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

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v. Case No. 20-cv-249-wmc

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

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

Plaintiffs,

v. 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.

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

Plaintiffs,

v. 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.

REPLY BRIEF OF PLAINTIFFS IN *LEWIS, ET AL. v. KNUDSON, ET AL*, 20-CV-284 ON ITS RULE 41(a)(2) MOTION TO DISMISS

INTRODUCTION

The *Lewis* Plaintiffs have filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 41(a)(2). Dkt. 205.[1] All parties agree that *Lewis, et al. v. Knudson, et al.*, 20-CV-284 ("the *Lewis* case") is moot, and that it should be dismissed. However, Defendants Wisconsin Elections Commission members and Administrator ("WEC") (dkt. 209), the Intervenor-Defendants – the Wisconsin Legislature (dkt. 210) and the Republican National Committee and Republican Party of Wisconsin ("RNC/RPW") (dkt. 211) – submitted briefs opposing the Motion to Dismiss, arguing that the *Lewis* Plaintiffs should not be awarded costs, and should not be permitted to petition to recover their attorney's fees,

[1] Unless otherwise indicated, all citations in this Brief are to the docket in case number 20-cv-249-wmc (the "'249 case"). Where a docket citation is specifically to the docket in the *Lewis* case, the citation is to the "'284 case."

because they are not a "prevailing party." The RNC/RPW also opposed the *Lewis* Plaintiffs' request for dismissal unless the dismissal is entered with prejudice.

This reply brief will explain that the objections of the WEC, the Wisconsin Legislature, and the RNC/RPW are meritless, and why (as requested in the Motion to Dismiss) the Court should under Rule 41(a)(2) dismiss the *Lewis* case without prejudice, with costs, and with the *Lewis* Plaintiffs retaining their right to seek attorneys' fees and expenses under 42 U.S.C. § 1988. As shown below: (a) the *Lewis* Plaintiffs succeeded on a significant issue which achieved a benefit to them and their members, as well as the general public; and (b) the dismissal of the *Lewis* case should be without prejudice because that is the default manner for dismissal under Rule 41(a)(2) and nothing supports a deviation from that approach.

I. The *Lewis* Plaintiffs are a "prevailing party."

A. A party is "prevailing" if it succeeded on a significant beneficial issue.

The *Lewis* case presented civil rights claims under 42 U.S.C. § 1983. The United States Supreme Court has broadly defined as "prevailing parties" those civil rights plaintiffs who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemore*, 581 F.2d 275, 278-79 (1st Cir. 1978)); *see also Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (affirming definition of "prevailing party" used in *Nadeau v. Helgemore*, 581 F.2d 275 and *Hensley v. Eckerhart*, 461 U.S. 424). It has consistently held that prevailing party status can be conferred in an interim fee award where "a party has prevailed on the merits of at least

some of [its] claims." *Buckhannon Bd. & Care Home v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 605 (2001), *citing Texas State Teachers Assn. v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792 (1989). Although *Buckhannon* jettisoned what was known as the "catalyst rule," the Court distinguished circumstances where defendants simply altered their conduct in the absence of a court order and held that prevailing party status hinged upon a "judicially sanctioned change in the legal relationship of the parties," *Buckhannon,* 532 U.S. at 605, which is precisely what occurred here.

The WEC, Wisconsin Legislature, and RNC/RPW have separately argued that the *Lewis* Plaintiffs are not "prevailing parties" because: 1) the *Lewis* Plaintiffs did not request that the April 7 statutory deadline for receipt of absentee ballots be enjoined and extended; 2) the Court did not grant the *Lewis* Plaintiffs' central request to postpone the April 7 in-person election; and 3) the *Lewis* Plaintiffs "won" nothing because the WEC offered to extend the deadline in a letter to the Court. As shown below, all these arguments fail.

B. The *Lewis* Plaintiffs explicitly and consistently requested an extension of the deadline for submission of absentee ballots.

Contrary to the WEC's claims, each and every submission to the Court by the *Lewis* Plaintiffs sought, *inter alia,* an extension of the deadline for voters to submit absentee ballots, the precise remedy ordered by the Court. Their Complaint directly addressed the problem imposed by the 8 p.m. election day deadline for return of voters' absentee ballots, statutorily mandated by Wisconsin Statutes Section 6.87, alleging the

problems identified in various municipalities, and specifically alleging with respect to the City of Madison that:

> The circumstances described above makes the 8:00 p.m. election day deadline for receipt of absentee ballots completely unworkable. The combination of the volume of requests for absentee ballots, the ever-increasing backlog the City has, and the fact that it now takes about a week to send voters an absentee ballot means that a very large number of absentee ballots from lawful voters will not arrive until after election day. The Clerk estimates that the City will receive more than 1,000 absentee ballots after 8:00 p.m. on April 7. Under the current law, all of those voters will be disenfranchised -- their votes won't count.

'284 case dkt. 1 ¶ 140.

Their Complaint further alleged that an extension of the 8:00 p.m. election day deadline for receipt was essential to avoid disenfranchisement of voters:

> [A]s absentee balloting becomes the only safe way to vote, Wisconsin voters are at a high risk of not receiving their ballots with sufficient time to mail it into the municipal clerk's office so that it is received prior to the Election Day Receipt Deadline. This too will lead to disenfranchisement.

Id. ¶ 235.

The Complaint's Prayer for Relief specifically asked the Court to declare "the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, [Wis. Stat.] § 6.87, [] unconstitutional in violation of the First and Fourteenth Amendments;" "[e]njoin[ ] Defendants…from rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk's office by June 2, 2020" and order "[d]efendants to establish Tuesday, June 2, 2020 as the deadline by which municipal clerks must have counted all returned mailed absentee ballots." '284 case dkt. 1 at 65-67, "Prayer for Relief," ¶¶ B, H, L.

While Defendants assert that the *Lewis* Plaintiffs' TRO Motion focused exclusively on postponing the in-person election, in fact, the *Lewis* Plaintiffs sought a TRO specifically to enjoin the WEC Defendants from "enforcing the requirement that polling places receive absentee ballots by 8:00 p.m. on Election Day to be counted ("Election Day Receipt Deadline"), § 6.87." '284 case dkt. 17 at 2. And in their supporting Brief for the TRO Motion, the *Lewis* Plaintiffs likewise requested that the "process for voter requests and submissions of mail-in absentee ballots be extended beyond April 7." '284 case dkt. 18 at 13. Contrary to Defendants' argument, that request was not conditional upon postponement of the in-person vote.

Finally, in their Statement of Record Facts in Support of Emergency Motion for Temporary Restraining Order, describing the sworn testimony (in the form of declarations) and other evidence submitted by them, the *Lewis* Plaintiffs identified the serious problems of backlogs, shortages of supplies, and the likelihood that absentee voters would not be able to return their ballots by April 7. With respect to the City of Madison, the testimony stated that:

> The circumstances described above makes the 8:00 p.m. election day deadline for receipt of absentee ballots completely unworkable. The combination of the volume of requests for absentee ballots, the ever-increasing backlog the City has, and the fact that it now takes about a week to send voters an absentee ballot means that a very large number of absentee ballots from lawful voters will not arrive until after election day. The Clerk estimates that the City will receive more than 1,000 absentee ballots after 8:00 p.m. on April 7. Under the current law, all of those voters will be disenfranchised -- their votes won't count.
>
> The City also is beginning to receive calls from voters who are currently overseas and unable to return their absentee ballot via mail because the country in which they are located is no longer offering mail

> service due to COVID-19. The City Clerk's Office contacted the Wisconsin Elections Commission about this issue and was informed that the only option for these voters is to return their ballot through the mail. The City has issued absentee ballots to over 500 voters who are currently overseas.
>
> In addition to the above issues, the unprecedented requests for absentee voting is hampered at times by shortages of mailing labels and envelopes.

'284 case dkt. 19 ¶¶ 110-112.

The *Lewis* Plaintiffs presented sworn testimony identifying similar problems in Green Bay:

> To address absentee ballot envelope shortages, the Commission directs clerks to be prepared to print their own…. Such a suggestion, however, fails to take into account staffing shortages caused by COVID-19 as well as the fact that current clerks' staffs are already stretched too thinly while they attempt to process the overwhelming backlog created by unprecedented demand for absentee ballots. As of March 24, 2020, the City Clerk's Office was handling a backlog of over 4,000 absentee ballots with six staff members, including staff from outside of the department.
>
> The City Clerk's Office does not have the resources to adequately handle all of the requests for absentee ballots plus these new directives from the Commission. Notably, the Clerk's office is attempting to address the new directives in addition to its day-to-day duties, all of which have been assigned to other departments to the extent they can be at this time.

Id.¶¶ 116-117.

Suggesting that the *Lewis* Plaintiffs were focused solely on a postponement of the in-person vote is a blatant mischaracterization of the actual record in this litigation. The *Lewis* Plaintiffs consistently sought a broad range of relief, including extension of the April 7 absentee ballot return deadline to ensure that thousands of eligible Wisconsin voters were not disenfranchised due to the COVID-19 pandemic.

C. The Court's order to extend the statutory deadline for receipt of absentee ballots was a significant beneficial issue on which the *Lewis* Plaintiffs prevailed, warranting prevailing party status.

The Court's Order to allow absentee ballots to be received by local clerks until 4 p.m. on April 13 was a significant remedial measure that enfranchised nearly eighty thousand otherwise-qualified voters. That the Court declined to grant the other remedies -- including postponement -- sought by the *Lewis* Plaintiffs does not diminish the profound importance of the Court's remedial order.

Hensley, supra, establishes the principle that a party can acquire prevailing party status where it prevails on some, but not all, of its claims. Yet, the WEC now contends that the *Lewis* Plaintiffs are not entitled to prevailing party status because they did not prevail on their "principal issue," dkt. 209 at 9, ignoring that, post-*Hensley,* the Supreme Court explicitly rejected a district court's use of such a "central issue" test to determine prevailing party status, holding that plaintiffs must only succeed on a "significant issue." *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782, 789 (1989) (quoting *Hensley* in holding that "the most critical factor is the degree of success obtained." 461 U.S. at 436). Moreover, the Supreme Court subsequently distinguished cases involving only nominal damages awards, or technical, or minimal victories for plaintiffs, where no fee award is typically appropriate from those that attained relief on a "significant issue." See *Farrar v. Hobby,* 506 U.S. 103 (1992) (where plaintiff sought $17 million award and received a nominal $1 award no fee award was appropriate); see also, *Aponte v. City of Chicago,* 728 F.3d 724, 726-27 (7th Cir. 2013) (summarizing Seventh Circuit precedent applying *Garland* and *Farrar*).

Where plaintiffs receive meaningful relief, even despite falling substantially short of loftier objectives in their complaints, as Defendants claim occurred here, the Seventh Circuit "has rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought or that the fee award might, in fact, be more than the plaintiff's recovery." *Estate of Enoch v. Tienor,* 570 F.3d 821, 823 (2009) (plaintiff achieved more than nominal damages and was thereby entitled to fee award as prevailing party in connection with accepted offer of judgment for $635,000 despite procuring only a fraction of $10 million sought in complaint).

In this case, the Court's order to allow six additional days for absentee ballots to be received by local clerks enfranchised nearly eighty thousand qualified voters by the WEC's own admission. That result was neither nominal, trifling, nor minimal relief. By any measure, the L*ewis* Plaintiffs procured a meaningful measure of success and thereby prevailed.

D. The Court's preliminary injunctive relief to extend the statutory absentee ballot return deadline was not mere recognition of an act of volition by the WEC; it was affirmative relief obtained by the *Lewis* Plaintiffs.

The Court's order to extend the absentee ballot return deadline was not, as the WEC Defendants suggest, an act of volition by the WEC that would have occurred in the absence of this litigation. The WEC's letter to the Court on the cusp of the April 1 TRO hearing indicating that it did not object to extension of the statutory deadline does not alter the *Lewis* Plaintiffs' status as a prevailing party. Even if the WEC had offered to enter into a settlement or a consent decree – which it did not and could not -- such conduct would still not adversely affect the *Lewis* Plaintiffs' entitlement to attorney fees.

Maheer v. Gagne, 448 U.S. 122, 129 (1980) (fact that plaintiff obtained relief via settlement agreement had no impact on her being a prevailing party). The two other sets of intervening Defendants both opposed and appealed to both the Seventh Circuit and the Supreme Court this Court's April 2 Order, forcing the *Lewis* Plaintiffs to defend and preserve the remedial relief ordered by this Court.

In addition, the fact that only preliminary injunctive relief was ordered without a final judgment has no bearing on the prevailing party status of the *Lewis* Plaintiffs. The Seventh Circuit adheres to what has become a clear majority view in the circuits in the wake of *Buckhannon* that prevailing party status may be conferred when: a) plaintiffs request and win preliminary injunctive relief from a district court on the merits of their clams, and not simply to equitably preserve the *status quo*; b) the injunctive order altered the parties' legal relationship; and c) the complaint sought the affirmative relief and became moot prior to the time the plaintiffs petitioned for fees. *See Young v. City of Chicago,* 202 F.3d 1000, 1000-01 (7th Cir. 2000) and *Dupuy v. Samuels,* 423 F.3d 714, 724-725 (7th Cir. 2005).

In *Young,* the plaintiffs requested and won a preliminary injunction granting them a permit to engage in assembly outside the 1996 Democratic Party convention. *Id.* Defendants' post-Convention appeal was dismissed as moot but the Seventh Circuit which held that the plaintiffs were a prevailing party entitled to fees even though the district court never reached a final judgment on the merits of plaintiffs' claims. *Id.*

In *Dupuy* the court distinguished the circumstances where a preliminary injunction became moot because it had merely preserved the status quo until the court

could reach a decision on the merits, versus cases such as *Young* – and in this case-- where the mere passage of time mooted the matter after the event which was enjoined had passed. In *Dupuy* noted that the Seventh Circuit's view was consistent with how other circuits had addressed the issue in the wake of *Bukhannon*:

> Our circuit's law on the mootness issue is hardly an outlier among the federal circuit courts. We note that, in cases with circumstances similar to those in *Young*, several of our sister circuits have held that attorneys' fees may be awarded after a party has obtained a preliminary injunction and the case subsequently has become moot. *See, e.g.*, *Select Milk Producers, Inc. v. Johanns*, 365 U.S. App. D.C. 183, 400 F.3d 939 (D.C. Cir. 2005); *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002); *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987).

Dupuy, 423 F.3d at 723, n. 4; *see also Consol. Paving Inc. v. City of Peoria,* No. 10-cv-1045, 2013 WL 916212 at *9 (C.D. Ill., Mar. 7, 2013) (surveying and summarizing the development of federal circuit positions including that of the Seventh Circuit, post-*Bukhannon,* on a party's prevailing party status in a moot case after procuring preliminary injunctive relief).

Since *Dupuy*¸ other circuits have adopted rules and general approaches affirming "prevailing party" fee awards in similar circumstances where plaintiffs won preliminary injunctive relief predicated upon a probability of success on the merits and the case became moot due to the passage of time and conclusion of the event enjoined, or other circumstances beyond the control of the plaintiff. *See, e.g., Dearmore v. City of Garland,* 519 F.3d 517, 524 (5th Cir. 2008) (adopting test that plaintiff is a "prevailing party" if it wins preliminary injunction based upon likelihood of success and action becomes moot); *People Against Police Violence v.*

City of Pittsburgh, 520 F.3d 226, 228-29 (3d Cir. 2008) (plaintiff "prevailed" where it achieved preliminary injunction and case became moot by virtue of "the results of the legal process"); *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1234, 1238 (10th Cir. 2011) (plaintiff was a prevailing party by acquiring preliminary injunction).

In the *Lewis* Plaintiffs' Prayer for Relief in their Complaint, they explicitly requested that § 6.87, Wis. Stats. be enjoined and that the 8:00 P.M., April 7 deadline for the return of absentee ballots be extended. '284 case dkt. 1 at 65-67, "Prayer for Relief," ¶¶ B, H, L. The Court's April 2 Order granted the *Lewis* Plaintiffs' requests in paragraphs B, H and L of their Prayer for Relief by enjoining Defendants from enforcing § 6.87 and requiring them to "extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020." Dkt. 170 at 5.

That Order was without question a "judicially sanctioned change in the legal relationship of the parties," *Buckhannon*, 532 U.S. at 605, which resulted in the counting of 79,054 additional absentee ballots received by municipal clerks across the state between April 8 and April 13. *See* WISCONSIN ELECTION COMMISSION, "*April 7 2020 Absentee Voting Report,*" at p. 7 & Table 8, May 15, 2020, available at: https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/May%2020%2C%202020.Final_.pdf. (last visited June 2, 2020) The 79,054 absentee ballots returned during the period allowed by the preliminary injunction represented 6.68% of total ballots, including all in-person and absentee ballots cast in the election. *Id.*

The Court's preliminary injunction was judicially-sanctioned relief that altered the parties' legal relationship. It was a judicial determination to directly address the merits of the *Lewis* Plaintiffs' claims and provide relief to what the Court recognized was a serious infringement upon Wisconsinites' right to vote. It was not a mere equitable remedy designed to preserve the *status quo.*

The preliminary injunction was widespread, substantial, and meaningful in enfranchising scores of thousands of qualified Wisconsin electors who otherwise would not have been able to participate in this important election. The Legislature and Republican Party Defendants immediately appealed the preliminary injunction to the Seventh Circuit Court of Appeals and failing there on the issue of the absentee ballot deadline, applied for an emergency stay from the United States Supreme Court. Although the Supreme Court qualified the injunction regarding § 6.87 by imposing a postmark requirement, the preliminary injunction remained otherwise intact and resulted in profound relief and vindication of the *Lewis* Plaintiffs' claims.

The *Lewis* Plaintiffs sought no relief in their Complaint beyond Wisconsin's Spring General Election and Presidential Preference Primary. Accordingly, their claims are now moot. The *Lewis* Plaintiffs are in the exact posture as the plaintiffs in *Young,* who similarly prevailed in procuring preliminary injunctive relief. In *Young,* plaintiffs sought to engage in protest activity at a specific event, only to have the case mooted by the passage of time and conclusion of the event which was the subject of the injunction. For the *Lewis*

Plaintiffs, they likewise won injunctive relief applicable to an event that has now passed. In both cases, mootness arose post-injunction solely due to the temporal conclusion of the enjoined event, and dismissal was appropriate because further litigation to a final judgment on the merits served no purpose.

By all applicable measures, the *Lewis* plaintiffs "prevailed."

II. The Court's dismissal should be without prejudice.

A. Dismissal without prejudice is the default under Rule 41(a)(2), and dismissal with prejudice is only appropriate when needed to shelter defendants from prejudicial effects of a dismissal without prejudice.

In their motion under Rule 41(a)(2), the *Lewis* Plaintiffs ask that the case be dismissed as moot. The Rule itself provides that "unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice," and the ordinary consequence of mootness is dismissal without prejudice. *Dixon v. ATI Ladish LLC*, 667 F.3d 891, 894 (7th Cir. 2012); *see also* 9 Fed. Prac. & Proc. Civ. § 2364 (3d ed.) (dismissals without prejudice generally should be granted by the district court under Rule 41(a)(2) if no prejudicial effects would result for the opposing party, citing cases).

Under Rule 41(a)(2), at its discretion, the Court may place conditions on the plaintiff's voluntary dismissal as it deems necessary to offset the possible prejudice that the defendant may otherwise suffer from dismissal without prejudice. *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir. 1994). None of the objecting Defendants have alleged that there are any prejudicial effects that would result from dismissal of the *Lewis* case without prejudice. "In exercising its discretion, the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer

some plain legal prejudice other than the mere prospect of a second lawsuit." *Stern v. Barnett*, 452 F.2d 211 (7th Cir. 1971); *Woodzicka v. Artifex Ltd.*, 25 F. Supp. 2d 930, 934 (E.D. Wis. 1998).

Nevertheless, the WEC argues in its response brief that "dismissal for mootness is generally with prejudice." Dkt. 209 at 9. The sole case they cite for that proposition is *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) in which there is absolutely nothing supporting the WEC Defendants' statement. *Deakins* presented "questions concerning a federal court's obligation to abstain from the adjudication of federal claims arising out of an ongoing state grand jury investigation." *Id.* at 194-195. The only thing it discussed said about mootness and dismissal was this:

> And respondents can be prevented from reviving their claims by the order of dismissal. Because this case was rendered moot in part by respondents' willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated. This will prevent the regeneration of the controversy by a reassertion of a right to litigate the equitable claims in federal court.

Id. at 200.

Dismissal with prejudice is unnecessary to prevent revival of the *Lewis* Plaintiffs' claims in this case. The passage of time (the occurrence of the April 2020 elections), and the limited relief sought by the *Lewis* Plaintiffs (only injunctive relief as to those elections), alone will prevent revival of the *Lewis* Plaintiffs' claims here. That is why the case is now moot, as everyone agrees. The mootness of the *Lewis* Plaintiffs' claims is all the protection the Defendants need.

Moreover, dismissal with prejudice would harm some of the *Lewis* Plaintiffs. By its nature, a dismissal with prejudice not only prevents a plaintiff from filing the same lawsuit again; it can in some circumstances also have other preclusive effects, such as preventing a plaintiff from pursuing other claims that existed at the time of filing against the same defendants. Here, two of the *Lewis* Plaintiffs, Black Leaders Organizing for Communities ("BLOC") and the League of Women Voters of Wisconsin ("the League"), are also plaintiffs in other cases pending against many of these same defendants: (1) *Gear, et al. v. Bostelmann, et al.*, Case No. 20-cv-278-wmc (W.D. Wis.) (consolidated with *DNC, et al. v. Bostelmann, et al.,* Case No. 20-cv-249-wmc (W.D. Wis.) (LWVWI); and (2) *Swenson, et al. v. Bostelmann, et al.,* Case No. 20-cv-459-wmc (W.D. Wis.). Those cases pursue different claims and remedies than this one.

A dismissal of the *Lewis* Plaintiffs' Complaint "with prejudice" could end BLOC's and the League's abilities to pursue those ongoing cases. Such an effect would work an unmerited penalty on those plaintiffs. By contrast, a dismissal "without prejudice" would allow those plaintiffs to continue to pursue those other cases, seeking prospective relief pertaining to future elections, and would not work any legal prejudice on the Defendants here.

B. The *Lewis* Plaintiffs have not engaged in bad behavior, which can also support imposition of the condition of "with prejudice" dismissal by a court.

Sometimes courts will require a plaintiff's voluntary dismissal to be with prejudice as punishment for bad behavior on the plaintiff's part, or to prevent sharp practices, as was the case in *Pace* and *Ratkovich*. Those cases were cited by the Republican Party in its opposition brief to support the proposition that because there have been "extensive proceedings" in this case and the "election period that was the focus of the action" has "expired," dismissal with prejudice is appropriate. *See* dkt. 211 at 2. Those cases do not support that proposition.

Pace is the leading Seventh Circuit case describing the factors to be considered in whether to condition voluntary dismissal on the penalty of dismissal with prejudice. Those factors are:

(1) the defendant's effort and expense of preparation for trial,
(2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action,
(3) insufficient explanation for the need to take a dismissal, and
(4) the fact that a motion for summary judgment has been filed by the defendant.

Pace v. S. Exp. Co., 409 F.2d 331, 334 (7th Cir. 1969).

Finding those factors present, the *Pace* court upheld the district court's denial of the motion to dismiss without prejudice. *Id.* It specifically endorsed the district court's finding that denial of the motion to dismiss without prejudice, filed while a motion for summary judgment was pending, was necessary to protect the defendants from future litigation, and that ruling on the motion for summary judgment to reach a final decision

on the merits was also appropriate: three lawsuits with causes of action *identical* to those pending before the federal court were then also pending in state court. *Id.* at 334-335. "[I]t would be unfair to permit plaintiff to press them when it has failed to develop any material issue for trial in its earlier-filed federal court case.…defendant was entitled to a judgment which would preclude continued litigation on the same issue in any other court." *Id.* at 335.

Ratkovich presented similar bad behavior on the part of the plaintiff and simply applied the *Pace* factors to uphold the district court's exercise of discretion. None of the *Pace* factors apply here. Consequently, *Pace* and *Ratkovich* provide no support for conditioning voluntary dismissal of Plaintiff's case on a "with prejudice" designation.

Finally, the Republican Party also cites *Timothy B. O'Brien LLC v. Knott*, 18-CV-684-JDP, 2019 WL 4722483, *1 (W.D. Wis., May 16, 2019), for the proposition that a plaintiff's motion for voluntary dismissal should be with prejudice, or withdrawn, because the defendant had to defend against a motion for preliminary injunction. *See* dkt. 211 at 2. That case is inapposite. Unlike here, in *O'Brien* the preliminary injunction was denied based on a finding that the plaintiff did not show a likelihood of success on the merits or irreparable harm. Thereafter, it filed a motion to voluntarily dismiss its claims without prejudice. The court ruled that "because defendants had successfully defended against Apple Wellness's motion for preliminary injunction," the plaintiff had to "either accept dismissal *with* prejudice or withdraw its motion." *Id.*

III. The Legislature misrepresents the holding of *Sole v.Wyner.*

Sole v. Wyner, 551 U.S. 74 (2007) was cited by the Wisconsin Legislature to support its assertion that *Lewis* Plaintiffs should not be permitted to seek costs, expenses and fees because they "lost even on the overwhelming majority of their arguments at the preliminary injunction and appellate stages." Dkt. 201 at 2. *Sole* does not support the Legislature's argument. It presented a single question:

> Does a plaintiff who gains a preliminary injunction after an abbreviated hearing, but is denied a permanent injunction after a dispositive adjudication on the merits, qualify as a 'prevailing party' within the compass of § 1988(b)?

551 U.S. at 77. The Court then held that:

> [a] plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision *if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.*" *Id.* at 78 (emphasis added).
>
> Prevailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case."

Id. at 83.

Here, the *Lewis* Plaintiffs' victory was not "undone." Quite the contrary: their victory resulted in the enfranchisement of over 79,000 voters whose ballots would otherwise not have been counted. It was a resounding victory for democracy and the right to vote.

CONCLUSION

The *Lewis* Plaintiffs' motion to dismiss without prejudice, with costs and with them retaining the right under 42. U.S.C. § 1988 to seek attorneys' fees and expenses should be granted.

Dated this 2nd day of June 2020.

Respectfully submitted,

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