No. 20A-

IN THE

Supreme Court of the United States

SYLVIA GEAR, *et al.*,

Applicants,

v.

WISCONSIN STATE LEGISLATURE, *et al.*,

Respondents.

ON APPLICATION 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

EMERGENCY APPLICATION OF PLAINTIFFS IN *SYLVIA GEAR V. WISCONSIN STATE LEGISLATURE* TO VACATE STAY

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PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Applicants Sylvia Gear, Claire Whelan, Katherine Kohlbeck, Diane Fergot, Gary Fergot, Bonibet Bahr Olsan, Sheila Jozwik, Gregg Jozwik, League of Women Voters of Wisconsin, and Wisconsin Alliance for Retired Americans were plaintiffs in the U.S. District Court for the Western District of Wisconsin and appellees in the U.S. Court of Appeals for the Seventh Circuit.

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

Respondents Republican National Committee ("RNC") and the Republican Party of Wisconsin ("RPW") were intervenor-defendants in the district court. They have pursued their own appeal from the district court's injunction, but the Seventh Circuit denied their motion to stay the injunction for lack of standing to appeal. RNC and RPW are briefing the issue of their standing to the Seventh Circuit.

Respondent Wisconsin Legislature intervened as a defendant in the district court proceedings, and is an appellant in the U.S. Court of Appeals for Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

League of Women Voters of the United States is the parent of Leagues of Women Voters of Wisconsin. Alliance for Retired Americans is the parent of Wisconsin Alliance for Retired Americans. There are no publicly-held companies with a 10% or greater ownership interest in Leagues of Women Voters of Wisconsin or Wisconsin Alliance for Retired Americans.

RELATED PROCEEDINGS

The related proceedings below are:

1. *Democratic National Committee, et al. v. Bostelmann, et al.*, Nos. 20-2835 & 20-2844 (7th Cir.) – Order entered October 8, 2020;

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

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

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

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

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EMERGENCY APPLICATION TO VACATE THE SEVENTH CIRCUIT'S STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

TO: The Honorable Brett M. Kavanaugh, Circuit Justice for the Seventh Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court, Plaintiffs-Applicants Sylvia Gear, Claire Whelan, Katherine Kohlbeck, Diane Fergot, Gary Fergot, Bonibet Bahr Olsan, Sheila Jozwik, Gregg Jozwik, League of Women Voters of Wisconsin, and Wisconsin Alliance for Retired Americans, Plaintiffs-Appellees in the courts below, respectfully apply for an order vacating the stay issued on October 8, 2020, by a panel of the United States Court of Appeals for the Seventh Circuit, a copy of which is appended to this application. App. 1–32. *Democratic Nat'l Comm., et al. v. Bostelmann, et al.*, No. 20-2835, 2020 WL 5951359 (7th Cir. Oct. 8, 2020). Plaintiffs-Appellees opposed the Wisconsin Legislature's stay motion. App. 130–49. The Seventh Circuit's order stayed the preliminary injunction that was issued on September 21, 2020, App. 33–101, *Democratic Nat'l Comm. et al. v. Bostelmann, et al.*, 20-cv-249-wmc, 20-cv-278-wmc, 20-cv-340-wmc, & 20-cv-459-wmc 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020); *see* also App. 102–04.[1]

[1] Four cases were consolidated in these proceedings, and the *Gear* Plaintiffs were the sole litigants to seek this part of the preliminary injunction. This Application only addresses the limited electronic delivery fail-safe. Any district court docket references are to the lead docket, 20-cv-249 (W.D. Wis.), unless otherwise noted.

INTRODUCTION

Thousands of Wisconsin voters lost their right to vote in the April 7 election. Among them were five of the Plaintiffs-Applicants in *Gear v. Bostelmann* ("*Gear* Plaintiffs"), who requested but never received their absentee ballots in the mail and could not safely vote in person due to the COVID-19 pandemic. To prevent their disenfranchisement in Wisconsin's spring election from recurring in the fall general election, in early July, four months before the November election, they sought a preliminary injunction requiring the Wisconsin Elections Commission ("WEC" or "the Commission") to offer electronic delivery of replacement mail-in absentee ballots as a fail-safe for themselves and other voters who do not receive their timely-requested ballots in the mail. *See* dkt. 421; App. 84–86. The district court found that "the evidence [was] 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." App. 85 (emphasis in original). Accordingly, it granted the *Gear* Plaintiffs the limited relief they sought. App. 86, 100. The U.S. Court of Appeals for the Seventh Circuit stayed the injunction. App. 6.

The Seventh Circuit committed demonstrable legal and factual errors and abused its discretion in staying the order providing for electronic delivery of replacement ballots. The history of the litigation over this particular Wisconsin law puts this case on very different footing from every other election law case that has

reached this Court this year. That history demonstrates that the Seventh Circuit, in this instance, demonstrably erred in applying *Purcell v. Gonzalez*, 549 U.S. 1 (2006), in an arbitrary manner.

First, the Seventh Circuit's admonition that to be timely under *Purcell* the district court's injunction should have been issued in May is irrational with respect to the *Gear* case. In May, before the Seventh Circuit's June 29 decision in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), electronic delivery of ballots was available to all Wisconsin voters, including the *Gear* Plaintiffs. Consequently, an injunction to secure electronic delivery of ballots would have been unripe in May, and there would have been no rational reason for the *Gear* Plaintiffs to seek one, or for the district court to order one, at that time. Once the need arose on June 29 for the *Gear* Plaintiffs to seek an injunction requiring electronic ballot delivery because the Seventh Circuit's *Luft* decision eliminated their right to it, the *Gear* Plaintiffs moved for a preliminary injunction within nine days. The *Gear* Plaintiffs have not been dilatory in the slightest, having sought the injunctive relief now stayed by the Seventh Circuit neither prematurely nor too late. Perhaps the most charitable reading of the panel majority's opinion is that it failed to consider the distinct claims and remedies in the *Gear* case. On that ground alone, the stay should be vacated for demonstrable error.

Second, the Seventh Circuit's rationale is plainly irreconcilable with the same court's *denial* of a stay in August 2016 in *One Wisconsin Institute v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016), *and aff'd in part, vacated in part, rev'd in*

part sub nom. Luft v. Evers, 963 F.3d 665 (7th Cir. 2020). That case resulted in a judgment that included a *far broader* extension of electronic delivery of absentee ballots than the district court has ordered here, among a multitude of other election law changes. The stay is also wholly at odds with the Seventh Circuit's decision to issue its opinion and mandate in *Luft v. Evers*, 963 F.3d 665, 676–77 (7th Cir. 2020), this summer, well after May, when that court held the district court's injunction here should have issued to be timely. The Seventh Circuit ultimately reversed the unstayed injunction in the middle of this year's August 11 primary election (the mandate issued while early in-person voting was ongoing) and mere weeks before the mailing of absentee ballots began for the November general election. No legal principle or fact can harmonize these divergent outcomes. As such, the Seventh Circuit demonstrably erred and abused its discretion in applying *Purcell* in a wholly arbitrary manner.

Third, the Seventh Circuit demonstrably erred by failing to consider the specific considerations outlined in *Purcell*, failing to differentiate among the numerous voting claims and remedies at issue in these consolidated proceedings, failing to consider record evidence, and disregarding the district court's factual findings. These errors resulted in a stay decision that fundamentally subverts the objectives and interests identified in *Purcell*. The alternative-ballot-delivery option the district court ordered will not confuse election officials or voters, at least some of whom have already come to expect and rely upon email delivery of mail-in ballots over the course of many years, until approximately 76 days ago. Many voters were

already led to believe that they would be able to use this method in the 2020 election cycle; therefore, if anything, the Seventh Circuit's ruling switching this option off in late July will confuse voters who had planned to request electronic delivery. Moreover, this exceedingly narrow relief will serve to ensure that only the most vulnerable voters who risk being "thwarted through no fault of their own" can cast their ballots. App. 85. It will not deter, but facilitate, voter participation. Finally, election officials and their staff are deeply experienced with this ballot delivery method and know it well, having used it over the last twenty years. For all these reasons, the Seventh Circuit has deviated from and undermined this Court's statement of the law as set forth in *Purcell*.

In the absence of guidance from this Court that differentiates among specific election law changes and ensures more uniform treatment across voting cases, there is no *Purcell* principle or even a set of *Purcell* considerations, just the exercise of unfettered whim under the aegis of *Purcell*.[2] Respectfully, this Court should vacate the stay.

[2] App. 10 (Rovner, J., dissenting) ("[T]he 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."); *id*. at 9 ("Perhaps we can say at this point that *Purcell* and its progeny establish a presumption against judicial intervention close in time to an election. . . . But how near? As to what types of changes? Overcome by what showing? These and other questions remain unanswered.").

STATEMENT OF THE CASE

I. Email delivery of mail-in absentee ballots has been an option for some or all absentee voters in Wisconsin for two decades.

For the last twenty years, Wisconsin law has permitted some or all voters to receive an absentee ballot by email. Wis. Stat. §§ 6.87(3)(a), 6.87(3)(d). Voters print and mark these ballots by hand and then return them to their municipal clerks by mail or by dropping them off in person. Wis. Stat. §§ 6.87(3)(d), 6.87(4).

The original statute authorizing electronic transmission of ballots was created by 1999 Wis. Act 182, § 97 (May 24, 2000), took effect in 2000, and permitted any voter—domestic civilian, military, or overseas—to request and receive a mail-in absentee ballot by email:

> Unless a municipality uses an electronic voting system that requires an elector to punch a ballot in order to record the elector's votes, a municipal clerk of a municipality may, if the clerk is reliably informed by an absent elector of a facsimile transmission number or electronic mail address where the elector can receive an absentee ballot, transmit a facsimile or electronic copy of the absent electors ballot to that elector in lieu of mailing under this subsection *if, in the judgment of the clerk, the time required to send the ballot through the mail may not be sufficient to enable return of the ballot by the time provided under sub. (6).*

Wis. Stat. § 6.87(3)(d) (2000) (emphasis added), *amended by* 2001 Exec. Budget Act, § 9415, 2001-2002 Wis. Legis. Serv. Act 16 (2001 S.B. 55) (eliminating punch card electronic voting systems). For the first decade of this statute's life span, clerks were given discretion to decide whether email delivery was necessary to ensure timely receipt. In 2011, the Wisconsin Legislature mandated that clerks provide such alternative ballot delivery methods. Wis. Stat. § 6.87(3)(d) (June 10, 2011) ("A

municipal clerk *shall*, if the clerk is reliably informed by an absent elector of a facsimile transmission number or electronic mail address where the elector can receive an absentee ballot, transmit a facsimile or electronic copy of the absent elector's ballot to that elector in lieu of mailing under this subsection.") (emphasis added).

Six months later, the Wisconsin Legislature enacted 2011 Wis. Act 75, § 50 (Dec. 1, 2011), mandating that municipal clerks "transmit a facsimile or electronic copy of the elector's ballot to that elector in lieu of mailing" only to military and overseas voters who request delivery by this means. Wis. Stat. § 6.87(3)(d) ("An elector may receive an absentee ballot only if *the elector is a military elector or an overseas elector under s. 6.34(1)* and has filed a valid application for the ballot under as provided in s. 6.86(1).") (emphasis added). Now the statute permits only military electors, as defined in Wis. Stat. § 6.34(1)(a), and overseas electors, as defined in Wis. Stat. § 6.34(1)(b), to request that their municipal clerk deliver their absentee ballot electronically instead of by mail.

II. The district court's 2016 ruling in *One Wisconsin Institute* struck down Act 75's ban on electronic delivery of absentee ballots to domestic civilian voters.

Four years after it was enacted, Act 75's ban on emailing mail-in absentee ballots to domestic civilian voters was struck down by the district court's decision in *One Wisconsin Institute v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), *and aff'd in part, vacated in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). Wisconsin

voters can request replacement mail-in absentee ballots by email or fax if they spoil or fail to receive a ballot up until the ballot-request deadline. *See* dkt. 423-23, Wisconsin Elections Commission, Uniform Instructions for Absentee Voting, at 2 ("A voter may request that a replacement ballot be faxed or emailed to him or her."); Wis. Stat. § 6.80(2)(c); Wis. Stat. § 6.86(5).

On August 22, 2016, just one month before municipal clerks began mailing out absentee ballots for the 2016 presidential election, the Seventh Circuit denied a motion to stay that permanent injunction. App. 155–75. The court also denied a petition for initial en banc review. App. 176–79. In addition to extending electronic delivery of mail-in absentee ballots, the judgment included a multitude of other changes to Wisconsin election laws. *One Wisconsin Inst.*, 198 F. Supp. 3d at 964–65; App. 150–52.[3] The November 2016 election proceeded under this injunction. A significant number of voters requested electronic delivery of their ballots in the 2016 presidential election: 9,619 mail-in absentee ballots were delivered by email to voters. *See* dkt. 423-3. That comprised more than 5 percent of the 178,996 mail-in absentee ballots delivered to absentee voters statewide. *Id.* 7,231 of these 9,619 email-delivered ballots were ultimately returned by mail, *id.*—"without incident," as the district court found, App. 86, or dispute.

[3] The declaratory judgment alone contained ten specific subparts.

III. The Seventh Circuit's decision this summer in *Luft v. Evers* reinstated the statutory ban on electronic delivery of absentee ballots to domestic civilian voters.

In February 2017, the Seventh Circuit heard oral argument in the appeal from the *One Wisconsin Institute* injunction. The case remained undecided for approximately three-and-a-half years, until June 29 of this year, when the Seventh Circuit reversed the district court's ruling, reinstating the statutory restriction on electronic ballot delivery. *Luft v. Evers*, 963 F.3d 665, 676–77 (7th Cir. 2020).[4] The mandate issued on July 29, 2020, just seven weeks before clerks, by law, started mailing out absentee ballots for the November 2020 election. Wis. Stat. § 7.15(cm). Indeed, the 27-page decision was handed down in the middle of Wisconsin's August 11 primary election—after the first wave of absentee ballots had been mailed out—with no stay and no instruction as to how its reversals of the status quo should be applied when the mandate issued just thirteen days before Election Day. Consequently, the pre-*One Wisconsin Institute* reach of Section 6.87(3)(d), permitting only overseas and military voters to use these alternative absentee ballot delivery methods, snapped back into place.

The *One Wisconsin Institute* injunction reversed in *Luft v. Evers* long predated the COVID-19 pandemic. The record on which that injunction was entered contained no epidemiological or other evidence relating to the danger that this pandemic poses for voters or how long that danger may persist. The record here, on which Judge Conley acted, has ample evidence on these issues. Unlike this case,

[4] *Luft* was consolidated with *One Wisconsin Institute*, so the decision was issued under both captions but *Luft* was listed first.

One Wisconsin Institute was largely premised on the alleged discriminatory treatment of regular domestic civilian voters, on the one hand, and overseas and military voters, on the other. 198 F. Supp. 3d at 946.

IV. The district court's preliminary injunction in *Gear* enjoined the ban on a limited basis from October 22 through 29 for voters who have applied for but not received their mail-in absentee ballots.

In light of the COVID-19 pandemic, the *Gear* Plaintiffs amended their complaint in late June to plead an *Anderson-Burdick* claim and seek a fail-safe alternative for voters who do not receive their timely-requested absentee ballot in the mail. *See* dkt. 165 at 65–79. Pursuant to a scheduling order agreed to by all parties, the *Gear* Plaintiffs moved for a preliminary injunction on July 8, twenty-one days before the mandate in *Luft* issued, and the district conducted an all-day evidentiary hearing on August 5. On September 21, the district court issued its opinion and order preliminarily enjoining the ban instated by 2011 Wisconsin Act 75 and reinstated by *Luft*, 963 F.3d at 676–77. *See* dkt. 538 at 52–54, 68; dkt. 539 at 3. The injunction temporarily permits municipal clerks to issue replacement ballots via email to regular civilian voters residing in Wisconsin who properly request absentee ballots but do not receive their ballots by mail. This fail-safe option can be exercised only during the eight-day period from October 22 through October 29. App. 104. This decision was based on the high percentage of registered voters who have requested absentee ballots for the November 3 election, taking into account the impact of the COVID-19 pandemic, which has reasonably prompted an unprecedented number of voters to avoid voting in person and prompted the WEC

itself to send absentee ballot applications to all registered Wisconsin voters. *See* dkt. 423-17; dkt. 423-18. The district court decision also creates a fail-safe in an instance when USPS is unable to deliver ballots to registered voters in a timely manner, such that they may be returned to the municipal clerk or postmarked by November 3.

STANDARD OF REVIEW

Federal courts consider four factors in deciding whether to enter a stay of a district court's injunction: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation and quotation marks omitted).

There is no controlling precedent on the standard of review for applications to vacate stays entered by the U.S. Courts of Appeals. In one in-chambers opinion, Justice Marshall reviewed a stay entered by the U.S. Court of Appeals for the Second Circuit for abuse of discretion. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973) (Marshall, J., in chambers). Two subsequent in-chambers opinions instruct that the Court may vacate an appellate court stay where (1) the case "could and very likely would be reviewed here upon final disposition in the court of appeals," (2) "the rights of the parties . . . may be seriously and irreparably injured by the stay," and (3) "the court of appeals is demonstrably wrong in its application of

accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); *see also W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). Finally, most recently, in a concurring opinion, Justice Scalia, joined by Justices Thomas and Alito, focused on the last of those three factors and stated that this Court may vacate a stay if the court below "demonstrably erred in its application of accepted standards." *Planned Parenthood of Greater Tx. Surgical Health Servs. v. Abbot*, 571 U.S. 1061 (2013) (Scalia, J., concurring) (quotations omitted).

Under any of these standards, the stay here should be vacated for demonstrable error and abuse of discretion. "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action." *Burns v. United States*, 287 U.S. 216, 222–23 (1932). Under Seventh Circuit precedent, a court "abuses its discretion when (1) the record contains no evidence upon which the court could have rationally based its decision; (2) the decision is based on an erroneous conclusion of law; (3) the decision is based on clearly erroneous factual findings; or (4) the decision clearly appears arbitrary." *Walker v. Price*, 900 F.3d 933, 938 (7th Cir. 2018) (citation and quotation marks omitted). This is that rare case where these deferential standards have been breached. The Seventh Circuit has demonstrably erred and abused its discretion because its opinion granting the stay: (1) fails to consider the distinct legal claims and remedies raised in *Gear* that would have made moving for an

injunction in May completely futile; (2) departs arbitrarily from the court's recent prior rulings in related litigation; (3) stands upon clearly erroneous factual representations that contradict the record and the district court's findings; and (4) erroneously applies *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

ARGUMENT

I. The Seventh Circuit has demonstrably erred in its application of *Purcell* and applied the precedent arbitrarily, thereby abusing its discretion.

As a threshold matter, the Seventh Circuit neither articulated how it was applying the concerns or factors identified by this Court in *Purcell* nor applied the four equitable *Nken* factors for issuance of a stay. 556 U.S. at 426. Instead, invoking a reductive version of *Purcell* and not the inquiry this Court actually prescribed, the panel majority simply stated that "[i]f 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." App. 4.

First, the Seventh Circuit's admonition that to be timely under *Purcell* the district court's injunction should have been issued in May implicitly criticizes the district court and the *Gear* Plaintiffs for failing to do the illogical and unnecessary. In May and at all other times until the Seventh Circuit's June 29 decision in *Luft*, electronic delivery of ballots was available to all Wisconsin voters, not just to military and overseas voters. The *Gear* Plaintiffs moved for a preliminary injunction a mere nine days after the Seventh Circuit issued its decision in *Luft*, withdrawing email delivery as an option for domestic civilian voters, and, notably, twenty-one

days before the mandate in *Luft* issued on July 29. App. 180–82. They could not have so moved prior to *Luft* but wasted no time in taking action once this gap in protection for voters emerged. Yet the Seventh Circuit stayed the relief here as not timely sought. On this ground alone, the stay should be vacated for demonstrable error.

Second, the Court's rationale is fundamentally inconsistent and irreconcilable with the Seventh Circuit's previous *denial* of a stay in *One Wisconsin Institute* in August 2016 and its decision to issue its opinion and mandate in that case mere weeks before the mailing of absentee ballots began this year. Setting a de facto "May deadline for any changes to election rules," App. 12 (Rovner, J., dissenting), is irreconcilable with the Seventh Circuit's actions in *One Wisconsin Institute* in 2016 and the decision in *Luft* that reversed the *One Wisconsin Institute* judgment in relevant part. The Seventh Circuit has demonstrably erred and abused its discretion in applying *Purcell* in such a manifestly arbitrary manner.

Following the decision in *One Wisconsin Institute v. Thomsen*, which enjoined the statutory restriction on electronic transmission of ballots to military and overseas voters and ordered a multitude of other changes to Wisconsin election laws, 198 F. Supp. 3d at 946, 964–65, App. 150–52, WEC filed its notice of appeal on August 2, 2016. App. 153–54. On August 22, 2016, the Seventh Circuit *denied* a motion to stay that permanent injunction. App. 155–75. This occurred one month before municipal clerks began to mail out absentee ballots for the 2016 presidential election. For the ensuing nearly four years while the case remained on appeal,

Wisconsin voters requested mail-in absentee ballots by email delivery and returned them by mail.

The Seventh Circuit panel could have left the state of Wisconsin's election law undisturbed, given the length of time the case had been pending and the upcoming elections, but it decided to issue its opinion in late June—with the mandate following in late July, just seven weeks before clerks, by law, started mailing out ballots for the 2020 presidential election. Wis. Stat. § 7.15(cm). Indeed, the 27-page decision was handed down in the very middle of the August 11, 2020 primary election in Wisconsin—after many ballots had been mailed out pursuant to the deadlines under federal and state statutes—and the mandate issued in late July, during the early in-person voting period. The Seventh Circuit did not stay its ruling or provide any instruction as to how its various reversals of the status quo should be applied in the midst of an ongoing election. That abrupt ruling disturbed the status quo that had been in place over nearly four years and many elections in which email delivery of mail-in absentee ballots was available to *all* Wisconsin voters, making it reasonable for them to expect that this alternative ballot delivery method would once again be available in the August primary and in the November general election.

The *Gear* Plaintiffs sought to reinstate this alternative delivery option, but only as a time-limited fail-safe for a narrow set of voters who diligently request their ballots well in advance of an election but do not receive them in the mail in time to timely return them under the default statutory deadline of 8:00 p.m. on

Election Day. Many such absentee voters cannot safely vote in person at a polling place due to an underlying condition or disease that puts them at severe risk of suffering complications or dying from COVID-19. For these voters, as the district court found, the confluence of a deadly pandemic marked by aerosolized and widespread transmission in Wisconsin, a sclerotic U.S. Postal Service ("USPS"), and overwhelmed municipal clerks' offices spells certain disenfranchisement absent a fail-safe alternative. App. 85–86. The record is "replete" with declarations from would-be voters in the April 7 election who did not receive their ballot in time or even after Election Day, even though they all applied multiple weeks in advance. App. 84–85. Absent the district court order granting this relief as a back-up option to receive a *replacement* ballot by email within an eight-day period later this month, as in April, Wisconsin voters will again lose their right to vote.

But this much more limited extension of electronic delivery has met a different fate on appeal in 2020. Four years ago, the Seventh Circuit rejected *Purcell* arguments to *deny* a stay of an injunction that expanded email delivery to *all* voters in August 2016. That relief was of course not limited to a specific time period or subset of voters; nor was it issued because of the exigent circumstances of a pandemic. But now, during a pandemic that threatens election administration and voter participation alike, the Court has invoked *Purcell* to *grant* a stay of an exceedingly limited, targeted extension of the *same* relief for a narrow subset of voters that was issued at approximately the *same* time relative to a federal general election. And it has done so by suggesting that to be timely under *Purcell*, a district

court must act six months before an election. This rationale and requirement find no support in this Court's or any other court's precedents. Such a requirement would directly conflict with: (1) the Seventh Circuit's 2016 ruling denying the stay motion in *One Wisconsin Institute*; (2) the Seventh Circuit's June 29, 2020 ruling in *Luft* after nearly three and a half years under submission, with the mandate issuing on July 29, mere weeks before the first wave of absentee ballot mailings or the November election and well after the court's May deadline; and (3) this Court's precedent.

Given the Seventh Circuit's substantively irreconcilable prior rulings in *One Wisconsin Institute* and *Luft* and the *timing* of those rulings, the court has demonstrably erred and abused its discretion in applying *Purcell* to this litigation over the email delivery of absentee ballots in Wisconsin.

II. The Seventh Circuit demonstrably erred by misapplying *Purcell*, clearly erred in applying the facts, and disregarded the district court's factual findings which were owed deference.

In addition to the patently inconsistent and arbitrary manner in which the Seventh Circuit has ruled on stay motions concerning this particular Wisconsin election law, the court also misapplied the considerations outlined in *Purcell* in this case. Given the stay order's complete silence on these considerations, one can only speculate that the court either did not weigh them at all or believed they favored granting the Wisconsin Legislature's stay motion. However, each *Purcell* factor favors preserving this vital fail-safe remedy for the November election.

In *Purcell*, this Court directed the lower courts to weigh "considerations specific to election cases"—namely the risks of confusing voters, unduly increasing administrative burdens, and disincentivizing voter turnout—amongst the standard equitable factors for issuance of an injunction. 549 U.S. at 4–5. Courts are "required to weigh" these election-specific considerations "*in addition to* the harms attendant upon issuance or nonissuance of an injunction," not instead of them. *Id.* at 4 (emphasis added). *Purcell* and its progeny stand for the proposition that finality in election law disputes is desirable, not for its own sake, but because it prevents voter and administrator confusion, avoids deterring voter participation, and minimizes the risk of imposing significant costs and burdens on administrators. However, a federal court order that does not incur these risks should not be stayed only because it constitutes a change to the status quo.

The Seventh Circuit's treatment of *Purcell*, however, embraces finality for finality's sake, while disregarding this Court's reasoning. In this case and others, *Purcell* has become disconnected from its animating concerns; through repeated summarization, the precedent has lost its original meaning. A blunt, reductive version has emerged in its place, resulting in an analysis of election law litigation and remedies that fails to actually assess whether a court has effectuated or undermined the animating interests and objectives *Purcell* identified.

a. The risks of voter confusion and disincentivizing voter turnout do not apply here and provide no support for the Seventh Circuit's stay.

It is plain that *Purcell*'s clear, overriding commitment is to minimizing voter confusion and thereby maximizing voter participation. This Court wrote that: "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. This means *Purcell* should not act as a bar to injunctive relief when voters' rights would be vindicated and disenfranchisement and voter confusion prevented by the relief ordered, as in this case. *See Frank v. Walker*, 574 U.S. 929 (2014) (vacating stay of injunction against implementation of voter ID requirement to avoid voter confusion and disenfranchisement); *id.* at 929 (Alito, J., dissenting) (acknowledging that "absentee ballots ha[d] been sent out without any notation that proof of photo identification must be submitted").

In this case, the district court's preliminary injunction creates a fail-safe option for voters who do not receive a ballot in the mail. App. 104 (authorizing replacement ballot delivery by email or online access "for domestic civilian voters . . . 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"). This will enable, not deter, voter participation and turnout.

The district court found that the record across all four cases was "replete" with examples of voters not receiving their ballots on time or at all, even if they had applied well in advance of the election. App. 84–85. The Seventh Circuit owed deference to this factual finding. *See Purcell*, 549 U.S. at 5 (reversing in part because U.S. Court of Appeals' decision failed to "give deference" to the "factual findings" of the district court). Instead, the panel majority ignored the district court's factual findings, relying upon a clearly erroneous interpretation of the record. This caused the court to deviate from *Purcell*.

The district court's limited remedy adhered to *Purcell*'s interests in minimizing confusion and maximizing voter participation by granting an exceedingly narrow remedy to ensure that diligent, but vulnerable, voters could still cast their absentee ballots:

> [T]he 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*.

App. 85. But the Seventh Circuit mistakenly focused only on voters who apply for absentee ballots at the "last minute," App. 5, not voters like the *Gear* Plaintiffs who apply weeks or more in advance. In Plaintiffs' case, they apply timely *precisely because* they are at higher risk from COVID-19 and cannot vote safely in person. In applying *Purcell* to these consolidated *but distinct* cases, the Seventh Circuit appears to have conflated the various claims and overlooked the specific category of

voters the *Gear* case and the corresponding part of the preliminary injunction sought to protect. The panel majority writes:

> *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.

App. 5. This passage shows that the Court demonstrably erred by either disregarding or failing to consider the *Gear* Plaintiffs' facts or the district court's analysis as to the email delivery fail-safe.

During the April 7 election, the *Gear* Plaintiffs applied for their mail-in absentee ballots weeks in advance of Election Day, but their ballots did not arrive in the mail. *See* dkt. 372, Declaration of Katherine Kohlbeck ("Kohlbeck Decl.") ¶¶ 5, 9; dkt. 375, Declaration of Bonibet Bahr Olsan ("Bahr Olsan Decl.") ¶ 6; dkt. 376, Declaration of Sheila Jozwik ("Sheila Jozwik Decl.") ¶ 4 (requested ballot three weeks in advance); dkt. 377, Declaration of Gregg Jozwik ("Gregg Jozwik Decl.") ¶ 4 (same); dkt. 374, Declaration of Gary Fergot ("Gary Fergot Decl.") ¶¶ 5, 7 (requested ballot two weeks before Election Day); dkt. 373, Declaration of Diane Fergot ("Diane Fergot Decl.") ¶¶ 5, 7 (same). Five of them ultimately could not vote as a result of these ballot processing and delivery failures and their vulnerability to COVID-19 due to underlying diseases, medical conditions, and/or age. *See* dkt. 372, Kohlbeck Decl. ¶ 9; dkt. 375, Bahr Olsan Decl. ¶ 8; dkt. 376, Sheila Jozwik Decl. ¶ 8; dkt. 374,

Gary Fergot Decl. ¶ 7; dkt. 373, Diane Fergot Decl. ¶ 7. Currently, a civilian voter can only request that a *replacement* ballot be sent by mail, but this is an exercise in futility considering USPS failed to deliver the originally-requested ballot. During the April 7 election, several Plaintiffs in fact tried to request that a replacement mail-in absentee ballot be sent by mail, but those second requested ballots also failed to arrive in time. *See* dkt. 372, Kohlbeck Decl. ¶¶ 7–9; dkt. 373, Diane Fergot Decl. ¶¶ 5–7; dkt. 373, Gary Fergot Decl. ¶¶ 5–7. Numerous additional declarants met the same fate; indeed, the district court found that the record was "replete" with examples of voters not receiving their ballots on time or at all. App. 84–85. Because the Seventh Circuit failed to acknowledge and consider this crucial record evidence, it has entered a stay seemingly on the assumption that the court is only denying relief to voters who wait until the "last minute" to apply for a mail-in ballot. This was clearly and demonstrably erroneous.

The Seventh Circuit also failed to apply *Purcell* according to its express terms. In misapplying this Court's precedent, it again demonstrably erred and abused its discretion. Per the district court's order, this relief will take effect in less than two weeks on October 22, about a month after the injunction was issued. App. 104. If this were a case in which a federal court had ordered a change in voting rules and procedures that impose some obligation on voters and with which Wisconsin voters had zero or little prior experience, those considerations might weigh in favor of staying the injunction on *Purcell* grounds. There might be other countervailing factors that outweigh those considerations, but that factor, at least,

would counsel in favor of delaying the injunction's implementation. But this case is different for two reasons.

First, because the extension of electronic ballot delivery to all voters is an obligation imposed upon election officials, not voters, this is not a change in the law that is susceptible to causing voter confusion. As Judge Rovner noted, "[o]nly two of the five modifications that Judge Conley ordered alter what is expected of voters," and the email delivery fail-safe is not one of them. App. 10 (Rovner, J., dissenting). Indeed, "[t]he other three changes are directed to election officials and what they must do. By their nature, these changes will not impact voter decisions." *Id.* at 11.

Second, the relief sought has been utilized in Wisconsin for two decades. And for the last four years following *One Wisconsin Institute* (less about 77 days), regular civilian voters, not just military and overseas voters, have been permitted to request their ballots be delivered by email. Since email delivery has long been available in Wisconsin, there is no such risk of voter confusion from the district court's ordering that this option be provided once again on a limited basis as a fail-safe for voters who request but do not receive their ballot in the mail. This is a last resort, not a first choice. In order to qualify for this relief, the voter must have previously applied for an absentee ballot to be delivered by mail. App. 86. Accordingly, most voters will never need to learn of this fail-safe. A voter will only learn of their options for replacement ballot delivery if their ballot does not arrive in the mail and they contact their clerk's office to ask about their options. Because most voters will never learn of this back-up option, it cannot confuse them or deter

them from voting. Regardless of whether voters know of this fail-safe before they have a problem, it is crucial that this fail-safe be in place when overwhelmed municipal clerks and USPS facilities cannot keep up with the demand, as in the April 7 election, which saw half the total turnout anticipated for this election. Moreover, since this alternative delivery option can only *safeguard* the rights of voters who never received their ballot in the mail, this fail-safe does not undermine *Purcell*'s express concerns with minimizing voter confusion or doing no harm to voter turnout. Rather, it advances those objectives. Voters would be far more confused and alienated from the electoral process if their timely-requested ballot did not arrive in the mail, a replacement ballot also stalled, and no recourse was available.

Voters' preexisting familiarity with email delivery will of course vary. Some will have used this method, but most will not. And only the last two and half months have seen the availability of electronic transmission alternatives retracted in part. That development, the result of the Seventh Circuit's decision in *Luft*, will never reach most lay voters' attention, the overwhelming majority of whom, of course, do not follow federal constitutional litigation or the technicalities of election administration. If anything, voters who have previously requested email delivery will be confused to learn that *Luft* has withdrawn this ballot delivery option, especially since it was available for the last four years and earlier this year during the April 7 Wisconsin Supreme Court and primary elections.

Recent Kenosha City Clerk Treasurer Debra Salas entered a declaration in this matter, noting that voters in her city have come to rely on email delivery:

> Despite the Seventh Circuit's recent decision, once again restricting email delivery of absentee ballots to military and overseas voters, it is anticipated that many domestic civilian voters will request email delivery of absentee ballots for the November general election. For some domestic civilian voters, particularly those that are temporarily away, or in counties with unreliable mail delivery, receiving a ballot via email was the only way to guarantee the voter would have an adequate amount of time to send their ballot back to the City Clerk's Office.

See dkt. 384, Declaration of Debra Salas ("Salas Decl.") ¶ 10. To be clear, Plaintiffs are not contesting the merits of *Luft* here. Instead, Plaintiffs take issue with the Seventh Circuit's decision to upset Wisconsin's electoral status quo in late July, just seven weeks before the first mailing of absentee ballots and, in light of that decision's timing, that court's inconsistent imposition of a stay in this action. Further, the Seventh Circuit could have stayed the *One Wisconsin Institute* injunction during that appeal's nearly four-year pendency after oral argument but declined to do so. In that time, some portion of Wisconsin voters became well-accustomed to email delivery as an option. Indeed, this option has been listed on Form EL-121, the State's absentee ballot application, for four years[5] and was used by nearly ten thousand voters in the last presidential election and thousands in the April 7 election. *See* dkt. 423-20; dkt. 423-3; dkt. 382, Declaration of Maribeth Witzel-Behl ("Witzel-Behl Decl.") ¶¶ 7–8 (Madison City Clerk noting her office

[5] The pre-*Luft* version included email delivery as an option without restriction. *See* dkt. 423-20.

"delivered 2,225 mail-in absentee ballots by email upon voters' requests" for April 7 election and at least "821 mail-in absentee ballots" for August 11 primary).

There is no factual or legal basis to conclude that Wisconsin voters will be confused or deterred from participating in the election due to the limited fail-safe for ballot delivery failures that the district court ordered.

b. The risk of increasing administrative burdens and costs is similarly inapposite here.

Furthermore, there is no risk of election administrator confusion because municipal clerks and their staff have used and been trained on email delivery of mail-in absentee ballots for two decades. WEC's staff has also become more adept at implementing legal changes quickly and effectively. In April, the district court, the Seventh Circuit, and this Court issued rulings mere days before the April 7 primary election. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020), *stayed in part by Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). WEC has continually and successfully issued new guidance, developed new policies, and updated its websites and materials throughout the COVID-19 pandemic, trying to prepare for the November general election. In the run-up to the April 7 election, WEC successfully issued over fifty communications and guidance documents to clerks to keep pace with the unprecedented and rapidly-evolving pandemic. *See* dkt. 446, Declaration of Meagan Wolfe ¶ 23. Such extensive and ever-evolving administrative responses to the pandemic ultimately proved manageable for WEC. The same will hold true here,

where the preliminary injunction offers voters a tested and proven alternative that municipal clerks have used—without incident or dispute—for the last four years (less 77 days) and with which many voters are already familiar. The district court's remedy ensures that a ballot can be timely delivered, and it ensures that the success of the replacement ballot's delivery need not turn on USPS's efficacy.

This Court has rejected arguments that increased administrative burdens and costs override First Amendment rights. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) ("[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights."). This principle should apply with maximum force in a case that concerns voters' rights and where the requested relief will not require any training of municipal clerks or retraining of poll workers. Poll workers are, of course, not involved in absentee ballot delivery, and municipal clerks' office staff already have longstanding experience with email delivery.

The district court's fail-safe remedy of electronic transmission as an alternative ballot delivery method will only slightly increase the administrative burdens on WEC and municipal clerks in just one respect. Remaking or duplicating ballots is necessary when a ballot is electronically transmitted to the voter, so that the voter's choices can be scanned and tabulated. App. 85–86. That will mean some additional back-end work during the processing and counting of ballots, but it is far outweighed by the benefits of preventing the disenfranchisement of diligent voters through ballot processing and delivery delays and failures and reducing demand for

and strain on polling places on Election Day. The district court observed that the only declarations from municipal clerks in the record showed that "local election officials themselves represent that this inconvenience is outweighed by the benefit of having fewer, in-person voters on election day." App. 86.

Furthermore, the record contains declarations from three municipal clerks (two current and one former) for three of Wisconsin's largest municipalities, all noting that the duplication of electronically-delivered ballots is not an extreme hardship and more than justified by its enfranchising effects. *See* dkt. 382, Witzel-Behl Decl. ¶ 14 (representing that "value to voters who are trying to vote—and vote safely—would far outweigh any inconvenience or burden to my staff and those canvassing ballots at polling places"); dkt. 383, Declaration of Racine City Clerk Tara Coolidge ("Coolidge Decl.") ¶¶ 9–10 (same); dkt. 384, Salas Decl. ¶ 16 (same). And because the cut-off for email delivery of replacement ballots under the preliminary injunction is October 29, five days in advance of the election, that leaves sufficient time according to Racine City Clerk Coolidge to ensure adequate staffing at polling places to remake or duplicate ballots. Dkt. 383, Coolidge Decl. ¶¶ 9–12. There is no evidence in the record to support the notion that the injunction will prove unduly burdensome for state and local election officials. As the district court concluded, a voter's burden when a ballot does not arrive in the mail "is not outweighed by the interests of the State." App. 86.

Purcell, therefore, provides no basis to stay the district court's order permitting domestic civilian voters to request email delivery of *replacement* absentee ballots when their initially-requested ballots do not arrive in the mail.

III. The Legislature is unlikely to succeed on the merits of its appeal.

The Legislature is unlikely to prevail on the merits because the burdens on voters, particularly COVID-19-vulnerable voters, are extremely severe when a timely-requested absentee ballot does not arrive in the mail. Yet no state interest has been identified to justify this severe burden under the *Anderson-Burdick* balancing test.

On March 11, 2020, the same day the World Health Organization declared the novel coronavirus a pandemic, Plaintiff Katherine Kohlbeck received devastating news: she had breast cancer, a potentially deadly condition in and of itself, but also one that puts her at increased risk of severe illness or death from COVID-19. Due to the pandemic, her life-saving surgery to remove the cancer would be postponed to May—but, as a prerequisite for her surgery, she would need to test negative for COVID-19. And so when her mail ballot for the April 7 election failed to arrive by Election Day, she faced a stark choice: risk her life to vote in person, or lose her right to vote. Unconstitutionally forced to make this impossible choice, Plaintiff Kohlbeck lost her right to vote. *See* dkt. 372, Kohlbeck Decl. ¶¶ 3–9.

Stories like the this are all too common. At least one-third of Wisconsin adults are at increased risk from COVID-19 due to their age and/or a preexisting condition. *See* dkt. 370, Declaration of Dr. Megan Murray ("Murray Decl.") ¶ 79. The

district court agreed that forcing voters to make these kinds of choices violates the Constitution and enjoined a statutory restriction on electronic ballot delivery so that voters who timely request mail-in ballots but fail to receive them can request that a replacement ballot be electronically transmitted to them between October 22 and October 29. App. 52–54.

The minimal discussion of the merits in the Seventh Circuit's stay order shows that court demonstrably erred in staying the distinct relief afforded to the *Gear* Plaintiffs by relying upon a clearly erroneous reading of the record and failing to give the district court's factual findings proper deference. *See Purcell*, 549 U.S. at 5. In conflating the distinct claims and remedies in these four consolidated cases, the Seventh Circuit appears to have overlooked the unique harm established by the *Gear* Plaintiffs' evidence.

To the extent the Seventh Circuit considered the merits of the *Gear* action, the court erred in concluding the Legislature was likely to succeed on the merits of the appeal. For *Anderson-Burdick* claims alleging an undue burden on the right to vote, this Court has developed the following test:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S., at 788, 103 S.Ct., at 1569–1570; *see also id.*, at 788–789, n. 9, 103 S.Ct., at 1569–1570, n. 9.

Burdick v. Takushi, 504 U.S. 428, 434 (1992). "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. at 434 (citations and quotation marks omitted).

The district court granted an exceedingly narrow remedy to ensure diligent, but vulnerable, voters could still cast their absentee ballots: "[T]he 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." App. 85. But, again, the Seventh Circuit mistakenly focused only on voters who apply for absentee ballots at the "last minute," App. 4, not voters who apply weeks or more in advance, as Plaintiffs did. The Seventh Circuit thus demonstrably erred in failing to consider the circumstances of the *Gear* Plaintiffs and record evidence of similarly-situated voters who did *not* wait until the "last minute" but still failed to receive a ballot in the mail. App. 84–85.

Moreover, it was the *Gear Plaintiffs* who suggested to the district court that this narrow remedy could be further narrowed by limiting eligibility for this back-up option to voters who had applied for an absentee ballot some number of days in advance of the fail-safe period to obtain a replacement ballot by email. *See* dkt. 505 at 34. If the Seventh Circuit sought to incentivize diligent voter behavior while

safeguarding voters' rights in keeping with this Court's precedents, that would counsel in favor of modifying the preliminary injunction in accordance with Plaintiffs' original suggestion, not staying the relief in full.

In this case, the district court applied the *Anderson-Burdick* framework and correctly concluded that the confluence of the COVID-19 pandemic, USPS's delivery delays and failures, and WEC's ongoing challenges in meeting the unprecedented demand for mail-in absentee ballots necessitates limited relief to guarantee that voters have a fail-safe option when their ballots do not arrive in the mail on time or at all:

> [T]he 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*.

App. 85 (emphasis in original). The district court found that the record was "replete" with examples of voters not receiving their ballots on time or at all. App. 84–85. Under these exigent circumstances, the district court's relief was necessary in order to comply with the Seventh Circuit's instruction that because "'the right to vote is personal' . . . 'the state must accommodate voters' who cannot meet the state's voting requirements 'with reasonable effort.'" App. 66 (quoting *Luft*, 963 F.3d at 669). A voter who does not receive a timely-requested ballot in the mail and cannot safely vote in person at the polls is denied their right to vote without any justification—the *Anderson-Burdick* burdens-versus-interests balancing scales tip

decisively in one direction. Accordingly, as the district court concluded, vulnerable voters' rights will depend on this fail-safe remedy and, therefore, this was indeed a case for intervention to protect a narrow subset of voters from disenfranchisement, in compliance with this Court's precedents: "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." App. 85–86.

Luft v. Evers—a case decided on a record developed long before the COVID-19 pandemic, the concomitant surge in demand for mail ballots, and USPS delivery breakdowns—does not change the above calculus and does not foreclose this action. Even a holistic analysis of Wisconsin's entire election code provides no recourse for voters who do not receive their ballot in the mail and cannot vote safely in person due to their age or comorbidities and, therefore, no defense against this *Anderson-Burdick* claim. *Luft*, 963 F.3d at 671–72. As the district court found, voters will reasonably conclude that they cannot safely vote in person due to COVID-19. App. 51 ("[T]he aged, those with comorbidities or those lacking confidence in the ability of local officials and the public to get all those [COVID-19 infection control] factors right are understandably less confident in that assessment."). Because no law safeguards the right to vote safely during this pandemic when a mail-in absentee ballot is not delivered, judicial intervention was necessary to safeguard vulnerable voters' rights in these exigent (and hopefully rare) circumstances.

The Legislature has argued that Plaintiffs can vote in person safely, R. 9-1 at 17,[6] but this argument is completely undermined by the epidemiological evidence in the record, which the district court credited, App. 23, and the evidence of unsafe conditions at polling places. *See, e.g.*, dkt. 386, Declaration of Barbara Keresty ¶¶ 3–7. Relying on expert witness evidence, the district court found that the COVID-19 pandemic poses an extremely serious danger to in-person voters, particularly those at higher risk. App. 23 ("[P]laintiffs 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.") (citation omitted). The threat of airborne transmission in indoor settings where people congregate is real, substantial, and not meaningfully mitigated by any of the available protective measures. *See* dkt. 370 Murray Decl. ¶¶ 6-20, 32–44, 48–56; *see also* dkt. 490, Reply Declaration of Dr. Megan Murray ("Murray Reply. Decl.") ¶¶ 1-3; dkt. 490-1. This is especially so given pre-symptomatic and asymptomatic voters can unwittingly transmit SARS-CoV-2. *See* dkt. 370, Murray Decl. ¶¶ 8-9, 32–42. The district court found that "[c]ertain individuals, such as those who are elderly, immunocompromised or suffer comorbidities, are at a greater risk for complications from COVID-19" and that in-person appearances pose too great a risk of COVID-19 exposure and therefore severely restrict their right to vote. App. 42; *see also* App. 72 (noting registration cut-off "will likely restrict many Wisconsin citizens' freedom to exercise their right to vote, at least without having to take unnecessary risks of

[6] Citations to the docket of the action below in the consolidated Seventh Circuit proceedings, 20-2835, take the form "R. __."

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 also* App. 14 (Rovner, J., dissenting) ("[L]eaving one's home and joining other voters at the polls carries with it a genuine risk of becoming seriously ill."). These findings were entitled to deference, absent a showing of clear error. Forcing voters to take this risk is per se a severe burden on the right to vote. App. 28 (Rovner, J., dissenting) (noting "the unacceptable risks that in-person voting presents to the citizens of Wisconsin"). Given the overwhelming record evidence of the risks to COVID-19-vulnerable voters from voting in person at a polling place, if these individuals cannot vote safely absentee by mail, they cannot vote at all.

Furthermore, Wisconsin is experiencing alarming rates of infection, hospitalization, and death from COVID-19. As the district court found, "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." App. 52; *see also* App. 13 (Rovner, J., dissenting) ("[I]t is only *now* that Wisconsin is facing crisis-level conditions. . . . Wisconsin infection rates in early May were less than one quarter of what they are now.") (emphasis in original).[7]

[7] Judge Rovner added: "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

Accordingly, the Legislature is unlikely to prevail on the merits.

IV. The other equitable *Nken* factors also militate in favor of vacating the stay.

The Seventh Circuit also demonstrably erred in granting the Legislature's stay motion because the Legislature failed to articulate an irreparable harm. "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. The Legislature states merely, "'[T]he inability [of the State] to enforce its duly enacted plans clearly inflicts irreparable harm on the State' by interfering with its sovereignty." R. 9-1 at 20. It appears to contend that an injunction against a Wisconsin law per se causes irreparable harm to the Legislature, but there is no majority opinion from this Court or the Seventh Circuit that stands for that proposition. *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers), and *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers), relied on concrete evidence of irreparable harm to the states' interests, not a mere abstraction. *See, e.g.*, *King*, 133 S. Ct. at 3 ("Here there is . . . an ongoing and concrete harm to Maryland's law enforcement and public safety interests. . . Collecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby

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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). Hospitalization rates are at record highs in the State, with facilities in northeast Wisconsin approaching capacity due to the surge in Covid-19 cases . . ." App. 20-21 (Rovner, J., dissenting). The Legislature no longer argues that it is speculative that COVID-19 transmission will be continuing through Election Day. *See* dkt. 454 at 125.

helping to remove violent offenders from the general population. . . . That Maryland may not employ a duly enacted statute to help prevent these injuries constitutes irreparable harm." (internal citation omitted) (emphasis added)); *New Motor Vehicle Bd. of Calif.*, 434 U.S. at 1351 (holding that state's interest in "examining the proposed relocations" of car dealerships is "infringed by the very fact that the State is prevented from engaging in investigation and examination").

Here, the Legislature has not identified any specific, irreparable harms to the state's interests that the district court's injunction will cause. The little it did say in its stay motion, pointing to hypothetical administrative burdens on municipal clerks, *see* R. 9-1 at 16- 17, 21, is contradicted by municipal clerk declarations in the record. *Supra* at 27–28. Instead of baldly asserting that third parties would face substantial burdens, the Legislature could have substantiated its argument with declarations from one of the state's 1,850 municipal clerks. The district court could not consider evidence that was not presented, and its factual finding that electronic delivery of replacement ballots would benefit clerks and voters alike is owed deference. The district court considered the burden the fail-safe option would impose on clerks, but correctly concluded that administrative burden did not outweigh the burden on the right to vote of individuals who need to cast an absentee ballot to protect their health but fail to receive their ballots by mail. App. 85–86. The district court's analysis thus conforms to this Court's precedent holding that increased administrative costs cannot override rights protected by the First Amendment. *Tashjian*, 479 U.S. at 218. If such costs cannot override these rights, it

follows that they also cannot constitute irreparable harms. Because the Legislature has failed to identify any irreparable harm, the Seventh Circuit's stay should be vacated.

Finally, the public interest strongly favors vacating the stay of this narrow relief to protect voters' rights. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019) ("Without a doubt, Florida has a legitimate and strong interest in preventing voter fraud. But that interest is not mutually exclusive of vote-by-mail and provisional voters' interest in not being disenfranchised through no fault of their own." (internal citation omitted)); *Obama for Am. v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012) ("While states have 'a strong interest in their ability to enforce state election law requirements,' the public has a 'strong interest in exercising the 'fundamental political right' to vote.' 'That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful.' (internal citations omitted)). The district court's fail-safe remedy authorizes the extension of electronic ballot delivery, as is already in use for military and overseas voters, to ensure no voter is disenfranchised through no fault of their own. This is manifestly in the public interest, because vindicating constitutional rights always serves the public interest. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Voters and election administrators alike have been forced to adapt to the COVID-19 pandemic. As the district court found, this has meant overwhelmed

election office staff and USPS workers trying but failing to handle an unprecedented shift to mail-in absentee balloting. App. 44–46, 51–54, 79–86. It has also caused Wisconsin voters to seek to protect themselves by voting by mail in unprecedented numbers. Voters who are at higher risk from COVID-19 cannot vote safely in person when their requested ballot does not arrive in the mail, and it is unreasonable for the state to require them to risk their health to cast a ballot they timely requested but never received. The *Gear* Plaintiffs, including the two organizational plaintiffs League of Women Voters and Wisconsin Alliance for Retired Americans who assist and educate voters who have failed to receive their ballots in the mail, were determined to prevent a recurrence of this mass disenfranchisement. The district court's narrow relief ensures that no voter will lose their right to vote when a ballot is lost in the system. That relief should be allowed to take effect.

CONCLUSION

Respectfully, Plaintiffs request that this Court vacate the stay as to the part of the preliminary injunction authorizing the electronic delivery of replacement ballots to domestic civilian voters when their timely-requested ballot does not arrive in the mail.

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Respectfully submitted,

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APPENDIX

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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

No. 20-2835

In the United States Court of Appeals

FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
PLAINTIFFS-APPELLEES,
v.
MARGE BOSTELMANN, ET AL.,
DEFENDANTS,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

SYLVIA GEAR, ET AL.,
PLAINTIFFS-APPELLEES,
v.
MARGE BOSTELMANN, ET AL.,
DEFENDANTS,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

CHRYSTAL EDWARDS, ET AL.,
PLAINTIFFS -APPELLEES,
v.
WISCONSIN STATE LEGISLATURE,
DEFENDANT-APPELLANT.

JILL SWENSON, ET AL.,
PLAINTIFFS -APPELLEES,
v.
MARGE BOSTELMANN, ET AL.,
DEFENDANTS,
and
WISCONSIN STATE LEGISLATURE,
INTERVENING DEFENDANT-APPELLANT.

On Appeal From The United States District Court
For The Western District of Wisconsin
Consol. Case Nos. 3:20-cv-249, -278, -340, & -459
The Honorable William M. Conley, Presiding

WISCONSIN LEGISLATURE'S EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION

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INTRODUCTION

In March, the district court granted to Plaintiffs certain relief for the April 7 Election, premised upon that court's view that the unexpected, late-breaking nature of the COVID-19 pandemic did not give voters enough time to register remotely, obtain witness signatures, and return absentee ballots. Even in that situation, this Court and then the Supreme Court stayed most of the relief that the district court ordered. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, ___ U.S. ___, 140 S. Ct. 1205 (2020) (per curiam); *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1539, -1545, -1546, 2020 WL 3619499 (7th Cir. Apr. 3, 2020).

Plaintiffs have now brought strikingly similar challenges related to the November Election, even though the law and the facts have all moved against them. On the law, this Court in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), provided significant guidance limiting courts' authority to enjoin election laws, explaining that "[o]ne federal judge's preference" for a voting policy is insufficient to bar "a state legislature from implementing a different approach." *See id.* at 679. Meanwhile, the Supreme Court has granted multiple stay applications regarding COVID-19-related election-law injunctions, including in the prior iteration of this case, *Republican Nat'l Comm.*, 140 S. Ct. at 1206–08; *Merrill v. People First of Ala.*, No. 19A1063 (U.S. July 2, 2020), *staying People First of Ala. v. Sec'y of State*, No. 20-12184, 2020 WL 3478093 (11th Cir. June 25, 2020); and it has refused to disturb a court of appeals' stay of such changes, *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *application*

to vacate stay denied, No. 19A1055 (June 26, 2020).[1] Thus, the Supreme Court has made clear that COVID-19 is not a basis for judicially changing duly-enacted election laws. And on the facts, Wisconsin's voters and election officials have had much more time to prepare for the November Election than the April Election, no longer adjusting to a pandemic that "no one saw" coming, R.181:127–28 (Tr. of April 1, 2020 Hearing). Wisconsin voters have *many weeks* to register to vote and to request and cast absentee ballots, if they now wish to vote absentee in light of COVID-19. And election officials have had months to prepare for even safer in-person voting.

The district court nevertheless again enjoined several Wisconsin elections laws, ordering changes in the middle of an ongoing election. The nature of, and rationale underlying, the district court's relief dictates the conclusion that, contrary to *Luft*, the court thought that it had the lawful authority to order any relief—whether major or minor—that it believed would improve Wisconsin's election system to deal with COVID-19. The Wisconsin Legislature ("Legislature") thus respectfully asks this Court **to issue an emergency stay of that injunction in full, before the expiration of the district court's seven-day stay on September 28, 2020**.

[1] In the only case where the Supreme Court has denied a COVID-19-related election-change-stay request, the Court did so because the private party seeking the stay "lack[ed] a cognizable interest in the State's ability to enforce its duly enacted laws." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28 (S. Ct. Aug. 13, 2020) (citations omitted).

STATEMENT OF THE CASE

A. "Wisconsin has lots of rules that make voting easier," even as compared to "the rules of many other states." *Luft*, 963 F.3d at 672; *see Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014) ("*Frank I*").

"Registering to vote is easy in Wisconsin." *Id.* Wisconsin voters need only complete a registration form and, for most voters, provide "an identifying document that establishes proof of residence." Wis. Stat. § 6.34(2); R.538:5 ("Op."). Voters may register in person at the clerk's office, by mail, or online using the Wisconsin Election Commission's ("Commission") "MyVote" website. Wis. Stat. §§ 6.28(1), 6.29(2)(a). For the November Election, voters must either register online or by mail by October 14, *see* Wis. Stat. §§ 6.28(1), 6.29(2)(a), or complete "[l]ate registration" in person at the clerk's office by October 30, 2020, Wis. Stat. § 6.29(1)–(2). *See* Op.5. Finally, a voter may register in person on election day, immediately before casting a ballot. Wis. Stat. § 6.55(2); *see also Luft,* 963 F.3d at 672; Op.5.

Voting by mail is also easy in Wisconsin, under Wisconsin's no-excuses-needed absentee-voting regime, Wis. Stat. § 6.85; *Luft,* 963 F.3d at 672, and that by-mail voting for the November Election has *already begun*, *see* Op.55. To obtain an absentee ballot, voters need only submit a request by October 29, if requesting it by mail, fax, or online, Wis. Stat. § 6.86(1)(ac), (b); Op.6–7, or by November 1, 2020, if requesting it in person, Wis. Stat. § 6.86(1)(b); Op.8. Any registered voter may request a ballot *immediately*, so voters who do not wish to vote in-person still have many weeks to request and return their ballots. *See* Wis. Stat. § 7.15(1)(cm); R.458-2. Voters must

then return the ballot by 8:00 p.m. on election day, which they or their agent may do by mail, via a "drop box" where available, through hand delivery to the clerk's office or another designated site, or by delivering it to their polling place. Op.7–8; Wis. Stat. § 6.87(6). For "military [and overseas] voters" requesting absentee ballots, Wisconsin law allows municipal clerks to "fax or email" them absentee ballots after receiving a valid absentee-ballot request. *Luft*, 963 F.3d at 677; *see* Wis. Stat. § 6.87(3)(d).

Wisconsin law allows voters who are "indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period" to elect to "automatically" receive absentee ballots "for every election," without satisfying the photo-ID requirement. Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)2. The Commission has clearly explained this exception to voters, noting that "[d]esignation of indefinitely confined status is for each individual voter to make based upon their current circumstance[s]," "[i]t does not require permanent or total inability to travel outside of the residence," and "shall not be used . . . simply as a means to avoid the photo ID requirement." R.458-12 (Wis. Elections Comm'n, *I Want to Vote Absentee*);[2] *see Jefferson v. Dane Cty.*, No. 2020AP557-OA (Wis. Mar. 31, 2020) (preliminarily enjoining election clerk's inaccurate statements about the availability of the indefinitely-confined-voter exception and noting the Commission's guidance on the term "indefinitely confined").[3]

[2] Available at https://elections.wi.gov/voters/absentee.

[3] This original action is currently pending before the Wisconsin Supreme Court. *See Jefferson v. Dane Cty.*, No. 2020AP557-OA (Wis. Mar. 31, 2020).

Finally, eligible Wisconsinites have multiple options to vote in person, both for two weeks in-person absentee until November 1, Wis. Stat. § 6.86(1)(b), and on election day, Wis. Stat. §§ 6.76–78, 6.80. "[T]he [Commission] is taking [ ] steps" to "do more or do better" with respect to the in-person aspects of the November Election, including "earmark[ing] $4.1 million to provide increased safety measures at locations"; "designat[ing] $500,000 to secure and distribute sanitation supplies"; and "providing public health guidance and training to local election officials." Op.60–61.

B. In these consolidated cases, Plaintiffs challenged a host of Wisconsin election laws with respect to the upcoming November Election. Op.2–4. On September 21, the district court entered an order granting to Plaintiffs the following relief: (1) extending the deadline for online and mail-in registration to October 21, 2020, under Wis. Stat. § 6.28(1); (2) directing the Commission 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; (3) extending the receipt deadline for absentee ballots by one week until November 9, 2020, under Wis. Stat. § 6.87(6), while still requiring the ballots be mailed and postmarked on or before election day; (4) allowing access to replacement absentee ballots online or via email from October 22, through October 29, for any voters who timely requested an absentee ballot, which request was approved and the ballot was mailed but not received by the voter; and (5) enjoining Wis. Stat. § 7.30(2)'s rule that each election official be an elector of the county in which the municipality is located. Op.67–69. The court stayed its

preliminary injunction order for seven days, to provide the aggrieved parties an opportunity to seek this emergency appellate relief. Op.69.

JURISDICTION

As this Court already held in the prior round of this case, the "Legislature has standing to pursue this appeal." *See DNC*, 2020 WL 3619499, at *2 (citing *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), and *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019)).

LEGAL STANDARD

"The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *accord Nken v. Holder*, 556 U.S. 418 (2009). In that analysis, this Court must consider whether the moving party "establish[ed] that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ill. Republican Party v. Pritzker*, No. 20-2175, ___ F.3d ___, 2020 WL 5246656, at *2 (7th Cir. Sept. 3, 2020) (citation omitted).[4]

[4] The Legislature orally moved the district court to stay any preliminary injunction pending the Legislature's appeal, R.532:215–17, just as Intervenor-Defendant Republican National Committee did with the first appeal in this case, R.181:135–36. The district court granted only a one-week stay to seek appellate review, Op.4, thus necessitating this Emergency Stay Motion, *see* Fed. R. App. P. 8(a)(1)(A).

ARGUMENT

I. The Legislature Is Exceedingly Likely To Succeed On Appeal Because All Of The Challenged Election Laws Are Constitutional

Federal courts analyze challenges to voting laws under the *Anderson/Burdick* framework, "weigh[ing] 'the character and magnitude of the asserted injury to the [voting] rights protected by the First and Fourteenth Amendments" against "'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). A state violates the Constitution if it requires a voter to expend more than "reasonable effort" to vote. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"); *accord Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling plurality op. of Stevens, J.).

As this Court explained in *Luft*, the *Anderson/Burdick* analysis considers any particular election law's burden in light of "the state's election code *as a whole*." 963 F.3d at 671. Absent a plaintiff satisfying the demanding *Anderson/Burdick* test—that is, showing that more than "reasonable effort" is needed to vote, *Frank II*, 819 F.3d at 386—a court cannot order *any* election-law reform, no matter how "beneficial" the court thinks the reform is "on balance." *Luft*, 963 F.3d at 671. After all, "[o]ne federal judge's preference" alone "does not prevent a state legislature from implementing a different approach." *Id.* at 679.

And, finally, even if a provision *does* impose an unconstitutional burden on particular voters (*i.e.*, foreclosing those specific voters from voting after expending "reasonable effort"), a court cannot "prevent the state from applying the law

generally." *Frank II*, 819 F.3d at 386. Instead, the specific voters may be eligible for as-applied relief, not a statewide injunction applicable to all voters. *Id.* at 386–87.

Here, the district court preliminarily enjoined several provisions of Wisconsin's election law, and its analysis on each provision was legally wrong.

A. Extending The Deadline To Register To Vote, Even Though Voters Have Many Weeks To Register

Wisconsin's voter registration deadlines are plainly constitutional. Under Wisconsin law, voters *still* have many weeks until the deadlines to register online, by mail, or in person at the clerk's office—October 14 for regular registration, and October 30 for late registration in person at the clerk's office. *See supra* p.3. Further, Wisconsin also has "generous . . . same-day registration" at the polls. *Luft*, 963 F.3d at 676. These reasonable deadlines easily satisfy *Anderson/Burdick* and directly further the State's "valid and sufficient interests in providing for *some* period of time . . . to prepare adequate voter records and protect its electoral process from possible fraud." *Luft*, 963 F.3d at 676 (citation omitted).

The district court ordered the State to extend "the current electronic and mail-in registration deadline of October 14, 2020," by one week to October 21, Op.41, and that decision was plainly wrong. The court's conclusion that anyone is "restrict[ed]" in their "right to vote" by the October 14 deadline is incorrect, given that voters *still* have weeks to meet this deadline and, even after that date, may easily register in person at the clerk's office by October 30, or at their polling location on election day itself. *Supra* p.3. The court's related concerns for "a smaller, but significant group" that may face "severe[ ]" burdens from this deadline likewise does not support its

decision, Op.41, including because: (1) it is easy for *any* voter to register *now* online or by mail, or, if they want, to register in person; and (2) the court ordered a one-week extension for *all* voters, not tailored relief for this (frankly, non-existent) "small[ ]" group for whom the court thought October 14 deadline is problematic in some respect. Op.41; *see Frank II*, 819 F.3d at 386.

The other reasons that the district court offered for this aspect of its injunction are similarly unavailing. The court's desire to provide more time for "unwary individuals"—who apparently do not know about the October 14 deadline—is indefensible. Op.39; *see also* Op.40. The Constitution gives "little weight to the interest [of voters] . . . in making a later rather than early decision." *Burdick*, 504 U.S. at 437 (citation omitted); *see also Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (failure to "act" according to "mere[ ] [ ] time limitation[s]" is a voter's "own failure to take timely steps"). And the court's concern about possible mailing delays, Op.40, misses the mark because, even if such delays occur for a particular voter, that voter can register online, in person at the clerk's office, or at the polling place—alternatives that all require only "reasonable effort," *Frank II*, 819 F.3d at 386.

B. Further Extending The Deadline To Deliver Absentee Ballots, Even Though Voters Have Many Weeks To Deliver Their Ballots

Wisconsin's requirement that absentee ballots be "delivered to the polling place serving the elector's residence before 8 p.m. on election day," is also constitutional. Wis. Stat. § 6.87(6). This deadline requires only "reasonable effort" from voters, *Frank II*, 819 F.3d at 386, since voters who do not wish to vote in-person have *weeks* to request and return their absentee ballots, *see* Wis. Stat. § 7.15(1)(cm). Any

registered voter may request a ballot *immediately*, and clerks *have already begun* to deliver them to voters. *See supra* pp.3–4; Op.55. Further, voters (or their agents) may return these ballots by the election-day deadline through a variety of methods: in the mail; via "drop box"; hand delivery to the clerk's office or another designated site; or at the polling place itself on election day. *See* Op.8. These mild "[a]dministrative steps" require little of the voter, thus reasonably diligent voters wishing to vote absentee should take them immediately. *Luft*, 963 F.3d at 679 (citation omitted). And, of course, other voters can simply choose to vote in person—either during the two-week in-person absentee-voting period, or on election day. *See supra* p.5.

The district court ordered an extension of the absentee-ballot-receipt deadline to November 9, for all voters, so long as "the ballots [are] mailed and postmarked on or before election day, November 3, 2020." Op.51. The district court's order is legally unjustified, especially since now—unlike in the Spring—voters concerned about voting in person due to COVID-19 have *many weeks* to vote absentee.

To begin, the court mistakenly looked to whether "unwary voters" could or would wait until the last minute to mail their absentee requests or ballots. Op.49 ("so-called procrastinators"). But, again, unwariness is not the constitutional standard. *See supra* p.9. Nothing in the Constitution gives voters' the constitutional right to delay until the last minute in requesting or mailing their absentee ballots, without risking the foreseeable consequences of such delay. As the Supreme Court explained in the earlier round of this very case, "even in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots . . . will usually receive their

ballots on the day before or day of the election," *Republican Nat'l Comm.*, 140 S. Ct. at 1207, which, in turn, may not provide them with enough time to successfully mail the ballot back to the clerk by election day even before COVID-19. Yet, no one would argue that this previously rendered any State's voting laws unconstitutional before COVID-19. So while the district court worried about voters who wanted to wait until close to election day to decide for whom to vote, Op.49–50, absentee voters almost *always* vote without "information . . . that surfaces in the late stages of the election campaign," *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

In any event, and independently fatal to the district court's injunction, Wisconsin's multiple in-person voting options—including two weeks of in-person absentee voting and election day voting, *see supra* p.5—are constitutionally adequate options for Wisconsin voters who experience any absentee-voting mailing or processing problems. *See supra* pp.7–8. Again, a State only needs to provide voters a constitutionally adequate "path to cast a vote," *Luft*, 963 F.3d at 678, with "reasonable effort," *Frank I*, 819 F.3d at 386. It follows that voters who can vote in person with reasonable effort have "no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see Griffin*, 385 F.3d at 1130; *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–08 (1969). And COVID-19 "has not suddenly obligated [the State] to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. 2020).

Wisconsin's own election experiences during COVID-19 show that in-person voting is a constitutionally adequate alternative. As the district court acknowledged, Wisconsin's experience with its April and August Elections "suggest[s] that in-person voting can be conducted safely if the majority of votes are cast in advance, sufficient poll workers, polling places, and [personal protective equipment] are available, and social distancing and masking protocols are followed." Op.19. The Commission is taking comprehensive steps to ensure even greater safety for in-person voting for November, such that the district court saw "no basis to *order*" the Commission to take any additional measures. Op.60–61. Thus, if some voters choose to wait until close to election day to cast their absentee ballot and something goes wrong with the processing or mailing of their absentee ballots, in-person voting remains a constitutionally adequate option, thereby making Wisconsin's voting system "*as a whole*" constitutional. *Luft*, 963 F.3d at 671.

Further, and also independently fatal to the district court's injunction, the court granted *facial relief* against this deadline, "prevent[ing] the state from applying the law generally" to any voter, *even voters who can indisputably vote in-person with reasonable effort*, if something goes wrong with the mailing of their absentee ballots. *See Frank II*, 819 F.3d at 386. If the district court thought that some identified group of voters could not safely vote in person, and was concerned about what would happen to those voters if they experienced absentee-ballot mailing problems, the court was duty-bound to tailor any relief *only* to those voters. *Id.*

Finally, the court wrongly minimized the State's interest in adopting an election-day-receipt deadline that many other States have chosen, Op.50, in an effort to forward "orderly administration" of its elections, *see Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.). The district court believed that the State's interest "rings hollow during a pandemic," Op.50, but that is the court "substitut[ing]" the "judicial judgment for legislative judgment." *Luft*, 963 F.3d at 671.

C. Unnecessarily Creating A Confusing, Difficult-To-Administer Week Of Faxing And Emailing Absentee Ballots

Wisconsin's decision to allow only military or overseas electors to receive faxed or emailed absentee ballots, Wis. Stat. § 6.87(3)(d), poses no constitutional issues under *Anderson/Burdick*, as this Court held in *Luft*. As *Luft* concluded, Wisconsin "could reasonably conclude that members of the military [and overseas voters] face special problems," such as the inability "to return to the state to use its regular voting methods[ ], which justify willingness on the state's part to accept the burdens that fax or email cause for the vote-counting process." 963 F.3d at 677.

The district court essentially overruled *Luft*, in part, by ordering local election officials to send and receive absentee ballots online between October 22 and October 29 for all "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." Op.54. This relief was not nearly as "narrow" as the court claimed. Op.54. To take just one problematic example, voters could request an absentee ballot on October 21 or 22, have their ballots mailed by the clerk within one day of that request,

see Wis. Stat. § 7.15(1)(cm); R.458-4, and then request that the clerk email the ballot instead since they may not "receive the ballot in time to vote," Op.54.

Even beyond the fact that the district court's order here impermissibly overturns, in part, this Court's recent decision in *Luft*, the court's order was also legally indefensible for the independent reason that Wisconsin's multiple in-person voting options *already* provide constitutionally adequate options to every voter whose mailed absentee ballot is lost or delayed. *See supra* pp.4–5, 11–12. Further, and closely related, even if the record had established that some extremely limited group of voters could not safely vote in person if their absentee ballot gets lost or delayed—and, to be clear, the record lacks evidence of any voters who cannot safely vote either in person or in-person absentee, after following all public health protocols—the district court's injunction would still be unconstitutionally overbroad because it is not limited to those specific voters. *See Frank II*, 819 F.3d at 386.

Nor did the district court adequately address the difficulty that its judicially created email-ballot regime would impose on election officials. As a threshold matter, the district court did not explain how local election officials across Wisconsin could consistently determine which voters actually qualified for the district court's judicially created option. Further, broadening the availability of online ballot access risks "errors arising from the fact that faxed or emailed ballots cannot be counted by machine." *Luft*, 963 F.3d at 677. Alternative delivery arrangements impose burdens on elections officials, especially because returns of faxed/emailed absentee ballots come "on regular printer paper," not "official ballot stock," requiring the clerks to

"remake the ballots [on official paper] so that it can be counted by the voting equipment on election day." R.247:153. In response, the district court cited the remarks of a handful of local election officials, who claimed that any inconvenience would be "outweighed by the benefit of having fewer, in-person voters on election day." Op.54. Such personal opinions of local elections officials about statewide election laws are, of course, irrelevant, as "which decisions a state wishes to make statewide, and which locally, are for the state to decide." *Luft*, 963 F.3d at 674.

D. Requiring The Commission To Tell Voters Duplicative Information About The Indefinitely Confined Exception

The district court also erred in requiring the Commission "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.'" Op.58. The court did not hold that Wisconsin's photo-ID law would be unconstitutional without providing this duplicative information to voters, Op.56–58, nor would such a holding be even arguably plausible, *see Frank I*, 768 F.3d at 749–51. Furthermore, the district court nowhere explained why its ordered "relief" is necessary to protect the right to vote or tailored to remedying an *Anderson/Burdick* problem. As the district court admitted, Op.6, 58, both the Wisconsin Supreme Court, *Jefferson v. Dane Cty.*, 2020AP557-OA (Wis. Mar. 31, 2020), and the Commission, *see* R.458-12, have *already* provided all Wisconsin voters with this same guidance on the meaning of the law, which all voters

are presumed to know in any event, *see Cochran v. Ill. State Toll Highway Auth.*, 828 F.3d 597, 600 (7th Cir. 2016).

E. Unnecessarily Lifting Rules For The Residency Of Election Officials

The district court also wrongly enjoined Wis. Stat. § 7.30(2), which provides that a polling-place inspector must "be a qualified elector of a county in which the municipality where the official serves is located." This "reasonable" regulation, *Stone v. Bd. of Election Comm'rs for City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2014), ensures that officials who are truly local administer their own polling places, furthering the State's desire to take a "decentralized" approach to election administration, *see* R.227-1:1; R.227-2:10.

The district court failed to explain what, if any, constitutional violation might arise if Section 7.30(2) remained in place. Instead, it concluded only that Section 7.30(2) presented a "tricky and fluid barrier" to in-person voting. Op.60. The court also noted that allowing local election officials to "access[ ] National Guard members who reside outside of their community" would help them recruit additional poll workers. Op.60. But the record evidence showed that Section 7.30(2) imposed no barriers to properly staffing polling locations in jurisdictions that were willing to accept the help of the National Guard. R.227-1:8–9. "Municipalities who used [National Guard] personnel" in the April 7 Election "report[ed] the experience as a very positive one" and "hope[d] that the service members will continue to serve as volunteer poll workers *in their home communities* in the future." R.227-1:8 (emphasis added). The only evidence of staffing difficulties that any Plaintiffs could muster were

in jurisdictions where *local* staffing decisions contributed to poll-worker shortages. *See Swenson* R.41:41–42; R.397:53.

II. The Equitable Factors Favor Staying The District Court's Injunction

"[T]he inability [of the State] to enforce its duly enacted plans clearly inflicts irreparable harm on the State" by interfering with its sovereignty. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018). While the changes that the district court ordered vary in practical significance—from deeply significant changes to election deadlines, to unnecessary requirements to re-publish "indefinitely confined" guidance—each aspect of the order infringes upon Wisconsin's sovereignty by substituting "[o]ne federal judge's preference[s]" for those of the "state legislature." *Luft*, 963 F.3d at 679. This imposes unjustified irreparable harm on the State and its citizens.

Further, the timing of the district court's injunction beckons for a stay. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), recognized that federal-court intervention in elections "can [ ] result in voter confusion and consequent incentive to remain away from the polls," especially "[a]s an election draws closer," *id.* at 4–5; *accord Republican Nat'l Comm.*, 140 S. Ct. at 1207. The November Election in Wisconsin has *already* begun, since clerks began mailing absentee ballots to voters on September 17, 2020. *Supra* pp.3–4. So, under *Purcell*, any federal-court intervention, including multifaceted orders like the district court's order here, comes with the grave risk of "voter confusion" and concomitant disenfranchisement. *See Purcell*, 549 U.S. at 4–5. This is why another district judge in the Western District of Wisconsin considering a *narrower* challenge to portions of Wisconsin's photo-ID laws today refused to enjoin

these provisions prior to the November Election, since Wisconsin is now "well within the sensitive time frame" where any injunction would sow "exactly the chaos and confusion that the *Purcell* principle is meant to avoid." *Common Cause v. Thomsen*, No. 3:19-cv-323, Dkt.51:2–3 (W.D. Wis. Sept. 23, 2020).

Even if this Court were to consider the provisions that the district court enjoined, one by one, the balance of the irreparable harms and the equities strongly supports granting a stay of the district court's unlawful injunction.

First, the court's extension of the registration deadlines disrupts the State's "valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral process from possible fraud." *Luft*, 963 F.3d at 676 (citation omitted). And while the district court concluded that the State's election officials could likely comply with this order "without significant impact," Op.40–41, this order necessarily diverts sovereign resources in the crucial run-up to the election from where the Legislature thought best to the processing of late registration applications.

Second, the extension of the absentee-ballot-receipt deadline harms the State's ability to canvass the election results, introducing unnecessary uncertainty and delay into "the democratic process." *Anderson*, 460 U.S. at 788 (citation omitted). That potential for disorder explains why *most* States express a similar interest in the finality that comes from collecting all ballots on election day. *See* Op.50. And, of course, a State "inevitably must" enact *some* ballot deadline, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), so the district court's preference of

November 9 is an impermissible "substitution of judicial judgment for legislative judgment" that unjustifiably infringes upon state sovereignty, *Luft*, 963 F.3d at 671. That "election officials were able to meet all post-election canvassing deadlines notwithstanding th[e] court's six-day extension of the deadline in April," Op.50, does not alter the balance, since that extension required these officials to expend "incredible efforts" to make "an extremely tight turnaround," R.247:48.

Third, the opening of a difficult-to-administer, weeklong window where voters may request emailed or faxed absentee ballots will likewise sow needless confusion into Wisconsin's election. *Anderson*, 460 U.S. at 788 (citation omitted). As noted above, it will be difficult for local election officials statewide to determine which voters qualify for the district court's judicial bypass. *See supra* pp.13–15. Further, processing faxed and mailed ballots creates serious practical problems, as this Court discussed in *Luft*, 963 F.3d at 677, and as the record below establishes, *see* R.247:153.

Fourth, the court's order that the Commission provide voters with duplicative information about the indefinitely confined exception imposes an unnecessary obligation on the Commission, while also infringing upon the State's sovereignty by forcing it to restate guidance that it has *already* given its citizens.

Finally, the district court lifted Wisconsin's rules that election officials must be electors of the counties in which they work, undermining the State's interest in local election administration. *See supra* pp.16–17. And, as discussed above, there is no record evidence that lifting this requirement will make a meaningful difference in terms of election-day staffing. *See supra* pp.16–17.

CONCLUSION

This Court should stay pending appeal the district court's entire preliminary injunction.

Dated: September 23, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,187 words, excluding the parts of the Motion exempted by Federal Rule of Appellate Procedure 32(f).

This Motion complies with all typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)–(6), because it has been prepared in a proportionally spaced typeface using the 2016 version of Microsoft Word in 12-point Century Schoolbook.

Dated: September 23, 2020.

/s/ Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2020, I filed the foregoing Emergency Motion To Stay The Injunction Pending Appeal with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: September 23, 2020

/s/ Misha Tseytlin
MISHA TSEYTLIN

Nos. 20-2835, 20-2844

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs-Appellees,

v.

WISCONSIN STATE LEGISLATURE, et al.,

Intervenor-Defendants-Appellants.

GEAR V. BOSTELMANN PLAINTIFFS-APPELLEES' OPPOSITION TO INTERVENOR-DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO STAY DISTRICT COURT'S PRELIMINARY INJUNCTION

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
Consol. Case Nos. 3:20-cv-249, -278, -340, -459 The Honorable William M. Conley, Presiding

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INTRODUCTION

The district court granted relief to the *Gear* Plaintiffs-Appellees in part (d) of the preliminary injunction order. *See* dkt. 539 at 3.[1] For two decades, Wisconsin election officials have emailed mail-in absentee ballots upon request. For the first decade, the statute gave clerks discretion to send *any* absentee voter their ballots by email when, in their judgment, there was insufficient time to receive the ballot by mail and timely cast it. Then, for about four-and-a-half years, the Legislature made email delivery non-discretionary but restricted it to military and overseas voters. In 2016, the district court struck down the statutory provision barring all but military and overseas voters from receiving their absentee ballots by email and fax delivery.[2] This Court denied a motion to stay that order[3] and, while that case was pending before this Court, municipal clerks delivered mail-in absentee ballots to voters by email—"without incident," as the district court found. *See* dkt. 538 at 54.[4] For the next four years, every election in Wisconsin was conducted with email delivery of mail-in absentee ballots available to all voters.

In late June, this Court reversed the district court's injunction and reinstated the ban on electronic transmission of ballots to domestic civilian voters,[5] but did so on a record developed long before Covid-19. Those consequences include a death toll now surpassing 200,000 Americans; the consequent, unprecedented demand for mail-in ballots; and a sclerotic U.S. Postal Service that has failed to deliver ballots to voters on time or at all. The district court found the

[1] Unless otherwise indicated, citations to the district court docket in this brief ("dkt.") are to the docket under which the *Gear* case was consolidated, case number 20-cv-249-wmc.
[2] *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016).
[3] *One Wisconsin Inst., Inc. v. Thomsen*, No. 16-3083, at *1 (7th Cir. Aug. 22, 2016).
[4] Absentee voters *must* return these ballots by mail or drop them off at their municipal clerk's office, polling place, or dropbox. Wis. Stat. §§ 6.87(3)(d), 6.87(4). Plaintiffs' claims solely address the delivery of ballots *to* voters by electronic means, not the method by which voters return their ballots.
[5] *Luft v. Evers*, 963 F.3d 665, 676-77 (7th Cir. 2020).

record evidence on these points "overwhelming." Dkt. 538 at 53. Earlier this year, these forces disenfranchised voters, including five of the Plaintiffs-Appellees, who are at much higher risk from Covid-19. Given the health risks they face and the corresponding severe burden on their right to vote, no legitimate and rational, let alone compelling, state regulatory interest could justify forcing such voters to vote in person, if their absentee ballots cannot timely be received and cast by mail. Such voters need a fail-safe.

The district court issued limited relief for this specific group of voters who do not timely receive a timely-requested absentee ballot in the mail. From October 22-29, voters who have not yet received their ballot in the mail may do so by email or through myvote.wi.gov. The district court left the choice of electronic transmission method to the Wisconsin Elections Commission ("WEC" or "the Commission"). WEC has sufficient time to restore email delivery to domestic civilian voters, which it had done until two months ago. Municipal clerks know how to deliver mail-in absentee ballots by email; this requires no retraining of clerks and no involvement of poll workers. Voters are familiar with email delivery as an option, having used it for four years. This limited relief provides only a back-up option to receive ***replacement*** ballots within an eight-day period. Most voters will never need to learn of or use this fail-safe but, as the district court found, vulnerable voters' rights will depend on it. Accordingly, courts' usual concerns of voter confusion, voter suppression, and increased administrative burdens are significantly diminished.[6]

The Intervenor-Defendants-Appellants Wisconsin Legislature ("Legislature"), Republican National Committee ("RNC"), and Republican Party of Wisconsin's (RPW") have moved to stay the preliminary injunction. These motions should be denied because the movants lack standing to appeal and are unlikely to succeed on the merits anyway. While *Luft* commands a holistic review

[6] *See Purcell v. Gonzalez*, 549 U.S. 1 (2006).

of the election code, it also instructs that voters' rights are personal and must be protected through fail-safe options if they cannot vote through reasonable effort. The eight individual Plaintiffs-Appellees and the organizational Plaintiffs-Appellees League of Women Voters of Wisconsin ("LWVWI") and Wisconsin Alliance for Retired Americans ("WIARA") which divert resources, time, and money to assist and educate voters who do not receive ballots in the mail filed suit to ensure voters have a fail-safe option.

FACTUAL & PROCEDURAL BACKGROUND

Email delivery of mail-in absentee ballots has been an option for some or all of Wisconsin's absentee voters for two decades. The statute in question was created by 1999 Wis. Act 182, § 97 (May 24, 2000), went into effect in 2000, and permitted any voter—domestic civilian, military, and overseas—to request and receive a mail-in absentee ballot by email "*if, in the judgment of the clerk, the time required to send the ballot through the mail may not be sufficient to enable return of the ballot by the time provided under sub. (6).*" Wis. Stat. § 6.87(3)(d) (2000) (emphasis added), *amended by* 2001 Exec. Budget Act, § 9415, 2001-2002 Wis. Legis. Serv. Act 16. For ten years, clerks were given discretion to decide whether email delivery was necessary. In 2011, the language that made alternative delivery methods discretionary was dropped. Wis. Stat. § 6.87(3)(d) (June 10, 2011) ("A municipal clerk shall…transmit a facsimile or electronic copy of the absent elector's ballot to that elector in lieu of mailing under this subsection.").

The Wisconsin Legislature enacted 2011 Wis. Act 75 in December 2011, mandating that municipal clerks "transmit a facsimile or electronic copy of the elector's ballot to that elector in lieu of mailing" only to military and overseas voters who request delivery by this means. Wis. Stat. § 6.87(3)(d). Now the statute only permits military electors and overseas electors, both as defined in Wis. Stat. § 6.34(1), to request delivery of their absentee ballot by fax or email, or to access and

download their absentee ballot at myvote.wi.gov and return them by mail. *See* dkt. 247, Deposition of Meagan Wolfe ("Wolfe Tr.") at 130:21-131:14; 136:20-139:19.

In 2016, Act 75's ban on emailing or faxing mail-in absentee ballots to domestic civilian voters was struck down by the district court's decision in *One Wisconsin Institute,* 198 F. Supp. 3d at 946. WEC has construed the law to limit email or fax delivery to *replacement* mail-in absentee ballots and, therefore, has permitted requests for email or fax delivery of absentee ballots only until the regular deadline for mail-in absentee ballots (October 29). *See* dkt. 423, Sherman Decl., Ex. 23, WEC, Uniform Instructions for Absentee Voting, at 2 ("A voter may request that a *replacement* ballot be faxed or emailed to him or her."); Wis. Stat. § 6.86(5). In the 2016 presidential election, 9,619 mail-in absentee ballots were delivered by email to voters without incident.[7] 7,231 of these email-delivered ballots were ultimately returned by mail.[8] There was no documented incident with email delivery.

In June, the Seventh Circuit reversed the *One Wisconsin Institute* order invalidating the ban on electronic delivery of absentee ballots to domestic civilian voters. *Luft*, 963 F.3d at 676. The mandate issued at the end of July. Consequently, the pre-*One Wisconsin Institute* reach of Section 6.87(3)(d)'s restriction to overseas civilian and military voters has been restored.

The district court has preliminarily enjoined the ban reinstated by *Luft*. The injunction temporarily permits municipal clerks to issue replacement ballots via email or make them available at myvote.wi.gov to civilian Wisconsin voters who properly request absentee ballots but do not receive their ballots by mail. This fail-safe can be exercised from October 22-29. *See* dkt. 539 at 3. This decision was based on the high percentage of registered voters who have requested absentee

[7] *See* dkt. 423, Sherman Decl., Ex. 3, WEC, Absentee Ballot Report (Nov. 8, 2016).
[8] *Id*.

ballots for the November 3 election, account for the Covid-19 pandemic, which has prompted an unprecedented number of voters to choose not to vote in person, and potential U.S. Postal Service ("USPS") delivery delays or failures that may prevent registered voters from timely receiving ballots.

LEGAL STANDARD

"In deciding whether to stay a federal court decision (other than a money judgment) while review proceeds, on appeal or otherwise, courts consider the merits of the moving party's case, whether the moving party will suffer irreparable harm without a stay, whether a stay will injure other parties interested in the proceeding, and the public interest." *Venckiene v. United States*, 929 F.3d 843, 853 (7th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 428 (2009)). The movant must demonstrate the district court abused its discretion in denying a stay. *Nken*, 556 U.S. at 433.

This Court reviews findings of fact for clear error. *Venckiene*, 929 F.3d at 853.

ARGUMENT

I. The Intervenor-Defendants-Appellants lack standing to move for a stay.

Neither the Legislature nor the RNC has standing to appeal the district court's order. The *Gear* Plaintiffs-Appellees join and incorporate herein Plaintiffs-Appellees Democratic National Committee and Democratic Party of Wisconsin's arguments as to the Legislature's lack of standing, while further noting that the Supreme Court has held that state legislatures have no cognizable interest in cases challenging "the constitutionality of a concededly enacted" state statute and thus do not have standing to appeal rulings in such cases. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019); *Planned Parenthood of Wis.*, 942 F.3d 793, 798 (7th Cir. 2019). Here, because the *Gear* Plaintiffs-Appellees challenge the constitutionality of Wis.

Stat. § 6.87(3)'s electronic ballot delivery restrictions during the pandemic, the Legislature has no actionable interest in this case and, therefore, no standing to appeal.

The RNC and RPW equally lack standing to appeal. They identify no interests in their brief supporting their motion to stay that confer standing to appeal. Moreover, the Supreme Court has indicated that only states have an interest in enforcing state statutes, and that third parties lack standing to stay orders enjoining those statutes. *Hollingsworth v. Perry*, 570 U.S. at 701–02. The Court also recently rejected for lack of standing the RNC's attempt to stay a court order in another voting rights case, *Common Cause Rhode Island v. Gorbea*. There, the plaintiffs and state entered into a consent decree enjoining the state's requirement that mail-in ballots be signed by two witnesses or notarized, as it concerned ballots cast in the upcoming general election. *See* No. 1:20-cv-00318-MSM-LDA, 2020 WL 446091 (D.R.I. July 30, 2020). Subsequently, the RNC intervened and asked the Supreme Court to stay the decree. The Court denied that request because the RNC lacked standing: "[H]ere the state election officials support the challenged decree, and no state official has expressed opposition. Under this [*sic*] circumstances, the applicants lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws." No. 20A28, 2020 WL 4680151, at *1 (U.S. Sup. Ct. Aug. 13, 2020) (Mem). So too here.

WEC has neither appealed nor opposed the narrowly tailored relief granted below. Whatever interest Wisconsin holds in enforcing Section 6.87(3) rests solely with WEC.

II. The Intervenor-Defendants-Appellants are unlikely to succeed on the merits.

Sections 6.87(3)(a) and 6.87(3)(d) together provide that mail-in absentee ballots may *only* be delivered to regular civilian voters by mail. Wisconsin voters can request replacement mail-in absentee ballots if they spoil or fail to receive a ballot up until the ballot request deadline. Wis.

Stat. §§ 6.80(2)(c), 6.86(5); dkt. 247, Wolfe Tr. at 145:9-20. Plaintiffs filed an *Anderson-Burdick* challenge to this delivery method restriction.

The Seventh Circuit applies *Anderson-Burdick* "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); *Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017). The Supreme Court has developed the following test:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal citations omitted). "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434.

Here, the district court applied *Anderson-Burdick* and correctly concluded that the confluence of the Covid-19 pandemic, USPS's delivery failures, and WEC's ongoing challenges with the unprecedented demand for mail-in absentee ballots necessitates limited relief to guarantee voters have a fail-safe option when their ballots do not arrive by mail on time or at all:

> [T]he 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 [on] in person voting, nor addressed by the Seventh Circuit's recent decision in *Luft*.

See dkt. 538 at 53. The district court found that the record was "replete" with examples of voters not receiving their ballots on time or at all. *Id*. at 52-53. These factual findings are not clearly erroneous and point inexorably to one conclusion: under these exigent circumstances, the injunction is necessary to comply with this Court's instruction that because "'the right to vote is personal'…'the state must accommodate voters' who cannot meet the state's voting requirements 'with reasonable effort.'" Dkt. 538 at 34 (quoting *Luft*, 963 F.3d at 669). A voter who does not receive a timely-requested ballot in the mail and cannot safely vote in person is denied their right to vote without any justification—the *Anderson-Burdick* scales tip decisively in one direction. As the district court held, that voter must be provided with a fail-safe option to receive their mail-in absentee ballot. *See* dkt. 538 at 54. Noting that vulnerable voters' rights will depend on this fail-safe remedy, the district court held that, under this Court's precedent, judicial intervention is necessary to protect a narrow subset of voters from disenfranchisement. *See* dkt. 538 at 53.

Luft v. Evers—a case decided on a record developed long before the Covid-19 pandemic and USPS delivery breakdowns—neither changes this calculus nor forecloses this action. This "Courts weigh these burdens against the state's interests by looking at the whole electoral system." *Luft*, 963 F.3d at 671-72. But if the election code addresses a particular burden or denial of the right to vote, then unrelated provisions such as Election Day registration provide no defense to an *Anderson-Burdick* claim. When voters face disenfranchisement due to ballot delivery issues and a Covid-19 risk that makes in-person voting unduly dangerous, no part of the code mitigates this constitutional violation.

Absent the district court's injunctive relief, that voter's only recourse is to request a *replacement* mail-in absentee ballot, once again by mail delivery, and to hope it arrives faster than

the first ballot they requested but never received. Indeed, several Plaintiffs-Appellees tried just that, but the replacement ballot *also* failed to arrive in the mail on time. *See* dkt. 372, Declaration of Katherine Kohlbeck ¶¶ 7-9; dkt. 373, Declaration of Diane Fergot ¶¶ 5-7; dkt. 373, Declaration of Gary Fergot ¶¶ 5-7. Many voters would reasonably continue to wait for their initially-requested mail-in ballot's arrival until after the deadline to request a ballot and/or it is far too late to guarantee a ballot can arrive timely by mail. Voters will also reasonably conclude they cannot safely vote in person due to Covid-19. Dkt. 538 at 19. Because Wisconsin law fails to safeguard the right to vote safely during this pandemic, judicial intervention is necessary.

Intervenor-Defendants-Appellants nevertheless claim that "[t]he district court essentially overruled *Luft*." *See* R. 9-1 at 16.[9] This misrepresents both *Luft* and the limited, fact-specific nature of the district court's ruling here. *Luft* does not foreclose this action. The claim in *One Wisconsin Institute* attacking Section 6.87(3)(d)'s restriction of email delivery to military and overseas voters was based in large part on the disparate treatment of domestic civilian voters and did not consider the burdens of voting safely during a pandemic. 198 F. Supp. 3d at 946 ("Plaintiffs contend that this provision unjustifiably burdens voters who are traveling but who do not qualify as overseas electors."). *Luft* characterized that claim much the same way. 963 F.3d at 676-77. By contrast, the *Gear* action focuses on the burdens facing all voters trying to cast ballots safely during the pandemic but particularly those more vulnerable to Covid-19. This case was not based on the disparate availability of email delivery but on the unique challenges of voting during this pandemic and evidence of its impact election administration and USPS's operations.

Intervenor-Defendants-Appellants do not contest the district court's finding that the April 7 election was marred by absentee ballot processing and delivery problems or that the procedures

[9] Citations to the docket in this action are to "R.__."

at municipal clerks' offices and USPS will be insufficient to prevent "something go[ing] wrong with the processing or mailing of their absentee ballots" for a portion of voters once again. *See* R. 9-1 at 15. They also appear to have abandoned their longstanding argument that it is speculative Covid-19 transmission and mortality continue through Election Day. *See* dkt. 454 at 125. Instead, they press their argument that Plaintiff-Appellees can safely vote in person, R. 9-1 at 17, notwithstanding Covid-19's death toll, extremely serious clinical manifestations (including long-lasting health complications), and persistent transmission in Wisconsin. R. 9-1 at 17. But that argument is undermined by the record epidemiological evidence, *see infra*, and the evidence of unsafe conditions at polling places, *see, e.g.* dkt. 386, Declaration of Barbara Keresty ¶¶ 3- 7.

The Covid-19 pandemic poses a serious danger to in-person voters, particularly those at higher risk.[10] The threat of airborne transmission in indoor settings where people congregate is real, substantial, and not meaningfully mitigated by any available protective measures. *See* dkt. 370, Declaration of Dr. Megan Murray ("Murray Decl.") ¶¶ 6-20, 32-44. Forcing at-risk voters to take this risk is *per se* a severe burden on the right to vote. Due to pre-symptomatic and asymptomatic transmission of SARS-CoV-2, voters will cast their ballots in person at the polls not knowing that they are Covid-19-positive and further transmit viral particles in large respiratory droplets and much smaller aerosolized droplet nuclei that can stay suspended in the air for much longer. *Id.* ¶¶ 8-9, 32-42; *see also* dkt. 440, Murray Tr. at 122:15-123:11. Because these microdroplets stay aloft and travel farther, aerosolized transmission is the hardest to control via interventions like sanitization, masks other than N95s, or social distancing. *Id*. at 123:11-17, 124:2-6, 125:9-126:3, 126:15-127:22, 129:9-130:6, 133:1-6; *see* dkt. 370, Murray Decl. ¶ 36; *id*. ¶¶ 48-

[10] *See* dkt. 503, Sherman Reply Decl., Ex. 5, CDC, Coronavirus Disease 2019 (COVID-19), *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (updated July 30, 2020).

56; dkt. 490, Reply Declaration of Dr. Megan Murray ("Murray Reply. Decl.") ¶¶ 1-3; *id*., Ex. 1 (Dr. Murray Deposition Exhibit 4). If at-risk voters cannot vote safely absentee by mail, they cannot vote at all.

Moreover, COVID-19 transmission is *increasing* in Wisconsin. As the district court found, "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* dkt. 538 at 20. The district court correctly found that "[c]ertain individuals, such as those who are elderly, immunocompromised or suffer comorbidities, are at a greater risk for complications from COVID-19" and that in-person appearances pose too great a risk of Covid-19 exposure, therefore severely restricting their right to vote. Dkt. 538 at 10; *see also id*. at 40.

Intervenor-Defendants-Appellants posit that Plaintiffs-Appellees can bring an as-applied challenge should harm come to them. *See* R. 9-1 at 10-11. Such relief would be illusory. It would be absurd and infeasible to require voters to file individual constitutional lawsuits to secure a replacement absentee ballot when their initial request fails, just days before Election Day. The Constitution requires a fail-safe that can actually prevent the violation.

If state lawmakers and executive officials need not wait until electoral fraud actually occurs to create and enforce requirements they believe will prevent such crimes, *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 (2008) (finding state anti-fraud interest even given absence of "evidence of any such fraud actually occurring"), then voters need not wait until they suffer grievous injury to their right to vote or health before securing preliminary injunctive relief. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (granting motion for preliminary injunction because "Florida's signature-match scheme subjects vote-by-

mail and provisional electors to *the risk* of disenfranchisement") (emphasis added). To hold otherwise would privilege credible risks to the state's legitimate interest in protecting election integrity while dismissing credible risks to voters' rights to participate in their democracy. Such disparate treatment of these competing interests would run counter to the Supreme Court's precedent, which emphasizes that preliminary injunctive relief is warranted "to prevent a substantial risk of serious injury from ripening into actual harm." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

The burdens on voters are severe when a timely-requested absentee ballot does not arrive in the mail. As to the state's interest, the Intervenor-Defendants-Appellants raise third parties' interests, but actually *mis*represent them. The only evidence in the record from municipal clerks' offices are declarations noting that the duplication of electronically-delivered ballots is not an extreme hardship but is justified by its enfranchising effects, and that the October 29 cut-off for email delivery of replacement ballots under the preliminary injunction is sufficient time to ensure adequate staffing at polling places to remake or duplicate ballots. *See* dkt. 382, Declaration of Maribeth Witzel-Behl ("Witzel-Behl Decl.") ¶ 14; dkt. 383, Declaration of Tara Coolidge ("Coolidge Decl.") Decl. ¶¶ 9-10; Declaration of Debra Salas ("Salas Decl.") ¶ 16.

Any arguments that the injunctive relief could be exercised by voters who did not timely request their ballots, *see* R. 9-1 at 16-17, can be resolved by slightly modifying the injunction. Plaintiffs-Appellees suggested to the district court that voters exercising the fail-safe could be required to apply some number of days in advance of the fail-safe period. Dkt. 505 at 34.

III. The Intervenor-Defendants-Appellants will suffer no irreparable harm without a stay.

The movants have failed to articulate any interest that will be irreparably harmed absent a stay of the preliminary injunction. The RNC and RPW do not describe their interests or how they

would be irreparably harmed if the motion to stay were denied, and instead "simply adopt[ed] the Legislature's motion and incorporate[d] those arguments" into their brief in support of their motion to stay. R. 4 at 5. Accordingly, because the RNC/RPW have not identified any interests that will be irreparably harmed, their motion fails. *Nken*, 556 U.S. at 434.

The Legislature raises a general, abstract harm to the state's ability "to enforce its duly enacted" election laws. R. 9-1 at 20. It also claims, without evidence, that the electronic transmission of replacement ballots "will likewise sow needless confusion into Wisconsin's election" because "it will be difficult for local election officials statewide to determine which voters qualify for the district court's judicial bypass." *Id.* at 22. It also states that "processing faxed and mailed ballots creates serious practical problems." *Id.* These are of course third parties' purported administrative concerns, not the Legislature's or the RNC and RPW's.

"As the party invoking this Court's jurisdiction, [the Legislature] bears the burden of doing more than simply alleging a nonobvious harm." *Bethune-Hill*, 139 S. Ct. at 1955 (citation, quotation marks, alteration omitted). Yet, the Legislature's arguments as to how it will be irreparably harmed by the fail-safe remedy are speculative and in direct conflict with the record. Multiple clerks have submitted declarations explaining that election officials can determine which voters have been mailed a ballot by looking up the voter's record in MyVote, then cancel the mailed ballot in the system before emailing a replacement ballot. *See* dkt. 382, ¶ 11; dkt. 383, ¶ 11; dkt. 384, ¶ 14. Even if a voter receives, completes, and returns the initial ballot, it will not count because it bears a unique numerical code and will have been cancelled. Dkt. 384, ¶ 14. It is the professional opinion of these clerks—the officials responsible for issuing ballots to voters—that any administrative burdens caused by the fail-safe option constitute "minor inconveniences"

and do not render this remedy infeasible or impractical, much less irreparably harmful. *See* dkt. 383, ¶ 10; dkt. 384, ¶ 16.

IV. The balance of the equities and the public interest favor denying the Intervenor-Defendants-Appellants' motion for a stay.

Appellants argue *Purcell v. Gonzalez*, 549 U.S. 1 (2006) instructs this Court to stay its hand this close to an election. R.9-1 at 20-21. But that case did not create a *per se* rule requiring courts to reject any request for injunctive relief as to voting rules brought within a certain timeframe before an election. Appellants' argument is divorced from the animating concerns in the Supreme Court's original decision, which directed federal courts to weigh "considerations specific to election cases"—namely the risks of confusing voters, increasing administrative burdens, and suppressing voter turnout—amongst the normal equitable factors for issuance of an injunction. *Purcell*, 549 U.S. at 4-5.

First, a close review of *Purcell* and subsequent cases demonstrate that *Purcell* does not bar injunctive relief when the relief ordered would *vindicate* voters' rights and prevent disenfranchisement. The district court's preliminary injunction creates a fail-safe option for voters who do not receive a ballot in the mail. This will enable, not deter, voter participation and turnout. Circuit courts have upheld injunctions issued shortly before an election where the challenged law or rule would have the effect of disenfranchising voters. *See League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Obama for Am. v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012); *U.S. Student Ass'n Fdn. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008).

Second, Appellants cannot invoke the purported risk of voter confusion as support for rules that *disenfranchise and burden* voters. *Purcell* should be taken at its word; the Supreme Court was deeply concerned with the risk of suppressing turnout. 549 U.S. at 4-5 (citing the "consequent incentive to remain away from the polls"). But here, the requested injunction will *facilitate and*

increase voter turnout. Any confusion over an injunction that benefits voters and facilitates their participation hurts ***voters***, not Defendants. *Cf. Frank v. Walker*, No. 11-C-1128, slip op. at 38-39 (E.D. Wis. July 19, 2016).

The risk of voter confusion in this case approaches zero. There is still time to adjudicate this dispute before this relief takes effect on October 22. While it would be best to have this resolved some time in advance of October 22, it is most important that clerks offer it as an option for replacement ballot delivery during the fail-safe period. This case is clearly distinguishable from the recent order in *Common Cause v. Thomsen*, No. 3:19-cv-323, dkt. 51, at 3 (W.D. Wis. Sept. 23, 2020), in which the Court expressed concern that an "inevitable appeal" and potentially changing rulings would confuse college student voters as to which college IDs are valid. There is no such risk of voter confusion here, particularly because email delivery of absentee ballots has previously been available in Wisconsin for twenty years and available to *all* voters upon request over the last four years, minus the last two months. Voters would be much more confused if their ballot did not arrive in the mail and a replacement was also stalled. Further, unlike in *Common Cause*, there is no action the voter needs to take here, like procuring a compliant student ID; voters will simply learn what their options are when they contact their municipal clerks' office.

Third, Intervenor-Defendants-Appellants have no basis to claim that this remedy will increase WEC's or municipal clerks' burdens. In April, this Court and the U.S. Supreme Court issued rulings days before the April 7 election. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 20-1538 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). Despite the legal battles, WEC has continually and successfully issued new guidance, developed new policies, and updated its websites and materials throughout the Covid-19 pandemic. In the run-up to the April 7 election, WEC successfully issued over fifty communications and guidance documents to

clerks to keep pace with the unprecedented and rapidly-evolving pandemic. *See* dkt. 446, Declaration of Meagan Wolfe ¶ 23. Such extensive administrative responses to the pandemic proved manageable for the WEC and did not unduly confuse voters in either the April election or elections in past years.

Finally, the Supreme Court has soundly rejected arguments that increased administrative burdens and costs override First Amendment rights. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) ("[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights."). This principle should apply with maximum force in a case that concerns voters' rights and where the relief will not require any training of municipal clerks or poll workers. Poll workers are not involved in absentee ballot delivery, and municipal clerks already have experience with email delivery. Granted, remaking or duplicating ballots at polling places is necessary when a ballot is electronically transmitted so that the ballot can be scanned and tabulated, but the net result will overwhelmingly be less burdensome for administrators and voters alike. The Intervenor-Defendants-Appellants' arguments are self-defeating. They claim that absentee ballot preparation and delivery failures will be "extremely rare," dkt. 454 at 43, but then this fail-safe would be exercised by many fewer voters and impose a minimal burden. The only clerks who testified in this case have stated that this burden is a "minor inconvenience" and well worth safeguarding voters' rights.

Accordingly, the public interest strongly favors affirming this narrow relief to protect voters' rights.

CONCLUSION

Respectfully, the motion to stay should be denied.

DATED: September 25, 2020

Respectfully submitted,

/s/ Jon Sherman

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because this brief contains 5,197 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with all typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 12-point font.

Dated: September 25, 2020

/s/ *Jon Sherman*
Jon Sherman

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 25, 2020

/s/ *Jon Sherman*
Jon Sherman

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

ONE WISCONSIN INSTITUTE, INC., CITIZEN ACTION OF WISCONSIN EDUCATION FUND, INC., RENEE M. GAGNER, ANITA JOHNSON, CODY R. NELSON, JENNIFER S. TASSE, SCOTT T. TRINDL, MICHAEL R. WILDER, JOHNNY M. RANDLE, DAVID WALKER, DAVID APONTE, and CASSANDRA M. SILAS,

Plaintiffs,

v.

MARK L. THOMSEN, ANN S. JACOBS, BEVERLY R. GILL, JULIE M. GLANCEY, STEVE KING, DON M. MILLS, MICHAEL HAAS, MARK GOTTLIEB, and KRISTINA BOARDMAN, *all in their official capacities,*

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 15-cv-324-jdp

This action came before the court for consideration with District Judge James D. Peterson presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs as follows:

1. As to Count 1 of the Second Amended Complaint:

   a. The challenged provisions limiting in-person absentee voting to one location per municipality violate the Voting Rights Act; and

b. The challenged provisions restricting the hours and days for in-person absentee voting, except for the provision preventing in-person absentee voting from occurring on the Monday before an election, violate the Voting Rights Act.

2. As to Count 2 of the Second Amended Complaint:

a. The challenged provisions limiting in-person absentee voting to one location per municipality are unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

b. The challenged provisions restricting the hours and days for in-person absentee voting, except for the provision preventing in-person absentee voting from occurring on the Monday before an election, are unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

c. The challenged provisions requiring that "dorm lists" to be used as proof of residence include citizenship information are unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

d. The challenged provisions increasing the durational residency requirement from 10 days to 28 days are unconstitutional under the First and Fourteenth Amendments to the United States Constitution;

e. The challenged provisions prohibiting municipal clerks from distributing absentee ballots by fax or email are unconstitutional under the First and Fourteenth Amendments to the United States Constitution; and

f. The IDPP as implemented is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

3. As to Count 3 of the Second Amended Complaint, the challenged provisions prohibiting voters from using expired, but otherwise qualifying, student IDs are unconstitutional under the Fourteenth Amendment to the United States Constitution.

4. As to Count 5 of the Second Amended Complaint, the challenged provisions of 2013 Wis. Act 146 are unconstitutional under the Fourteenth and Fifteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED AND ADJUDGED that:

1. Plaintiffs' request for a permanent injunction is GRANTED, and defendants are permanently enjoined from enforcing any of the provisions identified above;

2. Defendants, and their officers, agents, servants, employees, attorneys, and all those acting in active concert or participation with them, or having actual or implicit knowledge of this judgment, are ORDERED to:

a. Promptly issue a credential valid as a voting ID to any person who enters the IDPP or who has a petition pending;

b. Provide that any such credential has a term of expiration equivalent to that of a Wisconsin driver license or photo ID and will not be cancelled without cause;

c. Inform the general public that credentials valid for voting will be issued to persons who enter the IDPP;

d. Further reform the IDPP so that qualified electors will receive a credential valid for voting without undue burden; and

3. Provisions 2.a. through 2.d., immediately above, are to be effectuated within 30 days so that they will be in place and available for voters well before the November 8, 2016, election.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of defendants on all remaining claims in the Second Amended Complaint.

Approved as to form this 1ST day of August, 2016.

James D. Peterson
District Judge

Peter Oppeneer, Clerk of Court

8/1/16
Date

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

ONE WISCONSIN INSTITUTE, INC,
et al.,

Plaintiffs,

v. Case No. 15-CV-324

MARK L. THOMSEN, *et al.*,

Defendants.

NOTICE OF CROSS[1]-APPEAL

PLEASE TAKE NOTICE that Defendants Mark L. Thomsen, Ann S. Jacobs, Beverly R. Gill, Julie M. Glancey, Steve King, Don M. Millis, Michael Haas, Mark Gottlieb, and Kristina Boardman, by their attorneys, Attorney General Brad D. Schimel and Assistant Attorneys General S. Michael Murphy, Gabe Johnson-Karp, and Jody J. Schmelzer, appeal to the United States Court of Appeals for the Seventh Circuit from the Decision and Order entered by this Court on July 29, 2016. (Dkt. 234) and the Judgment entered by this Court on August 1, 2016 (Dkt. 235).

[1] Plaintiffs filed a notice of appeal on August 2, 2016. (Dkt. 236.) Under Federal Rule of Appellate Procedure 28.1(b) the party who first files a notice of appeal is the appellant and the later-filing party is the cross-appellant.

A true and correct copy of the Decision and Order is being filed with this Notice of Appeal, along with a Docketing Statement. The appropriate filing fee is being paid concurrent with this Notice of Appeal.

Dated this 3rd day of August, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/S. Michael Murphy
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No. 16-3091 [Consolidated with 16-3083]

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

ONE WISCONSIN INSTITUTE, INC., ET AL.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

MARK L. THOMSEN, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

Appeal From The United States District Court
For The Western District Of Wisconsin, No. 3:15-cv-324,
The Honorable James D. Peterson, Presiding

DEFENDANTS-APPELLANTS, CROSS-APPELLEES' EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL

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INTRODUCTION

The district court in this case enjoined *seven* of Wisconsin's election laws on their face. These laws govern ordinary election logistics, and do so in a manner consistent with both nationwide practice and sound election administration. They include such banal provisions as a 28-day residency requirement (where 30 days is a common standard), rules governing the time and location for no-questions-asked in-person absentee voting (a permissive type of absentee voting many States do not even offer), and a mandate that clerks distribute absentee ballots by mail. The court invalidated all of these rules even though a longer residency requirement would have been lawful, *see, e.g.*, *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (upholding a 50-day residency requirement), and even though there is no constitutional right to unrestricted absentee voting, *see Griffin v. Roupas*, 385 F.3d 1128, 1129, 1130–32 (7th Cir. 2004); *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–08 (1969).

Without a stay, the district court's "disruption of the state's electoral system will cause irreparable injury" to Wisconsin and its citizens. *Frank v. Walker*, No. 16-3003, Dkt. 42, at 1 (7th Cir. Aug. 10, 2016) (order granting stay). The court's judgment upsets the status quo, overturning a regime under which Wisconsinites have voted for years. Forcing the State to put its entirely reasonable, commonplace election-administration rules on hold will waste the time and resources of the State's election officials and county clerks' offices, requiring a revamping of their election publications, official forms, website notices, training materials, polling schedules, and more.

Meanwhile, the risk of any harm to Plaintiffs from a stay is minimal, given that even the district court concluded that most of these provisions impose only meager burdens.

In light of the upcoming deadlines in Wisconsin's election laws—especially the Wednesday, August 31, 2016, date for printing and mailing absentee ballots, *see infra* pp. 15–18—the State respectfully asks for a decision on this stay motion as soon as practicable, but preferably no later than Friday, August 26.

STATEMENT

I. The District Court Facially Enjoins Seven Election Provisions

Over the last decade, Wisconsin has adopted (and, in one case, declined to adopt) several election rules relevant to this appeal. On July 29, 2016, the district court invalidated and enjoined seven laws on their face. R.234:118–19.[1]

28-day durational residency law. Wisconsin law requires that residents who move within Wisconsin fewer than 28 days before an election vote in their former municipalities (or by absentee), but residents who move into Wisconsin from out of State must have lived in Wisconsin for at least 28 days before voting here (except if casting a ballot for the offices of president and vice president), R.234:74. Wis. Stat. §§ 6.02, 6.15(1); 6.85. The 28-day minimum is slightly *more* favorable to voters than the average of the 25 States and the District of Columbia that have reported a date-specific residency threshold. *See* R.86:23–24. The district court enjoined this provision

[1] Citations of the district court record are: "R.[ECF Entry Number]:[Page Number]."

under the "*Anderson-Burdick*" test—derived from the First and Fourteenth Amendments, *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992)—holding that the burdens that the 28-day rule imposed were not outweighed by the State's interests. R.234:53–54; 74–79. The court then mandated that the State impose a 10-day residency requirement, which the court derived from Wisconsin's prior law.

Three laws providing for the locations and times for in-person absentee voting. Wisconsin has a highly permissive in-person absentee voting program that is available "for any reason" to almost any eligible voter who is "unable or unwilling" to vote in person. Wis. Stat. § 6.85(1). Such a no-questions-asked in-person absentee voting program is not available in 23 States.[2] The district court invalidated three provisions of that voter-friendly regime, even though none of the provisions make this type of absentee voting unavailable to any voter.

Wisconsin law permits municipalities to designate an alternate site for absentee voting. Wis. Stat. § 6.855(1). Some in the Legislature preferred that there be more than one site, so they introduced Senate Bill 91, which "would have permitted municipalities to open multiple in-person absentee voting locations." R.234:10. The Bill was never signed into law, yet the district court held that the *Anderson-Burdick* doctrine requires the reforms as proposed in Senate Bill 91. R.234:61–62.

Wisconsin law also directs municipalities to offer in-person absentee voting between the third Monday preceding an election day and the Friday before election day,

[2] National Conference of State Legislatures, *Absentee and Early Voting*, *available at* http://goo.gl/uSPUZx.

and makes the timing of in-person absentee voting consistent across the State, limiting it generally to weekdays between 8 a.m. and 7 p.m. Wis. Stat. § 6.86(1)(b). The court held that these timing rules were unlawful because the State could not justify the "moderate burdens" they supposedly imposed. R.234:56, 62. The court also held the provisions invalid under the Voting Rights Act. R.234:109–10. And the court held that the law requiring uniform timing of in-person absentee voting intentionally discriminated on the basis of race, in violation of the Fifteenth Amendment, because, in the court's view, the legislative history showed that the law was enacted with Milwaukee and other "large municipalities" in mind. R.234:45.

Law requiring that absentee ballots be sent by regular mail. Before 2011, municipal clerks transmitted some absentee ballots to voters "by fax or email," in addition to regular mail. R.234:85. This put a demand on clerk resources and exposed absentees' votes to election officials, who had to "re-create electronically returned ballots in paper form on election day." R.234:85. Wisconsin thus enacted a law prohibiting "municipal clerks from faxing or emailing absentee ballots to absentee voters other than overseas and military voters." R.234:9. The court struck down this law under *Anderson-Burdick*, concluding that it "places a moderate burden on voters who are traveling" but that it lacks sufficient "justification[s]." R.234:84.

Two laws relating to voting by college students. Under Wisconsin law, a college student may establish residency for voter registration by relying on a certified list, provided at the university's option, of those who live in college housing. Wis. Stat.

§ 6.34(3)(a)7.b ("dorm lists"). To also confirm students' citizenship, Wisconsin law requires that any dorm list include only U.S. citizens. Wis. Stat. § 6.34(3)(a)7. The court held that this rule put "only slight" burdens on students, yet, because the court thought the rule not even "minimally rational," it was held invalid under the *Anderson-Burdick* test. R.234:69.

Finally, Wisconsin law provides that students may use current, but not expired, student IDs to satisfy the photo ID requirement. Wis. Stat. § 5.02(6m)(f). The court concluded that this rule failed rational-basis review. R.234:112–15.

II. The District Court Declines To Stay Its Across-The-Board Injunctions Of The Seven Invalidated Laws

Defendants asked the district court to stay its judgment and injunction, pointing out that the court's rulings were likely to be reversed and would cause the State substantial harm while also confusing voters. R.241:1–14. On August 11, 2016, the district court denied the motion in relevant part, reiterating its view that the invalidated laws are unconstitutional and adding that no irreparable harm would befall the State during the pendency of the appeal. R.255:1–12.[3]

LEGAL STANDARD

Presented with a motion for stay pending appeal, this Court "consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will

[3] Defendants also asked the court to stay an as-applied injunction of Wisconsin's ID Petition Process ("IDPP"), which relates to the State's photo ID law, *see* 2011 Wis. Act 23. The district court granted, in part, Defendants' stay motion as to that portion of the injunction. R.234:2. Accordingly, this motion will not address the IDPP decision, although Defendants intend to challenge the district court's injunction with regard to the IDPP in their merits briefing.

result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other. . . . [A] sliding scale approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (citations omitted).

ARGUMENT

I. Defendants Are Very Likely To Succeed On Appeal

A. The court held seven of Wisconsin's laws facially invalid under the First and/or Fourteenth Amendments, principally under the *Anderson-Burdick* test. But the court's analysis violated at least three principles: *First*, to warrant an "across-the-board injunction" under *Anderson-Burdick*, an election regulation must unduly burden the right to vote *not* of discrete pockets of electors but of voters *generally*, *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*) ("[T]he burden some voters face[ ]" under a challenged law "[can]not prevent the state from applying the law generally."); *see Burdick*, 504 U.S. at 436–37; *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (opinion of Stevens, J.) (courts must consider "the statute's broad application to all [of the State's] voters"). *Second*, "the usual burdens of voting" set the objective benchmark of an election regulation's severity, *Crawford*, 553 U.S. at 198 (plurality) (holding in context of facial challenge that, "for *most* voters," getting an ID is "surely" not "a substantial burden" (emphasis added)). *Third*, non-severe burdens on voting "trigger less exacting review, and a State's 'im-

portant regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions,'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citing *Burdick*, 504 U.S. at 434), meaning that mere rational-basis review usually applies, *see, e.g.*, *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998), just as it does in many equal-protection challenges.

28-day durational residency law. The district court concluded that the 28-day rule imposed only "a moderate burden on voters," but then claimed three pages later that the burden was "severe" in light of its supposed impact on some poor and transient voters, R.234:74–77. Regardless of which (if any) of these contradictory views one accepts (in reality, any "burden" is mild: Wisconsin's rule is friendlier to residents than similar requirements in many other States, *see supra* pp. 3–4), there is no possible claim that the 28-day rule even prevents "a significant number of voters from participating in [State] elections in a meaningful manner," *Crawford*, 553 U.S. at 190 (opinion of Stevens, J.) (describing the basis of Justice Kennedy's dissent in *Timmons*), or that it lacks a "plainly legitimate sweep," *id.* at 202–03. Moreover, the district court did not account for the State's interest in efficient, secure election administration, R.206:64–66 (and record citations therein),[4] which is more than enough to justify this "reasonable, nondiscriminatory" rule. *Timmons*, 520 U.S. at

[4] R.206 is the defendants' post-trial brief. Citations in this brief refer to the page number of the brief on the bottom of the page and not to the ECF page numbers on the top of each page.

358. Notably, the Supreme Court has rejected an equal-protection challenge to a residency requirement of 50 days, explaining that "[S]tates have valid and sufficient interests in providing for *some* period of time [for durational residency]—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds." *Marston*, 410 U.S. at 680. Wisconsin's more voter-friendly law is lawful under the same rationale.

Three laws providing for the locations and times for in-person absentee voting. Wisconsin has enacted three relevant laws that impose certain limitations on the State's no-questions-asked in-person absentee voting regime—a regime that many States do not offer. *See supra* p. 4. These three laws limit municipalities to one alternate site for in-person absentee voting (aside from the office of the municipal clerk), provide for a 10-day in-person absentee voting window, and mandate uniform rules for in-person absentee voting hours. *See supra* pp. 4–5. The court evaluated these in-person absentee timing and location rules as applied to certain subgroups' "[p]re-existing disadvantages." R.234:57. What was missing from the district court's analysis was any explanation of how these in-person absentee voting rules impose burdens on the electorate in general, *Crawford*, 553 U.S. at 202–03 (plurality), or involve greater burdens than those involved in election-day in-person voting, *id.* at 198 (plurality). The court also concluded that any burden these laws placed upon voters was "moderate," R.234:56, but then impermissibly invalidated them on their face, R.234:118, even though these banal laws plainly served the legitimate interest of reducing burdens on election officials before election day. R.206:54–60 (and record citations

therein); *see Timmons*, 520 U.S. at 358. The court further did not adequately address the point that no-questions-asked in-person absentee voting is not constitutionally required *at all*, *see Griffin*, 385 F.3d at 1129, 1131, *McDonald*, 394 U.S. at 807–08, meaning that Wisconsin has already provided voters with more in-person absentee voting rights than the Constitution mandates.

Law requiring that absentee ballots must be sent by regular mail. The court invalidated a law requiring that most absentee ballots be sent only by regular mail—rather than by fax or email—because the court believed that this "moderate[ly]" burdened voters "who are traveling [around election day], particularly [those] outside of the country or in locations with unreliable mail delivery." R.234:84. But facial invalidation based upon a "moderate" burden on only an exceedingly small group of voters is forbidden. *Crawford*, 553 U.S. at 190 (plurality). The district court further erred by disregarding the State's interest in reducing burdens on clerks' offices and alleviating concerns that *actual votes* not be exposed to election officials, *see, e.g.*, R.86:19, which interests easily sustain a "reasonable, nondiscriminatory" rule. *Timmons*, 520 U.S. at 358. Anyway, there is no general constitutional right to unrestricted absentee voting to begin with. *See Griffin*, 385 F.3d at 1129; *McDonald*, 394 U.S. at 807.

Two laws relating to voting by college students. The court also invalidated a law providing that if a university submits a dorm list for voter-registration purposes, such a list must confirm that the students are U.S. citizens. The court stated that the "burdens" this imposed were "only slight," but concluded that the rule was not "min-

imally rational," in part because "none of the state's other methods for proving residence require voters to 'confirm' their U.S. citizenship beyond signing" a form. R.234:69. But a law "aimed at remedying a problem need not entirely eliminate the problem"—"reform may take one step at a time." *Greater Chicago Combine & Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1072 (7th Cir. 2005) (citation omitted). Regardless, this rule cannot plausibly be described as a meaningful burden: college students continue to have *numerous* options to prove their residency, the same options available to all voters in general. R.217:133. Even if the provision does impose a "burden," albeit "only [a] slight" one, the district court also erroneously failed to consider whether the burden fell upon voters *generally*—or even all student voters—before striking it down on its face. *See Crawford*, 553 U.S. at 202–03 (plurality).

The court made a similar error when it invalidated, on mere rational-basis review, the provision deeming non-expired student IDs acceptable for purposes of the photo ID law. R.234:112–15. Permitting current—as opposed to expired—student IDs is not even arguably "discriminatory" and is, in any event, clearly "related to [the] legitimate state interest" served by a voter ID law. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950–51 (7th Cir. 2002).

B. The court also held that certain in-person absentee timing rules violate the Fifteenth Amendment's ban on intentional race discrimination because, when the Legislature passed Act 146, it was focused upon in-person absentee voting in Milwaukee and other "large municipalities." R.234:45. That holding has several flaws.

To begin with, the district court rested its finding of discrimination on statements from *two* legislators (out of 132) "objecting to the extended hours for in-person absentee voting in Milwaukee and Madison," and one election official testifying secondhand as to what he thought the Legislature knew about the law's possible effects. R.234:42–45. The court's theory was that, by "specifically" regulating "large municipalities," the Legislature was targeting "African Americans and Latinos" by proxy. R.234:45. This does not add up. The challenged rules also affect Milwaukee's *non*-black and *non*-Hispanic voters, who make up a substantial part of the city.[5] And in Madison and many other "large municipalities," African Americans and Latinos are disproportionately *under*represented relative to national averages[6]—sometimes vastly.[7] Far stronger "large municipality" theories of intentional discrimination have failed. *See Hearne*, 185 F.3d at 776 (rejecting equal-protection argument that legislation applying only to Chicago targeted African Americans by "proxy"); *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 370 (6th Cir. 2002) (holding that, by restricting the voting rights of only Detroit residents, "the Michigan legislators sought to address a problem that they perceived to exist in [places] with large populations, not that they wanted to disenfranchise African-Americans").

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[5] U.S. Census Bureau (USCB), *QuickFacts: Milwaukee city, Wisconsin*, *available at* http://goo.gl/ZRgPJL.

[6] *E.g.*, U.S. Census Bureau, *QuickFacts: Madison city, Wisconsin*, *available at* https://goo.gl/Xq5Vrt.

[7] *E.g.*, U.S. Census Bureau, *QuickFacts: Appleton city, Wisconsin*, *available at* https://goo.gl/5kVLkb; U.S. Census Bureau, *Quickfacts: Eau Claire city, Wisconsin*, *available at* https://goo.gl/y69PNQ.

In any event, under the district court's own theory, the law was not racially motivated. The court concluded that the Legislature's "intent" had been *at worst* merely "to secure [a] partisan advantage," R.234:45, not to harm certain racial minorities, which would mean that the Legislature had been at worst indifferent to the law's supposed disparate racial impact. This point alone should have doomed any claim of discriminatory purpose. *See Bond v. Atkinson*, 728 F.3d 690, 693 (7th Cir. 2013) ("[I]t is not enough to show that" the Legislature "knew" that members of certain racial groups "would fare worse than [white voters]"; must show "that the [Legislature] adopted that policy because of, not in spite of or with indifference to," any disparate racial effect). Compounding its error, the court did not dismiss the Legislature's race-neutral justifications of the law as simply "pretextual," *David K. v. Lane*, 839 F.2d 1265, 1272 (7th Cir. 1988), but instead as "meager." R.234:45.

C. The court also concluded that the 28-day residency rule violated Section 2 of the Voting Rights Act (the Act) because, in the court's view, the rule imposed a burden on voting closely linked to "historical conditions of discrimination" caused in particular by the City of Milwaukee. R.234:107. But *Frank I* held that "units of government are responsible for *their own* discrimination" under Section 2. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (*Frank I*). While the district court seemed to recognize that Milwaukee's discrimination was "technically not the state's own discrimination," it thought the "broad remedial purpose" of the Act trumped what it described as *Frank I*'s "rigid distinction." R.234:107. But the district court had no authority to question *Frank I*'s "distinction[s]," rigid or otherwise.

The court alternatively held that it was enough that Milwaukee's discrimination "interact[ed]" with the 28-day rule to produce "disparate burdens," R.234:107–08, but such "interaction" hardly establishes the State's supposed "purpose" of curtailing minority voting, *Frank I*, 768 F.3d at 753–54. In any event, the Act's 1970 Amendments permit States to close registration 30 days before elections for federal office, which supports the conclusion that Wisconsin's less restrictive 28-day rule (which does not even apply to votes for president or vice president) is lawful under Section 2. *See* 52 U.S.C. § 20507(a).

II. The Injunction Will Irreparably Harm The State And Public, And A Stay Will Cause Plaintiffs No Harm

A stay of the district court's sweeping injunction would "simply . . . preserve the status quo." *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995). Most of the enjoined laws have been on the books for years. With fewer than 90 days remaining before the November elections, and "the state's election machinery already in progress," *Reynolds v. Sims,* 377 U.S. 533, 585 (1964), requiring clerks' offices and election administrators to discard their election manuals and comply immediately with the court's wide-ranging injunction would waste public resources and "result in voter confusion," *Purcell v. Gonzalez,* 549 U.S. 1, 4–5 (2006). Meanwhile, any risk of temporary harm to Plaintiffs from a stay is either minimal or speculative.

Declining to stay the district court's decision and injunction would prevent the State from "effectuating" its laws, itself "a form of irreparable injury," *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The election reforms targeted

in this litigation represent the will of Wisconsin's citizens. Until each of the provisions' validity has been finally determined, the popular will should not be frustrated. *See Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998) ("[T]he court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance.").

While this democratic-governance rationale is sufficient to justify a stay here as to all of the laws, failure to issue a stay will also cause law-specific harms, further reinforcing the need for immediate relief.

28-day durational residency law. Absentee ballots—which must be printed and ready for circulation by August 31, 2016, *see* Wisconsin Government Accountability Board (now "Elections Commission"), *Calendar of Election and Campaign Events* at 15, *available at* http://goo.gl/ZTK2M1—will need to inform voters what the durational-residency rule is in Wisconsin: either presumably 10 days (under the court's ruling) or 28 days (per the statute). That is because an absentee voter must certify, if appropriate, that he has not "changed [ ] residence within the state from one ward to another later than 28 days [or, under the judgment below, 10 days] before the election." Elections Commission, *Official Absentee Ballot Application/Certification (EL-122)*, *available at* http://goo.gl/udSS11. Relatedly, if the decision below is not stayed, the Commission may well need to rewrite, reprint, and recirculate the statewide voter-registration application, which presently references the 28-day rule. Elections Commission, *Wisconsin Voter Registration Application (EL-131)*, *available at*

http://goo.gl/9W8QUL ("Voter Registration Form"); *see also* DMV, *Voter Registration in Wisconsin*, *available at* http://goo.gl/YlycAz (informing voters of 28-day rule).

In addition, without a stay, the public would also suffer from a sudden (and likely temporary) change in the durational-residency rule. As the district court explained, R.234:74, knowing where to go to cast one's ballot is important; potential absentees must be allowed to make plans. Finally, changing the "28" to "10" in the registration form could raise a different problem: if the judgment were not stayed, but this Court were to reverse near election day, the State would need to determine whether registrations completed between 28 days and 10 days before the election are valid.

Three laws providing for the locations and times for in-person absentee voting. The court's micromanagement of the location and times of in-person absentee voting will impose administrative and financial burdens on local election administrators, putting pressure on clerks to open additional voting places and keep longer hours at the municipalities' expense—the avoidance of which expense was a reason for the reforms. *See* R.216:118–20; R.219:14–16, 32–33; R.218:114–15, 160–61. The court's new in-person-absentee election rules also threaten widespread voter confusion. *See Purcell,* 549 U.S. at 4–5. For example, without a stay, voters will need to figure out their municipalities' new schedules for in-person absentee voting. *See* R.219:15–16; R.216:118–20; R.218:114. And those schedules surely will differ even across regions of the State, a problem especially for residents of smaller municipalities in the Milwaukee and Madison media networks, where news of the big cities' unique voting

schedules could crowd out reports of which polling places in their own towns will be open for absentee voting and when. *See* R.218:160–61, 170–71, 179–80.

Law requiring that absentee ballots must be sent by regular mail. As noted above, on August 31, election clerks will mail absentee ballots to voters with valid requests on file. *See supra* p. 15. Absent a stay, clerks will need to start emailing and faxing absentee ballots and also process the ballots that are returned via those methods. *Supra* pp. 5, 10. Both tasks will drain clerk-office resources.

Two laws relating to voting by college students. The injunction will have a similarly disruptive effect on the rule requiring dorm lists to confirm students' citizenship. The registration form currently in circulation throughout the State instructs student applicants that they may present a student "ID . . . coupled with an on-campus housing listing . . . that denotes US Citizenship." *Voter Registration Form* at 2. Unless the judgment is stayed, the Elections Commission will need to reprint and recirculate the corrected version.

In addition, changing the list of permissible IDs will also cause harm to the State and public. As voters begin receiving their absentee ballots, they will need to know what forms of ID may be presented with their votes. As of today, notices on official state election websites, including the posted instructions for submitting absentee ballots, specify in detail what forms of ID are acceptable. Elections Commission, *Application for Absentee Ballot (EL-121)*, *available at* http://goo.gl/yZOACv. Absent a stay, these and other forms (including the absentee ballots themselves) would likely need to be altered—and immediately.

CONCLUSION

The judgment and permanent injunction should be stayed pending appeal.

Dated: August 12, 2016.

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2016, I filed the foregoing Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: August 12, 2016

s/Misha Tseytlin
MISHA TSEYTLIN

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORDER

August 22, 2016

Before

FRANK H. EASTERBROOK, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

Nos. 16-3091 &16-3083	ONE WISCONSIN INSTITUTE, INC., et al., Plaintiffs - Appellees, Cross -Appellants, v. MARK L. THOMSEN,et al., Defendants - Appellants, Cross - Appellees.
Originating Case Information:	
District Court No: 3:15-cv-00324-jdp Western District of Wisconsin District Judge James D. Peterson	

The following are before the court:

1. **DEFENDANTS-APPELLANTS, CROSS-APPELLEES' EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL** , filed on August 12, 2016, by counsel for the defendants.
2. **PLAINTIFF-APPELLEES, CROSS-APPELLANTS' OPPOSITION TO DEFENDANT-APPELLANTS, CROSS-APPELLEES' EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL,** filed on August 18, 2016, buy counsel for the plaintiffs.
3. **DEFENDANTS-APPELLANTS, CROSS-APPELLEES' REPLY IN SUPPORT OF THE EMERGENCY MOTION TO STAY THE INJUNCTION PENDING APPEAL**, filed on August 19, 2016, by counsel for the defendants.

IT IS ORDERED the motion to stay is **DENIED.**

form name: **c7_Order_3J**(form ID: **177**)

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 16-3003 & 16-3052

RUTHELLE FRANK, *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, *et al.*,

Defendants-Appellants, Cross-Appellees.

Nos. 16-3083 & 16-3091

ONE WISCONSIN INSTITUTE, INC., *et al.*,

Plaintiffs-Appellees, Cross-Appellants,

v.

MARK L. THOMSEN, *et al.*,

Defendants-Appellants, Cross-Appellees.

On Petitions for Initial Hearing En Banc

AUGUST 26, 2016

Before WOOD, *Chief Judge*, and POSNER, FLAUM, EASTERBROOK, KANNE, ROVNER, SYKES, and HAMILTON, *Circuit Judges*.*

PER CURIAM. Before us are two sets of appeals and cross-appeals, each of which concerns Wisconsin's law requiring voters to have qualifying photo identification. In each matter, one originating in the Eastern District of Wisconsin and the other in the Western District of Wisconsin, the plaintiffs have petitioned for initial review en banc. We have consolidated their petitions for the purposes of this order. The plaintiffs argue that only initial en banc treatment will permit a decision in time for the court's conclusions to be put into effect for the election upcoming in November 2016. It is questionable whether action on that schedule is feasible, given that Wisconsin will start printing absentee ballots at the end of this month. We will assume for the sake of argument, however, that this obstacle alone is not enough to deny the petitions.

There is a more important concern, however, which has to do with the regularity of the judicial process. Whether this court should try to resolve the parties' disputes on such a short schedule depends in part on whether qualified electors will be unable to vote under Wisconsin's current procedures. In evaluating that question, we must take account of the conclusions reached by the district court in the Western District of Wisconsin in *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 U.S. Dist. LEXIS 100178 (W.D. Wis. July 29, 2016). The Eastern District of Wisconsin, in the decision under review in Nos. 16-3003 and 16-3052, concluded that

* Circuit Judge Williams took no part in the consideration or decision on these petitions.

every registered voter should be allowed to vote if he or she signs an affidavit stating that obtaining a qualifying photo ID would be unreasonably hard. A panel of this court has stayed that order. See Order, *Frank v. Walker*, Nos. 16-3003 & 16-3052 (7th Cir. Aug. 10, 2016). The Western District, by contrast, declined to adopt the affidavit procedure but required Wisconsin to reform its ID Petition Process (IDPP), revised in May in response to this court's decision in *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (*Frank II*).

Frank II held that "[t]he right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily", and that the state may not frustrate this right for any eligible person by making it unreasonably difficult to obtain a qualifying photo ID. *Id.* at 386. The district court in *One Wisconsin Institute* concluded from this that an eligible voter who submits materials sufficient to initiate the IDPP is entitled to a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector. The court in *One Wisconsin Institute* also held that the state must inform the general public that those who enter the IDPP will promptly receive a credential valid for voting, unless readily available information shows that the petitioner is not a qualified elector entitled to such a credential. 2016 U.S. Dist. LEXIS 100178 at *181–82. This court denied the State's motion to stay the Western District's injunction pending appeal. See Order, *One Wis. Inst., Inc. v. Thomsen*, Nos. 16-3083 & 16-3091 (7th Cir. Aug. 22, 2016).

The State assures us that the temporary credentials required in the *One Wisconsin Institute* decision will indeed be

available to all qualified persons who seek them. In its response to the petition for initial hearing en banc in Nos. 16-3003 and 16-3052, it said this: "[T]he State has already voluntarily accommodated any concerns relating to the November 2016 election. Specifically, Wisconsin has enacted a rule that requires the Division of Motor Vehicles ('DMV') to mail *automatically* a free photo ID to anyone who comes to DMV one time and initiates the free ID process. *See* Wis. EmR1618, § 10. No one must present documents, that, for some, have proved challenging to acquire; no one must show a birth certificate, proof of citizenship, and the like. *Id*. § 6." Resp. to Pet. For Initial Hr'g En Banc at 1, *Frank v. Walker*, Nos. 16-3052 & 16-3003 (7th Cir. Aug. 8, 2016) (emphasis in original).

Given the State's representation that "initiation" of the IDPP means only that the voter must show up at a DMV with as much as he or she has, and that the State will not refuse to recognize the "initiation" of the process because a birth certificate, proof of citizenship, Social Security card, or other particular document is missing, we conclude that the urgency needed to justify an initial en banc hearing has not been shown. Our conclusion depends also on the State's compliance with the district court's second criterion, namely, that the State adequately inform the general public that those who enter the IDPP will promptly receive a credential for voting, unless it is plain that they are not qualified. The Western District has the authority to monitor compliance with its injunction, and we trust that it will do so conscientiously between now and the November 2016 election.

On these understandings, the petitions for initial hearing en banc are DENIED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NOTICE OF ISSUANCE OF MANDATE

July 29, 2020

To: Gina M. Colletti
UNITED STATES DISTRICT COURT
Eastern District of Wisconsin
Milwaukee , WI 53202-0000

No. 16-3003	RUTHELLE FRANK, et al., Plaintiffs - Appellees v. TONY EVERS, in his official capacity as Governor of the State of Wisconsin, et al., Defendants - Appellants
No. 16-3052	RUTHELLE FRANK, et al., Plaintiffs - Appellants v. TONY EVERS, in his official capacity as Governor of the State of Wisconsin, et al., Defendants - Appellees
No. 16-3083	ONE WISCONSIN INSTITUTE, INC., et al., Plaintiffs - Appellants v. MARK L. THOMSEN, et al.,

	Defendants - Appellees
No. 16-3091	ONE WISCONSIN INSTITUTE, INC., et al., Plaintiffs - Appellees v. MARK L. THOMSEN, et al., Defendants - Appellants

Originating Case Information:
District Court No: 2:11-cv-01128-LA Eastern District of Wisconsin District Judge Lynn Adelman

Originating Case Information:
District Court No: 2:11-cv-01128-LA Eastern District of Wisconsin District Judge Lynn Adelman Clerk/Agency Rep Gina M. Colletti

Originating Case Information:
District Court No: 3:15-cv-00324-jdp Western District of Wisconsin

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

RECORD ON APPEAL STATUS: No record to be returned

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

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Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: **Received by:**

_____ _____

form name: **c7_Mandate**(form ID: **135**)