

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

DEMOCRATIC NATIONAL COMMITTEE,
et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, *et al.*,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Intervening Defendants.

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

SYLVIA GEAR, *et. al.*,

Plaintiffs,

v.

MARGE BOSTELMANN, *et al.*,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Intervening Defendants.

Civil Action No. 3:20-cv-278-wmc

REVEREND GREG LEWIS, *et al.*,

Plaintiffs,

v.

MARGE BOSTELMANN, *et al.*,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Intervening Defendants.

Civil Action No. 3:20-cv-284-wmc

**MEMORANDUM OF PLAINTIFFS DEMOCRATIC NATIONAL COMMITTEE AND
DEMOCRATIC PARTY OF WISCONSIN IN OPPOSITION TO INTERVENING
DEFENDANT WISCONSIN LEGISLATURE'S MOTION TO DISMISS**

**Plaintiffs' Memorandum in Opposition to
Wisconsin Legislature's Motion to Dismiss - 1**

INTRODUCTION

Now that Wisconsin’s infamous April 7, 2020 Spring Election¹ has passed, intervening defendant Wisconsin Legislature—but not the other intervening defendants, let alone the original defendants—has moved to dismiss one of three consolidated cases pending before this Court—but not the other two cases, which seek much of the same relief as the case the Wisconsin Legislature has targeted for dismissal. The Legislature has moved to dismiss the amended complaint in *Democratic National Committee v. Bostelmann*, No. 3:20-cv-249-wmc (ECF No. 55), in its entirety, arguing that (1) “the *DNC* Plaintiffs’ claims in their Amended Complaint are now moot, since the April 7, 2020 Spring Election ‘ha[s] come and gone by,’” and (2) dismissal is required on “*Burford* abstention grounds,” so-called after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). ECF No. 197 at 1, 3 (citation omitted). As this Court will recall, it already has once rejected the Legislature’s *Burford* abstention arguments in the leadup to the April 7 election. *See Democratic Nat’l Comm. v. Bostelmann*, No. 3:20-cv-249-wmc, 2020 WL 1320819, at **7-8 n.12 (W.D. Wis. Mar. 20, 2020) (“*Burford* abstention is not an appropriate reason to duck this court’s obligation to protect voters’ rights”).

This Court should deny the Legislature’s motion to dismiss in its entirety because plaintiffs’ claims are not moot and are not appropriate for *Burford* abstention.²

¹ As discussed in plaintiffs’ Second Amended Complaint (SAC) (ECF No. 198-1), the decision to proceed with the April 7 election and the manner in which it was conducted have been branded a “travesty” and “an abomination, a civic tragedy that never should have occurred”; “insane”; “cruel”; “brazen”; “nightmarish” and “scandalous”; “appalling” and “terrifying”; “a dangerous spectacle that forced voters to choose between participating in an important election and protecting their health”; and “[o]ne of the most shameful chapters in American’s long history of voter suppression,” requiring voters “to make an unconscionable choice between their lives and their citizenship.” The title of one article has urged: “Never Forget Wisconsin.” *See* proposed SAC ¶ 2 & nn. 1-9, ECF No. 198-1.

² This memorandum in opposition borrows heavily from plaintiffs’ Motion for Leave to

BACKGROUND

This Court needs little reminding of the relevant background. Plaintiffs filed this suit on March 18, 2020. ECF No. 1. In several orders in late March and early April, this Court denied plaintiffs' preliminary injunction motions in some respects (without prejudice), while in other respects granting important relief that enabled tens of thousands of voters to register and cast their ballots. *See* ECF Nos. 37, 170, 179. Although this Court's preliminary injunction was further narrowed on appeal by the Seventh Circuit and the Supreme Court, one of the most important parts of this Court's injunctive relief survived intact: the Court's order enjoining defendants "from enforcing the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted," and extending that deadline for receipt of absentee ballots by six days, provided that such ballots were mailed and postmarked on or before election day. *See Democratic Nat'l Comm. v. Bostelmann*, Civ. No. 3:20-cv-249-wmc, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020), *clarified & amended*, ECF Nos. 179-80 (W.D. Wis. Apr. 3, 2020), *stayed in part sub nom. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). The defendants and intervening defendants did not challenge this extension of the ballot-receipt deadline in the Supreme Court, and the Court relied on this extension in denying "an additional extension, which would allow voters to mail their ballots after election day." 2020 WL 1672702, at *2.

This Court's April 2 preliminary injunction extending the ballot-receipt deadline from April 7 to April 13 appears to have avoided the disenfranchisement of over 142,000 Wisconsin

File Second Amended Complaint (ECF No. 198), which also addresses the Legislature's mootness and *Burford* abstention arguments.

citizens, whose ballots were cast by election day, but absent court intervention would have been rejected. *See* proposed Second Am. Compl. (SAC) ¶ 5 & n.11.³ The Court’s March 20 order also enabled thousands of additional voters to register online rather than having to register at an early in-person absentee voting site or on election day at the polls. *Id.* ¶¶ 4, 73.

ARGUMENT

I. Plaintiffs’ claims are not moot.

Although the April 7 Spring Election is now over, several more elections will be held in Wisconsin in 2020, culminating in the November 3 General and Presidential Election. Yet the Legislature contends this case—but not the other two cases that have been consolidated with this one—should now be dismissed in its entirety because it is moot. The Legislature claims that plaintiffs have “alleged constitutional violations *only* with respect to this [April 7] Spring Election,” and have “challenged election laws ... *only for this past Spring Election.*” ECF No. 197 at 3 (emphasis in original). Putting its argument another way, the Legislature claims that

³ The data regarding ballots that arrived between April 8 and April 13 can be found at <https://elections.wi.gov/blog>; *see also* Richard Pildes, *How Many Absentee Ballots in WI Came In on Time Because of the Court Decision to Extend the Receipt Deadline?*, Election Law Blog (Apr. 15, 2020), <https://electionlawblog.org/?p=110746>. As of 8 p.m. on April 7, there had been 990,129 absentee ballots returned. *Election Day Update Blog*, Wisconsin Elections Commission, <https://elections.wi.gov/blog> (last visited May 7, 2020). The Wisconsin Elections Commission (WEC) reports that, ultimately, 1,132,923 absentee ballots were returned and counted, suggesting that 142,794 ballots were able to be counted that would not otherwise have been. *See* 2020 Spring Election and Presidential Preference Vote Ballot Status as of April 17, 2020, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Ballot%20Data%20as%20of%20April%2017%202020.pdf> (last visited May 7, 2020); *see also* Amy Gardner *et al.*, *Unexpected outcome in Wisconsin: Tens of thousands of ballots that arrived after voting day were counted, thanks to court decisions*, Washington Post (May 3, 2020), https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9dcc71fc_story.html.

plaintiffs “have not specifically challenged the application of the relevant election laws here to any specific election in the future.” *Id.* at 5.

The Legislature’s claims are false, and the exact opposite of what the plaintiffs’ pleadings actually say. Plaintiffs’ original and amended complaints clearly and repeatedly ask for injunctive relief both with respect to the April 7 election and for “*any election that occurs while this crisis continues.*” ECF No. 55 ¶ 7 (emphasis added); *see id.* at 19, ¶¶ C-E (asking for various injunctive relief to extend “*until the COVID-19 crisis is over*”) (emphasis added); *id.* ¶ 44 (seeking injunctive relief for “the upcoming April 7, 2020 [election], *as well as other elections taking place during the COVID-19 crisis*”) (emphasis added).

Although the current amended complaint (ECF No. 55) should be more than sufficient to withstand the Legislature’s contrived mootness challenge, plaintiffs have moved for leave to file a proposed Second Amended Complaint that specifies in even more unmistakable terms that plaintiffs have always sought, and continue to seek, injunctive relief applicable to any and all elections—including the November 3, 2020 General and Presidential Election—that are held while the COVID-19 crisis continues in Wisconsin and until that crisis is over. *See* ECF No. 198, 198-1 at ¶¶ 6, 8, 33, 45-46, 67, 90, 97.⁴

⁴ In addition to responding to the Legislature’s mootness arguments, plaintiffs in their Second Amended Complaint have substantially revised and expanded their allegations to account for all of the factual and legal developments since their amended complaint was filed on March 26, especially the April 7 Spring Election itself, the litigation surrounding it, and the many constitutional flaws regarding the conduct and consequences of that election. The Second Amended Complaint also fine-tunes plaintiffs’ claims and requested relief to take account of the rulings over the past several weeks by this Court, the Seventh Circuit, and the Supreme Court, and adds an additional challenge growing directly out of how the April 7 election was conducted: defendants’ failure to provide sufficient financial, personnel, and other resources to ensure an adequate number of early in-person absentee voting sites and election-day polling places throughout the State to accommodate in-person voters in a safe and secure manner. *See* SAC ¶¶ 7, 9, 83.

That should dispose of the Legislature’s mootness defense. Contrary to the Legislature’s argument, the “capable of repetition, yet evading review exception to mootness” (ECF No. 197 at 4) does not apply because plaintiffs are seeking prospective relief relevant to upcoming elections in Wisconsin during the pandemic, and any such relief will be “capable of review” if granted. Plaintiffs are not seeking to establish liability because of past elections, but to enjoin *prospective* harms because of how the challenged statutes are likely to impact the *upcoming* elections during the pandemic, including the November 2020 election.

The Legislature appears to argue “there is no ‘reasonable expectation’” that the pandemic will affect the remaining 2020 elections. ECF No. 197 at 5 (citation omitted). That is squarely refuted by the public health evidence, and in any event is a question of fact not suitable for resolution at the pleadings stage. *See* SAC ¶ 31 (April 21 warning by Director of Centers for Disease Control of a potential second and even deadlier wave of COVID-19 this fall). And the Legislature’s attempt to use a mootness defense to force plaintiffs to litigate their *federal* constitutional voting rights claims “before the state courts or the Wisconsin Elections Commission,” ECF No. 197 at 5, is simply an attempt to cloak their *Burford* abstention arguments in mootness garb. As emphasized in the *Burford* discussion below, federal constitutional claims are entitled to be litigated in federal court. *See infra* at 8-9.

The Legislature’s extensive reliance (at ECF No. 197 at 2-3, 5) on *Tobin for Governor v. Illinois State Bd. of Elections*, 268 F.3d 517 (7th Cir. 2001), is far off base. That case involved a claim that the state elections board had violated the federal constitution in a just-concluded election by refusing to certify and place on the ballot the Libertarian Party’s slate of candidates as the result of the board’s allegedly illegal striking of thousands of signatures from the party’s nominating petition. The Seventh Circuit held that plaintiffs’ claim for “declaratory relief” was moot because

it did *not* involve a challenge to “any statutory provision that will continue to operate past the [just-concluded] election,” but instead was a challenge to the procedural fairness of “a one-time decision” rejecting a specific nominating petition in a now-concluded election. *Id.* at 529. This case is just the opposite—it challenges the continuing application of specific statutes in elections to be held over the next six months (and perhaps beyond), and seeks to require defendants to undertake certain actions *in those upcoming elections*. *Tobin for Governor* is a poor choice of supporting precedent.

The Legislature’s reliance (at 2) on *Stone v. Bd. of Election Commr’s for City of Chicago*, 643 F.3d 543 (7th Cir. 2011), is similarly misplaced. Plaintiffs in that case sought a preliminary injunction against the enforcement of a ballot-access requirement in the February 2011 municipal election. The district court denied injunctive relief, the plaintiffs appealed, and the election was held while the appeal was pending. The Seventh Circuit thereafter held that the appeal was moot because “[t]he *only* relief Plaintiffs seek from us is an injunction pertaining to the municipal election on February 22, 2011,” and with the passage of that election “the requested injunction is now worthless.” *Id.* at 545 (emphasis added). Here, on the other hand, plaintiffs seek relief with respect to *all* Wisconsin elections held while the pandemic continues. *See supra* at 5-6; *see also McDonald v. Cook Cty. Officers Electoral Bd.*, 758 Fed. Appx. 527, 529-30 (7th Cir. 2019) (similar challenge to ballot-access requirement was moot where election had passed, and plaintiff’s challenge had been specifically limited to that one election).⁵

⁵ Plaintiffs call to the Court’s attention that the Seventh Circuit has asked for the parties’ views on whether the appeals from this Court’s injunctive orders are now moot. *See* Apr. 20, 2020 Order in Seventh Cir. No. 20-1538 (parties’ joint status report due May 11). Plaintiffs believe that, while their *claims* are not moot, the intervening defendants’ *appeals* are moot. This Court’s injunctive relief was time-limited and specific to the April 7 election based on then-existing conditions. *See* ECF No. 37 (extending deadline for registering to vote by email from March 18 to March 30); *Bostelmann*, 2020 WL 1638374, at *22 (extending receipt deadline to April 13 and

II. Plaintiffs' claims are not subject to *Burford* abstention.

As for the Legislature's shopworn *Burford* abstention argument, "the power to dismiss recognized in *Burford* represents an 'extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (citations and internal quotation marks omitted). *Burford* gives a court the discretion, but not the obligation, to dismiss a federal case in exceptional circumstances where it unduly interferes with "complex state administrative processes." *Id.* at 727. It is a sharply limited exception to the "virtually unflagging obligation" of federal courts "to exercise the jurisdiction given them"; abstention always is "the exception, not the rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976).⁶

This Court already has ruled that "*Burford* abstention is not an appropriate reason to duck this court's obligation to protect voters' rights." 2020 WL 1320819, at **7-8 n.12. This is precisely the type of case in which the "strong federal interest in having certain classes of cases,

request deadline to April 3); ECF No. 179 at 2 (enjoining release of unofficial results until April 13). To the extent this Court's April 2 order enjoining in part the witness-certification requirement in Wis. Stat. § 6.87(2) is not expressly time-limited, *see* 2020 WL 1638374, at *22, the Seventh Circuit stayed this provision of this Court's order because "the district court did not give adequate consideration to the state's interests" when suspending this requirement. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538 & 20-1546, at **3-4. The Seventh Circuit did not declare that suspension of this rule was inappropriate under all circumstances, and in fact suggested a modified witness requirement might be appropriate. *Id.* at *4. Plaintiffs intend to recommend that the Seventh Circuit remand the witness certification issue to this Court for further consideration.

⁶ Thus, just because a State has an administrative process like the WEC's regulation of elections does not suggest that federal abstention is appropriate. "While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989); *see also Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) ("the mere existence of a statewide regulatory regime is not sufficient" for *Burford* to apply).

and certain federal rights, adjudicated in federal court” outweighs any alleged countervailing state interests. *Quackenbush*, 517 U.S. at 728. “[T]he federal issues in this case eclipse any state issues that might arise.” *Hammer v. U.S. Dep’t of Health & Human Servs.*, 905 F.3d 517, 532 (7th Cir. 2018). Where the issue is a State’s “adherence” to federal constitutional requirements regarding voting rights, “*Burford* abstention is inapplicable.” *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1136 (7th Cir. 1981) (reapportionment claim); *see also Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) (“voting rights cases are particularly inappropriate for abstention”); *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981) (abstention inappropriate where the issue was “nothing less than the fundamental right to vote”); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971) (“We take *Harman v. Forssenius* to mean that the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote.”); *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1283 (N.D. Fla. 2018) (“Federal courts do not abstain when voting rights are alleged to be violated.”); *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 943 (W.D. Mich. 2016) (*Burford* abstention inappropriate in federal voting rights case that “does not involve a state law claim” and seeks to protect federally guaranteed rights; “federal review of similar cases has never been overly disruptive of state efforts to develop a coherent voting policy”); *Bogaert v. Land*, 675 F. Supp. 2d 742, 747 (W.D. Mich. 2009) (citing additional cases holding that *Burford* abstention is “wholly inapplicable” to federal constitutional challenges to state election laws).⁷

⁷ Moreover, to the extent the Legislature claims that the exercise of federal jurisdiction over federal claims would disrupt its efforts to “establish a coherent policy with respect to a matter of substantial concern,” *Burford* abstention requires not only the existence of a state forum “in which claims may be litigated,” but also that the state forum “be special—it must stand in a special relationship of technical oversight or concentrated review in the evaluation of those claims.”

CONCLUSION

The Wisconsin Legislature's motion to dismiss should be denied in its entirety.

Dated this 7th day of May, 2020.

Respectfully submitted,

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Property & Cas. Ins. Ltd. v. Cent. Nat. Ins. Co. of Omaha, 936 F.2d 319, 323 (7th Cir. 1991). The “specialized tribunal” must have “exclusive jurisdiction over the matter.” *Wis. Term Limits v. League of Wis. Municipalities*, 880 F Supp. 1256, 1261 (E.D. Wis. 1994) (emphasis added). These requirements are “a prerequisite of, not a factor in,” this type of *Burford* abstention. *Property & Cas.*, 936 F.2d at 323; *see also Hammer*, 905 F.3d at 534-35. Neither the WEC nor Wisconsin’s courts of general jurisdiction meet these mandatory criteria for *Burford* abstention, especially with respect to federal constitutional claims. They are neither “specialized tribunal[s]” nor do they have “exclusive jurisdiction” over voting rights issues.