

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, ET AL.

Applicants,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Respondents.

THE WISCONSIN STATE LEGISLATURE,

Applicants,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

Respondents.

SEVENTH CIRCUIT CASE NOS. 20-1538 AND 20-1539

**DIRECTED 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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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Per Supreme Court Rule 29.6, respondents Democratic National Committee and Democratic Party of Wisconsin have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

Per Supreme Court Rule 29.6, Souls to the Polls, Voces de la Frontera, and American Federation of Teachers, Local, 212, AFL-CIO have no parent companies or publicly-held companies with 10% or greater ownership interest in them.

Tides Advocacy is a parent company of respondent Black Leaders Organizing for Communities. No publicly-held company owns a 10% or greater ownership interest in Black Leaders Organizing for Communities.

Per Supreme Court Rule 29.6, respondent SEIU Wisconsin State Council has no parent company or publicly traded companies with a 10% or greater ownership interest in it.

TABLE OF CONTENTS

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE APPLICATION	7
I. There is neither a reasonable probability that four Justices would vote to grant review nor a fair prospect that this Court would reverse, given that this is not the case that applicants describe.	7
A. The application rests on repeated mischaracterizations of the arguments, evidence, and decision below.	7
B. The district court’s narrow injunction is fully consistent with the <i>Anderson-Burdick</i> framework and will not “cast[] a cloud of illegitimacy over the entire election.”	11
C. The <i>Purcell</i> principle cuts strongly against applicants’ requested relief.	16
II. The balance of potential harms and the public interest strongly favor denial of the application.	18
CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	11
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	11
<i>Crawford v. Marion Cty. Election Bd.</i> , 553 U.S. 181,191 (2008)	12
<i>Obama for Am. v. Husted</i> , 697 F.3d 423 (6th Cir. 2012)	12, 19
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	4, 16, 17, 18
<i>Regal Knitwear Co. v. N.L.R.B.</i> , 324 U.S. 9 (1945)	14
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	12
<i>Thompson v. Freeman</i> , 648 F.2d 1144 (8th Cir. 1981)	14
<i>U.S. Student Ass’n Found. v. Land</i> , 546 F.3d 373 (6th Cir. 2008)	12
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	12

STATUTES

Wis. Stat. § 5.05(1).....	14
Wis. Stat. § 6.87(6).....	1
Wis. Stat. § 7.30(a)(b)	13
Wis. Stat. § 7.51(4)(b)	13, 15, 16
Wis. Stat. § 7.52(1)(a)	15

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

INTRODUCTION

Respondents, in addition to the Democratic National Committee and the Democratic Party of Wisconsin, are comprised of voting rights organizations, individual Wisconsin voters,¹ and the SEIU Wisconsin State Council. They are all of the plaintiffs in two of three cases consolidated in the District Court. Collectively, they respectfully submit this opposition to the Emergency Application for Stay filed late yesterday afternoon.

Wisconsin law does not impose a postmark deadline for absentee ballots, but instead provides that all such ballots, no matter when they are postmarked, “shall be returned so [they are] delivered to the polling place no later than 8 p.m. on election day.” Wis. Stat. § 6.87(6). Ballots arriving after this deadline “may not be counted.” *Id.* Respondents brought suit on March 18, 2020 to enjoin the strict enforcement of this deadline during the COVID-19 pandemic, which, as discussed in the Statement of the Case, has wreaked havoc on Wisconsin’s upcoming April 7 election, driving poll

¹ The first named plaintiff case no. 20-cv-284, Reverend Greg Lewis, subsequent to the filing of that action, was hospitalized for a Covid-19 infection and is on a ventilator. On page ii of their Emergency Application, Applicants erroneously assert that the Respondents include the “League of Women Voters.” That is incorrect; the League of Women Voters of the US (“LWVUS”) – the League of Women Voters national organization – is not a party to the consolidated actions. Rather, the League of Women Voters of Wisconsin (“LWVWI”), which is a state affiliate of LWVUS, is a party to two of the consolidated cases in the district court, nos. 20-cv-278-wmc and 20-cv-284.

workers and voters away from the polls, dramatically escalating the number of requests for absentee ballots, and overloading Wisconsin’s absentee-voting process. Respondents initially sought, among other relief, to postpone the election-day deadline for receipt of absentee ballots that were postmarked on or before April 7. But it quickly became apparent that thousands, if not tens of thousands of voters would not even receive their timely requested absentee ballots until on or after April 7, so respondents expanded their initial request for relief to include all absentee ballots received by a certain deadline regardless of postmark. The district court agreed, setting April 13 as the deadline for receipt of absentee ballots regardless of when they are postmarked. Opinion (Op.) at 38-40.

The applicants—the Republican National Committee, Republican Party of Wisconsin, and Wisconsin Legislature—have now agreed with the initial relief that respondents requested—counting any ballot that is *postmarked* on or before election day, even if received later. They now concede “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 ballot to the polling place—could not deliver them by election day” will still have their ballots counted. App. at 17-18. Applicants therefore seek only a “*partial* stay” of the district court’s injunction, opposing only respondents’ expanded request for relief. *Id.* at 20 (emphasis added). But as the district court recognized, that expanded relief is essential because thousands will be disenfranchised without it.

The district court granted relief only to the limited extent necessary to address the “severe” burdens “faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of” the April 7 absentee ballot-receipt deadline, given that “even the most diligent voter may be unable to return his or her ballot in time to be counted.” *Id.* at 38-39. Part of that relief includes requiring the counting of any ballot received by April 13, regardless of when it is postmarked. Importantly, the Wisconsin Election Commission (WEC), which is charged with the weighty responsibility of administering the election in the midst of the unprecedented pandemic, has no objection to this relief and believes it will “not impact the ability to complete the canvass in a timely manner.” *Op.* at 39.

Applicants nonetheless challenge this part of the injunction on several grounds. *First*, they claim that “no party asked the court to grant such extraordinary relief, nor submitted any evidence justifying that remedy.” *Op.* at 1. As shown below, that claim is baseless; respondents requested this specific relief and introduced abundant evidence why it is necessary, especially because it appears that tens of thousands of voters may not even *receive* their requested absentee ballots by election day.

Second, applicants argue that the proper *Anderson-Burdick* balancing analysis is one-sided, claiming that respondents failed to demonstrate “*any* burden on voting rights” while the State’s interest in requiring all ballots to be postmarked by election day is supposedly “overwhelming.” *Id.* at 12, 14 (emphasis added). But applicants entirely ignore the plight of voters who timely requested their absentee ballots but

will not receive those ballots until *after* April 7, and their claim that the injunction will “cast[] a cloud of illegitimacy over the entire election” is contrived and demonstrably false.

Third, applicants invoke the so-called *Purcell* principle in objecting to the district court’s “last-minute” injunction prior to the election, even though they do *not* challenge the court’s “last-minute” order extending the absentee-ballot receipt deadline to April 13, which they concede is “understandable” given the electoral crisis caused by the COVID-19 pandemic. Op. at 17. But *Purcell* deals with last-minute judicial orders that threaten to create chaos and confusion in an otherwise-stable election process. Here, the chaos and confusion are being caused by the pandemic, and the district court’s order seeks to *alleviate* that chaos and confusion and ensure that Wisconsin voters are not disenfranchised.

Finally, applicants’ claim that their potential injuries somehow outweigh the potential disenfranchisement of tens of thousands of voters is unpersuasive, especially since their claimed injuries are fabricated. The public interest will be best served by denying the stay, which will ensure that voters receiving their requested absentee ballots after election day because of delays in county clerks’ offices resulting from the effects of the COVID-19 pandemic will not forfeit their votes.

STATEMENT OF THE CASE

The State of Wisconsin, unlike nearly a dozen other States, has decided to proceed with its April 7, 2020 election in the midst of the worst national health emergency since at least the Great Influenza of 1918-20. As of today (April 5) there are 2,112 confirmed cases of coronavirus in Wisconsin, and 56 Wisconsinites already

have died from it. <https://www.dhs.wisconsin.gov/covid-19/map.htm>. The numbers of infections and deaths continue to grow alarmingly by the day. The application only glancingly acknowledges the “challenges” and “difficult circumstances associated with COVID-19.” App. at 1, 3 n.1. It only once mentions the “pandemic,” and only once refers to “public health.” *Id.* at 2, 17. And it fails to acknowledge—let alone dispute—the district court’s extensive findings of fact detailing the consequences of the pandemic on the orderly conduct, safety, and integrity of the upcoming election. These include:

- “[S]tate election officials are confronting a huge backlog in requests for absentee ballots.” Op. at 2. There has been an “unprecedented” and “extraordinary” number of requests for absentee ballots (in excess of 1.1 million, compared to a previous high of about a quarter-million in 2016). *Id.* at 9-11. This has led to a substantial backlog of requests for absentee ballots and long delays in sending out ballots. “[D]espite diligent efforts, as of April 2, 2020,” there was still “a backlog of over 21,000 absentee ballot applications.” *Id.* at 39; *see also id.* at 11, 20-22, 38-39.
- These delays are being compounded because the U.S. Postal Service “is operating more slowly” during the COVID-19 crisis. *Id.* at 12.
- These backlogs and delays *will* disenfranchise voters, in the absence of any emergency extension of the deadlines for mailing and receiving absentee ballots. The City Clerks for Milwaukee and Madison have concluded there is “no practical way” that scores of thousands of voters from these two

municipalities alone who have not yet received their absentee ballots will be able to vote and return their ballots by the deadline, which is now “completely unworkable.” *Id.* at 39. The Director of the Wisconsin Election Commission (WEC) estimates that approximately 27,500 absentee ballots that were requested in a timely manner “will be received *after* the receipt deadline ... and, therefore, will not be counted.” *Id.* at 12 (emphasis added); *see also id.* at 38 (“the evidence ... demonstrates that even the most diligent voter may be unable to return his or her ballot in time to be counted”).

- Meanwhile, the WEC and local municipalities have 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.” *Id.* at 3. Nevertheless, 111 municipalities have reported they do not have “the capacity to staff *even one polling place.*” *Id.* at 19. The Milwaukee City Clerk has reported that his city “likely will be *unable* to conduct in-person voting in its 327 wards on April 7.” *Id.* at 20 (emphasis added); *see also id.* at 30.
- The crisis has been compounded even further because “[i]n-person absentee voting and pre-election, in-person registration has already been limited or even eliminated in some voting areas” because of fear of the COVID-19 virus, which has led to severe staffing shortages. *Id.* at 30.

- One of the “most likely consequences” of this situation will be “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.” *Id.* at 3.
- “[T]here 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.” *Id.* at 30.

The applicants have not acknowledged, let alone attempted to refute, the district court’s detailed findings about the numerous severe, and in some instances insurmountable burdens that the challenged provisions are imposing on the right to vote in Wisconsin. Rather than disputing any of these detailed findings, applicants simply ignore them entirely.

REASONS FOR DENYING THE APPLICATION

I. THERE IS NEITHER A REASONABLE PROBABILITY THAT FOUR JUSTICES WOULD VOTE TO GRANT REVIEW NOR A FAIR PROSPECT THAT THIS COURT WOULD REVERSE, GIVEN THAT THIS IS NOT THE CASE THAT APPLICANTS DESCRIBE.

A. The application rests on repeated mischaracterizations of the arguments, evidence, and decision below.

The application claims in its opening sentence that “no party asked the court to grant” an extension of the mailing deadline, “nor submitted any evidence justifying that remedy.” App. at 1. These allegations are repeated throughout the application:

respondents, we are told, “never requested” such relief (*id.* at 2); “sought only to ensure that ballots postmarked by election day ... would be counted” (*id.*); “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” (*id.* at 14, emphasis in original); and “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” (*id.* at 19, emphasis in original). Applicants insist that “the district court’s decision to grant a form of extraordinary relief that Respondents never requested below *itself* supports the granting of a stay.” *Id.* at 14 (emphasis added); *see also id.* at 7 (district court’s order “unexpectedly expanded” the respondents’ requested “moderate” relief “into a far more sweeping authorization for post-election day voting”); *id.* at 8 (criticizing district court’s “unrequested relief”); *id.* at 18 (issue of allowing post-election postmarks “had not even been squarely raised by the parties”).

None of these claims is true. Respondents specifically asked the district court not only to extend the deadline for *receipt* of absentee ballots, but to allow ballots to be postmarked after election day given the growing evidence that many voters who have timely requested absentee ballots will probably not even *receive* their ballots until after the election. Respondents argued that, given the “significant backlog” in requests for absentee ballots and ongoing mail delays, it is “probable” that “tens of thousands” of requested absentee ballots may not be received by voters until *after* April 7. Preliminary Injunction Transcript (Tr.) at 98, 101. Given that backlog, respondents asked the court to extend the ballot-receipt deadline to April 13 “*and not*

worry about the postmark.” *Id.* at 102 (emphasis added); *see also id.* at 103 (“let’s make [April 13] a receipt deadline and not worry about the postmark”). Respondents argued this would “be much more enfranchising,” would resolve the problem of voters receiving their requested absentee ballots “on the eve of the election” or thereafter, and “would go a long way toward taking care of the problem we’re wrestling with right now.” *Id.* at 102-03. The court acknowledged the “backlog” in absentee ballot requests and that “maybe it is true that the ballots just aren’t going to arrive in time for individuals to vote.” *Id.* at 101-02; *see also id.* at 98-99 (court’s acknowledgment that “if we continue to see these tremendous requests for absentee ballots” and if “the clerks’ offices across the state haven’t been able to send out the absentee ballots,” it may be necessary to “let people know you could continue ... to mail them in, have the Commission continue to accept afterwards”).

The record evidence conclusively establishes that thousands of voters *at minimum* will be disenfranchised if their requested absentee ballots must be postmarked by Tuesday the 7th. That evidence shows that, as of Thursday the 2nd, there was a backlog of 21,590 requested ballots that had not even been mailed out yet. *Op.* at 11; *see also id.* at 39. Even assuming that all of these requested ballots were mailed out on Friday the 3rd—which did *not* happen²—it is currently taking up to a full week or more for the U.S. Postal Service to deliver mail in Wisconsin due to

² Far from eliminating this backlog since last Thursday, the WEC website reported that as of today, April 5, there is still a backlog of 12,113 absentee ballot requests that have not yet been processed according to the Wisconsin Elections Commission website. <https://elections.wi.gov/node/6814>. Even if all of these requested ballots are mailed out tomorrow (Monday the 6th), it will be impossible for them to be delivered, used, and postmarked by the next following day.

the disruptive effects of the COVID-19 pandemic. Tr. at 18-19 (testimony by WEC Executive Director); *see also* Witzel-Behl Decl., ECF No. 77 ¶ 13; Wolfe Decl., ECF No. 106, ¶ 11; Morse Decl., ECF No. 72 ¶ 7; Wilson Decl., ECF No. 75 ¶ 6. Thus, many if not most of these backlogged absentee ballots will not even be received by voters until after election day, even though all voters who requested them did so before expiration of the deadline for requesting absentee ballots.

The on-the-ground realities have not improved as of today, Sunday the 5th. Respondents are submitting with this opposition declarations from election officials in Wisconsin's largest cities that establish the insurmountable challenges the cities are facing and the imminent risk of broad disenfranchisement of their citizens. The declaration of Neil Albrecht, for example, establishes that in Milwaukee, 92,108 absentee ballots have been sent to voters and only 31,674 have been returned. Albrecht explains that given the flood of absentee ballots and delays in the mail, thousands of Milwaukee voters will be unable to return their absentee ballots until after April 7. The City Clerk of Madison, Maribeth Witzel-Behl, similarly reports that as of this morning, her office had issued 87,323 absentee ballots, of which only 46,902 have been returned. She states that nearly 10,000 voters likely will not receive their absentee ballots until after April 7 and that more than 38,000 ballots are likely to arrive after that date.

The situation is no different in Green Bay and Racine. The declaration from Green Bay's City Clerk, Kris Teske, explains that the Clerk's office has a backlog of 4,000 unfilled requests for absentee ballots. For all of those voters, it will be virtually

impossible to comply with a deadline of April 7, as most will not receive their ballots by that date. And, in Racine, the City Clerk, Tara Coolidge, reports that the Clerk’s office has mailed more than 11,000 absentee ballots and has received less than half that number—5,338—back from voters. She also reports that Racine has a backlog of more than 100 requests for absentee ballots, that those ballots will not be mailed until tomorrow, April 6, and that she is concerned large numbers of Racine voters will be disenfranchised through no fault of their own.³

B. The district court’s narrow injunction is fully consistent with the *Anderson-Burdick* framework and will not “cast[] a cloud of illegitimacy over the entire election.”

Applicants claim that the district court misapplied the *Anderson-Burdick* framework. Op. at 12-18; see *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). They contend that respondents failed to “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,” Op. at 14, and that the State has an “overwhelming” interest in “avoiding a two-track election—in which numerous voters might strategically cast ballots *after* election day results are announced,” *id.* at 12 (emphasis in original). Applicants ignore the severe burdens imposed on voters by an April 7 postmark requirement, and they are simply wrong in claiming that

³ These issues are not limited to these municipalities. For instance, Diane Coenen, Oconomowoc’s clerk and president of the Wisconsin Municipal City Clerks’ Association has said “Am I confident those people will get their ballots by Monday, by Tuesday? No.” Doug Schneider, *‘Nightmare’: Clerks working overtime, but some Wisconsin voters may not get ballots filed by Election Day*, GREEN BAY PRESS GAZETTE (Apr. 1, 2020), available at <https://www.greenbaypressgazette.com/story/news/2020/04/01/wisconsins-local-clerks-scramble-ensure-no-one-shut-out-vote/5105915002/>.

absentee voters will have knowledge of the preliminary election results when they cast their ballots.

As for the severe burdens on voters, the evidence establishes that a minimum of tens of thousands of voters who have requested absentee ballots will probably not receive those ballots in time to mail them back on or before election day. If an election-day postmark were required, that would result in the outright disenfranchisement of all these voters through no fault of their own. The “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is “regarded as a fundamental political right, because preservative of all rights”). Constitutional government is “best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful.” *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012) (citation omitted); *see also U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008). Thus, even if a state burden on voting is “slight,” it must still “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) (citation and quotation omitted). Here, of course, the burdens are not “slight” but “severe.” *Op.* at 31, 39.

What are the state interests supposedly justifying these “severe” burdens? Applicants claim that absentee voters casting their ballots after April 7 will know the election day results already and be able to vote “strategically,” which will “cast[] a

cloud of illegitimacy over the entire election” and undermine Wisconsin’s “compelling interest in preserving the integrity of its election process.” App. at 15 (quoting *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 231 (1989)). This too is a fabrication. Applicants only barely acknowledge that the district court ordered that “[d]efendants (the Wisconsin Election Commissioners) 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.” April 3, 2020 Order, ECF No. 179 at 2. Applicants claim it is “doubtful and unrealistic” to believe this part of the order will be obeyed, and that “widespread leaks” will allow voters and political parties to game the system, but their arguments are baseless. App. at 17. They are wrong for many reasons.

First, applicants incorrectly claim that the district court would have needed to enjoin the municipal clerks themselves to prevent the release of unofficial election results until April 13; “municipal clerks are not parties to these lawsuits and therefore not subject to the court’s powers.” App. at 16. Under Wis. Stat. § 7.51(4)(b), however, inspectors must report the election results to municipal clerks before the clerks can release those results. The district court’s order enjoins those “inspector[s],” so municipal clerks will have nothing to release prior to April 13.

Second, contrary to applicants’ argument, the district court’s injunction binds municipal clerks and any others charged with publicly announcing election results. As *Smith v. Bayer* acknowledged, there are “discrete exceptions to the general rule against binding nonparties.” 564 U.S. 299, 308 (2011). This Court “explained that

the power of a court to bind a nonparty to the provisions of an injunctive order derives ‘from the common-law doctrine that a decree of injunction not only binds the . . . defendant[s] but also those identified with them in interest, in privity with them, represented by them or subject to their control.’” *See Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981) (quoting *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945)); *see also* Fed. R. Civ. P. 65(d)(2). As applicants themselves acknowledge, App. at 16 n.7, all elections officials are “subject to [Wisconsin Elections Commissioners’] control.” *See Regal Knitwear*, 324 U.S. at 14; Wis. Stat. § 5.05(1) (“The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns”); *id.* § 5.05(3g) (“The commission administrator shall serve as the chief election officer of this state.”). At the very least, elections officials are “identified with” WEC Commissioners “in interest” and/or “represented by them.” *See Regal Knitwear*, 324 U.S. at 14. Notably, the Wisconsin Election Commission *itself* has nowhere suggested that the district court’s injunction against “releasing any unofficial results until April 13” might be unenforceable.

Third, applicants speculate that “given the number of clerks and other 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.” App. at 17. This speculation is unfounded; all evidence is to the contrary. During elections in the normal course, there are just as many (if not more, given COVID-19) clerks and other parties involved in the counting process, and

applicants have pointed to no evidence of a leak ever occurring no matter how “controversial and hotly contested” the election. In prior elections, statutes have permitted the tallying of absentee ballots beginning at any time after the opening of the polls, Wis. Stat. § 7.52(1)(a), and applicants present no examples of leaks about those ballots influencing who comes to the polls later in the day by 8 p.m.

Fourth, applicants claim that exit polling about in-person voting on election day and the purported requirement that municipal clerks must publicize the returns of ballots “as soon as they are counted” will “encourage[] absentee voters to withhold their ballots beyond the April 7 Election Day.” App. at 11-12, 15 (citing Wis. Stat. § 7.51(4)(b), (c)). But applicants have presented no evidence that exit polling will even be conducted; all the evidence indicates there will be no such polling in the April 7 election because of the pandemic. *See* Statement from the national election pool regarding March 17th elections, Edison Research (Mar. 13, 2020), <https://www.edisonresearch.com/statement-from-the-national-election-pool-regarding-march-17th-elections/>; *see also* The survey of record for U.S. elections, Edison Research, <https://www.edisonresearch.com/election-polling/> (“Our unique data includes the only national and state exit polls in the U.S.”). Nor are municipal clerks required to “immediately” publicize the results as soon as ballots are counted. The statute requires that, “except in 1st class cities” like Milwaukee, the chief inspector shall “immediately” report the returns of the election “to the municipal clerk or to the school district clerk,” Wis. Stat. § 7.51(4)(b) (emphasis added), and that the municipalities report the returns to the county clerk “no later than 2 hours after the

votes are tabulated,” *id.* § 7.51(4)(c). The statute does not require the clerk to immediately make the returns public. *See id.* § 7.51(4)(b). Applicants simply have no evidence that absentee voters will know which candidate is ahead or behind in the period between April 7 and 13.

C. The *Purcell* principle cuts strongly against applicants’ requested relief.

Applicants rely heavily on *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), in which this Court cautioned that “[c]ourt orders affecting elections, ...can themselves result in voter confusion and consequent incentive to remain away from the polls,” a risk that increases “[a]s an election draws closer.” The underlying purpose of this so-called “*Purcell* principle” is to avoid “changing the electoral *status quo* just before the election,” which would cause “voter confusion and electoral chaos.” Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2016).

But in this case, the “electoral *status quo*” *already* has been upended—not by any judicial order, but by the COVID-19 pandemic and the “voter confusion and electoral chaos” it is causing. Until very recently, Wisconsin voters reasonably expected they would be able either to vote safely in person on election day or through a reliable, well-functioning absentee ballot system. Now they cannot—and not because of any court order, but because of the pandemic. *See Op.* at 39 (“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”) (emphasis in original).

Likewise, this Court in *Purcell* was concerned that pre-election judicial orders might create a “consequent incentive to remain away from the polls.” 549 U.S. at 5.

Here again, the “incentive to remain away from the polls” in these consolidated cases results not from federal judicial action, but from a deadly pandemic. Voter confusion and abstention from voting are “consequent” of COVID-19, not of anything the district court has done. That court’s limited relief will result in *more* voters being able to cast their ballots and ensure those ballots *will* be counted, rather than threatening to keep voters from casting their ballots. The court’s injunction, in other words, is an effort to mitigate the confusion and chaos caused by the pandemic that are interfering with voters’ reasonable expectations and threatening to keep them from voting. Indeed, it is telling that the WEC — the body responsible for administering election — is not challenging the district court’s order or arguing that extending the ballot receipt deadline to April 13 will cause disruption.

Applicants’ reliance on *Purcell* is misplaced for yet another reason. It will be much less confusing and unfair if the district court’s order—which has received substantial publicity and is in the process of being implemented by the WEC and election clerks throughout Wisconsin⁴—simply remains in effect rather than being

⁴ See, e.g., *Federal Court Order Affects Spring Election – Absentee Ballot Request and Receipt Deadlines Extended; Witness Signature Requirement Modified COVID-19*, WIS. ELECTIONS COMM’N (Apr. 2, 2020), available at <https://elections.wi.gov/node/6807>; see also *Appeals court refuses to block extended voting in Wisconsin*, FOX 6 NOW (Apr. 3, 2020), available at <https://fox6now.com/2020/04/03/appeals-court-refuses-to-block-extended-voting-in-wisconsin/>; Ruth Conniff, *Appeals court upholds absentee ballot extension, but restores signatures*, WIS. EXAMINER (Apr. 3, 2020), available at <https://wisconsinexaminer.com/brief/appeals-court-upholds-absentee-ballot-extension-but-restores-signatures/>; *Wisconsin limps toward Tuesday election despite virus fears* (Apr. 4, 2020), available at <https://www.wjfw.com/generalnews.html?SKU=20200404162347&textsize=small>; Patrick Marley, *Wisconsin’s election is still April 7, but a federal judge has extended the deadline for absentee votes to be counted*, MILWAUKEE JOURNAL-SENTINEL (Apr. 2, 2020), available at <https://www.jsonline.com/story/news/politics/elections/2020/04/02/>

changed less than 48 hours before the election, which would lead to yet further confusion and uncertainty, as well as harm to voters who already have relied on the district court's order in planning how and when to vote. Granting a stay, in other words, would simply create *Purcell* problems of its own, including by forcing voters who had planned to vote absentee but not yet received their ballots to either vote in person on election day and risk exposure to the coronavirus, or abstain from voting altogether.

II. The balance of potential harms and the public interest strongly favor denial of the application.

The balance of harms and the public interest also strongly favor denying the application. As the district court emphasized, the potential harms to voters are severe, if not catastrophic, and there are no adequate remedies at law. Op. at 24-25. “When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury.” *Obama for Am.*, 697 F.3d at 436. Moreover, “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *Id.*

A stay also could exacerbate the unfolding COVID-19 public health disaster. If voters are not confident their absentee ballots will be counted, this will drive more

wisconsin-election-judge-extends-absentee-voting-but-keeps-vote-date/5112276002/; Ed Trevelan, *'Ill-advised' election to go on amid COVID-19 pandemic, judge says, but some absentee ballot rules rolled back*, WIS. STATE JOURNAL, (Apr. 3, 2020), available at https://madison.com/wsj/news/local/crime-and-courts/ill-advised-election-to-go-on-judge-says-but-some-absentee-ballot-rules-rolled-back/article_8dd80672-af4b-5bc6-b25b-f29b92a78382.html; Shawn Johnson, *Despite COVID-19 Concerns, Federal Judge Won't Postpone Wisconsin's April 7 Election*, WIS. PUBLIC RADIO (Apr. 2, 2020), available at <https://www.wpr.org/despite-covid-19-concerns-federal-judge-wont-postpone-wisconsins-april-7-election>.

people to vote in-person on election day, thereby increasing the risks of community spread through polling places in cities and towns throughout Wisconsin. The district court's narrow injunction dramatically reduces the need for person-to-person contact, easing the "severe" burdens that Wisconsin law places on absentee voters in the circumstances of the present pandemic. A stay would negate these reasonable remedies for the extreme, unprecedented circumstances that tens of thousands of Wisconsin voters are likely to face: either they venture out to vote in person and risk their health and the health of others, or they forfeit the right to vote through no fault of their own.

Applicants entirely ignore these harms to voters and the public interest, simply repeating their false claims that "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." Op. at 19 (emphasis added). And applicants' claims of "irreparable harm" to themselves are simply a rehash of their unfounded arguments that voters completing their absentee ballots after April 7 will have knowledge of the preliminary election results, thereby undermining the "integrity" and "orderly administration" of the election. *Id.* Respondents have refuted these claims above in Part II-B. It is the district court's injunction that will best promote the "integrity" and "orderly administration" of the April 7 election by ensuring that voters who receive their requested absentee ballots late because of the COVID-19 chaos will still be able to cast those ballots rather than having to venture to the polls and risk exposure to the coronavirus.

CONCLUSION

For these reasons, the Emergency Application for Stay should be denied.

Respectfully submitted,

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No. 19A1016

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, ET AL.

Applicants,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Respondents.

THE WISCONSIN STATE LEGISLATURE,

Applicants,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

Respondents.

SEVENTH CIRCUIT CASE NOS. 20-1538 AND 20-1539

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

CERTIFICATE OF SERVICE

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

I, Marc E. Elias, a member of the Supreme Court Bar, hereby certify that the a copy of the forgoing Response to Emergency Application to Stay Injunction Pending Appeal in the United States Court of Appeals for the Ninth Circuit was filed by email with the Clerk's Office of the Supreme Court of the United States, and was served via email on the following parties listed below on this 5th day of April, 2020:

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IN THE
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**DECLARATION OF MARC E. ELIAS IN SUPPORT OF
RESPONDENTS' OPPOSITION TO APPLICANTS' EMERGENCY STAY**

I, Marc E. Elias, am an attorney with the firm of Perkins Coie LLP and counsel for Respondents Democratic National Committee and Democratic Party of Wisconsin. I make this declaration in support of Respondents' Opposition to Applicants' Emergency Stay.

1. Attached as **Exhibit 1** is a true and correct copy of the certified transcript of the April 1, 2020 evidentiary hearing on Respondents' motion for preliminary injunction in the district court.

2. Attached as **Exhibit 2** is a true and correct copy of the declaration of Neil Albrecht, Executive Director for the City of Milwaukee Election Commission, dated April 5, 2020.

3. Attached as **Exhibit 3** is a true and correct copy of the declaration of Maribeth Witzel-Behl, City Clerk of Madison, dated April 5, 2020.

4. Attached as **Exhibit 4** is a true and correct copy of the declaration of Kris Teske, City Clerk of Green Bay, dated April 5, 2020.

5. Attached as **Exhibit 5** is a true and correct copy of the declaration of Tara Coolidge, Racine City Clerk, dated April 5, 2020.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of April, 2020.

s/ Marc E. Elias
Marc E. Elias

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

-vs-

Case No. 20-CV-249-WMC

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

Madison, Wisconsin
April 1, 2020
1:09 p.m.

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,

-vs-

Case No. 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.

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REVEREND GREG LEWIS, SOULS TO THE
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AMERICAN FEDERATION OF TEACHERS,
LOCAL 212, AFL-CIO, SEIU WISCONSIN
STATE COUNCIL, and LEAGUE OF WOMEN
VOTERS OF WISCONSIN,

Plaintiffs,

-vs-

Case No. 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.

STENOGRAPHIC TRANSCRIPT OF VIDEOCONFERENCE EVIDENTIARY HEARING
HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

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Also Appearing: Administrator MEAGAN WOLFE, Wisconsin
 Elections Commission

INDEX OF WITNESSES

<u>PLAINTIFFS' WITNESSES</u>	<u>EXAMINATION</u>	<u>PAGE</u>
MEAGAN WOLFE	Adverse Examination by Mr. Devaney	33
	Adverse Examination by Mr. Sherman	43
	Adverse Examination by Mr. Poland	66
	Clarification Examination by Mr. Strawbridge	83
	Clarification Examination by Mr. Lenz	86

INDEX OF EXHIBITS

<u>PLAINTIFFS' EXHIBITS</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
51	Memo - 3/29/20	44
52	Absentee Ballot Certification (EL-122)	60
54	U.S. Census Table	63
102	WEC Agenda - 3/31/20	66

7 (On the record at 1:09 p.m.)

8 THE COURT: All right. Let's go on the record. I am
9 calling Case No. 20-CV-249, 278, and 284, *Democratic National*
10 *Committee, et al. v. Bostelmann, et al.*, and I'll hear
11 appearances first for the 294 [verbatim] plaintiff.

12 MR. DEVANEY: Your Honor, John Devaney for the
13 Democratic National Committee and the Wisconsin Democratic
14 Party, and I'm accompanied by my colleague, Mr. Bruce Spiva.

15 THE COURT: Very good.

16 For the 278 plaintiffs?

17 MR. SHERMAN: Good afternoon, Your Honor. Jon Sherman
18 on behalf of the Gear plaintiffs in 278. I'm joined by my
19 colleague, Michelle Kanter Cohen.

20 THE COURT: All right.

21 And for the 284 plaintiffs?

22 MR. POLAND: Good afternoon, Your Honor. Attorney Doug
23 Poland from Rathje Woodward accompanied by Attorney Tamara
24 Packard of Pines Bach appearing for the Lewis plaintiffs.

25 THE COURT: For the WEC defendants?

1 MR. GAHNZ: Good afternoon, Your Honor. Dixon Gahnz
2 and Dan Lenz from Lawton & Cates. Also present is Meagan Wolfe
3 from the Wisconsin Elections Commission.

4 THE COURT: Very good.

5 And then, finally, for the intervening defendant --
6 defendants.

7 MR. STRAWBRIDGE: Good afternoon, Your Honor. Patrick
8 Strawbridge on behalf of the Republican National Committee and
9 the Republican Party of Wisconsin.

10 THE COURT: All right. As I indicated, we will begin
11 with a witness and additional evidence by the parties. And with
12 that said, I understand we have one witness, and appropriately
13 enough, it is Ms. Wolfe.

14 So, Ms. Wolfe, I'll ask our clerk to swear you in.

15 **MEAGAN WOLFE, PLAINTIFFS' WITNESS, SWORN**

16 THE COURT: And, Joel, I'm not seeing Ms. Wolfe. I'm
17 still seeing Mr. Strawbridge.

18 THE CLERK: Not entirely clear what's happening, Judge,
19 why that's not working.

20 THE COURT: And I think it's pretty obvious that that's
21 not going to fly. I'm looking at gallery view, and then I can
22 see Ms. Wolfe. Let me see. But I can't call her up as the
23 principal speaker.

24 THE CLERK: I could -- the only thing that I can do,
25 Judge, is I can pin Ms. Wolfe as the spotlight speaker, which

1 would have her show up on the screen at all times, and then we
2 would hear other counsel in the background.

3 THE COURT: All right. Let's do this -- and I
4 apologize to everyone. I thought we had eliminated most of
5 these kinks already. But, Ms. Wolfe, I listened in to about a
6 half hour of one of your sessions, and I know you're all too
7 familiar with these problems with your own commission. I got
8 off by the time you got into the substance of your
9 decision-making, because I didn't think, once you were talking
10 about specifics, it would be appropriate for me to listen, but
11 at least I have a sense of what you're dealing with every day.

12 You are now under oath. You understand that?

13 THE WITNESS: Yes, I do, Your Honor.

14 THE COURT: Okay. And I can see you in the bottom
15 right of my gallery, so we'll operate on that basis.

16 I'm going to follow the suggestions of a number of parties
17 on our last call and simply to ask you some questions directly,
18 and then I'll give counsel an opportunity to ask their questions
19 of you, finishing with your own counsel. I would suggest that
20 you try to focus closely on the specific question being posed
21 and just answering that question, whether it's from me or the
22 other attorneys on this call, understanding that if you do need
23 to expand your answers, you'll have an opportunity to do that
24 with respect to your own counsel's questioning. All right?

25 THE WITNESS: Thank you.

1 THE COURT: And you can just leave your mic open at
2 this point. I think that will probably make the most sense.

3 We do have the benefit of a number of seemingly undisputed
4 facts, and so I'm not going to spend a lot of time on those, but
5 it did strike me that it would be appropriate to begin with your
6 own view of where you believe you stand with respect to absentee
7 ballots and particularly if I were, as the Wisconsin Election
8 Commission indicated, to extend the absentee ballot date to
9 postmarked by April 7th and received by April 13, 2020. Where
10 in your view do you think you stand as to the viability of
11 accomplishing that with respect to absentee ballots?

12 THE WITNESS: Yes, Your Honor. Thank you.

13 So as you stated, the Commission did pass a motion to say
14 that they would --

15 THE COURT: You don't need to preface it. I'm just
16 asking, assuming that I were to adopt that suggestion, where do
17 you think the Commission and the some 1,800 poll workers, 1,850
18 poll workers, stand as to accomplishing the counting of -- or
19 the processing and counting of absentee ballots?

20 THE WITNESS: We have heard from municipal clerks, and
21 there's 1,850 municipal clerks --

22 THE COURT: I'm not asking you for any preface. I'd
23 like you just to answer the question. Personally under oath,
24 you, individually, where do you think the Commission and the
25 1,850 municipal clerks and the 72 county clerks stand as to your

1 ability to process the absentee ballots? You're not speaking
2 for the Commission right now. You're speaking for yourself
3 personally under oath. Where do you think you stand?

4 THE WITNESS: Municipal clerks have expressed that they
5 have many absentees to process, more than they've ever had, and
6 so additional time may be useful for them to be able to process
7 those. There's also been expressed concerns about the return of
8 ballots from voters and the time it may take in the mail to
9 receive those. We've also -- as was shown in the declaration,
10 with what the Commission approved, that date would also allow
11 the other statutory requirements for canvassing and tallying the
12 ballots to be met as well.

13 THE COURT: And so I think what your answer is, is that
14 you believe if I were to extend the absentee ballot postmark
15 date to the day of election and to count ballots received by
16 April 13, that it would be manageable for the poll workers,
17 including municipal clerks, to accomplish the voting -- or the
18 counting and logging of votes consistent with their statutory
19 obligations. Is that what you're saying?

20 THE WITNESS: That's correct, as well as for the postal
21 return of ballots from voters to the municipal clerk.

22 THE COURT: Are you concerned about errors that are
23 likely to occur because of poll worker shortages?

24 THE WITNESS: There's always the possibility for errors
25 in the process. We've heard though that they are bringing in

1 additional poll workers that may not be seasoned as poll
2 workers. So as they're dealing with a larger volume of
3 absentees in addition to having new poll workers, there is the
4 potential for errors that we may not have seen in the past, but
5 we've provided ample training as well about some of these new
6 processes to help aid them in being prepared.

7 THE COURT: And what I'm interested in in particular,
8 given, as you say, you're going to have a lot of people who are
9 not well versed, what do you anticipate in terms of how the
10 clerks would accomplish absentee ballot voting consistent with
11 COVID-19 protocols? Which I guess at the outset we're not going
12 to be complying with them because you're going to be bringing
13 together a certain number of individuals in one room, I assume,
14 correct? Or have you come up with a way to accomplish both
15 counting of the absentee ballots and doing so in a safe manner?

16 THE WITNESS: Yes, Your Honor. We have provided many
17 documents on how to conduct both absentee voting as well as
18 in-person election day voting. We --

19 THE COURT: Yeah. I'm not asking about the voting.
20 I'm asking about the counting of the ballots themselves, the
21 absentee ballots.

22 THE WITNESS: Sure.

23 THE COURT: So what protocols have you suggested to
24 local clerks and the poll workers who will be exchanging pieces
25 of paper, I assume, or at least having to be close enough to

1 supervise and instruct other poll workers who are not
2 experienced on how to accomplish the actual tally of the
3 absentee ballots? And again we're just talking about the
4 absentee ballots.

5 THE WITNESS: Thank you, Your Honor.

6 Yes, we have provided guidance on the counting of absentees.
7 For example, there have been jurisdictions that do what we call
8 central count. They have moved the facilities to larger
9 facilities so that they can accomplish social distancing. We've
10 also provided guidance to the clerks about the CDC
11 recommendation for handling paper and the recommendations that
12 they focus on hand hygiene.

13 So, for example, in the checklist we provide to the clerks,
14 we talk about processing absentee ballots and how the poll
15 workers should be allowed to have a break every ten minutes to
16 preferably wash their hands with soap and water or to sanitize.
17 They do not recommend gloves or other things at this point. We
18 also had discussions with the public health official about how
19 long biological material can live on paper and that, when people
20 are transmitting it by mail, the time period for which that type
21 of material could still be viable has passed. So they don't
22 believe there's additional protocols beyond social distancing
23 and beyond having those opportunities to exercise hand hygiene
24 are the steps that are recommended.

25 THE COURT: Let me step back from that then, and I

1 should have said at the outset I understand just from what I've
2 read and from your affidavits as well as the other materials in
3 this case how hard you and the Commission have worked to try to
4 make a difficult situation viable, and obviously I know you
5 appreciate the efforts being made at the county and municipal
6 levels as well to make this happen.

7 If we were in a different world for the moment and before
8 you were aware of the COVID-19 epidemic, did you project how
9 many voters you anticipated for this election?

10 THE WITNESS: We do not do projections per se. We do
11 help clerks estimate how many materials to procure prior to each
12 election by looking at historical turnout, so we advised them to
13 the comparable elections, the presidential preference in 2012
14 and in 2016. In the 2012 presidential primary, we saw about 1.1
15 million voters turn out for that election. In the 2016
16 presidential preference, we had a new high historical turnout of
17 just over 2 million voters for that presidential preference, and
18 so we advised them to plan accordingly with history for a
19 comparable election, so we would have had them base their
20 resources on the 2016 numbers, knowing that they might likely be
21 higher than we might see this year.

22 THE COURT: Okay. So you would have expected going in,
23 in terms of your advice to the municipalities, that they should
24 plan for up to 2.1 million, but they're likely to see someplace
25 between 1.1 million and 2.1 million. Is that fair?

1 THE WITNESS: That's correct.

2 THE COURT: Okay. Based on what you've seen so far in
3 terms of absentee ballots, in order to achieve we'll just say
4 1.6 million voters, what would be the likely number that will
5 need to appear at the polls in person based on projected
6 absentee ballots in order to meet that number?

7 THE WITNESS: Right now we have -- there have been
8 100 -- or, I'm sorry, 1,050,000 absentee ballots that have been
9 recorded as requested in the statewide database. Now, that does
10 not reflect other ballots that have not yet been entered, data
11 entered into the system. There may be ballots that are sent
12 that aren't reflected in that number because, again, the clerk
13 may have sent them but hasn't had an opportunity to enter them
14 into our system. So we're operating under the assumption that
15 there are more than that million that we have in the system
16 right now, but being that that number is unknown, in your
17 scenario there would be about 500,000 voters that would still
18 need to vote in person or still need to request an absentee
19 ballot, but, again, we don't have an exact number at this point.

20 THE COURT: And that's data based on absentee ballots
21 sent, not actually returned, correct?

22 THE WITNESS: That's based on absentee ballot requests
23 entered into the system.

24 THE COURT: Right.

25 THE WITNESS: So, again, the number sent would be

1 higher.

2 THE COURT: Right.

3 THE WITNESS: And you're correct though; it's not
4 ballots returned.

5 THE COURT: And at this point the ballot return numbers
6 are approximately what?

7 THE WITNESS: I believe they're approximately 400,000,
8 but, again, those are that have been entered into the system.
9 There may be many more that have been returned, but the clerk
10 has not had an opportunity to enter them.

11 THE COURT: Understood. And how does that compare -- I
12 know these numbers are much larger than historic numbers, but
13 how does that return rate compare to prior elections, if you
14 know?

15 THE WITNESS: I'm not sure on return rates. I
16 apologize. I do know that we've broken records in terms of
17 absentees issued and entered into the system already. In the
18 2018 presidential -- or, I'm sorry, in the last presidential in
19 2016, I believe we saw about 800,000 absentee ballots issued.

20 THE COURT: So we really don't know if we're -- what's
21 the experience and do you even have a general percentage for the
22 number of absentee ballots that are normally returned compared
23 to the numbers that are mailed?

24 THE WITNESS: I believe, if my memory serves me
25 correctly, you know, it is less than half of the ballots that

1 have been returned that have been requested initially.

2 THE COURT: So that would mean, if that experience
3 occurred, that we would be short basically a million voters that
4 would have to appear in person on election day. Is that fair?
5 Assuming you had that same experience -- and maybe it will be
6 much higher. That would be lovely. But if we expected half of
7 those ballots to be returned, we'd be looking at about a
8 million-voter shortfall.

9 THE WITNESS: Your numbers would be correct, yes, and I
10 should note that when a voter shows up at the polls on election
11 day, if they've been issued an absentee, they're asked whether
12 or not they've returned the absentee. If the voter has indeed
13 returned their absentee ballot, then they cannot be issued
14 another ballot at the polls. If they have not yet returned it,
15 then they can receive and cast a ballot at the polls on election
16 day.

17 THE COURT: And so if I were to extend the counting of
18 absentee ballots, how would that be accomplished?

19 THE WITNESS: So under the motion passed by the
20 Commission, if it extended for voters to be able to postmark
21 their ballot by election day but received by their clerk by the
22 Monday after the election --

23 THE COURT: I'm sorry. It was a horrible question.
24 What I understood you to have just said is that there will be
25 individuals who may appear to vote in person who you have not

1 yet received their absentee ballot on the day of the election.

2 THE WITNESS: Okay.

3 THE COURT: And now the question is what if that comes
4 in -- if I extend the date for receipt through the date of the
5 election, how would you accomplish addressing those who
6 proceeded to vote but had also sent in an absentee vote?

7 THE WITNESS: Understood. Thank you for the
8 clarification.

9 So, yes, the statutes do state that if somebody has returned
10 their absentee ballot, that they cannot receive a ballot on
11 election day, and so that is a statutory requirement. So under
12 that scenario, the voter could not be issued another ballot on
13 election day, but if the return period were extended, then the
14 clerk would be waiting for that ballot to come back in the mail
15 during that extended period to add it to the count.

16 THE COURT: So would the clerks have in front of them a
17 list of everyone who was sent an absentee ballot?

18 THE WITNESS: Yes, Your Honor. On the actual poll book
19 itself, there is what we call a watermark on the voter records
20 of voters who have been sent an absentee, and this prompts the
21 poll worker to ask the voter the question, "Have you returned
22 your ballot?" And if the voter has already returned it, if the
23 clerk already has it in their hand, then it will actually show
24 that the ballot has been returned already, so, again, they
25 wouldn't be allowed to get another ballot on election day.

1 THE COURT: So the question would really have to be,
2 "Have you returned the ballot or do you intend to return the
3 ballot today," if I would extend as you're suggesting.

4 THE WITNESS: The question would be, "Have you already
5 put it in the mail?" So if it's already in transit to the
6 clerk, then they would not be able to get another one on
7 election day because the theory is --

8 THE COURT: I'm not asking the question as clearly as
9 I'm trying to. If I allow ballots to be counted that are
10 postmarked April 7th --

11 THE WITNESS: Uh-huh.

12 THE COURT: -- then how do we ensure that people who
13 vote in person have not also mailed in an absentee ballot on
14 that date, even if they answer honestly they haven't sent it in
15 yet?

16 THE WITNESS: Understood.

17 So in that scenario if someone came in on election day and
18 they were asked, "Have you returned your absentee," and the
19 voter said, "No, I haven't," but in actuality they had --

20 THE COURT: No, no. I'm not talking about fraud. That
21 could happen in any case. I'm talking about in this election if
22 they move the postmark date to the day of election for absentee
23 ballots, they could honestly answer no but still drop a ballot
24 in the election box. Now, I would think that would be a rare
25 situation, so maybe we don't have to overly think this, but I'm

1 just suggesting perhaps a poll worker would need to make sure
2 they understand they can't proceed to do so that day.

3 THE WITNESS: Yes. Thank you for the clarification.

4 You're right. Additional training could certainly be
5 conducted about those scenarios, and also if the voter did later
6 that day put their ballot in the mail, when they're reconciling,
7 when they're actually doing their municipal board of canvass,
8 they wouldn't count that ballot once it came in the mail because
9 they'd see that there was already participation recorded for
10 that voter in person.

11 THE COURT: And I take it that would just be one more
12 wrinkle that would be impacted by a change obviously, but is it
13 one that you think would further exacerbate the ability to count
14 the absentee ballots even with the extended time that I'm
15 providing -- that you're suggesting I provide?

16 THE WITNESS: There would need to be some adjustments
17 to our training. I think that scenario you just presented is an
18 interesting one that we don't have right now, and so we would
19 have to -- there would be some work on the municipal clerks'
20 parts for double-checking to make sure that voters who are
21 returning an absentee ballot that may be postmarked on election
22 day didn't participate. So that's not currently part of their
23 check but certainly something we could produce training to make
24 sure that they understood how to process those ballots.

25 THE COURT: Before I get off the absentee ballot

1 subject, do you have a sense as to whether the requests are
2 continuing to come in at record levels through at least
3 yesterday?

4 THE WITNESS: Yes, Your Honor. There's huge amounts
5 that continue to be entered into our system every day. We did
6 see a small plateau over the weekend, but we have actually a
7 chart on our website that shows the increase in requests day to
8 day, and it continues to grow at a pretty incremental, steady
9 pace from day to day.

10 THE COURT: All right. And just to confirm, that will
11 end then tomorrow. That is the last day to request is April
12 2nd.

13 THE WITNESS: For most voters. For voters who are
14 indefinitely confined and who -- actually who request a calendar
15 year request rather than a single election have through Friday.

16 THE COURT: All right. And what would be the impact if
17 I were to extend the overall request period to Friday for
18 everyone in light of this uncertainty as to whether you can
19 check COVID-19 as a reason for -- or concerns as a reason for
20 not leaving your home or taking steps?

21 THE WITNESS: I think that, you know, the biggest thing
22 to consider would, of course, be the opportunity for the voter
23 to receive that ballot by mail. We've heard that first-class
24 mail, which is what ballots are usually -- well, what ballots
25 are marked as, as election mail, take about two days, but the

1 postal service has advised that mail can take up to a week.
2 We've also heard from some jurisdictions it can take a week to
3 eight days for that transaction to happen. So the closer we get
4 to election day and the day that the voter would have to
5 postmark it for return, the more precarious the situation is
6 that they'll get their ballot back.

7 THE COURT: I get that. And have you had that
8 experience with people who have indicated an inability, whether
9 because of a handicap or age or other factors, to comply? In
10 other words, they've done the check-off, mailed it on the Friday
11 before election day, and you've not received the ballot by
12 election day?

13 THE WITNESS: Yes, that certainly does happen. There
14 are sometimes voters who may not know the deadline or who even
15 will send them to things like our office because they're not
16 sure where to return it. It's quite rare in that specific
17 circumstance, but there was a change in the law a few years ago.
18 There used to be a provision that allowed ballots from military
19 and overseas voters to be received by 4:00 p.m. on the Friday
20 after the election in coincidence with that provisional ballot
21 deadline, and so a lot of times when voters were in places where
22 the mail took a little longer, it would come back during that
23 period to the jurisdictions, and they have to delay their
24 canvassing until those ballots come back.

25 THE COURT: Which -- would that be addressed by

1 extending the postmark date to the date of election? In other
2 words, in those -- in your experience, does the individual -- I
3 guess you're saying they don't even -- there are situations
4 where they would not even get the ballot until on or after
5 election day, so they can't even get it postmarked on election
6 day. That's happened in the past.

7 THE WITNESS: That is certainly a potential situation.
8 There's also, I should note, the opportunity for voters to
9 request they receive their ballot by email, so that is an option
10 for voters, but then they have to have a printer and the ability
11 to mail that ballot back or hand deliver the ballot. So there
12 are some transactions that don't have to involve the mail
13 service, but the most common is, of course, mail.

14 THE COURT: Right. Understood.

15 I just want to talk a little bit more about the poll workers
16 themselves. Obviously we've heard from a number of
17 municipalities as to the difficulties that are being created by
18 poll workers, who understandably for their own reasons, perhaps
19 in many cases valid health reasons, that they're not going to be
20 able to appear, and I know you say municipalities are taking
21 steps to try to address that shortfall by enlisting others or --
22 and/or, I should say, by consolidating voting locations.

23 How -- this is the Hobson's choice for the poll workers and
24 the municipalities. The more you consolidate voting, the more
25 challenging it will be for voters to get to the right place, and

1 I know that you have undertaken various suggestions about
2 posting at the municipal clerk's office where the open polls are
3 and leaving that up on a sheet even after 5:00 p.m. -- or even
4 after the closing, whatever closing time is, 4:30 or 5:00 p.m.
5 or 5:30, for the local municipality. But on one side that
6 consolidation, which is intended to facilitate the ability to
7 process voters, creates a set of problems for people seeking to
8 vote in person on Tuesday.

9 You've at least acknowledged that's a concern for the
10 Commission, correct?

11 THE WITNESS: There certainly, in that scenario, would
12 be less availabilities in, you know, neighborhoods for people to
13 be able to walk, let's say, to the polling place because, yes,
14 certainly consolidation means fewer places, especially in our
15 mid to large-size communities.

16 THE COURT: And the Hobson's choice that I was talking
17 about is by consolidating poll workers and voters into a fewer
18 number of locations, you're also raising the COVID-19 risk for
19 everyone. In other words, the more people who congregate in one
20 place, the higher the risk develops, and I don't think you
21 dispute that. You're just saying that the Commission, who is
22 stuck with trying to make this happen, is taking what steps they
23 can to inform municipalities as to how they can effectively
24 address that based on what we know so far of this virus, which
25 is, unfortunately, not all we need to know.

1 THE WITNESS: Yes, Your Honor. We have developed some
2 guidance for how to make sure that only enough voters who can
3 safely be in a space are admitted at one time. So, for example,
4 we just had a live webinar to answer questions from clerks at
5 10:00. We have another one at 2:00. And a common question is,
6 is there a capacity limit for how many people can be in the
7 building? Our guidance remains that that capacity limit depends
8 on the facility and how many people can be in the facility and
9 still maintain the proper social distancing from one another and
10 from the poll workers, and so we suggest that they only allow
11 the number of people in at a time that they can accomplish that,
12 and then if there's sort of a waiting area outside, that they
13 should also be instructed in the waiting area to practice social
14 distancing as well.

15 THE COURT: And do you have sufficient masks -- do
16 local municipalities have sufficient masks to at least give to
17 the poll workers?

18 THE WITNESS: There are not masks. In our work with
19 the public health official and the guidance from the CDC
20 specific to elections, they have not advised at this point that
21 poll workers or voters use masks. They actually --

22 THE COURT: Yeah. Let me just stop you there. I
23 understand that, but as you might also know, the CDC is also
24 currently considering whether they should advise everyone to
25 wear a mask. My understanding is that basically COVID-19 is

1 everywhere in the country at this point, and a mask, other than
2 helping an individual from touching their face, doesn't do much
3 for the individual, but because we don't know who carries it, it
4 may help prevent someone who does have it and is asymptomatic
5 from spreading it.

6 So it would seem to me that masks for the poll workers, who
7 are most likely to be infected and most likely to transmit it to
8 others, if not on election day to other poll workers and voters
9 but within seven to 14 days later among their -- the people they
10 come in contact with, that they may be well served to wear masks
11 because they will be less likely to touch their face, and if
12 they, in fact, are transmitting and have not yet shown symptoms,
13 are less likely to transmit it to others. I just suggest that
14 to you. I'm not sure that's within the scope of what is before
15 me, but the attorneys will argue about that. In terms of the
16 poll workers themselves, I think -- and I know you're trying to
17 stay on top of the advice from the CDC, but that may be
18 something to consider.

19 We really won't know until election day whether or not
20 you're going to have sufficient staffing. Is that fair? To
21 handle in-person voting.

22 THE WITNESS: Right. I think our municipal clerks have
23 made many adjustments to make sure they have enough for these
24 consolidated polling places. We've also heard about many taking
25 creative approaches to working with their town boards or other

1 leadership in their town to ensure they have people sort of on
2 the bench in the event that someone is unable to serve. As you
3 know, each polling place has to have a minimum of three people
4 that are serving at the polling place, and so they've been
5 making contingencies to ensure if one of the three is
6 unavailable, there's someone else that can serve in that
7 capacity. And so I think a lot of the consolidation we're
8 seeing is a result of them ensuring they have adequate staffing
9 for fewer polling places.

10 THE COURT: And do you anticipate at this point the
11 National Guard being involved, as was suggested by the Governor?

12 THE WITNESS: We are certainly postured to help with
13 training and deployment if that is something that's made
14 available to us. It's been part of our discussions but nothing
15 that's formally been announced to us, but we certainly stand
16 ready to train and make people -- make sure they understand the
17 basics of the duties at any point if there were guard members
18 that were willing to serve in that capacity.

19 THE COURT: Then I guess we have the -- you know,
20 again, there's this Hobson's choice, because the more people you
21 get located at the voting, the greater the COVID-19 risk, so it
22 really is a tough balance that will be challenging each
23 municipal clerk or at least those experienced enough as poll
24 workers to guide others at each location.

25 What steps, if any, do you anticipate being taken if some

1 polls are -- end up having to close entirely?

2 THE WITNESS: So we do practice as part of our usual
3 contingency planning before this crisis occurred, we have what
4 we call tabletop exercises, scenario-based trainings with our
5 municipal elections officials, and they used to focus on
6 cybersecurity and other security measures like what would you do
7 in the event that your polling place flooded? If there was some
8 other safety issue in your polling place, how would you
9 consolidate with, say, a neighboring township to ensure that
10 you're able to continue to run the election? So these are plans
11 that are transferrable to the current crisis, and so we're
12 working on developing plans like consolidation as well as, like
13 you mentioned, the potential of training guards members that may
14 be able to fill in in that capacity in the event that there's an
15 emergency on an election morning and we need to ensure a polling
16 location is able to open.

17 THE COURT: And I assume those polling stations will
18 then be required to be in compliance with other relevant laws
19 like ADA accessibility or the presence of bilingual poll
20 workers.

21 THE WITNESS: Yes, Your Honor. We've been reinforcing
22 with the municipalities that changes to the process to
23 accommodate the current crisis must still meet the requirements
24 of the law. So they may look a little different than they have
25 in the past, but they still need to meet the requirements of the

1 law.

2 THE COURT: So let me ask you the last impossible
3 question about this subject, which is how confident are you that
4 voters will know where to go on election day or do you expect
5 that's just going to vary by local municipality?

6 THE WITNESS: I do think there will be some variation
7 between municipalities, but we do train them on the vital
8 importance of keeping their polling place records and election
9 plans up to date in the statewide database because this allows
10 voters to see where their polling place is. So the clerks enter
11 the polling places into our statewide database, which then
12 pushes to the MyVote Wisconsin website so voters can find their
13 polling place. We also instruct them, like you previously
14 mentioned, if they are changing polling locations, they need to
15 provide notice in their community, including putting a notice
16 on, let's say, the door of the facility that usually serves as
17 the polling place directing people to the new facility so that
18 they're aware when they arrive to maybe where they're used to
19 going about the change in location.

20 THE COURT: And, again, would it be fair to say that we
21 won't know until election day whether or not those mechanisms
22 are sufficient given the impacts of COVID-19?

23 THE WITNESS: Certainly the scope and likelihood that
24 there could be these consolidations and changes is greater than
25 previous elections, but every election there's at least one

1 place that does have to change locations at the last minute for
2 a variety of reasons. So it's certainly part of their
3 contingency planning that they've been doing for all previous
4 elections.

5 THE COURT: I'm also thinking that that's going to be
6 true with respect to challenges that will no doubt come for
7 recounts, whether because of concerns about incorrectly
8 recording voters, incorrectly mailing ballots -- excuse me -- or
9 the wrong ballot to voters, and I don't know how to weigh those
10 things other than to say -- I guess I'm being invited to say
11 that there's just so many potential problems that we're not
12 going to be able to accomplish a meaningful election. Again, we
13 have this irony that we're going to need between 500,000 to a
14 million voters to vote in person to have -- for this to appear
15 to be a viable election based on historic patterns, but if we
16 get that big a turnout, it may overwhelm those poll workers who
17 are being tasked with the extremely difficult job of trying to
18 accept that many voters in a safe manner.

19 I guess I'm not asking that question as much as do you
20 disagree with that observation?

21 THE WITNESS: I never want to underestimate our local
22 election officials. They are incredibly resilient. They are
23 incredibly resourceful, and so -- and we always say we're the
24 little agency that could, and so, you know, I don't want to
25 underestimate our ability to overcome obstacles, but it will

1 certainly be challenging.

2 THE COURT: The recount process also would be
3 problematic in this case, I assume, because the statute requires
4 that people who want to be can be present to observe in person
5 and by counsel. I assume that's not a bridge you've tried to
6 address yet or do you have a contingency in place for that?

7 THE WITNESS: Well, our clerks are certainly practiced
8 in recounts. As the only state that had a presidential recount,
9 we've -- they've all had practice in that, and there's many
10 training materials and guidance on the process. We also, if you
11 recall, during the gubernatorial recall, we were able to sort of
12 remotely make sure that people were able to observe the process.
13 So as we were processing recall petitions, for example, we had
14 cameras, and people were able to log in and publicly access the
15 process without being there. And so we can certainly prescribe
16 procedures for remote public involvement in those processes.

17 THE COURT: I'm going to ask this question because I
18 think it's likely to come up: With respect to handling absentee
19 ballots, is there any ability for drop boxes at local
20 municipalities? Has that been created?

21 THE WITNESS: So we actually yesterday with our
22 commission -- I'm sorry. I'm losing track of days. Whenever
23 the last daytime meeting was of our commission, we discussed
24 some options that jurisdictions are using for drop boxes.
25 They're not drop boxes maybe in the traditional sense you'd see

1 in vote-by-mail states, but what they have been doing, again, is
2 being very resourceful and utilizing things like library book
3 drop-offs, tax return slots, and other public facilities that
4 currently exist that may not be used right now to allow for
5 ballot drop-off. So we also instructed them to include
6 information about alternative drop-off sites in any future
7 mailings of their absentee ballots, and we gave them a template
8 they can use to include in those ballots so voters know that the
9 closer they get to the deadline, it may be advisable for them to
10 drop their ballots off rather than sending them through the
11 postal service. We also advised them to work with their local
12 postal service to do things like have the election mail held on
13 the days around the election so that the clerk can go pick it up
14 at the postal service rather than having it in transit to the
15 clerk's office. So we have advised them on some alternatives to
16 ensure that voters are able to get their ballots back as we get
17 closer to election day.

18 THE COURT: Would it make more or less sense, if the
19 Court were to extend the time for counting absentee ballots, to
20 allow clerks to begin that count before April 7th?

21 THE WITNESS: I believe there are some considerations
22 that we'd have to take into account. There has been legislation
23 in the last year, pending legislation, draft legislation, that
24 the clerks have been working on about early processing, and
25 concerns have come up throughout that process, one of which in

1 this point in time would be the testing and the certification of
2 voting equipment. So our voting equipment has to be tested and
3 certified at the federal and the state level to perform under
4 regular conditions, and that certification does not currently
5 include that voting equipment being opened and in use for
6 multiple days, and so that might be one of the considerations
7 that we'd have to weigh about the early processing is we have
8 not tested our voting equipment in that capacity. That's not to
9 be said that we couldn't, but we have not done that.

10 THE COURT: All right. And if I were to order
11 consolidation of the April 7th election with the 7th
12 Congressional District's May 12 special election, you've
13 indicated your concerns with respect to overlapping voter
14 registration deadlines, overlapping absentee ballot procedures
15 and time periods, as well as voting equipment programming and
16 official canvassing. Do you anticipate that those problems
17 could be addressed? You and your people who work under you seem
18 to have a view that no matter what is thrown at you, you'll make
19 it work, and particularly with the Commission, who can't agree
20 on specifics, you've been moving with remarkable adeptness with
21 what is being thrown at you.

22 But do you think that -- if I were to conclude, and I don't
23 know that it's my place, that this April 7th date of election is
24 excruciatingly in the dead middle of the most important period
25 for people not to be congregating and that for public health

1 conditions it should be moved, would it make sense to move it to
2 the May 12th special election date or simply to postpone it to
3 another date to be decided by the Election Commission and state
4 government?

5 THE WITNESS: So the May 12th dates, we would
6 essentially be asking the local election officials in the 7th
7 Congressional, which spans 526 municipalities, to be running two
8 elections concurrently. What that would mean practically is
9 that, like you said, there would be overlapping deadlines, but
10 it would also mean things like ballots have already gone out for
11 the 7th Congressional. So the state deadline is 47 days prior
12 to the election, and so at this point they would also have to
13 have two sets of voting equipment because the ballots can no
14 longer be consolidated with the programming to tabulate the
15 ballots, so they'd have to purchase additional equipment or rent
16 it. They'd also have to have things like two separate poll
17 books because who is registered in the registration --

18 THE COURT: And I appreciate it, and you're properly
19 providing a litany of problems. What I'm hearing you're saying
20 is that if I were to move it, you'd prefer that it be moved to a
21 different date than the May 12th special election because it
22 would probably create more problems than it would solve.

23 THE WITNESS: You know, as you noted, I always feel
24 like our job is to overcome obstacles, so it's always difficult
25 to lay out the series of potential challenges, but this year is

1 in itself a very challenging year. As we went through the
2 exercise of trying to schedule with the Governor's office the
3 special election for the 7th Congressional, there are nearly no
4 days in the entire calendar year where ballots aren't out for an
5 election. So if an alternate date is chosen, there's this
6 cascading effect where you're always going to be bumping up
7 against deadlines for another election this year. Ballots go
8 out for the August primary in June, and so no matter what day
9 you choose, there's going to be a different series of issues
10 that we'd need to consider.

11 THE COURT: Understood.

12 I'm going to turn you over then to counsel to ask their
13 specific questions. My sincere hope is that plaintiffs' counsel
14 for the three cases have done some coordination and have decided
15 who would start questioning and who will do what I'll describe
16 as cleanup, but I will make -- I want to make clear that we're
17 not going to be continually referring around. That's not to say
18 you can't ask about matters that I've already raised. I think
19 it's only fair that you get straightforward answers to any of
20 those subject matters as well as others you might want to raise,
21 but I want plaintiffs' counsel to be aware that we're not going
22 to have overlap.

23 As a practical matter, the intervening defendant is going to
24 be asking questions in counterpart to the questions that your
25 group, the plaintiffs, will be posing, and then I would view the

1 WEC defendants as asking cleanup.

2 Are you prepared to proceed, Ms. Wolfe, or do you need a
3 break?

4 THE WITNESS: I'm prepared to proceed. Thank you, Your
5 Honor.

6 THE COURT: All right. Then I'll ask hopefully that --
7 has there been an agreement as to who would go first among
8 plaintiffs' counsel?

9 MR. DEVANEY: Your Honor, this is John Devaney for the
10 DNC and the Wisconsin Democratic Party.

11 Yes, we have conferred among plaintiffs' counsel, and what
12 we did, Your Honor, is we identified four or five general topics
13 and divided them among us in the hopes that we wouldn't be
14 stepping on each other and we'd be efficient, and it was agreed
15 that I would go first with my couple of topics, if that's
16 acceptable to Your Honor.

17 THE COURT: You may proceed.

18 MR. DEVANEY: Thank you.

19 ADVERSE EXAMINATION

20 BY MR. DEVANEY:

21 Q Ms. Wolfe, it's nice to meet you, and thank you for your
22 public service in this challenging time.

23 I wanted to follow up on the Court's questions to you
24 relating to the absentee ballot issue, and the Court covered
25 much of what I was going to ask, but I have a few follow-ups.

1 One of them just relates to the number of what I call
2 unfulfilled absentee ballot requests that are pending. I just
3 define that -- we put in an affidavit from the Madison city
4 clerk, and at that time there were 12,000 requests for absentee
5 ballots that Madison had yet responded to. So I'm looking for
6 that number as it exists today on a statewide basis, if you know
7 it.

8 A So thank you for the question.

9 I do not have that number. Here's a few things I can tell
10 you about that: So, first is, again, the number of ballots
11 requested versus the number sent, the number sent might be
12 higher than what's reported because we have worked with
13 jurisdictions to develop a report that allows them to see the
14 requests to do more easy data entry than individual paper
15 requests. So often they may produce labels or other things
16 based on that report, and then they may have someone going in
17 and doing the data entry later. And so just because something's
18 not showing as sent in the official report we released doesn't
19 mean it hasn't been sent in the mail, and I have been checking
20 in with our jurisdictions, and it seems like especially the
21 larger ones are getting caught up in terms of sending out those
22 requests. I think initially there was such a large volume that
23 wasn't anticipated that it took them a while, as it should, to
24 get caught up on those requests, but it seems like they are now
25 getting caught up on those. You'll see that that chart that we

1 put out every day kind of reflects that they're getting caught
2 up on some of those requests and they don't have as large of
3 backlogs.

4 Q Are you able to give me any quantification approximately as
5 to what the backlog is today? Is it in the thousands, the tens
6 of thousands?

7 A I'm sorry. I cannot provide those numbers. They would
8 have to come from the individual municipalities. It would be my
9 assumption that smaller jurisdictions don't have a backlog, and
10 the larger ones -- you know, I know I've spoken to Milwaukee,
11 and it seems like they have now hired additional staff and do
12 not have the backlogs that they were previously seeing.

13 Q But you don't know what the backlogs are today; is that
14 correct?

15 A I'm sorry.

16 Q Okay. And then I wanted to follow up on a question
17 relating to the mail. You answered Your Honor's question about
18 the mail by saying that the post office is advising, I think you
19 said, seven or eight days for the transaction, and what I wanted
20 to clarify is, is that seven or eight days in total from an
21 election official sending out an absentee ballot, the voter
22 returning it, or does it take seven or eight days given COVID-19
23 for the ballot to reach the voter once it's sent by the
24 official?

25 A So first-class mail, the USPS has advised, should only take

1 two days for delivery, so the time that the voter drops it in
2 the mail to the time the clerk receives it or vice versa, and so
3 that's the usual. However, that being said, for the last few
4 years, they have always asked us to advise voters that it may
5 take up to a week, and so this is not new guidance. This has
6 always been our guidance. For example, on the MyVote Wisconsin
7 website in the past, as we get closer to the deadline, we post a
8 message on there for the absentee requests that reminds people
9 that the USPS advises that it may be up to a week for those
10 ballots to be returned. So it's really dependent on where the
11 voter is as well. Some of them may be --

12 THE COURT: I just -- I just want to break down that
13 question a little bit. You're saying from the time -- the
14 average time that the post office is advising for the request to
15 be honored by a municipal clerk and in the hands of the voter is
16 how long?

17 THE WITNESS: So from the time the voter -- let's say
18 the clerk sent -- put their ballot in the mail to be sent to the
19 voter, that transaction time from the time the clerk puts it in
20 the mail to the voter receiving it could take up to a week.

21 THE COURT: And then the same thing for the return.
22 Once the voter actually puts it in the mail, it could take up to
23 a week to arrive.

24 THE WITNESS: That's correct, yes, although they advise
25 first-class mail should only be two days.

1 THE COURT: Understood. Thank you.

2 I'm sorry. You may proceed, Mr. Devaney.

3 MR. DEVANEY: Thank you, Your Honor.

4 BY MR. DEVANEY:

5 Q And, Ms. Wolfe, with that clarification, what I'm trying to
6 get at is given the volume of absentee ballots, unprecedented
7 volume, given the time it's taking in the mail, and the
8 Commission has said that the mail is slower in one of its
9 filings with the Court, isn't it true that we can expect
10 probably hundreds or thousands of absentee ballots to be
11 returned after April 7th?

12 THE COURT: You mean to be --

13 MR. DEVANEY: I'm sorry, to arrive, to arrive after
14 April 7th.

15 THE COURT: So even though they're postmarked by
16 election day, there's a real possibility that they won't arrive
17 until up to a week after that.

18 MR. DEVANEY: That's my question, Ms. Wolfe, yes.

19 THE WITNESS: So because there's no longer a late
20 return deadline in the law, the clerks do not typically track
21 how many ballots come back after election day. We do have --
22 just looking at my notes from 2016, it appears there were about
23 5,500 ballots that were returned after election day, but we
24 weren't sure if those were just military and overseas voters or
25 all voters, so I don't have any historical numbers to really

1 paint a picture for what to expect from that.

2 BY MR. DEVANEY:

3 Q And would you agree with me that, given the unprecedented
4 volume of absentee ballots this year, given the Commission's
5 statement that the mail is moving slower because of COVID-19,
6 that we can expect a significantly larger number than that 5,500
7 number that you just cited?

8 A The number is likely proportionate I would say to -- you
9 know, the number of ballots issued may result in, you know, more
10 ballots that come back after the deadline.

11 THE COURT: And when you say "proportionate," what are
12 you thinking about in relation to past experience? How many
13 more are we talking about? 5,500 of what voters and what
14 percent of the current expectation?

15 THE WITNESS: I wish I had a number for you. I don't
16 know because, again, we don't really track that number, so I'm
17 not sure --

18 THE COURT: Yeah. I'm not asking it very well. If you
19 put in multiple -- on a multiple basis, how many more absentee
20 ballots have been requested than in the past?

21 THE WITNESS: Thank you for the clarification.

22 So for reference, I guess in 2016 there were just over
23 200,000 absentee ballots issued, and then if we had 5,500 that
24 were returned after the deadline -- so, pardon me, I'm an
25 election official, so my math isn't great, but I'm not sure what

1 that percentage is, but perhaps that might be a percentage that
2 we could look at.

3 THE COURT: So you would expect a minimum of about, if
4 we stay just at a million, about 27,500 votes coming in
5 afterward, even if it's not further skewed by all the other
6 impacts here. Is that fair?

7 THE WITNESS: I think that's fair, yes.

8 THE COURT: Next question, Mr. Devaney.

9 MR. DEVANEY: Thank you, Your Honor.

10 BY MR. DEVANEY:

11 Q Ms. Wolfe, right now the deadline for requesting a ballot,
12 an absentee ballot, is tomorrow, April 2nd, and you said that
13 the number of requests continues to be at a very high volume.
14 And so if someone requests a ballot tomorrow, April 2nd, and
15 given your statement that it could take up to a week for that
16 person to actually receive the ballot, assuming it's sent out
17 tomorrow, there are going to be multiple situations where lawful
18 voters receive their absentee ballot actually after election
19 day; isn't that correct?

20 A I can't assume what will happen or who that will impact.
21 Again, USPS says that you should expect two days for first-class
22 mail, but it may take up to a week for some voters. So I'm not
23 sure, you know, where or who would fall into that category.
24 We've also provided some additional information and templates
25 that we've asked the clerks to include in their ballots as we

1 get closer to the deadline to ensure that voters are aware of
2 other opportunities to drop off their ballots, so be it in a
3 drop box, in a municipal clerk's office, or a voter can, of
4 course, hand deliver their absentee ballot to the polls on
5 election day.

6 Q Ms. Wolfe, I'm going to ask you, if you could, to limit
7 your answers to the question that I'm asking --

8 THE COURT: And that's fair, Mr. Devaney, and I will
9 encourage you again, Ms. Wolfe, to focus on the question that's
10 asked and not on the kind of answer you would typically give in
11 a call with commissioners, and the specific question was it's
12 possible, and I think you're conceding it's quite possible, that
13 there will be some people who request a vote, absentee ballot,
14 tomorrow who will not be receiving it in time to put it in the
15 mail by April 7th. That will occur for some.

16 THE WITNESS: Yes, I think it's accurate to assume that
17 that will occur for some.

18 THE COURT: And what you can't say is whether it's
19 going to be -- what percentage that will be, and your hope is it
20 won't be a large percentage of those requesting on April 2nd.

21 THE WITNESS: Of course, yes.

22 THE COURT: So I've now led the witness to that answer,
23 Mr. Devaney, but if you want to explore that further, you're
24 more than welcome to.

25 MR. DEVANEY: Thank you, Your Honor.

1 BY MR. DEVANEY:

2 Q And my follow-up to that, Ms. Wolfe, is if someone gets
3 their ballot on April 8th and they send it in that very day,
4 under the Commission's current position, that ballot wouldn't be
5 counted because it's not postmarked by April 7th; is that
6 correct?

7 A Under the Commission's current proposal, yes, but under
8 current law, it has to be received by 8:00 p.m. on election day.

9 Q Okay.

10 THE COURT: So it wouldn't be counted anyway, but if I
11 were to move it -- move the date to a postmark date of April
12 7th, the election day, there will be some absentee ballots that
13 will not be counted because they're not physically -- they don't
14 physically get the ballot in time to put it in the mail that day
15 or to at least get the stamp on it that day. I should say more
16 importantly to get the stamp on it that day. That will occur.
17 The question remains what percentage that is.

18 THE WITNESS: That's correct.

19 THE COURT: Is that fair?

20 THE WITNESS: Yes, that's correct.

21 THE COURT: Okay. Anything else, Mr. Devaney?

22 BY MR. DEVANEY:

23 Q And my one follow-up to that, Your Honor, if I may, is, Ms.
24 Wolfe, given that that is likely to happen, wouldn't it be
25 fairer and wouldn't it be more enfranchising to count ballots

1 that come in after April 7th even if they're postmarked after
2 April 7th as long as they arrive by a date certain? Let's say
3 we pick ten days after the election, April 17th, and disregard
4 postmark and just have that as the deadline for receiving an
5 absentee ballot, wouldn't that prevent the kind of harm that
6 we're -- that I'm describing in my question of someone who can't
7 comply with the postmark deadline because of when they received
8 the ballot?

9 MR. LENZ: Judge, I'm going to object to the extent
10 that that calls for Ms. Wolfe to provide a legal analysis.

11 THE COURT: I'll sustain the objection.

12 Anything else, Mr. Devaney?

13 BY MR. DEVANEY:

14 Q My last question, Your Honor, is, Ms. Wolfe, can you tell
15 us today how many poll locations are without poll workers, any
16 poll workers?

17 A So as of the date of the survey that we conducted, there
18 were, I believe, 111 jurisdictions that indicate a critical need
19 to staff their polling places. We have since done a lot of work
20 with them to help them recognize opportunities to perhaps
21 recruit poll workers in their community. So I do not know as of
22 today the exact stance, but that was the date of the survey.

23 MR. DEVANEY: Thank you, Ms. Wolfe. No further
24 questions.

25 THE COURT: All right. I'll let whoever is scheduled

1 to proceed next go ahead. Otherwise I'll just take them in
2 order of appearance.

3 MR. SHERMAN: Thank you, Your Honor. Plaintiffs'
4 counsel agreed I'd go next for the Gear plaintiffs. And, Your
5 Honor, I'd ask --

6 THE COURT: Mr. Sherman.

7 MR. SHERMAN: Thank you.

8 THE COURT: Go ahead.

9 MR. SHERMAN: I'd ask that the witness be shown a copy
10 of Exhibit 51 on the screen, if that's possible.

11 THE COURT: It is. Just give us a moment.

12 And then if we could go to the first page of Exhibit 51.

13 MR. SHERMAN: Thank you very much, Your Honor.

14 ADVERSE EXAMINATION

15 BY MR. SHERMAN:

16 Q And good afternoon, Ms. Wolfe. Thank you. Thank you for
17 your service and for testifying today.

18 Can you see the exhibit up on your screen?

19 A Yes, I can.

20 Q And do you recognize it?

21 A Yes, I do.

22 Q And what is it?

23 A It's a memo issued on March 29th to municipal and county
24 clerks and the City and County of Milwaukee Elections Commission
25 regarding guidance on absentee ballot witness signature

1 requirements.

2 Q Did you author this memo in conjunction with other staff?

3 A Yes, I did.

4 Q Thank you. Does this appear to be a true and accurate copy
5 of the memo?

6 A Yes, it does.

7 MR. SHERMAN: And, Your Honor, I don't know if this is
8 required here, but I'd ask that Exhibit 51 be moved into
9 evidence, if necessary.

10 THE COURT: And just because it's become part of this
11 hearing, I'll grant that motion, and I'll accept Exhibit 51 as
12 an exhibit in this hearing. Frankly, I've obviously seen it
13 before. Frankly, I'm not certain if it was attached to an
14 affidavit, but just to allay everyone's fears, to the extent
15 that any documents were attached to declarations or affidavits,
16 they are considered part of this record regardless of whether
17 they're shown or admitted at this hearing, but for purpose of
18 this hearing, Exhibit 51 is admitted.

19 MR. SHERMAN: Thank you, Your Honor.

20 BY MR. SHERMAN:

21 Q Who is the public official, public health official, who
22 offered guidance in crafting this memo?

23 A We worked with a Mr. Ryan Wozniak, who is a public health
24 official with the Department of Health Services assigned to us
25 by the Governor's office.

1 Q Understood. Thank you.

2 And in this memorandum, for voters struggling to secure a
3 witness on their mail-in of an absentee ballot, the Commission
4 laid out guidance in the form of an 11-step process that they
5 were recommending to voters; is that correct?

6 A Yes, as it pertains to the assumption that the voter is
7 quarantined, not self-isolating or taking other measures.

8 Q Understood.

9 If we could go to page 2, Your Honor, or -- I wanted
10 to direct --

11 THE COURT: We'll be there in just a moment. Yep.

12 MR. SHERMAN: Thank you.

13 BY MR. SHERMAN:

14 Q Do you see, Ms. Wolfe, where it says, "Other options for
15 witnesses" -- this is the second bullet point -- "Other options
16 for witnesses in these situations include mail delivery persons,
17 grocery or food delivery persons, and medical professionals"?
18 It says that, correct?

19 A Yes, I do. I see that.

20 Q When would a medical professional be able to witness a
21 mail-in absentee ballot for a voter who was self-quarantining at
22 home?

23 A I'm not aware of the specific circumstances of individual
24 voters' medical needs, but someone that's coming to their home
25 perhaps to provide those services.

1 THE COURT: All right. I suppose under your current
2 guidance it could also be a doctor who is appearing via Skype or
3 some other video chat means as well.

4 THE WITNESS: Yes, it could be, but they would also
5 have to have a physical copy of the certificate to be able to
6 accomplish this process.

7 THE COURT: I'm sorry to interrupt, Mr. Sherman. Go
8 ahead.

9 MR. SHERMAN: Not at all, Your Honor. Thank you.

10 BY MR. SHERMAN:

11 Q So a doctor appearing via Skype to do -- for a telemedicine
12 appointment, that wouldn't suffice, correct, because they would
13 not have the certification envelope before them, correct?

14 A In all likelihood. We did discuss, and this is probably
15 more feasible earlier in the process, that the voter could send
16 or mail the absentee certificate envelope to someone else who
17 could then witness them via video chat marking their ballot and
18 then send the certificate back to the voter to be able to
19 complete the process.

20 THE COURT: And you say more viable because as we get
21 closer to the April 2nd date, it becomes more and more
22 unrealistic for reasons we've already discussed.

23 THE WITNESS: That's correct.

24 BY MR. SHERMAN:

25 Q Would anyone feel comfortable mailing a voted ballot to a

1 stranger or even a person they have a relationship with like
2 their doctor to sign the certification?

3 THE COURT: I'm going to treat that as argumentative,
4 Mr. Sherman. You're welcome to make that argument if you wish.
5 You can ask your next question.

6 MR. SHERMAN: Okay. Thank you, Your Honor.

7 BY MR. SHERMAN:

8 Q Can mailmen or other delivery persons access the door to a
9 person's apartment or are they prevented from entering apartment
10 buildings?

11 A I'm not sure of the individual setups of each apartment
12 complex. There may be places where that is possible.

13 Q The guidance that we're looking at on page 2 suggests that
14 mail delivery persons, grocery or food delivery persons could
15 witness an absentee ballot. I'm wondering whether this guidance
16 was crafted with folks who lived in apartment buildings -- with
17 that in mind as opposed to just residents in homes with, you
18 know, a door that a mailman can approach?

19 A We certainly did discuss people in apartments when we
20 developed this guidance. One of the things we discussed is the
21 video chat option. So let's say you're in an apartment where
22 you have a door without a window in a hallway. Perhaps the
23 voter could leave their certificates, not their ballots, outside
24 of their door and then video chat with the person on the other
25 side while the voter marked their ballots, and then later the

1 voter would retrieve that certificate to put their voted ballot
2 inside.

3 Q How -- and a person who witnesses a ballot, they have to
4 actually witness the voting of the ballot, correct? They can't
5 just sign having not witnessed the voting.

6 A That's correct.

7 Q And how long does it typically take on average to vote a
8 ballot?

9 A I do not have that data. I'm sorry.

10 Q Do you expect that delivery people will be able to hang out
11 and witness a voter cast their ballot and then -- for a handful
12 of minutes, five, ten minutes?

13 MR. LENZ: Judge, objection. Foundation.

14 THE COURT: I'm not going to -- I'll just treat it as
15 argumentative, and you can ask your next question, Counsel.

16 MR. SHERMAN: Okay. Thank you, Your Honor.

17 BY MR. SHERMAN:

18 Q I wanted to scroll down on the page -- or you can see it
19 already actually. Step 3 under *Process Developed With Public*
20 *Health Official Guidance* reads, "The voter opens their absentee
21 materials envelope and places the certificate envelope outside
22 their door in a mailbox, et cetera, where a person who is
23 providing supplies or services can access it. If possible, the
24 voter should put the certificate envelope and leave it untouched
25 for 24 hours before the witness handles it." It says that,

1 correct?

2 A Yes, it does.

3 Q Would it be safe to leave the certificate and envelope
4 outside one's door for 24 hours?

5 A I cannot, again, speak to the individual circumstances of
6 people's homes.

7 Q Understood.

8 Will this guidance work for people who live in apartment
9 buildings?

10 MR. LENZ: Judge, objection.

11 THE COURT: Counsel, I'm going to let her answer the
12 basic question. I'll overrule an objection at this stage.

13 You can answer the basic question, Ms. Wolfe.

14 THE WITNESS: As we previously discussed, we considered
15 people in apartments and how, again, they might leave that
16 certificate in a place where the witness could retrieve it and
17 then potentially video chat with them to accomplish the witness
18 requirement.

19 BY MR. SHERMAN:

20 Q Step 3 also contains a recommendation to leave the ballot
21 untouched for 24 hours. Why is that?

22 A So that is to, as we previously discussed, to address any
23 potential biological material that may be on paper and the
24 scientific recognized time period for how long it takes for that
25 material to degrade.

1 Q Thank you, Ms. Wolfe.

2 I wanted to direct your attention to step 4 in this memo and
3 step 6. Step 4 reads, "The witness should be prepared to watch
4 the voter mark their ballot through a window or by video chat."
5 And step 6 says, "The voter marks their ballot in view of the
6 witness but with a physical barrier between them or by video
7 chat." Is that correct?

8 A Yes, that's correct.

9 Q And I don't mean to be repetitive here, but would you agree
10 that this guidance would not work for individuals who live in
11 apartment buildings who don't have a window that faces a ground
12 floor, for instance?

13 A Again -- and I'm unsure of your question -- as we
14 discussed, we thought of the video chat and other means for
15 people that maybe don't have a window to accomplish that.

16 MR. SHERMAN: Your Honor, I'm just skipping a few
17 questions --

18 THE COURT: That's fine. Take your time. If you're
19 skipping questions, take all the time you need.

20 BY MR. SHERMAN:

21 Q I mean, you offer video chats as an alternative. Is it
22 common for people to utilize a video chat with a delivery person
23 or a mailman? Has this been done before in any other electoral
24 context or any other context you can think of?

25 A It is not a part of any other voting procedure.

1 Q Is it part of any other procedure that --

2 THE COURT: I understand, Ms. Wolfe, you to be saying
3 this is not a protocol you're aware was ever used before.
4 Personally you don't know of it ever being implemented before.
5 Is that fair?

6 THE WITNESS: Other than with witness requirements. We
7 have discussed with, you know, let's say, overseas voters or
8 others who had concerns about finding a witness similar things.
9 Like we talked about, you know, sending a certificate or leaving
10 the certificate with someone to then witness by video chat. So
11 there have been circumstances where people have utilized that
12 option in the past.

13 THE COURT: Having said that, that would be a rare
14 exception until this election.

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: Next question, Mr. Sherman.

17 MR. SHERMAN: Thank you, Your Honor.

18 BY MR. SHERMAN:

19 Q Do you think most elderly voters who live alone could
20 manage a video chat? Is that a reasonable alternative for them?

21 A It depends on the individual. I think we all know
22 individuals who are elderly that can accomplish a video chat and
23 some that would struggle with it, so it depends on the
24 individual.

25 Q Relatedly, on page 2, if we could scroll back up again,

1 Your Honor. Thank you.

2 It says in bullet point 4, "This process can be done via
3 video chat like Skype or FaceTime with the ballot left outside
4 of the door in a mailbox for the witness to sign and provide
5 their address after the fact. The ballot could even be mailed
6 to the witness (who observed by video chat) after it is marked
7 and sealed in the envelope so they can sign it."

8 Relatedly, do you think many elderly voters are familiar
9 with Skype and FaceTime and could use this as a reasonable
10 alternative?

11 A Again, that would -- that would require -- that would be an
12 individual consideration for the voter.

13 Q While I'm thinking of it, how -- has your office done
14 anything to broadcast this guidance more widely? I mean,
15 everyone knew of the Wisconsin Emergency Order No. 12. That got
16 a lot of press. Are you aware of this guidance being broadcast
17 or otherwise disseminated through public outreach materials?

18 A We do our usual protocol in terms of making sure that we're
19 advising people. So, for example, on social media, as we've
20 been asked this question, we've been advising individuals. We
21 also answer many phone calls and emails throughout the day in
22 our office in addition to the training we do with our 1,850
23 municipal election officials and 72 county election officials to
24 ensure they have this guidance to be able to advise their
25 voters.

1 Q Understood.

2 THE COURT: So I'm clear though, in terms of posting it
3 on your MyVote website, it's not -- this advice on witnessing is
4 not specially posted in some way that it would be easily
5 accessible to a voter.

6 THE WITNESS: It's available through our
7 elections.wi.gov website. The first thing on the home page is
8 COVID-19 and all of the guidance that relates to voter and
9 clerks' procedures. We have videos, other things that are out
10 there to guide voters through the new guidance.

11 THE COURT: So on the COVID-19 site, there is a
12 specific procedure set forth for options to be used in getting a
13 witness if you need one for an absentee ballot.

14 THE WITNESS: Yes, Your Honor. This guidance appears
15 on that page.

16 THE COURT: All right. Thank you.

17 Next question, Mr. Sherman.

18 BY MR. SHERMAN:

19 Q Has -- thank you, Your Honor.

20 Has this guidance been disseminated to people without
21 digital access in any way?

22 A Could you please repeat the question?

23 Q Sorry. Could the -- has this guidance issued on March
24 29th, 2020, been disseminated in any other way publicly to
25 voters if they don't have digital access? Is there a way for

1 them to receive -- have they received it? Or would they have to
2 access it under a website?

3 A Because of the volume of local election officials, it
4 depends on, I suppose, where they live and the questions that
5 have been asked from voters to their local election official.
6 We have not -- if you're asking if we've individually mailed
7 this to voters, we have not. You can see we've put out many
8 memos in the last few days, but local election officials may, in
9 sending out their absentee balloting materials, advise voters
10 about some of the guidance.

11 THE COURT: You just don't know what practices are
12 being adopted locally, and you're not sending it out to
13 individual absentee ballots nor have you directed local
14 officials in mailing the absentee ballot to include it.

15 THE WITNESS: That's correct.

16 THE COURT: Correct?

17 THE WITNESS: Yes, that's correct, Your Honor.

18 THE COURT: Next question.

19 BY MR. SHERMAN:

20 Q If a voter took advantage of the suggestion to mail their
21 completed ballot to the witness after a video chat, would that
22 witness then mail the ballot back to the voter or would that
23 person, the delivery guy or whoever else, have to be trusted to
24 drop the ballot in the mail?

25 A So I think this needs to be clarified a little bit. We're

1 talking about the certificate, not the ballot itself. The
2 ballot itself shouldn't be transmitted. It would be the
3 certificate that the witness is signing. The voter maintains
4 the ballot.

5 Q Understood.

6 And this certificate envelope would be signed and then
7 mailed back to the voter?

8 A Under the scenario, yes.

9 Q Okay. And that would take several extra days, correct, in
10 order to complete the process, mail it back to the voter, wait
11 24 hours for decontamination on both ends, and then the voter
12 would be able to seal it up and mail it in, correct?

13 A The same postal requirements would apply to this as the
14 other transactions we've discussed.

15 Q Thank you. I wanted to direct your attention to step 8, if
16 we could scroll back down, Your Honor. Thank you very much.

17 Step 8 says, "The voter washes" -- actually I wanted to
18 direct your attention to three steps here. Step 8 says, "The
19 voter washes or sanitizes their hands and then retrieves the
20 signed certificate envelope."

21 Step 9 says, "The voter takes extra care not to cough on
22 balloting materials and places the marked ballot into the
23 envelope."

24 Step 11 says, "By the time the clerk receives the ballot,
25 any potential contamination will be degraded."

1 All three of those steps say what I just read, correct?

2 A Yes, they do.

3 Q And previously you recall we discussed step 3's
4 recommendation to leave the ballot untouched for 24 hours to
5 protect the witness, correct?

6 A Yes, that's correct.

7 Q Does this guidance recommend a 24-hour period of
8 decontamination after the delivery person or mailman handles it
9 to sign?

10 A I'm not sure I understand your question.

11 Q Sorry. I'll rephrase. So after -- if it's in person, I
12 mean the delivery person is standing on the front doorstep, they
13 pass back the certification envelope in some way or just leave
14 it on the doorstep, does this guidance recommend that the voter
15 leave that certification envelope untouched for 24 hours?

16 A Thank you for the clarification.

17 So in our discussions with the public health official, this
18 was presented in a way that it assumed, again, that the voter is
19 quarantined, so they may already have been exposed or have
20 COVID-19. And so this guidance was -- it was to protect the
21 witness more so than the voter that may be quarantined from
22 exposure from the witness.

23 Q Why is that?

24 THE COURT: Why was -- you're saying why was the focus
25 of the memo on the witness as opposed to on the voter beyond

1 what was just described, which was an expectation that it would
2 be the voter who needed to be -- I'm sorry, the witness who
3 would need to be protected from an isolated voter. Is there any
4 other reason why you did it that way, Ms. Wolfe?

5 THE WITNESS: No. That's correct, Your Honor.

6 BY MR. SHERMAN:

7 Q On page 3, if we could go to page 3, in the *Overview* --
8 sorry. On page 3 it says, "Voters may also be able to drive to
9 a meet-up spot to observe or witness through their vehicle
10 windows."

11 Sorry. I must have the page wrong. I think this is page 1.
12 It's definitely up on the document. Let me see if I can locate
13 this real quick.

14 Sorry. This is on page 2. It's the fifth bullet point. My
15 apologies. Fifth bullet point on --

16 THE COURT: It was there. Just go down one more bullet
17 point to 5.

18 MR. SHERMAN: So bullet point 5 --

19 THE COURT: Is it -- I'm sorry. It's bullet point 5?

20 MR. SHERMAN: Bullet point 5, Your Honor, yes --

21 THE COURT: Go ahead.

22 MR. SHERMAN: -- on the page we're on.

23 BY MR. SHERMAN:

24 Q "Voters may also be able to drive to a meet-up spot to
25 observe or witness through their vehicle windows."

1 How would this work in practice for -- and limit
2 transmission of COVID-19?

3 A So following the other practices that are outlined below,
4 in these discussions where voters have brought to our attention
5 they utilized this process, they may drive to a park or other
6 location, park next to one another. The voter could pass the
7 certificate to the witness through a crack in the window. The
8 witness could retrieve it. Again, they should both sanitize
9 their hands before the transaction in accordance with the other
10 directions. The voter would then mark their ballot with their
11 window closed while the witness signs and fills out the
12 certificate, and then again the witness would exchange the
13 certificate back to the voter through the crack in the window
14 therefore not -- still having that physical barrier between
15 them.

16 Q If there's a crack in the window, is that a sufficient
17 barrier for the transmission of COVID-19?

18 A Again, this was discussed with the public health official,
19 and we -- they thought that if these practices were followed, it
20 could be a safe transaction.

21 Q And given your knowledge of Emergency Order No. 12,
22 wouldn't this constitute a public gathering that's with people
23 outside of one's household that's barred by the emergency order?

24 THE COURT: I'm just -- Mr. Sherman, I appreciate
25 you're trying to develop certain facts through this witness, but

1 I think we're falling astray of what she's competent to testify
2 about.

3 MR. SHERMAN: Understood, Your Honor. I'll move on.

4 BY MR. SHERMAN:

5 Q And just, lastly, on this point, could most elderly voters
6 or people living with disabilities engage -- take advantage of
7 this suggestion to meet up at a spot, drive to a meet-up spot?

8 A Again, that's relevant to specific voters' individual
9 circumstances. I can't speak to the condition of all voters and
10 their access.

11 Q Understood.

12 On page 1 in the *Overview* section, it says, "This process
13 serves as verification that the voter who requested the ballot
14 is the person who actually received and voted the ballot"; is
15 that correct?

16 Can we scroll up, Your Honor, to page 1? Thank you very
17 much.

18 For -- do you see where it says that? It's in the --

19 A Yes, I do.

20 Q You see it. Okay. Thank you.

21 And this is consistent with the language for the witness
22 certification on EL-122, the absentee ballot certificate,
23 correct?

24 A I believe so, although I do not have it in front of me.

25 MR. SHERMAN: Your Honor, if we may, could I ask that

1 Exhibit 52 be shown on the screen?

2 THE COURT: You may.

3 MR. SHERMAN: Thank you.

4 BY MR. SHERMAN:

5 Q If we could scroll down, please, to the witness
6 certification -- or the witness and voter certification. If we
7 could show both the witness and voter certification. Thank you.
8 Sorry.

9 Reading these two certifications that -- well, sorry. I
10 should back up. What is this document that you're looking at?

11 A This is the absentee ballot certificate.

12 Q And this appears to be a true and accurate copy, correct?

13 A Yes, it does, although typically it would be printed on an
14 envelope.

15 Q Understood.

16 MR. SHERMAN: And, Your Honor, if I may, could I ask,
17 please, that Exhibit 52 be moved into evidence?

18 THE COURT: It is admitted.

19 MR. SHERMAN: Thank you, Your Honor.

20 BY MR. SHERMAN:

21 Q In reading the language of the voter certification and the
22 witness certification, isn't it true that the witness has to
23 have knowledge of who the voter is and be able to confirm that
24 fact in signing the witness certification? You can take a
25 minute to read the two certifications.

1 A Yes, that would be correct.

2 Q Would a UPS or Instacart delivery person or some other -- a
3 mailman, have that knowledge of who the voter is even if they
4 appear at their home or at their apartment?

5 A They would have to know enough to be able to deliver that
6 package accurately.

7 Q In delivering a package, do they definitely know that the
8 person at the door is who they say they are? They're just
9 trusting their word, correct?

10 A I suppose it would --

11 MR. LENZ: Objection, Your Honor.

12 THE COURT: Well, I'm -- you can answer the basic
13 question, but I do think we are getting back down into the
14 weeds, Mr. Sherman, of argument.

15 But you can answer the question if you're able to.

16 THE WITNESS: It would depend on the type of
17 transaction they were conducting.

18 THE COURT: So, in other words, a regular messenger,
19 someone who has delivered pizza 20 times to the same person at
20 the same address, they might have developed that familiarity.
21 Otherwise they might not.

22 Mr. Sherman, you should ask your next question.

23 MR. SHERMAN: Understood. I just have a few more, Your
24 Honor, and then I'm going to wrap up.

25 THE COURT: All right. That's fine.

1 BY MR. SHERMAN:

2 Q Ms. Wolfe, in just summing -- wrapping up for this --
3 sorry. I should go back to Exhibit 51, the guidance, if I
4 could.

5 Ms. Wolfe, in light of what we've discussed here, I just
6 wanted to ask as an overall point, is this guidance reasonable?
7 Does it provide reasonable access to voters and a reasonable
8 alternative to comply with the witness signature requirement?

9 MR. LENZ: Same objection, Your Honor.

10 THE COURT: You can answer the question.

11 THE WITNESS: It provides guidance that meets the
12 statutory requirements and the guidance provided by the public
13 health official.

14 BY MR. SHERMAN:

15 Q Understood.

16 What purpose does the witness certification serve in your
17 view?

18 A As stated in the memo and in the certification language,
19 it's to verify the voter marked the ballot.

20 Q Is it difficult to forge a signature that would evade
21 detection?

22 A I don't analyze signatures. I can't answer that question.

23 Q Do you know of instances where the witness certification
24 has helped law enforcement identify and prosecute fraud in
25 Wisconsin?

1 A I'm not aware of specific cases where that was used.

2 Q Understood.

3 MR. SHERMAN: With the Court's permission, I have just
4 one other exhibit I wanted to show Ms. Wolfe and just --

5 THE COURT: Go ahead.

6 MR. SHERMAN: -- one question.

7 THE COURT: What exhibit?

8 MR. SHERMAN: Exhibit 54, please, Your Honor. Thank
9 you.

10 THE COURT: Yep.

11 MR. DEVANEY: Your Honor, while we're pausing, could I
12 mention that I received an email saying that the public audio
13 line is not working.

14 THE COURT: We'll look into that on our end.

15 MR. DEVANEY: Thank you, Your Honor.

16 BY MR. SHERMAN:

17 Q Ms. Wolfe, could you identify the document that you're
18 looking at here?

19 A (No response.)

20 Q If you can.

21 A (No response.)

22 Q What does it appear to be?

23 A I'm sorry. Did you ask -- was that directed towards me?

24 Q Yeah. I'm sorry. Yes.

25 THE COURT: If you can look at this document, do you

1 recognize what this is?

2 THE WITNESS: I'm sorry. No, I do not.

3 BY MR. SHERMAN:

4 Q What does it appear to be?

5 THE COURT: Well, why don't you just represent to the
6 witness what you say it is, Counsel, and let's move along.

7 BY MR. SHERMAN:

8 Q All right. This is a document from the U.S. Census Bureau.
9 It's a table of facts on household size for Wisconsin. It comes
10 from the 2013 to 2017 *American Community Survey 5-Year*
11 *Estimates*. Can you see --

12 THE COURT: All right. And what's the question you had
13 for the witness?

14 BY MR. SHERMAN:

15 Q Can you see that there are more than 600,000 people who
16 live in a single-person household in Wisconsin according to this
17 document?

18 A I have no familiarity with this chart --

19 THE COURT: That's not the question, Ms. Wolfe, and I
20 appreciate this is new to you, but do you see at the line under
21 *Household Size*, 1-person household for Wisconsin of 675,580? Do
22 you just see that?

23 THE WITNESS: Yes, I do.

24 THE COURT: Next question, Mr. Sherman.

25 BY MR. SHERMAN:

1 Q And if we could scroll down just to where it shows the ages
2 of folks?

3 THE COURT: And, Mr. Sherman, you're welcome to make
4 this argument to me, but unless you have a specific question of
5 the witness, we're not going to just start introducing what you
6 think are key pieces of evidence.

7 MR. SHERMAN: All right. This was just my -- I just
8 wanted to ask her whether she expected a certain percentage of
9 folks, especially the elderly who live alone, to be able to use
10 this guidance based on the numbers, but Your Honor has the
11 document, so I can, you know, abandon this line of questioning.

12 THE COURT: Well, you can ask that question. Do you
13 understand the question, Ms. Wolfe?

14 Do you anticipate that those in the elderly demographic will
15 be able to follow the guidance not on Exhibit 54 before you but
16 on the other Exhibit 52 that you were talking about?

17 THE WITNESS: Again, it would be my belief that it
18 would depend on the individual. I have -- I can't speak to this
19 entire demographic of people and their aptitudes.

20 THE COURT: Understood.

21 Anything else, Mr. Sherman?

22 MR. SHERMAN: No further questions. Thank you, Your
23 Honor.

24 THE COURT: All right. Then, Mr. Poland, are you
25 batting cleanup?

1 MR. POLAND: I am, Your Honor. Thank you.

2 Your Honor, before I begin, would it be an appropriate time
3 to suggest a break --

4 THE COURT: Nope, it would not, but you're welcome --

5 MR. POLAND: I will begin.

6 THE COURT: -- to proceed.

7 MR. POLAND: Thank you, Your Honor.

8 ADVERSE EXAMINATION

9 BY MR. POLAND:

10 Q Ms. Wolfe, my name is Doug Poland. I'm an attorney for one
11 of the three plaintiff groups. I'm going to be focusing my
12 questions on in-person voting as opposed to absentee vote.

13 (Phone ringing.)

14 MR. POLAND: I apologize for that. That is my --

15 THE COURT: That's fine. Do you have a question for
16 the witness?

17 MR. POLAND: I do, Your Honor. That's my line that's
18 ringing.

19 BY MR. POLAND:

20 Q Yes. I'd ask that Exhibit 102 be shown to the witness,
21 please.

22 THE CLERK: I'm sorry, sir. Could you repeat that?
23 Which exhibit?

24 MR. POLAND: Exhibit No. 102.

25 THE COURT: 102. It's docket 169, Joel.

1 All right. I believe that's in front of you now. Can you
2 see that, Ms. Wolfe?

3 THE WITNESS: Yes, I can. Thank you.

4 THE COURT: Question, Mr. Poland.

5 MR. POLAND: Thank you, Your Honor.

6 BY MR. POLAND:

7 Q Ms. Wolfe, you mentioned that there was an elections
8 committee meeting yesterday, correct?

9 A There's been one most days, so, yes, there was one
10 yesterday as well.

11 Q And do you see Exhibit 102 on the screen in front of you?

12 THE COURT: She said she does. What's the question?

13 BY MR. POLAND:

14 Q Do you recognize the document?

15 A Yes, I do.

16 Q What is the document?

17 A It's a Wisconsin Elections Commission meeting agenda for
18 Tuesday, March 31st.

19 Q I'll represent to you that this is a 15-page document that
20 contains a number of memorandums attached to it, but I'll refer
21 to it as a packet. Is that fair?

22 THE OPERATOR: All participants are now in listen-only
23 mode.

24 MR. POLAND: I'm sorry. I didn't hear that.

25 THE COURT: No, that's fine. For the record, hopefully

1 that interruption indicates that individuals are again able to
2 listen on telephone or by telephone, and we will continue.

3 Did you get the question, Ms. Wolfe?

4 THE WITNESS: Yes, I did. I believe you were asking if
5 I recognized this document, which I do, as the Election
6 Commission agenda from Tuesday, March 31st.

7 BY MR. POLAND:

8 Q And I'll represent to you, Ms. Wolfe, that this is a
9 15-page document that has attached to it a number of different
10 memorandums. Is that fair?

11 A Yes, that's fair.

12 Q All right. And you're familiar with this document,
13 correct, the entire packet?

14 A Yes, I put it together myself.

15 Q And does this appear to be a true and correct copy of the
16 packet put together for the Elections Commission meeting
17 yesterday?

18 A Yes, it does.

19 Q Is this the type of document that you typically prepare and
20 maintain in the ordinary course of your job in the Elections
21 Commission's business?

22 A Yes, it is.

23 MR. POLAND: Your Honor, I will move Exhibit 102 into
24 evidence.

25 THE COURT: I will admit it.

1 MR. POLAND: Thank you, Your Honor.

2 I'd ask that the exhibit be scrolled down to page 12.

3 BY MR. POLAND:

4 Q Ms. Wolfe, do you see page 12 in front of you?

5 A Yes, I do.

6 Q This is a memorandum that was written for the March 31st,
7 2020, commission meeting, and the subject line says "Polling
8 Place Supply and Personnel Shortages." Do you see that?

9 A Yes, I do.

10 Q Was this a memo that you wrote?

11 A Along with other staff in my office, yes.

12 Q And do you see there's a chart in the middle of the page?

13 A Yes.

14 Q I believe a short time ago you testified that there were,
15 the most recent number you had, that there were 111
16 jurisdictions that did not have even one polling place they
17 could staff, correct?

18 A Yes, that's correct.

19 Q And that's the number that's reported on this page of
20 Exhibit 102, correct?

21 A Yes.

22 Q Now, in addition, there are 126 jurisdictions where they
23 cannot staff all polling places, correct?

24 A Yes, that's correct.

25 Q Would you please display the very last page of this

1 document.

2 There should be one more page. There we go. Thank you.

3 Ms. Wolfe, do you see on page 15 of Exhibit 102 a map
4 displayed in front of you?

5 A Yes, I do.

6 Q And this depicts the municipal worker shortage, critical
7 and serious, in considering shortages of poll workers throughout
8 the state, correct?

9 A Yes, this weighs critical and serious categories we defined
10 in the survey.

11 Q Thank you. And those are scattered throughout the entire
12 state, correct?

13 A Yes, that's correct.

14 Q Those places that have serious shortages of poll workers
15 include Milwaukee, Madison, and Green Bay, correct?

16 A I'm sorry. I do not have the specific jurisdictions, just
17 sort of the geographical location represented on the map.

18 Q Do you know whether there are serious shortages in
19 Milwaukee, Madison, and Green Bay of poll workers?

20 A I'm sorry. Again, I do not know. I don't have the
21 specific jurisdictions represented.

22 Q All right.

23 THE COURT: You don't have any reason to doubt that
24 each of those locations are experiencing some issues based on
25 the affidavits that have been submitted in this case?

1 THE WITNESS: I believe the representation of the
2 locals in terms of their poll worker needs, yes.

3 THE COURT: Thank you.

4 Next question.

5 BY MR. POLAND:

6 Q Those cities are making significant consolidations in the
7 number of polling places, correct?

8 A I believe --

9 THE COURT: "Those cities" meaning Madison, Milwaukee,
10 and Green Bay, Mr. Poland? Is that your question?

11 MR. POLAND: Yes, Your Honor.

12 THE COURT: Do you know the answer to that question,
13 Ms. Wolfe?

14 THE WITNESS: I do not know exactly all three of those
15 jurisdictions' plans specifically. Every day we see media
16 reports and whatnot on consolidations. I'm not sure the exact
17 status of those three cities.

18 THE COURT: But if that's what they represent, you
19 don't have any reason to dispute it, correct?

20 THE WITNESS: That's correct.

21 THE COURT: Mr. Poland, go ahead.

22 MR. POLAND: I will skip a few questions, Judge.

23 BY MR. POLAND:

24 Q Now, Ms. Wolfe, Section 5.25 of the Wisconsin Statutes
25 prohibits the consolidation of polling places except by

1 resolution adopted no less than 30 days before an election,
2 correct?

3 A That's correct.

4 Q And so if there is continuing consolidation of polling
5 places, that would not be in conformance with state statutes,
6 correct?

7 A There are also provisions for emergency changes needed on
8 election day, and our commission has discussed this
9 consolidation inside of those time parameters.

10 Q And do you know whether those comply with the emergency
11 statute?

12 THE COURT: You mean as a matter of the law or in her
13 view? I'm not sure I understand the question, Mr. Poland.

14 MR. POLAND: Yeah, I would ask in her view, Your Honor.

15 THE COURT: Would the current situation in the view --
16 in your view or the view of the Commission satisfy the emergency
17 requirements of that section?

18 THE WITNESS: Yes, Your Honor. The Commission has
19 considered this issue and in light of the current crisis
20 believes that consolidation or changing polling places may, of
21 course, become necessary, and that the -- has prescribed
22 procedures for the clerks to conduct that process and alert
23 their voters.

24 BY MR. POLAND:

25 Q Is it fair to say -- I'm sorry.

1 THE COURT: Go ahead. No, go ahead. Sorry.

2 BY MR. POLAND:

3 Q Is it fair to say, Ms. Wolfe, that rapidly and continually
4 consolidating polling places will cause confusion among voters
5 who must now go to a different polling place?

6 A We've prescribed procedures for the municipalities to,
7 again, alert their voters, such as posting notice on former
8 polling places so that voters are aware of where to go on
9 election day. We've also discussed with them the procedure for
10 the statewide database, to update those plans immediately so
11 they can display on the MyVote Wisconsin website and other voter
12 lookup tools that we provide official data to.

13 Q And, Ms. Wolfe, the changes that are pushed out on the
14 polling places, pushed out to MyVote online, people without any
15 internet access will not have access to the MyVote website,
16 correct?

17 A They would not have access to MyVote but would have access
18 to public notices on the former polling place facilities or
19 places like city hall.

20 Q If they know to go there to find them, correct?

21 A Correct.

22 Q Has the Elections Commission made any analysis of the
23 impact on minority voters of consolidating so many polling
24 places into relatively few polling places?

25 A We have not done such analysis.

1 Q As you sit here today, do you know the impact of
2 consolidation of polling places in the cities of Milwaukee,
3 Madison, Green Bay, and Racine on the ability of minority voters
4 to vote?

5 A I do not know the impact.

6 Q Ms. Wolfe, are you aware of other -- of statutes that are
7 not being complied with as a result of some of the procedures
8 that are being changed to try to accommodate in-person voting
9 under the current situation?

10 A I just need to think for a minute. The Commission has
11 considered a great deal of guidance and documentation over the
12 last few days and weeks. I believe that they have adapted what
13 the process looks like in some cases for in-person voting on
14 election day but that it still required that the law -- the
15 requirements of the statute need to still be met, although they
16 may look different than they have in previous elections.

17 Q So, for example, are you familiar with Statute Section 6.80
18 that provides that each polling site in an election contains a
19 private voting booth where voters must cast their ballots?

20 A Yes.

21 Q All right. And you testified a little earlier that --
22 actually strike that question.

23 Different question: Are you familiar with curbside voting
24 that is going on in some municipalities?

25 A There's a statutorily required curbside process, but then

1 we also have heard about sort of drive-up or drive-through
2 processes, which are just more or less outdoor locations. But
3 curbside is a very specific set of requirements in the statute,
4 so not to be conflated with other polling places that may just
5 be moved outdoors.

6 Q Are there situations you've heard of that wouldn't comply
7 with the requirements of Section 6.80?

8 A I am not aware of any situations currently in use that
9 wouldn't comply with that statute.

10 Q Are you familiar with Statute Section 7.37, which provides
11 that two inspectors shall be assigned to have charge of the
12 polls at each election?

13 A I don't have it in front of me, but I have a general
14 familiarity with that statute, yes.

15 Q With the consolidation of polling places to include up to
16 perhaps 20 wards per team of poll workers, would that
17 potentially violate the statute?

18 A In our guidance and discussion of consolidated polling
19 places, the Commission still believes in the guidance they've
20 approved that when polling places are consolidated, that they
21 still need to meet the requirements of the law, and that would
22 include having representatives from each of the reporting units
23 represented as part of that process.

24 Q Are you familiar with Statute Section 5.35(2) that says
25 that there shall be one voting booth for every 200 electors who

1 voted in the last general election?

2 A Again, I have general familiarity, although it's not in
3 front of me.

4 Q Okay. And would the consolidation of locations of polling
5 places comply with Section 5.35?

6 A It would depend on the individual circumstances of the
7 polling place. I'm not sure.

8 Q One more question for you about the statutes, and that is
9 Statute Section 5.35, that's ballot boxes, and that provides
10 that where voting procedures make it necessary, there shall be a
11 separate ballot box for each form of ballot at each polling
12 place. There shall be a suitable lock and key for each and an
13 opening no larger than is sufficient to receive a single ballot
14 or single folded ballot if the box is used for deposit of paper
15 ballots. Are you familiar with that section?

16 A Again, I'm generally aware of that statute, yes.

17 Q Do the drop boxes that are being used comply with that
18 statutory section?

19 A I'm sorry. I don't quite understand your question.

20 Q The procedures that are being used now for drop boxes,
21 would they comply with the requirements of Section 5.35 on
22 ballot boxes?

23 A Ballot boxes apply to election day. Drop-off locations are
24 where voters are depositing their ballot prior to election day
25 to be brought to their polling place.

1 Q Are you familiar with the canvassing statutes in Wisconsin?

2 A I am generally aware, yes.

3 Q Okay. So you're aware of the statutes that govern the
4 local board of canvassers, municipal canvass, the county
5 canvass, and the state canvass. Is that fair to say?

6 A Yes.

7 Q And there are -- there are date deadlines. They proceed in
8 that progression, correct, local board, municipal canvass,
9 county canvass, and then state canvass, correct?

10 A That's correct.

11 Q And each step in the canvassing -- and for the record,
12 those statutes are found at Section 7.51, 7.53, 7.60, and 7.70.

13 Ms. Wolfe, is it possible -- strike that question.

14 At each step in the canvassing procedure, the board must
15 certify the results of the election before it passes it on to
16 the next step in the process, correct?

17 A That's correct.

18 Q Is it possible that a canvassing board will not certify the
19 election results to the Elections Commission if they find that
20 votes have not been counted or that there are other
21 irregularities with the processes being used?

22 A I'm not aware of a time that that situation has occurred.
23 They would need to reconcile the issue and then certify.

24 Q Have you read that -- have you read that concern that's
25 been raised by any of the county clerks?

1 A I'm sorry. I'm not aware of that specific concern.

2 Q Now, the Elections Commission does not dispute that courts
3 have the authority to order changes in elections when the facts
4 merit such orders, correct?

5 A Could you please repeat the question?

6 Q Sure. And I'll give you the reference. There was a brief
7 that was filed. For the record, this is docket 155, and this is
8 from page 6.

9 The Elections Commission does not dispute that courts have
10 the authority to order changes in elections when the facts merit
11 such orders; is that correct?

12 A I believe so, although I don't have it in front of me.

13 Q Ms. Wolfe, if the Court were to allow greater time for
14 casting in-person absentee ballots, that would allow people who
15 don't have internet access a better opportunity to cast an
16 absentee ballot, correct?

17 MR. LENZ: I'll object to the term "better
18 opportunity."

19 THE COURT: Overruled.

20 Do you understand the question, Ms. Wolfe?

21 THE WITNESS: In so much as I can say, again, it would
22 depend on the individual circumstance and voter behavior of how
23 they're conducting the process.

24 THE COURT: But certainly at this point for someone
25 who's facing the deadline tomorrow to request a ballot, those

1 who have internet access are in a much better chance of
2 accomplishing that than those who are going to have to rely on
3 the mail, correct?

4 THE WITNESS: That may be the case in terms of a
5 quicker transaction.

6 THE COURT: And turnaround by mail of both the ballot
7 and then mailing it back.

8 THE WITNESS: Correct.

9 THE COURT: Next question.

10 MR. POLAND: Thank you, Your Honor.

11 BY MR. POLAND:

12 Q Ms. Wolfe, to the extent that people take advantage of
13 voting by in-person absentee ballots, assuming the Court does
14 not postpone the election, that would ease congestion at the
15 polls, correct?

16 THE COURT: I don't understand that question, Mr.
17 Poland. Could you rephrase that?

18 MR. POLAND: Sure.

19 BY MR. POLAND:

20 Q If the Court were not to postpone the election, to the
21 extent that people take advantage of voting by in-person
22 absentee ballots -- well, actually, strike the question. I'm
23 sorry.

24 Ms. Wolfe, to the extent that statutes regarding canvassing
25 and certification of the results of the election -- strike that

1 question too.

2 Ms. Wolfe, it's true, isn't it, that, in your opinion, it's
3 likely that without relief from the Court, a substantial number
4 of Wisconsin voters will be disenfranchised, correct?

5 MR. LENZ: Objection, Your Honor.

6 THE COURT: I'll sustain the objection as phrased. Why
7 don't you try it again, Mr. Poland.

8 BY MR. POLAND:

9 Q Is it fair to say, Ms. Wolfe, in your opinion, that unless
10 the Court orders some kind of changes in conjunction with the
11 April 7th election, a substantial number of Wisconsin voters
12 will not be able to vote or will not have their votes counted;
13 is that fair to say?

14 MR. LENZ: Same objection.

15 THE COURT: I'll allow you to answer the question if
16 you're able to, Ms. Wolfe.

17 THE WITNESS: I'm sorry, but it is not my job to have
18 opinions, so I can't assume --

19 THE COURT: Let me try a different way. The Commission
20 has now indicated that they wouldn't object to extending the
21 absentee ballot postmark to the date of the election and to
22 receiving ballots up to April 13. I assume that's because they
23 anticipate a substantial number of last-minute absentee ballot
24 voters, correct?

25 THE WITNESS: Yes, that's correct.

1 THE COURT: And if I weren't to extend it by those
2 dates, then there are at least some, if not many, absentee
3 ballots that will not be counted on election day, correct?

4 THE WITNESS: The extended period would certainly allow
5 more ballots to make it back in time.

6 THE COURT: Understood.

7 Anything else, Mr. Poland?

8 MR. POLAND: One more question, Your Honor.

9 BY MR. POLAND:

10 Q Ms. Wolfe, it's fair to say, isn't it, that the Elections
11 Commission itself is deeply divided on the issue of
12 postponement; half the Commission is in favor of postponement
13 and half is not?

14 A I'm sorry. I don't have the exact voting patterns of the
15 Commission in front of me.

16 THE COURT: It's fair to say that on this subject, that
17 is, the April 7th election, you've had a lot of split votes,
18 3-3, correct?

19 THE WITNESS: That is correct.

20 MR. POLAND: One final question, Your Honor.

21 BY MR. POLAND:

22 Q Ms. Wolfe, what is the plan if no poll workers show up in a
23 jurisdiction on election day?

24 A We're currently continuing to expand our guidance to clerks
25 about exactly that question. As we've discussed before, we do

1 have established training protocols for them to be able to,
2 let's say, consolidate with a neighboring town in the event of
3 an emergency. We've also been discussing with them
4 opportunities to perhaps have people on stand-by that can serve
5 in that capacity if someone is unavailable on election day, and
6 as we've also heard, there's been discussions about having a
7 pool of people that we're able to deploy in the event of an
8 emergency need, and so we stand ready, again, to train a
9 potential pool of individuals that could be deployed if the need
10 arises.

11 Q So there is no plan at this moment, correct?

12 A For that additional pool, there is no plan at this moment,
13 correct.

14 MR. POLAND: Thank you, Your Honor. No further
15 questions.

16 THE COURT: All right. Ms. Wolfe, I'd like to go until
17 3:30 before we take a break, but I'm happy if you'd prefer to
18 take a break now. We can do that.

19 THE WITNESS: I'm just fine. Thank you, Your Honor.

20 THE COURT: All right. Then I'll then leave it to you,
21 Mr. Strawbridge, to ask your questions.

22 MR. STRAWBRIDGE: Sure, and I hopefully only have just
23 a couple of minutes of questions here.

24

25

1 A I do not have any reason to believe that, no.

2 Q Okay. Has the United States Postal Service actually
3 advised the Election Commission that first-class mail in the
4 state of Wisconsin right now, in fact, is taking up to seven
5 days to be delivered?

6 A So we have had some contact with the postal service.
7 Again, it can depend on region in terms of guidance, but I've
8 actually -- over the course of the last few years, we've been in
9 contact with the national representatives of the USPS, and,
10 again, this has been their guidance for voters over the course
11 of the last few years.

12 Q And it hasn't changed with respect to the last few weeks?

13 A I'm not aware of any specific change in the last few weeks,
14 no.

15 Q Okay. The guidance that you were shown earlier that the
16 Elections Commission issued with respect to people who were
17 living alone and needed to obtain -- or, I'm sorry, who were
18 quarantined and needed to obtain a witness signature -- do you
19 recall that line of questioning?

20 A Yes, I do.

21 Q Okay. You testified that was developed specifically for
22 people who are alone in a quarantine situation, correct?

23 A That's correct.

24 Q Those procedures don't necessarily apply to the people who
25 are living in the household with someone who could provide the

1 witness signature themselves, correct?

2 A That's correct.

3 Q Okay. Has any municipality advised you that they have
4 canceled in-person voting in this election?

5 A Could you please clarify? Election day or prior to
6 election day?

7 Q Election day.

8 A I am not aware of any jurisdictions that will not be
9 providing election day voting opportunities.

10 Q And for people who are voting by absentee ballot who for
11 whatever reason do not have access or cannot obtain a witness
12 signature in their location, is it your understanding that some
13 municipalities are, in fact, providing witness verification
14 services at clerks' offices or potential curbside absentee
15 ballot locations?

16 A I'm not aware of that particular circumstance that you
17 present. If a person is voting in-person absentee, there's a
18 whole different process for that.

19 Q Okay. In that case do they need to obtain a separate
20 witness verification from another person or can they do that at
21 that location?

22 A If they're doing in-person absentee, the municipal clerk or
23 their designee is serving as the witness.

24 MR. STRAWBRIDGE: All right. I have no other
25 questions.

1 THE COURT: All right. Any clarification, Mr. Lenz?

2 MR. LENZ: Very briefly, Your Honor. Thank you.

3 CLARIFICATION EXAMINATION

4 BY MR. LENZ:

5 Q Ms. Wolfe, in testimony with the Court, you indicated that
6 historically about one half of absentees that are sent out to
7 voters are returned. Has the Commission performed any analysis
8 or do you have any personal belief as to whether or not that
9 number will be the case in this election?

10 A I do not, and I also should clarify. I may have misstated.
11 I apologize. I have some notes in front of me, and in 2012 and
12 2016, about 80 to 85 percent of ballots that were requested --
13 or were issued were returned by voters. So I apologize for
14 misstating that.

15 THE COURT: And, I'm sorry, could you give me those
16 statistics again?

17 THE WITNESS: Sure. In the 2012 and 2016 presidential
18 preference, 80 to 85 percent of ballots that were issued were
19 returned by the voters.

20 THE COURT: And I take it you still don't know what
21 percent were received after election day.

22 THE WITNESS: I'm sorry, Your Honor, I do not. Other
23 than that statistic I provided earlier, I don't have any other
24 numbers.

25 THE COURT: Would you expect that 80 to 85 percent that

1 you're quoting for those two elections were only those that were
2 actually counted or could it include some that arrived late and
3 were not allowed to be counted?

4 THE WITNESS: Thank you for the clarification, Your
5 Honor.

6 It was those that were arrived in time to be counted or that
7 were counted.

8 THE COURT: Thank you.

9 Anything else, Mr. Lenz?

10 MR. LENZ: Yes. Thank you, Your Honor.

11 BY MR. LENZ:

12 Q You also briefly discussed supplies that have been sent to
13 local municipalities. Could you provide an update from probably
14 your most recent declaration as to what the status of those
15 supplies are and what supplies are being sent out?

16 A Sure. So right now as we speak there are supplies being
17 prepared to be sent to regional armories for counties to collect
18 to distribute to their municipalities. Among those supplies are
19 a 70 percent alcohol -- liquid alcohol solution, spray bottles
20 for that solution to be used on hands and surfaces. We're also
21 providing copies of the signs that we produced -- the public
22 health signs that we produced. We'll be providing tape for
23 marking the floors for six-foot distances and for hanging the
24 signs. We're also going to be providing isopropyl wipes for
25 voting equipment and touch screens, and we did just find out

1 that there is also going to be some masks included as part of
2 that shipment. We had previously asked for masks but had been
3 told that they were only available to medical professionals at
4 this time and weren't advised for elections, but it sounds like
5 they did find some that will be included in those shipments
6 today. Again, it's expected those will be delivered at regional
7 armories for the county clerks to collect and then distribute
8 those to polling places.

9 Q Do you know how many masks are part of that?

10 A I believe it's about 25,000.

11 Q Are you conducting -- is the Commission and staff
12 conducting any additional trainings above and beyond what would
13 be normal for a spring election and presidential primary?

14 A Yes. We are providing many additional opportunities for
15 training on the specific COVID-19 crisis, including webinars on
16 public health guidance and procedures that can be adapted.
17 We've also recorded a number of videos, and today, like I
18 mentioned, we're holding three live question-and-answer sessions
19 with municipal election officials to make sure that they
20 understand how to incorporate this guidance. We're also sending
21 out in paper form the guidance and the checklist to all the
22 municipalities as part of today's shipment, so for those of them
23 that may not have had an opportunity to check their email or our
24 other webinars and guidance, they'll also receive that in paper
25 form. And we have many, many, many guidance documents that

1 we've produced and that are available through our recent clerk
2 communications where we communicate to them about guidance and
3 materials as well as on the Election Commission's COVID-19 page.

4 Q And do you anticipate continuing to provide live guidance,
5 webinars, question/answer sessions between now and the date of
6 the election?

7 A Anytime something changes, we will provide guidance to the
8 local election officials and adapt to the situation. That being
9 said, the closer we get to election day, they're very busy, and
10 so we try not to bombard them with additional things unless it's
11 a critical change.

12 Q Okay. I have one last point of clarification, which is in
13 Exhibit 102, which is the exhibit -- we don't need to bring it
14 up -- but the exhibit in which -- the memorandum dealing with
15 critical and serious limitations on poll workers -- do you
16 remember that testimony and that exhibit?

17 A Yes, I do.

18 Q Okay. Of the -- in that exhibit you identified 126
19 jurisdictions that cannot staff all polling places. Just for
20 everyone's clarification, what does "all" mean in that
21 definition? Let me know if that question doesn't make sense.

22 A Sure. So when we initially sent the survey, it was based
23 on the election plans that they entered, which is usually long
24 before the election. So usually -- well, it would be more than
25 45 days before the election, jurisdictions enter what we call

1 their election plan into the statewide database that includes
2 setting the amount of polling places and locations of the
3 polling places, and so it was based on that plan, asking them if
4 they have staffing to staff their usual polling places for that
5 type of election.

6 Q Okay. So to be clear, if a jurisdiction has consolidated
7 their polling places and had sufficient staff to staff the
8 consolidated polling places, they may still appear to be in
9 serious need because they cannot staff what had been planned 45
10 days ago to be all of their polling places; is that correct?

11 A That's correct.

12 Q Okay. I apologize for the leading question.

13 And then to the extent you know, is there a specific type of
14 jurisdiction that is more likely or are you having more types --
15 more of one type of jurisdiction that has a critical or serious
16 need for poll workers?

17 A Based on those preliminary survey results, and, again,
18 they're changing constantly, we did see a lot of smaller
19 jurisdictions that perhaps -- well, they usually only have a
20 single polling location, and they may only have three poll
21 workers on election day because of the small size of their
22 jurisdiction, and so smaller jurisdictions were more prominent
23 in those preliminary results. I'm not sure exactly of the
24 municipal makeup of the current results.

25 MR. LENZ: Thank you. I have nothing further.

1 THE COURT: All right. Then, Ms. Wolfe, I am painfully
2 aware that we're keeping you from the hard work of making the
3 election happen. Regardless of what this court may do, that's
4 obviously your primary focus. So I do want to thank you again
5 for all that you're doing. I don't know what your salary is,
6 but based on your performance throughout this process, I'm
7 guessing you're grossly underpaid. I do appreciate the time you
8 spent with us, and you are relieved from any further
9 participation today.

10 (Witness excused at 3:21 p.m.)

11 THE COURT: And we will take our break at this time.
12 Why don't we plan on reconvening at 20 to 4:00. I'll hear
13 closing arguments first from the -- from plaintiffs' counsel.
14 I'm hoping that there will be some coordination again there.
15 And I would propose that you divide them up similar to your
16 questioning beginning with, if you intend to argue for it, a
17 basis for actually delaying the in-person election on April 7
18 and then the specific modifications that are proposed by
19 plaintiffs. I'll then hear argument for the intervening
20 defendant and for the WEC defendants and short rebuttal,
21 preferably by one member of the plaintiffs' group, but maybe you
22 can talk me into two.

23 With that said, we'll take our break, and I would suggest
24 that everyone just keep their mic muted and plan that we will
25 just come right back on this same call -- (inaudible).

1 And we are in break and off the record. Thank you.

2 MS. WOLFE: Thank you, Your Honor.

3 (Recess at 3:23 p.m. until 3:41 p.m.)

4 THE COURT: All right. We're back on the record, and I
5 will hear from the first to argue for the plaintiffs.

6 MR. DEVANEY: Thank you, Your Honor. John Devaney for
7 the DNC and the Wisconsin Democratic Party.

8 Your Honor, before I begin, I just wanted to ask a
9 clarifying question: Right at the break Your Honor suggested
10 that perhaps you wanted to hear from the parties who are
11 requesting postponement of the election first, but I want to
12 make sure I --

13 THE COURT: Well, that's a fair point. My
14 understanding is that at this point the DNC has gotten on board
15 for that requested relief, but it's not part of your complaint
16 or written submissions to date. It struck me that that might be
17 the order in which to do this, but I'm not going to insist on
18 it. If you're the one who is prepared to take the lead, I'll
19 let you do that on whatever subjects you want to address, and
20 then I'll hear from the others.

21 MR. DEVANEY: Thank you, Your Honor. In that case,
22 I'll go ahead and proceed.

23 And, Your Honor, I don't intend to go through the entire
24 *Anderson-Burdick* legal analysis. The Court is obviously very
25 familiar with that, and I want to really focus mostly on remedy.

1 But before I get to specific remedies, I really just -- I want
2 to emphasize the point that I think the defendants, despite
3 whatever good faith they're operating with, just are not
4 recognizing the harsh reality of the situation on the ground for
5 the voters. And in putting together our PI motion, we were in
6 touch with dozens of voters, city clerks, county clerks, and we
7 got a feel for what's actually happening out there, just how
8 very, very hard these circumstances are for voters.

9 Obviously -- and it goes way beyond voting, right? It's all of
10 our lives. But for voters, the issue before us, these are just
11 extraordinary obstacles that I don't think we've ever
12 encountered before, and the very, very modest relief that the
13 defendants are proposing to address the situation just fall way
14 short of reality, and I think that's the important backdrop to
15 bear in mind and that we've tried to emphasize in our papers.

16 And, you know, just as examples -- and when you look at the
17 *Anderson-Burdick* framework, it's hard to imagine a greater
18 burden on voting than the situation we have. We are talking
19 about absolute disenfranchisement of at least hundreds, and
20 probably thousands, of voters under the scheme that's currently
21 in place. And, you know, I could walk -- I will walk through
22 each of the proposed remedies, but the absentee ballot receipt
23 deadline alone is -- if left in place, and at least the
24 Commission has agreed to extend that, but even with that
25 extension, it's going to probably disenfranchise thousands of

1 voters.

2 And so the remedy in this case has to address the gravity of
3 the situation --

4 THE COURT: And is your position -- I'm sorry to
5 interrupt, Mr. Devaney, but is it your position that your burden
6 is to show thousands may be impacted as opposed to hundred
7 thousands?

8 MR. DEVANEY: No, no, Your Honor. You know, there's
9 case law that says literally if a single voter is
10 disenfranchised, under *Anderson-Burdick* that is satisfying our
11 burden.

12 THE COURT: Well, when you say that, Mr. Devaney, I'm
13 not sure that the case law -- there is case law that would
14 suggest that literally one voter being disenfranchised by virtue
15 of the COVID virus means you get relief in a statewide election.
16 As I've indicated already, I -- if the question were, as a
17 matter of public health, is this election a good idea, my
18 response personally would be no. From everything I've read, not
19 just what has been submitted but from popular press and medical
20 experts, Wisconsin is right on the edge of its exponential
21 explosion of COVID-19 disease, and probably the days from April
22 1st through the 15th are crucial, and April 7th falls in the
23 dead middle of that, so even, one would speculate -- and that's
24 all it would be -- even more crucial.

25 So I don't -- you know, defendants are welcome to argue

1 otherwise, but I don't think there's any question that there
2 will be voters probably who are discouraged from even getting an
3 absentee ballot, much less showing up in person and voting, and
4 if that's the test, then I probably would have to find that some
5 voters have been impinged, but I find it really hard to accept
6 that that's the test. I think for a statewide election to be
7 suspended by a federal judge or modified in a way that would
8 substantially affect it would require some real evidence that
9 the election itself has been wholly undermined, and I don't
10 think you're going to have that until election day. Because I
11 don't know -- I think it's quite possible that the risks
12 involved here are going to be such that the polls won't open
13 appropriately, and, if they do, will open in a way that will not
14 allow sufficient numbers to vote, or simply that sufficient
15 numbers won't vote. I don't know what would be worse, frankly,
16 that we get a good turnout and we spread this virus or -- but
17 that there's no constitutional claim or that we don't get it and
18 there is a constitutional claim. But I'm not sure it's my place
19 in advance to assume that the steps being taken by the state or
20 not being taken by the state are an impingement on an
21 individual's right to vote. That's what I'm struggling with.

22 And I certainly, for your benefit, agree that since the
23 Election Commission has made clear that extending the postmark
24 date to April 7th and the receipt date to April 13th is
25 something that's doable within the confines of the goal of

1 holding an election, that seems to me a reasonable step that we
2 can take that recognizes the risk or -- and impingement on
3 voters both in attempting to vote safely absentee or deciding,
4 without that possibility, not to vote in person.

5 Beyond that relief I feel like I'm tinkering with the
6 election in ways that changes its nature, and as much as I would
7 like our legislature and governor to stop the public health
8 risk, I'm not sure that the voting right is being sufficiently
9 impinged, because voters do have a fairly robust absentee ballot
10 option which has now been taken advantage of whether -- you
11 know, one of the questions after the fact will be was it taken
12 advantage of by enough people, but we have now over a million
13 people who have requested a ballot, and because an individual
14 voter, assuming these steps are taken, is going to be told that
15 it's safe for them to come and vote in person. And it may be
16 for an individual voter, and it comes down to a question of
17 whether they're willing to run any risk in this environment,
18 that if they keep their distance from everyone else, they go in
19 and simply register, if they have to, from a distance and enter
20 a ballot, that most of those people are not going to get
21 COVID-19. That seems to be where we're at, although it would
22 increase if you had a mask on, again, mostly because you won't
23 be touching anything. And if they wash their hands going in and
24 coming out and they don't touch their face, then I don't know
25 that the right that you're arguing from appropriately is

1 sufficiently impinged that I can say stop the election or
2 radically change what is required to vote.

3 MR. DEVANEY: Your Honor, I certainly hear you and --

4 THE COURT: And so we're clear, I'm not precluding you
5 from arguing otherwise, but when I was in practice, I
6 appreciated a judge telling me what it is that would move them,
7 so if I'm -- and that's what I'm doing for all parties. If I'm
8 missing something here, and I'm sure every attorney on this call
9 thinks I am, I'd be interested in hearing, as well as starting
10 from there what else you think I should be considering that's
11 appropriate, assuming we let the election go, or why my analysis
12 is inconsistent with the law. You won't offend me in the least
13 if you take either of those positions.

14 MR. DEVANEY: Well, thank you, Your Honor, and my
15 response is twofold.

16 The first is I want to emphasize I had talked about
17 disenfranchisement, but, of course, under *Anderson-Burdick* it's
18 not just disenfranchisement. It's a burden on voting and
19 obstacles to voting. It's not just --

20 THE COURT: Right.

21 MR. DEVANEY: And I think that's a very important legal
22 point to emphasize, and we have lots of evidence in the record
23 about the burdens on voting that Your Honor is aware of and in
24 addition to evidence of disenfranchisement, so that's my first
25 point.

1 My second point though, Your Honor, is you said earlier that
2 we won't know the harm, if you will, until the election actually
3 occurs or whether the election has been undermined, and that's
4 where I respectfully disagree.

5 THE COURT: Yeah.

6 MR. DEVANEY: I think that if you look at our
7 evidence -- and, you know, you hear Ms. Wolfe's testimony just
8 an hour or two ago about the fact that it's probable -- and Your
9 Honor helped with the math -- it's probable that, you know, tens
10 of thousands, potentially, of ballots are going to come in after
11 April 7th without a postmark before April 7th, and they're
12 just going to be --

13 THE COURT: But let's assume that that happens.

14 MR. DEVANEY: Right.

15 THE COURT: If that happens, thousands or tens of
16 thousands --

17 MR. DEVANEY: Right.

18 THE COURT: -- don't come in until a postmark of April
19 8th or April 9th, why wouldn't I grant relief at that point? If
20 it turns out that most people choose either to mail it by
21 election day or to deliver it to a polling booth by election day
22 and there's only a few thousand that come in after the fact,
23 maybe I still -- maybe I still grant that. Is it -- or, for
24 example, what if we continue to see these tremendous requests
25 for absentee ballots today and tomorrow -- actually, I guess it

1 was yesterday and today. If we continue to get those so that we
2 anticipate -- and there's evidence that the clerks' offices
3 across the state haven't been able to send out the absentee
4 ballots for -- until the end of the week, then I could extend
5 the date to the 8th or the 9th and let people know you could
6 continue -- you can continue to mail them in, have the
7 Commission continue to accept afterwards. It does raise a
8 question about notice to -- or whether we should allow early
9 returns or not because that might, in fact, influence voters as
10 to whether they're going to bother to send in their April 8th or
11 April 9th ballot, but why would I decide that before we really
12 have reason to think that's going to be a significant problem?

13 MR. DEVANEY: Well, the first answer to the question,
14 Your Honor, is for those voters who are going to be receiving
15 absentee ballots in the next several days, and it sounds like
16 there are thousands of them, they may --

17 THE COURT: It sounds like that, but I don't have to
18 decide that today or tomorrow. I could wait and see what we're
19 really looking at in the last days. If you're right that
20 hundreds of thousands have requested them and that clerks'
21 offices are reporting that they're not going to be able to get
22 them out of the mail -- out in the mail until Friday or even
23 Monday, then clearly we've got a disenfranchisement problem --

24 MR. DEVANEY: Right.

25 THE COURT: -- and I ought to provide relief. But

1 until then I don't know why I would, as one of our magistrate
2 judges likes to put it, go look for trouble. We've got enough
3 trouble already that I'm trying to address on the evidence
4 before me, and I get your point that you could assume, I guess,
5 that -- there's certainly -- if the question was simply is it
6 more likely than not that we're going to have a problem with
7 absentee ballots getting to voters late so that they're not able
8 to drop it in the mail, I don't know that that's true. Even if
9 they get it on Friday or Monday, there are two ways they can
10 still vote. They'll have to act right away, and they'll have to
11 put it in the mail by Tuesday or they can drop it off at a
12 polling place by Tuesday. It's not until we determine that
13 they're really not going to get the ballot before election day
14 that they don't have a solution, and that would be, I guess,
15 inconsistent with the basic timing that we're talking about
16 because by the end of the day tomorrow, they're going to have
17 made their request for a ballot. That's seven days. It's
18 really just a matter of the turnaround by the clerks, and I
19 don't know what their turnaround will be. None of us do.

20 MR. DEVANEY: Well, Your Honor, hypothetically you said
21 if someone drops it in the mail on Monday or Tuesday.

22 THE COURT: Yeah.

23 MR. DEVANEY: Under the current state of the law --

24 THE COURT: No. But I'm telling you for purposes of
25 this argument, I'm convinced, for the very reason we're talking

1 about, I have to move the -- to the postmark date of April
2 7th --

3 MR. DEVANEY: Got it.

4 THE COURT: -- so you can -- I'll hear from the
5 defendant why that's a horrible, or maybe from the intervening
6 defendant, why that's a horrible idea, or maybe I won't --

7 MR. DEVANEY: Right.

8 THE COURT: -- but we start from that proposition --

9 MR. DEVANEY: Got it.

10 THE COURT: -- for purposes of your argument.

11 MR. DEVANEY: Got it.

12 THE COURT: So then the question is, is it more
13 appropriate for me to wait and see how well the clerks' offices
14 are doing in getting absentee ballots out by the end of the week
15 or not.

16 MR. DEVANEY: And, Your Honor, my response to that is
17 the evidence establishes a significant backlog already, and I
18 think the evidence --

19 THE COURT: You know, certainly there's a backlog, but
20 it's not clear in realtime how big of a backlog. Ms. Wolfe
21 suggested that clerks' offices have been working through the
22 backlog, and so I don't know that at this point. It may be
23 you're right. I'm not saying you're wrong. And, unfortunately,
24 this is -- I'm not faulting the evidence, because we're working
25 with three or four days' knowledge in the past. We don't have

1 current. But I think -- let's assume that this backlog has been
2 maintained, and it's something similar to what we have now.
3 Then I suppose you're right. If I assume that and that we're 20
4 to 30,000 on Wednesday -- I get my days confused. Especially
5 with social distancing, it gets harder and harder to tell which
6 is a work day. But if we assume that by April 4th they're still
7 working on the backlog and getting ballots out, then maybe it is
8 true that the ballots just aren't going to arrive in time for
9 individuals to vote, but I am a little concerned about not
10 encouraging people to turn around their votes prematurely.
11 That's where my concern is.

12 MR. DEVANEY: Well, Your Honor, my response is some
13 people will be requesting ballots today and tomorrow, and
14 they're going to get them very close to the election, and even
15 if they get around to dropping them in the mail on the 6th or
16 7th, they may not be postmarked. Right now it's an April 7th
17 postmark date, and so I think at a minimum I would ask the Court
18 to consider if you're going to -- I think the Commission
19 proposed, what was it, the 13th? Let's at least have that as a
20 receipt deadline and not worry about the postmark. That's going
21 to be much more enfranchising. It's going to allow for this
22 situation where ballots are arriving on the eve of the election,
23 someone wants to think about their vote, they turn it around,
24 they get it in the mail, and if it's not postmarked, they
25 shouldn't be discounted under these facts.

1 And so I would ask the Court to at least consider that
2 extension to the 13th, and I would argue it should be longer
3 than that, but let's make that a receipt deadline and not worry
4 about the postmark. I think that would go a long way toward
5 taking care of the problem we're wrestling with right now.

6 THE COURT: Understood.

7 MR. DEVANEY: And then the other point I'd make on
8 this -- and I would move on to the other issues -- is there's a
9 real chilling effect too, and Your Honor asked why shouldn't I
10 wait? Why shouldn't you wait to see what really happens? But
11 with these delays in voters getting absentee ballots, there are
12 probably going to be voters who get their ballot, see an April
13 7th deadline, and say, "Why bother?" And so that's why I
14 think -- one, I think the evidence now supports extending and
15 extending that postmark date we just talked about --

16 THE COURT: I'm not sure I get that argument "because
17 they're going to look at April 7th and say why bother." Well,
18 the "why bother" is get it in the mail. Turn it around. If I
19 were to relieve it on April 6th because it's clear people are
20 still not getting their ballots, they will get -- they will --
21 we'll try and get the message out that they can go ahead and
22 vote, but I don't think that's going to change very much whether
23 I make that decision tomorrow or I make that decision on Monday
24 as to who's going to actually take advantage of an extension of
25 the postmark date.

1 MR. DEVANEY: Uh-huh.

2 THE COURT: I do get your first point.

3 MR. DEVANEY: Okay.

4 THE COURT: Your first point is that if I extend it,
5 period, maybe people will not think, well, this is -- this
6 deadline is impacting, and even if they -- and if they are
7 willing to ignore it, they at least get their ballot in, and
8 maybe that will encourage more people who get the ballot late to
9 turn around and vote quickly so they can be counted.

10 MR. DEVANEY: Well, thank you for that, Your Honor.

11 The other issue -- a couple other issues I want to turn to
12 is the witness requirement for absentee ballots, and Your Honor
13 has heard plenty of evidence on that, and I won't beat it into
14 the ground. What I will point out though is that in our PI
15 papers, we provided declarations from five witnesses, Ms. Morse,
16 Mr. Keel, Mr. Trapp, Mr. Wilson, and Ms. Larson, and two city
17 and county clerks who I think really bring this issue to life.
18 It's very --

19 THE COURT: Let me -- the obvious question is --

20 MR. DEVANEY: Sure.

21 THE COURT: -- you managed to work with them in that
22 detail to get an affidavit from them. Why couldn't you do the
23 same to let them vote?

24 MR. DEVANEY: Well, they didn't need a witness to
25 provide an affidavit. I mean --

1 THE COURT: But you -- obviously you at least talked
2 with someone on the phone, right?

3 MR. DEVANEY: Sure.

4 THE COURT: How were the affidavits prepared? Was
5 there videoconferencing? I don't know.

6 MR. DEVANEY: No.

7 THE COURT: Okay. So you're on the phone. You've
8 reached out to them. You've developed an affidavit. And then
9 how did they provide their signature to it?

10 MR. DEVANEY: They were e-signatures. In one case we
11 couldn't get a signature because the woman did not have a
12 working computer.

13 THE COURT: But as for four, you were able to get
14 e-signatures.

15 MR. DEVANEY: That's true, but I --

16 THE COURT: Which suggests that -- I'm sorry. I don't
17 mean to minimize them, but this witnessing problem is not unique
18 to the coronavirus. It's going to be a problem for any
19 homebound person in any election --

20 MR. DEVANEY: Well, I think --

21 THE COURT: -- for those who are homebound because they
22 are susceptible to illnesses. And it's true you have five
23 anecdotal instances of individuals who claim they're not able to
24 accommodate this. They've had some time now to develop
25 alternatives, and I hope they do, but I'm not convinced that I

1 should -- whatever arguable merit you or I think there is to the
2 witness requirement, I'm not sure that COVID-19 completely says
3 I should throw that out for all people sending in absentee
4 ballots, which is the relief you're asking for.

5 MR. DEVANEY: That is true, Your Honor, but the reason
6 why it's appropriate in this circumstance is we are in this
7 COVID world, and for many --

8 THE COURT: But, again, with respect, those people
9 you're talking about, the true shut-in who knows no one, I don't
10 know how I would assume that that's a large enough group that I
11 would say for, I don't know, 99 percent, 99.9 percent of voters
12 who do not fit that category, that they should be relieved of a
13 witness requirement that the State of Wisconsin in its wisdom
14 felt was important to ensure the integrity of the absentee
15 ballot.

16 MR. DEVANEY: Well, it's not just those declarants,
17 Your Honor. It's also the city and county clerks who submitted
18 affidavits and reported on the many phone calls they received
19 about this and the many voters who are struggling with that, and
20 I do --

21 THE COURT: Right. But it's not a matter of struggling
22 with it. It's a matter of whether they can overcome it, and
23 there have been offered lots of ways in which someone who is
24 calling, including some groups that are reaching out to those
25 people, to give them the ability to get a witness on their

1 ballot. I just don't know how to measure that against the far
2 greater group that I would be letting in without a witness.

3 MR. DEVANEY: Well, Your Honor, there are also
4 penalties that exist if someone inaccurately --

5 THE COURT: I agree. I agree with you, but that to
6 me -- that's a great point, and that's a reason why there
7 shouldn't be a witness requirement, period, but there is one in
8 Wisconsin. They value that. Whether they're right to, whether
9 they should have a robust exception for people who have
10 difficulty finding someone to witness, those are all important
11 questions, but I'm not sure that they rise to the level of
12 violating the United States Constitution. That's where I'm
13 struggling.

14 MR. DEVANEY: Well, Your Honor, I think that the
15 evidence establishes that some number of people will not be able
16 to vote because of this requirement, and under *Anderson-Burdick*
17 we believe that's a sufficient showing, and it just isn't a
18 compelling state interest because they're already under penalty
19 if they say something false on their absentee ballot. And I
20 would encourage Your Honor, if you haven't already, just as an
21 example, the affidavit of -- the declaration of Martha Love, an
22 80-year-old woman -- it's just a heartbreaking story. I mean,
23 she's voted since she was age 20. She's 80 years old. She
24 wants to vote. She can't get a witness, and she's afraid of
25 exposing herself to COVID, and she's not alone.

1 THE COURT: But she may not be alone, but she's a small
2 group, and I would hope that your firm or whatever firm got her
3 affidavit will get her an absentee ballot and witness it for
4 her. That's -- I mean, I'm sorry, but that's -- it's pregnant
5 that there's got to be a way for these people to get a witness.
6 Perhaps it's true that some just will not come up with a
7 solution, but there are solutions out there for them, and I
8 still haven't heard a reason why she couldn't, with the
9 assistance of the same people who worked with her on this
10 affidavit, get a witness on her ballot for the reasons that Ms.
11 Wolfe described. And I know you say, "Well, there are others,"
12 and my answer is they are told by the clerk's office or they
13 should be told by clerks' offices what they need to do to get a
14 witness.

15 I'm not sure you've met your burden that this is really
16 going to disenfranchise a substantial number of people, but I
17 agree with you that it's a different question than if I were to
18 move the election. I think your burden is much higher for that
19 than it is for relieving the signature. If you gave me some
20 solution as to how we could do this for that group, a practical
21 way to do that for that group, I'd be more inclined to do it,
22 because I agree with you that I think COVID-19 has heightened
23 the concern, and the rational concern, with any interaction with
24 others, but I'm hopeful that the number of true shut-ins who
25 have no one is not a large group. If you gave me a way to

1 address those true shut-ins, I would do it, but my suspicion is
2 that true shut-ins, people who have no one, are probably not
3 voting anyway.

4 MR. DEVANEY: Well, Your Honor, I would say too that
5 it's not just shut-ins. These are -- some of these are young
6 people who have illnesses, pre-existing conditions, and they're
7 genuinely afraid of having contact with someone to witness their
8 ballot and --

9 THE COURT: But is there a case you can provide me
10 where a small percentage of the population is having difficulty
11 meeting a witness requirement and that means no one should have
12 to meet it? Because that's what --

13 MR. DEVANEY: Well, there -- there are certainly plenty
14 of cases where a segment of the population is burdened by a
15 voting obstacle, not the entire population, and sometimes it's a
16 small percentage, where the *Anderson-Burdick* analysis kicks in,
17 and the question --

18 THE COURT: Let me propose this to you: Why couldn't I
19 say that if a person indicates that because of necessity they
20 were unable to get a witness, that that should be counted,
21 absent evidence to the contrary.

22 MR. DEVANEY: I think that would help, Your Honor, by
23 all means.

24 THE COURT: All right. Anything else? Any other
25 particular category you're tasked with addressing?

1 MR. DEVANEY: I'm just looking at my list, and I don't
2 want to take too much time. I know we've got other counsel
3 coming behind me.

4 The only other one I would say is the photo ID requirement
5 for requesting an absentee ballot. Our evidence shows through
6 declarations and through application of judicially noticeable
7 facts that it's very hard right now for people to make copies of
8 photo IDs, and I know Your Honor considered that in your ruling
9 a couple of weeks ago or whatever that was, and our point is
10 that the circumstances have gotten considerably worse because of
11 the Safer-at-Home Order, the shutdown of businesses. The
12 State's answer is --

13 THE COURT: The easiest way to do it is find someone
14 who has an iPhone or a Samsung or any device that can take a
15 picture and send it electronically. And now you're going to
16 tell me there's a group who have not been able to do that. It
17 becomes even more problematic to have them -- I don't know how
18 the State implements that. I think that becomes an even harder
19 reach since the State has considered, right or wrong, that the
20 requirement of an ID is important.

21 I think -- you know, it's funny because we have this
22 situation where ballots, absentee ballots, have been mailed out
23 to people, the form has been mailed out by third-party groups to
24 individuals to fill out and send in. So we're creating this
25 never world where they're not registered, but they have an

1 absentee ballot in their hands. I just -- to me that becomes
2 sort of a further reach into what the State of Wisconsin has
3 required and is less directly related to COVID-19 and more --
4 I'm not questioning the potential for impingement on voters'
5 rights as much as I am that that argument has been made and lost
6 in court -- whether it should have been or not, I'm not even
7 expressing an opinion -- independent of COVID-19, and I'm not
8 convinced that COVID-19 has substantially changed the burdens
9 that people face.

10 MR. DEVANEY: And, Your Honor, my response to that is
11 since Your Honor issued your ruling 12 days ago or whatever
12 that -- I think it was March 20th -- the Safer-at-Home Order
13 from the Governor has come out that literally threatens people
14 with criminal prosecution should they leave their homes and
15 shuts down --

16 THE COURT: That's really not literally -- you're
17 probably not calling from Wisconsin.

18 MR. DEVANEY: No, I'm not. That's true. So I'm
19 probably -- maybe I'm over --

20 THE COURT: It's an overstatement, but I take your
21 point. They've been told they shouldn't leave the house, and
22 for those who aren't adept or don't have someone they know who
23 is adept with a phone capable of making images, it's still a
24 burden. I understand that.

25 MR. DEVANEY: And my last point on that factual point

1 is the State says 81 percent of people have smartphones. 19
2 percent don't, and that's a big number. That's the only other
3 point I wanted to make.

4 THE COURT: Yeah. I don't know what percent don't know
5 someone with a smartphone though, but I take your point.

6 MR. DEVANEY: Yeah.

7 THE COURT: All right. I appreciate --

8 MR. DEVANEY: My last point is, just for the record, in
9 our papers, as I pointed out at the start, we didn't advocate
10 postponing the election. In watching though the developments
11 over these past days and looking at our co-plaintiffs' papers,
12 the DNC and Wisconsin Democratic Party have come around to we do
13 support it. I'm going to leave that argument to others, but I
14 just, for the record, want to be clear that we are supportive of
15 that request given the chaos --

16 THE COURT: That's been noted and will be noted in the
17 opinion.

18 MR. DEVANEY: Okay. Thank you, Your Honor.

19 THE COURT: Thank you. I'll leave to Mr. Poland and
20 Mr. Sherman as to who takes up the remaining issues for the
21 plaintiffs.

22 MR. SHERMAN: Thank you, Your Honor. We didn't want to
23 duplicate efforts, but I had -- this is our sole claim over the
24 witnessing requirement, so if Your Honor --

25 THE COURT: Yes.

1 MR. SHERMAN: -- would permit, I'd like to --

2 THE COURT: Briefly, picking up where we left off, if
3 there's something more you want to add, I'll hear it.

4 MR. SHERMAN: Yes, Your Honor.

5 So, respectfully, this is not a small group. Based on the
6 CDC guidance, anyone who is 65 years old or older and anyone
7 with an immunocompromised condition is at severe risk of
8 complications or even death from COVID-19, and the census data
9 that we submitted shows that this is --

10 THE COURT: And let me stop you there. You've created
11 a factual scenario where there are a lot of people who need to
12 stay home. You've done that. But you also heard lots of ways
13 if they have one friend they can accomplish the signature on the
14 envelope. So what you haven't established is there's a large
15 group of individuals who have no one capable of providing the
16 witness requirement in a fashion that is safe even in an age of
17 COVID-19.

18 MR. SHERMAN: Well, respectfully, Your Honor, these --
19 our clients, they're terrified.

20 THE COURT: All of this is respectful. All of this is
21 respectful.

22 MR. SHERMAN: Understood.

23 THE COURT: I'm just saying that I haven't seen it.
24 Point out to me what percentage of the CDC numbers don't have
25 the capacity to have someone witness their ballot.

1 MR. SHERMAN: Our clients are afraid of contracting the
2 disease and of dieing from it --

3 THE COURT: Of course.

4 MR. SHERMAN: -- so for that reason they are --

5 THE COURT: There are clients who had that fear before
6 this. They were rightly afraid of the flu. I'm not suggesting
7 that COVID-19 isn't much worse than the flu. All of the
8 evidence so far is that it's much more communicable and much
9 more deadly than influenza, but they -- for people who are
10 compromised, COVID-19 is just one more problem that they face in
11 trying to avoid exposures to others. I just don't know what
12 percent of those, admittedly a greater group now that we have
13 COVID-19, which seems to have even worse implications for those
14 with comorbidities and the aged, but I don't know what percent
15 of those don't have the capacity, if they want to, to get a
16 witness.

17 MR. SHERMAN: Well, they're homebound solely because of
18 the disease. These are not people who are shut-ins, as the
19 Court put it. These are folks who have extended families and
20 friends. Dr. Hakami is a clinical psychologist. She sees
21 patients --

22 THE COURT: All of whom could go to a window and sign
23 their ballot and put it through the mailbox to someone else at
24 no risk to them.

25 MR. SHERMAN: Your Honor, I respectfully disagree. The

1 guidance --

2 THE COURT: How so?

3 MR. SHERMAN: The guidance that the Wisconsin Elections
4 Commission has put forward is patently unreasonable. It has --

5 THE COURT: How so?

6 MR. SHERMAN: It's calling upon elderly voters to --

7 THE COURT: But now you changed subjects. You changed
8 subjects. If it's elderly voters, it's even more appropriate
9 that -- I'm talking about people who face comorbidities and are
10 taking steps to remove themselves from society generally, but
11 let's include the aged. Why is it unreasonable for them to make
12 an arrangement of witnessing that's remote enough so they don't
13 represent a risk?

14 MR. SHERMAN: So in the case -- that's why I'm
15 referring to the guidance that the WEC has put out, and that
16 guidance calls for them to, either through a window or by video
17 chat, ask a, say, UPS delivery person or --

18 THE COURT: No, no. UPS -- a friend, a relative, a
19 reasonable acquaintance, the next-door neighbor, someone to come
20 to the window --

21 MR. SHERMAN: Right.

22 THE COURT: -- and sign.

23 MR. SHERMAN: Well, they have to pass -- they have to
24 leave their certification envelope for 24 hours outside until
25 that person comes and it decontaminates. Then it's signed,

1 passed back to the voter, and based on the available science,
2 has to be left for another 24 hours to decontaminate. The
3 Commission even recommended that people meet like spies in the
4 parking lot to pass it through cracked windows. Respectfully, I
5 just don't think that's a reasonable response to voters'
6 concerns of contracting the disease --

7 THE COURT: Well, we really don't know, but let's take
8 it a step further. What about simply requiring them to make a
9 statement providing a reason for not being able to get a
10 witness?

11 MR. SHERMAN: I think it would be a solution if it were
12 workable, Your Honor. The reason we asked for the remedy we did
13 is on the thought that it would be impossible to amend the
14 absentee ballot certificate envelope at this juncture and
15 because there would be no reasonable way to --

16 THE COURT: But that's not an answer. I'm sorry.
17 That's not an answer at all. If that's true, you're not going
18 to be able to change the ballot, so whatever I do, whether I
19 make an announcement that no one has to have a witness or I make
20 an announcement that if you can't have a witness, you don't have
21 to have one as long as you make a statement, that's not going to
22 be consistent with the ballots that have gone out, so that's not
23 even an argument. What's wrong with that being the solution so
24 that I don't completely ignore the State's interest in
25 witnesses?

1 MR. SHERMAN: I'm just trying to --

2 THE COURT: For everyone else who can -- for everyone
3 who can get a witness, you've got to have a witness. But if you
4 make a representation that you are not able to make a witness
5 because of your fears of COVID-19, you should include that
6 instead.

7 MR. SHERMAN: I understand --

8 THE COURT: How does that not address your concern?

9 MR. SHERMAN: It would address the concern. I just was
10 wondering how it would be practically workable, and what's
11 why --

12 THE COURT: How is it any more practical than what
13 you're suggesting?

14 MR. SHERMAN: Because, Your Honor, I think if you
15 enjoin the requirement, then the Commission and all municipal
16 clerks can make a broad announcement. These ballots are already
17 piling up. There are hundreds --

18 THE COURT: No, no. No, no. No, no, no. If I enjoin
19 the requirement of a witness for those who are willing to
20 represent in writing that they couldn't get a witness because of
21 COVID-19, how is that different than if I enjoin it for
22 everybody if it still requires an announcement by WEC?

23 MR. SHERMAN: Understood.

24 THE COURT: And I'm only intending it to apply to
25 people who are endangered. I'm not -- the whole point of this

1 is to be respectful of the State of Wisconsin's requirement,
2 whether we think it's a good idea or not.

3 MR. SHERMAN: I understand, Your Honor. I was trying
4 to think of what the practical limitations of it were --

5 THE COURT: I don't know why it's any less -- I don't
6 know why it's any less or more practical.

7 MR. SHERMAN: Right. I think people could submit a
8 letter along with their ballot, and that would be sufficient,
9 and that would solve the problem. The only reason that I had
10 raised it was I just thought -- you know, I thought you were
11 suggesting that there could be some certification, some kind of
12 checkbox that they couldn't reasonably -- they had a
13 reasonable --

14 THE COURT: But there isn't going to be one now either.

15 MR. SHERMAN: I understand. I understand, but I think
16 a letter in conjunction with --

17 THE COURT: Anything else that you want to add, Mr.
18 Sherman, before I hear from Mr. Poland?

19 MR. SHERMAN: I just wanted to note, because we moved
20 away from this point, that the census data that we submitted
21 showed that there are 600,000 single-person households in the
22 state --

23 THE COURT: I'm well aware of the numbers. Again, it
24 doesn't tell me what of that group which cannot witness, but
25 we've already gone through that.

1 Anything else you want to add?

2 MR. SHERMAN: Thank you, Your Honor. No.

3 THE COURT: Thank you.

4 Let me then hear from Mr. Poland.

5 MR. POLAND: Thank you, Your Honor. Your Honor, I'm
6 going to address -- I'm going to start out much in the way Mr.
7 Devaney did, addressing the situation on the ground, but this
8 will be from the standpoint of in-person voting as opposed to
9 absentee voting.

10 THE COURT: Okay.

11 MR. POLAND: And the situation, it is grim, but it is
12 deteriorating, and that's the point that I wanted to raise. The
13 statistics that were released today from the Department of
14 Health Services is that we now have 1,530 positive tests in the
15 state and 24 deaths from COVID-19. Milwaukee has
16 consolidated --

17 THE COURT: And, Mr. Poland, I just have to stop you
18 because I have yet to hear how I have the authority to stop what
19 may well be an ill-advised, if not a colossal, mistake from a
20 perspective of public health. I don't disagree with you, and
21 you can start already from the proposition that this is a bad
22 idea as a matter of what we know about COVID-19, what the
23 medical community knows about COVID-19. It's not worth the
24 risk. But I'm not sure how a federal district judge has the
25 authority to tell the State of Wisconsin and what was designed

1 as a commission that would not be able to make tough decisions
2 because they would split 3-3 that they're doing the wrong thing
3 from a matter of public health.

4 MR. POLAND: Your Honor --

5 THE COURT: But let's assume -- let's assume from your
6 proposition that this is a bad decision from the perspective of
7 public health and it could be excruciatingly bad given its
8 timing.

9 MR. POLAND: And it's going to make the election
10 unworkable, and that's where I'm going, Your Honor. It
11 certainly is a health and safety crisis that brought us to this
12 place. What we're asking the Court to do isn't based on that
13 particular health threat that's posed, but it's a voting rights
14 crisis. It's a crisis of constitutional rights. We share the
15 Court's frustration that the legislature and that the Governor
16 are not stepping in, but it's the inaction of those authorities
17 to ensure Wisconsin holds fair elections and that the voters'
18 constitutional rights are protected, that's the basis that we're
19 asking the Court to issue an injunction that would --

20 THE COURT: I'm still waiting for you to get to what it
21 is -- I mean, let's take rosiest scenario, and we have now a
22 million-and-a-half absentee voters. We get 1,300,000 who take
23 advantage of that option, and we get another three to 400,000
24 who vote on election day in relatively sparse numbers. You've
25 got a fairly robust voting turnout.

1 MR. POLAND: I think what we heard from the testimony
2 of Administrator Wolfe and then also from the declarations that
3 we have put into evidence, that the problem is that the
4 procedures that have been put into place by the Elections
5 Commission, and they're evolving as we go along, they are
6 helping -- they are helping or trying to loosen up the
7 restrictions on absentee voting by mail. The problem that we
8 run into though is that all of the changes that are coming to
9 the procedures are actually making it more difficult for people
10 to vote in person, and that's if you look at the -- if you look
11 at the amicus briefs from the cities of Milwaukee and Madison
12 and Green Bay and Racine, if you look at the declarants whose
13 declarations we put into evidence as well, what they identify is
14 that minority voters in the cities, and especially Milwaukee,
15 vote substantially through same-day registration.

16 So, for example, if you look at the declaration of Neil
17 Albrecht, who is the executive director of the Milwaukee
18 Elections Commission, he says that in the 2016 spring
19 presidential primary, 167,765 total ballots were cast and that
20 1,400 of them -- I'm sorry, 14,000 were by email. Well, that
21 means that there are -- I'm sorry, absentee, mail absentee
22 ballots. In the 2012 spring presidential primary election, the
23 Commission documented 84,641 ballots cast. They processed 5,690
24 by email.

25 THE COURT: Mr. Poland, let me ask you a question:

1 Let's say I don't stop this election. It goes forward on the
2 7th as scheduled, and there is a great turnout in the
3 districts -- the voting jurisdictions that you're talking about
4 in Milwaukee. It could well be that's a horrible public health
5 consequence, but they weren't prevented from exercising their
6 franchise. The way they would be prevented from exercising
7 their franchise is they don't show up, which could be an
8 absolutely rational decision, and then we'll see that in the
9 numbers in those jurisdictions, and you can come back to me and
10 say, "This wasn't a valid election."

11 Is it my place as a federal district judge to say, "Nope,
12 the State of Wisconsin doesn't get to hold an election at all"?

13 MR. POLAND: Yeah, actually, Judge, we think that it
14 does. If you look at the supplemental -- the brief that we
15 submitted last night, it goes --

16 THE COURT: Yeah. I did. Yep.

17 MR. POLAND: So I think a couple of things come
18 through. Now, granted, granted, Your Honor, we will admit the
19 last time we faced a public health crisis like this was in 1918,
20 a very different time. We didn't have voting rights laws. The
21 19th Amendment hasn't been adopted. The jurisprudence isn't
22 what it is today. We didn't have *Anderson-Burdick* and that
23 framework, and so the lack of directly on-point authority, what
24 do you do in the case of --

25 THE COURT: But give me any on-point authority. I'm

1 looking at your brief. Which of these cases makes clear that a
2 federal district court should stop a statewide election based on
3 a public health crisis?

4 MR. POLAND: We don't have a statewide election, Your
5 Honor. We don't have a statewide election.

6 THE COURT: Well, give me -- what's the closest case to
7 what I'm facing?

8 MR. POLAND: Well, I would say that the closest case
9 that we have to what you're facing was the *Michaelson* case that
10 we discussed. That was -- that was a smaller jurisdiction.

11 THE COURT: It was an incredibly smaller jurisdiction.

12 MR. POLAND: I understand, Your Honor, but from --

13 THE COURT: I'm not sure you do because that's what
14 you're asking for is to prevent the election from going forward
15 at all by a federal judge because the State of Wisconsin's
16 legislature and governor are not willing to step up and say
17 there's a public health crisis that makes it absolutely clear
18 that we should not be allowing poll workers and voters to
19 congregate on April 7th, Tuesday.

20 MR. POLAND: It's because the Elections Commission is
21 going to hold an election next Tuesday that's going to deprive
22 tens of thousands of people of their right to vote.

23 THE COURT: But I don't know that.

24 MR. POLAND: Well, Judge, but you can't know that ahead
25 of time. All you can do is act on the information that's in

1 front of you.

2 THE COURT: Right. Thank you. I can't know that ahead
3 of time. What I can know is that an incredible number of people
4 got absentee ballots, and maybe enough people will go to the
5 polls on election day confident in the steps that have been
6 taken to allow for a relatively robust election, and you want to
7 stop it before it happens because you don't think that will be
8 true.

9 MR. POLAND: Your Honor, it's not me who thinks that.
10 I've got -- we've got --

11 THE COURT: No, no, no. Mr. Poland, I'm not saying you
12 personally.

13 MR. POLAND: No, I understand.

14 THE COURT: Your clients and certain municipalities
15 want a federal district judge to step in and prevent a state
16 from holding a statewide election because you don't think
17 there's going to be a good enough turnout between absentee
18 ballots and in-person voting. Maybe you're right, but why
19 wouldn't I in -- under principles of federalism allow the State
20 to try it? And the only reason is because it's really a bad
21 public policy idea and they should stop it for health reasons,
22 not because it's impinging on infringement. It may be impinging
23 on some voters because they won't go to the polls, but there's
24 going to be always some voters who won't go to the polls and for
25 whatever reason, because there's a storm that day. There could

1 be lots of reasons why individuals decide they don't want to
2 show up at the polls, and the result is we look at the voting
3 turnout after the fact and determine whether, in fact, that was
4 the effect. We don't say there's going to be a bad storm and a
5 federal district judge gets to stop the election.

6 MR. POLAND: Your Honor, this is not the situation of
7 that there would be a bad storm. This is --

8 THE COURT: No, but it is exactly that situation.
9 There's a hurricane coming. You can't even give me a case where
10 a federal judge stopped a state from stupidly holding an
11 election when most of the voters were not going to go to the
12 polls because there was a hurricane coming. You expect the
13 State of Wisconsin to realize this is a hurricane and for them
14 to stop it for public health reasons, but you don't get to go to
15 a federal judge and say it's impinging on voting rights so you
16 get to stop a statewide election. The reason you can't cite me
17 a case is because it's not appropriate. I'm sorry that that's
18 what the situation is, but this is a public health crisis that
19 the state legislature and the Governor have refused to accept as
20 severe enough to stop this statewide election.

21 MR. POLAND: Your Honor, we certainly --

22 THE COURT: And that's where the remedy is under case
23 law and under the U.S. Constitution, and you may have a remedy
24 after the fact if voters rationally decide not to go get
25 absentee ballots and not to show up in person at the polls, but

1 I don't see a basis on which I stop this, albeit very risky,
2 decision by the State of Wisconsin.

3 MR. POLAND: Your Honor, we do disagree. We do think
4 that the Court has the power, and we put that argument into our
5 briefs.

6 THE COURT: All right. Let me then hear from I guess
7 it's Mr. Lenz, counsel for -- I'm sorry. I apologize --
8 Mr. Strawbridge, counsel for the intervening defendants.

9 MR. STRAWBRIDGE: Thank you, Your Honor.

10 It's late in the day, and I won't try to belabor some of the
11 points that have already been made I think by Your Honor with
12 respect to moving the election. We certainly agree with the
13 position that you've taken that this is ultimately a decision
14 that has to be made in other venues. I'll just note obviously
15 that Ms. Wolfe did testify that, you know, an open-ended relief
16 of moving the election creates its own problems, and there are
17 no perfect solutions here, and obviously we see the law --

18 THE COURT: Well, from a public health perspective,
19 there's a much better solution, which is to delay this election,
20 which is what every other state in the current setting has done.

21 MR. STRAWBRIDGE: Well --

22 THE COURT: And I'm talking about not that COVID-19
23 existed but that we were watching the ramp-up on a graph that
24 tells us that we're at a crucial stage in the state of Wisconsin
25 to prevent its dissemination, and yet the State of Wisconsin is

1 ignoring that data and is endangering its population, but as
2 I've said, I don't think it's for a federal district judge to
3 act as a super Department of Health for the State of Wisconsin.

4 Is there something more you want to add?

5 MR. STRAWBRIDGE: Yes. I want to move on to the
6 discussions about some of the voter integrity requirements,
7 which I think are the key questions at least that my clients
8 would like to highlight here.

9 I think that you're absolutely right with respect to what
10 the burden is on them, especially since they have only asked for
11 facial relief. The evidentiary record in this case is not
12 sufficient to sustain their request for broad relief. It's not
13 even close to being sufficient to sustain that request. There's
14 no quantification whatsoever of exactly how many people are
15 going to be affected by these long-existing requirements. Their
16 argument, of course, doesn't acknowledge the fact that this
17 election has been ongoing for weeks. We heard testimony that
18 the ballot has been available for more than 45 days --

19 THE COURT: I just find that an insulting argument.
20 I'm sorry that you went there. Because 45 days ago no one saw
21 this.

22 MR. STRAWBRIDGE: No, I didn't --

23 THE COURT: 30 days ago no one saw this.

24 MR. STRAWBRIDGE: I mean, please, please --

25 THE COURT: (Inaudible) days ago we were still not

1 being told to stay in place. This is a recent event, and
2 absentee ballot as a solution is only recently something that
3 the average Wisconsin voter would have considered, so the notion
4 that they've had weeks to vote absentee is insulting. They've
5 had about 15 days to consider it, and each day the risk is
6 becoming more obvious of not using the absentee ballot. So I'm
7 sorry that you went there, but that's a silly argument.

8 MR. STRAWBRIDGE: As Your Honor has pointed out,
9 there's been a number of requests that have been fulfilled
10 thanks in part to the TRO that was issued in this case and the
11 fact that the Elections Commission has continued to try to
12 fulfill those ballots. It's very difficult -- I think it's
13 impossible to predict exactly what this election is going to do,
14 and unfortunately for the plaintiffs, the burden falls on them
15 to try to make that prediction to carry the burden of seeking
16 the broad relief that they're seeking in this case.

17 THE COURT: What would be enough? What would be
18 enough --

19 MR. STRAWBRIDGE: I mean, what the *Frank* decisions say
20 coupled with *Crawford* is they have to come forward with some
21 actual evidence that quantifies a burden that carries to a large
22 population that justifies suspending a generally applicable
23 requirement.

24 THE COURT: So what would be enough? 50,000, 100,000,
25 200,000? What is enough of people who are unable to exercise

1 their franchise to be sufficient for a federal district court to
2 stop an election?

3 MR. STRAWBRIDGE: I don't think that I can certainly
4 quantify it to a specific degree. I can say that the
5 evidence --

6 THE COURT: Well, give me a rough estimate.

7 MR. STRAWBRIDGE: If they were able to demonstrate
8 that, you know, entire swaths of the state were physically
9 unable to get to the polls, that would be a different question,
10 but that's not the case here, and as Your Honor has pointed out,
11 Wisconsin actually has --

12 THE COURT: What if it turns out that 120 jurisdictions
13 are not able to allow in-person voting?

14 MR. STRAWBRIDGE: Well, if it turns out after the fact,
15 there may be some discussion to be had as to a remedy, but I
16 don't think that that can be made today. That's not even what
17 the testimony is. It's 120 are concerned they may not have
18 enough.

19 THE COURT: Right. Well, no, no, no, no, no. 120 said
20 at this point they don't have enough. They may be able to solve
21 that problem by election day, I agree with you, but right now
22 120 -- I shouldn't say right now. As of the last survey, 120
23 weren't prepared, and then there's another --

24 MR. STRAWBRIDGE: If we're being precise, I think it
25 was 111, but I don't mean to quibble.

1 THE COURT: Fair enough. You're right. It was
2 111 (inaudible) --

3 MR. STRAWBRIDGE: The other point I would make is --

4 THE COURT: -- are otherwise concerned about their
5 ability to go ahead, but --

6 MR. STRAWBRIDGE: Correct.

7 THE COURT: -- if that fact bears out, then would that
8 be enough to void the election?

9 MR. STRAWBRIDGE: Not necessarily, because as we heard
10 today, the contingency plans in place may direct those people to
11 alternative locations to vote and --

12 THE COURT: No, no, no, no. I'm not saying
13 alternatively. I'm saying we know. It's now April 8th. 120
14 jurisdictions were not able to accommodate in-person voting.
15 Would that be enough to void the election?

16 MR. STRAWBRIDGE: Let me ask what you mean by "void the
17 election." After the fact order a new election; is that the
18 question?

19 THE COURT: Yes.

20 MR. STRAWBRIDGE: I'm not so sure that it would be
21 under governing law --

22 THE COURT: Well, what would be?

23 MR. STRAWBRIDGE: -- but it would be a harder case than
24 this. Well, widespread --

25 THE COURT: What if the major metropolitan minority

1 voting dropped by 50 percent? Would that be enough?

2 MR. STRAWBRIDGE: Well, there's a real question there
3 as to whether that drop would be caused by actions of the
4 defendants. There are --

5 THE COURT: No, it wouldn't be -- I agree. I don't
6 think it would be actions of the defendants, but it would be
7 actions by the State of Wisconsin --

8 MR. STRAWBRIDGE: It may or may not be --

9 THE COURT: -- to go ahead with an election without
10 giving a viable means for a significant minority to be able to
11 participate in the election. Why wouldn't that be enough?

12 MR. STRAWBRIDGE: Well, I think the problem with that
13 is that there are no cases that have granted that remedy on that
14 basic theory. Obviously intentional discrimination is a
15 different question, but the --

16 THE COURT: Let's hope that that's not what we're going
17 to end up with. The alternative is you'll get a robust
18 response, and then you're going to have pockets of COVID-19
19 killing a large percentage of certain groups, and that may be
20 something that happens -- it would be outside of my
21 jurisdiction, but it will be on the hands of the state
22 legislature and the Governor.

23 MR. STRAWBRIDGE: I --

24 THE COURT: Anything else you want to add?

25 MR. STRAWBRIDGE: Yes. Let me add one point, and that

1 is that I commend to the Court to read the decisions in *Frank*
2 very carefully, and that was particularly with respect to this
3 notion of the carve-out affidavit with respect to the witnessing
4 requirement. *Frank* makes very clear that that's a problematic
5 remedy when there's no actual way to verify that the interest in
6 witnessing has been met. All the --

7 THE COURT: Well, there is a way to verify it. It's
8 the same thing that we do -- that the State of Wisconsin does
9 already when it's relieving someone of the photo ID requirement,
10 and that is the person indicates on the ballot that because
11 they're a shut-in, they're not able to comply, and each local
12 municipality looks at it and decides whether they believe that
13 or they want to investigate it.

14 MR. STRAWBRIDGE: Yeah. I think that there's --

15 THE COURT: If it's already in place in the State of
16 Wisconsin for other purposes, what difference is this?

17 MR. STRAWBRIDGE: Well, I think that -- two points.
18 *Purcell* strongly weighs against imposing that kind of what I
19 think is essentially a legislative judgment at this point in the
20 process.

21 THE COURT: Well, no. It wouldn't be a legislative
22 judgment. It would be a judgment of the unique situations of
23 COVID-19, which have changed the calculus for certain
24 individuals who are afraid, and legitimately afraid, of any
25 contact with another person.

1 MR. STRAWBRIDGE: I still think that there are serious
2 problems with trying to impose that requirement at this point in
3 the election under *Purcell* in a way that makes it effective for
4 Wisconsin to advance its (unintelligible) with respect to --

5 THE COURT: And the *Purcell* concern --

6 MR. STRAWBRIDGE: It may well be a good idea --

7 THE COURT: -- is that I'm changing the rules in the
8 middle of the game? Is that what you're concerned about?

9 MR. STRAWBRIDGE: Too close to the election, that's
10 correct. That's an argument that's notably missing from the
11 plaintiffs' filings --

12 THE COURT: Well, but all of this is too close to the
13 election. Two weeks ago we wouldn't have even have thought that
14 this would be a serious problem, and now in the middle of the
15 ramp-up of the COVID-19, we know it's a potentially serious
16 problem for some individuals.

17 MR. STRAWBRIDGE: Your Honor --

18 THE COURT: So there are some voters who will feel that
19 they cannot safely arrange for a signature.

20 MR. STRAWBRIDGE: Without minimizing the sincerity of
21 the belief, that is also true in a number of other situations in
22 a number of other elections. It's also true with respect to the
23 requirements that were at issue in *Frank* and that ultimately the
24 Seventh Circuit found this kind of relief could not be granted
25 and denied in granting a stay of a district court order of the

1 case. That's all I have to say about that. Your Honor can read
2 the cases obviously.

3 THE COURT: Anything else?

4 MR. STRAWBRIDGE: Yes. Two quick points.

5 THE COURT: And although I'm impatient at this point in
6 the day, I don't want to preclude you from making your
7 arguments. I've heard from three lawyers on the other side. I
8 imagine that the WEC defendants will have very little to say, so
9 you have the floor, and you should take the time you think is
10 necessary to apprise me of the most important issues.

11 MR. STRAWBRIDGE: It's late in the day, so I don't want
12 to belabor these points, and Your Honor may already understand
13 our position on it and may not need further argument.

14 But the first point I want to make is I do think that the
15 request to essentially change the postmark date to some date
16 even after the 7th is very problematic. It is based on a lot of
17 speculation at this point in time, and it is -- and runs
18 headlong into the *Purcell* issues as well. So I understand the
19 argument of moving it to balance their postmark and delaying the
20 time for counting. I think that that's a much closer call, and
21 I understand where the Court's coming from on that, but it seems
22 to me like it's a fundamental change when you start actually
23 extending the time period to cast the election. It creates some
24 uncertainty issues, as Your Honor identified.

25 The only other point that I would make about the counting

1 deadline that the Court may want to consider in this case,
2 because it is something that could be addressed after the
3 election -- and I'm just passing on essentially a concern that
4 has been raised to me about this -- the difference between, you
5 know, issuing an order that requires the counting to take place
6 through Friday as opposed to the following Monday is the fact
7 that that pushes into a holiday weekend. Poll observers and
8 others need to -- and by "holiday" I mean Easter is what I'm
9 referring to here. It's a real hardship on a lot of people, not
10 that maybe it won't be necessary, but it seems that judgment
11 could be made with a preliminary order if that's the way the
12 Court is inclined to go to try to do it by Friday and get status
13 reports and see whether it's really necessary to give additional
14 time through the weekend.

15 Last point, Your Honor, whatever relief you're inclined to
16 impose here, and I think that it was especially with respect to
17 the voting integrity measures we raised, we are required to
18 present a request for a stay to the Court. We ask the Court
19 address that in the first instance just so that we have at least
20 a 24-hour administrative appeal so we have an opportunity to
21 present any argument to the Seventh Circuit, if necessary. I
22 don't mean to prejudge what Your Honor is going to do.

23 THE COURT: No, I understand. I'm just -- I mean, you
24 would certainly have a right to appeal, and I understand your
25 request that I take up the stay now so that you wouldn't have to

1 go through that request after the fact. The problem is we're
2 just about to have an election, so even a 12-hour stay may be
3 meaningful. But I take your point, and I will certainly give
4 consideration to some short stay so that you would have an
5 opportunity to proceed to the Seventh Circuit.

6 Anything else?

7 MR. STRAWBRIDGE: No, Your Honor.

8 THE COURT: All right. Mr. Lenz, do you want to be
9 heard at all for the Wisconsin Election Commission --
10 commissioners?

11 MR. LENZ: Yes, Your Honor. And I'm sorry. You cut
12 out for just a moment there.

13 We'll be very, very brief. The commissioners are bound by
14 Wisconsin statute. The Commission has put forth its statement
15 on the counting deadlines, and I'll leave it at that. Thank
16 you.

17 THE COURT: All right. I will hear, briefly, rebuttal
18 from plaintiffs. My preference would be that someone take that
19 on for the group, but I'm not going to require it. I am going
20 to require true rebuttal in light of the short statements made
21 by the defendants and intervening defendants.

22 MR. DEVANEY: Your Honor, if I may, and I'll be quick,
23 two points.

24 The first is responding to the point just made by counsel
25 about an inconvenience of a holiday weekend and counting, and

1 while I have sympathy for respecting people's personal lives,
2 there's lots of case law that talks about when there's a risk of
3 disenfranchisement or significant burdens to voting, that the
4 interest in voting must prevail over administrative concerns,
5 and I just -- I have to make that point. I don't mean to be
6 insensitive to people's personal situations.

7 The second point I wanted to make is going back to the
8 discussion of whether the Court can issue a broad finding of
9 unconstitutionality with respect to a single provision of law
10 such as a witness requirement, by example, when not the entire
11 population or even, you know, less than a quarter of the
12 population is affected by it, I just want to point out, Your
13 Honor, we addressed that in our reply brief we filed yesterday
14 on page 6, and there's a string of cases going back to -- it
15 really begins with the poll tax cases. Obviously poll taxes did
16 not affect the entire population, probably a small percentage,
17 and yet the Supreme Court found them unconstitutional, and
18 tracing from that case forward, there are --

19 THE COURT: I'm not sure that I understand how they
20 trace, as you put it. What they found was the requirement
21 itself was unconstitutional because of its impact on a
22 substantial number of individuals and because of its intent.

23 MR. DEVANEY: No, that is true, but that case or those
24 cases spawned other cases that we cited in our brief like
25 *Crawford* that talk about -- that strike down laws that have an

1 effect on a very limited segment of the population, and the
2 relevant inquiry is on --

3 THE COURT: Yeah.

4 MR. DEVANEY: -- those affected by the law.

5 THE COURT: Well, but almost all of those cases that
6 I'm aware of, and you can disabuse me if there's some case
7 particularly you don't think this is true, but it's looking at
8 the impact of the law as passed on a group of individuals, and
9 this is not such a law. This is a requirement of a witnessing,
10 which because of the specific circumstances of COVID-19 is now
11 having a disproportionate impact, and I'm not sure you're right
12 that the laws become unconstitutional as a whole simply because
13 of unforeseen events by the legislature they may have a
14 disproportionate impact on certain individuals. And if there's
15 a case that holds that, I'd be happy to look at it.

16 MR. DEVANEY: Okay, Your Honor. Well, I just would
17 point the Court to page 6 of our reply brief which --

18 THE COURT: And -- yeah, I'm familiar with those cases,
19 but I understand the argument.

20 Anything else that you want to add?

21 MR. DEVANEY: No. Thank you, Your Honor.

22 THE COURT: All right. And did either of the other
23 plaintiffs' counsel want to be heard?

24 MR. SHERMAN: Your Honor, Jon Sherman here. Would you
25 entertain just a small point regarding any potential remedy?

1 It's not rebuttal, but I'm asking.

2 THE COURT: I'm inclined to say no because you should
3 have raised it already, but I'm going to give you one minute.

4 MR. SHERMAN: Thank you, Your Honor. I just wanted to
5 suggest, because we went quickly through this point, that
6 hundreds of ballots have already been cast, so if Your Honor is
7 inclined to craft any remedy directed at our claim, that we'd
8 just respectfully request that it cover folks who have already
9 submitted their ballots and outline some procedure that they
10 could follow as well.

11 THE COURT: I've lost you. So for people who have
12 successfully cast ballots --

13 MR. SHERMAN: Sorry, who have cast ballots without a
14 witness signature. If you look at the declaration from Neil
15 Albrecht, there are about -- there are over 400 ballots that
16 have already been submitted --

17 THE COURT: And how different is that from any other
18 election?

19 MR. SHERMAN: I don't know the answer to that, Your
20 Honor, but we --

21 THE COURT: And I don't know either, and absent some
22 evidence that that's not just typical of absentee voters missing
23 a requirement, I am not going to make this retroactive.

24 MR. SHERMAN: Understood.

25 THE COURT: And I'm not aware of anything in the record

1 that says that.

2 Anything else?

3 MR. SHERMAN: No, Your Honor. Thank you.

4 THE COURT: All right. Thank you.

5 Thank you, all. I do want to say I realize this has been a
6 difficult process for everyone involved, especially working
7 remote. I am --

8 Sorry. I want to make sure I'm seeing everyone.

9 I am aware of the challenges that were faced by all counsel
10 and certainly by the commissioners and Ms. Wolfe and the people
11 working with her, and I'm even more aware of the burden that's
12 being placed on individual poll workers and ultimately, unless I
13 change my mind, on voters on election day and those who are
14 facing the difficult challenge of accomplishing successful
15 absentee voting. I'm not taking any of that lightly, and I will
16 endeavor to get a decision out as soon as possible so that
17 whatever steps can be taken consistent with the law occur.

18 Thank you again for your time and patience with me and my
19 questions. We are off the record.

20 (Proceedings concluded at 4:56 p.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 1st day of April, 2020, before the Honorable
5 William M. Conley, U.S. District Judge for the Western District
6 of Wisconsin, in my presence and reduced to writing in
7 accordance with my stenographic notes made at said time and
8 place.

9 Dated this 3rd day of April, 2020.

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_____/s/ Jennifer L. Dobbratz____

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Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

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No. 19A1016

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, ET AL.

Applicants,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Respondents.

THE WISCONSIN STATE LEGISLATURE,

Applicants,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

Respondents.

SEVENTH CIRCUIT CASE NOS. 20-1538 AND 20-1539

DIRECTED 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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**DECLARATION OF NEIL ALBRECHT IN SUPPORT OF
PLAINTIFFS-APPELLEES OPPOSITION TO MOVANTS' EMERGENCY
STAY**

I, Neil Albrecht, make this declaration in support of Plaintiffs' Opposition to Movants' Emergency Stay.

1. I am the Executive Director for the City of Milwaukee Election Commission. I have been the Executive Director since 2012. Prior to that, I was the Deputy Director of the City Election Commission, a position I held since 2005. In this position, I oversee all aspects of local election management. The election-related responsibilities of my office include providing absentee ballots to voters and receiving and processing completed absentee ballots. Our office is currently in the process of sending and receiving absentee ballots for the Spring Election scheduled for April 7 ("Spring Election").

2. The COVID-19 pandemic that is spreading across the world is having direct and severe consequences for the Spring Election. The epidemic has led to declarations of emergencies by the national, state, and local governments. On March 25, 2020, a new "Safer At Home Order" from Wisconsin Governor Tony Evers took effect, which orders "All individuals present within the State of Wisconsin . . . to stay at home or at their place of residence . . ." With limited exceptions, the Order requires individuals in the Wisconsin to stay at home through April 24, 2020. Anyone who violates the Order is potentially subject to 30 days imprisonment or a fine up to \$250.

3. There are approximately 294,000 registered voters in Milwaukee. The public health crisis and the fear of contracting COVID-19 has led to an unprecedented

number of requests for absentee ballots. Based on my experience, we are experiencing approximately ten times the normal volume of by-mail voting for a spring election.

4. As of April 5, there have been 94,256 absentee ballot requests and we have sent out 92,108 to voters. As of today, we have a backlog of approximately 2,148 absentee ballot requests, plus approximately 500 requests for reissuing ballots that were not received.

5. As of April 4, we have sent out 92,108 absentee ballots to voters and only 31,674 had been returned.

6. Based on my experience and given the delays in U.S. mail delivery during the COVID-19 crisis, there is an unusually large but indeterminate number of the voters who have been mailed absentee ballots but have still yet to receive their absentee ballots at home. Plus, thousands of voters will either: a) receive their ballots only one or two days prior to April 7th and even if they promptly return those ballots via U.S. mail, the Clerk's office will not receive them prior to Election Day; or b) only receive their absentee ballots on or after Election Day. This means that scores of thousands of voters in Milwaukee will be unable to return those ballots until after April 7, even if they were attempting to comply with the previous April 7 deadline for the return of absentee ballots.

7. According to recent court decisions, including Judge Conley's Order and that of the 7th Circuit Court of Appeals, if a voter receives an absentee ballot after Election Day, that voter can still cast his or her ballot as long as it is received by 4 pm on April 13. This is a deadline that has been included in instructions provided to

absentee voters (as of the date of the court ruling) and that has been frequently communicated to the media and the public. Based upon my experience and our efforts to efficiently process the unprecedented number of absentee ballot requests, scores of thousands of voters will either not receive their ballots prior to April 7 much less be able to return their ballots to my office prior to April 7. These scores of thousands of voters will have no opportunity to have their absentee ballots in my office on Election Day or earlier.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of April, 2020.

DocuSigned by:

3AC85AC8D9EE43A
Neil Albrecht

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*Counsel for Respondents Democratic National Committee and
Democratic Party of Wisconsin*

**DECLARATION OF MARIBETH WITZEL-BEHL IN SUPPORT OF
PLAINTIFFS-APPELLEES OPPOSITION TO MOVANTS' EMERGENCY
STAY**

I, Maribeth Witzel-Behl, make this declaration in support of Plaintiffs' Opposition to Movants' Emergency Stay.

1. I am the City Clerk for the City of Madison, Wisconsin. As the City Clerk, I am charged with the statutory duty of running elections in the City of Madison, pursuant to chapters 5-11 of the Wisconsin Statutes, and related laws. I submitted a declaration in this case in the district court on March 18, 2020. I am submitting this declaration to update the information that I provided previously.

2. The election-related responsibilities of the Madison City Clerk's Office include providing absentee ballots to voters and receiving and processing completed absentee ballots. Our office is currently in the process of sending absentee ballots for the spring election scheduled for April 7 ("Spring Election").

3. The City of Madison has an approximate total population of 255,650 residents (213,725 of voting age) and approximately 179,648 registered voters. The health emergency and the fear of contracting COVID-19 has led to an unprecedented number of requests for absentee ballots. As of the morning of April 5, the Clerk's office has issued 87,323 absentee ballots. We have received 46,902 of them, or 53.7%. This percentage is significantly lower than in past years. In April 2016, for example, we issued 11,126 absentee ballots, of which 10,272 (92.3%) were returned to be counted.

4. Based on my experience and the number of outstanding absent ballot requests, and given the delays in U.S. mail delivery during the COVID-19 crisis, a large number of voters have still yet to receive their absentee ballots at their address.

We have issued 38,569 absentee ballots that have a high probability of being returned after Election Day, either because they arrive to the voter after Election Day or because we do not receive them until after Election Day. The Wisconsin Election Commission estimates that it is taking the U.S. Postal Service a week to deliver absentee ballots and we have taken calls from Madison voters whose ballots took one week to reach their Madison address through the mail.

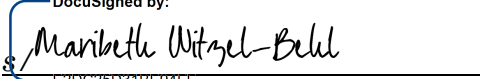
5. On Saturday, April 4, we issued 523 absentee ballots; on Friday, April 3, we issued 3,723 absentee ballots; on Thursday, April 2, we issued 2,751 absentee ballots; and, on Wednesday, April 1, we issued 2,587 absentee ballots. I anticipate that most, if not all, of these 9,584 ballots will not arrive to the requesting voter until after April 7. In addition, thousands of voters will receive their ballots either on Election Day or only one or two days before Election Day. On March 31, we issued 4,719 absentee ballots, 2,898 on March 30, and 2,306 on March 29. Even assuming these voters get their absentee ballots on or before April 7, if they promptly return those ballots via U.S. mail, the Clerk's office will not receive them until after Election Day. Meanwhile, thousands of remaining voters, as mentioned, will only receive their absentee ballots on or after Election Day. We are informing voters that even if they receive ballots after April 7, their vote will count so long as we receive them by 4 PM on April 13. This guidance conforms with recent court decisions.

6. Additionally, we have mailed over 500 absentee ballots overseas. We have heard from numerous voters that they cannot send their absentee ballots because mail from their origin country to the United States has been suspended. For

example, we recently received an email from a voter who lives in the United Arab Emirates who, along with approximately 30 co-workers, cannot mail their ballots because mail from the UAE to the U.S. has been halted.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of April, 2020.

DocuSigned by:

E2DC25D31BE94FF...
Maribeth Witzel-Behl

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REPUBLICAN NATIONAL COMMITTEE, ET AL.

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SEVENTH CIRCUIT CASE NOS. 20-1538 AND 20-1539

DIRECTED TO THE HONORABLE BRETT M. KAVANAUGH,
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AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT

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**DECLARATION OF KRIS TESKE IN SUPPORT OF
PLAINTIFFS-APPELLEES OPPOSITION TO MOVANTS' EMERGENCY
STAY**

I, Kris Teske, make this declaration in support of Plaintiffs' Opposition to Movants' Emergency Stay.

1. I am the City Clerk for the City of Green Bay. I have been the Clerk since 2012. In this position, I oversee all aspects of local election management. The election-related responsibilities of my office include providing absentee ballots to voters and receiving and processing completed absentee ballots. Our office is currently in the process of sending and receiving absentee ballots for the Spring Election scheduled for April 7 ("Spring Election").

2. There are approximately 52,230 registered voters in Green Bay. The public health crisis and the fear of contracting COVID-19 has led to an unprecedented number of requests for absentee ballots. Based on my experience, we are experiencing approximately six times the normal volume of by-mail voting for a spring election.

3. As of April 5, there have been approximately 17,000 absentee ballot requests and we have sent out approximately 13,000 to voters. As of today, we have a backlog of approximately 4,000 absentee ballot requests.

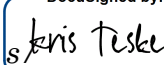
4. According to recent court decisions, including Judge Conley's Order and that of the 7th Circuit Court of Appeals, if a voter receives an absentee ballot after Election Day, that voter can still cast his or her ballot as long as it is received by 4 pm on April 13. This is a deadline we have been letting voters know about and has been publicized in the local media.

5. For the approximately 4,000 voters whose absentee ballot requests have

not been processed yet by my office, it will be very difficult, if not impossible for those ballots to be returned by the 7th.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of April, 2020.

DocuSigned by:

7809B7B104344B0
Kris Teske

SUPREME COURT OF THE UNITED STATES

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

No. 19A1016

Plaintiffs-Appellees,

v.

REPUBLICAN NATIONAL COMMITTEE, et
al.,

Defendant-Intervenor-
Appellants.

**DECLARATION OF TARA COOLIDGE IN SUPPORT OF
PLAINTIFFS-APPELLEES OPPOSITION TO MOVANTS' EMERGENCY STAY**

Tara Coolidge declares as follows:

1. I am an adult resident of the State of Wisconsin. I make this affidavit in support of Plaintiffs-Appellees Opposition to Movants' Emergency Stay. While various parties to this action are partisan political entities, the City of Racine, Wisconsin, is a nonpartisan municipal government. I am a statutory officer of the City of Racine. Nothing in this Declaration should be interpreted as taking position from a partisan political perspective.
2. I have personal knowledge of the matters set forth herein, and, if called as a witness, I could and would testify competently as to the truth of such matters.
3. I am the City Clerk for the City of Racine, Wisconsin. In this capacity, I am responsible for conducting elections within the City of Racine, pursuant to

Chapters 5 through 11 of the Wisconsin Statutes, as well as related statutes and regulations, and City of Racine ordinances.

4. Racine is the fifth-largest city in the State of Wisconsin. It is situated on the western shore of Lake Michigan, in southeastern Wisconsin, between Milwaukee and the Illinois state line. As of the 2010 United States census, Racine had a population of 78,860, approximately 56,852 of whom were of voting age. The population of Racine is similar to that level today. (All demographic data herein, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml, accessed March 31, 2020.) Racine is one of the most ethnically diverse cities in Wisconsin. Approximately 23% of its residents are African-American, and approximately 21% of Racine residents are Hispanic/Latino. Approximately 20% of Racine residents live below the poverty level. Approximately 32% of African-American Racine residents and 27% of Hispanic/Latino Racine residents live in poverty.
5. On March 18, 2020, Racine Mayor Cory Mason formally proclaimed that a state of emergency existed in the City of Racine, pursuant to his authority as mayor under Wisconsin Statutes section 323.11 and 323.14(4) and Racine Ordinance section 34-1. Such declaration of emergency shall expire at 11:59 P.M., April 20, 2020, unless extended by the Mayor or the Common Council of the City of Racine.
6. As City Clerk, my responsibilities respecting elections in the City of Racine include, but are not limited to, providing absentee ballots to voters; conducting

in-person, early absentee voting; receiving and processing completed absentee ballots; and overseeing in-person voting on election day in all City wards.

7. The election to be held on Tuesday, April 7, 2020 (“Spring Election”) includes Republican and Democratic Presidential Primaries. However, every other office or measure on every ballot, including municipal elective offices and the Wisconsin Supreme Court election, is nonpartisan.
8. Regarding the Spring Election, my office continues to struggle with the effects of, and the City of Racine’s crucial response to, the coronavirus pandemic. My office has been extremely burdened with processing the record number of absentee ballot requests that we have received.
9. The deadline for requesting absentee ballots had been Thursday, April 2, 2020. This was extended to Friday, April 3, 2020, by order of the United States District Court for the Western District of Wisconsin. Of the City of Racine’s more than 34,000 registered voters, we typically receive absentee ballot requests from approximately 1,500 voters. As of the end of the day, Friday, April 3, 2020, my office had received 11,087 absentee ballot requests. On Friday, April 3, alone—only four days before the election—my office received approximately 385 absentee ballots requests.
10. My office is fulfilling absentee ballot requests as fast as possible. Much of my staff along with additional City employees has been dedicated to that task. However, because of the extraordinary number of absentee ballot requests we have received, this has been overwhelming. The City Clerk’s Office is required to

respond to send an absentee ballot to an elector within 48 hours of receiving the request for a ballot. Because of the extraordinary dedication shown by Racine employees, we have generally done well meeting that timeline, but it has been difficult.

11. We make multiple runs to the post office each day to send absentee ballots. Many hundreds of absentee ballots have been mailed to electors each day through and including, Saturday, April 5, 2020. There are still more than 100 ballots that we were unable to take to the post office before now. They will be mailed out on Monday, April 6, 2020.
12. It is unreasonable to expect that absentee ballots sent by mail to electors within the last several days will be delivered to the electors and then returned by mail or otherwise to my office by April 7, 2020. In my experience, it can take as much as one week after posting for mail to be delivered from one address in Racine to another address in Racine. I understand this is because mail from Racine is transported to Milwaukee to be sorted and processed before being delivered to an address in Racine. Mail-delivery times for absentee ballots have increased in recent weeks, which I attribute to the volume of requests received and understandable fears due to the COVID-19 public health emergency.
13. The City has 14 polling locations on Election Day, all with two to four wards voting at them. They are held in schools, community centers, and churches. Each polling location requires an election chief, a greeter, and three election officials (together, "poll workers") to staff each ward. In a lower-turnout election, we

need approximately 135 poll workers, at minimum, to run the election effectively and to comply with the law. Based upon the anticipated voter turnout, I will need 180 to 200 poll workers comfortably to staff the April 7, 2020 election.

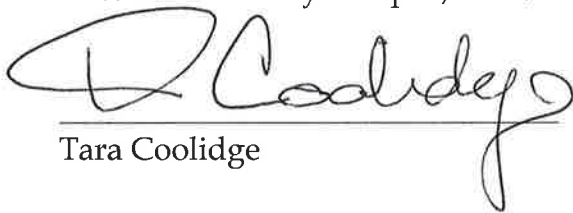
14. Of the 135 poll workers that we used in the February 2020 primary election, fewer than 25 of them were under the age of 60. I am concerned there will not be sufficient numbers of lower-risk poll workers available on April 7, 2020. Even before the Wisconsin Department of Health Services' "Safer at Home" Executive Order #12, we were losing poll workers. Many of the chief election officials previously scheduled to work have notified me that they have chosen to work the polls on April 7, 2020. I have been concerned we will not be able to fully staff our election locations.
15. As the City of Racine's difficulty in obtaining poll workers has been publicized, the number of absentee voter requests has increased. With the number of absentee ballot requests so-greatly increased, it has become clear we will not receive all absentee ballots back from electors desiring to cast a vote by 8:00 P.M., Tuesday, April 7, 2020. This led me and others within the City of Racine government to be concerned that large numbers of Racine voters would effectively be disenfranchised for no other reason than the unique moment in which we exist, specifically due to the fears of and responses to the COVID-19 public health emergency.
16. Within the City of Racine government, we were pleased that the United States District Court for the Western District of Wisconsin issued an order allowing us

to accept absentee ballots through 4:00 P.M., Monday, April 13, 2020, in order to assure all voters' ballots are received.

17. As of this writing, at about 10:00 A.M. CDT, Sunday, April 5, 2020, my office has 5,338 absentee ballots returned from electors. Therefore, of the more than 11,000 absentee ballots sent, there are more than 5,700 yet to be received.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 5th day of April, 2020.



Tara Coolidge