluded that: "There was no increase in COVID-19 new case daily rates observed for Wisconsin or its 3 largest counties following the election on April 7, 2020, as compared to the US, during the post-incubation interval period." (*Id.*)

defendants and the RNC/RPW also point out that the Wisconsin DHS explained that it is "not clear how many of the infections may have been caused by the spring election because many of the people had other exposures." (Leg. Defs.' & RNC/RPW's Resp. to Edwards Pls.' PFOFs (dkt. #485) ¶ 3.)

After the court's evidentiary hearing in this case, Wisconsin also held another primary election on August 11. Evidence presented by the parties prior to the election suggested that certain localities again had to consolidate polling locations due to poll worker shortages. For example, Sun Prairie expected to consolidate eight polling places down to one. The WEC told municipalities "not to plan on" assistance from the National Guard (Swenson Supp. Pls.' PFOFs (dkt. #494) ¶ 94), but the parties represented that Governor Evers ultimately did deploy the Guard to assist with the election on August 5, less than one week before the election. In the end, both the April and August elections suggest that in-person voting can be conducted safely if the majority of votes are cast in advance, sufficient poll workers, polling places, and PPE are available, and social distancing and masking protocols are followed. Of course, the aged, those with comorbidities or those lacking confidence in the ability of local officials and the public to get all those factors right are understandably less confident in that assessment.

C. Plans for the November Election in Light of the Ongoing COVID-19 Pandemic

While the exact trajectory of COVID-19 in Wisconsin is unknown, the unrebutted public health evidence in the record demonstrates that COVID-19 will continue to persist, and may worsen, through November. Recent outbreaks, particularly among Wisconsin

college students, and the onset of flu season continue to complicate assessments. For example, concern remains that the significant new infections reported on reopened college campuses may spread into the community. David Wahlberg, *UW-Madison threatens 'more drastic action' as experts say COVID-19 outbreak impacting broader community*, Wis. State Journal (Sept. 16, 2020), https://madison.com/wsj/news/local/education/university/uw-madison-threatens-more-drastic-action-as-experts-say-covid-19-outbreak-impacting-broader-community/article_dd00c9cc-5dc9-5924-99ca-40c94a0f6738.html. Indeed, with flu season yet to arrive, Wisconsin has already broken numerous new case records this month, with over 2,000 new cases reported on September 17, 2020, up from a daily average of 1,004 just one week prior. *See* WPR Staff, *Wisconsin Sets New Daily Record with 2,034 Coronavirus Cases Reported Thursday*, Wis. Public Radio (Sept. 17, 2020), https://www.wpr.org/wisconsin-sets-new-daily-record-2-034-coronavirus-cases-reported-thursday. Regardless, given the significantly higher voter turnout expected for the November election in comparison with April, there is little doubt that the WEC, clerks and voters will again face unique challenges in the upcoming election. As a result, the WEC is already urging as many people as possible to vote absentee in the hopes of avoiding large lines, shortages and attendant health risks on election day.

Moreover, the evidence suggests that Wisconsin voters will again rely heavily on the absentee voting system for the November election, with the WEC expecting some 1.8 to 2 million voters to request an absentee ballot, again smashing all records and turning historic voter patterns on their head. Unfortunately, Madison City Clerk Maribeth Witzel-Behl testified that at least her office "has not been given the resources and money necessary to

meet the anticipated demand for mail-in absentee ballots in November," and "with other departments going back to work, [her] staff now only has a few dozen League of Women Voters volunteers available to help." (Gear Pls.' Supp. PFOFs (dkt. #506) ¶ 20 (quoting Witzel-Behl Decl. (dkt. #382) ¶ 6).)

As previously discussed, the absentee ballot system in Wisconsin is also heavily reliant on the USPS, which has and continues to face its own challenges. WEC Administrator Wolfe in particular acknowledged "significant concerns about the performance of the postal service in connection with the April 7 election." (DNC Pls.' PFOFs (dkt. #419) ¶¶ 140, 142 (quoting Wolfe Dep. (dkt. #247) 89:10-15).) In addition, a report by the USPS Inspector General's Office found that voters requesting ballots five days before the election -- the deadline set by Wisconsin statutes -- face a "high risk" that their ballot will not be delivered, completed and returned in time to be counted. (Swenson Pls.' Supp. PFOFs (dkt. #494) ¶ 61 (quoting Second Goodman Decl., Ex. 17 (Timeliness of Ballot Mail) (dkt. #495-17) 6-7).) USPS also faces budget shortfalls, as well as challenges caused by increasing COVID-19 rates among postal workers themselves. Moreover, just a few weeks ago, the new Postmaster General established "major operational changes . . . that could slow down mail delivery," including restricting the ability for USPS employees to work overtime. (DNC Pls.' Supp. PFOFs (dkt. #501) ¶¶ 7-8.)

As to fulfilling the witness signature requirement, over 600,000 Wisconsinites live alone and even more live with an individual who is unqualified to be a witness. Prospective absentee voters in that situation will need to find someone outside of their household to witness their ballot before returning it. According to plaintiffs' expert, a "significant"

portion of voters who do not live with a qualified witness are senior citizens, who also face special risks of complications from COVID-19. (DNC Pls.' PFOFs (dkt. #419) ¶ 153 (citing Fowler Rep. ('459 dkt. #46) 12-13).) Relatedly, another expert produced by plaintiffs opined that the WEC's guidance on the witness signature requirement "may be difficult to understand by the homebound individual and witness" and "may be impractical in certain situations, such as for persons living in multi-level or multi-unit apartment complexes." (Swenson Pls.' PFOFs ('459 dkt. #42) ¶ 81 (citing Remington Rep. ('459 dkt. #44)).) That being said, notwithstanding a few, individual affiants who had experienced difficulties securing a witness signature requirement or submitting proof of ID for the April election, the Legislature points out that plaintiffs produced no evidence of voters who are still unable to meet the challenged requirements *for November*.[14]

In-person voting in November is also likely to be strained by a shortage of poll workers, despite more time to plan for that shortage than was available for the spring election. On the one hand, Milwaukee officials testified that they hope to be able to open all 180 polling sites (up from five in April), and Green Bay expects to have at least 13 polling locations (up from two in April). On the other hand, clerks are still reporting poll worker shortages for November. Similarly, WEC Administrator Wolfe testified that

[14] The DNC plaintiffs also contend that: "many workplaces, public libraries, and copy shops may remain or become closed given the pandemic's acceleration in the U.S., many voters will continue to face substantial burdens in obtaining the copies or scans they need to complete their absentee ballot applications and will continue to be prevented from voting. In addition, even if those establishments were open, many voters are fearful of leaving their homes because of the health risks of the coronavirus pandemic and the restrictions imposed under their respective County's health orders." (DNC Pls.' PFOFs (dkt. #419) ¶ 164.) Again, however, the only evidence they cite in support is voter declarations expressing fear of in-person voting due to COVID-19, rather than a personal inability to arrange an effective witnessing of their ballot.

"despite the advance warning [and] the greater time to plan for people who will opt-out because of COVID-19 risks, local municipalities are still having problems filling all their polling stations." (8/5/20 Hr'g Tr. (dkt. #532) 82.) Because of this, Wolfe explained a lack of poll workers was the thing she "worr[ies] about the most" for the upcoming November election. (*Id.* at 83.)

More fundamentally, plaintiffs have produced a credible expert report that concludes in-person voting in November will continue to pose "a significant risk to human health" due to the COVID-19 pandemic. (Swenson Pls.' PFOFs ('459 dkt. #42) ¶ 7 (citing Remington Expert Report ('459 dkt. #44)).) While not disputing this risk, the WEC counters with the general observation that the risk of transmission is "greatly reduced" if people are wearing masks and practicing social distancing. (WEC Resp. to Swenson Pls.' PFOFs (dkt. #439) ¶ 7.) The Legislative defendants and the RNC/RPC further dispute any suggestion that in-person voting in November will be unsafe, again pointing to the two studies concluding that the April election was not associated with an increase in COVID-19 infection rates. (*See* (Leg. & RNC/RPW's Resp. to Swenson Pls.' PFOFs (dkt. #451) ¶¶ 7, 36 (citing Tseytlin Decl., Ex. 18, 19 (dkt. ##458-18, -19)).) At minimum, the evidence continues to suggest that a large election day turnout will stretch safety protocols and increase risk of transmission particularly to poll workers, which is why the WEC has continued to promote voting by mail.

Regardless of the objective risks, plaintiffs have also produced declarations from various voters who aver that if unable to vote by mail, they will not vote in-person in November. (*See* Gear Pls.' PFOFs (dkt. #422) ¶¶ 186, 215, 279, 323, 355, 387, 407 (citing

various voter declarations).) Others declare that they intend to vote by mail in November, but would like a "back-up" option, because of their previous personal experiences in not receiving an absentee ballot for the April election despite requesting it timely. (*See id.* ¶¶ 445, 474, 501, 576, 633, 669 (citing various voter declarations).)

In preparation for these anticipated challenges in administering the November election, the WEC has taken a number of steps. Of particular note, the WEC mailed absentee ballot *applications* to nearly all registered voters. The application itself contains an information sheet, which among other things generally describes the "indefinitely confined" exception to the photo ID requirement, but does not indicate what constitutes "indefinitely confined" under Wisconsin law. Instead, the instructions warn a prospective voter may be fined $1,000 or imprisoned up to 6 months for falsely asserting that they are indefinitely confined. This mailer went out on September 1st.

In addition to encouraging Wisconsinites to vote absentee, the WEC has also: (1) directed staff to spend federal CARES Act grant money to distribute sanitation supplies to all 72 counties in Wisconsin; (2) planned to implement intelligent mail barcodes ("IMB") to facilitate more detailed absentee-ballot tracking; (3) planned to spend up to $4.1 million on a CARES Act sub-grant to local election officials to help pay for increased elections costs caused by the pandemic; (4) made upgrades to the MyVote website; (5) issued guidance to local officials about providing drop boxes for the safe and easy return of absentee ballots; (6) made CARES Act subgrant money available for the purchase of additional, absentee ballot drop boxes; (7) urged localities to solicit election inspectors, create recruitment tools for local officials, and promote the need for poll workers; (8) produced content to educate

voters on "unfamiliar aspects of voting" for use by local election officials, voter groups, and the public; (9) worked with public health officials to produce public health guidance documents for clerks, poll workers, and the public; and (10) developed a webinar series for local officials to provide training on election procedures, including COVID-19-specific training. Just as in April, what the WEC has not done is ease any of the statutory deadlines, having again concluded on a 3-3 vote that it lacks the authority to do so even in the face of the anticipated effects of the COVID-19 pandemic.

OPINION

I. Motions to Dismiss

As an initial matter, the court will address certain issues raised in defendants' pending motions to dismiss, considering first various jurisdictional challenges and then arguments that some of plaintiffs' claims must be dismissed for failure to state a claim on which relief may be granted. [15]

[15] Specifically, the WEC moved to dismiss the Swenson plaintiffs' complaint (*see* WEC's Mot. to Dismiss ('340, dkt. #14)), and the Legislative defendants moved to dismiss the Gear, Edwards and Swenson plaintiffs' operative complaints (*see* Leg. Defs.' Mot. to Dismiss Gear Compl. ('278 dkt. #382); Leg. Defs.' Mot to Dismiss Edwards Compl. ('340 dkt. #12); Leg. Defs.' Mot to Dismiss Swenson Compl. ('459 dkt. ##27, 272)). Although the WEC also initially moved to dismiss the Gear plaintiffs' original complaint, after the Gear plaintiffs' filed a proposed, first amended complaint, plaintiffs filed a joint stipulation with the WEC, which withdrew the WEC's pending motion to dismiss the first amended complaint, while reserving its right to answer, move or otherwise plead in response to the second amended complaint. (Joint Stipulation (dkt. #230).) Finally, although the Legislative defendants did not formally move to dismiss the DNC plaintiffs' second amended complaint (the court having previously denied their motion to dismiss the DNC plaintiffs' first amended complaint (6/10/20 Op. & Order (dkt. #217)), they argued in their briefing that "especially after *Luft*, the DNC Second Amended Complaint must be dismissed for many of the same reasons supporting dismissal of the operative complaints in Gear and Swenson." (Leg. Defs.' Omnibus Br. (dkt. #454) 5 n.3.)

A. Jurisdictional Challenges

In evaluating challenges to its subject matter jurisdiction, this court "must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff." *Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993) (quoting *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993)). Still, the court may "properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co.*, 999 F.2d at 191.

The WEC argues that no actual controversy exists between that entity and plaintiffs' since the WEC neither opposes nor supports plaintiffs' requests for injunctive relief (WEC Br. ('340, dkt. #15) 4-5), and for a case to be justiciable, there must be an actual dispute between adverse litigants. (*See id.* (citing *Oneida Tribe of Indians v. Wisconsin,* 951 F.2d 757, 760 (7th Cir. 1991).) However, as the U.S. Supreme Court held in *United States v. Windsor*, 570 U.S. 744 (2013), "even where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.'" *Id.* at 759 (quoting *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983)). Similarly, in this litigation, the WEC has indicated its intention to enforce Wisconsin's current elections laws unless otherwise directed by a state or federal court. Thus, regardless of its failure to dispute plaintiffs' requested relief affirmatively, sufficient adverseness exists between the parties to create a justiciable dispute. Of course, by virtue of the intervention by multiple other defendants who *are* actively disputing plaintiffs' right

to any of the relief requested, there is little question that there is an actual dispute between the parties needing resolution by this court.

Next, both the WEC and the Legislative defendants attack plaintiffs' claims on standing grounds. To establish standing, "[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 125 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Again, the WEC maintains that it has "no power to enact any changes to the election laws in regard to the Spring Election, and it has no authority to change the law relative to the conduct of future elections." (WEC Br. ('340, dkt. #15) 6.) After *Windsor*, however, this is just the same "case or controversy" argument in different clothing, since the WEC's administration of Wisconsin's elections, including the enforcement of its current election laws, is the cause of plaintiffs' alleged injuries. Moreover, the WEC has the authority to implement a federal court order relating to election law to redress these alleged injuries. That the WEC maintains it lacks any *independent* authority under state law to make the changes requested by plaintiffs poses no jurisdictional barrier. If anything, it demonstrates the WEC is an indispensable party for plaintiffs to achieve the remedies they seek.

Relatedly, the Legislative defendants argue that many of plaintiffs' claims challenge independent actions of third-parties who were not named as defendants -- specifically, the USPS and local election officials -- and thus plaintiffs' lack standing to bring those claims. (Leg. Defs.' Omnibus Br. (dkt. #454) 100.) Certainly, actions of both the USPS and local

election officials appear to have contributed and may contribute to plaintiffs' alleged injuries, and those third-parties may also have some power to redress those injuries, but this does not mean the WEC's actions or inactions were not *also* causes of plaintiffs' injuries. What matters for standing is that: (1) defendant's conduct was *one* of the multiple causes; and (2) defendant can at least partially redress the wrong. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."); *Orangeburg v. Fed. Energy Reg. Comm'n*, 862 F.3d 1071, 1077-84 (D.C. Cir. 2017) ("FERC contends that the causation element is not satisfied because Orangeburg's injury is actually caused by NCUC, an absent third party, not the Commission. To be sure, NCUC -- a non-party -- is a key player in the causal story. But the existence of, perhaps, an equally important player in the story does not erase FERC's role.").

Similarly, here, the actions of the USPS and local election officials may be equally important players in the conduct of the November election but that does not erase the WEC's overall statutory responsibility for the administration of Wisconsin's elections. Wis. Stat. § 5.05(1). Regardless, it is the WEC's role and specific authority to promulgate rules and guidance to localities in order to implement Wisconsin law (including any court order) related to elections and their proper administration under § 5.05(1)(f) that is in dispute. Moreover, should this court enter a binding order, the WEC will be required to issue updated rules, procedures, or formal advisory opinions under § 5.05(5t) to ensure its implementation. This is more than enough to establish standing.

The Legislative defendants further lodge a narrower standing challenge against just one of the Swenson plaintiffs' ADA claims. (*See* Leg. Defs.' Omnibus Br. (dkt. #454) 105-08.) Specifically, they contend the Swenson plaintiffs lack standing to pursue a claim that the WEC's failure to provide accessible online ballots impermissibly discriminates against voters with vision or other print disabilities because none of the Swenson plaintiffs have such a disability. (*See id.*) As the Swenson plaintiffs point out, however, they have produced evidence that Disability Rights Wisconsin (one of the named plaintiffs in the Swenson complaint) has *itself* been injured by the alleged violation of the ADA, as it has had to divert its own resources to assist voters with those disabilities to both get access to and cast absentee ballots. (*See* Swenson Pls.' Reply (dkt. #493) 21.) Because Disabilities Rights Wisconsin has alleged a concrete and particularized injury to its own interests, and advocate for the interests of others with relevant disabilities, the Swenson plaintiffs have established standing to pursue their claim regarding accessible online ballots. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-80 (1982) (holding that organization that had to divert resources to mitigate effects of allegedly discriminatory practices had standing bring suit).

Finally, the Legislative defendants contend that plaintiffs' claims are unripe and should be dismissed under the *Burford* abstention doctrine. Little time need be spent on these contentions because the court previously addressed nearly identical arguments in an earlier opinion and order. (*See* 6/10/20 Op. & Order (dkt. #217).) The court finds no reason to depart from its earlier conclusion that plaintiffs' claims are ripe and fit for judicial review, presenting an "actual and concrete conflict premised on the near-certain

enforcement of the challenged provisions in the context of the present and ongoing COVID-19 health care crisis" and because plaintiffs are "likely to suffer adverse consequences if the court were to require a later challenge." (*Id.* at 7-8.) Further, as previously explained, the *Burford* abstention doctrine is not applicable to any of the cases or controversies before this court because Wisconsin state courts "are not specialized tribunals with a special relationship with voting rights issues" and because *Burford* abstention is often "inappropriate in federal constitutional challenges to state elections laws." (*Id.* at 17-18.)

B. Failure to State a Claim

Dismissal under Rule 12(b)(6) is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). To survive a motion to dismiss, a complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Certain of plaintiffs' claims are plainly barred by immunity doctrines, and thus, fail to state a claim. First, to the extent that any plaintiffs seek money damages pursuant to § 1983, such relief is barred by state sovereign immunity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 66 (1989). Second, the Edwards plaintiffs' claims against Wisconsin State Assembly Speaker Robin Vos and Wisconsin State Senate Majority Leader Scott Fitzgerald are foreclosed by the doctrine of legislative immunity, which provides absolute immunity from liability for an official's legitimate legislative activity. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Tenney v. Brandhove*, 341 U.S. 367, 376

(1951). The Edwards plaintiffs' complaint faults Speaker Vos and Majority Leader Fitzgerald for failing to take action to postpone the April election or otherwise enact measures regarding Wisconsin's elections in the face of the pandemic, but any decision not to act qualifies as legislative activity protected by absolute immunity. *See NRP Holdings LLC v. City of Buffalo*, 916 F.3d 177, 192 (2nd Cir. 2019) (decision not to introduce resolutions before city council was protected legislative activity).

The Edwards plaintiffs' only response to defendants' invocation of legislative immunity is to assert without legal authority that it applies only to state law claims. (*See* Edwards Pls.' Br. ('340, dkt. #25) 16.) To the contrary, the immunity doctrine is a creature of federal common law and applies to federal civil claims. *See Bogan*, 523 U.S. at 48 (explaining that the U.S. Constitution and federal common law "protect[s] legislators from liability for their legislative activities"); *NRP Holdings LLC*, 916 F.3d at 190 (describing the doctrine of absolute legislative immunity as a matter of common law created by the U.S. Supreme Court and applicable to federal civil claims).

Oddly, having asserted immunity on their behalf, the Legislative defendants nevertheless urge the court to permit Speaker Vos and Majority Leader Fitzgerald to remain as parties to defend state law. (Leg. Defs.' Br. ('340, dkt. #13) 30-31.) In doing so, they, too, cite to no legal basis for a defendant to be found immune from suit yet remain as a party. (*See id.*) Even if there were some legal basis to allow the defendants to remain, this court has previously held that an individual "legislator's personal support [of a law he or she enacted] does not give him or her an interest sufficient to support intervention." *See One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (citing *Buquer v. City*

of Indianapolis, No. 11–cv–00708, 2013 WL 1332137, at *3 (S.D. Ind. Mar. 28, 2013), *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 251 (D.N.M. 2008)). Indeed, to their credit, defendants themselves readily admit that the Edwards plaintiffs have "name[d] the Wisconsin Assembly and the Wisconsin Senate as parties, meaning there is no practical need to retain Speaker Vos and Majority Leader Fitzgerald as additional named Defendants here." (Leg. Defs.' Br. ('340, dkt. #13) 31.) Having been presented no legal or practical reason to grant immunity but retain Speaker Vos and Majority Leader Fitzgerald as defendants, the court will dismiss them from this case.[16]

II. Motions for Preliminary Injunction[17]

To make out a prima facie case for a preliminary injunction, a party must show (1)

[16] Defendants also move to dismiss the Edwards plaintiffs' claim for monetary damages under the ADA. A required element of a compensatory damages claim for intentional discrimination under Title II of the ADA is deliberate indifference. *See Lacy v. Cook Cty., Ill.*, 897 F.3d 847, 862-63 (7th Cir. 2018). This requires both "knowledge that a harm to a federally protected right is substantially likely" and "a failure to act upon that likelihood." *Id.* at 863 (quoting *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013)). The WEC and Legislative defendants both argue that the Edwards plaintiffs do not assert a cognizable claim for ADA damages because they failed to allege deliberate indifference explicitly. (WEC Defs.' Mot. to Dismiss Br. ('340, dkt. #15) 8; Leg. Defs.' Mot. to Dismiss Br. ('340, dkt. #14) 24.) Reading the Edwards plaintiffs' complaint in the light most favorable to them, as this court must at the pleading stage, it is reasonable to infer this claim based on their allegations that defendants have (1) knowledge of the past and planned enforcement of Wisconsin's election laws, as well as the dangers posed by the COVID-19 pandemic, and (2) have and are continuing to fail to act on that likelihood. Thus, plaintiffs have alleged sufficient facts to support their implicit claim for deliberate indifference and survive the defendants' motions to dismiss. Of course, whether or not there was or is likely to be a violation of the ADA, much less a deliberate one, remains to be proven. Finally, as to defendants' remaining grounds for dismissal based on plaintiffs' failure to plead sufficient allegations to support their claims as a matter of law, the court will address these arguments in its substantive consideration of each of plaintiffs' claims in the discussion that follows.

[17] In addition to the parties' briefs, the court received two amicus briefs from Common Cause (dkt. #251) and the American Diabetes Association ('340 dkt. #23). The policy of the Seventh Circuit is to "grant permission to file an amicus brief only when: (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another

irreparable harm, (2) inadequate traditional legal remedies, and (3) some likelihood of success on the merits. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If all three threshold requirements are met, the court must then engage in a balancing analysis, weighing "the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017). The court must also "ask whether the preliminary injunction is in the public interest." *Id.* "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984).

A. *Anderson-Burdick* Analysis

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court set forth a balancing test to determine whether an election law unconstitutionally burdens a citizen's right to vote. Under the *Anderson-Burdick* test, a court must weigh "the character and magnitude of the asserted injury to the rights" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).[18]

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case, and the case in which he seeks permission to file an amicus curiae brief, may by operation of stare decisis or res judicata materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Following that same policy, the court concludes that these parties fall into the latter category, will grant their respective motions, and has considered their proposed briefs.

[18] As a group, plaintiffs also invoke four additional, legal claims: (1) Title II of the Americans with

The Seventh Circuit recently applied and elaborated on this merits test in its long-awaited decision in *Luft v. Evers*, 963 F.3d 655, considering a series of challenges to Wisconsin's election laws, including some of the provisions at issue in this litigation. Fundamentally, the *Luft* court cautioned that the burden of a specifically challenged election provision must be considered against "the state's election code as a whole" -- that is, by "looking at the whole electoral system," rather than "evaluat[ing] each clause in isolation." *Id*. at 671. *Luft* further "stressed" that "Wisconsin's system as a whole is accommodating." *Id.* at 674. At the same time, the court reaffirmed its earlier holding that "the right to vote is personal" and, therefore, "the state must accommodate voters" who cannot meet the state's voting requirements "with reasonable effort." *Id.* at 669.

Having already addressed at length the scope of the state's constitutional obligation to accommodate voting rights during the COVID-19 pandemic in its April 2, 2020, decision (4/2/20 Op. & Order (dkt. #170) 26-28), which was largely left unchallenged on appeal to the Seventh Circuit, *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1546, -1545, (7th Cir. April 3, 2020), and U.S. Supreme Court, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___ (2020) (per curiam), the court simply adopts it

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Disabilities Act, 42 U.S.C. § 12132; (2) the *Mathews v. Eldridge*, 424 U.S. 319 (1976), procedural due process balancing test; (3) the Equal Protection Clause's guarantee against arbitrary election administration; and (4) section 11(b) of the Voting Rights Act ("VRA"). The latter three legal claims either prove a poor fit for the relief plaintiffs are seeking, or plaintiffs fail to describe how these standards would advance their claims beyond the *Anderson-Burdick* test. Thus, for reasons addressed at the close of this opinion, the court concludes that plaintiffs have failed to demonstrate any likelihood of success on the merits as to those claims for relief beyond that available under the *Anderson-Burdick* test. Finally, three of the cases before the court also pursue claims for injunctive relief under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. At the hearing, plaintiffs specifically relied on the ADA to advance two of the requests for relief, to enjoin or modify the witness signature requirement and to provide an accessible, online absentee ballot. The court addresses those challenges where relevant below.

again by reference. Instead, in considering plaintiffs' requests for injunctive relief with respect to the November election, the court will stress the three, core concerns that drives its analysis here.

First, the court is mindful, as it must be, that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). In weighing the individual requests for relief, the court must consider the risk that any of its actions may create confusion on the part of voters, either directly or indirectly, by creating additional burdens on the WEC and local election officials. To ameliorate that risk, the court has generally attempted to issue a decision far enough in advance to allow an appeal of the court's decision, provide sufficient time for the WEC and local election officials to implement any modifications to existing election laws, and to communicate those changes to voters. Issuing the decision now, six weeks out, rather than two weeks as in the April election, does not come without its tradeoffs: the court must make certain, reasonable projections about what the pandemic and other events relevant to voting will be like by late October and early November. Of course, the court would prefer to be making these decisions with a more complete understanding of the record of voter behavior during that time, but that luxury does not exist. On the other hand, the court has a much better understanding of the likely impacts of the pandemic on voting behavior, as well as the State of Wisconsin's capacity to address them, than it did in March.

Second, the court will focus solely on how the COVID-19 pandemic presents unique challenges to Wisconsin's election system and burdens Wisconsin voters. The court is not

interested in plaintiffs' general challenges to Wisconsin elections, because those challenges have now been largely addressed in *Luft* or, to the extent left open, remain subject to further proceedings before Judge Peterson. On the other hand, the court rejects the Legislature's attempts to paint plaintiffs' claims as purely facial challenges, arguing that specific individuals who face insurmountable burdens due to the COVID-19 pandemic could bring as-applied challenges for relief at a later date. Still, recognizing that the line between a facial and an as-applied challenge can be hazy, *see Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012), plaintiffs' claims here are only viable to the extent they constitute as-applied challenges and, in particular, are compelling after fairly extrapolating from relevant voters' and local election officials' experiences during the pandemic in April to prove near certain burdens in November, particularly with respect to the availability of mail-in absentee, early absentee and in-person voting options.

To the extent that some of the relief requested -- for example, the extension of certain deadlines -- is substantial likely to provide needed relief to Wisconsin voters and poll workers burdened by the pandemic's impact, and even likely to "severely restrict" an individual's right to vote, the state may still articulate "compelling interests" for the challenged election laws and prove those laws have been "narrowly tailored." *Luft*, 963 F.3d at 672. As to other requested relief, plaintiffs seek "safety nets" to ensure that the state is protecting the "personal" nature of the right to vote. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"); *Luft*, 963 F.3d at 677-78 (reaffirming *Frank II* holding that "voting rights are personal," requiring "that each eligible person must have a path to cast a vote"). Regardless of how it is characterized, the relief requested by plaintiffs

must be consistent with the Seventh Circuit's decisions in *Luft* and *Frank II*. The rub, as described in detail below, is whether plaintiffs have submitted sufficient evidence from which this court must conclude that certain individuals are unlikely to be able to exercise their right to vote despite reasonable effort.

Third, while the court will take up each of plaintiffs' requested items of relief, after *Luft*, the court must consider each request in light of the election system as a whole. Here, the court principally considers the interplay between the WEC's, local officials' and voters' expressed preference for absentee voting by mail in this election compared to the historic, overwhelming preference for in-person voting. Obviously, ensuring that mail-in, absentee voting is a tenable option for the majority of the electorate who are expected to vote this way in November, whether based on the WEC's strongly-stated preference or on personal risk assessments, will decrease the number of individuals who will need to vote in-person. In turn, this will help ensure that there are adequate and safe, in-person voting sites for individuals unable or uninterested in voting by mail, whether because of a personal preference to exercise their right to vote in person or because of difficulties in providing the necessary photo ID, obtaining a required witness signature, or negotiating the U.S. mail system., Even so,, to the extent the State has had more time to address those issues before this election and chosen not to address them by virtue of a lack of political will or simple inertia, the court will only grant relief where this failure to act in the face of the pandemic is substantially likely to severely restrict the right to vote.

With those considerations in mind, the court addresses plaintiffs' requests for preliminary injunctive relief in the following, four categories: registration, absentee voting,

in-person voting, and miscellaneous relief.

1. Registration

a. Extending Registration Deadlines

The DNC plaintiffs seek an order enjoining Wisconsin Statute § 6.28(1), which requires a mail-in registration to be received by the clerk or postmarked no later than the third Wednesday preceding the election (here, October 14), and requires electronic registrations to be received by 11:59 p.m. on the third Wednesday preceding the election. DNC argues that the court should extend both deadlines to the Friday before the election, October 30, to align with the deadline for registering in person before election day. As the DNC points out, the court granted similar, preliminary relief to that requested by plaintiffs here before the April election, extending the mail-in postmark date and electronic registration receipt deadline by 12 days to the Friday before the election. (3/20/20 Op. & Order (dkt. #37) 10-15.)

However, the six weeks leading up to this election are different than the week or two before the April 7 election, when the pandemic was a new phenomenon and demanded swift adjustments to the timetable to accommodate voting from the safety of one's home, rather than venturing out into the public. As defendants persuasively argue, individuals are now sufficiently on notice of the pandemic's risks, its impacts on their daily lives, and measures that can be taken to reduce those risks. So, to the extent individuals wish to register electronically or by mail to facilitate later voting by mail, defendants argue that voters must plan accordingly and complete their electronic and mail-in registrations by the established deadline of October 14.

Of course, what the Legislature originally afforded as a convenience to in-person registration and voting has, at least for this election, become a necessity for some, as well as an important tool for WEC and local officials to reduce the number of people voting in person on the day of the election. Even more to the point, as WEC Administrator Wolfe testified at the hearing, registering in person on the day of the election not only risks longer lines, but increases the amount of time individuals are inside polling stations, as well as requiring person-to-person engagement in two separate processes, which are further prolonged by the additional, COVID-19 protections of social distancing and masking. (8/5/20 Hr'g Tr. (dkt. #532) 60-61, 98-100.) Facilitating early registration electronically and by mail will not only limits sustained interactions on election day, but will allow some, significant number of unwary individuals sufficient time to request absentee ballots and vote by mail (or by drop-off), rather than voting in person before or on the day of the election. For these reasons, WEC Administrator Wolfe testified at the hearing, the tradition of having a significant number of individuals register in person on the day of the election is incompatible with the goal of -- and projected, significant demand for -- voting by mail via absentee ballot. (*Id.* at 57.) 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. This is especially true in light of Wisconsin's "cultural tradition" of registering on election day, with more than 80% of registered voters having engaged in that process in the past. (*Id.* at 58.)

Still, the recognized health benefits of driving the electorate to mail-in registration

and absentee voting is probably insufficient alone to justify this court modifying an established deadline for doing so. The difference in April, and again this November, is the sheer number of new registrations and absentee voters who will rely on the U.S. mail to do so, especially as compared to past elections, and the risks of severely restricting that option during the pandemic for those who will come to the realization that the window has closed too soon for them to register and request an absentee ballot. Unless some relief is provided to the October 14 deadline, the likelihood of thousands of voters missing this window and choosing not to vote in person is quite high, and while that eventuality may be present in any election, the risks expand to tens of thousands of voters in the midst of the pandemic. For these reasons, plaintiffs have demonstrated that discontinuing electronic and mail registration options precipitously on October 14 will likely restrict many Wisconsin citizens' freedom to exercise their right to vote, at least without having to take unnecessary risks of COVID-19 exposure by registering in person, and for some significant minority of citizens, will severely restrict that right because of age, comorbidities or other health concerns. *See Luft*, 963 F.3d at 671–72 ("Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules.") (citations omitted).

In contrast, the only interest in enforcing the October 14 deadline articulated by the defendants is providing sufficient time for election officials to prepare voter records. As WEC Administrator Wolfe testified at the hearing, however, this deadline could be extended an additional week until October 21, 2020, while still providing sufficient time for local election officials to print poll books. (8/5/20 Hr'g Tr. (dkt. #532) 62.) Indeed,

the record reflects that local election officials were able to accommodate the court's April 2020 extension of electronic registration by 12 days before the April election without significant impact of local officials' ability to manage in-person voting. (*Id.* at 63-64; *see also* DNC Pls.' PFOFs (dkt. #419) ¶ 194.)

Accordingly, the court concludes that plaintiffs have sufficiently demonstrated that the current electronic and mail-in registration deadline of October 14, 2020, will substantially (and in a smaller, but significant group, severely) restrict the right to vote during the ongoing pandemic, particularly after considering the likely impact of increased, in-person registration on the orderly, safe functioning of voting on Election Day. Moreover, by moving the deadline only one week to October 21st, rather than the two-week extension requested by plaintiffs, the court has amply accounted for any arguable state interest in allowing sufficient time to prepare voter records. Finally, with this accommodation, the court finds that the balance of interests weighs heavily in favor of plaintiffs as to this narrow relief.

b. Proof-of-Residence Requirement

The DNC plaintiffs also seek an order enjoining the proof-of-residence requirement under Wisconsin Statute § 6.34(2) for individuals who attest under penalty of perjury that they cannot meet the requirement after reasonable efforts. During the evidentiary hearing, the DNC plaintiffs acknowledged that they do not have any declarations establishing an actual instance of a voter being unable to meet this requirement. (8/5/20 Hr'g Tr. (dkt. #532) 200.) In light of the record evidence, this is unsurprising, since it is fairly easy to satisfy the requirement. For those requesting an absentee ballot electronically, a driver's

license also satisfies the proof-of-residence requirement. (8/5/20 Hr'g Tr. (dkt. #532) 80 (Wolfe testifying that "[i]f someone registers to vote online, they do not need to provide proof of residence because the match with their DMV record fulfills that requirement").) If a person wishes to register by mail or early in person, a utility bill would suffice, and the voter would not even need to provide a copy of it. For some individuals, this requirement still may constitute a burden -- for example, as the DNC plaintiffs argued at the hearing, there may be college students not on a lease or on utility accounts -- but this is *always* the case and not specific to the pandemic.[19] Finally, as the Seventh Circuit recognized in *Luft*, there is a significant state interest in ensuring that individuals are voting in their proper districts. *Luft*, 963 F.3d at 676. On this record, therefore, the court concludes that plaintiffs are not likely to succeed in demonstrating that the proof-of-residence requirement substantially burdens the right to vote or that this burden outweighs the State's interests, even in light of the circumstances surrounding the COVID-19 pandemic.

2. Absentee Voting

a. Counting of Absentee Ballots

Next, the Edwards and Swenson plaintiffs seek an order enjoining Wisconsin Statute §§ 6.88, 7.51-.52, which require that absentee ballots not be counted before election day. Plaintiffs argue that this requirement thwarts local election officials' ability to address defects in absentee ballots -- particularly a voter's failure to comply with the

[19] While the DNC plaintiffs propose use of "an affidavit" as a possible "safety net," *Frank II*, 819 F.3d at 387, they fall short of proposing specific language, much less describing how this exception would be administered. Regardless, the court is concerned about adding any additional burdens on the WEC's electronic registration process or on the stretched resources of local election officials.

witness certification requirement. If the court were to enjoin this requirement and allow counting before the election day, then local election officials could find defects, contact voters and give them a chance to fix them before it is too late.

The court is not persuaded by this argument. As the Legislature explains, Wisconsin law already provides procedures for absentee ballot voters to correct errors. Indeed, the errors typically will occur on the outside of the envelope, and therefore, it need not be opened, nor must the ballot be counted for an election official to alert a voter of a witness certification error or some other defect. Regardless, the court agrees with the Legislature that plaintiffs' proposed solution is a poor fit for the general problem of absentee ballot errors. Finally, plaintiffs' argument is insufficiently tied to the particular circumstances surrounding the pandemic. Indeed, to the extent that plaintiffs pursue this injunction to facilitate efficient counting of absentee ballots, the court's extension of the absentee ballot receipt deadline sufficiently addresses this concern. If anything, by precluding early counting of absentee ballots during a period when they are likely to comprise 60 to 75% of all ballots cast, the state's interest in securing the tallying process until after the election is closed is stronger. On this record, the court finds no basis to grant relief.

b. Witness Signature Requirement

All four plaintiffs next seek an order enjoining the witness signature requirement under Wisconsin Statute § 6.87(2), although the plaintiffs again suggest various replacements for this requirement. In essence, the DNC plaintiffs seek to enjoin this requirement for those individuals who (1) attest under penalty of perjury that they cannot meet the requirement after reasonable efforts, (2) sign a form and provide contact

information, and (3) cooperate with local election officials who may follow-up. The DNC argues that this process would satisfy *Frank II* and *Luft.* The Edwards plaintiffs similarly request that the court allow the small population of people who cannot secure a witness to sign a sworn statement to that effect. Next, the Gear plaintiffs propose an order following the Seventh Circuit's opinion reviewing this court's April preliminary injunction by allowing voters to write in the name and address of a witness but not require a signature. Finally, the Swenson plaintiffs argue that self-certification should be sufficient to satisfy the State's interest.

In support of their various requests for relief from a witness signature, plaintiffs submit substantive evidence in the form of affidavits from individuals who recount difficulties they encountered in obtaining or attempting to obtain a witness signature during the April election. (*See, e.g.*, DNC Pls.' PFOFs (dkt. #419) ¶¶ 157-60 (citing declarations).) Plaintiffs also assert that the proposed alternatives in the April election (e.g., have someone witness it via a video call or through a window) obviously did not work in light of the roughly *14,000* ballots that were rejected because of insufficient witness certifications, and further suggest that some portion of the 135,000 unreturned ballots were not submitted because voters could not secure a witness.

While acknowledging the possible burden that the witness signature requirement will place on some voters, the Seventh Circuit reversed this court's entry of preliminary relief from this requirement for the April 2020 election. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1546, -1545, (7th Cir. April 3, 2020). Moreover, it did so even though the arguable need was greater then, given (1) the compressed period for election

officials to adjust to the COVID-19 restrictions, (2) increased uncertainty as to how the virus spreads and risks of contracting it, and (3) the dramatic increase in first-time absentee applications and voters. Further, the Seventh Circuit faulted this court for giving inadequate weight to the State's interests behind the witness requirement and vacated that portion of this court's preliminary injunction, rather than merely modifying it to require a more robust affidavit or a witness, but no signature. Finally, the Supreme Court recently signaled its own reticence to set aside such state law requirements by staying the effect of an Eleventh Circuit decision blocking photo-ID and witness-signature requirements for absentee ballots. *See Merrill v. People First of Ala.*, No. 19A1063 (U.S. July 2, 2020).

To the extent, the Seventh Circuit left room for other possible workarounds to the witness-signature requirement, the WEC has again proposed a number of options for any voters having difficulty meeting the requirement for safety or other reasons all of which would allow a voter to maintain a safe distance from the witness. *See* WEC, "Absentee Witness Signature Requirement Guidance" (Mar. 29, 2020), https://elections.wi.gov/node/6790. Given a greater understanding as to the efficacy of masks and social distancing in substantially lowering the risk of transmitting the virus (and the seemingly reduced risks of its transmittal on surfaces than by aerosols), these options also appear more viable and safe for individuals wishing to vote via absentee ballot than they did in April; albeit for some, the requirement may still present a significant hurdle. Finally, under *Purcell*, there remains the challenge of fashioning and implementing an effective exception to this requirement in the shorter period for voting via absentee ballot in terms of: drafting an appropriate form, publicizing the option, managing its distribution

to voters who cannot meet the requirement, and effecting the return of that form.

Viewing the election system as a whole, including the flexibility surrounding this requirement, coupled with additional options for voting in person, either early or on the day of the election, the court concludes that plaintiffs have failed to demonstrate a sufficient likelihood of success in proving that the burden placed on some voters by this requirement outweighs the State's interests and possible disruption in the orderly processing of an unprecedented number of absentee ballots. Accordingly, the court will deny this request for relief under *Anderson-Burdick*.

As noted above, some of the plaintiffs assert claims under the ADA as well. At the hearing, the Swenson plaintiffs specifically argued that relief from the witness signature requirement was warranted in light of the ADA. To establish a violation of the ADA, a plaintiff "must prove that he is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was 'by reason of' his disability." *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (quoting 42 U.S.C. § 12132). A defendant's "failure to make reasonable modifications in policies, practices, or procedures can constitute discrimination under Title II." *Lacy v. Cook Cty.*, 897 F.3d 847, 853 (7th Cir. 2018) (citing 28 C.F.R. § 35.130(b)(7)(i)3). An accommodation is reasonable if "it is both efficacious and proportional to the costs to implement it." *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002). The ADA, however, does not require a modification that would "fundamentally alter the nature of the service, program, or activity." *P.F. by A.F. v. Taylor*,

914 F.3d 467, 472 (7th Cir. 2019) (quoting 28 C.F.R. § 35.130(b)(7)(i)).

Here, for the same reason that the court concluded the risks of administering an affidavit, self-certifying or other program outweigh the burden on voting rights, the court also concludes that the recommended accommodation is not reasonable under the ADA, because it is not "efficacious and proportional to the costs to implement it." *Oconomowoc Residential Programs*, 300 F.3d at 784. As such, plaintiffs have not shown a likelihood of success in proving that the witness signature requirement violates the ADA.

c. Receipt Deadline of Absentee Ballots

Next, the DNC plaintiffs and the Swenson plaintiffs seek an order enjoining the requirement that absentee ballots must be received by election day under Wisconsin Statute § 6.87(6), urging instead that the ballots again be postmarked by election day to be counted. In its prior opinion and order, the court extended the deadline for receipt of mailed-in absentee ballots until the Monday after the election day. On appeal, the Seventh Circuit upheld this same extension, as did the U.S. Supreme Court, except for requiring that the return envelope be postmarked before or on election day.

The reasons for the court's extension of the deadline for receipt of mailed-in absentee votes for the April 2020 election applies with almost equal force to the upcoming November 2020 election. The WEC is now projecting 1.8 to 2 million individuals will vote via absentee ballot, exceeding the number of absentees by a factor of three for any prior general, presidential elections *and* exceeding by as much as a million the number of absentee voters that overwhelmed election officials during the April 2020 election. As the court discussed during the August 5th hearing, Wisconsin's election system also allows

individuals to request ballots up to five days before the election. While this deadline has worked for the most part during a normal election cycle, the same statutory deadline is likely to disenfranchise a significant number of voters in the November election given the projected, record volume of absentee ballots. On top of the sheer volume of absentee ballot requests that election officials found difficult to manage, the record also establishes that the USPS's delivery of mail has slowed due to budget constraints or other reasons, and will undoubtedly be overwhelmed again with ballots in November, as they were in April.

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. To the contrary, the WEC acknowledges that the unprecedented numbers of absentee voters will again be very challenging for local election officials to manage in the compressed time frame under current law despite their best efforts to prepare for and manage this influx, and they have no reason to expect any better performance by the USPS.[20]

[20] This is not to denigrate the ongoing efforts of the small staff at WEC and efforts of local election officials, nor of postal workers, just to reflect the systemic issues that will arise in a system never meant to accommodate massive mail-in voting. Indeed, in addition to its efforts to encourage staffing up locally, WEC worked with USPS to add bar codes to absentee ballots, but without increased USPS personnel or automated tracking equipment, this is unlikely to change the speed of receipt of applications or absentee ballots, much less receipt of executed ballots. At best, it may help to better track how thousands of applications and votes became misplaced long after completion of the November election.

In response, the Legislature argues that individuals should request ballots now, so that they can receive, complete and mail them back well in advance of the statutory deadline, which requires receipt on or before election day. The court whole-heartedly agrees that Wisconsin voters should proactively manage their voting plans, request absentee ballots online or by mail *now* (or as soon as possible thereafter), if they wish to vote by absentee ballot, and then diligently complete and return them well in advance of the election. *Everyone* -- the WEC, the Legislature, other elected officials, and the political parties and affiliated groups -- should be advocating for and to a large extent are advocating for such action, although the latter entities are more targeted at best and subject mischief at worst. Nonetheless, given the sheer volume expected this November, there remains little doubt that tens of thousands of seemingly prudent, if unwary, would-be voters will not request an absentee ballot far enough in advance to allow them to receive it, vote, and return it for receipt by mail before the election day deadline despite acting well in advance of the deadline for requiring a ballot.

While the Legislature would opt to disregard the voting rights of these so-called procrastinators, Wisconsin's election system sets them up for failure in light of the near certain impacts of this ongoing pandemic. If anything, the undisputed record demonstrates that unwary voters who otherwise reasonably wait up to two weeks before the October 29, 2020, deadline, to request an absentee ballot by mail face a significant risk of being disenfranchised because their executed, mailed ballot will not be received by officials on or before the current election day deadline. Moreover, it is particularly unreasonable to expect undecided voters to exercise their voting franchise by absentee ballot well before the

end of the presidential campaign, especially when the Wisconsin's statutory deadline is giving them a false sense of confidence in timely receipt.

Not really disputing the magnitude of this risk in light of the vast, unprecedented number of absentee ballots received after the deadline in April, the Legislature instead argues that a similar extension this time will somehow undermine the state's interests in having prompt election results. Even this argument rings hollow during a pandemic, but it also ignores that some fourteen states, other than Wisconsin and the District of Columbia, follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election, so long as they are timely postmarked. (DNC Pls.' Supp. PFOFs (dkt. #501) ¶ 19.) As such, Wisconsin will not be an anomaly. Furthermore, by including a postmark-by-election-day requirement, there is no concern that initial election results will influence a voter's decision. Moreover, unlike in April, the court will not require election officials to refrain from publishing results until after the extended absentee ballot deadline, since that requirement was only added because of this court's original decision *not* to include a postmark deadline. With the guidance of the United States Supreme Court that a postmark deadline is warranted, any concern about early release of election results is mitigated.

Finally, while not addressed by defendants, plaintiffs offered evidence that the election day receipt requirement actually furthered the state's interest in completing its canvass during the April election. Regardless, WEC Administrator Wolfe testified that election officials were able to meet all post-election canvassing deadlines notwithstanding this court's six-day extension of the deadline in April, and the extension gave election

officials time to tabulate and report election results more efficiently and accurately. (DNC Pls.' PFOFs (dkt. #419) ¶ 195.) Nor have defendants identified any other predicted or unforeseen anomalies arise because of this extension. On the contrary, as previously discussed, there is strong evidence that as many as 80,000 voters' rights were vindicated by the extension in the primary election, and a reasonable extrapolation for the general election could well exceed 100,000.

Thus, on this record, the court concludes that plaintiffs have shown a likelihood of success in demonstrating the risk of disenfranchisement of thousands of Wisconsin voters due to the election day receipt deadline outweighs any state interest during this pandemic. Accordingly, the court will grant this request, extending the receipt deadline for absentee ballots until November 9, 2020, but requiring that the ballots be mailed and postmarked on or before election day, November 3, 2020.[21]

[21] The court is mindful that the addition of a postmark requirement by the U.S. Supreme Court created some unintended consequences in April 2020, since a small proportion of the absentee ballots returned by mail lacked a legible postmark, apparently as a result of processing anomalies at local post offices. The court was hopeful that the planned use of intelligent mail barcodes ("IMB") would assuage this concern, although it appears that the presence of IMBs on most return envelopes is uncertain, if not unlikely. To the extent that the use of IMBs does not resolve this issue, the WEC will again need to provide guidance to local election officials, as it did for the April election. Given the political deadlock among WEC Commissioners and the apparent lack of state law guidance on this subject -- as well as the fact that this postmark requirement is federally mandated and the apparent importance of equal treatment of ballots after *Bush v. Gore*, 531 U.S. 98 (2000) -- it is this court's view that local election officials should generally err toward counting otherwise legitimate absentee ballots lacking a definitive postmark if received by mail after election day but no later than November 9, 2020, as long as the ballot is signed and witnessed on or before November 3, 2020, unless there is some reason to believe that the ballot was actually placed in the mail after election day. *See Shiflett v. U.S. Postal Serv.*, 839 F.2d 669, 672 (Fed. Cir. 1988) (discussing prior version of regulation when timing was triggered by mailing of appeal to the Merit Systems Protection Board, explaining that "[t]he date of a filing by mail shall be determined by the postmark date; if no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt"); *Wells v. Peake*, No. 07-913, 2008 WL 5111436, at *3 (Vet. App. Nov. 26, 2008) (relying on prior regulation where timing of appeal was triggered by its mailing, to

d. Electronic Receipt of Absentee Ballots

The Gear, Edwards and Swenson plaintiffs further request an injunction preventing enforcement of Wisconsin Statute § 6.87(3)(a), which limits delivery of absentee ballots to mail only for domestic civilian voters, while military and overseas civilian voters can receive an absentee ballot by fax or email delivery, or can even access a ballot electronically, then download and print it. Wis. Stat. § 6.87(3)(d). As explained above, Judge Peterson invalidated this ban on email delivery of absentee ballots for domestic civilians in *One Wisconsin Institute*, 198 F. Supp. at 946-48, but that order was reversed by the Seventh Circuit's decision in *Luft*. Regardless, for the roughly four-year period of time that this court's order was in place, local election officials were given the option to email or fax absentee ballots to voters to ensure timely and efficient delivery.

Plaintiffs' renewed request for this relief is limited to those voters who timely request an absentee ballot (having already timely submitted their photo ID and registered by mail), had their requests processed *and* an absentee ballot mailed to them, but because of issues with the USPS (or for some other reason), the voters did not actually receive an absentee ballot by mail in a timely fashion. The record is replete with such examples from the April 2020 election. (*See* Swenson Pls.' PFOFs ('459, dkt. #42) ¶¶ 51, 164, 176 (citing declarations); DNC Pls.' PFOFs (dkt. #419) ¶ 73 (citing declarations); Edwards Pls.' PFOFs (dkt. #417) ¶¶ 67-162, 177-81) (citing declarations); Gear Pls.' PFOFs (dkt. #422)

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explain that "[s]ince there was no postmark, the BVA applied 38 C.F.R. § 20.305(a), which presumes the postmark date to be five days before the date VA receives the document, excluding Saturdays, Sundays, and legal holidays").

¶¶ 37, 43, 81, 157-677 (citing declarations).)[22]

In response, the Legislature argues generally that there are no special circumstances here to warrant granting this relief, even temporarily. The record strongly suggests otherwise. Specifically, the evidence is nearly overwhelming that the pandemic *does* present a unique need for relief in light of: (1) the experience during the Spring election, (2) much greater projected numbers of absentee ballot requests and votes in November, and (3) ongoing concerns about the USPS's ability to process the delivery of absentee ballot applications and ballots timely. None of this was remotely contemplated by the Legislature in fashioning an election system based mainly in person voting, nor addressed by the Seventh Circuit's recent decision in *Luft.* Moreover, the relief requested is narrowly tailored only to those voters who timely fulfilled *all* of the necessary steps to vote by mail, but were thwarted through no fault of their own. Indeed, this is exactly the "1% problem" that the Seventh Circuit indicated requires a safety net in both *Luft* and *Frank II*. The Gear plaintiffs further suggest that the court limit it to the week before the deadline for requesting absentee ballots, which for this election is October 29, 2020. Up until that deadline, voters may request a replacement ballot by mail. *See* Wis. Stat. § 6.86(5) (explaining process for requesting an absentee ballot).

The Legislature also argues that this solution may create significant administrative

[22] The Swenson plaintiffs also request online ballot delivery for individuals with print disabilities under the ADA. While this request may have merit, plaintiffs have failed to explain adequately why the current options have proven inadequate in past elections or how the pandemic creates sufficient, additional burdens to warrant relief. Given the numerous requests for relief in these consolidated cases, the court must remain focused on those requests for which the need and solution are clear and circumstances surrounding the pandemic in particular warrant an injunction.

hurdles for local election officials, specifically citing to the need by local election officials to recast the absentee ballot into a form that is readable by voting machines. However, local election officials themselves represent that this inconvenience is outweighed by the benefit of having fewer, in-person voters on election day. (Gear Br. (dkt. #421) 42.) Plus, Wisconsin has a four-year history when fax or electronic delivery was available to all voters at the discretion of local election officials without incident. In contrast, the court's injunction will only apply to a narrow subset of those voters for whom an absentee ballot was not received timely by mail, who afterwards request a replacement ballot in the week leading up to the deadline for making such a request, *and* satisfy local election officials of the need for an alternative means of delivery. For all these reasons, this limited relief should not overtax election officials' abilities to administer the November election.

Finding that plaintiffs are likely to succeed on their claim that limiting receipt of absentee ballots to mail delivery burdens voters' rights who fail to receive their absentee ballot timely, and that this burden is not outweighed by the interests of the State, the court will grant that relief. As set forth below, however, the ban on allowing online access to replacement absentee ballots or emailing replacement ballots is only lifted for the narrow period from October 22 to October 29, 2020, as to those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot in time to vote. For the limited number of disabled who truly require an electronic ballot to vote effectively under the ADA, and have failed to discern an effective means to vote using a hard absentee ballot, after meeting all the same requirements set forth above for all voters, this may also provide an alternative.

e. Mail Absentee Ballots to All Registered Voters

Finally, with respect to absentee ballots, the Edwards plaintiffs seek an order requiring the WEC to send out absentee ballots to all registered voters, or at least to all voters who previously voted absentee. This request was not pursued at the hearing, and for good reason, since it is neither narrowly tailored to the alleged violations to voting rights caused by the pandemic, nor considers the substantial burden it would place on the WEC and local election officials who have already begun responding to actual applications for absentee ballots. The court, therefore, denies this request.

3. In-Person Voting

a. Early In-Person Voting

Plaintiffs further seek several injunctions relating to in-person voting. To begin, the Edwards plaintiffs seek to enjoin Wisconsin Statute § 6.86(1)(b), which limits in-person, absentee voting to the period beginning 14 days before the election and ending the Sunday before the election. This request warrants little discussion because the Edwards plaintiffs failed to develop the record as to why a 12-day period is not sufficient to provide voters an adequate opportunity to vote early in-person. Viewing the election system as whole, a two-week period for in-person, early voting, is sufficient to protect voters' constitutional rights, especially when considered in light of a robust mail-in absentee voting option and what will hopefully be a generally safe and adequate, in-person voting opportunity on the day of the election.

b. Selection of Early In-Person Voting Sites

The Edwards and Swenson plaintiffs also seek to enjoin Wisconsin Statute §

6.855(1), which requires municipalities to designate in-person, absentee voting site or sites (other than the clerk of board of election commissioners' office) 14 days before absentee ballots are available for the primary. For the November election, this means the required designations were due by June 11, 2020. Plaintiffs contend that extending this deadline would (1) allow increased flexibility and (2) reduce crowds and encourage social distancing by allowing extra sites added. Here, again, plaintiffs have failed to develop any record to find that additional, in-person voting sites are necessary to meet the demand of voters who wish to vote in person before the election day, especially given that voters may do so over a 12-day period of time. Accordingly, the court will also deny this request.

a. Photo ID Requirement

The DNC and Edwards plaintiffs both seek an order enjoining the photo ID requirement under Wisconsin Statute § 6.87(1), although the contours of the relief requested are different: the DNC plaintiffs seek to enjoin the requirement for those individuals who attest under penalty of perjury that they cannot meet those requirements after reasonable efforts; while the Edwards plaintiffs seek to enjoin the requirement for people with disabilities if they swear that they are unable to obtain the required ID.

The DNC's request for relief from the photo ID requirement falters for similar reasons as plaintiffs' request for relief from the proof-of-residence requirement. When pressed at the hearing, the DNC plaintiffs listed four declarations from individuals who they represented were not able to vote in the April 2020 election because of the ID requirement. From the court's review of these four declarations, only one -- the declaration of Shirley Powell (dkt. #341) -- actually provides support for the requested relief. Powell

avers that she attempted to request an absentee ballot by mail, but could not do so because she did not want to leave her house to obtain the necessary copy of her photo ID. (*Id.* ¶ 5.)[23] That proof falls well short of a substantial burden on her right to vote.

For their part, the Edward plaintiffs simply direct the court to a report about the difficulty in obtaining photo IDs for the *2016* election, offering neither evidence specific to the COVID-19 pandemic nor proof of any unique burdens it places on disabled voters under the ADA. While the court acknowledges that some voters like Powell may encounter difficulty in uploading a photo of their ID or obtaining a hard copy, this burden has likely diminished since April 2020, given both the additional time voters will have to obtain the necessary documents to request an absentee ballot electronically or by mail, coupled with the increased awareness of how COVID-19 spreads and efforts one can take to avoid transmission upon leaving the house.[24]

Even if not entitled to broader relief, plaintiffs argue, the creation of a "safe harbor" or "fail-safe" measure is called for by the Seventh Circuit's decisions in *Luft* and *Frank II*. However, the court concludes that, while not a perfect solution, the "indefinitely confined" designation under Wisconsin Statute § 6.87(4)(b)2 provides such relief already for those

[23] The other individuals -- Sue Rukamp, Sharon Gamm and Marlene Sorenson -- simply averred that they encountered difficulty in uploading a photo of their ID or submitting a hard copy via mail, but it appears that all three were eventually able to *request* an absentee ballot. (Dkt. ##349, 294, 355.) Not to diminish the burdens that they encountered, their declarations do *not* support providing relief from the photo ID requirement. Instead, the difficulties that they encountered are more appropriately addressed in providing electronic delivery of ballots for those individuals who do not timely receive absentee ballots by mail and by extending the deadline for receipt of absentee ballots to account for USPS delays. Both forms of relief are granted below.

[24] Of course, the court is not definitively concluding such a burden cannot be proved, just that plaintiffs have not begun to proffer evidence of their likelihood of doing so given the work-arounds now available.

unique individuals who are *both* (1) not able to upload a photograph of their ID or obtain a copy *and* (2) avoiding public outings because of legitimate COVID-19 concerns.

Apparently anticipating this outcome, plaintiffs further argue that if the court relies on the "indefinitely confined" status as a safety net for the photo ID requirement, then it should also define that term and direct the WEC to provide this definition in its materials explaining and promoting voting via absentee ballot. As it concluded in its earlier opinion and order, however, the plain language of the statute, coupled with the WEC's March 2020 guidance that the term "does not require permanent or total inability to travel outside of the residence" provides sufficient, albeit imperfect, information to guide voters' use of that safe harbor. *See* Wisconsin Election Commission, *Guidance for Indefinitely Confined Electors COVID-19* (Mar. 29, 2020)), https://elections.wi.gov/node/6788.

On this record, therefore, the court concludes that plaintiffs have failed to demonstrate a likelihood of succeeding in their claim that the COVID-19 pandemic amplifies the typical burden of requiring a photo ID, so as to outweigh the State's repeatedly recognized interest in doing so. Because the court relies on the "indefinitely confined" option as a safety net or fail-safe for those legitimately unable to meet this requirement, however, the court will direct the WEC to include on the MyVote website (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence."

b. Election Official Residence Requirement

Next, the Edwards and Swenson plaintiffs seek to enjoin Wisconsin Statute § 7.30(2), which requires that each election official be an elector of the county in which the municipality is located. This request has significant more traction in light of the record. In particular, based on her past experience and unique perspective, Administrator Wolfe testified that her biggest worry in the administration of the November election is a lack of poll workers for in-person voting on election day. (8/5/20 Hr'g Tr. (dkt. #532) 83.) Both for the April and August 2020 elections, local municipalities struggled to recruit and retain sufficient poll workers, which resulted in some localities being severely limited in providing in-person voting opportunities. In fact, even with substantially greater warning and opportunity to plan, local election officials still had difficulty securing adequate people for Wisconsin's much smaller August 2020 election. (*Id.* at 82-83.) 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.

In response, the Legislature simply argues that this requirement furthers the State's interest in promoting a decentralized approach to election management. Without discounting the value of this interest, if a county or municipality lacks sufficient poll workers and wishes to recruit workers from other locations within the state, *including* accessing National Guard members who reside outside of their community (should the Governor choose to answer the repeated call by local officials to make them available sooner rather than later), the municipality or county has already conceded its inability to maintain that interest while still conducting a meaningful election, at least with respect to

the location of residence of poll workers. Regardless, in light of the record evidence demonstrating that recruitment of poll workers will present a tricky and fluid barrier for adequate in-person voting options up to and during election day, plaintiffs have demonstrated a likelihood of success in proving that this requirement will burden their right to vote and that this burden outweighs any state interest in maintaining the requirement over expressed, local need.. As such, the court will grant this requested relief during the ongoing pandemic.

c. Ensure Safe and Adequate In-Person Voting Sites

The DNC and Swenson plaintiffs seek an order requiring the WEC to provide safe and adequate, in-person voting options, including (1) adequate voting sites with sufficient number of poll workers, and (2) implementation of safety protocols like PPE, masks, social distancing requirements, hand washing and sanitizing steps. While the court agrees, and more importantly the WEC and, in turn, local election officials agree, that these are appropriate steps to be taken, the court sees no basis to *order* this requested relief.

Specifically, the WEC has earmarked $4.1 million to provide increased safety measures at locations and has also designated $500,000 to secure and distribute sanitation supplies. WEC also is providing public health guidance and training to local election officials. Plaintiffs fail to describe how these measurers fall short. As for the concern about the number of voting locations, as previously described, local election officials in Milwaukee and Green Bay, in particular, have indicated their intent to open significantly more polling locations than that opened in April. Again, considering the election system as a whole, including the WEC's, local officials', and now the court's efforts to ensure

robust absentee voting options, the court concludes that plaintiffs have failed to demonstrate that the WEC and local election officials' efforts to date with respect to ensuring safe and adequate election-day voting sites are inadequate.

4. Requests for Miscellaneous Relief

Finally, the Swenson plaintiffs propose a number of other areas of relief, which all involve ordering the WEC to do more or do better. Specifically, the Swenson plaintiffs seek orders requiring the WEC to: (1) upgrade electronic voter registration systems and absentee ballot request systems; (2) engage in a public education drive; (3) ensure secure drop boxes for in-person return of absentee ballots; and (4) develop policies applicable to municipal clerks regarding coordinating with USPS to ensure timely delivery of and return of absentee ballots. Again, all of these are worthwhile requests, but the record reflects that the WEC is taking such steps or, at least, that a court order to the same effect is unlikely to do more before November 3 than hamper the ongoing state and local efforts. For example, in its June 25, 2020, report to the court, the WEC detailed its efforts to upgrade MyVote and WisVote, as well as provide federal funds to help municipalities with their IT needs. Moreover, the WEC described its development of various voter outreach videos, guides and surveys to help educate voters on unfamiliar aspects of voting. Further, as the Legislature points out, Wisconsin Statute § 6.869 already requires the WEC to prescribe uniform instructions on absentee voting. As for the request for more drop boxes, the WEC is providing funding from the CARES Act to municipalities to provide such boxes. Finally, as described above, the WEC is working with the USPS to implement intelligent mail barcodes to track absentee ballots.

To the extent mail delivery issues persist despite these steps, the court has attempted by entry of the order below to accommodate these concerns by permitting online access, by emailing and faxing of absentee ballots for those individuals who do not receive their requested absentee ballots timely, and by extending the absentee ballot receipt date. Plaintiffs' further requests for relief are either too vague to be meaningful or unnecessary because the WEC is already taking such steps.

B. Alternate Claims for Relief Under the Due Process and Equal Protection Clauses and Voting Rights Act

As already discussed, constitutional challenges to laws that regulate elections are generally analyzed under balancing test set forth by the U.S. Supreme Court in the *Anderson-Burdick* test. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Luft*, 963 F.3d at 671; *see also* Samuel Issacharoff et al., *The Law of Democracy* 92-127 (5th ed. 2016) (reviewing the general constitutional framework for challenges to election laws affecting the right to vote). This balancing test is rooted in both the First and Fourteenth Amendments to the U.S. Constitution. *See Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788-89). In interpreting the Supreme Court's election law jurisprudence, the Seventh Circuit has concluded that the *Anderson-Burdick* test "applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (emphasis in original); *see also Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017) (the *Anderson-Burdick* framework addresses "the constitutional rules that apply to state election regulations").

As explained during oral argument, this court is exceedingly reluctant to apply more

generalized constitutional tests to the election laws challenged here, at least without a specific legal and factual basis to do so. Indeed, in its order preceding completion of briefing and oral arguments on the motions for preliminary injunction, the court suggested that to proceed on claims under other constitutional frameworks, plaintiffs must adequately distinguish such claims from those brought under *Anderson-Burdick*. (*See* 6/10/20 Op. & Order (dkt. #217) 14-15.) Without ever adequately addressing this concern, some plaintiffs nevertheless maintain that this court should venture outside of the *Anderson-Burdick* framework and consider their claims under alternative procedural due process and equal protection clause standards.

Specifically, plaintiffs urge the court to apply the more general procedural due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). That test requires the court to balance: (1) the interest that will be affected by the state action; (2) the risk of erroneous deprivation of this interest through the procedures used by the state and the probable value, if any, of additional procedural safeguards; and (3) the state's interest, including the fiscal and administrative burdens that the additional procedure would entail. *Id.* at 340-49. The Swenson plaintiffs contend that the *Anderson-Burdick* and *Mathews* tests are "analytically distinct" because "[t]he focus of the procedural due process inquiry is what *process* is due before a statutorily protected liberty or property interest is deprived." (Swenson Pls.' Br. ('459, dkt. #41) 47 n.188.) Similarly, the DNC plaintiffs contend that "*Anderson-Burdick* balances burdens on voting rights against states' justifications, while due process claims focus on the sufficiency of the process involved before the State deprives someone of their right to vote." (DNC Pls.' Br. (dkt. #420) 55.)

During initial briefing, no plaintiff could cite to any case law to support the nuanced differences suggested by their respective positions. To the contrary, the DNC plaintiffs acknowledged that "we have not yet found a decision in which a court accepted an *Anderson-Burdick* claim while rejecting a due process challenge to the same provision; or rejected an *Anderson-Burdick* challenge while striking down the same provision as violating due process." (DNC Br. (dkt. #420) 54.) Since then, plaintiffs have pointed to three, recent election cases in which a district court applied the general *Mathews* test to election law challenges, all of which were considered in the context of the current pandemic. (*See* Notice of Supp. Authority (dkt. #536) (citing *The New Georgia Project v. Raffensperger*, 1:20-cv-01986-ELR (N.D. Ga. Aug. 31, 2020)); Notice of Supp. Authority (dkt. #534) (citing *Frederick v. Lawson*, No. 19-cv-01959, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020)); Notice of Supp. Authority (dkt. #523) (citing *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. Jul. 27, 2020)).) However, even these cases fail to address the overlap between the *Mathews* and *Anderson-Burdick* standards, much less the exclusive role played by the latter test in the U.S. Supreme Court's overall election law jurisprudence, thus providing little guidance as to the role, if any, of the *Mathews* test here. Accordingly, plaintiffs have not convinced this court that in the claims before it, an independent analysis under the *Mathews* test is necessary, much less appropriate.[25]

As for the equal protection claims, plaintiffs rely on the standard articulated by the

[25] The DNC plaintiffs themselves admit that the "*Anderson-Burdick* and *Mathews v. Eldridge* analyses are both multi-factor balancing inquiries . . . and the results of the inquiries may often be the same." (DNC Pls.' Br. (dkt. #420) 55.)

Supreme Court's *per curiam* decision in *Bush v. Gore*, 531 U.S. 98 (2000). There, the Supreme Court explained that a state "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05.[26] Notwithstanding that the Supreme Court took unusual pains to limit its "consideration" specifically to the "present circumstances" surrounding the 2000 Florida recount, *id.* at 109, other courts have appeared to rely on *Gore* in attempting to analyze subsequent election challenges. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 337 (4th Cir. 2016) (redistricting); *Obama for Am. v. Husted*, 697 F.3d 423, 428–29 (6th Cir. 2012) (restrictions on early voting); *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003) (ballot-initiative process).

Even if applicable, however, the Legislative defendants persuasively point out that this standard requires plaintiffs to prove that the arbitrary and disparate treatment is a result of specific election "procedures." *Bush*, 531 U.S. at 105. Here, the alleged disparate treatment is rooted in poll closings and poll-worker shortages, lack of adequate personal protective equipment at some polling locations and disparate treatment regarding voter registration and requests for absentee ballots. Arguably, therefore, these allegations are not rooted in specific "procedures" at all. Even if they were, plaintiffs again fail to explain adequately what *additional* relief would or should be afforded under the equal protection

[26] Plaintiffs also included a variety of facts regarding the disparate impact of COVID-19 on particular groups seeking to vote, such as specific racial minorities and the elderly. Without denigrating this impact in any way, plaintiffs' equal protection claim is premised on a general "arbitrary treatment" theory, rather than an argument that defendants' actions specifically discriminated against a particular protected class of voters, making many of these facts not relevant to, and thus not referenced further in, the court's discussion.

clause that is not already available under *Anderson-Burdick*.

Finally, in addition to these constitutional arguments, the Swenson plaintiffs assert a claim under Section 11(b) of the Voting Rights Act ("VRA"), which provides in relevant part that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting." 52 U.S.C. § 10307(b). The Swenson plaintiffs argue that defendants' inadequate response to the pandemic means that voters are intimidated to vote in person, for fear of catching COVID-19. (Swenson Pls.' Br. (dkt. #41) 25.) Although admittedly a creative argument, such an interpretation seriously stretches the purpose and common-sense meaning of section 11(b).

The VRA was signed into law in 1965 against the backdrop of the civil rights movement and state resistance to enforcement of the Fifteenth Amendment. *See generally* Dep't of Justice, *History of Federal Voting Rights Laws* (July 28, 2017), https://www.justice.gov/crt/history-federal-voting-rights-laws. While other sections of the VRA had enormous consequences on voting rights -- particularly section 2, which prohibits discriminatory voting practices, and section 5, which provides for federal "preclearance" of election changes in states with a history of discriminatory practices -- relatively little case law has explored the scope of section 11(b). *See* Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 190 (2015). Considering this background, there is no evidence that Congress contemplated extending the VRA to impose liability on states that do not take adequate action to reduce citizens' "intimidation" of in-person voting due to an infectious virus.

Moreover, the plain language of the statute itself suggests that the intimidation must be caused by a "person," not a disease or other natural force. Further, the parties disagree over whether section 11(b) requires a *mens rea* -- plaintiffs argue that it does not, the Legislature argues that it does -- and no definitive answer is found in case law. In light of these various considerations and uncertainties, 11(b) also appears a poor fit for analyzing the issues presented in this case, and the court finds that plaintiffs have presented no likelihood of success on the merits of their claims under the VRA as well.

ORDER

IT IS SO ORDERED:

1) Common Cause Wisconsin's motion for leave to file a brief as amicus curiae ('249 dkt. #251; '278 dkt. #186; '340 dkt. #51; '459 dkt. #75) is GRANTED.

2) Plaintiffs Democratic National Committee and Democratic Party of Wisconsin's motion for preliminary injunction ('249 dkt. #252) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

3) The Wisconsin Legislature's motion to dismiss the Gear complaint ('278 dkt. #382) is DENIED.

4) Plaintiffs Sylvia Gear, *et al.*'s motion for preliminary injunction ('278 dkt. #304) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

5) Defendants Scott Fitzgerald, Robin Vos, Wisconsin State Assembly, and Wisconsin State Senate's motion to dismiss the Edwards complaint ('340 dkt. #12) is GRANTED IN PART AND DENIED IN PART. Plaintiffs' claims against Scott Fitzgerald and Robin Vos are DISMISSED. In all other respects, the motion is denied.

6) Defendants the WEC Commissioners and Administrator's motion to dismiss the Edwards complaint ('340 dkt. #14) is DENIED.

7) American Diabetes Association's motion for leave to file an amicus curiae brief ('340 dkt. #23) is GRANTED.

8) Plaintiffs Chrystal Edwards, *et al.*'s motion for preliminary injunction ('340 dkt. #195) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

9) The Wisconsin Legislature's motion to dismiss the Swenson complaint ('459 dkt. ##27, 272) is DENIED.

10) Plaintiffs Jill Swenson, *et al.*'s motion for preliminary injunction ('459 dkt. #40) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

11) Defendants the Commissioners of the Wisconsin Election Commission and its Administrator are:

a) Enjoined from enforcing the deadline under Wisconsin Statute § 6.28(1), for online and mail-in registration. The deadline is extended to October 21, 2020.

b) Directed to include on the MyVote and WisVote websites (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence."

c) Enjoined from enforcing the deadline for receipt of absentee ballots under Wisconsin Statute § 6.87(6), and the deadline is extended until November 9, 2020, for all ballots mailed and postmarked on or before election day, November 3, 2020.

d) Enjoined from enforcing Wisconsin Statute § 6.87(3)(a)'s ban on delivery of absentee ballots to mail only for domestic civilian voters, with that lifted to allow online access to replacement absentee ballots or emailing replacement ballots, for the period from October 22 to October 29, 2020, provided that those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot.

e) Enjoined from enforcing Wisconsin Statute § 7.30(2), to the extend individuals need not be a resident of the county in which the municipality is located to serve as election officials for the November 3, 2020, election.

12) The preliminary injunction order is STAYED for seven days to provide defendants and intervening defendants an opportunity to seek an emergency appeal of any portion of the court's order.

Entered this 21st day of September, 2020.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE,
et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE,
REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

PRELIMINARY
INJUNCTION ORDER

20-cv-249-wmc

SYLVIA GEAR, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE,
REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

20-cv-278-wmc

CHRYSTAL EDWARDS, et al.,

Plaintiffs,

v.

20-cv-340-wmc

ROBIN VOS, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

JILL SWENSON, et al.,

Plaintiffs,

v.

20-cv-459-wmc

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE,
REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

IT IS ORDERED that defendants the Commissioners of the Wisconsin Election Commission and its Administrator are:

a) Enjoined from enforcing the deadline under Wisconsin Statute § 6.28(1), for online and mail-in registration. The deadline is extended to October 21, 2020.

b) Directed to include on the MyVote and WisVote websites (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains

that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence."

c) Enjoined from enforcing the deadline for receipt of absentee ballots under Wisconsin Statute § 6.87(6), and the deadline is extended until November 9, 2020, for all ballots mailed and postmarked on or before election day, November 3, 2020.

d) Enjoined from enforcing Wisconsin Statute § 6.87(3)(a)'s ban on delivery of absentee ballots to mail only for domestic civilian voters, with that lifted to allow online access to replacement absentee ballots or emailing replacement ballots, for the period from October 22 to October 29, 2020, provided that those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot.

e) Enjoined from enforcing Wisconsin Statute § 7.30(2), to the extend individuals need not be a resident of the county in which the municipality is located to serve as election officials for the November 3, 2020, election.

Entered this 21st day of September, 2020.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR. and MARK L. THOMSEN,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

OPINION AND ORDER

20-cv-249-wmc

Within a few weeks of Wisconsin's April 2020 election, the Democratic National Committee and the Democratic Party of Wisconsin (jointly, "the DNC/DPW") filed this lawsuit, seeking a preliminary injunction against the enforcement of certain election laws on federal constitutional grounds due to the impacts of the unfolding COVID-19 health crisis. With lightening speed, the case made it to the United States Supreme Court and back. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ____ (2020) (per curiam). Now that the April election has come and gone, intervening defendant, the Wisconsin Legislature, has moved to dismiss this case (dkt. #197), while plaintiffs have moved to file a second amended complaint (dkt. #198), seeking to update their claims in light of the alleged impacts of COVID-19 on the ability to obtain and count a record number of absentee ballots during that election and similar, other challenges facing the

Wisconsin Election Commission ("WEC") in the impending August and November elections.[1] For the reasons discussed below, the court will grant plaintiffs' motion and deny intervening-defendant's motion as moot.

BACKGROUND

Shortly after the emergence of the COVID-19 health crisis in Wisconsin, the DNC/DPW filed this lawsuit, a temporary restraining order, and a preliminary injunction, seeking to enjoin enforcement of various provisions of Wisconsin's elections laws before Wisconsin's April 7, 2020, primary election. This court granted narrow injunctive relief a few weeks before the April election, and this injunctive relief was further narrowed on appeal to the Seventh Circuit and the United States Supreme Court.

The Wisconsin Legislature has now moved to dismiss the DNC/DPW's complaint, arguing primarily that the claims became moot after the passage of the April election. While the DNC/DPW maintain that their original claims were not mooted, plaintiffs also seek to "fine-tune[]" their claims in an amended complaint "to take account of the rulings over the past two months by this court, the Seventh Circuit, and the Supreme Court." (Pls.' Reply (dkt. #203) 2.) The DNC/DPW's proposed second amended complaint also

[1] This case was previously consolidated with two other related cases. (*See* dkt. #86 (consolidating cases 20-cv-249, 20-cv-278, and 20-cv-284).) Still, "actions which have been consolidated do not lose their separate identity." *Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 928 (7th Cir. 1983). The two motions presently before the court concern only the 20-cv-249 case. (*See* Wis. Leg. Mot. to Dismiss (dkt. #197); DNC/DPW Mot. for Leave to File Second Am. Compl. (dkt. #198).) Accordingly, this opinion and order applies only to the 20-cv-249 case and all references to "plaintiffs" refer only to the DNC/DPW. The court will take up the more recently filed motions in the '284 case and '278 cases by separate order.

seeks relief with respect to the August 2020 primary election and November 2020 general elections. Specifically, plaintiffs again request that, "in the context of the current coronavirus crisis," the court declare unconstitutional and enjoin in part the following statutory provisions ("the challenged provisions"): (1) the current by-mail and electronic registration deadlines, Wis. Stat. § 6.28(1); (2) the requirements that copies of proof of residence and voter photo ID accompany electronic and by-mail voter registration and absentee applications, Wis. Stat. §§ 6.34, 6.86, respectively; (3) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, Wis. Stat. § 6.87; and (4) the requirement that an absentee voter obtain the signature of a witness attesting to the accuracy of personal information on an absentee ballot, Wis. Stat. § 6.87(2). (Proposed Second Am. Compl. ("Proposed SAC") (dkt. #198-1) 38-39.) Plaintiffs also seek to "ensure safe and sufficient in-person registration and voting facilities for all voters throughout the State." (*Id.* ¶ 83.) These requests are brought under the First and Fourteenth Amendment's guarantee against undue burdens on the right to vote, the Fourteenth Amendment's procedural due process clause, and the Fourteenth Amendment's equal protection clause. (*Id.* at 31-38.)

Intervening defendants the Republic National Committee and the Republican Party of Wisconsin (jointly, "the RNC/RPW") have since joined in the Wisconsin Legislature's opposition to plaintiffs' motion for leave to amend their complaint (dkt. #201), although the originally-named defendants, the Commissioners of the Wisconsin Election Commission ("WEC"), do not appear to oppose plaintiffs' motion, and neither the Commissioners nor the RNC/RPW have joined in the Legislature's motion to dismiss.

OPINION

The Federal Rules of Civil Procedure provide that leave to amend a complaint should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). A court may, however, "deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, 870 F.3d 682, 693 (7th Cir. 2017) (quoting *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008)). "In the face of that uncertainty, applying the liberal standard for amending pleadings, especially in the early stages of a lawsuit, is the best way to ensure that cases will be decided justly and on their merits." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 520 (7th Cir. 2015).

The Legislature opposes plaintiffs' motion to amend on grounds of futility.[2] Specifically, the Legislature contends that: (1) plaintiffs' new claims are not yet ripe; (2) plaintiffs have alleged no claim upon which relief can be granted; and (3) all of plaintiffs' claims should be dismissed under the *Burford* abstention doctrine.[3] Unsurprisingly, the DNC/DPW responds by emphasizing the liberal standard generally applicable to requests for leave to amend and argue that their new claims are not futile.

[2] The Legislature also argued that the court should stay the case pending resolution of various interlocutory appeals before the Seventh Circuit. (Wis. Leg. Opp'n (dkt. #200) 37-39.) However, the Seventh Circuit has since dismissed the appeals, rendering this argument moot. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 20-1538 (7th Cir. May 14, 2020).

[3] In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that federal courts had the discretion to abstain from intervening in certain matters that would result in an impermissibly disruptive effect on state policies.

At this point, the court is unable to conclude that the entirety of plaintiffs' proposed amended complaint is futile and, having been presented with no other reason to deny leave to amend, the court will grant plaintiffs' motion. Because plaintiffs' second amended complaint is now the operative pleading, the Legislature's motion to dismiss plaintiffs' first amended complaint is rendered moot and, therefore, will be denied. *See* Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1476 (3d ed.) ("[I]f the first complaint is considered superseded by the amendment, the court is not required to dismiss the suit when a motion points up the weaknesses of the earlier pleading."). Inevitably, however, the court addresses The Legislature's arguments for dismissal in considering its opposition to plaintiffs' motion for leave to amend on futility grounds.

I. Ripeness

The Legislature first argues that plaintiffs' motion to amend is futile because their new claims are not yet ripe. Ripeness is a justiciability concern regarding the appropriate timing of judicial intervention.[4] *Renne v. Geary*, 501 U.S. 312, 320 (1991). The rationale

[4] In the past, the ripeness doctrine has been said to have both constitutional and prudential dimensions. *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 808 (2003). Recently, however, the Supreme Court called into question the "continuing vitality of the prudential ripeness doctrine." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (respondents' assertion that a claim is nonjusticiable on prudential ripeness grounds was in "some tension" with more recent cases reaffirming that a federal court's obligation to hear cases within its jurisdiction is "virtually unflagging"). Even so, the line between prudential and constitutional ripeness remains unclear. *See* Wright & Miller, 13B Fed. Prac. & Proc. Juris. § 3532.1 (3d ed.) ("Although the dual [prudential and constitutional] origins of ripeness doctrine are clear, the line between them is far from clear."). And without further guidance from the Supreme Court or the Seventh Circuit, this court will continue to apply traditional ripeness doctrine principles. *Cf. Skyline Wesleyan Church v. California Dep't of Managed Health Care*, No. 18-55451, 2020 WL 2464926, at *10 n.9 (9th Cir. May 13, 2020) ("Because the Supreme Court has not yet had occasion to resolve the continuing vitality of the prudential ripeness doctrine, we apply it here regardless of any uncertainty about its life expectancy.") (internal citations and quotations omitted).

behind this doctrine is to avoid premature adjudication and prevent courts from "entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Because ripeness affects justiciability, courts have held that affidavits and other evidence may be considered in determining whether or not a claim is ripe. *See, e.g.*, *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285, 1290 & n.7 (3d Cir. 1993); *St. Clair v. City of Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989).

Courts have traditionally considered two factors in determining ripeness: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs.*, 387 U.S. at 149). A claim is not fit for judicial review if "the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992). In evaluating a claim of hardship, courts consider whether "irremediably adverse consequences" would flow from requiring a later challenge. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

Here, the Legislature argues that plaintiffs' claims are not presently fit for judicial review "because those claims depend on both the health risks that COVID-19 may cause during those elections and the government's response to those risks." (Wis. Leg. Opp'n (dkt. #200) 18.) Notably, although the Legislature suggests that the WEC and the state and federal governments might take steps that affect plaintiffs' claims, it does not argue that *any* of the challenged provisions will *not* be enforced in the upcoming elections. (*See*

id. at 18-21.) The Legislature also argues that plaintiffs will suffer no hardship if the court requires a later challenge because "voters in Wisconsin have ample avenues to vote, including under Wisconsin's generous absentee-voting regime." (*Id.* at 21.) Plaintiffs counter that: (1) numerous reliable sources predict that the risks presented by COVID-19 will continue at least through the November election; and (2) there is no reason to expect that the challenged election laws will not be enforced. (Pls.' Reply (dkt. #203) 10-12.) Indeed, they point out that a delay in litigation will impose an increasing hardship: as the later the court's decision, the more likely relief will be barred by the *Purcell* doctrine. (*Id.* at 15.)

Turning to the first ripeness prong -- fitness for review -- the court concludes that plaintiffs' claims state an actual and concrete conflict premised on the near-certain enforcement of the challenged provisions in the context of the present and ongoing COVID-19 health care crisis. *See Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) ("The Supreme Court has long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds."). Indeed, the WEC, the Legislature, and the Wisconsin Supreme Court have already concluded that the election laws must be enforced as written. *See* WEC, Memorandum, Update Regarding COVID-19 Election Planning (Mar. 18, 2020) (taking the position that it did not have the authority to alter the election procedures set forth in Wis. Stat. § 6.28(1)(a) (online voter registration deadline) and §§ 6.88(3) and 7.52(1)(a) (absentee ballot return deadlines)); Wis. Leg. Proposed Mot. to Dismiss (dkt. #23) (taking the position that Wisconsin's elections statutes should be enforced in the April 2020

election); Wis. Leg. Mot. to Dismiss (dkt. #197) (taking the position that Wisconsin's elections statutes should be enforced in the upcoming elections); *Jeffersom v. Dane Cty.*, No 2020AP557-OA (Wis. Mar. 31, 2020) (directing enforcement of Wis. Stat. § 6.86 (absentee photo ID requirement) consistent with the WEC's guidance on indefinitely confined voters). This alone contrasts the present lawsuit from those where enforcement is in some reasonable doubt. *See Renne*, 501 U.S. at 322 (claim unripe where there was "no evidence of a credible threat that [the challenged law] will be enforced"); *Toilet Goods Ass'n, Inc.*, 387 U.S. at 163 (challenge to regulation authorizing penalties if plaintiffs did not permit the FDA to inspect their facilities was unripe in part because the court had "no idea whether or when" the challenged regulation might be enforced). Of course, in the event that some unforeseen, future event were to extinguish, or even call into reasonable question, plaintiffs' claims for relief because of governmental action related to election procedures, the Legislature is free to revisit and this court would be delighted to take up its ripeness argument again as this litigation progresses. But for now, plaintiffs have demonstrated that their claims rest on a real, substantial controversy, and not merely on a hypothetical question.

Plaintiffs have also demonstrated that they are likely to suffer adverse consequences if the court were to require a later challenge. The August election is less than three months away, and the November election only three months after that. As was amply demonstrated in the fire drill leading up to the April election, the longer this court delays, the less likely constitutional relief to voters is going to be effective *and* the more likely that relief may cause voter confusion and burden election officials charged with its

administration. Further, any delay may ultimately preclude relief under the *Purcell* doctrine, which cautions against court intervention in imminent elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 300-01 n.12 (1979) ("Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment."). As plaintiffs point out, the Legislature appears to propose a rule in which it would either be "too soon" or "too late" to enforce voting rights.

In similar cases, other courts have found challenges to election laws to be ripe even in the face of various factual uncertainties. In *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), the Fourth Circuit held that a challenge to Virginia's open primary law was ripe, even though it was uncertain whether a candidate would run in the primary and be subjected to the challenged provision. *Id.* at 319. The court reasoned that "[w]aiting until at least two candidates file for office likely would provide insufficient time to decide the case without disrupting the pending election," causing the court to ultimately conclude that "[t]he case is fit for judicial review despite this uncertainty." *Id.* at 319-20. Similarly, in *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the Eleventh Circuit concluded that plaintiffs' challenge to a Florida voter registration law was ripe even though it had not yet been enforced. *Id.* at 1164. According to that court, potential voters would face hardship if they had to wait until after their applications had been rejected to challenge the statute, as "there may not be enough time to reach a decision on the merits before the actual election." *Id.* The court further observed that state election

officials would likewise be burdened if the court were to enjoin enforcement of the challenged statute weeks or days before the election. *Id.* Regardless, this court does not relish, nor will it be receptive to, any repeat of last minute requests for relief from any party given that we have the luxury of months, rather than weeks, to address the merits of plaintiffs' claims and hard-earned lessons from which to draw in protecting the rights of Wisconsin voters.

As in *Miller* and *Browning*, therefore, the court finds that plaintiffs have shown their proposed claims are fit for judicial review and that they would suffer hardship if the court were to withhold their consideration. Accordingly, the court rejects the Legislature's ripeness argument.

II. Failure to State a Claim

The Legislature next argues that plaintiffs' proposed amendments are futile because the allegations fail to state a claim. Plaintiffs' proposed amended complaint challenges various provisions of Wisconsin's election laws set forth above, as well as an alleged failure to ensure safe and sufficient opportunities to vote in person, on three federal constitutional grounds: (1) an undue burden the right to vote in violation of the First and Fourteenth Amendment; (2) violations of the procedural due process clause of the Fourteenth Amendment; and (3) violations of the equal protection clause of the Fourteenth Amendment. (Proposed SAC (dkt. #198-1) 31-38.) The Legislature argues that all three grounds for relief fail as a matter of law, rendering plaintiffs' motion for leave to amend their complaint futile.

Certainly, "a district court is justified in denying an amendment if the proposed

amendment could not withstand a motion to dismiss." *Glick v. Koenig*, 766 F.2d 265, 268 (7th Cir. 1985). However, in considering such a motion, a court must accept all well-pleaded facts as true and draws all reasonable inferences in favor of the plaintiff. *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826 (7th Cir. 2015). Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (quoting *Alam v. Miller Brewing Co.*, 709 F.3d 662, 666 (7th Cir. 2013)). With these principles in mind, the court will review the factual allegations for each of plaintiffs' three constitutional claims.

A. Undue Burden on the Right to Vote

Plaintiffs' first claim that the challenged provisions impose an undue burden on the right to vote in violation of the First and Fourteenth Amendments. (Proposed SAC (dkt. #198-1) 31.) This claim is governed by *Anderson-Burdick* framework,[5] requiring courts to consider whether the burdens on the right to vote imposed by the challenged provisions are justified by the state's interests in enforcing the provision. *See One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016) (citing *Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428).

Plaintiffs' proposed complaint identifies specific burdens that allegedly will be imposed by each of the challenged provisions, and further avers that no state interest can justify their enforcement in light of the alleged burdens. (Proposed SAC (dkt. #198-1) 31.) The Legislature argues generally that plaintiffs' alleged burdens are not "plausible" or

[5] *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

are "speculative" and, therefore, are insufficient to support their claims. (Wis. Leg. Opp'n (dkt. #200) 26-30.) Yet the burdens on the right to vote that plaintiffs identify are based, at least in part, on burdens that allegedly befell voters in the April 2020 election. For example, plaintiffs allege that in the April election, thousands of voters did not receive requested absentee ballots with adequate time to return them before the receipt deadline. (Proposed SAC (dkt. #198-1) ¶ 50.) They further allege that a similar situation will occur during the August and November elections, and that such a burden is not justified by any state interest. (*Id.* ¶¶ 51-52.) They include similar allegations for all of the challenged provisions. (*See id.* at 21-30.) Accordingly, the Legislature's argument that such burdens are not "plausible" falls flat in light of this past experience, although plaintiffs' will ultimately face a high bar in *proving* the allegations made in their complaint.

The Legislature also contends that plaintiffs' alleged burdens on the right to vote are insufficient *as a matter of law* to overcome the state's interest in enforcing duly enacted election laws. (Wis. Leg. Opp'n (dkt. #200) 26-30.) Plaintiffs counter that balancing tests are "by the very nature, generally inappropriate for Rule 12(b)(6) dismissal for failure to state a claim." (Pls.' Reply (dkt. #203) 16.) The court is again inclined to agree. As a general matter, a motion to dismiss "is not an opportunity for the court to find facts or weigh evidence." *My Health, Inc. v. Gen. Elec. Co.*, No. 15-CV-80-JDP, 2015 WL 9474293, at *2 (W.D. Wis. Dec. 28, 2015). In a previous challenge to Wisconsin's election laws, this court explained that whether the laws at issue "actually burdened . . . voters, and if so, to what degree, is a question of fact that cannot be resolved at the pleading stage." *One Wisconsin Inst., Inc. v. Nichol*, 155 F. Supp. 3d 898, 905 (W.D. Wis. 2015) (citing *Cushing*

v. City of Chicago, 3 F.3d 1156, 1163 (7th Cir. 1993)); *see also Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) ("[a]ny balancing approach . . . requires evidence," and "without understanding the magnitude of both burdens and benefits," it is impossible to tell whether a particular burden is excessive); *Thomas v. Kaven*, 765 F.3d 1183, 1196 (10th Cir. 2014) (resolution of "a fact-intensive balancing test" is "not ordinarily suitable [at] the Rule 12(b)(6) stage"). Indeed, various circuit courts have reversed the dismissal of election-related challenges before the development of the evidentiary record. *See, e.g.*, *Soltysik v. Padilla*, 910 F.3d 438, 447 (9th Cir. 2018); *Duke v. Cleland*, 5 F.3d 1399, 1405-06 & n.6 (11th Cir. 1993); *Wood v. Meadows*, 117 F.3d 770, 776 (4th Cir. 1997). Here, plaintiffs have plausibly alleged that each of the challenged provisions imposes a burden on voters that is not justified by the state's interests. Because these allegations are sufficient to survive a motion to dismiss, the claim is not futile.

That being said, some of the provisions challenged in this suit have been repeatedly upheld in federal court. *See Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014) (upholding Wisconsin's voter ID law); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 935 (W.D. Wis. 2016) (upholding law requiring Wisconsin voters to provide documentary proof of residence when registering to vote). Absent some extraordinary showing as to the impact of the current health crisis on those statutory provisions, this court is unlikely to overturn those decisions. But, the court need not (and arguably cannot for the reasons set forth above) consider likely short-comings in plaintiffs' ultimate proof at the pleadings stage, understanding that plaintiffs will ultimately bear a heavy burden of persuasion to

obtain relief on any of their claims. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008).

B. Procedural Due Process

Plaintiffs' second proposed claim is that the challenged provisions violate the Fourteenth Amendment's procedural due process clause. (Proposed SAC (dkt. #198-1) 33.) In bringing this claim, plaintiffs invoke the test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires the court to balance: (1) the interest that will be affected by the state action; (2) the risk of erroneous deprivation of this interest through the procedures used by the state and the probable value, if any, of additional procedural safeguards; and (3) the state's interest, including the fiscal and administrative burdens that the additional procedure would entail. *Id.* at 340-49.

The Legislature argues that this claim is wholly duplicative of plaintiffs' *Anderson-Burdick* argument and should therefore be dismissed. (Wis. Leg. Opp'n (dkt. #200) 31.) As this court observed in its previous order, the Supreme Court's *Anderson-Burdick* balancing test is grounded in both the Fourteenth and First Amendments. (*See* Order (dkt. #170) 27 n.15 (citing *Burdick*, 504 U.S. at 434).) Moreover, "[i]n *Burdick v. Takushi*, the Court emphasized that [the *Anderson-Burdick*] test applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (emphasis in original). Further, despite the *Mathews* and *Anderson-Burdick* tests involving a similar balancing analysis, plaintiffs do not explain how, if at all, their separate procedural due process claim is distinguished from their undue burden claim.

Nevertheless, the Legislature also fails to point to any rule requiring the court to dismiss plaintiffs' claim simply because it appears to be duplicative.[6] *Cf. Glenwood Halsted LLC v. Vill. of Glenwood*, 866 F. Supp. 2d 942, 948 (N.D. Ill. 2012) ("There is no need to decide at the pleadings stage which constitutional provision necessarily governs Plaintiff's claims."). Accordingly, the court will not hold that plaintiffs' due process claim is futile simply because it is largely, if not entirely, duplicative. At the same time, unless plaintiffs are able to articulate a specific legal or factual rationale for applying the *Mathews* test over the *Anderson-Burdick* test in evaluating a challenged provision, the court will analyze their claims under the latter standard.

The Legislature argues that plaintiffs' procedural due process claim should be dismissed for the same reasons that their undue burden claim should be dismissed: they fail to allege private burdens that, as a matter of law, overcome the state's interest in preserving the integrity of its elections. (Wis. Leg. Opp'n (dkt. #200) 31-32.) For the same reasons identified above, however, the court concludes that plaintiffs have plausibly stated a claim and any balancing analysis is better undertaken with the benefit of a more developed evidentiary record.

C. Equal Protection Clause

Plaintiffs' last proposed claim sounds under the equal protection clause and is

[6] The Legislature cites generally to *Albright v. Oliver*, 510 U.S. 266 (1994), but that case stands only for the proposition that a plaintiff cannot bring a generalized *substantive* due process claim where a particular Amendment "provides an explicit textual source of constitutional protection." *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

premised on the Supreme Court's holding in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), that "[h]aving once granted the right to vote on equal terms," a state may not "by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. Generally, plaintiffs claim here that voters were subject to arbitrary and disparate treatment during the recent April election with respect to "[s]afe and sufficient in-person registration, absentee voting, and election-day voting opportunities." (Proposed SAC (dkt. #198-1) ¶ 94.) More specifically, plaintiffs allege that: (1) the application of documentation requirements varied broadly; (2) voters received conflicting guidance on the witness requirement; (3) the standards for what constituted a valid postmark varied across localities; and (4) the "indefinitely confined" exception is defined and enforced differently by local election officials. (*Id.* ¶¶ 95-96.) Given these allegations, the court cannot conclude that plaintiffs' equal protection claim is futile.

III. Burford Abstention

Finally, the Legislature argues that plaintiffs' motion to amend their complaint is futile because *Burford* abstention requires that this court dismiss or stay all of plaintiffs' proposed claims. Abstention under the *Burford* doctrine is appropriate where (1) "timely and adequate state-court review is available" and (2) federal intervention would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Serv., Inc. v. Council of City of New Orleans*,

491 U.S. 350, 361 (1989) ("*NOPSI*").[7] In examining *Burford* and its progeny, the Seventh Circuit has held that this abstention doctrine contains "two essential elements": (1) "the state must offer some forum in which claims may be litigated"; and (2) "that forum must be special -- it must stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims." *Prop. & Cas. Ins. Ltd. v. Cent. Nat. Ins. Co. of Omaha*, 936 F.2d 319, 323 (7th Cir. 1991). The Supreme Court has further cautioned that there is only a "narrow range of circumstances in which *Burford* can justify the dismissal of a federal action." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726 (1996). In particular, where federal issues eclipse state ones, the Seventh Circuit advised that principles of federalism do not warrant deference to a state regulatory regime. *Hammer v. United States Dep't of Health & Human Servs.*, 905 F.3d 517, 532 (7th Cir. 2018).

The Legislature contends that this court "should abstain from adjudicating Plaintiffs' claims under *Burford*, due to the extreme disruption that such intervention would cause to Wisconsin's important interests in comprehensive election administration." (Wis. Leg. Opp'n (dkt. #200) 35.) This is not the first time that the Legislature has advanced this argument, having previously urged this court to stay or dismiss this case under the *Burford* abstention doctrine in response to plaintiffs' first TRO request, albeit then in an *amicus* brief. (*See* Wis. Leg. Br. (dkt. #23) 2, 17-20.) The court was not persuaded by the Legislature's argument then (*see* Order (dkt. #37) 17 n.12), nor is it persuaded now.

[7] *Burford* abstention may also apply where a federal court is faced with "difficult state-law questions bearing on policy problems of substantial public import." *NOPSI*, 491 U.S. at 361. But the Legislature does not argue that this type of *Burford* abstention is applicable to this case, nor could it, as plaintiffs here bring exclusively federal law claims.

As plaintiffs point out, the Legislature's assertion that plaintiffs' claims may be litigated by Wisconsin state courts ignores that these courts are not specialized tribunals with a special relationship with voting rights issues. *See Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) ("judicial review by state courts *with specialized expertise* is a prerequisite to *Burford* abstention") (emphasis in original). Moreover, plaintiffs cite to numerous decisions holding that *Burford* abstention is inappropriate in federal constitutional challenges to state elections laws. *E.g., Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000); *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971); *League of Women Voters of Fla., Inc. v. Detzner,* 354 F. Supp. 3d 1280, 1283 (N.D. Fla. 2018); *Mich. State A. Philip Randolph Inst. v. Johnson,* 209 F. Supp. 3d 935, 943 (W.D. Mich. 2016); *Bogaert v. Land*, 675 F. Supp. 2d 742, 747 (W.D. Mich. 2009). Accordingly, the court finds that plaintiffs' amended complaint is not futile due to the *Burford* abstention doctrine.

Still, the court is mindful of the special role assigned the Wisconsin Election Commission in preparing for the August and November elections and will certainly take into consideration its actions in determining what steps, if any, a federal court should or may undertake in protecting the right of Wisconsin voters. Although given its recent history of strict adherence to the Wisconsin statutory requirements and deadlocking over any creative efforts to vindicate voter rights even if the statutes arguably allow them, this court would be remiss in abstaining from exercising its role in protecting the federal constitutional rights of Wisconsin voters, if necessary.

IV. Next Steps

In light of the impending August and November elections, and in an effort to adjudicate the claims presented in this case efficiently, the court will set the following schedule. If they have not already done so, the parties should commence expedited discovery immediately. The parties should be restrained in their requests and should also endeavor to turn around written responses within 7 to 10 days, as well as schedule any needed depositions shortly thereafter.

On or before June 25, 2020, WEC is directed to file a statement addressing the following issues: (1) what measures WEC is taking or anticipates taking to prepare for the August and November 2020 elections; (2) whether WEC believes that any additional requested relief would improve the administration of those elections; and (3) whether WEC believes it has the statutory authority to provide any of the relief requested by plaintiffs. The court will then hold a status conference with the parties on Monday, June 29, 2020, at 10:00 a.m..

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion for leave to file a second amended complaint (dkt. #198) is GRANTED.

2) The Wisconsin Legislature's motion to dismiss (dkt. #197) is DENIED as moot and all defendants and intervening defendants may have until June 30, 2020, to answer, move to dismiss, or otherwise respond to plaintiffs' second amended complaint.

3) The schedule and deadlines as described in the opinion above is adopted.

Entered this 9th day of June, 2020.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 20-2835 & 20-2844

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.

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

SUBMITTED SEPTEMBER 26, 2020 — DECIDED SEPTEMBER 29, 2020

Before EASTERBROOK, ROVNER, and ST. EVE, *Circuit Judges*.

PER CURIAM. 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 (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 (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 (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*, 139 S. Ct. 1945 (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.

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 (7th Cir. Apr. 3, 2020), stayed in part by *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (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 Wiscon-

sin 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 (July 9, 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*.

None of the appellants has suffered an injury to its own interests, and the state's legislative branch is not entitled to 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; *United States v. Windsor*, 570 U.S. 744, 756 (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 (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.

The First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 1 of The Fourteenth Amendment to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statute Section 6.28(1)(a)

(1) Registration deadline; locations.

(a) Except as authorized in ss. 6.29, 6.55(2), and 6.86(3)(a)2., registration in person for an election closes at 5 p.m. on the 3rd Wednesday preceding the election. Registrations made by mail under s. 6.30(4) must be delivered to the office of the municipal clerk or postmarked no later than the 3rd Wednesday preceding the election. Electronic registration under s. 6.30(5) for an election closes at 11:59 p.m. on the 3rd Wednesday preceding the election. The municipal clerk or board of election commissioners may assign election registration officials to register electors who apply for an in-person absentee ballot under s. 6.86(1)(b) or to register electors

at a polling place on election day or at a residential care facility, as defined under s. 6.875(1)(bm).

Wisconsin Statute Section 6.87(6)

The ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day. Except in municipalities where absentee ballots are canvassed under s. 7.52, if the municipal clerk receives an absentee ballot on election day, the clerk shall secure the ballot and cause the ballot to be delivered to the polling place serving the elector's residence before 8 p.m. Any ballot not mailed or delivered as provided in this subsection may not be counted.

Section 1983 of Chapter 42 of the United States Code

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 1988 of Chapter 42 of the United States Code

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's

judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.