

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

DEMOCRATIC NATIONAL COMMITTEE, <i>et al.</i> , Plaintiffs, v. MARGE BOSTELMANN, <i>et al.</i> , Defendants, and REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i> , Intervening Defendants.	Civil Action No. 3:20-cv-249-wmc
SYLVIA GEAR, <i>et al.</i> , Plaintiffs, v. MARGE BOSTELMANN, <i>et al.</i> , Defendants, and REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i> , Intervening Defendants.	Civil Action No. 3:20-cv-278-wmc
REVEREND GREG LEWIS, <i>et al.</i> , Plaintiffs, v. MARGE BOSTELMANN, <i>et al.</i> , Defendants, and REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i> , Intervening Defendants.	Civil Action No. 3:20-cv-284-wmc

**MOTION OF PLAINTIFFS DEMOCRATIC NATIONAL COMMITTEE AND
DEMOCRATIC PARTY OF WISCONSIN FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Democratic National Committee and Democratic Party of Wisconsin, pursuant to Fed. R. Civ. P. 15(a)(2), respectfully move this Court for leave to file the accompanying Second Amended Complaint for Declaratory and Injunctive Relief against defendants Marge Bostelmann, Julie M. Glancy, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen, all sued in their official capacities as members of the Wisconsin Elections Commission, and against intervening defendants Republican National Committee, Republican Party of Wisconsin, and Wisconsin Legislature. “The court should freely give leave [to amend] when justice so requires,” *id.*, and justice so requires in this case.

BACKGROUND

Plaintiffs filed their original complaint in this case just over six weeks ago, on March 18, 2020, challenging multiple provisions of Wisconsin law that are preventing Wisconsin citizens from fully exercising their constitutional right to vote in the midst of the COVID-19 pandemic. ECF No. 1. Plaintiffs also filed a motion for a temporary restraining order and preliminary injunction focused on the upcoming April 7 election, which this Court granted in part and denied in part (without prejudice) on March 20. ECF No. 37. Plaintiffs then filed an amended complaint as of right on March 26, followed by another motion for preliminary injunction on March 27, also focused on the April 7 election. ECF Nos. 55, 61.

Although this Court on April 2 denied plaintiffs’ March 27 motion in some respects (without prejudice), in other respects it granted important relief that enabled tens of thousands of voters to register and cast their ballots. And although the Court’s preliminary injunction was further narrowed on appeal by the U.S. Court of Appeals for the Seventh Circuit and the Supreme Court, one of the most important parts of this Court’s injunctive relief survived intact: the Court’s order enjoining defendants “from enforcing the requirement under Wis. Stat. § 6.87(6) that

absentee ballots must be received by 8:00 p.m. on election day to be counted,” and extending that deadline for receipt of absentee ballots by six days, provided that such ballots were mailed and postmarked on or before election day. *See Democratic Nat’l Comm. v. Bostelmann*, Civ. No. 20-cv-249-wmc, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020), *clarified*, ECF No. 122 (W.D. Wis. Apr. 3, 2020), *stayed in part sub nom. Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 140 S. Ct. 1205 (2020). The defendants and intervening defendants did not challenge this extension of the ballot-receipt deadline, and the Supreme Court relied on this extension in denying “an additional extension, which would allow voters to mail their ballots after election day.” 140 S. Ct. at 1208. This Court’s order extending the ballot-receipt deadline from April 7 to April 13 appears to have resulted in over 142,000 Wisconsin citizens being able to cast their absentee ballots by election day and have those ballots counted, thereby avoiding the need to vote in-person and risk exposure to the COVID-19 virus. *See* Second Amended Compl. (SAC) ¶ 5 & n.11.

Despite this Court’s important relief, the way in which Wisconsin’s April 7 election was conducted has been widely condemned as a voting rights and public health fiasco, as detailed at length in the accompanying Second Amended Complaint at ¶¶ 1-3, 34-74. Thousands of Wisconsin citizens were forced to stand in long lines for hours in order to cast their ballots, many wearing masks, gloves, and other protective gear as they congregated together to vote in the midst of the worst pandemic in over a century. As of April 28, 52 in-person voters and poll workers already had tested positive for COVID-19 statewide. *Id.* ¶ 3 & n.10. There also were critical breakdowns in Wisconsin’s absentee-voting process, with thousands of voters never even receiving their requested ballots in time to vote by election day, thus forcing them either to go to the polls during the pandemic and risk exposure to the COVID-19 virus or be disenfranchised

altogether. Nearly 12,000 absentee ballots that were received and returned were rejected for having “insufficient” witness certifications, and nearly 4,700 more were rejected because they were not received by election officials until after the April 13 deadline for receipt.¹ One investigation “into Wisconsin’s missing ballot crisis reveals a system leaking from all sides,” including through “[i]nadequate computer systems, overwhelmed clerks and misleading ballot information [that] hampered Wisconsin’s historic—and historically troubling—spring election.”²

Now that the April 7 election has passed, intervening defendant Wisconsin Legislature (but not the defendants or other intervening defendants) has moved to dismiss plaintiffs’ amended complaint (ECF No. 55) in its entirety, arguing (1) “the *DNC* Plaintiffs’ claims in their Amended Complaint are now moot, since the April 7, 2020 Spring Election ‘ha[s] come and gone by,’” and (2) dismissal is required on “*Burford* abstention grounds,” named after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). ECF No. 197 at 1, 3 (citation omitted). As this Court will recall, but as the Legislature does not acknowledge, the Court already has once rejected the Legislature’s *Burford* abstention arguments in the leadup to the April 7 election. *See Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1320819, at **7-8 n.12 (W.D. Wis. Mar. 20, 2020) (“*Burford* abstention is not an appropriate reason to duck this court’s obligation to protect voters’ rights”).

¹ J.R. Ross, 22,820 Wisconsin absentee ballots were rejected for various reasons, WISN 1130 (Apr. 18, 2020), <https://newstalk1130.iheart.com/content/2020-04-18-22820-wisconsin-absentee-ballots-were-rejected-for-various-reasons/>.

² Daphne Chen *et al.*, ‘They should have done something’: Broad failures fueled Wisconsin’s absentee ballot crisis, investigation shows, Milwaukee J. Sentinel (Apr. 21, 2020), <https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/> The investigation was conducted by the Milwaukee Journal Sentinel, the PBS series FRONTLINE, and Columbia Journalism Investigations.

ARGUMENT

Under Rule 15(a)(2), “[t]he court should freely give leave [to amend] when justice so requires.” That means a court should “freely” allow amendment *unless* there is “some reason—futility, undue delay, undue prejudice, or bad faith—for denying leave to amend.” *Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519, 522 (7th Cir. 2015); *see also Holder v. Fraser Shipyards, Inc.*, 288 F. Supp. 3d 911, 933 (W.D. Wis. 2018) (“district courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile”) (citations omitted). Plaintiffs will first explain the purpose of their proposed amendments, and then demonstrate that *none* of these potential grounds for denying leave to amend apply in this case, which was only first filed slightly more than six weeks ago.

The Legislature’s mootness argument. Although the now-infamous April 7 Spring Election has passed, several more elections will be held in Wisconsin in 2020, culminating in the November 3 General and Presidential Election. Yet the Legislature contends this case should now be dismissed in its entirety because it is moot, claiming that plaintiffs have “alleged constitutional violations *only* with respect to this [April 7] Spring Election,” and have “challenged election laws ... *only for this past Spring Election.*” ECF No. 197 at 3 (emphasis in original). Put another way, the Legislature claims that plaintiffs “have not specifically challenged the application of the relevant election laws here to any specific election in the future.” *Id.* at 5.

The Legislature’s claims are false, and the exact opposite of what the plaintiffs’ pleadings actually say. Plaintiffs’ original and amended complaints clearly and repeatedly ask for injunctive relief both with respect to the April 7 election and for “*any election that occurs while this crisis continues.*” ECF No. 55 ¶ 7 (emphasis added); *see id.* at 19, pts. C-E (asking for various injunctive

relief to extend “*until the COVID-19 crisis is over*”) (emphasis added); *see also id.* ¶ 44 (seeking injunctive relief for “the upcoming April 7, 2020 [election], *as well as other elections taking place during the COVID-19 crisis*”) (emphasis added).

Although the present amended complaint (ECF No. 55) should be more than sufficient to withstand the Legislature’s contrived mootness challenge, plaintiffs’ proposed Second Amended Complaint specifies in even more unmistakable terms that plaintiffs have always sought, and continue to seek, injunctive relief applicable to any and all elections—up to and including the November 3, 2020 General and Presidential Election—that are held while the COVID-19 crisis continues in Wisconsin and until that crisis is over. *See SAC* ¶¶ 6, 8, 33, 45-46, 67, 90, 97. That should dispose of the Legislature’s mootness defense. Contrary to the Legislature’s argument, the “capable of repetition, yet evading review exception to mootness” (ECF No. 197 at 4) does not apply because plaintiffs are seeking prospective relief relevant to upcoming elections in Wisconsin over the next six months. Plaintiffs are not seeking to establish liability because of past elections, but to enjoin *prospective* harms because of how the challenged statutes are likely to impact the *upcoming* elections in 2020.

The Legislature appears to argue “there is no ‘reasonable expectation’” that the pandemic will affect these remaining 2020 elections, ECF No. 197 at 5 (citation omitted), which is squarely refuted by the public health evidence and in any event is a question of fact not suitable for resolution at the pleadings stage. *See SAC* ¶ 31 (warning by Director of Centers for Disease Control of a potential second and even deadlier wave of COVID-19 this fall). And the Legislature’s attempt to use mootness doctrine to force plaintiffs to litigate their *federal* constitutional voting rights claims “before the state courts or the Wisconsin Elections Commission,” ECF No. 197 at 5, is simply an attempt to cloak their *Burford* abstention arguments

in mootness garb. As emphasized in the *Burford* discussion below, federal constitutional claims are entitled to be litigated in federal court. *See infra* at 9-10.³

Incorporation of new facts and law. Plaintiffs have substantially revised and expanded their previous amended complaint to account for all of the factual and legal developments since that pleading was filed on March 26, especially the April 7 Spring Election itself, the litigation surrounding it, and the many constitutional flaws regarding the conduct and consequences of that election. The intervening defendants argued in March that many of plaintiffs’ concerns were remote, speculative, and unfounded; the Second Amended Complaint demonstrates otherwise. The new pleading alleges in more specific detail how the challenged provisions operate to interfere unduly with voting. It also fine-tunes plaintiffs’ claims and requested relief to take account of the rulings over the past month by this Court, the Seventh Circuit, and the Supreme Court. Plaintiffs continue to challenge all of the same statutory provisions as before, but have amended and in some instances narrowed those challenges in light of intervening facts and judicial decisions.

Additional requested relief. Plaintiffs’ proposed Second Amended Complaint adds an additional challenge growing directly out of how the April 7 election was conducted: defendants’ failure to provide sufficient financial, personnel, and other resources to ensure an adequate number

³ The Legislature’s reliance (at ECF No. 197 at 2-3, 5) on *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517 (7th Cir. 2001), is far off base. That case involved a claim that the state elections board had violated the federal constitution in a just-concluded election by refusing to certify and place on the ballot the Libertarian Party’s slate of candidates as the result of the board’s allegedly illegal striking of thousands of signatures from the party’s nominating petition. The Seventh Circuit held that plaintiffs’ claim for “declaratory relief” was moot because it did *not* involve a challenge to “any statutory provision that will continue to operate past the [just-concluded] election,” but instead was a challenge to the procedural fairness of “a one-time decision” rejecting a specific nominating petition in a now-concluded election. *Id.* at 529. This case is just the opposite—it challenges the continuing application of specific statutes in elections to be held over the next six months, and seeks to require defendants to undertake certain actions *in those upcoming elections*. *Tobin for Governor* is a poor choice of supporting precedent.

of early in-person absentee voting sites and election-day polling places throughout the State to accommodate in-person voters in a safe and secure manner. See SAC ¶¶ 7, 9, 83. This is not a new count, but bolsters the three existing counts (*Anderson/Burdick*, due process, and equal protection). Although Wisconsin has delegated its authority to “establish[]” polling places to local governing bodies, Wis. Stats. § 5.25(2), the State cannot delegate its duty to ensure safe and sufficient in-person registration and voting facilities for all voters throughout the State. The defendants bear the statutory “responsibility for the administration of” Wisconsin’s election laws, Wis. Stat. § 5.05(1), which at minimum requires defendants to develop and implement plans to coordinate available state, local, and private resources to ensure that all voters throughout the State are able to cast early in-person absentee votes and to vote in-person on election day in a safe and secure manner.

Turning to the Rule 15(a)(2) analysis, none of the reasons this Court has identified for potentially denying leave to amend—“undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile”—applies to these plaintiffs or the proposed Second Amended Complaint. *Holder*, 288 F. Supp. 3d at 933. This litigation is only slightly more than six weeks old, and plaintiffs are seeking leave to amend less than three weeks following the April 7 election, so there can be no credible claim here of undue delay. The Court has not yet set a trial date or pretrial schedule, and discovery has not yet even commenced, so there can be no genuine claim of undue prejudice. Nor can plaintiffs fairly be accused of bad faith, dilatory motive, or repeated failures to cure deficiencies.

That leaves the possible claim of “futility” of amendment. The only grounds for dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) that the Legislature has identified are (1) mootness, and (2) *Burford* abstention. See ECF No. 197. Under the Legislature’s theory that this case is

moot because the April 7 election has passed, the Second Amended Complaint is hardly futile, but necessary to seek relief in the remaining 2020 Wisconsin elections. As shown above, plaintiffs' challenges in their prior pleadings clearly are not moot, and the Second Amended Complaint makes that even plainer than it already was.

As for *Burford*, it is an entirely *discretionary* doctrine—in certain “narrow” and “extraordinary circumstances,” a district court has the discretion, but not the obligation, to dismiss a federal case where it unduly interferes with “complex state administrative processes.” *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 727 (1996).⁴ There is no way a federal claim in federal court can be deemed to be “futile” at the leave-to-amend stage simply because the Court *might*, after full consideration, decide to exercise its “narrow” discretion under *Burford* to abstain.

Moreover, this Court already *has* decided that “*Burford* abstention is not an appropriate reason to duck this court’s obligation to protect voters’ rights.” 2020 WL 1320819, at **7-8 n.12. Far from explaining why the Court should reach a different decision this time around, the Legislature does not even acknowledge the Court’s prior rejection of *Burford*. In any event, this is precisely the type of case in which the “strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court” outweighs any alleged countervailing state interests. *Quackenbush*, 517 U.S. at 728. “[T]he federal issues in this case eclipse any state issues

⁴ Just because a State has an administrative process like the WEC’s regulation of elections does not suggest that federal abstention is appropriate. “While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a ‘potential for conflict’ with state regulatory law or policy.” *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989); *see also Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) (“the mere existence of a statewide regulatory regime is not sufficient” for *Burford* to apply).

that might arise.” *Hammer v. U.S. Dep’t of Health & Human Servs.*, 905 F.3d 517, 532 (7th Cir. 2018). Where the issue is a State’s “adherence” to federal constitutional requirements regarding voting rights, “*Burford* abstention is inapplicable.” *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1136 (7th Cir. 1981) (reapportionment claim). Courts repeatedly have held that *Burford* abstention is inappropriate when federal voting rights are at issue. See, e.g., *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) (“voting rights cases are particularly inappropriate for abstention”); *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981) (abstention inappropriate where the issue was “nothing less than the fundamental right to vote”); *Bogaert v. Land*, 675 F. Supp. 2d 742, 747 (W.D. Mich. 2009) (citing additional cases holding that *Burford* abstention is “wholly inapplicable” to federal constitutional challenges to state election laws).

CONCLUSION

Because the interests of justice favor leave to amend, this Court should grant plaintiffs’ motion and order that the accompanying Second Amended Complaint be accepted for filing.

Dated this 30th day of April, 2020.

Respectfully submitted,

/s/ John Devaney

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**SECOND AMENDED COMPLAINT OF PLAINTIFFS DEMOCRATIC NATIONAL
COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN
FOR DECLARATORY AND INJUNCTIVE RELIEF**

**SECOND AMENDED COMPLAINT OF DNC AND DPW FOR DECLARATORY AND
INJUNCTIVE RELIEF - 1**

Plaintiffs DEMOCRATIC NATIONAL COMMITTEE and DEMOCRATIC PARTY OF WISCONSIN file this Second Amended Complaint for Declaratory and Injunctive Relief against Defendants MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as Wisconsin Elections Commissioners, and against Intervening Defendants REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF WISCONSIN, and the WISCONSIN LEGISLATURE, and allege as follows:

NATURE OF THE CASE

1. Wisconsin's April 7, 2020 Spring Election was a voting rights and public health fiasco. People throughout the nation were horrified by images of thousands of Wisconsin citizens forced to stand in long lines for hours in order to cast their ballots, many wearing masks, gloves, and other protective gear as they congregated together to vote in the midst of the worst pandemic in over a century. Virtually every other jurisdiction in the United States has thus far postponed in-person voting since mid-March because of the obvious public health risks. But due to Wisconsin's ongoing political dysfunction, the apparent desire of some to use a public health emergency to suppress the vote, and other factors, the State proceeded with the April 7 election in the face of scathing criticism from throughout the country. Equally shocking was the breakdown in Wisconsin's absentee-voting process, with thousands of voters never even receiving their requested ballots in time to vote by election day, thus forcing them either to go to the polls during the pandemic and risk exposure to the COVID-19 virus or be disenfranchised altogether.

2. Plaintiffs support in-person voting options that can be conducted in a safe and secure manner. That did not occur in Wisconsin's April 7 election. The decision to proceed with the election and the manner in which it was conducted have been branded a "travesty" and "an

abomination, a civic tragedy that never should have occurred”;¹ “insane”;² “cruel”;³ “brazen”;⁴ “nightmarish” and “scandalous”;⁵ “appalling” and “terrifying”;⁶ “a dangerous spectacle that forced voters to choose between participating in an important election and protecting their health”;⁷ and “[o]ne of the most shameful chapters in American’s long history of voter suppression,” requiring voters “to make an unconscionable choice between their lives and their citizenship.”⁸ These harms fell disproportionately and with especially brutal impact on voters of color and economically disadvantaged voters.⁹ The title of one article has urged: “Never Forget Wisconsin.” *Supra* n.8.

¹ Ned Foley, *Worrying about Wisconsin, While Waiting for Its Election Returns*, Medium (Apr. 12, 2020), <https://medium.com/@Nedfoley/worrying-about-wisconsin-while-waiting-for-its-election-returns-9dc94334c8a6>.

² The Editorial Board, *You Shouldn’t Have to Risk Your Life to Vote*, N.Y. Times (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/opinion/wisconsin-primary-coronavirus.html>.

³ Leah Litman, *The Supreme Court’s Wisconsin Decision Is a Terrible Sign for remaining*, The Atlantic (Apr. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/04/supreme-courts-hypocrisy-going-get-americans-killed/609598/?utm_source=newsletter&utm_medium=email&utm_campaign=atlantic-daily-newsletter&utm_content=20200407&silverid-ref=MzEwMTU3MjAxODkzS0.

⁴ Zak Cheney-Rice, *Wisconsin Supreme Court Justices Voted Absentee Before Making Everyone Else Vote in Person*, New York Magazine (Apr. 14, 2020), <https://nymag.com/intelligencer/2020/04/wisconsin-voters-braved-covid-while-justices-voted-absentee.html>.

⁵ Ed Gilgore, *After Its Disturbing Election Day, What Happens Next in Wisconsin?*, New York Magazine (Apr. 8, 2020), <https://nymag.com/intelligencer/2020/04/after-a-disturbing-election-day-now-what-in-wisconsin.html>.

⁶ Miela Fetaw, *‘I Could Get the Virus If I Vote’: Wisconsin’s Terrifying Election Day*, The Daily Beast (Apr. 7, 2020), <https://www.thedailybeast.com/people-are-going-to-die-in-this-election-wisconsin-votes-amid-coronavirus-pandemic-1>.

⁷ Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html>.

⁸ Sherrilyn Ifill, *Never Forget Wisconsin*, Slate (Apr. 8, 2020, 6:46 PM), <https://slate.com/news-and-politics/2020/04/never-forget-wisconsin.html>.

⁹ See Fetaw, *supra* n.6; Scott Bauer, *Milwaukee’s black community hit hard by COVID-19 pandemic*, Wisconsin State Journal (Mar. 28, 2020),

3. On April 28, three weeks after the election, the Wisconsin Department of Health Services reported that 52 people who voted in person or worked the polls on April 7 have tested positive for COVID-19 thus far. These numbers may grow.¹⁰

4. Plaintiffs filed this suit on March 18, 2020 in an effort to avoid this calamity and ensure that Wisconsin voters—many of whom are their members and constituents—would be able to fully exercise their constitutional right to vote in the midst of this unprecedented public health crisis. Although this Court denied plaintiffs’ preliminary injunction motion in some respects (without prejudice), in other respects it granted important relief that enabled tens of thousands of voters to register and cast their ballots. And although the Court’s preliminary injunction was further narrowed on appeal by the U.S. Court of Appeals for the Seventh Circuit and the Supreme Court, one of the most important parts of this Court’s injunctive relief survived intact: the Court’s order enjoining defendants “from enforcing the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted,” and extending that deadline for receipt of absentee ballots by six days, provided that such ballots were mailed and postmarked on or before election day. *See Democratic Nat’l Comm. v. Bostelmann*, Civ. No. 20-cv-249-wmc, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020), *clarified*, ECF No. 122 (W.D. Wis. Apr. 3, 2020), *stayed in part sub nom. Democratic Nat’l Comm. v. Republican Nat’l Comm.*,

https://madison.com/wsj/news/local/health-med-fit/milwaukees-black-community-hit-hard-by-covid-19-pandemic/article_8cf82962-0e17-5044-aba9-ecdd9b54b65a.html; David Bowen, *Wisconsin’s primary subjected people of color to yet another Covid-19 disadvantage*, *The Guardian* (Apr. 8, 2020), <https://www.theguardian.com/us-news/2020/apr/08/wisconsin-coronavirus-black-communities-inequality>.

¹⁰ Associated Press, *The Latest: 52 coronavirus cases may be linked to spring election* (Apr. 28, 2020), <https://apnews.com/b1503b5591c682530d1005e58ec8c267>. “Several” of these people reported additional possible exposures, so it is unclear whether the election itself caused them to contract the virus. If they already had contracted the virus prior to the election, they may also have spread it to others at the polls on April 7.

Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). The defendants and intervening defendants did not challenge this extension of the ballot-receipt deadline, and the Supreme Court relied on this extension in denying “an additional extension, which would allow voters to mail their ballots after election day.” 2020 WL 1672702, at *2.

5. This Court’s April 2 preliminary injunction extending the ballot-receipt deadline from April 7 to April 13 appears to have resulted in over 142,000 Wisconsin citizens being able to cast their ballots by election day—ballots that would otherwise have been rejected and, thus, voters who would have been disenfranchised.¹¹

6. Although the disastrous April 7 Spring Election is now past, several more elections will be held in Wisconsin in 2020, culminating in the November 3 General and Presidential Election. Contrary to the Wisconsin Legislature’s false claims in a recently filed motion to dismiss, *see* ECF No. 197, plaintiffs’ original and amended complaints clearly and repeatedly ask for injunctive relief both with respect to the April 7 election *and* for “**any election that occurs while this crisis continues.**” ECF No. 55 ¶ 7 (emphasis added); *see id.* at 19, pts. C-E (asking for various injunctive relief to extend “**until the COVID-19 crisis is over**”) (emphasis added); *see also id.* ¶ 44 (seeking injunctive relief for “the upcoming April 7, 2020 [election], **as well as other elections taking place during the COVID-19 crisis**”) (emphasis added). To reiterate, plaintiffs seek injunctive relief applicable to *any and all elections*—up to and including the November 3

¹¹ The data regarding ballots that arrived between April 8 and April 13 can be found at <https://elections.wi.gov/blog>; *see also* <https://electionlawblog.org/?p=110746>. As of 8 p.m. on April 7, there had been 990,129 absentee ballots returned. <https://elections.wi.gov/blog>. WEC reports that, ultimately, 1,132,923 absentee ballots were returned and counted, suggesting that 142,794 ballots were able to be counted that would not otherwise have been. *See* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Ballot%20Data%20as%20of%20April%2017%202020.pdf>.

election—that are held while the COVID-19 crisis continues in Wisconsin and until that crisis is over.

7. Plaintiffs in this Second Amended Complaint challenge the same statutory requirements for registering to vote and absentee voting that they challenged in their prior pleadings, *see* ECF Nos. 1, 55, and add an additional challenge regarding early in-person absentee voting and in-person voting on election day. The previously challenged provisions are: (a) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day for ballots to be counted (“Election Day Receipt Deadline”), Wis. Stat. § 6.87; (b) the requirement that for an absentee ballot to be counted, the absentee voter must have a witness certify to the truth of the information the voter provides on the ballot, *id.* § 6.87(2); (c) the requirement that copies or scans of photo identification accompany absentee ballot applications, *id.* § 6.86; (d) the requirement that copies of proof of residence accompany electronic and by-mail voter registration, *id.* § 6.34; and (e) the by-mail and electronic registration deadlines in *id.* § 6.28(1), which require the registration to “be delivered to the office of the municipal clerk or postmarked no later than the 3rd Wednesday preceding the election.” The additional challenge is to the defendants’ failure to provide sufficient financial, personnel, and other resources to ensure an adequate number of early in-person absentee voting sites and election-day polling places throughout the State to accommodate in-person voters in a safe and secure manner. These challenges are collectively referred to as the “challenged matters” or “challenged provisions.”

8. Each of the challenged matters, on its own, continues to pose significant risks to voters seeking to exercise their right to vote in the remaining 2020 elections (and any other election that occurs while the pandemic continues). Collectively, these challenged matters will ensure that many Wisconsin citizens (a disproportionate number of whom are voters of color or live in

economically disadvantaged communities) will be unable to vote or will have their validly cast ballots discarded. Without injunctive relief from this Court, thousands of Wisconsin voters *at minimum* will likely be disenfranchised again, as occurred in the April 7 election. Or, as also happened in the April 7 election, many other voters will refuse to be disenfranchised, will vote in-person, and will risk exposure to the COVID-19 virus. These are irreparable injuries.

9. Accordingly, plaintiffs file this Second Amended Complaint to ensure that Wisconsin voters—many of whom are their members and constituents—are able to fully exercise their right to vote in the midst of this unprecedented crisis. Plaintiffs seek expanded injunctive relief enjoining the Election Day Receipt Deadline and allowing all ballots postmarked¹² on or before an election day but received within a minimum of 10 days thereafter to be counted; enjoining in part the requirement that a voter submitting an absentee ballot have a witness certify to the accuracy of the voter’s information on the ballot; suspending in part the requirements that copies of documents and photo IDs be included with voter registration and absentee ballot applications; extending the deadline for electronic and by-mail voter registration to the Friday before an election, or whenever in-person absentee voting ends; and requiring defendants to take immediate steps to ensure there will be an adequate number of early in-person absentee voting sites and election-day polling places throughout the State to accommodate in-person voters in a safe and secure manner.

¹² The term “postmark” refers to any type of imprint applied by the U.S. Postal Service to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before election day unless the preponderance of the evidence demonstrates it was mailed after election day.

JURISDICTION AND VENUE

10. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation, under color of state law, of a right secured by the United States Constitution.

11. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

12. This Court has personal jurisdiction over the defendants, the Commissioners of the Wisconsin Elections Commission (WEC), who are sued in their official capacities only. The intervening defendants have voluntarily submitted to the Court's jurisdiction.

13. Venue is proper in the U.S. District Court in the Western District of Wisconsin pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events that gave rise to plaintiffs' claims occurred there.

14. This Court has the authority to enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

15. This Court has continuing jurisdiction to enter and enforce additional injunctive relief despite the intervening defendants' appeal of this Court's April 2 and 3 interlocutory orders on plaintiffs' motion for a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). This Court's April 2 and 3 orders pertained only to the April 7 election. *Bostelmann*, 2020 WL 1638374, at *22 (extending receipt deadline to April 13 and request deadline to April 3); ECF No. 122 at 2 (enjoining release of unofficial results until April 13). To the extent this Court's April 2 order extended beyond the April 7 election—for example, preventing defendants “from enforcing Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so,”

2020 WL 1638374, at *22, the Seventh Circuit’s stay does not prevent this Court from reconsidering the issue. The Seventh Circuit stayed this provision of this Court’s order because “the district court did not give adequate consideration to the state’s interests” when suspending this requirement. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546, at **3-4. The Seventh Circuit did not declare that suspension of this rule was inappropriate under all circumstances. In fact, the Seventh Circuit suggested that a modified witness requirement might be appropriate. *Id.* at *4. The United States Supreme Court did not consider this issue. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 2020 WL 1672702, at *1 (order stayed only “to the extent it requires the State to count absentee ballots postmarked after April 7, 2020”).

PARTIES

16. Plaintiff the Democratic National Committee (DNC) is a national committee, as that term is defined by and used in 52 U.S.C. § 30101, dedicated to electing local, state, and national candidates of the Democratic Party to public office throughout the United States. In particular, the DNC is charged with facilitating the Democratic presidential nominating process, which culminates in the 2020 Convention that is scheduled to take place in Milwaukee, Wisconsin in August.

17. The DNC has members and constituents across the United States, including eligible voters in Wisconsin whose rights to vote have been and will continue to be severely burdened and denied outright by the challenged matters during the current coronavirus crisis.

18. Plaintiff the Democratic Party of Wisconsin (DPW) is a state committee, as defined by 52 U.S.C. § 30101(15), dedicated to electing candidates of the Democratic Party to public office throughout the State of Wisconsin. The DPW has members and constituents from across

Wisconsin, including many voters whose rights to vote have been and will continue to be severely burdened and denied outright by the challenged matters during the current coronavirus crisis.

19. As part of their missions, both plaintiffs work to ensure that their members and constituents are able to effectively exercise their right to vote for their chosen candidates. Plaintiffs are directly harmed by the challenged matters, which by making it more difficult for plaintiffs' members and constituents to register and vote, have required and will continue to require plaintiffs to expend additional resources assisting their members and constituents to overcome these burdens to exercise their right to vote. These are resources that the plaintiffs otherwise could be spending in educating voters about core issues and preparing for the general election. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (political party had standing because of its diversion of resources "to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"), *aff'd*, 553 U.S. 181, 189 n.7 (2008); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 908-10 (W.D. Wis. 2016).

20. Defendants Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen are the six Commissioners of the WEC and are named as defendants in their official capacities. Together, they comprise the WEC, the body that administers and enforces Wisconsin's election laws, including Wis. Stats. §§ 6.28(1), 6.34, 6.86, and 6.87. *See id.* § 5.05. Defendants have acted under color of state law at all times relevant to this action. Defendants also have "the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1); *see also Frank v. Walker*, 196 F. Supp. 3d 893, 918 (E.D. Wis. 2016) ("Carrying out a federal court's order concerning the state's election procedures would

qualify as administering the state’s election laws and ‘other laws relating to elections’ (which includes federal laws relating to elections).”).

21. Intervening defendant the Republican National Committee (RNC) is a national committee, as that term is defined by and used in 52 U.S.C. § 30101, dedicated to electing local, state, and national candidates of the Republican Party to public office throughout the United States. This Court granted the RNC leave to intervene permissively in this litigation on March 28, 2020. *See* ECF No. 85.

22. Intervening defendant the Republican Party of Wisconsin (RPW) is a state committee, as defined by 52 U.S.C. § 30101(15), dedicated to electing candidates of the Republican Party to public office throughout the State of Wisconsin. This Court granted the RPW leave to intervene permissively in this litigation on March 28, 2020. *See* ECF No. 85.

23. Intervening defendant the Wisconsin Legislature (Legislature) is made up of the State Assembly and the State Senate, and is “vested” with the “legislative power” of the State of Wisconsin. *See* Wis. Const. art. IV, § 1. The United States Court of Appeals for the Seventh Circuit held on April 3, 2020 that the Legislature is entitled to intervene in this litigation, and this Court accordingly held that the Legislature has “effectively been an intervening defendant” since that decision and granted the Legislature’s motion to intervene on April 6. *See* ECF No. 191.

STATEMENT OF FACTS AND LAW

A. Wisconsin Registration and Absentee Laws

24. Wisconsin law provides that registration by mail and electronic registration closes on the third Wednesday preceding an election. Wis. Stat. § 6.28 (1)(a).

25. Individuals registering by mail or electronically must provide a copy of an “identifying document that establishes proof of residence.” *Id.* § 6.34(2). The only exception to

this rule is for individuals registering electronically who do not have to provide such documentation if they provide “the number of a current and valid operator’s license [or] identification card.” *Id.* (2m).

26. Individuals wishing to register after the mail and electronic registration deadline can only do so by registering in-person when they apply for an in-person absentee ballot or on Election Day at a polling place. *Id.*

27. Historically, Wisconsin voters have relied heavily on same day registration. Between 2008 and 2016, for example, 10 to 15% of all registrations took place on election day.¹³

28. Wisconsin also provides a process for absentee voting for all registered absentee voters, allowing them to request an absentee ballot by mail, in person at the municipal clerk’s office, or by signing a statement and requesting to receive an absentee ballot, via an agent, special voting deputy, or by e-mail or fax. *Id.* § 6.86(1)(a).

29. All voters, except for those who fall within specified exceptions, are required to present a copy of their proof of identification with their absentee application. *Id.* § 6.86(1)(ac).

30. Once a voter has received and completed their ballot, he or she must return it so that “it is delivered to the polling place no later than 8 p.m. on election day.” *Id.* § 6.87(6).

B. The COVID-19 Pandemic and the April 7 Spring Election

31. We remain in the midst of the worst national health emergency since at least the Great Influenza of 1918-20. As of April 29, 2020, Wisconsin had had at least 6,520 reported cases of the COVID-19 coronavirus, and at least 308 Wisconsinites had died from it, with the death toll continuing to rise. As a result, Wisconsinites continue to socially distance themselves from each

¹³ https://elections.wi.gov/sites/elections.wi.gov/files/page/general_election_voter_registration_and_absentee_s_4.

other to try to slow the spread of the disease in a collective effort to save their friends, neighbors, and families, with no clear end in sight. Projections by the federal government indicate that the virus will persist at least into the fall, if not longer. The Director of the Centers for Disease Control and Prevention recently warned that the country may encounter a second, more deadly wave of COVID-19 in the fall, which will “be even more difficult than the one we just went through.”¹⁴ This means that Wisconsin’s upcoming 2020 elections will occur in the middle or immediate aftermath of the worst public health crisis in over a century. Indeed, the latest projections indicate that this crisis may persist for 14 to 18 months, and perhaps even into 2022.

32. Governor Evers’ “Safer-at-Home Order,” issued March 24, 2020, has been extended pursuant to the April 16, 2020 Emergency Order #12 and is now scheduled to remain in effect until May 26, 2020 “or until a superseding order is issued.” All Wisconsinites must continue to stay at home as much as possible; non-essential businesses and operations remain closed, with limited exceptions; and all forms of travel continue to be prohibited unless explicitly excepted. Virtually all public and private gatherings of any number of people continue to be forbidden. Public and private K-12 schools are now closed for the remainder of the 2019-20 school year. The extended Order remains enforceable by local law enforcement officials and county sheriffs, with violations or obstruction of the Order punishable by imprisonment, fines, or both. Wis. Stat. § 252.25. It is presently uncertain whether and to what extent the Order will survive state legal challenges against it and, if it does, whether it will be extended past May 26. It is reasonably clear, however, that the pandemic will continue and may even worsen this year, and may well extend into 2021 or even 2022.

¹⁴ Zack Budryk, *CDC director warns second wave of coronavirus might be ‘more difficult’*, The Hill (Apr. 21, 2020), <https://thehill.com/policy/healthcare/493973-cdc-director-warns-second-wave-of-coronavirus-might-be-more-difficult>

33. Wisconsin citizens continue to distance themselves to ensure their safety and to comply with the Safer-at-Home Order. Many are unwilling to risk their safety and the safety of others by waiting in line to register to vote or cast their ballot. And the frightening results of the April 7 election, *see supra* ¶¶ 1-3, give them good cause for these concerns. Wisconsin voters have several more elections in 2020, culminating in the November 3 General and Presidential Election, with public-health conditions likely to be similar to, if not even worse than, the April 7 election. The experience of the April election helps demonstrate what the remaining 2020 elections in Wisconsin will be like absent additional judicial intervention and relief.

34. The City of Milwaukee shut down in-person registrations on March 23, 2020. ECF No. 63-1, at 8; *see also* ECF No. 63-9. Based on information and belief, other cities and towns took similar steps to limit in-person registration. As a result, for a large number of Wisconsin citizens, registering by mail or electronically was the only alternative to in-person registration on election day.

35. In-person absentee voting saw similar cuts throughout the State. During the in-person absentee voting period, for instance, the City of Milwaukee closed all three locations offering this option. ECF No. 63-1, at 8; *see also* ECF No. 63-9. The City of Madison closed all in-person absentee voting locations except for one location that permitted voters the option of curbside absentee voting. ECF No. 63-1, at 8.

36. The most severe impacts to in-person voting occurred on election day. This was due in large part to severe staffing shortages.¹⁵ Milwaukee only opened five of its usual 180 sites;

¹⁵ *See, e.g.*, Patrick Marley & Craig Gilbert, *Wisconsin polling places are closing because there's not enough people to work the April 7 election*, Milwaukee Journal Sentinel (Mar. 31, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/03/31/wisconsin-voting-sites-closing-due-coronavirus-poll-worker-shortage/5090003002/>.

Green Bay opened only two of its usual 30 sites; Waukesha opened just one of 13; and Kenosha opened only 10 of its usual 22 sites.¹⁶ In Milwaukee, these closures resulted in thousands of voters being forced to wait in line for hours in close quarters with other voters.¹⁷ The lines were consistently long throughout the day; according to poll workers at one location in north Milwaukee, no fewer than 350 voters were in line throughout the day.¹⁸ Voters in Green Bay also waited for as many as four hours to cast a ballot at one of two locations—down from the normal 30 polling places available.¹⁹

37. The burdens and risks imposed by all of these restrictions on in-person registration, early in-person absentee voting, and in-person voting on election day fell disproportionately on African-American, Latino, and Hmong voters and on economically disadvantaged communities. *See supra* n.9.

38. Faced with few options to vote in-person and stymied at multiple points in obtaining and casting an absentee ballot, it was not surprising that Milwaukee voters turned out in fewer numbers than expected. One political scientist estimates that the City of Milwaukee “saw nearly

¹⁶ Briana Reilly, *Madison has 66 polling sites on Election Day, Milwaukee has five. What’s the deal?* (Apr. 7, 2020) https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html.

¹⁷ Mary Spicuzza, ‘*A very sad situation for voters*’: *Milwaukeeans brave wait times as long as 2 1/2 hours, top election official says*, Milwaukee Journal Sentinel (Apr. 7, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/07/wisconsin-election-milwaukee-voters-brave-long-wait-lines-polls/2962228001/>.

¹⁸ Ben Jordan, *Voters bear long lines on Milwaukee’s north side*, WTMJ-TV Milwaukee (Apr. 7, 2020), <https://www.tmj4.com/news/coronavirus/voters-bear-long-lines-on-milwaukees-north-side>.

¹⁹ Daniel Bush, *Record absentee ballots sustain turnout in Wisconsin primary*, PBS (Apr. 14, 2020), <https://www.pbs.org/newshour/politics/record-absentee-ballots-sustain-turnout-in-wisconsin-primary>.

16,000 fewer votes than it should have, given the performance of other municipalities in the county.”²⁰ Similarly, in the City of Green Bay, voter turnout was reportedly down 50% from the 2016 presidential primary election and down 25% from a 2019 mayoral race.²¹

39. Even worse, the voters who stood in line to cast ballots faced public health risks—including exposure to the highly contagious COVID-19 virus. The Wisconsin Department of Health has hired 120 additional contact tracers specifically “to gear up for potential cases resulting from exposure at Tuesday’s Spring General Election.”²² The Wisconsin Department of Health Services reported on April 28 that 52 people who voted in-person or worked as poll workers on April 7 have tested positive for COVID-19.²³

40. For those voters who intended to cast absentee ballots—or did actually cast them—problems also were rampant. *First*, many voters could not provide the required identification to request an absentee ballot.²⁴ As a result, some local officials recommended that all voters consider

²⁰ Charles Stewart III, *Important lessons from the Wisconsin primary*, Mischief of Faction (Apr. 17, 2020), <https://www.mischiefsoffaction.com/post/important-lessons-from-the-wisconsin-primary>.

²¹ *Voter turnout in Green Bay down more than 50% compared to 2016 spring election*, Fox 11 News (Apr. 14, 2020), <https://fox11online.com/news/election/voter-turnout-in-green-bay-down-more-than-50-compared-to-2016-spring-election>.

²² J.T. Cestkowski, *State hires ‘contact tracers’ to help contain spread of COVID-19*, WKOW (Apr. 9, 2020, 5:04 PM), <https://wkow.com/2020/04/09/state-hires-contact-tracers-to-help-contain-spread-of-covid-19/>.

²³ *See supra* ¶ 3; *see also* Devi Shastri, *In-person voting was likely a ‘disaster’ for Wisconsin’s efforts to flatten coronavirus curve, national experts say*, Milwaukee Journal Sentinel (Apr. 8, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/08/coronavirus-wisconsin-election-likely-hurt-effort-flatten-curve/2961718001/>.

²⁴ *See, e.g.,* Reid J. Epstein & Adam Nagourney, *Democratic Victory in Wisconsin Looms as ‘Clarion Call’ for Trump*, N.Y. Times (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/trump-wisconsin-2020-election.html?smid=nytcore-ios-share> (quoting Wisconsinite on how some voters lacked the “wherewithal to request absentee ballots or the inclination to vote in person on April 7”).

themselves indefinitely confined and therefore exempt from the photo identification requirement.²⁵ The Wisconsin Supreme Court enjoined this practice, holding instead that each voter had to assess, based on their own individual circumstances, whether they were “indefinitely confined” and thus exempt from the photo identification requirement. The court added that a voter did not need to be completely or permanently confined to claim the exemption. *Jefferson v. Dane Cty.*, No. 2020AP557-OA (Wis. Mar. 31, 2020).

41. *Second*, many absentee ballots failed to arrive until *after* April 7, effectively denying the voters who received their ballots late even the opportunity to cast their vote.²⁶ According to statistics from the WEC, as of April 7, there were 1,282,762 absentee ballot applications but only 1,273,374 absentee ballots sent out—a difference of 9,388 absentee ballots that had not even been sent to the requesting voters as of *the day the voters had to mail them back*.²⁷ Other ballots were mailed but never delivered. In Milwaukee, a postal worker located three bins of absentee ballots that never reached their destinations in Oshkosh and Appleton.²⁸ In response to reports that the U.S. Postal Service struggled to deliver mail ballots to voters—resulting in some ballots being delayed or, even worse, not arriving at all—both of Wisconsin’s U.S. Senators called

²⁵ Alison Dirr & Patrick Marley, *Absentee voters in Milwaukee, Dane counties can say they're 'indefinitely confined' and skip photo ID, clerks say*, Milwaukee Journal Sentinel (Mar. 25, 2020), <https://www.jsonline.com/story/news/local/milwaukee/2020/03/25/absentee-voters-milwaukee-dane-counties-can-skip-photo-id-coronavirus-indefinitely-confined/5085017002/>.

²⁶ *See, e.g.*, Nick Corasaniti, *Some People Got to Vote Today*, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-absentee-ballots.html> (discussing voters, such as a pregnant health care worker, who did not receive their absentee ballot by the deadline and could not vote in-person).

²⁷ <https://elections.wi.gov/node/6825>

²⁸ Nick Corasaniti & Stephanie Saul, *Inside Wisconsin’s Election Mess: Thousands of Missing or Nullified Ballots*, N.Y. Times (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html>.

on the Inspector General of the U.S. Postal Service to begin an investigation into “absentee ballots not being delivered in a timely manner.”²⁹ One investigation “into Wisconsin’s missing ballot crisis reveals a system leaking from all sides,” including through “[i]nadequate computer systems, overwhelmed clerks and misleading ballot information [that] hampered Wisconsin’s historic—and historically troubling—spring election.”³⁰

42. The problems voters faced with the U.S. Postal Service during the recent election are not likely to abate any time soon. To the contrary, as more voters throughout the country turn to voting by mail in the coming months, that increased reliance in by-mail voting is likely to coincide with a budgetary crisis the U.S. Postal Service is facing due to COVID-19—a crisis that threatens to shutter the entire agency by this summer.³¹ The Postal Service is experiencing dramatic decreases in mail volume compared to last year and, “[a]s a result, . . . is projecting a \$13 billion revenue shortfall this fiscal year because of the pandemic and another \$54 billion in losses over 10 years.”³² And, as the pandemic continues to spread, postal workers have increasingly been infected. As of April 11, nearly 500 postal workers across the country had already tested positive

²⁹ See Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr. 9, 2020), <https://www.wispolitics.com/wp-content/uploads/2020/04/200409LETTER.pdf>.

³⁰ Daphne Chen *et al.*, ‘*They should have done something*’: Broad failures fueled Wisconsin’s absentee ballot crisis, investigation shows, Milwaukee Journal Sentinel (Apr. 21, 2020), <https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/> The investigation was conducted by the Milwaukee Journal Sentinel, the PBS series FRONTLINE, and Columbia Journalism Investigations.

³¹ Kyle Cheney, *House panel warns coronavirus could destroy Postal Service by June*, Politico (Mar. 23, 2020), <https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683>.

³² Nicholas Fandos & Jim Tankersley, *Coronavirus Is Threatening One of Government’s Steadiest Services: The Mail*, N.Y. Times (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html>.

for the coronavirus, 19 had died, and more than 6,000 were in self-quarantine because of exposure.³³

43. All of these developments have grave implications for voting rights in the State of Wisconsin. In years past, when the Postal Service has faced budget crises, it has closed hundreds of mail processing centers.³⁴ Moving forward, it is likely the Postal Service will need to make further cuts to routes, processing centers, and staff, which will exacerbate mail processing delays. Any such delays will be acutely felt in Wisconsin, where mail routing is already circuitous. *See* ECF No. 72 ¶¶ 6–7 (describing how mail takes five days to go across Madison); *see also* ECF No. 75 ¶ 6 (describing how mail in Viroqua is routed through Minneapolis).

44. *Finally*, even the votes from Wisconsinites who successfully received and returned their absentee ballots on time were not guaranteed to count. Many of them lacked a witness signature—even though it is likely many of them were cast during the window of time when this Court enjoined that requirement and offered a narrow, reasonable alternative. For example, in Milwaukee, at least 750 absentee ballots were missing the signature and were therefore not counted.³⁵ Hundreds in Marathon County were rejected for a variety of reasons, including 48 in the City of Marshfield either because of a late postmark or because of a missing witness signature.³⁶

³³ Jacob Bogage, *White House rejects bailout for U.S. Postal Service battered by coronavirus*, Wash. Post (Apr. 11, 2020), <https://www.washingtonpost.com/business/2020/04/11/post-office-bailout-trump/>.

³⁴ *See* Office of the U.S. Postal Service Inspector General, *Area Mail Processing Consolidations* (June 5, 2015), <https://www.uspsoig.gov/sites/default/files/document-library-files/2015/no-ar-15-007.pdf>.

³⁵ Spicuzza, *supra* note 17.

³⁶ Naomi Kowles, *Hundreds of absentee ballots for April election in Marathon County rejected*, WSAW.com (Apr. 17, 2020), <https://www.wsaw.com/content/news/Hundreds-of->

45. Despite all of these obstacles, more than 1.1 million Wisconsin voters cast absentee ballots.³⁷ Approximately 71% of Wisconsinites who voted in the election cast absentee ballots—far more than the 14% of the electorate who voted this way in the April 2019 election, the 11% in the April 2018 election, and even far more than the 27% in the 2016 general election.³⁸ Given the extraordinary circumstances of the April election that are likely to continue for the foreseeable future, it is not surprising that Wisconsinites—faced with this unconscionable choice between their safety and potentially endangering the lives of others and exercising their fundamental right to vote—relied on absentee voting at record levels. It is all but certain that this unprecedented demand will continue through the remaining elections held in 2020.

C. The Impact of the Challenged Statutory Provisions During the COVID-19 Pandemic

46. As the nation witnessed during the April 7 election, Wisconsin’s regulatory scheme is hostile to voting rights as applied in the context of the COVID-19 pandemic. As a direct result, without additional action by this Court, thousands of Wisconsin voters at a minimum will be disenfranchised in the remaining 2020 elections, culminating in the November 3 General and Presidential Election. Many thousands more, at a minimum, will vote only by overcoming unconscionable burdens, including potential exposure to the COVID-19 virus. These burdens disproportionately impact voters of color and economically disadvantaged communities.

absentee-ballots-for-April-election-in-Marathon-County-rejected-569748131.html.

³⁷ *Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary*, Wis. Elections Comm’n (Apr. 17, 2020), <https://elections.wi.gov/index.php/node/6859>

³⁸ Miles Parks, *‘In The End, The Voters Responded’: Surprising Takeaways From Wisconsin’s Election*, Nat’l Public Radio (Apr. 15, 2020), <https://www.npr.org/2020/04/15/834037566/in-the-end-the-voters-responded-surprising-takeaways-from-wisconsin-s-election>.

47. As described below, each of the challenged statutory provisions on its own poses significant risks to voters seeking to exercise their right to vote in the upcoming 2020 elections; collectively, they combine to ensure that many Wisconsin citizens will continue to be unable to vote or will have their ballots discarded.

a. Extension of Deadline for Receipt of Absentee Ballots

48. In the upcoming 2020 elections, it is highly likely that thousands of absentee ballots will arrive after the Election Day Receipt Deadline imposed by Wis. Stat. § 8.87(6), due to no fault of the voters.

49. In the weeks leading up to the April 7 election debacle, municipal clerks were inundated with an unprecedented number of absentee ballot requests. Despite valiant efforts from understaffed clerk's offices, over 9,300 absentee ballots that were timely requested were not even mailed out by election day. *See supra* ¶ 41. That figure apparently does not include the additional large tubs of undelivered absentee ballots found on election day. *Id.* Many thousands more voters received their ballots just days before the election, often leaving insufficient time for them to return their ballots through the mail by election day.

50. For the April election, this Court extended the absentee ballot receipt deadline by six days, and the Seventh Circuit affirmed that decision. The intervening defendants did not challenge this extension in the U.S. Supreme Court, but instead relied on it in arguing that the District Court should have imposed an April 7 postmark deadline for absentee ballots. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 2020 WL 1672702, at **3-4. Approximately 142,000 absentee ballots arrived during those six days. *See supra* ¶ 5. Had this Court not extended the absentee-ballot-receipt deadline, the voters casting these ballots would have been disenfranchised. In addition, approximately 4,678 additional absentee ballots were rejected

because they arrived after 4:00 p.m. on April 13; it is not yet known how many of these rejected ballots were timely mailed on or before April 7.³⁹

51. All evidence indicates the situation will remain the same for future elections this year. No plans to hire more staff have been announced, and there currently is no budget for heightened “postage and envelope costs” for absentee ballots.⁴⁰ The Postal Service, already “pushed to the brink of [its] capabilities” during the April election, is on the verge of bankruptcy. *Supra* ¶¶ 41-43.

52. Accordingly, it is likely that thousands of voters will once again receive their timely requested absentee ballots too late to be able to cast and return them in sufficient time that the ballots are received by election day. Without intervention by the Court, all of those voters will be disenfranchised by the Election Day Receipt Deadline imposed by Wis. Stat. § 8.87(6). That would squarely conflict with the outcome in *Democratic National Committee v. Republican National Committee*, in which all nine Justices unanimously agreed that it was appropriate to extend the Election Day Receipt Deadline by an additional six days, with the 5-4 disagreement being over whether those ballots had to be postmarked by election day itself. *Compare* 2020 WL 1672702, at **1-4 *with id.* at *5 (Ginsburg, J., dissenting) (“If a voter already in line by the poll’s closing time can still vote, why should Wisconsin’s absentee voters, already in line to receive ballots, be denied the franchise?”).

³⁹ See 2020 Spring Election and Presidential Preference Vote Ballot Status as of April 17, 2020, Wis. Elections Comm’n, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Ballot%20Data%20as%20of%20April%2017%202020.pdf>

⁴⁰ See Summary of April 7, 2020 Election at 5, Wis. Elections Comm’n, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf>.

53. The Supreme Court majority imposed the postmark deadline in part because it found “no probative evidence” that “late-requesting voters” in the April 7 election “would be in a substantially different position from late-requesting voters in other Wisconsin elections,” using the example of a voter who in an “ordinary election” requests an absentee ballot on the last day for doing so (the Friday before the election), who can “usually” expect to receive the ballot the following Monday or even on election day itself—*i.e.*, in time to mail and postmark the ballot by the end of election day. *Id.* at *3. The April 7 election results provide the “probative evidence” the Supreme Court found lacking before the election—evidence that thousands of voters did not receive their requested ballots until *after* election day, through no fault of their own. *See supra* ¶¶ 1, 41. These voters were all in “a substantially different position from the late-requesting voters” described in the *per curiam* opinion, who received their ballots in time to return them on election day.

b. Relief from Requirement of Witness Signature for Absentee Ballots

54. Wisconsin’s requirement that each voter submitting an absentee ballot have another adult witness and sign their ballot puts tens of thousands of Wisconsin voters in an untenable situation and unconstitutionally burdens their right to vote. *See* Wis. Stat. § 6.87(2). Over 600,000 Wisconsinites live alone, and even more live with an individual who is unqualified to be a witness (*e.g.*, a child or non-citizen). With the requirements of the Safer-at-Home Order and the health risks of venturing out to find a witness, many voters who live alone will not have a witness to attest to their absentee ballots and, absent intervention by the Court, simply will not be able to vote. Adding to their burden, a significant portion of this population is comprised of senior citizens who are most at risk from the coronavirus and who could not interact with a witness even if they could find one.

55. This Court granted limited relief from the witnessing requirement, allowing a voter who could not obtain a witness through reasonable effort to certify that “he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so.” *Bostelmann*, 2020 WL 1638374, at **20, 22. The Seventh Circuit stayed enforcement of this provision for the April 7 election, concluding that (a) “the district court did not give adequate consideration to the state’s interests in suspending this requirement”; (b) the *Purcell* principle counseled against relief given that the election was only days away; and (c) the “overbreadth of the district court’s order . . . categorically eliminates the witness requirement applicable to absentee ballots.” *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546, at *3. The panel suggested the WEC’s “alternative suggestions” for fulfilling the witness requirement (*e.g.*, having the witness observe the voter over Skype, the voter mail the completed ballot to the witness, and the witness sign and date the ballot) would be sufficient, especially given the extra time that voters had to obtain a witness signature because of the extension of the ballot-receipt deadline. *Id.*

56. WEC’s proposed alternatives proved insufficient. According to preliminary data, approximately 11,944 returned ballots were rejected because of “insufficient” certification. *Supra* ¶ 50 & n.39. Moreover, there are strong grounds to believe that many of the 135,417 unreturned ballots—over 10% of all ballots sent out—were not returned because the voters who had requested these ballots were unable to navigate the witnessing requirements in the midst of the pandemic and resulting isolation from others. *Supra* ¶¶ 44, 54.

57. Plaintiffs respectfully submit that, given the experience in the April 7 election, both this Court and the Seventh Circuit should reconsider their views on this issue. The Seventh Circuit was concerned that this Court gave “no effect to the state’s substantial interest in combatting voter fraud.” *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546, at *3.

That criticism is not fairly applied to this Court’s April 2 decision. Moreover, as discussed below, the State permits “indefinitely confined” voters to forego the requirement of submitting copies or scans of their photo IDs, even though the photo ID requirement serves the same “substantial interest in combatting voter fraud.” *See infra* ¶¶ 62-64. There is no sound basis for allowing indefinitely confined voters to avoid the photo ID requirements notwithstanding the State’s interest in combatting voter fraud but not extending similar relief to voters who are willing to attest they cannot meet the witness requirement.

58. The Seventh Circuit suggested that one way for a voter to “satisfy the statutory signature requirement” might be “by maintaining the statutory presence requirement but not requiring the witness’s physical signature.” *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546, at *4. The panel, however, incorrectly believed the WEC could implement that suggestion. The WEC does not believe it has the authority to make such an “accommodat[ion].”⁴¹

59. Even if it rejects broader relief, this Court should, at minimum, take the Seventh Circuit’s suggestion and provide that a voter who is unable to safely obtain a physical witness signature may have someone act as a witness from afar (or by video) without obtaining their physical signature. The voter would then write down the witness’s name and contact information on the ballot in the space provided, enabling election officials to contact the witness if they had any questions about the legitimacy of the ballot. This narrow relief would allow individuals to comply with social-distancing requirements and to avoid the risk of COVID-19 transfer from touching the same paper. It would not “categorically eliminate[] the witness requirement” and would give “effect to the state’s substantial interest in combating voter fraud.” *Democratic Nat’l*

⁴¹ *See, e.g.*, <https://elections.wi.gov/index.php/node/6790>.

Comm. v. Republican Nat'l Comm., Nos. 20-1538 & 20-1546, at *3. Indeed, every absentee voter would have a witness and the State would have information about that witness.

c. Relief from Proof of Identification Provision

60. Wis. Stat. §§ 6.86 and 6.87, which require a copy of a voter's photo identification to accompany a request for an absentee ballot, continue to burden voters.

61. As discussed *supra* ¶ 40, many voters did not even attempt to vote absentee during the April election because the photo ID requirements were too burdensome, especially for those without access to smartphones or the Internet. Because many workplaces, public libraries, and copy shops remain closed, 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 prohibitions in the extended Safer-At-Home Order.

62. Wisconsin law specifically exempts a voter from the requirement of providing a photo ID with a request for an absentee ballot if the voter is "indefinitely confined" because of age, illness, infirmity, or disability. Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(2). "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." *Jefferson*, No. 2020AP557-OA, at *2. This Court relied heavily on the "indefinitely confined" option in its April 2 order denying preliminary injunctive relief, holding that "the current proof of ID requirement, as being applied under the WEC guidance and state court order, does not impose an undue burden on the right to vote[.]" *Bostelmann*, 2020 WL 1638374, at *21.

63. The “indefinitely confined” option, however, gets only passing mention in the instructions provided to voters requesting an absentee ballot. Voters are not told that designation of indefinitely confined status is for each individual voter to make based on how they feel about their own current circumstances, nor are they told that a claim of indefinitely confined status does not require permanent or total inability to travel outside of their residence. As the WEC and Wisconsin Supreme Court have shown, “indefinitely confined” is not a self-defining term, and in the absence of explicit, prominent instructions on the absentee ballot request form, many voters are likely to misunderstand their entitlement to claim this status and, if they are otherwise unable to copy or upload an acceptable photo ID, may forego attempting to obtain an absentee ballot.

64. Thus, at a minimum, this Court should hold that materials for requesting absentee ballots must explicitly and prominently explain a voter’s option to claim “indefinitely confined” status during the COVID-19 pandemic, including the WEC and Wisconsin Supreme Court explanations of what that term means.

d. Relief from Proof of Residence Provision

65. Wis. Stat. § 6.34 requires new voters to provide a copy of their proof of residence to register if they do so by mail or online and do not have the number of a current driver’s license or state identification card with a matching address on file with the Wisconsin Department of Transportation.

66. This Court denied as moot plaintiffs’ request to enjoin the enforcement of this provision in connection with the April 7 election because the registration deadline for that election had already passed by the time the Court issued its order. *Bostelmann*, 2020 WL 1638374, at *50.

67. The issue is not moot with respect to the remaining 2020 elections. Wisconsin’s requirement that voters provide a copy of their proof of residence to register by mail or

electronically operated to burden eligible voters in the April 7 election and will continue to burden eligible voters in the upcoming 2020 elections. The scanners and printers that many would-be electronic or by-mail registrants would typically use are often located at places of work, libraries, and commercial establishments (*e.g.*, UPS locations) that are now closed or unsafe to visit. As a result, many Wisconsin citizens will be unable to obtain the copies they need to complete their voter registration applications and will be prevented from registering.

68. In addition, it is irrational and unfair for Wisconsin to exempt self-identified “indefinitely confined” voters from having to comply with some documentary proof requirements (*i.e.*, photo ID requirements, *see supra* ¶¶ 62-64) while refusing to exempt such voters from other documentary proof requirements (*i.e.*, proof of residency requirements). The anti-fraud and verification purposes of all these proof requirements are similar if not identical. No reasonable public purpose is served by excusing indefinitely confined voters from some documentation requirements but not others. If relaxing the photo ID requirements to accommodate indefinitely confined voters during the current pandemic is appropriate, there is no reasonable public purpose to be served in failing to relax other documentary proof requirements for such voters.

e. Extension of Mail-In and Electronic Registration Deadlines

69. Under Wis. Stat. § 6.28(1), the deadlines for registrations in person, by mail, and electronically all close on “the 3rd Wednesday preceding the election”—*i.e.*, 21 days before the election. This provision goes on, however, to authorize registrations in person (but not by mail or electronically) to continue for those voters who cast “in-person absentee ballot[s]” or vote at the polls on election day. *Id.* Thus, those casting in-person absentee ballots may continue to register until the Sunday before the election, *see id.*; *id.* § 6.86(b), and those voting at the polls may register

on election day itself, but those seeking to register by mail or electronically must do so no later than three full weeks before the election.

70. Historically, Wisconsin voters have registered to vote in person in large numbers, relying heavily on same-day registration during in-person absentee voting or on election day. As a result, thousands of Wisconsin voters typically do not register before they vote. However, many Wisconsinites did not have viable in-person registration options for the April 7 elections. As discussed above, in-person absentee voting was shut down in many parts of Wisconsin. *See supra* ¶ 34. And many Wisconsinites were understandably reluctant—if not altogether unable—to venture out in public to register and vote either through in-person absentee voting or at the polls, given the public health risks during the pandemic. For these voters, failure to register 21 days prior to the election effectively meant they could not vote.

71. No valid, reasonable state interests are served by this disparity and discrimination against by-mail and electronic registration. If election officials can accommodate registrations as late as election day when done in person, there is no sufficient reason why they cannot accommodate by-mail and electronic registrations much closer to the election than “the 3rd Wednesday preceding” it.

72. In its March 20, 2020 Opinion and Order, this Court recognized “the excruciating dilemma” faced by those who missed the statutory deadline for by-mail or electronic registration—“either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote.” ECF No. 37 at 11. The Court found it likely that this was “an undue burden on citizens’ right to vote,” and concluded that extending the registration deadline would “impose only a minimal burden while potentially affording a great number of as yet unregistered voters the opportunity to exercise their franchise by safely voting absentee.” *Id.* at

12, 15. The Court ordered that the “deadline by which individuals may register to vote electronically” be extended from March 18 to March 30 but declined to extend the by-mail registration deadline. *Id.* at 14-15, 20.

73. As the Court predicted, the evidence demonstrates that the extension of the electronic registration deadline to March 30 imposed only minimal burdens while affording many voters the opportunity both to register and to vote without risking exposure to the COVID-19 virus. In fact, the evidence shows that election administrators could have accommodated an extension of *both* the electronic and the by-mail registration deadlines to April 3, the Friday before the election. The Court’s concerns about by-mail registrations received even closer to the election than this, *see id.* at 14-15, could be resolved by requiring that by-mail requests be *received* by the Friday before the election.

74. Absent relief by this Court, unregistered but eligible voters who decide to register and vote shortly before one of the upcoming 2020 elections will face the same “excruciating dilemma” identified by this Court—“either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote.” *Id.* at 11.

75. The individual and cumulative impacts of the challenged statutory provisions discussed *supra* ¶¶ 46-74 (together with defendants’ failure to ensure a sufficient number of safe early absentee-voting sites and election-day polling places) will, absent injunctive relief, cause plaintiffs, their members, and their constituents irreparable injuries that cannot be adequately redressed by money damages. Those injuries greatly outweigh any alleged injuries that defendants and intervenor-defendants may claim to face from the requested injunctive relief.

76. The balance of the equities and the public interest strongly favor plaintiffs’ requested injunctive relief.

CLAIMS FOR RELIEF

COUNT I

**First and Fourteenth Amendments
U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202
Undue Burden on the Right to Vote**

77. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Second Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

78. Under the *Anderson-Burdick* balancing test, a court considering a challenge to a state election law must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights 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.’” See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

79. Unless plaintiffs are granted the relief requested herein thousands of Wisconsin voters, including plaintiffs’ members and constituents, will be severely burdened in attempting to exercise their right to vote (if not outright disenfranchised) in the upcoming 2020 elections. These burdens will fall disproportionately and with extra force on African American, Latino, and Hmong voters as well as economically disadvantaged voters.

80. Because of the ongoing pandemic and its projected course, many Wisconsin voters who would normally register in-person after the statutory cut-off for electronic and by-mail registration (either by registering during early in-person voting or at the polls) will continue to be unable or unwilling to do so. Similarly, Wisconsin voters are less able and, in some cases, wholly unable to copy and scan the documents and photo IDs required to complete their electronic and

by-mail registration and absentee ballot applications. And, as absentee balloting increasingly becomes the safest way to vote, Wisconsin voters will remain at high risk of not receiving their ballots with sufficient time to return them to the municipal clerk's office so they are received prior to the Election Day Receipt Deadline. Indeed, many thousands of voters may once again not even receive their timely requested absentee ballots by election day, making it impossible to cast those ballots by election day. These are severe burdens on the right to vote that will continue to lead to the outright disenfranchisement of many voters.

81. The State cannot provide any colorable justification as to why the statutory deadline for electronic and by-mail registrations should not be extended and why ballots received after the Election Day Receipt Deadline should not be counted in light of the unprecedented strains on the voting and postal systems created by the COVID-19 pandemic.

82. Further, the requirement that voters have witnesses attest to the truthfulness of their personal information on absentee ballots will disenfranchise many Wisconsin voters who are unable to locate witnesses for this purpose. The State has reasonable alternative means to enforce the witness requirement without requiring a physical witness signature on a voter's ballot.

83. And because of the State's continuing failure to provide sufficient financial, personnel, and other resources to local election officials to ensure an adequate number of safe early in-person absentee voting sites and election-day polling places throughout the State, many voters will continue to be at risk of having to endure long lines and wait times in order to register and vote in person on election day and will thereby increase their risk of exposure to the COVID-19 virus. Wisconsin has delegated its authority to "establish[]" polling places to local governing bodies, Wis. Stat. § 5.25(2), but the State cannot delegate its duty to ensure safe and sufficient in-person registration and voting facilities for all voters throughout the State. The defendants bear

the statutory “responsibility for the administration of” Wisconsin’s election laws, Wis. Stat. § 5.05(1), which at minimum requires defendants to develop and implement plans to coordinate available state, local, and private resources to ensure that all voters throughout the State are able to cast early in-person absentee votes and to vote in-person on election day in as safe and secure a manner as feasible.

84. In short, the challenged matters are not supported by a state interest that is sufficient to justify the resulting burdens on the right to vote, and thus violate the First and Fourteenth Amendments.

COUNT II

Due Process

U.S. Const. Amend. XIV, 42 U.S.C. § 1983

Denial of Procedural Due Process

85. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Second Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

86. The Fourteenth Amendment’s Due Process Clause prohibits the states from depriving “any person of . . . liberty . . . without due process of law.” U.S. Const. amend. XIV, § 1. The right to vote is a fundamental liberty that is recognized and protected by the U.S. Constitution. Which protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). Courts must first consider the nature of the interest that will be affected by the government’s actions as well as the “degree of potential deprivation that may be created” by existing procedures. *Id.* at 341. Second, courts consider the “fairness and reliability” of the existing procedures “and the probable value, if any, of additional procedural safeguards.” *Id.* at 343. Finally, courts consider the public interest, which “includes the administrative burden and other

societal costs that would be associated with” additional or substitute safeguards. *Id.* at 347 “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 334 (quotation and citation omitted).

87. Wisconsin’s procedures for registering to vote, absentee voting, and voting in person must comport with due process. “Such due process is not provided when the election procedures [for voting by mail]” do not adequately protect the right to vote or ensure that an “individual is not continually and repeatedly denied so fundamental a right.” *Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990); *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (“Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.”).

88. “When an election process ‘reache[s] the point of patent and fundamental unfairness,’ there is a due process violation.” *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183 (11th Cir. 2008) (citation omitted) (*re* substantive due process).

89. Under the current circumstances, there is little question that Wisconsin’s election process is fundamentally unfair. The nature of the interest at stake in this case—the right to vote and to have that vote count—is the most precious liberty interest of all because it is preservative of all other basic civil and political rights.

90. But the challenged matters threaten to continue to deprive Wisconsin voters of this right in the remaining 2020 elections. Given the unprecedented situation at hand, Wisconsin must establish adequate procedures to ensure that voters have a reliable, fair, effective and safe method to cast their ballots in these upcoming elections. Because the challenged matters are markedly inadequate in all of these respects, and substitute procedures are readily available to protect voters’

rights with minimal burden to the State, the challenged matters violate Wisconsin voters' procedural due process rights.

COUNT III

Equal Protection U.S. Const. Amend. XIV, 42 U.S.C. § 1983

91. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Second Amended Complaint and the paragraphs in the counts below as though fully set forth herein.

92. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from “denying to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. This constitutional provision requires that “all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

93. And this applies to voting. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Among other things, this requires “specific rules designed to ensure uniform treatment” in order to prevent “arbitrary and disparate treatment to voters” based on which county or local jurisdiction they live in. *Id.* at 106-07. There is no “emergency exemption” from this equal protection requirement. “The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.” *Id.* at 108-09; *see also id.* at 109 (shutting down the 2000 Florida recount

because the recount process was “inconsistent with the minimum procedures necessary to protect the fundamental right of each voter”).

94. The April 7 election abounded with many examples of unfair, unequal, and disparate treatment of Wisconsin voters depending on where they live. Safe and sufficient in-person registration, absentee voting, and election-day voting opportunities were available to some Wisconsin voters but not to others, depending on where they resided. *See, e.g.*, ECF Nos. 63-10, 63-12, 63-14; Exs. 10, 12, 14; *see also* ECF No. 39 at 2 (identifying closure of some, but not all, polling places due to COVID-19). Voters of color and the urban poor were disproportionately denied sufficient opportunities for safe in-person registration, early voting, and election-day voting. Similarly, the application of the documentation requirements for registering to vote and requesting an absentee ballot varied broadly across cities and counties, resulting in some voters being subject to these requirements while others were not. *See* ECF No. 74 ¶ 7. Voters also received conflicting guidance on the witness requirement for absentee ballots depending on where they lived and who they called. *See, e.g.*, ECF No. 63-16 at 6 (quoting Madison officials suggesting FaceTime or Skype to satisfy requirement). Many voters, particularly those who live alone, lacked access to a witness but were simultaneously being instructed by the authorities to stay at home and practice social distancing. *See, e.g.*, ECF No. 66 ¶ 3; ECF No. 70 ¶ 3; ECF No. 75 ¶ 4.

95. Another example of disparate and non-uniform treatment involved the interpretation and administration of the U.S. Supreme Court’s requirement that an absentee ballot be “postmarked by election day” in order to be counted. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 2020 WL 1672702, at *2. Wisconsin elections officials and the Postal Service do not follow uniform standards and procedures in postmarking absentee ballots. As a result, many

absentee ballots were returned to local election officials by the Postal Service with either no postmarks at all, postmarks without dates, or illegible postmarks. The six Commissioners of the WEC, on a 3-3 tie vote, largely failed to agree on how election officials should address these issues, leaving local election officials throughout Wisconsin to make these decisions without any uniform standards ensuring consistent treatment throughout the State, rather than through discretion exercised locality by locality.

96. A further example of “arbitrary and disparate treatment [of] voters,” *Bush*, 531 U.S. at 104-05, is the interpretation adopted by the WEC and the Wisconsin Supreme Court of Wis. Stat. §§ 6.86(2)(a) and 6.87(4)(b)(2), which exempt voters who are “indefinitely confined because of age, physical illness or infirmity” from many of the absentee voting restrictions and conditions. In response to conflicting advice from county and local election officials about what it takes to be “indefinitely confined” by the pandemic within the meaning of these statutes, the Wisconsin Supreme Court, in an original action, adopted the WEC’s guidance, which provides in relevant part that the “[d]esignation 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.” *Jefferson*, No. 2020AP557-OA, at *2 (emphasis added). This “guidance” in no way provides “uniform” rather than “arbitrary and disparate treatment to voters.” *Bush*, 531 U.S. at 106-07. If using a standard that “might vary ... from county to county” or “within a single county” violates equal protection, *id.* at 106, so much more the case where the interpretation and application of the standard varies from voter to voter.

97. In these and other respects, if this Court does not require “uniform rules” and “specific standards” in conducting the remaining 2020 elections under these emergency conditions, there will be an unacceptably high risk that Wisconsin will not satisfy “the minimum

requirement for nonarbitrary treatment of voters necessary to secure the fundamental right” to vote. *Bush*, 531 U.S. at 105-06. If anything, the equal protection risks are even greater here than in *Bush v. Gore*. There, the right to vote was at risk. Here, the risks are to the right to vote and to the right to life—our own and the lives of others.

98. The dramatically inconsistent availability of safe and sufficient in-person registration and voting opportunities, the diverging standards across cities and counties with respect to the documents required to register and vote, the conflicting guidance on the witness requirement for absentee ballots, the absence of any statewide standards for implementing the “postmark” requirement, and the standardless discretion left to each voter in applying the “indefinitely confined” exception are depriving voters, including plaintiffs’ constituents, of equal protection of the laws.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court enter judgment:

A. Declaring that in the context of the current coronavirus crisis, Wisconsin’s current by-mail and electronic registration deadlines, Wisc. Stat. § 6.28(1); requirements that copies of proof of residence and voter photo ID accompany electronic and by-mail voter registration and absentee applications, *id.* § 6.34, 6.86, respectively; requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, *id.* § 6.87; and requirement that an absentee voter obtain the signature of a witness attesting to the accuracy of personal information on an absentee ballot, *id.* § 6.87(2); together with defendants’ failure to ensure that all citizens have safe and sufficient opportunities to register and vote in person, are unconstitutional in violation of the First and Fourteenth Amendments;

B. Enjoining defendants and their respective agents, officers, employees, and

successors, and all persons acting in concert with each or any of them, from rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk's office within a minimum of ten days after Election Day, subject to the definition of "postmarked" discussed *supra* n.12;

C. Enjoining in part the enforcement of the witness requirement in Wis. Stat. § 6.87(2) until the COVID-19 crisis is over;

D. Enjoining in part the enforcement of the photo identification requirements in Wis. Stat. §§ 6.86 and 6.87 until the COVID-19 crisis is over;

E. Enjoining in part the enforcement of the proof of residency requirement in Wis. Stat. § 6.34 for voter registrations until the COVID-19 crisis is over;

F. Ordering defendants to extend Wisconsin's deadline for electronic and by-mail registration to the Friday before each of the remaining 2020 elections;

G. Ordering defendants to exercise their statutory authority and responsibility, *see* Wis. Stat. § 5.05(1), to develop and implement plans to coordinate available state, local, and private resources to ensure that all voters throughout the State are able to cast early in-person absentee ballots and to vote in-person on election day in a safe and secure manner;

H. Awarding plaintiff their costs, expenses, and reasonable attorneys' fees pursuant to, *inter alia*, 42 U.S.C. § 1988 and other applicable laws; and

I. Granting such other relief as the Court deems just and proper.

Dated this 30th day of April, 2020.

Respectfully submitted,

/s/ John Devaney

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