

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

DEMOCRATIC NATIONAL COMMITTEE and  
DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v.

MARGE BOSTELMANN, JULIE M. GLANCEY,  
ANN S. JACOBS, DEAN KNUDSON, ROBERT  
F. SPINDELL, JR., and MARK L. THOMSEN, in  
their official capacities as Wisconsin Elections  
Commissioners,

Defendants.

Civil Action No. 3:20-cv-249-wmc

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND RECONSIDERATION OF THE COURT'S RULING ON THE BY-MAIL  
ABSENTEE DEADLINE AND DOCUMENTATION REQUIREMENTS**

**I. NATURE OF THE CASE**

Since Plaintiffs filed their Motion for a Temporary Restraining Order on March 18, 2020, the situation in Wisconsin has only grown more dire and, by all accounts, will only get worse in the coming weeks. Wisconsin's confirmed cases of COVID-19 now number more than 710, at least twelve people have died from the disease, and Governor Evers has issued a "Safer-At-Home Order," prohibiting all "nonessential travel" and requiring Wisconsinites to stay at home unless they work in or need to access essential businesses such as doctors' offices, pharmacies, and grocery stores. Nevertheless, the April 7, 2020 election remains on the calendar, and Wisconsin voters need relief from this Court to safely and fully exercise their right to vote.

Indeed, as the COVID-19 crisis has unfolded over the last week, the evidence supporting the need for an injunction of (1) Wisconsin's Election Day Receipt Deadline, Wis. Stat. § 6.87(6), as well as the requirements that (2) a copy of a photo ID be submitted with an absentee ballot, *id.* § 6.86, (3) absentee ballots be signed by a witness, *id.* § 6.87(2), and (4) copies of proof of

residence be submitted with by-mail registrations, *id.* § 6.34, together with (5) the need for an extension of the by-mail registration deadline, § 6.28(1), (collectively, “Challenged Provisions”), have mounted. As Wisconsin Elections Commission (“WEC”) Administrator, Meagan Wolfe, explained to this Court just days ago, the ever-increasing and unprecedented numbers of Wisconsin voters who are requesting to vote absentee are causing the MyVote Wisconsin website to crash. March 27, 2020 Decl. of Bruce V. Spiva (“Spiva Decl.”), Ex. 3 at 25 - 26 (“[R]ight now clerks are entering in the statewide database all the absentees they need to mail out, and we’re also seeing unprecedented traffic for people requesting their absentee ballot.”).<sup>1</sup> Indeed, the City of Madison is anticipating approximately 118,000 absentee ballots, while Milwaukee is expecting approximately 105,000 absentee ballots—many thousands more than they usually receive. Mot. from Cities (“Cities’ Motion”), ECF No. 39, at 5; *see also* Decl. of M. Witzel-Behl (“Witzel-Behl Decl.”) ¶ 7; Decl. of N. Albrecht (“Albrecht Decl.”) ¶ 4. This deluge—coupled with understaffing due to social distancing—has caused these cities to specifically request that this Court “reinstate the counting” of absentee ballots that arrive after Election Day. *Id.*; Witzel-Behl Decl. ¶ 13. Moreover, it has resulted in the closure of in-person registration and absentee voting options in parts of the State, leaving voters without DMV-issued IDs with no recourse for registration. Voters have become increasingly more isolated, and many—for their protection, their neighbors’ protection, and pursuant to the Governor’s latest Safer-At-Home Order—cannot obtain the signatures needed to complete their absentee ballot or copies of their photo IDs or proof of residency. *See, e.g.*, Witzel-Behl Decl. ¶ 11; Decl. of S. McDonnell (“McDonnell Decl.”) ¶ 6 (describing calls from voters); *see also* Ex. 4 (prohibiting interactions between non household

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<sup>1</sup> Unless otherwise noted, all citations to exhibits herein refer to exhibits included in the March 27, 2020 Spiva Declaration.

members unless in keeping with social distancing criteria); Decl. of J. Keel (“Keel Decl.”) ¶ 3; Decl. of M. Love (“Love Decl.”) ¶¶ 3-5; Decl. of J. Trapp (“Trapp Decl.”) ¶ 3; Decl. of B. Larson (“Larson Decl.”) ¶ 3; Decl. of J. Morse (“Morse Decl.”) ¶ 4; Decl. of M. Callahan (“Callahan Decl.”) ¶ 4; Decl. of B. Wilson (“Wilson Decl.”) ¶¶ 4–5; *see generally* Decl. of D. Strang (“Strang Decl.”) ¶¶ 5, 9.

These circumstances, which have become markedly more dire since Plaintiffs filed their original Motion for a Temporary Restraining Order and Preliminary Injunction, give rise to a compelling need for relief on all the issues listed above. This relief is necessary immediately, not days from now or after the election has taken place. Setting clear deadlines, relieving voters of the document and witness requirements that simply cannot be met because of the pandemic and the Safer-At-Home Order, and judicial assurances to Wisconsin voters that their ballots *will* be counted are necessary to protect thousands of voters from imminent disenfranchisement, ensure consistent application of voting laws across the State, and protect Wisconsinites from exposing themselves and others to the coronavirus while attempting to comply with requirements that are now irrational and without justification in this new world order.

It is telling that not only are Plaintiffs seeking this type of relief, but the election officials who are on the front lines of handling registrations and absentee ballots are calling out for help and telling anyone who will listen that, absent immediate changes, thousands of voters in Wisconsin are at imminent risk of being disenfranchised. For example, in her declaration that accompanies this Motion, the City Clerk of Madison, Maribeth Witzel-Behl, states that Madison has a backlog of more than 12,000 requests for absentee ballots and that it is taking up to a week from receipt of a request for an absentee ballot to mailing a ballot to a voter. Witzel-Behl Decl. ¶ 9. Ms. Witzel-Behl estimates that unless the Ballot Receipt Deadline is pushed back, more than

1,000 voters in Madison alone will be disenfranchised because their ballots will arrive after election day. *Id.* ¶ 13. In Hudson, Wisconsin, a small staff of three is working to process a backlog of approximately 2,000 absentee ballot requests. Decl. of B. Eggen (“Eggen Decl.”) ¶ 2. Requests there continue to pour in, sometimes averaging one every thirty seconds. *Id.* The Hudson City Clerk estimates at least a couple dozen ballots will arrive late and therefore not be counted. *Id.* ¶ 4. Past local elections indicate that even this modest margin can be outcome-determinative. *Id.* ¶ 5.

Equally concerning, citizens from across the State are voicing deep concerns about their ability to meet the document and witness requirements for registering and requesting and submitting an absentee ballot. Morse Decl. ¶ 5; Trapp Decl. ¶ 4; Larson Decl. ¶ 3; Keel Decl. ¶ 3; Love Decl. ¶ 4. And, if they are able to find a witness, they must jump through a series of hoops in order to minimize the risks to the health of themselves and others. *See, e.g.*, Decl. of Peggy Roush (“Roush Decl.”) ¶ 3. Voters also are expressing concern that if they are able to cast an absentee ballot, it will not arrive in time to be counted. Strang Decl. ¶¶ 7, 10; Morse Decl. ¶¶ 6–8; Trapp Decl. ¶¶ 5–7; Larson Decl. ¶¶ 4–6; Callahan Decl. ¶¶ 5–6; Roush Decl. ¶¶ 6–7; Wilson Decl. ¶ 6; *see also* Keel Decl. ¶¶ 5–6 (describing how his absentee ballot, sent well before election day, arrived too late to be counted during the February 2020 election). In the short time available to prepare this Motion, Plaintiffs have collected and are submitting numerous declarations from affected voters. These represent just a small sample of the individuals impacted by the Challenged Provisions and this crisis—thousands of other Wisconsin citizens stand in the shoes of these declarants.

For these reasons and those set forth below, the State has no legitimate interest in continuing to impose the Election Day Receipt Deadline, the absentee photo ID and witness requirements, or the requirement for proof of documentation of residency. Nor does the State have

a legitimate interest in limiting by-mail registration, and certainly not the type of extremely compelling state interest that the State must show given the potential widespread disenfranchisement of Wisconsin voters. Accordingly, this Court should do what state officials in Wisconsin do not believe they have the authority to do—and what the State Legislature has flatly refused to do—ensure that as many Wisconsin citizens as possible who wish to vote in the April 7, 2020 election have the ability to do so and to do so safely.

## II. STATEMENT OF FACTS

On Tuesday, March 24, 2020, Governor Evers issued a Safer-at-Home Order, requiring all Wisconsinites to shelter in place to slow the spread of COVID-19. Ex. 4. The order was issued as the number of positive cases, as well as the COVID-19 death toll, continues to grow—at last count, over 710 cases and at least twelve deaths. Ex. 2. While the coronavirus crisis mounts, Wisconsin is moving forward with the April 7, 2020 election. Ex. 5; Ex. 6; Ex. 7; Ex. 8. And officials from Governor Evers, to the WEC administrator, to the Mayor of Milwaukee are all encouraging voters to vote absentee, with Milwaukee’s mayor actually asking for the election to be converted to an all-mail election. Ex. 6 (“The most important ask is for people to vote absentee,” [Gov. Evers] said.); Ex. 7 (“We are encouraging people across the state to avail themselves to absentee balloting or early voting. Either one of those work.”); *id.* (“If you are worried about getting to the polls on Election Day, make sure you are registered to vote at your current address and with your current name, and request an absentee ballot as soon as possible,” said [WEC] administrator Meagan Wolfe.”); *see also* Ex. 8 (“I think the real key here,” [Mayor] Barrett said at city hall Sunday afternoon, “is having more and more people voting absentee in this election. We don’t want to have a lot of people at the polls on election day.”); Ex. 9 (discussing Mayor of Milwaukee’s request for all-mail voting in April 7, 2020 election); *see also, e.g.*, Ex. 7; Ex. 10; Ex. 11; Ex. 12.

Wisconsinites have heeded these calls. In fact, while absentee ballot requests were already “pouring in,” at the time of Plaintiffs’ Temporary Restraining Order filing, *see* Br. in Support of Mot. at 4 (citing Ex. 3 to March 18, 2020 Spiva Decl. and explaining that between March 13 and March 16, 64,000 absentee ballots requests had come in); *see also* Ex. 12, they have since skyrocketed as the need to shelter in place and socially distance has become not only more apparent but required by law. *See* Ex. 4. To date, 699,431 absentee ballots have been requested statewide. Ex. 13. On March 23, 2020, WEC administrator Wolfe explained to this Court that “we’re also seeing unprecedented traffic for people requesting their absentee ballot”—so much so that it has caused the State’s MyVote system to crash. Ex. 3 at 25-26; Witzel-Behl Decl. ¶ 7 (discussing “unprecedented number of requests for absentee ballots” in Madison); Albrecht Decl. ¶ 5 (estimating absentee ballot requests this election are ten times the normal number); Eggen Decl. ¶ 2.

While this traffic demonstrates that Wisconsinites are taking both their health and their right to vote seriously, it also has unintended consequences that threaten the right to vote under the current laws. Specifically, Wisconsin law requires that individuals requesting an absentee ballot for the April 7 election for the first time must obtain a copy of their photo ID and return it with their request to receive a ballot. Wis. Stat. § 6.86. Similarly, all absentee voters must obtain a signature from a witness to complete their ballot. *Id.* § 6.87(2). All voters must also mail their absentee ballots so that they arrive at the municipal clerk’s office by 8:00 p.m. on Election Day (“Election Day Receipt Deadline”). *Id.* § 6.87(6). If the absentee ballot arrives after 8:00 p.m. on Election Day—even if cast long before Election Day—it is rejected, and the voter is disenfranchised. *Id.* Finally, as of March 18, voters without a Wisconsin DMV-issued ID no longer have any option to register in most localities, *id.* § 6.28(1), and, even if they could, these voters

would be required to mail copies proof of residency, *id.* § 6.34. But as the City Clerks of Madison and Milwaukee, as well as Dr. Barry Burden, an expert in election administration and voting, explain, it is exceedingly difficult, and in some cases impossible, to meet these requirements given the extraordinary circumstances caused by the COVID-19 crisis and the related Safer-At-Home Order. *See generally* Ex. 1 (report of Dr. Burden); Witzel-Behl Decl.; Albrecht Decl.; Cities’ Mot.; McDonell Decl. (Dane County Clerk).

In particular, the City Clerk of Madison 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.” Witzel-Behl Decl. ¶¶ 6,8; *see also, e.g.*, Ex. 9; Ex. 12; *see also* Albrecht Decl. ¶ 6 (identifying backlog of requests). Indeed, the influx of requests has resulted in backlogs that are causing at least a week-long delay in sending out absentee ballots in Madison, Witzel-Behl Decl. ¶ 9, and shortages of mailing labels and envelopes, *id.* ¶ 15. At last count, Madison still had a backlog of more than 12,000 absentee ballot requests to process. *Id.* ¶ 9. Moreover, poll workers—about 67% of whom are in the at-risk category for COVID-19 as they are over 60 years of age—are deciding not to work at in-person polling locations, reducing options for in-person early voting as well as election day voting and further pushing people to vote by mail. Witzel-Behl Decl. ¶ 4 (32% of Madison’s poll workers have canceled their assigned shifts); Albrecht Decl. ¶ 3 (less than 500 poll workers available out of 1,400 needed); McDonell Decl. ¶ 4. Milwaukee has reported that it no longer has sufficient staff to operate its three in-person early voting locations. Ex. 9. And Madison has limited in-person absentee voting to curbside voting, eliminating voting in its other early voting locations. Ex. 14. These challenges are not

limited to Madison and Milwaukee but are being faced by local election administrators throughout the state. Ex. 12.

As a result, “the 8:00 p.m. election day deadline for receipt of absentee ballots is completely unworkable.” Witzel-Behl Decl. ¶ 13. “[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 time to receive, vote and return their ballot by Election Day.” Cities’ Mot. at 5. And, indeed, in Madison alone, the City Clerk estimates that they will “receive more than 1,000 absentee ballots” after the Election Day Receipt Deadline. Witzel-Behl Decl. ¶ 13. Milwaukee similarly estimates that “thousands” of ballots will arrive late. Cities’ Mot. at 5; *see also* Albrecht Decl. ¶ 9 (estimating at least 1,000 ballots will arrive after the 8:00 p.m. deadline). Further, Dr. Burden explains that even in the best of times, two to three days are necessary for a ballot to arrive on time but now, as voters encounter significant disruptions “to their personal health, work, [and] meals . . . this timeline will be costly and challenging for many individuals to meet,” Ex. 1 at 10, particularly given that ballots are certain to actually arrive at voters’ homes within that two to three day window given the delays faced by election officials on the frontend. *See* Witzel-Behl Decl. ¶ 13.

Similarly, due to the coronavirus outbreak and the Governor’s Safer-At-Home Order, individuals who live alone have no person to witness their ballot. Witzel-Behl Decl. ¶ 11; *see also* Morse Decl. ¶¶ 3–5; Trapp Decl. ¶ 4; Keel Decl. ¶ 3; Wilson Decl. ¶¶ 4–5. Dr. Burden explains that “for a person who lives alone, is immunocompromised and self-quarantining to protect their health, or who has contracted COVID-19 and is in quarantine to protect others, it may be nearly impossible to secure a witness signature in a timely fashion.” Ex. 1 at 9. This is not a hypothetical risk. The Madison Clerk’s Office is already receiving “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.” Witzel-Behl Decl. ¶ 11; Eggen Decl. ¶ 6. And several voters have submitted declarations testifying that they face this very barrier to voting. *See generally* Morse Decl., Trapp Decl., Roush Decl., Wilson Decl., Keel Decl. Moreover, under the Safer-At-Home Order, there is a real question as to whether a voter is even allowed to find a witness given that interactions between non-household members are legally prohibited unless they are in keeping with social distancing’s six-foot criterion. Ex. 4.

Likewise, as all non-essential businesses are now shuttered, these same concerns apply to the requirement that first-time absentee voters—which, given this unprecedented crisis, will be most voters in this election—include a copy of a photo ID with their request for an absentee ballot. *See id.*; *see also* Ex. 1 at 5, 7. To create a copy, this requires a facility with a smart phone equipped with a camera, some other scanning or photographing equipment, or a traditional photocopy machine. *Id.* at 9. This is a new and foreign process for many Wisconsin voters. “Without 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, this step will be an administrative and technological hurdle for some prospective voters.” *Id.* And, in fact, an increasing number of voters have explained this to this Court, making it clear that they will be unable to vote without the temporary lifting of this requirement for this election. Love Decl. ¶ 4; *see generally* McDonell Decl. ¶¶ 6-7; *see also* Ex. 9 (“uploading an ID is confusing and cumbersome to voters and many do not have the cell phone or internet access to facilitate the process properly. For some individuals, it would present a significant barrier to voting. Consequently, photo ID requirements should be waived for registered voters.”). These same concerns apply to voters who must submit copies of their proof of residency when registering by-mail. Ex. 1 at 7-9.

Finally, while this Court has extended the online registration deadline to March 30, that accommodation only encompasses those voters who have a DMV-issued ID. Ex. 1 at 7. Since the Court's order, Madison has severely limited its remaining in-person registration options, Ex. 14, *see also* Ex. 1 at 8, and Milwaukee—the largest voting jurisdiction in the state—has eliminated all in-person registration options. Ex. 9; *see also* Ex 1 at 8. This means that in some parts of the state voters may have an option to register in-person if they do not have a DMV-issued ID, but in other parts of the state they will now have no option to register if they do not have a DMV-issued ID. Moreover, given that this is most likely to impact Milwaukee, the burden of not having by-mail registration will fall disproportionately on Wisconsin's African American citizens and those with lower incomes who are more transient. Cities' Mot. at 4; Ex. 1 at 8. Indeed, after this Court issued its order, both Madison and Milwaukee requested that the Court extend the by-mail registration deadline to April 2, 2020, so that persons requesting absentee ballots could also register to vote. Cities' Mot. at 4.

These facts make it clear that the Challenged Provisions impose severe burdens on Wisconsinites as they navigate this unprecedented crisis and that relief is warranted.

### **III. ARGUMENT**

Plaintiffs are entitled to a preliminary injunction because (1) they are substantially likely to succeed on the merits; (2) they will suffer irreparable harm absent relief; (3) traditional legal remedies will not adequately protect their rights; (4) the harm they will suffer absent a preliminary injunction outweighs harm the State will suffer because of one; and (5) a preliminary injunction is in the public interest. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

**A. Plaintiffs are likely to succeed on the merits.**

**a. Plaintiffs are likely to succeed on their right-to-vote claim.**

The Challenged Provisions severely restrict Wisconsin voters' right to vote by forcing them to make an unconscionable choice between disobeying government orders and risking their health or exercising their right to vote.

Under the *Anderson/Burdick* balancing test, the Supreme Court requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’” considering “‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)). This inquiry is highly fact-specific and may not be undertaken by rote. Rather, the court applies a “flexible standard.” *Id.* 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 less severe burdens remain subject to balancing: “[h]owever slight” the burden on voting rights may appear, “it must 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) (controlling op.) (quoting *Norman*, 502 U.S. at 288–89). In evaluating the burden a law imposes, a court must focus on both the burden on the general electorate and the effect on the actual individuals affected by the law. *Id.* at 201; *see also One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 930 (W.D. Wis. 2016).

Courts have repeatedly recognized that disenfranchisement severely burdens the right to vote—and that even disenfranchising a small number of voters can give rise to a severe burden. *See, e.g., League of Women Voters of N.C. (“LOWV”) v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“[T]he possibility that qualified

voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges."); *Ne. Ohio Coal. for the Homeless ("NEOCH") v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

Wisconsin will not count an absentee ballot that is received by election offices after 8:00 p.m. on Election Day. Wis. Stat. § 6.87(6). Nevertheless, it is a certainty that thousands of ballots will arrive after the April 7, 2020 deadline due to no fault of the voter. Witzel-Behl Decl. ¶ 13; Albrecht Decl. ¶ 9. Cities' Mot. at 5. Indeed, the Madison and Milwaukee clerks have explained that "there is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request . . . will have time to receive, vote and return their ballot by Election Day." Cities' Mot. at 5. The reason for this is obvious. Because 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. Under normal circumstances, the USPS estimates that it takes at least two to three days for a ballot to reach an election office. Ex. 1 at 9-10. Indeed, the State typically tells voters to send their ballot in at least a week before the election. Ex. 15. Thus, under these circumstances there is no way for an absentee ballot to arrive at the clerk's office prior to election day. As a consequence, thousands of voters will be disenfranchised.

In a situation analogous for its lack of foreseeability, one court allowed ballots cast on or before Election Day—but received after Election Day—to be counted due to the anthrax attacks of 2002. *In re Holmes*, 788 A.2d 291 (N.J. Super. Ct. 2002). The court held that "rigid application of the rule that all ballots be received by the board by 8:00 P.M. of Election Day would unfairly deprive absentee voters of their franchise as a result of exceptional circumstances neither within their control nor which, in light of human experience, might reasonably be expected." *Id.* at 295.

The same must result here. In similar contexts, courts have held that deadlines must give way when voting rights are at stake. *See Doe v. Walker*, 746 F. Supp. 2d 667, 677 (D. Md. 2010) (extending deadline to count votes after UOCAVA challenge); *United States v. Cunningham*, No. 3:08-cv-709, 2009 WL 3350028, at \*4 (E.D. Va. Oct. 15, 2009) (same).

The absentee ballot witness requirement, photo ID requirement, and documentation of residency requirement disenfranchise thousands of voters by forcing them to choose between preserving their health and obeying a statewide stay at home order and exercising their right to vote. Wisconsin voters who vote absentee by-mail must obtain a witness signature to complete their ballot. Wis. Stat. § 6.87(2). But the Governor's Safer-At-Home Order effectively prohibits individuals who live alone from doing so. Indeed, the Safer-At-Home Order restricts all interactions between non household members unless they are six feet apart. Ex. 4. However, to obtain a witness signature, a person living alone would have to interact with a non household member to secure a signature. *See* Ex. 1 at 9. Moreover, that interaction—both the witnessing and signing of the ballot—would require the individuals to come within six feet of each other. Thus, in these circumstances, it is extremely difficult if not impossible for a person living alone to obtain a witness signature. *Id.* at 9, 12; *see also* Morse Decl. ¶¶ 4–6; Trapp Decl. ¶¶ 4–5; Roush ¶ 3–4; Keel Decl. ¶ 3. In fact, numerous voters have already contacted the Madison's Clerk's Office to explain that they are afraid to leave their homes in search of a witness. Witzel-Behl Decl. ¶ 11; *see also* Eggen Decl. ¶ 6 (voters in Hudson contacting clerk's office for similar reasons). And for those individuals who live alone and are immunocompromised or self-quarantining, they do not simply risk breaking the law to obtain a signature, but they face placing their health in jeopardy. Ex. 1 at 9; *see also* Morse Decl. ¶¶ 3–5; Wilson Decl. ¶¶ 4–5; Larson Decl. ¶ 5; Trapp Decl. ¶ 4; Keel Decl. ¶ 3. Neither of these groups of individuals can vote without obtaining a signature, however.

Consequently, this requirement severely burdens individuals' voting rights because, absent disobeying state law and severely compromising their health, it results in disenfranchisement.

The requirements that individuals registering to vote or voters applying for an absentee ballot provide copies of documentation—proof of residency for registrants and voter identification for absentee ballot applicants—are no different. Wis. Stats. §§ 6.34, 6.86, 6.87. Indeed, since the Court issued its Order on Plaintiffs' Motion for a Temporary Restraining Order the burdens imposed by these requirements have only grown worse as Wisconsinites are now ordered to shelter in place. As noted, the Governor has since issued a Safer-At-Home Order that mandates that people stay at home, while also shutting down nonessential businesses and public libraries. Ex. 4. But to provide the required documents means a voter must locate a copier, scanner, computer, and/or printer. Ex. 1 at 9. These are machines not every individual or household has access to, particularly among less-affluent populations, the elderly (a population specifically at risk in this pandemic), and college students, among others. *Id.* at 8-9. Therefore, among large swaths of Wisconsin's population, to provide the required documentation means leaving the house, locating a copier, scanner, and/or printer (a task increasingly more difficult as locations with those machines shutter). Under the Safer-At-Home Order, it is plain that voters are not supposed to venture out to find these, and it is not clear that places with printers are deemed "essential" and thus even available should a voter take the risk to venture out. Ex. 4. In the same way that statutory notarization requirements are being temporarily relaxed because of the COVID-19 pandemic, the statutory witnessing requirement must be loosened to permit absentee voting to go forward during the emergency. *See* Ex. 17 ("We 'avoid statutory interpretations that lead to absurd results,' and it would be absurd to construe those statutes to require in-person appearances in the time of a global pandemic. People's lives are at stake."); *see also In re the Matter of the Remote Administration of*

*Oaths at Depositions via Remote Audio-visual Equipment During the COVID-19 Pandemic* (Wis. Mar. 25, 2020), <https://www.wicourts.gov/news/docs/oaths.pdf>, (court reporters need not be in the physical presence of the witness to administer an oath under Wis. Stat. §§ (Rules) 804.03 and 804.05); *In re the Matter of Admission to the Bar During the COVID-19 Pandemic*, (Wis. Mar. 25, 2020), <https://wicourts.gov/news/docs/baradmissions.pdf> (waiving requirement under Sup. Ct. R. 40.02(4) that bar applicant take the Attorney’s Oath in person). Accordingly, these requirements also severely burden individuals’ voting rights by forcing voters to the choice of unnecessarily risking their violation of an executive order or exposure to a deadly virus and results in disenfranchisement.

Finally, in the absence of expedited measures by this Court, there is a growing risk that the enforcement of the Challenged Provisions could result in widespread confusion and glaringly inconsistent enforcement throughout the State. The imposition of the March 18 by-mail registration deadline means that thousands of Wisconsin citizens are not afforded an equal opportunity to register as other similarly situated Wisconsin voters, severely burdening their right to vote. While this Court extended the online registration deadline to March 30, this extension only enables Wisconsin citizens who have DMV-issued ID to register. Ex. 1 at 7-8. And since this Court issued its Order circumstances on the ground have changed drastically. Milwaukee has eliminated all in-person early voting and registration locations, *see, e.g.*, Ex. 9, and Madison has severely limited them, Ex. 14. Consequently, Wisconsin citizens without DMV-issued IDs in these localities—a disproportionate number of whom are minority or low-income individuals—have severely limited to no way in which to register. Ex. 1 at 8; Cities’ Mot. at 5. As a result, citizens without DMV-issued IDs in Milwaukee and Madison are being treated differently, for no fault of their own, from other similarly situated Wisconsin voters across the state and, alarmingly, now

have no way to register to vote. This is an egregious denial of their right to vote and this Court, as other courts have done, should find that the by-mail registration deadline must give way for these potential voters to register and vote. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (granting preliminary injunction to extend voter-registration deadline due to a hurricane); *Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (granting preliminary injunction to extend voter-registration deadline due to a hurricane and observing that “an individual’s loss of the right to vote is clearly an irreparable injury that outweighs any damage caused by extending the deadline”).

No “precise interest” Wisconsin articulates can justify the burdens the Challenged Provisions inflict on its voters. *Anderson*, 460 U.S. at 789. *First*, while the State has an interest in ensuring the finality of elections, rejecting validly cast ballots that happen to arrive after 8:00 p.m. on Election Day does not serve that interest. In fact, this purported state interest is undercut by Wisconsin’s own processes. Ballots are *still* being processed long after Election Day. For instance, voters who cast provisional ballots have until 4:00 p.m. on the Friday after Election Day to cure them, while local boards of canvassers have until 9:00 a.m. on the Monday following Election Day to record and count the cured ballots. *See* Wis. Stat. § 6.97(3)–(4). County clerks need not deliver the election’s results to the State Election Commission until “no later than 9 days after each primary.” Wis. Stat. § 7.60(5). Even more, Wisconsin does not need to complete the canvassing following the “spring election” at issue here until May 15—more than five weeks after Election Day. Wis. Stat. § 7.70(3)(a). 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.

Moreover, the reality is that given the current COVID-19 crisis and the resulting influx of absentee ballots and decrease in available staff, the local election clerks do not anticipate being able to complete the counting of election returns within a week after the election much less on election day. *See* Cities' Mot. at 5 (discussing the practical constraints of counting thousands of absentee ballots while social distancing and noting that it could take "several days" to complete). Thus, as a practical matter, Wisconsin will not have a final election result on April 7 or anytime soon thereafter. As a result, there is simply no reason in this context to arbitrarily require that ballots arrive by 8:00 p.m. on Election Day when the only result will be the unjustified disenfranchisement of thousands of Wisconsin voters.

*Second*, while Wisconsin has interests in preventing voter fraud and ensuring electoral integrity, these interests do not justify the severe burden of requiring registrants and voters to disobey statewide orders to seek out witnesses, scanners, copiers, and printers during a global pandemic. The state's interests can be solved by far less risky means. *See, e.g.*, Ex. 17 (allowing remote notarization); *see also In re the Matter of the Remote Administration of Oaths at Depositions, supra; In re the Matter of Admission to the Bar, supra*. For instance, a voter must already sign a comprehensive certificate on absentee ballots stating she is a resident of the locality from where she is voting. Wis. Stat. § 6.87(2). This certificate is subject to penalties for false statements. *Id.* And, indeed, 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. *Id.* §§ 6.86(2)(a), 6.87(4)(b)(2). By virtue of the Governor's statewide Safer-At-Home Order and COVID-19, all Wisconsin voters are effectively confined due to infirmity or illness. *See McDonell Decl.* ¶ 7 (explaining that, without proper testing, all citizens should assume that they and others

they might interact with are sick). At the very least, those voters who are over 60 or in other high-risk groups are certainly “confined” due to their ages and/or infirmities. Thus, for these reasons as well, the absentee photo ID requirement should not apply to them and certainly cannot be justified by the State.

Finally, while the State has an interest in identifying a deadline for voter registrations, it has no precise interest in limiting voter registrations only to on-line registration, particularly where that form of registration is not available to citizens without a DMV-issued ID and current circumstances have eliminated in-person registration options for thousands of other individuals. In fact, under these circumstances, extending the by-mail registration deadline would ensure that the status quo—registration through April 2, Wis. Stat. 6.29(2)(a), remains in place for all voters in the state, not just those voters located outside of Milwaukee and Madison. Moreover, the extension of this is not only feasible administratively, but it is precisely what local clerks have requested from this Court. Cities’ Mot. at 4. Thus, the State can have no real argument against it.

**b. Plaintiffs are likely to succeed on their Procedural Due Process claim.**

Plaintiffs are also likely to succeed on their procedural due process claim. Wisconsin cannot deprive any person of liberty without “due process of law,” U.S. Const. amend. XIV, § 1. In the current environment of mandatory stay at home orders, self-quarantines, the shuttering of significant portions of the national and global economies, and social distancing amidst an extraordinary global pandemic, the Challenged Provisions do just that because they operate to deprive voters’ liberty interest in voting without process.

Courts must first consider the “private interest that will be affected by the official action.” *Boyd v. Owen*, 481 F.3d 520, 525 (7th Cir. 2007) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Next, courts must consider the “fairness and reliability” of the existing procedures and the “probable value, if any, of additional procedural safeguards.” *Mathews*, 424 U.S. at 343.

Finally, courts assess the public interest, “includ[ing] the administrative burden and other societal costs that would be associated with” additional or substitute procedures. *Id.* at 347.

Each of these factors weighs heavily in Plaintiffs’ favor here. *First*, the right to vote is unquestionably a liberty interest and cannot be “confiscated without due process.” *Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990). This liberty interest extends to by-mail voting in Wisconsin. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 215 (D.N.H. 2018) (“voter has a sufficient liberty interest once ‘the State permits voters to vote absentee.’”) (quoting *Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, at \*5 (N.D. Ill. Mar. 13, 2006)).

*Second*, the degree of deprivation resulting from the Challenged Provisions is extraordinarily high. This deprivation is neither hypothetical nor speculative; it is happening each day that the coronavirus spreads, governments respond to the growing threat, and individuals take extraordinary state mandated precautions to avoid the pandemic in the form of physical isolation. Already, Wisconsin voters have requested—and continue to request—record levels of absentee voting. *See supra* pp. 2, 6.

*Third*, the Challenged Provisions are neither fair nor reliable in the context of a growing global pandemic. The administrative burden on Wisconsin in waiving the proof of residency requirement and extending the deadline for by-mail voter registrations, waiving the photo identification requirement for absentee ballot applications, waiving the absentee witness requirement, and extending the time in which a likely avalanche of absentee ballots may be received and counted is marginal compared to the deprived liberty interest. *Mathews*, 424 U.S. at 335.

**c. Plaintiffs are likely to succeed on their Equal Protection claim.**

Plaintiffs are also likely to succeed on their equal protection claim. Wisconsin cannot deny[ ] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The requirements of equal protection in the electoral process are well known. “Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). Among other things, this requires “specific rules designed to ensure uniform treatment” in order to prevent “arbitrary and disparate treatment to voters” based on which county or local jurisdiction they live in. *Id.* at 106-07. There is no “emergency exemption” from this equal protection requirement. “The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.” *Id.* at 108-09; *see also id.* at 109 (shutting down the 2000 Florida recount because the recount process was “inconsistent with the minimum procedures necessary to protect the fundamental right of each voter”).

The present emergency abounds with many risks of unfair, unequal, and disparate treatment of Wisconsin voters depending on where they live. Statutorily guaranteed in-person registration and voting are now available to some Wisconsin voters but not to others, depending on where they reside. *See, e.g.*, Exs. 10, 12, 14; *see also* Cities Mot. at 2 (identifying closure of some, but not all, polling places due to COVID-19). Similarly, the application of the documentation requirements for registering to vote and requesting an absentee ballot varies broadly across cities and counties, resulting in some voters being subject to these requirements while others are not. *See* McDonell Decl. ¶ 7. Voters also are receiving conflicting guidance on the witness requirement for absentee ballots depending on where they live and who they call. *See, e.g.*, Ex. 16 (quoting Madison officials suggesting FaceTime or Skype to satisfy requirement). Many voters, particularly those who live alone, lack access to a witness but are simultaneously

being instructed by the authorities to stay at home and practice social distancing. *See, e.g.*, Trapp Decl. ¶ 3; Wilson Decl. ¶ 4; Keel Decl. ¶ 3.

Moreover, voters are receiving radically conflicting advice on whether they are now “indefinitely confined because of age, physical illness or infirmity” within the meaning of Wis. Stat. §§ 6.86(2)(a) and 6.87(4)(b)(2), and therefore exempt from many of the absentee voting restrictions and conditions. On information and belief, election officials in some Wisconsin counties and localities are telling voters they are now “indefinitely” confined by the pandemic and emergency government orders. *See* McDonnell Decl. ¶ 7. At the very least, voters who are over 60 and/or in one of the other high-risk groups would seem to be “indefinitely confined because of age, physical illness or infirmity.” *Id.* ¶ 6. So would those who are suspected of having been exposed to the COVID-19 virus and are under quarantine. Yet voters in other jurisdictions are being told this exception does not apply and that they must jump through the usual hoops, even if at risk to health and life.

In these and other respects, if this Court does not require “uniform rules” and “specific standards” in conducting the April 7 election under these emergency conditions, there will be an unacceptably high risk that Wisconsin will not satisfy “the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right” to vote. *Bush v. Gore*, 531 U.S. at 105-06. If anything, the equal protection risks are even greater here than in *Bush v. Gore*. There, the right to vote was at risk. Here, the risks are to the right to vote and to the right to life—our own and the lives of others.

**B. An injunction is necessary to avoid irreparable harm.**

The Challenged Provisions operate to inflict two irreparable harms on Wisconsin voters. *First*, they result in disenfranchisement. Disenfranchisement constitutes irreparable injury. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *LOWV*, 769 F.3d at 247 (“Courts routinely

deem restrictions on fundamental voting rights irreparable injury.”) (citations omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (explaining that the loss of constitutional “freedoms . . . unquestionably constitutes irreparable injury”). Once the election comes and goes, “there can be no do-over and no redress.” *LOWV*, 769 F.3d at 247. The Seventh Circuit has recognized that once a constitutional violation has been demonstrated, no further showing of irreparable injury is necessary. *Ezell v. City of Chi.*, 651 F.3d 684, 699 (7th Cir. 2011) (infringement on constitutional rights caused irreparable harm); *see also 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.”).

*Second*, the Challenged Provisions contribute to public health risks and encourage defiance of statewide orders. They operate to encourage determined registrants and voters to venture out into the world and interact face-to-face with people—despite a statewide order requiring otherwise. At worst, the Challenged Provisions risk exposing Wisconsinites to an ailment that has already claimed thousands of lives internationally. *Cf. Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (affirming preliminary injunction barring county from closing hospital because doing so would cause irreparable harm to patients and “exacerbation of the current overcrowded situation and additional suffering . . . avoided” by enjoining closure). The Seventh Circuit has recognized that “the denial of injunctive relief after a district court has found a risk of imminent and substantial danger to public health or to the environment should be rare.” *LAJIM, LLC v. Gen. Elec. Co.*, 917 F.3d 933, 942 (7th Cir. 2019). That risk of substantial danger to the public health is substantial, imminent, and ongoing.

### **C. Traditional legal remedies will not adequately protect Plaintiffs’ rights.**

Because members and constituents of Plaintiffs face the inability to register and vote without disobeying a statewide order, exposing themselves to the coronavirus, and negatively

impacting the public health, traditional legal remedies are inadequate. The Seventh Circuit has presumed that money damages cannot adequately remedy a constitutional violation. *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (reversing denial of preliminary injunction on complaint alleging First Amendment claims). More specifically, money damages cannot cure disenfranchisement post hoc. *Cf. Frank v. Walker*, 196 F. Supp. 3d 893, 904 (E.D. Wis. 2016) (finding, where plaintiffs faced violations of their voting rights in elections that might occur before the resolution of their claims, “traditional legal remedies, such as monetary damages, would be inadequate”). Given the close proximity of the primary election, it is certain that an election will occur, necessitating action from this Court to ensure that Plaintiffs’ voters’ and constituents’ rights are not violated.

**D. The balance of hardships weighs in favor of an injunction.**

The balance of the equities favors Plaintiffs. On the one hand, an injunction would protect the health of the public. An injunction would also prevent disenfranchisement by removing barriers to voting during a time of an unprecedented public health crisis. On the other hand, the state may have a handful more administrative tasks—though the declarations submitted by the local clerks indicate that, if anything, the relief Plaintiffs’ seek will actually ease administrative burdens. But even if there were limited administrative burdens, mild inconvenience is outweighed by the vindication of constitutional rights. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (holding “administrative convenience” cannot justify practices that impinge upon fundamental rights); *see also Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1268 (N.D. Ga. 2018) (holding increased administrative burden of “disseminating information” and “training poll managers. . . is minimal compared to the potential loss of a right to vote”); *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012) (“[t]he potential hardships that Georgia might experience are minor when balanced against the right to vote, a right that is essential to an

effective democracy.”); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at \*26 (N.D. Fla. Oct. 16, 2016) (“Any potential hardship [to the state] imposed by providing the same opportunity . . . for [] voters pales in comparison to that imposed by unconstitutionally depriving those voters of their right to vote and to have their votes counted.”).

Here, Wisconsin law does not require counties to begin their canvass until one week after Election Day. Wis. Stat. § 7.60(3). The law also provides that county clerks must deliver the results to the state election commission “no later than 9 days after each primary . . .” Wis. Stat. § 7.60(5). Even more, the state need not complete its canvass until May 15. *See* Wis. Stat. § 7.70(3)(a). There is, in short, ample time for the modest administrative tasks that an injunction would require—tasks far outweighed by the protection of voting rights and to benefit public health.

**E. An injunction is in the public interest.**

Without question, an injunction that is aimed to protect the public from more exposure to the coronavirus *and* avoid disenfranchisement is in the public interest. “[I]njunctive protecting First Amendment freedoms are always in the public interest.” *Christian Legal Soc’y*, 453 F.3d at 859. “The vindication of constitutional rights . . . serve[s] the public interest almost by definition,” including specifically when the right at issue is the right to vote. *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012). This is because the public has a “strong interest in exercising the fundamental political right to vote.” *Purcell*, 549 U.S. at 4. In sum, “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *Obama for Am.*, 697 F.3d at 437. Enjoining the Challenged Provisions here would do precisely that—allow as many qualified Wisconsinites as possible to safely vote.

**IV. CONCLUSION**

For the reasons stated, Plaintiffs respectfully request that the Court issue a preliminary injunction that: (1) requires defendants to extend Wisconsin’s by-mail registration deadline to

April 2, 2020; (2) enjoins the enforcement of Wis. Stat. § 6.34's proof of residency requirement for voter registrations; (3) enjoins the enforcement of Wis. Stat. §§ 6.86-87 photo identification requirements for absentee ballot requests until the COVID-19 crisis is over; (4) enjoins the enforcement of Wis. Stat. § 6.87(2) witness requirement for absentee ballots; and (5) prohibits defendants from rejecting ballots that are postmarked before or on Election Day that arrive within ten days of Election Day.

Dated this 27th day of March, 2020.

Respectfully submitted,

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