

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.
APPLICANTS,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

THE WISCONSIN STATE LEGISLATURE,
APPLICANTS,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

EMERGENCY APPLICATION FOR STAY

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Seventh Circuit

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

Applicants Republican National Committee and the Republican Party of Wisconsin were intervenor defendants in the district court and appellants in the court of appeals.

Applicant Wisconsin Legislature moved for and was denied intervention in the district court. It was an appellant in the court of appeals, which found it to have standing and to be a proper intervenor in this action.

Respondents are the Democratic National Committee, the Democratic Party of Wisconsin, Sylvia Gear, Makekeh K. Hakami, Patricia Ginter, Claire Whelan, Wisconsin Alliance for Retired Americans, League of Women Voters, Reverend Greg Lewis, Souls to the Polls, Voces de la Frontera, Black Leaders Organizing for Communities, American Federation of Teachers, Local, 212, AFL-CIO, SEIU Wisconsin State Council, and League of Women Voters of Wisconsin. Respondents were plaintiffs in the consolidated cases before the district court and appellees in the court of appeals.

Defendants below Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen are the members of the Wisconsin Election Commission. Defendant below Meagan Wolfe is the Commission's administrator. None of these defendants below have appealed the district court's injunction.

The related proceedings below are:

1. *Democratic National Committee, et al. v. Bostelmann, et al.* Nos. 20-1538, 20-1539, 20-1545 & 20-1546 (7th Cir.) – Judgment entered April 3, 2020;
2. *Democratic National Committee, et al. v. Bostelmann, et al.*, No. 3:20-cv-249 (W.D. Wis.) – Judgment entered April 2, 2020;
3. *Gear, et al. v. Dean Knudson, et al.*, No. 3:20-cv-278 (W.D. Wis.) -- Judgment entered April 2, 2020; and
4. *Lewis, et al. v. Knudson, et al.*, No. 3:20-cv-284 (WMC) (W.D. Wis.) – Judgment entered April 2, 2020.

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Applicants the Republican National Committee, the Republican Party of Wisconsin, and the Wisconsin State Legislature state that they have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

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

The district court below ordered that Wisconsin voters can continue to vote absentee *after election day*, even though no party asked the court to grant such extraordinary relief, nor submitted any evidence justifying that remedy. The district court issued this order five days before Wisconsin's scheduled April 7 election, for which absentee voting had been in process for more than a month. This aspect of the district court's injunction (which the Seventh Circuit declined to stay) plainly warrants this review and swift reversal, for at least two reasons. First, this Court's precedent prohibits federal courts from changing the rules of an ongoing or rapidly approaching election. The district court's order upends a key aspect of Wisconsin's election less than a week before election day. Second, requiring a state to permit unlimited absentee voting for almost a week *after* election day presents significant dangers to election integrity, voter confidence and the orderly administration of an election that already has strained state resources due to the difficult circumstances associated with COVID-19.

Because Wisconsin's election is already in full swing, and set to conclude on Tuesday, April 7, the Republican National Committee, Republican Party of Wisconsin and the Wisconsin Legislature (collectively, "Applicants") respectfully ask for an **immediate administrative stay**, in order to prevent further voter confusion and unjustified interruption of ongoing election processes and, thereafter, a stay pending resolution of the Applicants' appeal. **Specifically, Applicants seek a stay of the district court's injunction to the extent it requires the State to count**

absentee ballots postmarked after April 7, thus clarifying that absentee ballots must be postmarked (or personally delivered to the polls) no later than April 7 in order to be counted. Given the date of the election, and to provide clarity to voters, Applicants request the stay pending appeal be issued **no later than Monday, April 6.**

The Respondents—to their credit—never requested the drastic remedy issued below. Their concern was only that ballots cast on or before April 7 might not *arrive* at polling places until after election day, due to the significant increase in absentee voting during the current public health crisis and the possibility that mail service was slowed. That would normally cause the ballots to be invalidated under Wis. Stat. § 6.87(6), which requires that a “ballot shall be returned so it is delivered to the polling place no later than 8 p.m. on election day.” Respondents thus sought only to ensure that ballots postmarked by election day—that is, votes that were *cast* on or before election day—would be counted even if they arrived by mail a few days later. The district court went far beyond that concern, extending the deadline for the receipt of absentee ballots until 4 p.m. on Monday, April 13, and expressly declining to require any postmark or other evidence that the late-arriving ballot was actually completed on or before election day. This means that tens of thousands of Wisconsin residents will be permitted to vote *after* the election-day deadline.

The relief that Applicants seek here is exceedingly modest. Applicants appreciate the challenges that the current pandemic creates for voters and election officials. They have not appealed other adjustments made by the district court, such

as its extension of the deadlines to remotely register to vote and to request an absentee ballot.¹ And although Applicants maintain that the issue of late-arriving ballots is premature and could be addressed when and only if the predicted mail delays actually materialize, Applicants only ask for a partial stay of the portion of the district court's order, making clear that the extension of the deadline for the receipt of ballots applies only to those that were postmarked (or otherwise delivered) by April 7. This would give the Respondents the relief they actually requested, respect this Court's warnings about courts altering the rules on the eve of elections, and prevent the serious possibility of fraud and misconduct created by the district court's order.

OPINIONS BELOW

The district court issued three orders, one granting a temporary restraining order, one granting a preliminary injunction, and one clarifying that preliminary-injunction order, which are unreported, but attached at App. 61–81, App. 8–60, and App. 5–7. The Seventh Circuit's order granting in part and denying in part the Legislature's emergency motion for stay is unreported, but attached at App. 1–4.

JURISDICTION

This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(1) and 1651(a). The Republican National Committee and Republican Party of Wisconsin

¹ Notably, the decision below is the only case to date that has granted relief affecting an impending election due to claims arising from the challenges associated with COVID-19. See *Williams v. DeSantis*, No. 1:20-cv-00067 (N.D. Fla. Mar. 16, 2020); *Mays v. Thurston*, No. 4:20-cv-341 (E.D. Ark. voluntarily dismissed Mar. 31, 2020); *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-01638 (S.D. Ohio Apr. 3, 2020).

intervened as defendants before the district court and have standing. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Further, the Seventh Circuit correctly concluded that “the Wisconsin State Legislature has standing to pursue this appeal, and that the district court erred in refusing to permit the Legislature to intervene in the case below.” App. 4 (citing *Bethune-Hill*, 139 S. Ct. 1945; *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019)). Sections 13.365(3) and 803.09(2m) of the Wisconsin Statutes are exactly the types of statutes that this Court discussed in *Bethune-Hill*, which permit the Legislature “to litigate on the State’s behalf . . . in a defined class of cases,” that is, when, as here, a state statute is alleged to be unconstitutional. 139 S. Ct. at 1952.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Wisconsin Statute Section 6.87(6), and Sections 1983 and 1988 of Chapter 42 of the United States Code. All are reproduced in the Appendix beginning at App. 82.

STATEMENT

Under Wisconsin law, a “[s]pring election” must be “held on the first Tuesday in April to elect judicial, educational and municipal officers, nonpartisan county officers and sewerage commissioners and to express preferences for the person to be the presidential candidate for each party” in a Presidential election year. Wis. Stat. § 5.02(21). The State offers voters a generous, no-excuse-needed absentee voting

option. *See* Wis. Stat. § 6.85(1). But absentee voting, like all voting, must be completed by election day. That is why Wisconsin law provides that an absentee ballot “shall be returned so it is delivered to the polling place no later than 8 p.m. on election day.” Wis. Stat. § 6.87(6). Put another way, if a voter mails in an absentee ballot, but that ballot arrives at the clerk’s office after election day, that vote does not count.

Absentee voting in Wisconsin’s April 7 Election has been in full swing for weeks, and the interest in this election is understandable, given that it includes a presidential primary, a Wisconsin Supreme Court race, a constitutional amendment ballot initiative, and important local races. Under Wisconsin law, absentee ballots can be sent as soon as they are printed by the local clerk, which must begin “immediately upon receipt of the certified list of candidates’ names from the commission,” Wis. Stat. § 7.10(2), which certification occurred on March 3.² In the weeks following that certification, more than 1.1 million Wisconsinites received absentee ballots, and more than 561,000 already have been returned.³ So long as these ballots comply with all Wisconsin state law—including the photo ID and signature requirements—they will be counted, just like any ballot cast on election day.

² *See* Wisconsin Elections Commission, *Candidates on Ballot by Election* (rev. Mar. 3, 2020) available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Candidates%20on%20Ballot%20By%20Election_3_3_2020.pdf.

³ *See* Wisconsin Elections Commission, *Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary*, available at <https://elections.wi.gov/node/6808>.

The present Application arises from a series of lawsuits filed against each of the Wisconsin Elections Commissioners, relating to Wisconsin’s April 7 election. Only one of the legal theories raised in those lawsuits is relevant to this Application. On March 18, the Democratic National Committee and Democratic Party of Wisconsin sued the Commissioners, in the Western District of Wisconsin. D.Ct. Doc. 1. Those respondents then moved for a temporary restraining order or preliminary injunction, arguing, as relevant here, for relief because “the Election Day deadline prevents having ballots counted even if they are sent on or before Election Day.” D. Ct. Doc. 3 at 9. “There is, then, ample time to accept and count validly cast absentee ballots that are postmarked by Election Day but arrive at some point thereafter.” D. Ct. Doc. 3 at 11. The district court denied this relief as unjustified by the “limited record before it.” App. 17.⁴

Respondents thereafter moved for reconsideration of the district court’s denial of the preliminary injunction on this issue, arguing that “[b]ecause clerks are delayed in processing absentee requests—due both to the unprecedented influx and social distancing—the absentee ballots resulting from those requests will get sent out later, *arriving to the voter’s home most likely within two to four days of the election.*” D. Ct.

⁴ The district court did extend the time to register to vote online by an additional twelve days, from March 18 to March 30. App. 80. It also granted the motion to intervene as defendant filed by the Republican National Committee and Republican Party of Wisconsin, D. Ct. Doc. 85 at 12, and denied intervention by the Legislature, D. Ct. Doc. 85 at 12, and then denied the Legislature’s renewed intervention motion, even after the Wisconsin Attorney General withdrew from representing the defendant Elections Commissioners and the Commissioners refused to defend several of the challenged laws. D. Ct. Doc. 163.

Doc. 62 at 12 (emphasis added). “There is, then, ample time to accept and count validly cast absentee ballots that are postmarked by Election Day but arrive at some point thereafter. Doing so would not violate Wisconsin’s interest in finality of elections.” D. Ct. Doc. 62 at 16. Applicants responded by explaining that this request was premature, given that it was unclear whether the Respondents’ worries about delays in absentee ballot and mailing processing would actually materialize: “the Court may simply wait until after election day to determine whether any remedy is necessary or appropriate.” D.Ct. Doc. 90 at 25.⁵

On April 2, the district court entered a preliminary injunction that mandates, in part,⁶ that the State may no longer apply its 8:00 p.m. election-day deadline for the receipt of absentee ballots, moving the deadline to 4:00 p.m. on April 13. App. 59. This order unexpectedly expanded the moderate (although still premature) remedy that the Respondents had asked for into a far more sweeping authorization for post-election day voting. The district court explained that it was “simply moving the statutory absentee receipt deadline” to April 13 *even for ballots voted and postmarked after April 7, election day*, meaning that there would be up to six days of absentee

⁵ In a consolidated case, also part of this appeal, a different group of plaintiffs also asked for a temporary restraining order blocking the “the requirement that polling places receive absentee ballots by 8:00 p.m. on Election Day to be counted,” *Lewis*, D.Ct. (-284) Doc. 17 at 2, but did not mention this request or develop it in their supporting memorandum. *Lewis* D.Ct. (-284) Doc. 18.

⁶ The district court also further extended the time to request an absentee ballot to April 3, and it created an exception to the Wisconsin statute requiring absentee ballots to be witnessed by another person in order to be effective. App. 59. Applicants did not seek to stay the extension of the request deadline, and the Seventh Circuit stayed the portion of the order regarding the witnessing requirements. App. 3–4.

voting after election day. App. 47. The entirety of the court’s rationale for this unrequested relief was that “[n]o persuasive evidence suggests that further altering statutory requirements will impose tangible benefits or harms.” App. 47. The district court later amended this portion of its injunction by further enjoining both the Elections Commissioners and non-parties “from releasing any unofficial results until April 13, 2020, at 4:00 p.m. or as soon thereafter as votes can be tabulated.” App. 6. It cited no authority for its power to enjoin non-parties.

Applicants immediately moved for a stay from the Seventh Circuit. Last night, on April 3, the Seventh Circuit denied Applicants’ emergency motion for stay on this portion of the district court’s order. It offered no explanation at all, despite noting elsewhere that “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” App. 3 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (alterations in original)). The Seventh Circuit separately held that the district court had improperly denied the Legislature’s motion to intervene, and that the Legislature had standing to pursue this appeal under this Court’s decision in *Bethune-Hill*. App. 4.

REASONS FOR GRANTING THE APPLICATION

This Court will grant a stay of a district court’s order, including in a case still pending before the court of appeals, if there is “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3)

a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427–29 (2009); *West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017). Applicants have satisfied these standards here.

I. There Is A Reasonable Probability That Four Justices Would Vote To Grant Review And A Fair Prospect That This Court Would Reverse A Decision Upholding An Injunction Allowing Voting After Election Day, Issued While The Election Was Already Ongoing

A. This Court And The Courts Of Appeals Have Repeatedly Stayed Changes To Elections Laws On The Eve Of Election Day

This Court has repeatedly stayed orders directing last-minute changes to election laws “[g]iven the imminence of the election.” *Purcell*, 549 U.S. at 5. The Court has identified an imminent election as one “just weeks” away—while the election here is just *days* away. *Id.* at 4. Consequently, this Court’s customary practice is to stay lower court orders directing changes to election laws on the eve of Election Day and “allow the election to proceed without an injunction suspending [election] rules.” *Id.* at 6. This is a long-standing practice. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 34–35 (1968) (denying relief because it would result in “serious disruption of [the] election process” and “confusion” for voters).

In just the past few years, the Court time and again has stayed orders changing election laws when there were imminent deadlines—even with much more time remaining than the changes ordered here a mere *five days* before Election Day. *See,*

e.g., *North Carolina v. League of Women Voters of N. Carolina*, 574 U.S. 927 (2014) (this Court, 27 days before Election Day, stayed a lower court order changing election laws 32 days before Election Day); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (this Court, 36 days before Election Day, stayed a lower court order changing election laws 61 days before Election Day); *Purcell*, 549 U.S. at 4-5 (this Court, 18 days before Election Day, stayed a lower court order changing election laws 33 days before Election Day); *see also Abbott v. Perez*, 138 S. Ct. 49 (2017) (staying order directing that federal court would change election law unless Legislature did so within 3 business days, *see Abbott v. Perez*, 138 S. Ct. 2305, 2318 (2018)); *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (staying order directing that federal court would change election law unless Legislature did so within approximately 5 months); *Perry v. Perez*, 565 U.S. 1090 (2011) (this Court, 6 days before candidate registration deadline, stayed a lower court order changing election laws 22 days before candidate registration deadline).

This Court’s practice of granting stays to maintain the status quo of state election laws ensures that voters, candidates, and political parties know and adhere to the same neutral rules throughout the election process. As *Purcell* explained, “[c]onfidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.” 549 U.S. at 4. Fundamental fairness of the consistent application of established, accepted rules necessarily furthers the “integrity of our electoral process.” *Id.* Conversely, “voter confusion” is a paramount concern whenever

a court orders changes to established state election laws on the eve of an election. *Id.* at 4–5. And “[a]s an election draws closer, that risk will increase.” *Id.* at 5.

The courts of appeals have regularly followed the *Purcell* principle by staying orders changing election laws when an election is imminent. *See, e.g., Crookston v. Johnson*, 841 F.3d 396, 397–98 (6th Cir. 2016); *Veasey v. Perry*, 769 F.3d 890, 892–96 (5th Cir. 2014); *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012); *Respect Maine PAC v. McKee*, 622 F.3d 13, 14, 16 (1st Cir. 2010); *Ne. Ohio Coal. for Homeless and Serv. Employees Int’l Union*, 467 F.3d 999, 1003–04, 1012 (6th Cir. 2006); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 916–17, 919–20 (9th Cir. 2003) (en banc) (per curiam); *Page v. Bartels*, 248 F.3d 175, 195–96 (3d Cir. 2001).

Indeed, in rejecting other challenged portions of the district court’s injunction, the Seventh Circuit acknowledged and applied this principle. App. 3–4. But—without any analysis or explanation—it refused to stay the relevant portion of the district court’s injunction permitting the counting of ballots that were cast up to almost a week *after* Election Day. This change to Wisconsin law was imposed by the district court merely five days before the scheduled election, when absentee and early voting had already begun.

This was a deeply consequential and disruptive change. It will inevitably sow confusion over when voters need to submit their absentee ballots. A last-minute change to a voter deadline carries an increased risk that voters will not appreciate when votes actually must be cast. *See Purcell*, 549 U.S. at 4–5. Additionally, the district court’s order *encourages* absentee voters to hold their absentee ballots beyond

the April 7 Election Day, evaluate reports (authorized or otherwise) about exit polling and in-person voting, and then cast their votes days after in-person voting has concluded. *See infra* Part I.B.2. This information gap creates a fundamental unfairness that undermines the integrity of the election. Absentee voting should not be a procedure that gives some voters dramatically different incentives and information than others, permits advocacy groups to strategically chase down ballots that were not cast on election day, and otherwise disrupts Wisconsin statutes that aim to separate cleanly the time for ballot casting and ballot counting.

B. Under the *Anderson/Burdick* Framework, The State’s Interest In Avoiding A Two-Track Election—In Which Numerous Voters Might Strategically Cast Ballots *After* Election Day Results Are Announced—Is Overwhelming

1. To prevail on a vote-burden claim under *Anderson/Burdick*, see *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), Respondents must satisfy a two-step inquiry, bearing a heavy burden at each turn. First, they must establish both a cognizable burden on the right to vote from a challenged law and that burden’s severity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Alleged hardships are measured against the baseline of “the usual burdens of voting.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling opinion of Stevens, J.). Applying that standard, this Court has held that “making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely do[] not qualify as a substantial burden on the right to vote.” *Id.* at 198.

At the second step, Respondents must show that the alleged burden outweighs the State’s interest. *Id.* If the burden on the Respondents’ constitutional rights is “severe,” a state’s regulation must be narrowly drawn to advance a compelling state interest. *Burdick*, 504 U.S. at 434. If, on the other hand, the burden is merely “reasonable” and “nondiscriminatory,” the State’s legitimate regulatory interests suffice. *Id.* In either case, as Judge Easterbrook has explained, a justification’s sufficiency is generally a “legislative fact” that must be accepted if reasonable, not an “adjudicative fact[]” subject to courtroom testing. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014); see *Crawford*, 553 U.S. at 194–97 (opinion of Stevens, J.).

Last, Respondents raising a facial challenge to a voting law—seeking its across-the-board invalidation—must clear a final, especially steep hurdle. *Id.* at 200 (“heavy burden of persuasion”). Courts “must consider only the statute’s broad application to all [of the State’s] voters,” and the “facial challenge must fail where the statute has a plainly legitimate sweep.” *Id.* at 202–03 (citation omitted). Hence the challenge to Indiana’s photo ID law in *Crawford* fell short because “[t]he application of the statute to the vast majority of Indiana voters [was] amply justified.” *Id.* at 204. Likewise *Burdick* “upheld Hawaii’s prohibition on write-in voting despite the fact that it prevented a significant number of voters from participating in Hawaii elections in a meaningful manner.” *Id.* at 190 (quotation omitted).

2. In this exceptionally important case, there is a reasonable likelihood this Court would grant review and reverse the lower court’s holding that the Constitution

compels Wisconsin to allow absentee ballots to be cast after election day—a fundamental change to Wisconsin’s election procedures.

To begin, the district court’s decision to grant a form of extraordinary relief that Respondents never requested below itself supports the granting of a stay. *See Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312–13 (1985) (Rehnquist, J., in chambers) (noting that a district court’s granting “sweeping ‘preliminary’ relief” that the plaintiff “did not even seek” “would prompt at least four Members of this Court to grant review should the Court of Appeals affirm that aspect of the District Court’s order”); *see also C.I.R. v. McCoy*, 484 U.S. 3, 6 (1987) (court of appeals could not grant relief “beyond” what could have been sought from the Tax Court below).

Unsurprisingly, Respondents did not introduce any evidence to support a claim that post–election day absentee voting would be necessary to avoid unduly burdening anyone’s right to vote. *See* App. 44. Their concern focused instead on the potential burden that Wis. Stat. § 6.87(6) imposed on voters who would receive and complete their ballots by election day, but—due to the undisputed increase in absentee voting and the claimed potential for slowdown in mail service—would not be able to ensure they would be delivered to their polling place on election day. App. 44; D.Ct. Doc. 62 at 3–4, 8. The Respondents thus plainly never showed that there would be *any* burden on voting rights for Respondents to put their ballots in the mail on or before election day.

Second, the State’s interests in avoiding what are effectively *two* voting deadlines—here, one on April 7 and another on April 13—would amply justify any

burden imposed by its statute. Requiring that all voters vote by a single date, either by absentee ballots sent by that date or by voting in person, ensures—indeed, is *necessary* to ensure—the “orderly administration” of an election, *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.).

Having only one voting deadline also furthers the State’s “compelling interest in preserving the integrity of its election process,” *Eu*, 489 U.S. at 231. Consider the consequences of the district court’s order. Because municipal clerks in Wisconsin must publicize the returns of ballots cast on or after election day *as soon as they are counted*, see Wis. Stat. § 7.51(4)(b), (c), under the district court’s order, electors would have an incentive to *withhold* their ballots until the bulk of returns are released, perhaps even choosing not to cast their ballots at all if early returns suggest that their favored candidate will not likely overcome an election-night deficit. Meanwhile, campaigns would seize upon the opportunities presented under this rolling, single-election model, pressuring electors who had not yet participated to cast their ballots for this or that candidate, all the while undermining all timely-cast ballots and, more broadly, casting a cloud of illegitimacy over the entire election. Indeed, the League of Women Voters has previously recognized that projections “for election night victory when polls are open for any given office serve[] no positive purpose in the election process and may indeed have serious and harmful effects on voter confidence in the integrity of the election system and in the value of an individual vote.” Hearing Before the Task Force on Elections of Comm. of H. Admin. and Subcomm. on Telecomm.,

Cons. Protection, and Fin. of Comm. on Energy and Commerce, 97th Cong. 66 (1981) (statement of Dorothy Ridings, President, League of Women Voters).

Although the district court belatedly tried to diminish this risk by amending its order to require that returns not be released before April 13, it failed to actually protect against the harm its order creates. Nor is there any practicable way for the court to fix these problems. The district court instructed the Elections Commission and “any inspector” not to “releas[e] any unofficial results until April 13, 2020, at 4:00 p.m. or as soon thereafter as votes can be tabulated,” App. 6, but Wisconsin law does not impose the duty of releasing election results on the Commission or any inspectors in the first place—it places that duty instead on *municipal clerks*. See Wis. Stat. § 7.51(4)(b) (“The chief inspector, or one of the inspectors appointed by him or her, immediately after the votes are tabulated or counted at each election, shall *report* the returns of the election *to the municipal clerk*. . . . *The clerk shall then make the returns public*.” (emphasis added)). In any event, the court could not have stopped Wisconsin’s municipal clerks from releasing election-day results even if it had tried, since municipal clerks are not parties to these lawsuits and therefore not subject to the court’s powers. *Smith v. Bayer Corp.*, 564 U.S. 299, 305 (2011) (“[A] court’s judgment cannot bind nonparties.”).⁷ Additionally—given the number of clerks and other

⁷ Although the Wisconsin Elections Commission does have some enforcement authority over election officials—for example, it may commence investigations upon a complaint and bring actions for violations of Chapters 5 through 12, see Wis. Stat. §§ 5.05(2m), 5.06, 5.08, and 5.081—these enforcement matters are triggered only once there is some kind of allegation that an election statute has been violated. See Wis. Stat. § 5.06(1) (“Whenever any elector of a jurisdiction or district served by an election official believes that

parties involved in the counting process—it is doubtful and unrealistic for any court order to prevent widespread leaks about the progress of a controversial and hotly contested state election.

The district court portrayed its extension of the time for voting as an act of judicial modesty. Yet even as it disclaimed any desire to “further alter[] statutory requirements” by “add[ing] a postmarked-by date requirement,” it undermined the most important part of section 6.87(6). App. 47. The deadline for the delivery of ballots is the demarcation point for two distinct phases of the election: the time for casting ballots, and the time for counting them. Wisconsin law generally observes this important distinction. *See* Wis. Stat. § 6.88(1) (requiring absentee ballots generally to remain “unopened” when received); Wis. Stat. § 7.51(1) (requiring canvassing of results “[i]mmediately after the polls close” (emphasis added)).⁸

Given the challenges imposed by COVID-19, it is understandable that the district court wanted to ensure that voters who can complete their ballots by election day, but—due to mail delays and safety concerns about physically bringing their

a decision or action of the official or the failure of the official to act with respect to any matter concerning...election administration”). Thus, should a municipal clerk announce or otherwise publicize the unofficial election results, the harm will have occurred.

⁸ Wisconsin is hardly alone in prohibiting counting or release of voting results while voting is ongoing. Numerous states contain similar laws advancing this interest. *See, e.g.*, Alaska Admin. Code tit. 6, § 27.175; Ill. Admin. Code tit. 26, § 205.10; 950 Mass. Code Regs. 54.03; Code Me. R. tit. 01-001 Ch. 803, § 5; Mo. Code Regs. Ann. tit. 10, § 70-6.010; S.D. Codified Laws § 12-19-46. Others prohibit the publishing of results before polls are closed or votes counted. *See* 8 Colo. Code Regs. § 1505-1:7; Iowa Code Ann. § 53.23. And several states make it a crime to release results before the polls are closed. Fla. Stat. Ann. § 101.68; Neb. Rev. Stat. Ann. § 32-1545; N.M. Stat. Ann. § 1-20-19.1.

ballot to the polling place—could not deliver them by election day.⁹ But that concern cannot justify the fundamentally different relief of allowing voters to wait and actually cast their vote for nearly a week after the deadline for everybody else. Compounding its error, the court conceded that there was “no persuasive evidence” for keeping April 7 as the date by which voting must be completed. This amounted to placing the burden of proof under *Anderson-Burdick* on the State and not the Respondents, where it belongs. And it was especially unfair to reallocate this burden when this issue had not even been squarely raised by the parties before the district court’s order.

Finally, because there was no evidence to sustain this claim as to any voter (the Respondents having not even tried), there was also *a fortiori* insufficient evidence to invalidate application of Section § 6.87(6) as to *all* voters. In other words, because “[t]he application of [this] statute to the vast majority of [Wisconsin] voters [was] amply justified,” which the Respondents did not and could not refute, the facial remedy that the court ordered was improper. *Crawford*, 553 U.S. at 204 (opinion of Stevens, J.).

II. Applicants Will Suffer Irreparable Harm Absent A Stay

Any time a State is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury. *Abbott v.*

⁹ Along this line, the Wisconsin Elections Commission made clear to the district court that they did “not object to any absentee ballot *postmarked* by April 7, 2020 and received by April 13, 2020 by 4:00 p.m.” App. 44 (emphasis added).

Perez, 138 S. Ct. 2305, 2324 & n.17 (2018). And the “State indisputably has a compelling interest in preserving the integrity,” *Eu*, 489 U.S. at 231, and “orderly administration,” *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.), of its elections.¹⁰ Further, the Republican National Committee and Republican Party of Wisconsin have an interest in having their members’ rights as voters not undermined by eleventh-hour changes to election laws, including by permitting post-election voting. The irreparable harm to Applicants from this injunction is especially grave, given that the court has enjoined a state law imposing a deadline on voting on the eve of a statewide election. Applicants have explained these significant burdens and harms flowing from this injunction above. *See supra* Part I.B.2.

On the other end of the equitable balance, the district court failed to offer anywhere near sufficient equitable reasons for its decision to allow voting after election day. The court expressed concern that ballots diligently returned may not be counted, under the April 7 statutory deadline. App. 45–46. But the Respondents submitted evidence to support their point only that it would be hard for voters to get their ballots *to clerks* by election day, due to the speed of the mail, even though the ballots would—in fact—be postmarked by election day. *See supra* Part I.B.2. The Respondents did not provide *any* evidence to justify allowing voters to mail in their ballots after election day, since they were never even asking for this relief.

¹⁰ Here, the Legislature is speaking for the State of Wisconsin and its interests in the validity of its laws, including its election laws, *see Bethune-Hill*, 139 S. Ct. at 1952; Wis. Stat. §§ 13.365(3), 803.09(2m), as the Seventh Circuit properly concluded, App. 4.

CONCLUSION

This Court should issue the requested partial stay.

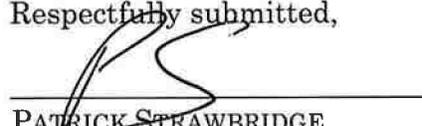
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April 2020

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.
APPLICANTS,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

THE WISCONSIN STATE LEGISLATURE,
APPLICANTS,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

APPENDIX TO EMERGENCY APPLICATION FOR STAY

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States and
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ADMINISTRATIVE STAY AND STAY PENDING APPEAL, filed on April 2, 2020, by counsel.

3. **GEAR PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR-DEFENDANTS-APPELLANTS' MOTION FOR ADMINISTRATIVE STAY AND STAY PENDING APPEAL**, filed on April 3, 2020, by counsel.
4. **LEWIS PLAINTIFFS' OPPOSITION TO MOTIONS TO STAY**, filed on April 3, 2020, by counsel.
5. **OPPOSITION OF PLAINTIFFS-APPELLEES DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN TO MOTIONS TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY IN NOS. 20-1538 AND 20-1539**, filed on April 3, 2020, by counsel.
6. **REPLY OF WISCONSIN LEGISLATURE IN SUPPORT OF EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY**, filed on April 3, 2020, by counsel.

The court is in receipt of these emergency appeals, which have been referred to a three-judge panel.

The Democratic National Committee and the Democratic Party of Wisconsin, individual voters, and various community groups (collectively, "plaintiffs") brought these three consolidated cases against Wisconsin election officials pursuant to 42 U.S.C. § 1983 challenging various aspects of the state's primary election scheduled for April 7, 2020. They alleged that in light of shelter-in-place orders issued by the governor due to the COVID-19 crisis, voters will rely very heavily on absentee voting, and in their view, certain provisions of Wisconsin law governing absentee voting pose severe obstacles to some voters that unduly burdens their right to vote. Among other relief, they sought injunctive relief in the form of an extension of the electronic registration deadline; a suspension of the requirement for documentation and/or photo identification; a suspension of the requirement that each absentee ballot be signed by a witness. The Wisconsin State Legislature sought to intervene in the case, but the district

Nos. 20-1538, 20-1539, 20-1545 & 20-1546

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court denied this request. On April 2, 2020, following a hearing, the district court issued a lengthy order granting in part and denying in part the plaintiffs' request for injunctive relief. The court subsequently made two minor amendments to the order. The Wisconsin State Legislature filed an emergency notice of appeal of the order denying intervention, and the Republican National Committee, which was permitted to intervene below, filed an emergency notice of appeal of the court's preliminary injunction order. They both seek a stay of the court's order. Notably, no aspect of these appeals challenge the district court's rejection of the plaintiffs' request to enjoin live voting on April 7. Upon review of the parties' filings,

IT IS ORDERED that the motions for a stay are **DENIED** as to the portions of the district court's order that (1) enjoin the enforcement of 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 extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020; and (2) enjoin the enforcement of the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020, and extend the deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) to 5:00 p.m. on April 3, 2020.

IT IS FURTHER ORDERED that the motions for a stay are **GRANTED** as to that portion of the district court's order that enjoins the enforcement of Wis. Stat. § 6.87(2) for absentee voters who provide a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so. The court concludes that the district court did not give adequate consideration to the state's interests in suspending this requirement. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," and "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The court is also cognizant of the Supreme Court's admonition that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4-5. This court is concerned with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest in combatting voter fraud. *Griffin*, 385 F.3d at 1130.

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On March 29, 2020, the Wisconsin Election Commission issued Absentee Witness Signature Requirement Guidance that contained suggested options for allowing absentee voters to meet the state's signature requirement. The guidance is available on the Commission's website at <https://elections.wi.gov/index.php/node/6790>. The guidance came out of a meeting the Commission held on March 27, 2020, and contains at least five concrete alternative suggestions for how voters can comply with the state's witness and signature requirements in light of the extraordinary challenges presented by the COVID-19 crisis. With the absentee ballot receipt date being extended to April 13, 2020, voters have more time to take advantage of one or another of the Commission's suggestions for obtaining a signature. So, too, do we have every reason to believe the Commission, in keeping with the forward-leaning action it has taken thus far to accommodate voters' interests while also striving to ensure their safety, will continue to consider yet other ways for voters to satisfy the statutory signature requirement (if possible, for example, by maintaining the statutory presence requirement but not requiring the witness's physical signature). It is best to leave these decisions and any more particular prescriptions to the Commission, as it is better positioned to know what additional alternative suggestions are able to accommodate the many intersecting interests in play in the present circumstances.

IT IS FINALLY ORDERED that the court concludes that the Wisconsin State Legislature has standing to pursue this appeal, and that the district court erred in refusing to permit the Legislature to intervene in the case below. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019).

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

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

AMENDED PRELIMINARY
INJUNCTION ORDER

v.

20-cv-249-wmc

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

SYLVIA GEAR, MALEKEH K. HAKAMI, PATRICIA
GINTER, CLAIRE WHELAN, WISCONSIN ALLIANCE
FOR RETIRED AMERICANS and LEAGUE OF WOMEN
VOTERS OF WISCONSIN,

Plaintiffs,

v.

20-cv-278-wmc

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

Defendants.

REVERAND GREG LEWIS, SOULS TO THE
POLLS, VOCES DE LA FRONTERA, BLACK LEADERS
ORGANIZING FOR COMMUNITIES, AMERICAN
FEDERATION OF TEACHERS, LOCAL, 212, AFL-CIO,
SEIU WISCONSIN STATE COUNCIL and LEAGUE
OF WOMEN VOTERS OF WISCONSIN,

Plaintiffs,

v.

20-cv-284-wmc

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

Defendants.

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

- a) Defendants are enjoined 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. The deadline for receipt of absentee ballots is extended to 4:00 p.m. on April 13, 2020.
- b) Defendants and any inspector appointed under Wis. Stat. § 7.30(a)(b) are enjoined from releasing any unofficial results until April 13, 2020, at 4:00 p.m. or as soon thereafter as votes can be tabulated.
- c) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020. The deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) is extended to 5:00 p.m. on April 3, 2020.

- d) Defendants and Wisconsin municipal clerks are enjoined from enforcing Wis. Stat. § 6.87(2) as to any absentee voter who, prior to their ballot being tabulated, provides a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so.

Entered this 3rd day of April, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v.

OPINION AND ORDER

20-cv-249-wmc

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

SYLVIA GEAR, MALEKEH K. HAKAMI, PATRICIA
GINTER, CLAIRE WHELAN, WISCONSIN ALLIANCE
FOR RETIRED AMERICANS and LEAGUE OF WOMEN
VOTERS OF WISCONSIN,

Plaintiffs,

v.

20-cv-278-wmc

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

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REVERAND GREG LEWIS, SOULS TO THE
POLLS, VOCES DE LA FRONTERA, BLACK LEADERS
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FEDERATION OF TEACHERS, LOCAL, 212, AFL-CIO,
SEIU WISCONSIN STATE COUNCIL and LEAGUE
OF WOMEN VOTERS OF WISCONSIN,

Plaintiffs,

v.

20-cv-284-wmc

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

Defendants.

In these three, consolidated cases, all filed in the last two weeks under the cloud of the emerging COVID-19 health crisis, plaintiffs¹ challenge a number of election-related, statutory requirements for the rapidly approaching April 7, 2020, election. Contrary to the view of at least a dozen other states, as well as the consensus of medical experts across the country as to the gathering of large groups of people, the State of Wisconsin appears determined to proceed with an in-person election on April 7, 2020. In the weeks leading up to the election, the extent of the risk of holding that election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers. As a result, state election officials are confronting a huge backlog in requests for absentee ballots made online, by mail or in person, including an unprecedented number of questions regarding how to satisfy certain registration requirements, properly request an

¹ For simplicity, all three groups of plaintiffs will be referred to simply as simply “plaintiffs” throughout this opinion unless otherwise indicated, while still recognizing that the three cases continue to retain their separate characters. *See Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 928 (7th Cir. 1983) (“[A]ctions which have been consolidated do not lose their separate identity.”).

absentee ballot, and return a properly completed absentee ballot in time to be considered for the April 7 election. On top of the burdens this influx has created for the Wisconsin Election Commission, its Administrator, staff and local municipalities in the days leading up to the election, that same group has been improvising in real time a method to proceed safely and effectively with in-person voting in the face of increasing COVID-19 risks, loss of poll workers due to age, fears or sickness, the resulting consolidation of polling locations, and inadequate resources.

Despite these truly heroic efforts, the three most likely consequences of proceeding with the election on this basis are (1) a dramatic shortfall in the number of voters on election day as compared to recent primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19. Nevertheless, the Wisconsin State Legislature and Governor apparently are hoping for a fourth possibility: that the efforts of the WEC Administrator, her staff, the municipalities and poll workers, as well as voters willing to ignore the obvious risk to themselves and others of proceeding with in-person voting, will thread the needle to produce a reasonable voter turnout and no increase in the dissemination of COVID-19.

However unlikely this outcome may be, or ill-advised in terms of the public health risks and the likelihood of a successful election, the only role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting

franchise as protected by the United States Constitution and federal statutes. That is what the court attempts to do in this opinion and the order below, understanding that a consequence of these measures may be to further the public health crisis in this State. Unfortunately, that is beyond the power of this court to control.

In a prior opinion and order in the '249 case, the court granted plaintiffs the Democratic National Committee and the Democratic Party of Wisconsin's (jointly, the "DNC/DPW") motion for temporary restraining order in part, extending the deadline by which an individual can register to vote electronically to March 30, 2020. The court denied the other requests, but signaled to plaintiffs that the court would consider their request for extension of the date by which absentee ballots may be counted toward the election and other relief in a motion for preliminary injunction. On March 27, 2020, plaintiffs filed a motion for preliminary injunction and supporting evidence, seeking an extension of the deadline for receipt of absentee ballots and a suspension of the witness signature requirement on those ballots, as well as reconsideration of the court's ruling on the by-mail absentee deadline and documentation requirements. ('249 dkt. #61.) In addition, on March 28, 2020, plaintiffs in the '278 and '284 cases filed motions for temporary restraining orders, requesting postponement of the April 7, 2020, election and other relief duplicative of the relief requested in the '249 motion for preliminary injunction. ('278 dkt. #8; '284 dkt. #17.)

In response to these motions, the court consolidated the three cases, and set briefing on the various motions. After reviewing the opposition briefs filed by defendants the Commissioners and Administrator of the Wisconsin Election Commission ("WEC") and

the intervening defendants the Republican National Committee and the Republican Party of Wisconsin (jointly, the “RNC/RPW”), as well as amici briefs, the court further conducted an evidentiary hearing and oral argument on April 1, 2020, at which the parties appeared by counsel and WEC Administrator Meagan Wolfe provided extensive testimony in response to the court’s questions, as well as those posed by counsel.²

For the reasons that follow and provided on the record during the hearing on plaintiffs’ motions, the court will grant plaintiffs’ motions in part, and provide the following preliminary relief: (1) enjoin the enforcement of 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 extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020; (2) enjoin the enforcement of the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020, and extend the deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) to 5:00 p.m. on April 3, 2020; and (3) enjoin the enforcement of 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, provided that the ballots are otherwise valid.³

² Initially, the Commissioners were represented by the Attorney General of Wisconsin. But on March 26, 2020, the Governor appointed special counsel to represent them pursuant to Wis. Stat. § 14.11(2)(a).

³ The court *will* reserve on the question as to whether the actual voter turnout, ability to vote on election day or overall conduct of the election and counting votes timely has undermined citizens’ right to vote.

FACTS

A. Overview of the WEC and Voting in Wisconsin

The WEC is charged with overarching responsibility to administer and enforce Wisconsin's election laws. In administering elections, the WEC works with the state's 72 county clerks and 1,850 municipal clerks. The WEC issues clerk communications, training materials and forms for local clerks. In turn, local clerks are tasked with implementing any changes in policy or law in their community, including administering absentee ballot voting. About two-thirds of the clerks in Wisconsin municipalities are part-time.

After the polls close, election inspectors are charged with tabulating the votes received at the polling places; municipal clerks are to report the returns within two hours after tabulation; and the county clerks are to post the results within two hours after receiving the returns. Wis. Stat. §§ 7.51(1), (4), 7.60(1). Municipalities have two ways to count absentee ballots: (1) count absentee ballots at the polling places, Wis. Stat. §§ 6.88, 7.51; or (2) count absentee ballots at a central location by a municipal board of absentee ballot canvassers, Wis. Stat. § 7.52. Under either method, the election inspector or absentee ballot canvasser reviews the certification contained on the envelope, and if the certification is insufficient, the ballot is not counted. Wis. Stat. §§ 6.88(3)(b), 7.52(a).

For the upcoming April 7 election, municipal boards of canvass have until April 13 to certify the results to the county. The county boards of canvass also have 10 days after the election to certify their results to the WEC or April 17, 2020, for the upcoming election. Wis. Stat. § 7.60(5). The municipal boards of canvass must further publicly declare the results for municipal contests by the third Tuesday of April, or in the case of

the April 7 election, by April 21, 2020. Wis. Stat. § 7.53(2)(d). Finally, the WEC has until May 15, 2020, to certify the election results for state and federal contests. Wis. Stat. § 7.70(3)(a).

In addition to the presidential primaries, the April 7, 2020, election has the following state and local seats on the ballot: a Wisconsin Supreme Court justice; three Wisconsin Court of Appeals judges; 34 Wisconsin circuit court judges; 102 municipal court judges; 1,596 county positions; 763 city positions; 464 village positions; 391 town positions; 565 school board seats; and 12 sanitary district supervisory board positions. (Gov. Evers Amicus Br. (dkt. #151) 6.)

B. Current State of COVID-19 Health Crisis

As of March 27, the date the DNC/DPW plaintiffs filed their motion for preliminary injunction, the state was reporting more than 710 cases of COVID-19 and at least 12 deaths. As of the date of this opinion and order, there are 1,550 confirmed cases in Wisconsin and 24 deaths.⁴ Wis. Dep. of Health Servs., “Outbreaks in Wisconsin” (as of Apr. 1, 2020), available at <https://www.dhs.wisconsin.gov/outbreaks/index.htm>. While Wisconsin and other parts of the country are taking steps to “flatten the curve,” it is clear that the outbreak in Wisconsin is still somewhat near the beginning of that curve, with evidence of increasing community spread. (Pls.’ PFOFs (’284 dkt. #19) ¶¶ 56-57; *see also* Gov. Evers Amicus Br. (’249 dkt. #151) 8 (“[T]he COVID-19 epidemic in Wisconsin will

⁴ Moreover, Wisconsin’s Department of Health Services’ chief medical officers and state epidemiologist for communicable diseases estimate that the actual number of Wisconsinites with COVID-19 is up to ten times higher than the number who have tested positive. (Gov. Evers Amicus Br. (’249 dkt. #151) 7 & n.12.)

get worse before it gets better,” with the DHS Secretary-Designee estimating that “it could be ‘10-plus’ days before the growth curve of COVID-19 flattens out in Wisconsin.”.)

On Tuesday, March 24, Governor Evers issued a “Safer-at-Home Order,” requiring all Wisconsinites to shelter in place to slow the spread of COVID-19 until April 24, 2020, or until a superseding order is issued. (Spiva Decl., Ex. 4 (’249 dkt. #63-4) (also known as “Emergency Order #12”).) This order is consistent with the Centers for Disease Control and Prevention’s (“CDC”) recommendations that people in the at-risk category, which includes people who are 65 years old or older or who have underlying health conditions and diseases, including chronic lung diseases, asthma, diabetes, serious heart conditions, and are otherwise immune-compromised, stay at home and avoid non-essential travel. (Pls.’ PFOFs (’278 dkt. #16) ¶ 6.) According to U.S. Census Bureau 5-year estimates, 15 per cent of the 2,328,754 Wisconsin households include someone 65 years of age or older.⁵

C. Increased Reliance on Absentee Ballots

State actors have increasingly focused on encouraging individuals to vote by absentee ballot, with Governor Evers recently calling on the Legislature to enable all registered voters to receive a ballot by mail and extend the time for mailed-in absentee ballots to be counted. (Pls.’ PFOFs (’284 dkt. #19) ¶ 67.) On March 24, the Governor issued an “EMERGENCY ORDER #12: SAFER AT HOME ORDER,” directing all Wisconsinites to stay at their home and places of residence, but a week later amended that

⁵ Although the number of those households occupied by those *only* 65 years or older is unclear, 675,000 households in the state are one-person, and 862,900 are two-person households. (Dkt. #166-4, Ex. 54.) By extrapolation, plaintiffs represent that 250,000 of these are over 65. (Pls.’ PFOF (’278 dkt. #16) ¶ 20.)

order to explain that “the Safer at Home Order is not intended to eliminate in-person absentee voting for the April 7, 2020, election” or “in person voting on the scheduled election date.” (Gov. Evers Amicus Br. ('249 dkt. #151) 5 & n.8.) In turn, the WEC indicated that it cannot cancel or postpone the election, and that “any change may require court intervention, an act of the Legislature, or an order of the Governor.” (Pls.’ PFOFs ('284 dkt. #19) ¶ 88.)

As a result, Governor Evers, the WEC Administrator, and the Mayor of Milwaukee, among other public officials, are encouraging voters to vote via absentee ballot. Ironically, while encouraging voting by absentee ballot, the options for in-person voting, either before the election day by absentee ballot or on election day are at risk of being eliminated or have been eliminated. In the City of Madison, 67% of poll workers are over 60 years of age, falling within the at-risk category for COVID-19, and 32% of poll workers have canceled their assigned, in-person voting shifts. Madison also limited in-person absentee voting to curbside voting and eliminated voting at other early voting locations. Similarly, the City of Milwaukee has reported that it no longer has sufficient staff to operate its three, in-person early voting locations, also eliminating the ability to register in-person before the election, although as the intervening defendants point out, drive-up early voting remains available through April 5. Milwaukee Elections Commission Website, available at <https://city.milwaukee.gov/election#.XoFPkpNKiqA>.

As of the date of the DNC/DPW plaintiffs’ motion, 699,431 absentee ballots have been requested statewide. As of the latest available data, that number has increased to 1,119,439, with today being the last remaining opportunity for individuals to request the

mailing of an absentee ballot. WEC, “Absentee Ballot Report - April 7, 2020 Spring Election” (Apr. 2, 2020), available at <https://elections.wi.gov/node/6806>. As a point of reference, in the four spring elections from 2016 to 2019, the number of absentee ballots issued ranged from a low of 103,533 in 2017 to a high of 249,503 in 2016. (Burden Rept. ('249 dkt. #63-1) 7.)⁶ In a March 23, 2020, hearing on the court’s prior temporary restraining order, WEC Administrator Wolfe, stated “we’re also seeing unprecedented traffic for people requesting their absentee ballot.” (Pls.’ PFOFs ('249 dkt. #62-1) ¶ 8.) Anticipating this growth in demand, the WEC has distributed 1.2 million absentee ballot envelopes to municipal clerks throughout the state. At the hearing, WEC Administrator Wolfe testified that for the 2012 and 2016 spring elections, approximately 80-85% of the absentee ballots sent to voters were returned in time to be counted.

As a result of the significant uptick in absentee ballot requests, Madison City Clerk Maribeth Witzel-Behl represents that Madison has received an “unprecedented number of requests for absentee ballots”; Milwaukee City Clerk Neil Albrecht estimates that “absentee ballot requests this election are ten times the normal number”; and Hudson City Clerk Becky Eggen avers that “[t]his election cycle is by far the busiest I have experienced in terms of volume and speed of requests for absentee ballots.” (*Id.* ¶¶ 9-11 (citing Witzel-Behl Decl. ('249 dkt. #77) ¶ 7; Albrecht Decl. ('249 dkt. #73) ¶ 5); Eggen Decl. ('249 dkt. #65) ¶ 2).)

In light of these unprecedented numbers, at least some clerks are having trouble

⁶ Moreover, in previous spring elections, absentee ballots were about as likely to be returned in person as by mail, a highly unlikely scenario for this election given the health risks and reduced options for doing so. (Burden Rept. ('249 dkt. #63-1) 7-8.)

processing the applications for absentee ballots. The Madison Clerk explains that “[a]ttempting to meet the extraordinary demand for absentee ballots and other requests from voters has strained the capabilities of the Clerk’s office,” and “[t]he ever increasing volume of requests for absentee ballots is threatening to overwhelm the staff available.” (Pls.’ PFOFs (’249 dkt. #62-1) ¶ 20 (quoting Witzel-Behl Decl. (’249 dkt. #77) ¶¶ 6, 8).) As of March 27, Madison had a backlog of more than 12,000 absentee ballots requests to process, and as a result it was experiencing at least a week-long delay in sending out absentee ballots. As of March 27, the City of Hudson had 2,000 pending requests for absentee ballots. The difficulty of processing the high volume requests is not limited to these cities, but extends to other municipal election offices across the state. Although WEC Administrator Wolfe represented at the April 1, 2020, hearing that the backlog had improved in recent days, she was unable to provide any specifics.

While recognizing the challenges in processing absentee ballot requests, the WEC maintains that “[i]t is not clear that the timely processing of requests for absentee ballots is impossible.” (Defs.’ PFOFs (’249 dkt. #109) ¶ 38.) In particular, the WEC represents that as of March 31, 2020, of the 972,232 absentee ballot requests, 942,350 have been sent out, leaving only a backlog of 30,000 statewide. WEC, “Absentee Ballot Report - April 7, 2020 Spring Election” (Mar. 31, 2020), available at <https://elections.wi.gov/node/6794>. As of April 2, the backlog was approximately 21,590. WEC, “Absentee Ballot Report - April 7, 2020 Spring Election” (Apr. 2, 2020), available at <https://elections.wi.gov/node/6806>.

Nevertheless, in light of the challenges in processing requests and mailing out

absentee ballots, the Madison City Clerk avers that “the 8:00 p.m. election day deadline for receipt of absentee ballots is completely unworkable.” (Pls.’ PFOFs (’249 dkt. #62-1) ¶ 29 (quoting Witzel-Behl Decl. (’249 dkt. #77) ¶ 13).) Specifically, the United States Postal Service estimates that two to three days are necessary for a ballot to arrive on time, although as the WEC points out during the past several years, USPS has advised voters to mail completed ballots one week before the election to ensure that they are received on or before election day, and since the beginning of the COVID-19 health crisis, the USPS is operating more slowly. (Defs.’ PFOFs (’249 dkt. #109) ¶¶ 8-9.)

As a result, the City Clerks for Madison and Milwaukee represent that “[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request . . . will have the time to receive, vote and return their ballot by Election Day.” (*Id.* ¶ 30 (quoting Cities’ Amicus Br. (’249 dkt. #39) 5).) The Madison City Clerk estimates that more than 1,000 ballots will be received after the election day deadline; Milwaukee estimates that “thousands” will arrive late. Indeed, at the hearing, in light of the number of absentee ballot requests to date and with reference to the 2016 spring election as a point of comparison, Wolfe acknowledged that approximately 27,500 voters absentee ballots will be received *after* the receipt deadline of 8:00 p.m. on the day of the election, April 7, 2020, and, therefore, will not be counted. No doubt at least in part for this reason, the WEC informed the court on March 31, 2020, that it no longer objects to any absentee ballot postmarked by April 7, 2020, and received by 4:00 p.m. on April 13, 2020, being counted in the election. (’249 dkt. #152.) In their notice to the court, the WEC also represented that “If the votes received by 4:00 p.m. on April 13, 2020, are

counted it will not impact the ability to complete the canvass in a timely manner.” (*Id.*)
At the hearing, WEC Administrator Wolfe and her counsel reiterated this position..

D. Challenges to Absentee Voting Posed by Safer-At-Home Order

I. Absentee Ballot Witness Signature Requirement

The Safer-At-Home Order did not explain how its provisions would implicate any of the state’s requirements for voting, including the witness signature requirement, although as the intervening defendants point out, there are numerous exceptions to the order including for “essential governmental functions” and “essential travel.” The envelopes in which absentee voters enclose and send in their ballots include the following language in the “Certification of Voter” box:

I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.

Wis. Stat. § 6.87(2). (*See also* Defs.’ PFOFs (dkt. #109) ¶ 16.) A box labeled “Certification of Witness” provides:

I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

Id. (*See also* Defs.’ PFOFs (dkt. #109) ¶ 17.)

On March 26, 2020, the Madison City Clerk issued a statement indicating that

“there is no exception to the witnessing and signature requirement for mail-in ballots,” and referring voters to non-profit organizations who can assist with witness signatures while maintaining social distancing. (Pls.’ PFOFs (’278 dkt. #16) ¶ 18 (quoting Aguilera Decl., Ex. T (’278 dkt. #15-20)).) On March 29, the WEC also issued guidance suggesting several options for voters to meet this requirement and avoid direct interaction, including a friend or neighbor may watch the voter mark their ballot through a window, open door or other physical barrier, and even may do so by video chat, like Skype or Facetime, with the voter then placing the ballot outside for the witness to sign and mail. WEC, “Absentee Witness Signature Requirement Guidance” (Mar. 29, 2020), available at <https://elections.wi.gov/node/6790>. The WEC even suggested that the voter could ask an individual delivering groceries or food to witness the ballot. *Id.* At the hearing, WEC Administrator Wolfe acknowledged that some of the guidance, in particular that concerning use of video chat, may not work for some elderly voters without access to or familiarity with the technology, and that the guidance may not account for all safety concerns about proper treatment of paper to avoid the spread of COVID-19. For its part, the City of Milwaukee has established five places where voters can drop off their completed absentee ballots and get them witnessed by staff, although obviously individuals would have to leave their home to access these services.

There are 675,850 single member households in Wisconsin, a substantial number of which are over the age of 65, including the four individual plaintiffs in the ’278 case. (Pls.’ PFOFs (’278 dkt. #16) ¶ 20.) Plaintiffs also submit declarations from several other individuals living alone, and in high risk groups, who explain the challenges they face in

complying with the witness signature requirement for absentee ballots and averring that they have been unable to secure the necessary signatures. (Pls.' PFOFs ('249 dkt. #62-1) ¶¶ 36, 39 (citing declarations); Pls.' PFOFs ('278 dkt. #16) ¶¶ 21-31 (citing plaintiffs' declarations); Pls.' PFOFs ('284 dkt. #19) ¶ 76 (citing declaration).) Plaintiffs' expert further opines "for a person who lives alone, is immunocompromised and self-quarantining to protect their health, or who has contacted COVID-19 and is in quarantine to protect others, it may be nearly impossible to secure a witness signature in a timely fashion." (*Id.* ¶ 37 (quoting Burden Rept. ('249 dkt. #63-1) 9).) The Madison City Clerk also avers that her office has received "numerous requests daily from individuals who have received an absentee ballot, but live alone and have no person to witness the ballot . . . [and] are afraid to leave their homes in search of a witness." (*Id.* ¶ 38 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶ 11); *see also* Eggen Decl. ('249 decl. #65) ¶ 6).⁷

2. Photo ID and Proof of Residency Requirements

Plaintiffs similarly contend that the Safer-At-Home Order, and specifically the requirement that all non-essential business close, poses challenges to individuals who need a copy of a photo ID or proof of residency in order to register to vote and request an absentee ballot online or by mail. While the intervening defendants point out that the Safer-At-Home order exempts business from closure that may provide photocopying services, a question remains whether voters, especially the elderly or other high-risk individuals, will feel safe venturing out to those businesses. Plaintiffs' expert again opines

⁷ As of March 31, 2020, the Milwaukee Clerk also avers that the city has received 450 absentee ballots that are missing the necessary witness signature. (Albrecht Decl. ('249 dkt. #135).)

that “[w]ithout the assistance of an election official and perhaps other friends or family who are separated physically due to ‘social distancing’ measures taken in response to the virus pandemic, [the copying and mailing in a copy of a photo ID or proof of residency] will be an administrative and technological hurdle for some prospective voters,” especially given that absentee voting is a “new and foreign process” for many Wisconsin voters, although recognizing that absentee voting has been in place in Wisconsin for some time. (Pls.’ PFOFs (’249 dkt. #62-1) ¶¶ 43-44 (quoting Burden Rept. (’249 dkt. #63-1) 12.)

One individual specifically avers that because of her lack of access to a copier or scanner, she will not be able to vote in this election. (*Id.* ¶ 45 (citing Love Decl. (dkt. #68) ¶ 4.) Moreover, the Dane County Clerk avers that he has received “many calls from elderly voters who are unable to provide a copy of their photo ID as required to request an absentee ballot.” (McDonnell Decl. (’249 dkt. #74) ¶ 6.)⁸ In response, he has advised these voters “to indicate on their absentee ballot requests that they are ‘indefinitely confined’ due to illness,” and on March 25, 2020, he advised all Dane County voters that they “should continue to follow the law requiring a photo ID but that they may indicate as needed that they are indefinitely confined due to illness.” (*Id.* ¶¶ 6-7.)

In response, the WEC issued guidance for indefinitely confined electors on March 29, 2020, which provides in pertinent part:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current

⁸ The intervening defendants dispute McDonnell’s account and other statements by clerks on hearsay grounds. At minimum, these statements are admissible for the impact they had on the declarants as voters. Fed. R. Evid. 803(3). To that extent, the court will at least credit the fact that some high risk voters have been paralyzed by the uncertain risks associated with venturing outside their homes.

circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

WEC, “Guidance for Indefinitely Confined Electors COVID-19” (Mar. 29, 2020), available at <https://elections.wi.gov/node/6788>. This guidance goes on to explain:

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. *During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.* We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

Id. (emphasis added).⁹

E. Challenges to In-Person Registration and Voting

While the significant increase in absentee ballot requests should decrease

⁹ In a March 31, 2020, order, the Wisconsin Supreme Court granted the Republican Party of Wisconsin’s motion for temporary restraining order, directing the Dane County Clerk to “refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance.” *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). (’249 dkt. #130.) In so holding, the Supreme Court effectively adopted the WEC’s guidance of the term “indefinitely confined” as quoted above.

significantly the number of in-person voters on April 7, assuming the total votes for this election fall somewhere in the mid-range of the total number of votes in the 2012 spring election (approximately 1.1 million) and the 2016 spring election (approximately 2.1 million), WEC Administrator Wolfe testified during the hearing that roughly 500,000 people would still need to vote in-person on April 7. In light of the COVID-19 health crisis and the various government orders, municipal clerks have expressed concerns about safely administering in-person voting and registration either before election day or on April 7. In response, the WEC has issued various communications, acknowledging concerns, including shortages of absentee ballot envelopes, polling locations, poll workers, hand sanitizer and cleaning products, as well as the real possibility that the clerks themselves may not be able to serve in the days leading up to election day and the election day itself. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 80-84.) Still, the WEC has directed municipal clerks to continue in-person registration and voting, while requiring at least six-feet of distance between voters and election workers.

As for election day, the WEC has directed that municipalities are required to conduct in-person election day voting and that local election officials and local elected officials are not authorized to terminate this option. (Defs.' PFOFs ('249 dkt. #157) ¶ 2.) After consulting the public health officials, the WEC recently provided guidance for polling stations on election day as well. (*Id.* ¶ 3; *see also* Wolfe Decl., Ex. F ('249 dkt. #106-6).) This guidance requires hand washing or sanitizing stations, wiping down tables, door handles, pens, etc., every ten minutes, ensuring at least six-foot distance between voters and between voters and election workers, and avoiding handling of photo IDs, among other

requirements. The WEC has purchased a large quantity of 70% ethyl alcohol liquid sanitizing product to provide clerks a disinfecting solution for use at polling sites, and is in the process of securing cleaning wipes. In addition, Governor Evers has indicated that he has agreed to use members of the Wisconsin Army National Guard to assist poll workers, although it is “anticipated that the assistance of the National Guard will not satisfy all of the current staffing needs.” (Gov. Evers Amicus Br. (’249 dkt. #151) 9.)

Even so, WEC Administrator Wolfe testified at the hearing that in a recent survey, 111 municipalities indicated that they did not have the capacity to staff even one polling place. Moreover, plaintiffs in the ’284 case submit more disturbing proposed findings of facts with respect to specific election preparations for the Cities of Milwaukee, Madison, Green Bay and Racine. In Milwaukee, the City has 592,000 residency, of which 439,000 are of voting age and approximately 298,000 are currently registered to vote. Approximately 40% of City residents are African-American; 17% are Hispanic/Latino; and 28% live in poverty, as compared to the state average of 13%. Milwaukee has 327 electoral wards and 180 polling stations, although 18 polling stations are unavailable due to risk of cross-contamination. In the 2016 spring presidential primary, Milwaukee documented 167,765 total ballots cast and processed 14,321 absentee ballots.

In preparation for the April 7, 2020, election, the City of Milwaukee will require some 300 staff members to assist in the processing of absentee ballots and 1,500 staff members for polling location operations. Due to the COVID-19 health crisis, as of March 30, 2020, there are less than 400 election workers (without confirmation from all) and 50 central count workers available. An estimated 50% of the City’s regular election workers

are over the age of 60, with approximately 33% over the age of 70. Milwaukee is concerned about training new poll workers due to the social distancing requirements. According to the City's Clerk, "[w]hether imposed *de jure* or *de facto*, the City of Milwaukee likely will be *unable* to conduct in-person voting in its 327 wards on April 7, leaving mail-in absentee voting as the only means currently [available] by which Milwaukee voters will be able to vote for the Spring Election scheduled to occur on April 7." (Pls.' PFOFs ('284 dkt. #19) ¶ 98 (citing Albrecht Decl. ('284 dkt. #12) ¶ 9) (emphasis added).) The WEC disputes this, pointing to its guidelines requiring municipalities to conduct in-person absentee and election day voting.

In addition, as of March 30, 2020, the City of Milwaukee has processed approximately 66,850 requests for absentee ballots. The Clerk estimates that if the City continues to receive approximately 5,000 requests per day until the last day such requests may be received, April 2, and assuming that 5% of the ballots mailed will not be returned, the City will process an additional 38,000 ballots for an estimated total of 90,000 ballots. Assuming in-person voting on election day is not possible, the Clerk estimates that the turnout for Milwaukee will be approximately 70,000 less than originally estimated.

In turn, the City of Madison has a population of approximately 255,650, with 213,725 of voting age, approximately 179,648 of which are registered to vote. The City has 152 voting wards and 92 polling stations, although 14 are not available due to COVID-19 health concerns, and the Madison Metropolitan School District is considering not allowing the City to use the 21 school facilities. Attempting to meet the demand for absentee ballots, other City of Madison employees have been reassigned to assist the City

Clerk, but even with that influx of employees, some staff have been working 12-17 hour days. As of March 24, the City has sent 40,275 absentee ballots by mail and 1,273 by email, by March 30, the total number of absentee ballots issued was over 69,000. Nonetheless, the City is having a difficult time processing the applications for absentee ballots, and it now has a backlog of over 12,000 requests. In the 2016 spring presidential primary, Madison voters cast 118,219 ballots, including 10,272 absentee ballots. The City is anticipating as many as 118,000 absentee ballots to be cast in the April 7 election.

As of March 24, 2020, 666 poll workers have also canceled their assigned shift at the polls in the City of Madison for the April 7 election. As such, 774 of the 1,500 morning shifts and 715 of the 1,500 evening shifts are vacant. In addition, approximately 67% of the City's poll workers were in the "at risk" category -- being over the age of 65. Accordingly, the City anticipates additional poll workers will opt not to work.¹⁰

As for Green Bay, as presented in the verified complaint in the Eastern District lawsuit, the City represents that it, too, is overwhelmed by the unprecedented demand for absentee ballots and has a backlog of over 4,000 requests with only six staff members, which includes employees from other departments, available to process the requests. As for election day, Green Bay currently lacks access to hand sanitizer or sanitation wipes, which are necessary to ensure cleanliness of polling places and limit potential exposure of

¹⁰ Dane County filed an amicus brief, in which it argues that the April 7 election should be postponed, including a statement from its Director of Public Health Madison & Dane County, in which she advises that a failure to postpone the election "would put all Wisconsin communities at greater risk of illness due to COVID-19, and puts our health care systems at risk of becoming overwhelmed and depleted of resources." ('249 dkt. #150-3 (quoting Ex. C. (dkt. #150-5)).)

COVID-19.¹¹ Moreover, 90% of its 278 poll workers are age 60 or older, and only 54 have agreed to work on election day. Of the 54 poll workers who have agreed to work, only 11 are chief inspectors. The City avers that with these staff shortages, proceeding with the April 7 election is “not only impractical, it is wholly irresponsible given that the integrity of the election will be jeopardized.” (Pls.’ PFOFs (’284 dkt. #19) ¶ 125.)

Finally, with respect to Racine, like Milwaukee, it is more ethnically diverse than other cities in Wisconsin, with approximately 23% of its residents are African-American and 21% are Hispanic/Latino. In addition, 20% of Racine residents lives below the poverty level. Of Racine’s more than 34,000 registered voters, the City typically sends approximately 1,500 absentee ballots. As of March 26, 2020, Racine has sent 4,500 ballots, which while a significant number, represents a small percentage of Racine’s voters. (Coolidge Decl. (dkt. #7) ¶ 6.) For early voting, Racine has developed a process to ensure social distancing and attempt to limit exposure to COVID-19, but it does not believe these same protections will be viable on election day. Of the 135 poll workers who routinely and reliably work elections, fewer than 25 are under the age of 60, and as of March 31, 2020, only 50 are willing to work the April 7 election. Moreover, many of the chief election officials previously scheduled to work have also notified the City that they will not work the April 7 election.

In addition to considering the challenges faced by these four cities, plaintiffs in the

¹¹ In its complaint in the Eastern District of Wisconsin, the City of Green Bay and the City Clerk, described the typical, in-person voting process on election day, noting several places where poll workers and voters will be closer to one another than the recommended six-foot separation for proper social distancing. (Pls.’ PFOFs (’284 dkt. #19) ¶ 78.)

'284 case also contend that African-American and Latino voters are particularly burdened by the impact of the COVID-19 health crisis with respect to the April 7 election. Since the 2008 election in Wisconsin, between 10 to 15% of all registrations have occurred at a polling place on the election day. (Pls.' PFOFs ('284 dkt. #19) ¶ 74.) For Milwaukee, approximately 20% of the total turnout for spring elections involve same-day registrants. (*Id.* ¶ 159.) Plaintiffs in the '284 case further aver that a "significant number of African-American voters have historically participated in same-day registration at the polls on election day, and will be unable to do this year due to the COVID-19 pandemic." (*Id.* ¶ 153.) Furthermore, due to the digital divide, registering to vote online or requesting an absentee ballot online may present more of a barrier for low-income African-American and Latino voters.

The burdens posed by this election will also likely disproportionately impact elderly voters, who are most vulnerable to the COVID-19 threat. On March 25, Bryan Boland, a Canvass Lead for SEIUWI, one of the plaintiffs in the '284 case, spoke with 43 people aged 60 and older living in the western part of Wisconsin. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 163-68 (citing Boland Decl. ('284 dkt. #2) ¶¶ 3-8); *see also* Lizotte Decl. ('284 dkt. #3) ¶¶ 3-10 (detailing additional concerns raised by voters ages 60 or older).) He avers that about half of the people that he spoke with were planning on voting in-person and would not request an absentee ballot, but a number of them recognized that if the coronavirus risks amplified, they might not be able to vote. A number of the people Boland spoke with also expressed difficulty in requesting a ballot on-line because of technical problems or lack

of a computer or smart phone.¹²

OPINION

The standard for determining whether a preliminary injunction or a temporary restraining order is appropriate is the same. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 865 (W.D. Wis. 2013) (citing *Winnig v. Sellen*, 731 F. Supp. 2d 855, 857 (W.D. Wis. 2011)). Specifically, a plaintiff must first show “(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)). Then, if this initial showing is successfully made, “the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant’s interests.” *Id.* (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016)).

I. Irreparable Harm & Inadequate Remedies at Law

The threatened loss of constitutional rights constitutes irreparable harm. *See Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm.”); *Elrod v. Burns*, 427 U.S.

¹² The WEC offered detailed facts about how postponing the election altogether would cause technical / logistics issues with respect to conducting the Special Election in the 7th Congressional District in particular (dkt. #157 at ¶¶ 8-17), but since the court does not believe this power lies within its purview, the court will not recite those here.

347, 373 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms “unquestionably constitutes irreparable injury”). More specifically, courts have held that infringement on the fundamental right to vote amounts to an irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs “would certainly suffer irreparable harm if their right to vote were impinged upon”).

Further, infringement on a citizens’ constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies would be inadequate in this case. *See Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (“The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate.”); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress.”). Accordingly, at least to the extent that they have demonstrated a likely constitutional violation as discussed below, plaintiffs have satisfied the first two prongs of the initial showing -- irreparable harm and inadequate remedies at law.

II. Likelihood of Success on the Merits & Balance of Equities

The court now turns to the heart of the matter -- whether plaintiffs have demonstrated a likelihood of success, and whether the balance of equities favors any of their requested relief. In the three motions, plaintiffs seek an order from the court restraining enforcement of the following six election-related requirements: (1) the current election day, April 7, 2020; (2) the current mail-in registration deadline under Wis. Stat.

§ 6.28(1); (3) the requirement that copies of proof of residence and voter ID accompany electronic and by-mail voter registration, under § 6.34; (4) the requirement that copies of photo identification accompany absentee ballot applications, under §§ 6.86, 6.87; (5) the requirement that absentee ballots be signed by a witness, under § 6.87(2); and (6) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, under § 6.87.

In these consolidated cases, the merits question is whether any of the challenged provisions impose an unconstitutional burden on the right to vote. The right to vote is fundamental, and any alleged infringement on this right “must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). This right, however, is not absolute, *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986), and “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes,” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Challenges to election laws are governed by the framework set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428

(1992).¹³ Under the *Anderson-Burdick* standard, the court must (1) “determine the extent of the burden imposed by the challenged provision”; (2) “evaluate the interest that the state offers to justify that burden”; and (3) “judge whether the interest justifies the burden.” *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016) (citing *Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428). When voting rights are severely restricted, a law “must be narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 280 (1992). But even “slight” burdens must be “be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288-89).

Even if plaintiffs are able to show that the challenged laws are likely unconstitutional, however, that does not automatically entitle them to the relief that they seek. Instead, the court must proceed “to weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one.” *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (citing *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). “In addition, the court must ask whether the preliminary injunction is in the public interest.” *Id.* (citing *Jones*, 842 F.3d at 1057). This latter consideration is

¹³ A citizen’s right to vote, and the *Anderson-Burdick* balancing test, is grounded in the First and Fourteenth Amendments. See *Burdick*, 504 U.S. at 434. So, while plaintiffs’ separately argue that the challenged provisions violate the equal protection clause and the due process clause of the Fourteenth Amendment, (see Pls.’ Br. (‘249 dkt. #62) 18-22), these concerns are properly addressed within the more specific *Anderson-Burdick* framework. See *Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017) (the *Anderson-Burdick* framework addresses “the constitutional rules that apply to state election regulations”); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (the constitutionality of an election law is governed by the *Anderson-Burdick* standard).

particularly critical here, as the Supreme Court has cautioned that “[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion As an election draws closer, that risk will increase.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

A. Postponement of Election Date

The court will begin with plaintiffs’ broadest request: that the court delay the April 7, 2020, election. They assert that “if the election remains on April 7, it will disenfranchise hundreds of thousands or more Wisconsin voters.” (Pls.’ Br. (‘284 dkt. #18) 2.) Although plaintiffs recognize that the decision to enjoin an impending election is serious, they maintain that such a measure is warranted given the immense burdens that will befall voters who attempt to exercise their franchise during the ongoing pandemic. (*Id.* at 8.)

First, plaintiffs contend that the burden that will be placed on citizens’ right to vote will not only be severe, but unprecedented. (*Id.* at 6.) Plaintiffs write that “[n]ever has an electorate in our state or country of this magnitude confronted the extreme burden of literally risking their health and lives in order to cast a vote.” (*Id.*) Moreover, they predict that in-person voting will be either cancelled or dysfunctionally understaffed as a result of poll workers’ decisions to stay home rather than risk their own health to operate the polls. (*Id.* at 2, 6.) Next, plaintiffs argue that the state has “no compelling interest justifying keeping the April 7 election date.” (*Id.* at 7.) According to plaintiffs, the election of candidates “by a mere fraction of qualified electors, under circumstances where a public crisis barred voters from participating, undermines the Defendants’ claims that adherence to the election schedule is essential to public confidence in the democratic process.” (*Id.* at 7-8.) Indeed, plaintiffs suggest that the state itself has an interest in postponing the

election since it is in the state's interest to hold a "meaningful" election which does not exclude significant number of eligible voters from the polls. (*Id.* at 8.)

Defendants, for their part, argue against delaying the election. The Commissioners maintain that they are capable of conducting an in-person election on April 7, despite the fact that certain unorthodox measures will need to be taken, such as consolidating polling stations and even possibly calling on Wisconsin National Guard members to serve as poll workers. In particular, the Commissioners voice concern over the cascading effects that may be caused by a delay in the scheduled election, including problems with processing ballots for upcoming elections and staying in compliance with federal laws regarding electronic tabulating equipment. (Defs.' Opp'n (dkt. #155) 3-4.) More forcefully, the RNC/RPW argue that delaying the April 7 election would throw the state's election preparations into turmoil and would harm those candidates who have spent time and resources campaigning. (RNC/RPW Opp'n ('249 dkt. #138) 3-4.) Further, they note that such interference would be unprecedented, and urge that this court "should not be the first to grant that drastic relief." (*Id.* at 4.)¹⁴

On the one hand, it is undeniable that the asserted state interests are strong. "The public interest in the maintenance of order in the election process is not only important, it is compelling." *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008). "Preventing

¹⁴ The RNC/RPW also argue that plaintiffs' claims should be denied because the additional burdens placed on voters are due not to state action, but the COVID-19 pandemic itself. (*See* RNC/RPW Opp'n ('249 dkt. #96) 3; ('249 dkt. #138) 2-3.) This argument is quickly dismissed. The state action challenged here is the enforcement of Wisconsin's election laws; just as a state may not enforce an apportionment scheme that, although once constitutional, has through the passage of time resulted in uneven representation, *Reynolds*, 377 U.S. at 587, Wisconsin here cannot enforce laws that, even due to circumstances out of its control, impose unconstitutional burdens on voters.

ambiguity and confusion serves” this compelling state interest. *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 948. Moreover, more generally states have “a strong interest in their ability to enforce state election law requirements.” *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011)

On the other hand, there is no doubt that the rapidly approaching election date in the midst of the COVID-19 pandemic means that citizens will face serious, and arguably unprecedented, burdens in exercising their right to vote in person. In-person absentee voting and pre-election, in-person registration has already been limited or even eliminated in some voting areas. An alarming number of poll workers have, understandably, cancelled their shifts, which is almost certain to lead to some degree of dysfunction on election day. Numerous polling stations have been ordered to close.

Although the Governor and other public officials have encouraged citizens to vote absentee, this is easier said than done. As plaintiffs have argued and as discussed below, the COVID-19 pandemic has raised concerns even for those seeking to vote absentee, particularly for those without access to the necessary technology. Further, unregistered voters at this point have no other option but to go in person to their clerk’s office or polling place on election day in order to register and thereby vote. Finally, voters who did not or could not vote absentee will be forced on election day to choose between exercising their franchise and venturing into public spaces, contrary to the public message to “stay home” delivered by countless public officials during the course of this pandemic. And this dilemma must be considered not only as an individual burden, but as a collective public health concern as the state continues to recommend limiting in-person interactions as

much as possible. Indeed, most at risk will be poll workers themselves, who may well be exposed to large number of voters throughout the day, and, as described in the facts above, the majority of which fall within the 60+ age range that is most at risk for serious complications due to COVID-19.

In light of these competing interests, the court cannot say with confidence that the state's asserted interests -- although strong -- are so compelling as to overcome the severe burdens that voters are sure to face in the upcoming election. Therefore, plaintiffs have demonstrated at least *some* likelihood of success on the merits of this claim. Even so, plaintiffs must further show that the balance of equities supports their requested relief.

In the balancing phase, "the court must compare the potential irreparable harms faced by both parties to the suit -- the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted." *Girl Scouts*, 549 F.3d at 1100 (citing *Ty, Inc.*, 237 F.3d at 895). Here, failing to delay the election day may well subject voters to unconstitutional burdens on their right to vote. The possibility that any law might disenfranchise qualified voters "would caution any district judge to give careful consideration to the plaintiffs' challenges." *Purcell*, 549 U.S. at 4.

Yet an injunction delaying the election altogether is not without harm to defendants. As a general matter, "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). More specifically, the Commissioners have expressed serious concerns about the impacts of a delayed election. (*See* Defs.' Opp'n ('249 dkt. #155).) WEC Administrator Wolfe

has explained that “changes to one aspect of the elections system have downstream impacts on voters, subsequent processes, and the ability of election officials to comply with statutory requirements and deadlines.” (Third Wolfe Decl. (‘249 dkt. #156) ¶ 9.) In particular, she has expressed concern that a delay to the April 7 election would interfere with the May election to be held in the 7th Congressional District, causing problems with “overlapping voter registration deadlines, overlapping absentee ballot procedures and time periods, voting equipment programming, and official canvass procedures.” (*Id.* ¶ 11.) Indeed, at the hearing, she testified that there are *no* other dates available that would not have some impact on another election to be held through September.

Crucially, “[w]hen conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation.” *Girl Scouts*, 549 F.3d at 1100 (citing *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Ty, Inc.*, 237 F.3d at 895). Here, the public interest cuts both in favor and against court involvement. As a general matter, “[e]nforcing a constitutional right is in the public interest.” *Whole Woman's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019). And, certainly, the public interest “favors permitting as many qualified voters to vote as possible.” *Obama for Am.*, 697 F.3d at 437.

That being recognized, a decision enjoining the election would not be an unequivocal benefit to all voters. As amicus Disability Rights Wisconsin points out, delaying the election day so that an all-mail election may be conducted, as has been suggested by some, may well adversely affect voters, including those with disabilities who

may require accommodations only possible via in-person voting. (Disability Rights Wis. Amicus Br. ('249 dkt. #121-1) 14.) Further, WEC Administrator Wolfe's testimony regarding the administrability of a delayed April 7 election suggest that such an order could potentially hamper registration efforts, undermine absentee voting, and confuse voters. Finally, a court "is entitled to and should consider the proximity of a forthcoming election" when considering the propriety of equitable relief. *Reynolds*, 377 U.S. at 585. This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion As an election draws closer, that risk will increase." *Purcell*, 540 U.S. at 4-5.

Plaintiffs argue that the pandemic "has prompted a burgeoning chorus of calls by the general public, public health experts, Mayors, Clerks, and local election commissions to postpone the April 7 election." (Pls.' Br. ('284 dkt. #18) 9.) And indeed the court has received numerous amicus briefs urging the court to take action. (*See, e.g.*, Dane Cty. Amicus Br. (dkt. #150); City of Green Bay Amicus Br. (dkt. #112); City of Milwaukee Amicus Br. (dkt. #100).) Yet there is also a "chorus of calls" to keep the April 7 election date, including those from the Governor (Gov. Evers Amicus Br. (dkt. #151)) and the Legislature (Wis. Legislature Amicus Br. ('249 dkt. #90)), who have both filed amicus briefs requesting that the court decline to stay the election. At the center of this maelstrom is the WEC, whose governing body was reconstituted relatively recently from a group of non-partisan judges to six Commissioners appointed equally by the two major political parties. As a consequence, the WEC's Administrator Meagan Wolfe has been expressly charged with the near impossible task of accomplishing a viable *and* safe election through

a combination of processing an unprecedented number of absentee ballots and an in-person election. If there is a hero to this story, it is the Administrator, her staff and municipal workers, all of whom continue to improvise election practices.

In doing so, the WEC retained the services of a medical expert approximately 3 weeks ago to advise how both can be accomplished under the threat of a COVID-19 outbreak and continued to consult with the Wisconsin State Emergency Operations Center (“SEOC”) established by the Governor on March 12, 2020, as the magnitude of the COVID-19 threat began to emerge. Among the exhibits provided this court is a copy of a memorandum prepared by the Administrator, which outlines the steps that have been taken so far to accomplish that task, some of which has been disseminated out to municipalities for implementation by its clerks and poll workers. On a rolling basis, the Administrator and her staff have been trying to update that advice and gather supplies for use by poll workers on election day. Indeed, during yesterday’s hearing, Administrator Wolfe learned for the first time that 25,000 masks were going to be provided at central locations for pick up by municipalities to be used during the local election next Tuesday. Until that moment, the advice by the Commissioner to municipalities was that masks would be unnecessary, apparently based on the previous advice of the medical expert and the fact that the CDC has not yet adopted the wearing of masks as a practice for the general public.

Because the only direction from an equally split group of Commissioners to the Administrator and her staff is to do the best they can in conducting a safe, in-person election, it appears that no medical expert has been retained by the Commission to advise

as to whether an in-person election *can* be conducted safely under any circumstances, nor even more remarkably does it appear that medical experts at SEOC have been asked to opine on this subject, despite the obvious risks of further dissemination of the coronavirus on election day, including the handling of recently submitted absentee ballots. The Administrator and her staff, as well as local municipalities and others are to be commended for their remarkable efforts to accomplish an in-person election that may well be unwise, not just for poll workers, but for voters and the general public given the crucial moment this state seems to be confronting in the COVID-19 growth curve.

This leaves the broader concern as to the propriety of a federal court taking the extraordinary step of delaying a state-wide election at the last minute, and the federalism problems that are necessarily implicated, which weigh heavily in favor of denying the plaintiffs' broadest, requested relief. Plaintiffs argue that "it is not uncommon for federal courts to enjoin state authorities from holding elections when doing so would violate the rights of voters that are protected by the Constitution." (Pls.' Reply ('249 dkt. #162) 2-3.) However, none of the cases cited by plaintiffs authorize what plaintiffs are asking the court to do in this circumstance: delay the date of an impending, state-wide election.

In contrast, the Supreme Court has endorsed district court decisions to refrain from action, even in the face of undisputed constitutional violations. In *Ely v. Klahr*, 403 U.S. 108 (1971), the Supreme Court upheld a district court's decision not to enjoin an election even under an unconstitutional apportionment plan. *Id.* at 113-14. Faced with an election that was "close at hand," the district court explained that an injunction delaying the vote would "involve serious risk of confusion and chaos." *Id.* at 133. In allowing the election

to proceed, the Supreme Court recognized that the district court “chose what it considered the lesser of two evils,” and affirmed the judgment of the court. *Id.* at 113-14; *see also Reynolds*, 377 U.S. at 586 (holding that the district court “acted in a most proper and commendable manner” in declining to enjoin Alabama’s impending primary election, even under an unconstitutional apportionment scheme).

Without doubt, the April 7 election day will create unprecedented burdens not just for aspiring voters, but also for poll workers, clerks, and indeed the state. As much as the court would prefer that the Wisconsin Legislature and Governor consider the public health ahead of any political considerations, that does not appear in the cards. Nor is it appropriate for a federal district court to act as the state’s chief health official by taking that step for them.

At most, the court can only act in good faith to allow the WEC, local municipalities and poll workers to take what steps they can to vindicate the constitutional right to vote. Accordingly, the court must conclude that plaintiffs have not met their burden of showing that the balance of equities favors enjoining the upcoming election day. As the Supreme Court held in *Purcell*, “[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction.” 549 U.S. at 5-6.

B. Extension of Deadline for Receipt of Absentee Ballots

Plaintiffs next request that the court extend the deadline by which absentee ballots may be received. Under current law, clerks will not count an absentee ballot that is received after 8:00 p.m. on election day. Wis. Stat. § 6.87(6). Plaintiffs argue that this statutory

deadline imposes an undue burden on voters because “it is a certainty that thousands of ballots will arrive after the April 7, 2020 deadline due to no fault of the voter.” (Pls.’ Br. (‘249 dkt. #62) 12.)

In support, plaintiffs point to *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Maryland 2010), in which the district court found that the statutory deadline for the receipt of absentee ballots imposed a severe burden on absent uniformed services and overseas voters that was not justified by the state’s interest in finality and certainty in elections. *Id.* at 678-80. The court found that due to long international mail delivery times, “even the most diligent absent uniformed services or overseas voter might be unable to return his ballot” in time to be counted. *Id.* at 678-79.¹⁵

Initially, the Commissioners maintained that the court should deny plaintiffs’ requests for any extension. (*See* Defs.’ Opp’n (‘249 dkt. #107) 9.) Later, however, the Commissioners submitted a notice to the court stating that they “do not object to any absentee ballot postmarked by April 7, 2020 and received by April 13, 2020 by 4:00 p.m. being counted in the Spring Election.” (Defs.’ Notice Mar. 31, 2020 (‘249 dkt. #152) 1.) They further represented that “[i]f the votes received by 4:00 p.m. on April 13, 2020 are

¹⁵ Plaintiffs also cite to *In re Holmes*, 788 A.2d 291 (N.J. Super. Ct. 2002), but this case is largely unhelpful. There, anthrax attacks had caused a particular postal facility to close shortly before an election, delaying their receipt by the Board of Elections. *Id.* at 293. The court ordered that the ballots cast on or before election day but trapped in the facility and not received until after election day, should be counted. *Id.* The court’s holding, however, was based on its interpretation of the state election law that set the deadline; the holding did not rely on or even discuss the federal constitutional analysis applicable to plaintiffs’ argument, making it of limited use here. *See generally id.* at 292-95. Similarly, plaintiffs’ citation to *United States v. Cunningham*, No. CIV. A. 3:08CV709, 2009 WL 3350028 (E.D. Va. Oct. 15, 2009), is unhelpful as that court bases its decision to extend the deadline by which absentee ballots should be received entirely on the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20401, *et seq.*

counted it will not impact the ability to complete the canvass in a timely manner.” (*Id.*)

The RNC/RPW and the Wisconsin Legislature contend generally that deadlines ensure the orderly administration of elections and also provide certainty and reliability that minimizes disorder. (*See* RNC/RPW Opp’n (‘249 dkt. #96) 2-3 (citing *Diaz*, 541 F. Supp. 2d at 1335; Wis. Legislature Amicus Br. (‘249 dkt. #90) 24 (citing *Crawford*, 553 U.S. at 196).) The RNC/RPW also argue that plaintiffs’ requested relief should be rejected because voters “face no imminent harm until those ballots are cast, do not arrive on time, are not counted, and are deemed material to the outcome.” (RNC/RPW Opp’n (‘249 dkt. #96) 6.) Similarly, the Wisconsin Legislature suggests that the court “wait until after election day to determine whether any remedy is necessary or appropriate.” (Wis. Legislature Amicus Br. (‘249 dkt. #90) 25.)

At the outset, the Legislature’s and RNC/RPW’s invitation to postpone deciding this issue must be declined. The record now contains sufficient evidence to show that the asserted harm is imminent, and a timely resolution is necessary if there is any hope of vindicating the voting rights of Wisconsin citizens in an April 7 election. Indeed, the evidence is nearly overwhelming that the WEC, local election units and poll workers will need additional time to address the avalanche of absentee ballots, still arriving daily, much less to do so safely.

Turning then to the merits, the court first considers the burden that the absentee receipt deadline will place on voters. Here, as in *Doe*, 746 F. Supp. 2d at 678-79, the evidence presented by the parties and amici demonstrates that even the most diligent voter may be unable to return his or her ballot in time to be counted. Wisconsin clerks are facing

a record number of absentee ballot requests, and despite diligent efforts, as of April 2, 2020, they are still working on sending out a backlog of over 21,000 absentee ballot applications. Both the Madison and Milwaukee City Clerks have represented that “[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request . . . will have the time to receive, vote and return their ballot by Election Day.” (Pls.’ PFOF (‘249 dkt. #62-1) ¶ 30 (quoting Cities’ Amicus Br. (‘249 dkt. #39) 5).) Under these circumstances, the court finds that the burden placed on absentee voters is severe. Thus, defendants must demonstrate that the state has a compelling interest in enforcing the challenged law. *See Norman*, 502 U.S. at 280. They have not done so here.

Certainly, deadlines do generally provide certainty and reliability, and protect the orderly administration of elections. Yet election deadlines have already been disrupted, with the evidence showing that many voters who *timely* request an absentee ballot will be unable to receive, vote, and return their ballot before the receipt deadline. The state’s interest in deadlines surely also extends to preserving the rights of those voters who themselves relied on those deadlines. More to the point, the state’s general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law.

Most persuasive is, of course, the fact that the WEC itself does not oppose extending the deadline and specifically averred that a receipt deadline of 4 p.m. on April 13, 2020, would “not impact the ability to complete the canvass in a timely manner.” (Defs.’ Notice Mar. 31, 2020 (‘249 dkt. #152).) Thus, the court concludes that plaintiffs have shown a

likelihood of success on the merits of their challenge to the absentee ballot receipt deadline. Moreover, the balance of harms favors preliminary injunctive relief. Specifically, an injunction moving the receipt deadline from 8 p.m. on April 7 to 4 p.m. on April 13 sufficiently accommodates canvassing deadlines while preserving citizens' rights.¹⁶

Similarly, the court will *not* add a postmarked-by date requirement; it is simply moving the statutory absentee receipt deadline. No persuasive evidence suggests that further altering statutory requirements will impose tangible benefits or harms, and indeed the amicus briefs from various local governments suggest that an extension of the deadline would be heartily welcomed by many local officials. (*See, e.g.,* City of Madison and Milwaukee Amicus Br. (dkt. #39); Dane Cty. Amicus Br. (dkt. #150).) Moreover, the WEC Administrator testified that the process of eliminating anyone who proceeded to vote in person after mailing an absentee ballot is already in place as part of the standard post-election canvassing of absentee ballots, and is not likely to create a substantial burden in this election. Finally, this relief is more generally in the public interest, which "favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

In light of the court's decision to extend the deadline for receipt of absentee ballots, the court will also extend slightly the receipt-deadline for absentee ballot requests.¹⁷ As

¹⁶ As such, this deadline addresses the concern raised in the Wisconsin Counties Association and Washington County's amicus brief, expressing concern about the expiration of county board supervisor's terms on the third Monday or Tuesday of April. ('249 dkt. #133.)

¹⁷ The court assumes that because the MyVote Wisconsin website still allows requests of absentee ballots online at the time this opinion issues, the WEC will be able to simply extend the clock until April 3, 2020, without having to engage in complex or risky computer changes. To the extent this assumption is incorrect, the WEC Administrator is empowered in her discretion not to implement this relief online, although municipalities are still required to accept requests locally through

described above, the general deadline for which an absentee ballot request must be received is today, April 2, 2020. In an effort to expand absentee voting to as many Wisconsin individuals as possible and reduce the number of people who will face the difficult choice of voting in-person on April 7, the court will extend the deadline by one day, until 5:00 p.m., April 3, 2020. This slight extension aligns with the deadline by which indefinitely confined and military voters' requests must be received. *See* Wis. Stat. § 6.86(1)(c), (2). Moreover, the increased flexibility on the back-end, extending the receipt deadline to April 13, should allow individuals whose absentee ballot request by 5:00 p.m. on Friday, April 3, 2020, to receive the ballot via mail, complete it, and return it via mail in time to meet the April 13, 2020, deadline.

C. Relief from Requirement of Witness Signature for Absentee Ballots

According to plaintiffs, the requirement that an absentee ballot be signed by a witness should also be enjoined because it imposes an unconstitutional burden under the current circumstances and is currently being applied in a way that violates the equal protection clause. Plaintiffs argue that for voters who do not have another adult U.S. citizen in their household, the witness requirement compels them to interact with a non-household member and “that interaction -- both the witnessing and signing of the ballot - - would require the individuals to come within six feet of each other” in violation of the Governor’s Safer-at-Home Order. (Pls.’ Br. (‘249 dkt. #62) 13.) Even aside from the Governor’s order, plaintiffs urge that interacting with another person to receive the

tomorrow, April 3, 2020.

necessary signature creates serious health risks due to the ongoing pandemic, especially for those who are elderly or immunocompromised. (*Id.* at 13; Pls.’ Br. (‘278 dkt. #17) 6-7.)

In support, plaintiffs have submitted a number of declarations by aspiring voters who have testified that they have been unable to secure a witness signature for their absentee ballot. (*See* Wilson Decl. (‘249 dkt. #75); Larson Decl. (‘249 dkt. #67); Keel Decl. (‘249 dkt. #66); Trapp Decl. (‘249 dkt. #70); Gear Decl. (‘278 dkt. #9); Ginter Decl. (‘278 dkt. #10); Hakami Decl. (‘278 dkt. #11); Whelan Decl. (‘278 dkt. #12); Ott Decl. (‘278 dkt. #13).) For example, Ben Wilson stated that he was “facing difficulty in finding a witness” because he lived alone and felt that “[k]nocking on a neighbor’s door or asking a gas station clerk would have me violate social distancing guidelines.” (Wilson Decl. (dkt. #75) ¶¶ 4-5.) Similarly, Jeff Trapp explained that he was “finding it difficult to get a witness” for his ballot, conceding that he “could sit on [his] doorstep and ask someone passing by,” but that he “really [did] not want to put someone else in the position of possible contact with the virus.” (Trapp Decl. (dkt. #70) ¶ 4.) Thus, plaintiffs conclude, the signature “requirement severely burdens individuals’ voting rights because, absent disobeying state law and severely compromising their health, it results in disenfranchisement.” (Pls.’ Br. (‘249 dkt. #62) 14; *see also* Pls.’ Br. (‘278 dkt. #17).)

In contrast, plaintiffs maintain that the state has no compelling interest in enforcing this requirement, and therefore the severe burden cannot be justified. Plaintiffs contend that “the witness requirement is an incredibly weak, borderline ineffectual, anti-fraud tool.” (Pls.’ Br. (‘278 dkt. #17) 7.) Moreover, according to plaintiffs, the state itself has an interest in encouraging individuals to observe social distancing guidelines, and the witness

requirement undermines the state's own interest in protecting the public health. (*Id.* at 9-10.)¹⁸

The RNC/RPW and Wisconsin Legislature oppose enjoining the witness requirement at all, arguing first that the burden on voters is not so severe as plaintiffs suggest. First, they point out that, if a voter can satisfy an election requirement with “reasonable effort,” then that requirement does not qualify as a substantial burden. (RNC/RPW Opp’n (‘249 dkt. #96) 5; Wis. Legislature Amicus Br. (‘249 dkt. #90) 20-21 (citing *Frank*, 819 F.3d at 386-87).) In particular, they argue that a voter can complete the requirement while abiding by the Governor’s orders and social distancing guidelines by, for example, having a witness observe through a window or even a videocall, then passing the ballot under a closed door to be signed and returned. (Wis. Legislature Amicus Br. (‘249 dkt. #90) 20-21.)

Second, the RNC/RPW and Wisconsin Legislature argue that any burdens imposed by the witness requirement are overcome by legitimate state interests. They both point to *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), in which the Seventh Circuit explained that voting fraud is a “serious problem” and is “facilitated by absentee voting.” (RNC/RPW Opp’n (‘249 dkt. #96) 2 (quoting *Griffin*, 385 F.3d at 1130-31); Wis. Legislature Amicus Br. (‘249 dkt. #90) 18 (quoting *Griffin*, 385 F.3d at 1130-31).) As to the specific

¹⁸ Plaintiffs also suggested that the requirement is not narrowly tailored because the state’s interests may be satisfied by other, less risky means. In particular, plaintiffs argued that the remote presence of a witness -- either through a live audio or video feed -- sufficiently accommodates the state’s asserted interests. (Pls.’ Br. (‘249 dkt. #62) 14-15, 20-21.) On March 29, 2020, however, the WEC issued guidance specifically confirming that a voter may complete their ballot in the remote presence of a witness. While the witness will still have to sign the physical certificate, this can be accomplished without a direct interaction with the age or health compromised voter.

witnessing requirement, they contend that it helps to prevent voter fraud “by adding an additional layer of protection, ensuring that the person filling out the absentee ballot is the actual voter listed on the ballot, and preventing undue influence or coercion.” (Wis. Legislature Amicus Br. (‘249 dkt. #90) 18.)

While generally arguing that the court should not enjoin the witnessing requirement, the Commissioners do not explicitly explain how the burdens imposed by the requirement are justified by state interests. (Defs.’ Opp’n (‘249 dkt. #107) 9.) Instead, they simply provide the court with the guidance developed by the WEC “for meeting the witness requirement . . . while either self-isolating or in quarantine.” (*Id.* at 17.)

It is undeniable that the COVID-19 pandemic and social distancing orders will make it harder for some aspiring absentee voters to satisfy the witness requirement. At the same time, for many voters, this requirement may easily be met by a fellow household member, with whom the strict social distancing guidelines discussed by plaintiffs do not apply. And even for those who do not reside with an adult U.S. citizen, in general the additional barriers they face may be overcome with some reasonable effort. In particular, the guidance published by the WEC suggests a variety of witnessing options for voters. (Aguilera Supp. Decl., Ex. W (dkt. #105-1) 2.) For example, the WEC suggests that a “family member, friend or neighbor” or even a “mail delivery person[.]” or “food delivery person[.]” “may watch the voter mark their ballot through a window, open door or other physical barrier.” (*Id.*) They also note that the “process can be done via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address after the fact.” (*Id.*) These options do not require the

voter or their witness to violate the Governor's Safer-at-Home Order, which allows individuals to interact so long as they "maintain social distancing of at least six (6) feet." (Spiva Decl., Ex. 4 ('249 dkt. #63-4) 2.)

Understood in this way, the state's asserted interests in the witness requirement as a tool against voter fraud justify the general application of the requirement. *See Crawford*, U.S. at 191 (preventing voter fraud is an important state interest); *Griffin*, 385 F.3d at 1130-31 (same); *Frank*, 768 F.3d at 750 (same). As such, plaintiffs have not met the "heavy burden of persuasion" needed to enjoin the requirement "in all its applications." *Crawford*, 553 U.S. at 200.

Even so, given the current unknowns regarding COVID-19 infection and transmittal risks, plaintiffs have shown that at least some isolated voters, and in particular those who are immunocompromised or elderly, will likely not be able to secure a witness certification safely even with reasonable efforts, or at minimum have reasonable concerns about their ability to do so and, therefore, may be particularly burdened by this requirement. To be clear, while this requirement may impose severe burdens on some limited subset of voters, that burden does not justify a wholesale rejection of the requirement. *See Crawford*, 553 U.S. at 199-200 (a conclusion that a burden "may not be justified as to a few voters" is not sufficient to strike down an election law). However, it may entitle those particular voters facing unreasonably high burdens to specific relief. In *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016), the Seventh Circuit considered a similar question related to Wisconsin's requirement that a voter present a valid photo ID in order to vote. After arguing unsuccessfully that the photo ID requirement should be struck down entirely, plaintiffs in

Frank returned to court with a different argument: that “high hurdles for *some* persons eligible to vote entitle those *particular* persons to relief.” *Id.* at 386 (emphasis added). The court reasoned that “[p]laintiffs’ approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort. The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily.” *Id.*

Here, the particularly high hurdles faced by this subset of voters are not overcome by the state’s general anti-fraud goals, and some limited relief is therefore appropriate. In particular, the court will order defendants to accept an unwitnessed ballot that contains a written affirmation or other statement by an absentee voter that due to the COVID-19 pandemic, he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so, provided that the ballot is otherwise valid. No magic words are required by a voter to successfully make this affirmation, and it will be left up to the individual discretion of clerks as to whether to accept a voter’s excuse for not completing the witness certification requirement based on the written affirmation by the individual voter.

Moreover, the balance of harms favors this approach. Plaintiffs have adequately demonstrated that the harm some voters are likely to face includes unjustified burdens in the exercise of their right to vote. On the other side, the WEC already has the ability to communicate this new exception rapidly to the various clerks across the state. While the additional burden on the election process is not minimized, it is overcome by voters’ right to exercise their franchise without undue burdens, especially as the court has given local

canvassers additional time to complete the review of absentee ballots and to follow up as to any written affirmation or statement they believe to be suspect, just as is already done with respect to the exceptions for Wisconsin IDs as discussed immediately below.

D. Relief from Proof of Identification Provision

Third, plaintiffs argue that the court should enjoin the statutory requirement that a photo ID be submitted with an absentee ballot. Wisconsin law provides that an individual requesting an absentee ballot for the first time must submit proof of a valid photo ID. Wis. Stat. § 6.86. Plaintiffs contend that many aspiring voters do not have in their homes the means necessary to submit the required proof, such as a copier, scanner, printer, and/or smartphone. Further, plaintiffs point out that while under normal conditions, individuals might be able to go to a library or copyshop to access these machines, due to the Safer-at-Home Order issued on March 24, 2020, most if not all of these locations have closed. Moreover, plaintiffs contend that even if such locations were still open, the Safer-at-Home order prohibits individuals from venturing outside of their homes in an attempt to find a machine that would allow them to submit their photo ID. The burden imposed by the proof of ID requirement for first-time absentee voters, plaintiffs argue, is severe because it requires voters without access to the necessary technology to disobey a statewide order to satisfy the requirement.

According to plaintiffs, any asserted state interest in preventing voter fraud or ensuring electoral integrity cannot justify the severe burden currently imposed by the requirement. First, plaintiffs suggest that the state's interests may be satisfied by less risky means, such as having a voter complete a certificate -- subject to penalties for false

statements -- affirming his or her identity. Second, plaintiffs point out that “state law already recognizes that there may be a need for exceptions to these types of rules, finding that voters who are ‘indefinitely confined’ due to age, illness, infirmity, or disability do not have to comply with the absentee photo ID requirements.” (Pls.’ Br. (‘249 dkt. #62) 17.)

The RNC/RPW and Wisconsin Legislature oppose enjoining the absentee ID requirement, arguing first that the burden on voters is not so severe as plaintiffs suggest. They point out that, if a voter can satisfy an election requirement with “reasonable effort,” then that requirement does not qualify as a substantial burden. (RNC/RPW Opp’n (‘249 dkt. #96) 5; Wis. Legislature Amicus Br. (‘249 dkt. #90) 15 (citing *Frank*, 819 F.3d at 386-87; *Crawford*, 553 U.S. at 198).) Here, according to the RNC/RPW and the Legislature, a voter could use their smartphone to upload proof of their ID or with reasonable effort could locate a person who could help them to do so, all while abiding by the Governor’s Stay-at-Home Order which permits interacting with others while staying six feet apart. (RNC/RPW Opp’n (‘249 dkt. #96) 5-6; Wis. Legislature Amicus Br. (‘249 dkt. #90) 15-16.) They further argue that any potential burdens are outweighed by the state’s interest in deterring fraud, which is particularly acute in the absentee ballot context. (RNC/RPW Opp’n (‘249 dkt. #96) 3; Wis. Legislature Amicus Br. (‘249 dkt. #90) 9.)

Again, under current conditions, there is little question that for some voters satisfying the proof of ID requirement will become more difficult, especially if fearful of any contact with others because of age or other high risk factor. At the same time, the court recognizes that for many if not most voters the requirement may be satisfied easily, and even for voters who face barriers those may be overcome with only reasonable effort.

(*See* Strang Decl. ('249 dkt. #76) ¶¶ 6, 9 (testifying that he initially had difficulty in attempting to provide proof of identification in requesting his absentee ballot, but that he was able to successfully upload his photo ID after spending 40 to 45 minutes on the effort).) Further, two days ago the Wisconsin Supreme Court issued an order in *Jefferson v. Dane County*, 2020AP557-OA, adopting the WEC's guidance of the term "indefinitely confined." The guidance 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." In light of these developments, the court is satisfied 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, and accordingly will deny plaintiffs' requested relief as to this requirement.

E. Extension of Mail-In Registration Deadline and Relief from Proof of Residence Provision

Plaintiffs also argue that the court should extend the by-mail registration deadline until April 2, 2020. (Pls.' Br. ('249 dkt. #62) 18.) The court will not dwell long on this question, because even if plaintiffs were to demonstrate a strong likelihood of success on the merits, the balance of equities does not favor the injunction they seek. Even given the best efforts of the court to expedite this case, as well as the diligent advocacy of all parties involved, the evidentiary hearing was held on April 1, 2020, and this court's opinion and order is being issued the following day, on April 2, 2020. Plaintiffs' requested injunction as to the by-mail registration deadline would open the registration window for less than

one day. Given this timeline, it is implausible that the order could be implemented in a way that would provide relief to any meaningful number of voters, but it *would* be sure to add additional burdens on an already overwhelmed state election apparatus. Accordingly, plaintiffs' request as to the by-mail registration deadline will be denied. Finally, plaintiffs ask the court to enjoin the requirement that copies of proof of residence be submitted with their mailed registration application. Because voters are no longer able to register by-mail for the upcoming election, this claim will be denied as moot.

III. Oral Motion for Stay

One final note. At the end of yesterday's hearing, counsel for the intervening defendants RNC and Republican Party of Wisconsin requested that if the court grants plaintiffs' request for preliminary relief, the court also stay its order for a limited amount of time to allow the intervening defendants to seek emergency relief from the Seventh Circuit Court of Appeals under Federal Rule of Civil Procedure 62(c). While the court is sympathetic to the intervening defendants' request, the relief being granted is not of the sweeping nature sought by plaintiffs and the court is also cognizant of the impending election, and the immediate steps the WEC and local clerks will need to take to implement the court's narrow injunction, along with the numerous other changes being made in real time by the WEC Administrator, her staff, local counties and municipalities, and poll workers in response to the current COVID-19 crisis. Regardless, the most significant relief provided at this time does not kick in until the evening of April 7, 2020, when, under the court's order, local municipalities may continue to count absentee ballots received after

8:00 p.m.¹⁹ As such, the preliminary injunction implicitly contains a window of time during which the intervening defendants may seek an emergency appeal and relief from the injunction. The court, therefore, will deny defendants' oral motion for a stay. At the same time, both defendants WEC and its Administrator, as well as intervening defendants, are encouraged to return to this court if some modification of the preliminary injunction is necessary to accomplish the goals set out in this opinion.

ORDER

IT IS ORDERED that:

- 1) In Case No. 20-cv-249, plaintiffs' motion for preliminary injunction and motion for reconsideration ('249 dkt. #61) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.
- 2) In Case No. 20-cv-278, plaintiffs' motion for temporary restraining order ('278 dkt. #8) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.
- 3) In Case No. 20-cv-284, plaintiffs' motion for temporary restraining order ('278 dkt. #17) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.
- 4) Wisconsin Legislature's motion for leave to file an amicus curiae brief in opposition to the motions for preliminary injunction and temporary restraining order ('249 dkt. #89) is GRANTED.
- 5) Honest Elections Project's motion for leave to file amicus brief ('249 dkt. #94) is GRANTED.

¹⁹ The extension of the deadline by which individuals may request absentee ballots is a more immediate action, but even then, it is unlikely that the requests for absentee ballots received on April 3, 2020, would be processed, mailed, received by the voter, completed, and returned before April 7, 2020, and, therefore, in appealing the extension of the deadline for receipt of absentee ballots, the intervening defendants necessarily would also be able to appeal the extension of the deadline for requesting an absentee ballot online.

- 6) The City of Milwaukee's motion for leave to file an amicus brief ('249 dkt. #98) is GRANTED.
- 7) The City of Green Bay's motion for leave to file an amicus brief ('249 dkt. #111) is GRANTED.
- 8) American Civil Liberties Union of Wisconsin, Disability Rights Wisconsin, Inc., and Wisconsin Conservation Voters' motion to file amici curiae brief (dkt. #121) is GRANTED.
- 9) Governor Tony Evers' motion for leave to file amicus brief (dkt. #125) is GRANTED.
- 10) City of Racine's motion for leave to file amicus brief (dkt. #129) is GRANTED.
- 11) Washington County and Wisconsin Counties Association's motion for leave to file amicus brief (dkt. #131) is GRANTED.
- 12) Plaintiffs Democratic National Committee and Democratic Party of Wisconsin's motion for leave to file a reply brief (dkt. #153) is GRANTED.
- 13) Plaintiffs American Federation of Teachers Local, 212, AFL-CIO, Black Leaders Organizing for Communities, League of Women Voters of Wisconsin, Greg Lewis, SEIU Wisconsin State Council, Souls to the Polls, Voces De La Frontera's motion to supplement brief addressing remedies (dkt. #161) is GRANTED.
- 14) Defendants the Commissioners of the Wisconsin Election Commission and its Administrator are ENJOINED as follows:
 - a) Defendants are enjoined 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. The deadline for receipt of absentee ballots is extended to 4:00 p.m. on April 13, 2020.
 - b) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020. The deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) is extended to 5:00 p.m. on April 3, 2020.
 - c) Defendants are enjoined 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, provided that the ballots are otherwise valid.

15) Intervening defendants' oral motion to stay this order and preliminary injunction is DENIED.

Entered this 2nd day of April, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v.

OPINION AND ORDER

20-cv-249-wmc

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

Defendants.

In light of the ongoing impact of the COVID-19 crisis, the Democratic National Committee (“DNC”) and the Democratic Party of Wisconsin seek a temporary restraining order and preliminary injunction barring enforcement of three requirements for the upcoming April 7, 2020, election: (1) the current electronic and mail-in voter registration deadline under Wis. Stat. § 6.28(1) of March 18, 2020; (2) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted under Wis. Stat. § 6.87; and (3) the requirements of proof of residence and voter ID for electronic and mail-in registration and of photo identification for absentee ballot applications under Wis. Stat. §§ 6.34, 6.86, 6.87. (Dkt. #2.)

Yesterday, the court held a telephonic conference with counsel for the parties -- plaintiffs appeared by private counsel and defendants appeared by the Department of Justice. In addition, the court allowed counsel for the Wisconsin Legislature to participate based on its expressed intent to file a motion to intervene and a motion to dismiss

plaintiffs' complaint. (Dkt. #8.)¹ After the hearing, the court directed defendants to file a written response to plaintiffs' motion for TRO and preliminary injunction, as well as set a deadline of noon today for the proposed intervenor to seek to intervene formally and its own response to plaintiffs' motion.²

In light of the plaintiffs' motion and supporting materials, defendants' and the proposed intervenor's respective responses, arguments by all parties during the telephonic conference, *and* the near certainty of increasing barriers to *in person* voting for the April 7, 2020, election due to the COVID-19 pandemic, the court will grant in part and deny in part plaintiffs' motion for a temporary restraining order. Specifically, the court will grant plaintiffs' request to extend the deadline by which an individual can register to vote electronically to March 30, 2020, and deny the motion in all other respects at this time. In denying the remaining aspects of plaintiffs' motion for a temporary restraining order, the court expressly reserves on their request for extension of the date by which absentee ballots may be counted toward the election, which may still be taken up by motion for a preliminary injunction, either on or after April 7, or earlier if plaintiffs believe they have

¹ Today, the Wisconsin Legislature filed a motion to intervene and a proposed motion to dismiss and opposition to plaintiffs' motion for TRO. (Dkt. ##20, 22.) The court will take up these motions after considering responses from the parties, although the court has considered the Legislature's arguments expressed during the hearing and in the proposed intervenor's motion to dismiss and opposition to plaintiffs' TRO motion.

² Late today, the court also received a request from the Republican National Committee and the Republican Party of Wisconsin asking that the court delay any decision in this case for 48 hours so that they may file a motion to intervene. (Dkt. #34.) Due to the pressing circumstances surrounding this case, the court is unable to delay ruling and would simply encourage prompt filing of an intervention motion if either party continues seeks to participate going forward.

sufficient evidence to support that request, including the submission of proper, proposed findings of fact.

FACTS

A. Challenged Election Laws

Plaintiffs filed their complaint and the present motion on the afternoon of Wednesday, March 18, 2020, the third Wednesday before the April 7, 2020, election, which was also the last day for electronic and mail-in registrations for that election under Wisconsin Statute § 6.28(1). Left unchanged, individuals who still need to register to vote for the April 7 election must now either register in person (1) at the municipal clerk's office on or before Friday, April 3, 2020, or (2) at their polling place on the date of the election, Tuesday, April 7, 2020. In past elections, between 11% and 12% of voters registered at their polling place on the date of the election. (Pl.'s Br., Ex. 5 (dkt. #3-6) (12.7% of voters registered on election day in 2016 general election; 11.2% of voters registered on election day in 2014 general election).)

Under Wisconsin Statute § 6.87(6), absentee ballots must arrive at the municipal clerks' offices by 8:00 p.m. on election day to be counted. Under § 6.87(6)(b), individuals can request absentee ballots by submitting an application by April 2, 2020, the Thursday before the election, but must already be registered to do so online. In order to request an absentee ballot, individuals must also provide copies of photo identification pursuant to Wisconsin Statute § 6.86 and § 6.87.

Finally, Wisconsin Statute § 6.34 requires individuals seeking to register to vote electronically or by mail to provide copies of proof of residence. Section 6.34 contemplates proof of residence besides a valid, unexpired driver's license or Wisconsin State ID card, but practically speaking, if the same individual who is seeking to register online also wants to vote by absentee ballot, then that individuals would have to provide a picture or copy of a valid, unexpired Wisconsin driver's license or Wisconsin State ID card.

B. COVID-19 Health Crisis

As of March 19, 2020, 155 people in Wisconsin had tested positive for COVID-19, although a substantially larger number has likely already contracted it.³ On March 17, Governor Evers had ordered “a statewide moratorium on mass gatherings of 10 people or more to mitigate the spread of COVID-19.” (Pls.’ Br., Ex. A (dkt. #3-2).) Moreover, restaurants, bars, indoor shopping malls and all public and private schools have been ordered closed. (*Id.*) Libraries are also closing, including those in Madison. (*Id.*, Ex. 3 (dkt. #3-4).)

According to recent news reports, while “[e]stimates vary, . . . most public health experts believe that the U.S. is between one and two weeks behind what has befallen Italy, where a near-total lockdown has been imposed on 60 million citizens, with only

³ CDC, Cases in the U.S. (Mar. 19, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-in-us.html; Wis. Dept. of Health Services, “Outbreaks in Wisconsin,” available at <https://www.dhs.wisconsin.gov/outbreaks/index.htm>.

supermarkets and drug stores open to the public.”⁴ At best, the impacts of the coronavirus between now and election day on April 7th are uncertain, although informed predictions are not good.

Plaintiffs reason that because of existing restrictions, as well as the likelihood of even greater restrictions, voters will rely on voting by absentee ballots in significantly higher numbers than typical. Yet but individuals who have not already registered (or modified their registration to vote because of a change in address) no longer have the option to do so other than *in person*. As support, plaintiffs point to the relatively large number of absentee ballots already requested relative to past Spring elections. For example, as of the morning of Tuesday, March 17, the Wisconsin municipal clerks have received 173,000 absentee applications, of which 22% were received on Monday, March 16. (Pl.’s Br., Ex. 2 (dkt. #3-3).) With more than two weeks until the April 2 deadline for requesting absentee ballots, the number of requests already exceeds three out of the four most recent Spring elections. (*Id.*)⁵ Moreover, in elections held in other states this past Tuesday, March 17, 2020, “significantly fewer voters showed up in-person on Tuesday, and turnout plummeted in Illinois, amid rising health concerns and social-distancing requirements.”

⁴ Kim Hjelmgaard & Jim Sargent, USA Today, “USA TODAY analysis: America’s coronavirus ‘curve’ may be at its most dangerous point” (Mar. 19, 2020), available at <https://www.usatoday.com/in-depth/news/2020/03/18/u-s-coronavirus-growth-rates-show-many-states-could-close-behind-new-york/5072663002/>.

⁵ This trend is likely to hold. As of March 19, according to news reports, the number of absentee ballot requests is now more than 315,000. Stephanie Fryer, Channel 3000, “Wisconsin absentee ballots break record amid virus outbreak,” available at <https://www.channel3000.com/wisconsin-absentee-ballots-break-record-amid-virus-outbreak/>.

OPINION

I. Standing

As an initial matter, the threshold jurisdictional question of standing must be addressed. *See Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988) (“Standing is a threshold question in every federal case”); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (federal courts are obligated to consider the question of standing, regardless of whether the issue is raised by the parties). “An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)).

In the voting rights context, courts have held that political parties have standing to assert the rights of its members who may face burdens to vote in upcoming elections. *See, e.g., Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008) (“The Democratic Party . . . has standing to assert the rights of those of its members who will be prevented from voting by the new law.”); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (political parties and labor organizations had “standing to assert, at least, the rights of their members who will vote in the [upcoming] election”); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) (“[P]olitical parties have standing to assert, at least, the rights of its members

who will vote in an upcoming election.”) (citing *Fla. Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1078-79 (N.D. Fla. 2004)). Moreover, an organization may establish standing by asserting injury to their own rights. See *Crawford*, 472 F.3d at 951 (Democratic Party injured by new voting law that compelled party to “devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote”); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 909 (W.D. Wis. 2016) (organizations had standing to challenge new voting laws by establishing that they “devoted money, staff time, and other resources away from their other priorities to educate voters about the new laws”).

Here, plaintiffs are two membership organizations -- the DNC and the Democratic Party of Wisconsin. Plaintiffs claim that the challenged provisions place undue burdens on their members’ right to vote in the upcoming April 2020 election. (Compl. (dkt. #1) ¶¶ 16-17.) Additionally, they assert that the challenged provisions will require them to “expend additional resources to assist their members and constituents to overcome these burdens to exercise their right to vote.” (*Id.* ¶ 18.) Accordingly, plaintiffs have adequately established their standing to sue, both on behalf of their members and on behalf of themselves.

II. Standard for Relief

Plaintiffs style their motion as a request for both a temporary restraining order and a preliminary injunction. (Pls.’ Mot (dkt. #2) 1.) Both types of relief are designed to protect against irreparable injury and to preserve the court’s power to render a meaningful decision after a trial on the merits. See *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 323 (7th

Cir. 1984) (citing *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 440 (1974)); *Faheem-El v. Klinicar*, 841 F.2d 712, 717 (7th Cir. 1988). A temporary restraining order, however, may be issued “before the adverse party can be heard in opposition,” and has strict durational limits. Fed. R. Civ. P. 65(b). *See also Geneva Assurance Syndicate, Inc. v. Med. Emergency Servs. Assocs.*, 964 F.2d 599, 600 (7th Cir. 1992) (“The essence of a temporary restraining order is its brevity, its ex parte character, and (related to the second element) its informality.”). Moreover, the federal rules only expressly require a party making such a request to provide “specific facts in an affidavit or a verified complaint.” Fed. R. Civ. P. 65(b)(1)(A). Given the emergency nature of such relief, a relaxed evidentiary standard is appropriate. *See* 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2952 (3d ed.) (“There does not seem to be any case law defining the applicable standards for judging the quality and character of an affidavit offered in support of a motion under Rule 65(b). Since a temporary restraining order generally is sought on short notice, in a situation of pressing need, and Rule 65(b) expressly permits its issuance on the presentation of a verified complaint, it probably is unsound to hold affidavits to too rigorous a standard.”).

At this point, the relief sought, and the order granted, is better classified as a temporary restraining order as opposed to a preliminary injunction due to the brief duration of the lawsuit and motion, the lack of a developed record, and the limited notice and opportunity to be heard provided the defendants. *See McDougald v. Jenson*, 786 F.2d 1465, 1472-73 (11th Cir. 1986) (“When determining whether to consider an order a TRO or a preliminary injunction . . . courts typically look to such factors as the duration of the

order, whether it was issued after notice and a hearing, and the showing made to obtain the order.”); *Connell v. Dulien Steel Prod., Inc.*, 240 F.2d 414, 418 (5th Cir. 1957) (“Where, as here, the duration of the order barely extends beyond 20 days and even though issued after notice (perhaps insufficient) we think it is not a temporary injunction and appealable.”).⁶ So while this opinion and order resolves plaintiffs’ motion for a temporary restraining order, their motion for a preliminary injunction is still pending. *See Levas & Levas v. Vill. of Antioch, Ill.*, 684 F.2d 446, 448 (7th Cir. 1982) (“[A] party might fail to satisfy the criteria for an ex parte TRO and still be entitled to a preliminary injunction.”). If plaintiffs wish to continue to pursue that motion they must follow this court’s preliminary injunction procedures, which are available on the court’s website at https://www.wiwd.uscourts.gov/sites/default/files/Injunctive_Relief.pdf.

Regardless, as the proposed intervenor noted, the standard for determining whether either form of relief is appropriate is the same. *See Van Hollen*, 963 F. Supp. 2d at 865 (citing *Winnig v. Sellen*, 731 F. Supp. 2d 855, 857 (W.D. Wis. 2011)). Specifically, a plaintiff must first show “(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)). Then, if this showing is successfully made, “the court must engage in a balancing analysis, to determine whether

⁶ Viewing the motion in this light, coupled with the limited nature of relief provided by the court at this time, largely addresses the concerns raised in the proposed intervenor’s opposition brief about the limited evidence in support of the motion.

the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.* (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016)). A factor that the court must consider in balancing the equities in this particular case is the confusion that can result from last-minute orders affecting elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Such confusion can undermine confidence in our electoral processes, which itself is integral to our system of democracy. *Id.*

A. Likelihood of Success on the Merits

The court will begin with the third prong of the initial inquiry -- likelihood of success on the merits. Here, the merits question is whether any of the challenged provisions impose an unconstitutional burden on the right to vote. This question is governed by the framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* framework, the court must (1) "determine the extent of the burden imposed by the challenged provision"; (2) "evaluate the interest that the state offers to justify that burden"; and (3) "judge whether the interest justifies the burden." *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016) (citing *Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428).

1. Online and By-Mail Registration Deadline

First, plaintiffs argue that in light of the current public health crisis, Section 6.28(1) -- which imposed a deadline of March 18, 2020, for voters to register safely online or by-mail -- creates an undue burden on a citizen's right to vote, since the only way for an

individual to register to vote now is to do so in person. (Pls.' Br. (dkt. #3) 7-8.) Because individuals are being urged by the State of Wisconsin and the CDC to avoid public spaces altogether, plaintiffs further contend that "many individuals will abide by these precautions and will not leave their homes to go to the municipal clerk's office or a polling place on election day or during the early vote period." (*Id.* at 8.)

In this way, plaintiffs analogize this case to *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016), in which a federal district court extended the voter registration deadline after a hurricane hit the state. *Id.* at 1257-59. According to that court's findings, the hurricane forced many citizens to evacuate the state and foreclosed in-person and by-mail registration: "[b]ecause those aspiring eligible voters could not register, they could not vote in the upcoming election." *Id.* at 1257. The court concluded that the registration deadline imposed a severe burden on the right to vote, and no legitimate state interest could justify the "de minimis" burden of extending the voter registration deadline. *Id.* Similarly, in *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016), a district court ordered an extension of the registration deadline where a hurricane had caused the elections office to close for a week, delayed mail service, and forced citizens to evacuate or take shelter. *Id.* at 1345.

Here, unlike in *Scott* and *Georgia Coalition*, citizens have not *yet* been prevented from registering. However, the court cannot help but take judicial notice of the excruciating dilemma that will soon be faced by eligible voters who did not register by the March 18, 2020, deadline: either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote. Moreover, while the court

recognizes the state's interest in the orderly administration of its elections, a short extension of the registration deadline would on its face appear to 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.

At the court's request, Megan Wolfe, the Administrator of the Wisconsin Elections Committee, filed a declaration in response to plaintiffs' motion for temporary restraining order and preliminary injunction, setting forth the possible difficulties in extending the deadline for online and mail-in voter registration. *First*, Wolfe explains that reactivating the online registration process requires software changes that would need to be tested, including possible collaboration with the Department of Transportation (Wolfe Decl. (dkt. #24) ¶ 11.) Wolfe further explains that there are risks associated with software changes in the weeks preceding a statewide election.⁷ While the court is certainly reluctant to create risks to election technology systems, reactivating a link that was in place as of two days ago should not pose a significant risk to the security of the election systems or, at least, Wolfe does not explain why such a risk should preclude such efforts. If after attempting to reactivate on-line registration, however, WEC learns of additional issues or risks, they could, of course, promptly return to the court for relief from its order.

⁷ Wolfe also represents that a court order requiring reactivation of online registration would violate a "statewide enterprise level change freeze enacted to protect critical elections operations from unintentional disruption" (Wolfe Decl. (dkt. #24) ¶ 12), but the policy Wolfe appears to reference states that non-critical patches -- and this would appear to be a critical change -- cannot be made in the "*week* prior to a major election," and this order will not require any changes in the week before the election. *See* Wisconsin Elections Commission, "Election Security Report" (Sept. 2019) pp.16-17, available at <https://elections.wi.gov/sites/electionsuat.wi.gov/files/2019-09/2019%20Elections%20Security%20Planning%20Report.pdf>.

Second, Wolfe raises a concern about the timing of printing of municipal poll books, representing that a number of large municipalities and counties that assist with poll book printing on behalf of municipalities may have already sent their poll books to the publishers for printing. (*Id.* ¶ 14.) As Wolfe also explains, however, in-person registrations that occur up to April 3, 2020, and mail-in registrations that were required to be post-marked by March 18, 2020, will appear in supplemental or post-supplemental poll books. (*Id.* ¶¶ 14, 17.) Likewise, municipalities will be able to publish the additional online or mail-in registrations in these supplemental books. The court understands that these supplemental books may be significantly larger than normal as a result of any order extending the registration deadline, but this appears to be a reasonable downside to equitable relief that could increase both the robustness and health of the electorate, especially in light of the corresponding effect of having fewer, in-person voters to manage on election day.⁸

Third, Wolfe raises concerns about voter confusion in light of numerous publications informing individuals that their last day to register online was March 18, 2020. (*Id.* ¶ 16.) This, too, is a fair concern, but Wolfe does not explain, nor can the court conceive of any *prejudice* to voters caused by this confusion. While some individuals will not take advantage of the additional time to register online because they understandably believed that the opportunity had already passed, but at least some will be afforded a mechanism to vote safely, rather than be effectively denied that franchise by health restrictions, government edict or justified prudence for their safety or the safety of others.

⁸ The proposed notice at the end of this order is intended to both encourage online registration for those now looking to vote absentee and discourage registration if the voter still intends to appear in person, particularly on election day.

The court understands that this is far from a perfect solution. At minimum, however, individuals who either were not aware of the March 18, 2020, deadline or learn of this court's extension of that deadline, will be able to register online for an extended period of time. The ideal solution under the circumstances would probably be to delay the vote itself, as some other states have already done, but as defendants point out this too has its problems, and regardless is up to the State of Wisconsin to decide. There being no such prospect on the horizon, the court has attempted to fashion what limited remedy it can to vindicate the rights of as many voters as practical.

Fourth, Wolfe expresses a number of concerns about implementing a new mail-in deadline. Specifically, she addresses the impact of extending the deadline until April 3, as plaintiffs request, which would permit mail-in registrations that are post-marked by that day and mean that registration requests may not even be received through the mail by election day. (*Id.* ¶ 18.) The court shares this concern, especially when coupled with the current requirement that absentee ballots be received by April 7, 2020, in order to be counted. Indeed, extending the mail-in registration deadline may act to disenfranchise certain voters, by giving them a false sense of confidence that they will be able to vote by absentee ballot in time for the April 7, 2020, election. Moreover, unlike the online or electronic registration process, the mail-in process is not centralized; instead, as Wolf explains, any change to the process would depend on implementation by 1,850 municipal clerks and 72 county clerks. In light of this dynamic, the court is concerned about the ability to manage the communication process, as well as ensuring that these clerks are not overwhelmed by mail-in registration requests during the same period in which they will be

preparing polling books and managing absentee applications.

Accordingly, the court finds that plaintiffs have demonstrated a likelihood of success on the merits that the March 18, 2020, online registration deadline imposes an undue burden on citizens' right to vote, but concludes that plaintiffs have not met their burden with respect to mail-in registration.⁹

2. Proof of Residence and Identification Provisions

As previously litigated, plaintiffs also renew their contention that requiring individuals seeking to register to vote or applying for an absentee ballot to provide copies of documentation places a severe burden on the right to vote. As described in the fact section above, Wisconsin Statute §§ 6.34, 6.86 and 6.87 require proofs of residency for registrants and proof of voter identification for absentee ballot applicants. Plaintiffs reason that obtaining these documents may require individuals to venture out into the public to gain access to a copier, scanner, computer and/or printer, and specifically point out that the need to venture out of one's home to access this technology will likely disproportionately impact less-affluent populations, including the elderly and college students.¹⁰ In support of this argument, plaintiffs submit proof that libraries, which may typically provide access to copiers and printers, have closed because of the COVID-19

⁹ As addressed below, some further relief may be sought by either side should the extension of online registration create issues with respect to receipt and processing of absentee votes timely.

¹⁰ While perhaps not a complete solution, the court notes, as defendants' counsel suggested during the hearing, that an individual can upload a photo of his or her driver's license or Wisconsin ID from virtually any smart phone in applying for an absentee ballot, thus eliminating the need to venture outside, although this assumes access to a smartphone.

outbreak.

The court does not dismiss out of hand the additional burden placed on some by the proof of residency and identification requirements in the face of the COVID-19 pandemic, either because of more limited access to public copiers, printers or scanners or because of fears in venturing out to access that technology. However, the State's interest with respect to this requirement has been recognized by the United States Supreme Court and the Seventh Circuit Court of Appeals, and appears to be much more significant than any interest in limiting the time period for registering to vote electronically or by mail. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (holding that Indiana's interests in statute requiring government issued photo identification to vote were sufficiently weighty to justify any limitation imposed on voters); *Frank v. Walker*, 768 F.3d 744, 751 (7th Cir. 2014) (relying on *Crawford* to reject challenge to Wisconsin's photo identification requirement).

Plaintiffs also argue that the state's interest is adequately addressed by the requirement that a voter must "sign a comprehensive certificate on absentee ballots stating she is a resident of the locality from where she is voting" (Pl.'s Br. (dkt. #3) 10 (citing Wis. Stat. § 6.87(2))), but this was true in past lawsuits and yet not found to be sufficient to satisfy the state's interest in requiring identification, including preventing voter fraud and safeguarding voter confidence. *See Crawford*, 553 U.S. at 191 (describing interests at play). On this limited record, the court cannot conclude that plaintiffs are likely to succeed in

this challenge.¹¹

3. Absentee Ballot Receipt Deadline

Finally, plaintiffs request that the court extend the deadline for receipt of absentee ballots from the current deadline of 8:00 p.m. on election day pursuant to Wis. Stat. § 6.87(6). While this request may have merit, and may be of assistance for the Elections Commission and municipal clerks should state and local officials not fulfill their promise to ensure sufficient staffing before and on election day, the court will not speculate about the need for this relief on the limited record before it. Instead, as described above, the court will allow plaintiffs to pursue additional relief in a motion for preliminary injunction, with a more robust record, following the court's guidelines.¹²

¹¹ The court acknowledges that late today plaintiffs submitted affidavits from four potential voters averring to the difficulty in providing proof of residence and photo identification.

¹² The proposed intervenor also argues that this court should deny plaintiffs' request for relief and dismiss their complaint under the *Burford* abstention doctrine, pointing out that decisions as to the administration of the state's elections laws are reserved to the Wisconsin Election Commission, which is subject to state judicial review. (Proposed Intervenor's Br. (dkt. #23) 2, 17-20.) Any intervention by this court into the state's election administration would, according to the proposed intervenor, "usurp" the Commission's role and disrupt state efforts to establish a critical balance between the needs of public health and democracy. (*Id.* at 18-19.) *Burford* abstention applies when federal intervention would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) (quoting *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*")). Certainly, the administration of elections during a public health emergency is a matter of substantial public concern and as proposed intervenor points out, the Commission met two days ago to "decide what action to take in response to the current public health situation" (Proposed Intervenor's Br. (dkt. #23) 2, 18), but in a memo published that same day, the Commission specifically advised it does not have the authority to change the statutory deadlines for online and by-mail registration or for the return of absentee ballots, and that "any change may require court intervention, an act of the Legislature, or an order of the Governor." (Tseytlin Decl., Ex. 9 (dkt. #25-9) 2-3.) Moreover, *Burford* abstention is only appropriate "[w]here timely and adequate state-court review is available," *NOPSI*, 491 U.S. at 361, and there appears to be no time or inclination for state-court review, with the online and by-mail registration deadline having now passed and election day is fast approaching. Given the apparent lack of any state-court

B. Irreparable Harm and Inadequate Remedies at Law

As for the online and by-mail registration deadlines, the remaining two prongs of the initial showing -- irreparable harm and inadequate remedies at law -- are also satisfied. Where, as here, plaintiff has demonstrated a likelihood of success on the merits as to a constitutional claim, such an injury has been held to constitute irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms “unquestionably constitutes irreparable injury”); *Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm.”). Moreover, courts have specifically held that infringement on the fundamental right to vote constitutes irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs “would certainly suffer irreparable harm if their right to vote were impinged upon”).¹³

Additionally, traditional legal remedies would be inadequate, since infringement on a citizens’ constitutional right to vote cannot be redressed by money damages. *See Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (“The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not

review and the narrow relief being fashioned by this court, *Burford* abstention is not an appropriate reason to duck this court’s obligation to protect voters’ rights. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”).

¹³ Plaintiffs also argue that exposing Wisconsin voters to the coronavirus constitutes irreparable harm (Pls.’ Br. (dkt. #3) 13), but have offered *no* evidence as to the efforts being made by the state to mitigate that risk or its extent.

adequate.”); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress.”). Accordingly, plaintiffs have made an initial showing that a temporary restraining order is warranted as to the online and by-mail registration deadline.

C. Balance of Harms

Finally, the court must engage in a balancing analysis to determine whether a temporary restraining order is warranted. Under Seventh Circuit law, a “sliding scale” approach is used for this purpose: “[t]he more likely it is that [the movant] will win its case on the merits, the less the balance of harms need weigh in its favor.” *Girl Scouts*, 549 F.3d at 1100. “When conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation.” *Id.*

Plaintiffs argue that an injunction would protect the health of the public and prevent disenfranchisement. (Pls.’ Br. (dkt. #3) 14.) Although plaintiffs recognize that their requested relief will create more administrative tasks for the state, they contend that such an inconvenience is “outweighed by the vindication of constitutional rights.” (*Id.*) Certainly, the extension of the online registration deadline will impose administrative burdens on the state, but these potential hardships appear minor compared with the growing dilemma being faced by eligible, but as yet unregistered voters between now and election day: either risk your and the public’s health by venturing into public to register in person, or stay home and relinquish your voting franchise. While a modest extension of the registration deadline is not likely to relieve all or even most of that difficult choice,

it may do so for some.

Finally, the court is sensitive to the fact that last-minute changes to election laws may generate confusion and in turn undermine confidence in the electoral system. *See Purcell*, 549 U.S. at 4. Nevertheless, it is apparent that some accommodation is necessary to preserve citizens' right to vote amidst this unprecedented public health crisis. This court's narrow remedy attempts to find a balance between these vitally important interests.

ORDER

IT IS ORDERED that plaintiffs' emergency motion for temporary restraining order and preliminary injunction (dkt. #2) is GRANTED IN PART AND DENIED IN PART as follows:

- a) The motion is GRANTED with respect to plaintiffs' request to extend the deadline by which individuals may register to vote electronically until March 30, 2020, subject to the following steps:
 - (i) Defendants shall reset the "clock" that tells the MyVote website (<https://myvote.wi.gov>) to stop accepting on-line registration requests until the end of the day on Monday, March 30, 2020.
 - (ii) Defendants shall test the necessary code changes to validate correct operation and the absence of errors or defects, including proper interface with the Department of Transportation and testing of the statewide voter registration system.
 - (iii) Defendants shall release and activate the new code, making it accessible to the public and post a notice as prominently as practical on the first page of both MyVote and WEC website. For review by the parties, the court proposes the following language. The parties should provide any proposed edits to this language on or before Monday, March 23, 2020, at 12:00 p.m.

SPECIAL NOTICE WITH RESPECT TO ONLINE REGISTRATION AND ABSENTEE BALLOTS FOR APRIL 7, 2020, ELECTION ONLY DUE TO CORONAVIRUS PANDEMIC

By order of the U.S. District Court for the Western District of Wisconsin, online registration to vote is extended until March 30, 2020, for the April 7, 2020, election ONLY, notwithstanding ANY contrary Wisconsin statute, notice on this website, other state websites or other writing or postings. HOWEVER, the purpose of this extension is to facilitate voting by absentee ballots for those who may no longer wish or be unable to vote in person at your local municipal clerk's office by absentee ballot on or before Friday, April 3, 2020, or at your local polling place on election day, Tuesday, April 7, 2020, due to the coronavirus pandemic. If you are not currently registered to vote in the State of Wisconsin, to obtain an absentee ballot, you will not only have to complete the online registration requirements, but then also request online that an absentee ballot be mailed to you. Both steps will require that you already have a valid, unexpired Wisconsin driver's license or Wisconsin state ID card reflecting your current address, and have the ability to post it electronically for purposes of requesting the mailing of an absentee ballot. If you are unable to do these things or still intend to appear in person to actually vote, you are **STRONGLY DISCOURAGED** from still registering to vote in the April 7th election online, since online voter registration during this special extended period **MAY** complicate your ability to vote in person.

- (iv) Consistent with the above, this notice shall be promptly removed after March 30, 2020.
- b) Defendants are ENJOINED from enforcing the March 18, 2020, deadline under Wisconsin Statute § 6.28(1) with respect to online registration.
- c) In all other respects, the motion is DENIED, albeit without prejudice to plaintiffs renewing their request for extension of the deadline for counting absentee ballots in a motion for preliminary injunction.

Entered this 20th day of March, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

The First Amendment to the United States Constitution

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

Section 1 of The Fourteenth Amendment to the United States Constitution

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

Wisconsin Statute Section 6.87(6)

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

Section 1983 of Chapter 42 of the United States Code

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

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

Section 1988 of Chapter 42 of the United States Code

(a) Applicability of statutory and common law

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

to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

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