

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

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DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

Case No. 20- CV-249

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,  
REPUBLICAN PARTY OF WISCONSIN AND  
WISCONSIN STATE LEGISLATURE,

Intervening Defendants

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SYLVIA GEAR, et al.,

Plaintiffs,

Case No. 20- CV-278

v.

DEAN KNUDSON, et al

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,  
REPUBLICAN PARTY OF WISCONSIN AND  
WISCONSIN STATE LEGISLATURE,

Intervening Defendants.

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REVEREND GREG LEWIS, et al.,

Plaintiffs,

Case No. 20- CV-284

v.

DEAN KNUDSON, et al.,

Defendants.

and

REPUBLICAN NATIONAL COMMITTEE,  
REPUBLICAN PARTY OF WISCONSIN AND  
WISCONSIN STATE LEGISLATURE,

Intervening Defendants.

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**DEFENDANTS DEAN KNUDSEN, JULIE M. GLANCEY, ROBERT F. SPINDELL, JR.,  
MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN AND  
MEAGAN WOLFE  
NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT  
GEAR, et al. v. KNUDSON, et al. – CASE NO. 20 CV 278**

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PLEASE TAKE NOTICE, the above-named defendants, WEC Commissioners Bostelmann, Glancey, Jacobs, Knudsen, Spindell and Thomsen, and WEC Administrator Wolfe, the individuals being sued in their official capacity, will move for an order dismissing them pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. Proc. from Gear, et al. v. Knudson, et al. as soon this matter may be heard. The bases for this motion are set forth in the attached memorandum in support of the motion to dismiss.

Respectfully submitted this 26<sup>th</sup> day of May, 2020.

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WEC Commissioners Bostelmann, Glancey,  
Jacobs, Knudsen, Spindell and Thomsen,  
and WEC Administrator Wolfe

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**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS  
GEAR, et al. v. KNUDSON, et al. – CASE NO. 20 CV 278**

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The defendants, Dean Knudson, Julie Glancey, Robert Spindell, Jr., Mark Thomsen, Ann Jacobs, Marge Bostelmann and Meagan Wolfe by their attorneys Lawton & Cates, S.C. move to dismiss the complaint in Gear, et al. v. Knudson, et al. pursuant to FRCP 12 (b)(1) and (6). The defendants move to dismiss the complaint on the grounds that it is moot.

The complaint requested relief related to the April 7, 2020 Spring election. (Dkt. 1 Prayer for Relief). That election has passed and there is no basis to continue this action. In addition, the complaint seeks relief for the duration of Governor Evers's Emergency order #12 and any extensions thereof. On May 13, 2020 the Wisconsin Supreme Court invalidated the safer at home order that was in effect at the time. Wisconsin Legislature v. Palm, 2020 WI 42. Finally, the issues raised in the complaint have been litigated and decided.

“A case is moot when it no longer presents a live case or controversy”. Tobin for Governor v. Illinois State Bd. of Elections, 268 F.3d 517, 528 (7<sup>th</sup> Cir. 2001). The court in Stone v. Bd. Election Comm’rs for City of Chicago, 643 F. 3d 543, 544 (7<sup>th</sup> Cir. 2011) held that once an election has occurred requests for injunctive relief are of no value. In Stone, the plaintiff sought an injunction related to the February 22, 2011 Chicago mayoral race. The election occurred without the injunction and the plaintiff appealed. The court of appeals dismissed the appeal because it was moot. The court held:

[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.” North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 30 L.Ed.2d 413 (1971) (per curiam). If an event occurs during appeal that eliminates the court's power to provide relief, the appeal is moot. Dorel Juvenile Grp., Inc. v. DiMartinis, 495 F.3d 500, 503 (7<sup>th</sup> Cir.2007). The only relief Plaintiffs seek from us is an injunction pertaining to the municipal election on February 22, 2011. That election has passed, the requirement was enforced, and the requested injunction is now worthless.

The same rationale applies to the relief requested in this case. The plaintiffs requested the following relief:

1. A declaration that Wis. Stat. § 6.87(4)(b)1 [witness requirement for absentee ballots] violates the First and Fourteenth Amendments to the U.S. Constitution, as enforced through 42 U.S.C. § 1983;
2. A temporary restraining order and a preliminary injunction enjoining Defendants from enforcing Wis. Stat. § 6.87(4)(b)1. and from rejecting and/or refusing to process and count absentee mail-in ballots that lack a witness signature for at least such time as Emergency Order #12 remains in place, subject to further extension
3. A permanent injunction enjoining Defendants from enforcing Wis. Stat. § 6.87(4)(b)1. and

from rejecting and/or refusing to process and count absentee mail-in ballots that lack a witness signature for at least such time as Emergency Order #12 remains in place, subject to further extension;

The election has been completed and the emergency order is no longer in effect. Even if this Court were to issue the permanent injunction sought, it would already expired. As such, there is no active controversy and this case should be dismissed.

This case does not fall within any of the exceptions to the mootness doctrine. The absentee ballot witness requirement in §§6.87(2) and (4) at issue in this case were only challenged as they related to the April 7, 2020 election. The plaintiffs' claim that the signature requirements placed an unconstitutional burden on them are set forth at paragraphs 55-63 of the Complaint. The claim is limited to the circumstances surrounding the pandemic, Emergency Order #12, and the April 7, 2020 Spring Election. The exception requires the plaintiff to meet the following test: (1) the challenged action is too short in duration to be litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187, 99 S. Ct. 983 (1979).

The plaintiffs in this case cannot show that there is insufficient time to litigate any perceived shortcomings related to the absentee ballot procedures in the upcoming elections. Unlike the April 7, 2020 election, where the crisis was first hitting, the electorate is aware of the pandemic and has ample time to request and return absentee ballots. Wisconsin statutes provide that absentee ballots are to be in the municipal clerks' possession 48 days before the election in question. Wis. Stat. § 7.10(3)(a). The clerks are then to start sending ballots out 47 days before the date of the election. Wis. Stat. § 7.115 (1)(cm).

The situation presented in April of 2020 is not likely to recur and the plaintiffs in this case will not be subjected to the same action. The fact that the safer at home order is no longer in place in Wisconsin negates the central argument of the complaint. The COVID-19 virus will likely still pose a threat, but that is not a governmental action that this court has any control over.

Finally, this court and the court of appeals have already decided the issues raised in this complaint. This court granted some injunctive relief with respect to the absentee ballot signature issue and the court of appeals stayed that relief. The election proceeded pursuant to this Court's Amended Preliminary Injunction, as modified by the Court of Appeals and Supreme Court. [‘249 Dkt. No. 180]. The Court of Appeals has since dismissed the appeals. In sum, there is nothing left to litigate regarding whether Wisconsin could enforce its witness requirement for the April 7 Spring Election.

### CONCLUSION

For the reasons stated, the defendants respectfully request an order dismissing the complaint with prejudice and without costs.

Dated: 5/26/2020

LAWTON & CATES, S.C.

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