

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

DEMOCRATIC NATIONAL COMMITTEE, et al., Civil Action No.: 3:20-cv-249-wmc

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants.

SYLVIA GEAR, et al.,

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

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants.

CHRYSTAL EDWARDS, et al.,

Civil Action No. 3:20-cv-340-wmc

Plaintiffs,

v.

ROBIN VOS, et al.,

Defendants.

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants.

JILL SWENSON, et al.,

Plaintiffs,

v.

Civil Action No. 3:20-cv-459-wmc

MARGE BOSTELMANN, et al.,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants.

**BRIEF OF THE *EDWARDS* PLAINTIFFS IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Courts almost never write on a blank slate.

Even when they encounter that *rara avis*, the case of first impression, courts turn to the Constitution, decades if not centuries of case law, state and federal statutes, and administrative law. Rarely must a court start from scratch.

Yet the cliché is right: there is a first time for everything, and this case is truly unprecedented. The United States has never before attempted to conduct a Presidential election amidst an outbreak of a deadly contagious disease. The 1918 Influenza pandemic, tragic as it was, happened during a midterm election, when the total U.S. population was less than one-third of its

size today, two years before women could vote at all, and during a time when African-Americans were effectively disenfranchised altogether. With a much larger electorate today, coupled with rapid means of travel that were barely imaginable in 1918, it is no stretch to conclude that an outbreak of infectious disease is a much greater threat to an election today than it was just over a century ago.

In the intervening 100 years, Congress passed the Americans with Disabilities Act, the Voting Rights Act of 1965, and the Help America Vote Act to eliminate barriers to full participation by the electorate, and the federal courts have repeatedly recognized that voting is **the** fundamental civil right that operates as the key to all other rights. But as significant as those advances were, they did not anticipate – they could never have anticipated – the devastating effect of this virus on the United States in 2020.

The scourge of COVID-19 has hit the United States harder than any other country in the world. More Americans have contracted the disease, and more Americans have died from it, than the citizens of any other nation. Worst of all, the mounting data day by day demonstrates that the pandemic keeps growing exponentially – and the rate of growth is now worse in Wisconsin than in any other state.

The outlook is dire. At best, it is naïve to contend that Wisconsin can conduct a statewide election making no (or very few) changes to its regular rules and procedures without exposing even its healthiest citizens to unacceptable risks to their lives and health. Wisconsin voters with disabilities – such as respiratory diseases, compromised immune systems, and cancer, to name only a few – are even more threatened by electoral business-as-usual during what is shaping up to become the worst public health crisis in United States history.

Yet the Wisconsin Legislature has refused to take any steps to adjust Wisconsin election law to accommodate the legitimate needs of voters in this once-in-a-lifetime crisis. And, while the Wisconsin Elections Commission, which is responsible for administering our election statutes, has commendably made some changes in the face of COVID-19's threats to public health and safety, it nevertheless has failed to appreciate that those alterations will alleviate only a minimal part of the fear that Wisconsin's voters face under the laws as written.

Changes are needed, for this extraordinary election **only**. We know that the separation of powers is a bedrock principle of American government. But we also know that the right to vote is the keystone of our system, and we know that when the political branches disregard their duty to safeguard the rights of the people, a court in a position to do something about it must step in and make things right. Plaintiffs' motion summarizes 13 specific changes that the Court should order for the November 3, 2020 General and Presidential Election (the "November Election"). The remainder of this brief presents how those specific (and modest) changes ordered by the Court will preserve voters' health and safety and their franchise, along with the legal basis for requiring those changes to be made.

STATEMENT OF FACTS

A. COVID-19 and Wisconsin's Ongoing Public Health Emergency.

The Pre-Election Litigation (Amended Complaint ("AC") ¶ 55) over the April 7, 2020 statewide election (the "Spring Election") formally introduced the Court to the COVID-19 pandemic that continues to attack the United States. As of April 2, 2020—the date of the Court's preliminary injunction order closest to the Spring Election—there were 1,550 confirmed cases of

COVID-19 in Wisconsin, which had resulted in 24 deaths.¹ *Democratic National Committee v. Bostelmann*, 2020 WL 1638374, 20-cv-249-wmc, at *3 (W.D. Wis. April 2, 2020).

Despite initially optimistic projections by certain government officials, the pandemic has gotten worse – much worse. As of July 7, 2020, the Wisconsin Department of Health Services (“DHS”) reported 32,556 confirmed cases in Wisconsin and 805 deaths. (Proposed Findings of Fact (“PFOF”) 1.) Thus, in the past 91 days COVID-19 cases are approximately 21 times higher in Wisconsin than they were when this Court made its most recent ruling on injunctive relief, and total deaths are a staggering 33.5 times higher than they were as of April 2, 2020. (PFOF 2.)

The Spring Election went forward on April 7, 2020, and as the plaintiffs in the Pre-Election Litigation predicted, many Wisconsin citizens who voted in person contracted the virus. (PFOF 3.) DHS directly traced 71 confirmed cases of COVID-19 to voting at the polls; an empirical study of the Spring Election concludes that in-person voting led to approximately 700 additional COVID-19 cases in Wisconsin, approximately 7.7 percent of all new cases in our state during the five-week post-election period. (PFOF 4.)

It is inescapable: COVID-19 will not “disappear” soon despite what politicians say. Certainly, it will not miraculously vanish before the November Election that is the subject of this

¹ The Court may take judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies. *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Further, Federal Rule of Evidence 201(b) permits a court to take judicial notice of an adjudicative fact that is “not subject to reasonable dispute” because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *In re Lisse*, 905 F.3d 495, 496 (7th Cir. 2018). Because this case is on a fast track and the pandemic that spurred its filing is moving even faster, Plaintiffs rely in part on judicial notice to establish the record on COVID-19 and the State of Wisconsin’s approach to addressing this public health emergency. The *Edwards* Plaintiffs also join the other plaintiffs’ motions for injunctive relief in the cases filed before and after this case, which the Court intends to adjudicate with this one in accordance with the Court’s June 30, 2020 Order adopting the Parties’ stipulated schedule (20-cv-249 Docket No. 232).

motion.² Indeed, the online Johns Hopkins University Coronavirus Resource Center (the “JHU Website”) reported a total of 2,134,465 cases of COVID-19 worldwide as of April 16, 2020, with 142,148 deaths. (PFOF 5.) Yet, as of yesterday, the JHU Website stated that globally there have been 11,679,808 cases of COVID-19, with 539,764 deaths. (PFOF 6.) Thus, in the last 82 days the world has seen an approximate 5.5-fold increase in cases, with a corresponding increase in deaths of nearly four times that in April. (PFOF 7.)

While not an apples-to-apples comparison, the world is generally dealing with the pandemic better than Wisconsin. The first diagnosed case of COVID-19 in Wisconsin occurred on February 6, 2020. (PFOF 8.) On March 12, 2020 Governor Tony Evers declared a public health emergency to direct all resources needed to respond to and contain COVID-19 in Wisconsin. (PFOF 9.) On March 24, 2020, at the direction and with the full authority of Governor Evers, Andrea Palm, the Secretary-Designee of DHS, entered Emergency Order No. 12 (the “Safer at Home Order”), which took effect at 8:00 a.m. on March 25, 2020. (PFOF 10.)

The Safer at Home Order, entered 14 days before the Spring Election, made specific public health findings and mandated that those physically present in Wisconsin engage in “social distancing” and otherwise comply with its terms. (PFOF 11.) They include:

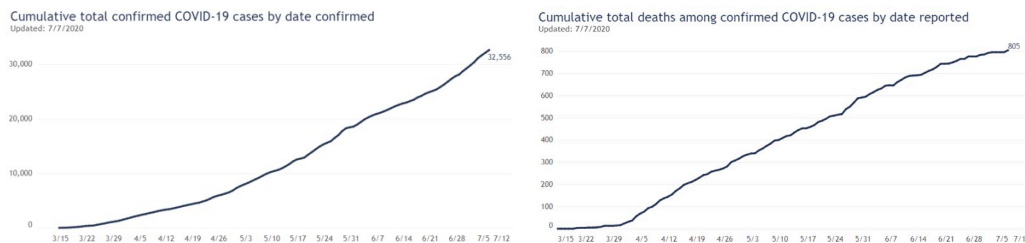
- i. Establishing that “social distancing,” the practice of keeping at least six feet apart from others and avoiding direct physical contact, is the only effective means of slowing the rate of COVID-19 infections (PFOF 12);
- ii. Concluding that, despite prior emergency orders from Wisconsin and elsewhere banning mass gatherings, the rates of infection continue to drastically increase such

² Plaintiffs’ Amended Complaint initially sought relief for both the November Election and the August 11, 2020 statewide primary. Plaintiffs have chosen against seeking relief for the August Election. This motion makes clear that Plaintiffs seek relief solely in relation to the November Election and do not seek to unwind established law on a permanent basis.

that additional measures were needed to slow the rate of COVID-19 infections in Wisconsin (PFOF 13);

- iii. Prohibiting all non-essential businesses and operations from remaining open during the crisis and limiting all public and private gatherings of any number of people not part of a single household (PFOF 14);
- iv. Closing public schools and libraries, public amusement, and salons and spas (PFOF 15);
- v. Imposing an obligation on all citizens of Wisconsin to follow DHS and CDC guidelines regarding COVID-19 care (PFOF 16);
- vi. Obligating those “at high risk of severe illness from COVID-19 and people who are sick . . . to stay in their home or residence to the extent possible except as necessary to seek medical care;” (PFOF 17);
- vii. Identifying “essential” activities, governmental functions, and businesses and operations (PFOF 18);
- viii. Exempting healthcare and public health operations, human service operations, and essential infrastructure from the effects of the order (PFOF 19);
- ix. Establishing the meaning of “essential” travel (PFOF 20);
- x. Implementing minimum basic operational rules for how “essential” businesses and government functions should operate during the term of the order (PFOF 21); and
- xi. Requiring all persons residing in Wisconsin to follow “social distancing” rules, including maintaining appropriate distancing from each other and washing their hands in a manner provided within the order. (PFOF 22.)

Clearly concerned about “flattening the curve,” on April 16, 2020 DHS issued an amended Safer at Home Order, which took effect a day later and was to remain in place until May 26, 2020. (PFOF 23.) The Wisconsin Legislature, led by some of the defendants in this case, challenged that amended order in an original action before the Wisconsin Supreme Court. (PFOF 24.) On May 13, 2020, the court ruled that Secretary-Designee Palm had overstepped her authority by imposing the Amended Safer at Home Order on Wisconsin residents. (PFOF 25.) In fact, positive cases of COVID-19 and associated deaths have risen since the Wisconsin Supreme Court issued its decision eight weeks ago, as DHS details in the following graphs:



(PFOF 26.)

B. How COVID-19 Transmission Works.

The ways that COVID-19 spreads are important to this Court’s evaluation of the threats the disease poses to voting in light of the relief plaintiffs seek. “The virus that causes COVID-19 is mostly spread by respiratory droplets released when people cough, sneeze, or talk. Someone can also get COVID-19 by touching a surface or object that has the virus on it and then touching their own nose, mouth, or possibly their eyes.” (PFOF 27.) Thus, DHS warned early on that “[l]imiting physical contact between people is the best strategy to slow the spread of COVID-19, and it is saving lives. **Wisconsinites need to continue this work to keep flattening the curve.**” (PFOF 28.) The Centers for Disease Control and Prevention (“CDC”) expresses the concern about community spread this way:

Because COVID-19 is **highly transmissible and can be spread by people who do not know they have the disease**, risk of transmission within a community can be difficult to determine. Until broad-scale testing is widely implemented or we have a more comprehensive and precise measure of disease burden, **states and communities should assume some community transmission or spread is occurring.**

(PFOF 29.)

Knowing how COVID-19 spreads, Dr. Caitlin Rivers, an epidemiologist at Johns Hopkins University, opines that there are three different factors to consider when evaluating risk regarding the virus. (PFOF 30.) The first is “contact intensity,” which involves determining how close you will be to someone, how confined, and over what period of time. (PFOF 31.) Second, Dr. Rivers advises consideration of how many people you will come in contact with in a particular setting during the pandemic and recommends that smaller groups are far better than larger groups. (*Id.*) Finally, in calculating the risk of COVID-19, we must look to how mitigation techniques are employed or capable of being employed by each person and the communities in which they live. (*Id.*)

Applying these three rules, it’s not hard to discern how to approach the COVID-19 risk. For example, bars are considered high risk for COVID-19 transmission because contact intensity (close proximity to people, enclosed space, long duration), the number of people (high), and inability to fully mitigate (alcohol-impaired patrons, sharing of common touchpoints, inability to have the experience without close proximity to each other) all fail these three tests. (PFOF 34.) Similarly, large scale music and sporting events, gyms, amusement parks, libraries, churches, public pools, and schools are equally “high risk” endeavors for COVID-19 transmission when viewed through the lens of these three ground rules. (*Id.*) On the other end of the spectrum, the experts assess running and walking outside, playing tennis or golf, and getting takeout from a restaurant to be relatively “low risk” behaviors during the pandemic when considering these three

factors. (*Id.*) The Court from its own experience knows that Wisconsin elections are often run out of schools, churches, and other unfriendly places for viral transmission; but if it wants to test the idea, we recommend that random addresses from around the state be entered into Wisconsin's MyVote Website to see where voters at those addresses will vote in the November Election: <https://myvote.wi.gov/en-us/FindMyPollingPlace>. (See PFOF 37.) We suspect the Court will learn what we did: churches, governmental buildings, and schools are routinely used as polling stations—and these are the buildings that assist viral spread.

C. COVID-19's R0 and Rt Factors.

Epidemiologists talk about a particular virus's transmission ability in terms of its R0 (pronounced "R naught") factor. (PFOF 38.) Used by public health officials to structure their response to a viral outbreak, "[s]cientists use R0 – the reproduction number – to describe the intensity of an infectious disease outbreak." (PFOF 39.) By way of example, estimated R0 factors influenced how public health officials addressed the 2003 SARS Pandemic, the 2009 H1N1 Influenza Pandemic, and the 2014 Ebola Epidemic in West Africa. (PFOF 40.)

The "formal definition of a disease's R0 is the number of cases, on average, an infected person will cause during their infectious period." (PFOF 41.) The term is used, though, in two different ways:

The **basic reproduction number** represents the maximum epidemic potential of a pathogen. It describes what would happen if an infectious person were to enter a fully susceptible community, and therefore is an estimate based on an idealized scenario.

The **effective reproduction number** depends on the population's current susceptibility. This measure of transmission potential is likely lower than the basic reproduction number, based on factors like whether some of the people are vaccinated against the disease, or whether some people have immunity due to prior exposure with the pathogen. Therefore, the effective R0 changes over time and is an estimate based on a more realistic situation within the population.

It's important to realize that both the basic and effective R_0 are situation-dependent. **It's affected by the properties of the pathogen**, such as how infectious it is. **It's affected by the host population** – for instance, how susceptible people are due to nutritional status or other illnesses that may compromise one's immune system. **And it's affected by the environment**, including things like demographics, socioeconomic and climatic factors.

For example, R_0 for measles ranges from 12 to 18, depending on factors like population density and life expectancy. This is a large R_0 , mainly because the measles virus is highly infectious.

On the other hand, the influenza virus is less infectious, with its R_0 ranging from 2 to 3. Influenza, therefore, doesn't cause the same explosive outbreaks as measles, but it persists due to its ability to mutate and evade the human immune system.

(PFOF 42.)

Since the 1950s, public health officials analyzing a particular pathogen have sought to move the R_0 factor to below 1. (PFOF 43.) An R_0 below 1 means the disease ultimately will die out, because each person who has it transmits it, on average, to fewer than one person, meaning that perpetual reproduction is not possible. (PFOF 44.) In contrast, when R_0 exceeds 1, the disease will spread because each infected person is on average infecting more than one other person. (PFOF 45.)

In the case of the 2003 SARS pandemic, for example, “scientists estimated the original R_0 to be around 2.75. A month or two later, the effective R_0 dropped below 1, thanks to the tremendous effort that went into intervention strategies, including isolation and quarantine activities.” (PFOF 46.) While we are still learning about COVID-19 and data are still being collected on its R_0 factor, certain studies assert a current R_0 of between 1.5 and 3.5. (PFOF 47.) Early on, the World Health Organization (“WHO”) placed the basic R_0 range value for the novel coronavirus at between 1.4 and 2.5. (PFOF 48.) Other studies early in review of the disease's trajectory (that is, in January and February this year) placed the basic R_0 at between 1.5 and 6.68. (PFOF 49.) While R_0 is not the only variable important to public health assessments of COVID-

19, it is an important tool for understanding the severity of the current pandemic, and the Court should look at it that way.

As an infectious disease takes hold in a population, the **basic** reproduction number becomes less important and the **effective** reproduction rate, also known as R_t , gains significance. (PFOF 50.) Because at least 11,679,808 people have now been infected with COVID-19 around the world (PFOF 6) (32,556 in Wisconsin as of July 7, 2020) (PFOF 1), the population has experienced some exposure, meaning that some people who have had the disease and recovered may have immunity to future infection, which will naturally impede transmission rates. But the basic mathematics of R_t are identical to those of R_0 : So long as the R_t exceeds 1, and absent significant interventions to reduce opportunities for transmission, communities will continue to see viral spread, because each infected person goes on to infect, on average, more than one person. (PFOF 51.)

On this front, the news is grim: Wisconsin's R_t factor as of July 7, 2020 is 1.39 (PFOF 52), ranking **highest** as of that date among the 50 states for viral transmission possibility (PFOF 53); as the data demonstrate, Wisconsin finds itself in a world of transmission hurt since the Wisconsin Supreme Court ordered that the Safer at Home Order be lifted. While down from the February 29, 2020 R_0 of 2.26 (PFOF 54), there is no reasonable basis in the empirical data for any conclusion other than this: COVID-19 continues to be a highly transmissible contagion in Wisconsin that will continue to make many people sick and some people die. The Court should look at anything it does in relation to the relief sought through this prism.

D. COVID-19's Disparate Impact on Minorities and Urban Centers.

COVID-19 has had and will continue to have a disproportionate impact on urban centers and particularly on African Americans and Latinos and the poor (regardless of race). (PFOF 55.)

A cardiologist and academic from Northwestern University recently summed up the impact of COVID-19 on African Americans:

In Chicago, more than 50% of COVID-19 cases and nearly 70% of COVID-19 deaths involve black individuals, although blacks make up only 30% of the population. Moreover, these deaths are concentrated mostly in just 5 neighborhoods on the city's South Side. [Citation omitted.] In Louisiana, 70.5% of deaths have occurred among black persons, who represent 32.2% of the state's population. [Citation omitted.]. In Michigan, 33% of COVID-19 cases and 40% of deaths have occurred among black individuals, who represent 14% of the population. [Citation omitted.] If New York City has become the epicenter, this disproportionate burden is **validated again** in underrepresented minorities, especially blacks and now Hispanics, who have accounted for 28% and 34% of deaths, respectively (population representation: 22% and 29%, respectively). [Citation omitted.]

The Johns Hopkins University and American Community Survey indicate that to date, of 131 predominantly black counties in the US, the infection rate is 137.5/100 000 and the death rate is 6.3/100 000. [Citation omitted.] **This infection rate is more than 3-fold higher than that in predominantly white counties.** Moreover, this death rate for predominantly black counties is 6-fold higher than in predominantly white counties. Even though these data are preliminary and further study is warranted, **the pattern is irrefutable: underrepresented minorities are developing COVID-19 infection more frequently and dying disproportionately.**

(PFOF 56.)

Wisconsin urban centers, particularly in the highly segregated city of Milwaukee, illustrate the devastating impact of COVID-19 on communities of color. For example, of the 45 people confirmed to have died from complications of COVID-19 in Milwaukee County as of March 30, 2020, 33 were African American. (PFOF 57.) David R. Williams, public health professor and chairman of the Department of Social and Behavioral Sciences at Harvard University, explained the impact of COVID-19 on Milwaukee's African-American community: "Here is a virus attacking individuals, and they're more vulnerable physically and they're also vulnerable socioeconomically . . . We have mountains of evidence that indicates people of color in this country have higher levels of underlying stressors." (PFOF 58.) Professor Williams asserts

that COVID-19 and the longstanding problems associated with the overall health and socioeconomic disparity in communities of color has created a “perfect storm.” (PFOF 59.)

DHS data reported as of July 7, 2020 demonstrate that Wisconsin’s mostly urban counties have been hit hardest by COVID-19 with a total of 23,413 confirmed cases out of a total 32,556. (PFOF 60.) Specifically, Brown County (3,072 cases), Dane County (2,510 cases), Kenosha County (1,610 cases), Milwaukee County (12,539 cases), Racine County (2,253 cases), and Waukesha County (1,429 cases) presently make up approximately 72 percent of Wisconsin’s COVID-19 cases. (PFOF 61.) When considering the impact of COVID-19 on voting rights, the Court should appreciate that “[n]early 90 percent of Wisconsin’s African American population lives in the following six counties, all of which are located in Southeastern or Southern Wisconsin: Milwaukee, Dane, Racine, Kenosha, Rock, and Waukesha. When looking at African Americans as a percent of the total county population, Milwaukee County tops this list, with 25.6 percent.” (PFOF 62.) In sum, five of the six Wisconsin counties deemed by DHS to have been hit hardest by the pandemic contain the largest populations of African Americans who themselves are most vulnerable the disease.

E. The CDC’s Recommendations for a Safer Election.

The CDC dedicates an entire webpage to safe voting during the pandemic. (PFOF 63.) Specifically, the CDC asserts that “[e]lections with only in-person voting on a single day are **higher risk** for COVID-19 spread because there will be larger crowds and longer wait times.” (PFOF 64.) The CDC’s recommendations for “in person” voting during COVID-19 are designed to mitigate – that is, diminish and not eliminate – the effect of the pandemic on both voters and poll workers. (PFOF 65.)

In general, to reduce the threat of COVID-19 transmission during elections, the CDC recommends: (1) a wide variety of voting options; (2) longer voting periods (more days, **and** more hours each day); and (3) any other feasible options for reducing the number of voters who simultaneously congregate indoors in polling locations. (PFOF 66.) Rather than repeat them verbatim in this brief, the full list of guidelines from the CDC are included at **Exhibit Z** to the Declaration of Joseph S. Goode filed with this brief.

If the Court is inclined to allow the November Election to proceed under the rules that govern elections conducted in normal health conditions, it should at a minimum order the WEC Defendants to impose those standards statewide across all polling stations; to prepare and distribute written guidance consistent with these protocols to each county and municipality overseeing one or more polling stations for the November election, no later than August 31, 2020; and to condition each municipality's receipt of grant money upon its written agreement to implement these protocols and train personnel no later than October 1, 2020.

F. The Plaintiffs' Experiences.

The plaintiffs are eligible voters whose voting rights have been and, without the Court's intervention, will continue to be compromised by COVID-19. Subsection F-1 below introduces the plaintiffs, describes their specific circumstances, and relates their unfortunate voting experiences during the Spring Election. For the Court's convenience and for organizational purposes, Subsection F-2 describes how each plaintiff falls in one or both of the following categories of aggrieved voters: vulnerable voters and underserved voters. "Vulnerable voters" are those voters whose right to vote is impaired by their preexisting health risks, the preexisting health risks of their family members, and the health risks associated with COVID-19. "Underserved voters" are those voters whose right to vote was impaired during the Spring Election by electoral

system failures, as well as the inadequacy of in-person voter protections and accommodations. The plaintiffs hope that this organizational approach will aid the Court and parties in narrowly tailoring remedial measures to meet the plaintiffs' specific needs.

1. The Plaintiffs' Stories.

The plaintiffs are Wisconsin citizens, each guaranteed the full and equal right to participate in the democratic process by voting in open elections. Plaintiffs share their stories here, explaining how their individual circumstances contributed to the injuries they sustained during the Spring Election and why, without appropriate safeguards, they are rightly concerned about the November Election and their ability to vote.

a. Chrystal Edwards and Terron Edwards.

Chrystal and Terron Edwards are registered African-American voters who have regularly voted in Wisconsin elections for over a decade. (PFOF 67.) They see voting as a civic duty and, particularly with local elections, appreciate the very real stake they have in the outcomes. (PFOF 68.) Indeed, Chrystal makes it her business to familiarize herself with the candidates and their campaign promises, going so far as to educate others about those issues. (PFOF 69.) They understand the historical context of African-American enfranchisement, a right for which their ancestors fought and died. (PFOF 70.)

Terron has diabetes, a metabolic disorder involving dysregulation of blood-sugar levels. (PFOF 71.) He and Chrystal both know that the CDC associates diabetes with an increased risk of severe illness from COVID-19. (PFOF 72.)

Chrystal and Terron have three children especially vulnerable to illness. (PFOF 73.) They have a 14-year-old daughter who suffers from symptoms consistent with asthma, a respiratory inflammation disorder, and who regularly relies on an inhaler. (PFOF 74.) They understand that

the CDC associates asthma with an increased risk of severe illness from COVID-19. (PFOF 75.) Chrystal and Terron also have a five-year-old son who was born with spina bifida, a congenital deformity of the spine. (PFOF 76.) Their son is currently waiting to undergo a surgical procedure. (PFOF 77.) Finally, Chrystal and Terron have a 16-year-old for whom they are guardians. (PFOF 78.) This last child is unvaccinated. (*Id.*)

Chrystal and Terron decided to vote absentee in the Spring Election because of the COVID-19 pandemic. (PFOF 79.) They chose absentee voting because voting in person created a risk that they would contract and possibly die from a severe illness, such as COVID-19, and/or spread such severe illness to their vulnerable children. (PFOF 80.)

Chrystal and Terron requested absentee ballots about three weeks before the Spring Election. (PFOF 81.) Because they had not received their absentee ballots by April 6, 2020, they hoped that the Spring Election would be postponed or that the deadline for submitting their absentee ballot would be extended by a week. (PFOF 82.) Chrystal and Terron were devastated when they learned of the court decisions forcing them to vote in person if they wanted their votes counted. (PFOF 83.)

Considering the very significant health risks to themselves and their children should one or both of them contract COVID-19, Chrystal and Terron determined that voting in person might lead to their or their childrens' deaths. (PFOF 84.) They further knew that the entire City of Milwaukee—and its roughly 600,000-person population—would be serviced by only five voting stations. (PFOF 85.) They were shocked, appalled, disgusted, and disappointed at the position in which they were placed. (PFOF 86.) They chose **not** to vote in person. (PFOF 87.)

For reasons the WEC Defendants should be required to explain, their absentee ballots never arrived (PFOF 88) and they were thus disenfranchised because of the failure of defendants to reasonably navigate an election during the pandemic.

b. William Laske.

William Laske is a registered voter who resides in Milwaukee and who has regularly voted in state and local elections. (PFOF 89.) He takes his right to vote seriously and considers it his responsibility to exercise that right. (PFOF 90.) Accordingly, William has voted consistently in nearly every election since he was discharged from the military in 1972. (PFOF 91.)

William has chronic obstructive pulmonary disease (“COPD”), a progressive lung disease, and obliterative bronchiolitis (“OB”), an inflammatory disorder affecting smaller airways of the lungs. (PFOF 92.) He uses supplemental oxygen for his breathing difficulties in connection with these conditions. (PFOF 93.) He understands that the CDC associates COPD with an increased risk of severe illness from COVID-19. (PFOF 94.)

William was concerned that, given his COPD, OB, and need for supplemental oxygen, he might die if he was exposed to the coronavirus while voting in person. (PFOF 95.) Consequently, he chose to order an absentee ballot on March 20, 2020. (PFOF 96.) This was the first time William had ever requested an absentee ballot. (PFOF 97.)

On March 25, 2020, William received a mailing confirming that he requested a ballot. (PFOF 98.) But as of April 6, 2020, he had not received the ballot. (PFOF 99.) For that reason, William called the Milwaukee Election Commission. (PFOF 100.) After being placed on hold for an hour, the person with whom William spoke told him that his absentee ballot had been mailed on March 22, 2020. (PFOF 101.) The person further told him that he could either vote in person or deliver a ballot to the Zablocki Library polling location by April 14, 2020. (PFOF 102.)

William has since learned that the United States Supreme Court later ruled that delivering the ballot after April 7, 2020 was not a viable option if he wanted his vote to be counted. (PFOF 103.)

William did not feel safe to vote in person due to the COVID-19 pandemic and his respiratory diseases. (PFOF 104.) He believed that contracting COVID-19 would be a “death sentence” for him. (PFOF 105.) He decided against voting in person. (PFOF 106.)

The absentee ballot never arrived (PFOF 107) and, like the Edwards, he was disenfranchised by the unreasonable positions taken by the defendants in relation to the Spring Election. William was upset, and he felt cheated, that he was unable to exercise his right to vote. (PFOF 108.) Had he been timely provided an absentee ballot, or had he been provided a safe method to vote in person, he would have voted in the Spring Election. (PFOF 109.)

c. Kileigh Hannah.

Kileigh Hannah is a registered voter residing in Fox Point. (PFOF 110.) She and her family resided in Wisconsin between 2002 and 2016, moving away to Vermont for four years before returning to Wisconsin in February 2020. (PFOF 111.) Upon returning to Wisconsin, Kileigh secured a driver’s license amid the chaos and uncertainty of the COVID-19 pandemic so that she could successfully order a Wisconsin absentee ballot. (PFOF 112.) Kileigh has voted in every major election since turning 18 years of age. (PFOF 113.)

Kileigh has multiple sclerosis (“MS”), a progressive neurological disorder that has many harmful symptoms, including disruption of the immune system. (PFOF 114.) She treats the disorder by, among other things, maintaining a safe and healthy lifestyle and taking medications such as ocrelizumab (brand name Ocrevus), an immunosuppressive drug. (PFOF 115.) She understands that the CDC associates MS with an increased risk of severe illness from COVID-19 and ocrelizumab with an increased risk of respiratory tract infections. (PFOF 116.) This increased

risk of respiratory tract infections also increases the risk of severe illness from COVID-19, according to the CDC. (PFOF 117.) Incidentally, Kileigh had an all-day infusion of disease-modifying treatment scheduled for the day after the Spring Election, a treatment that “knocks out [her] immune system” and puts her at an elevated risk of respiratory infection. (PFOF 118.)

Due to her health conditions and treatment, the rapid spread of COVID-19 in Milwaukee County, and her fear of severe illness or death, Kileigh decided **not** to vote in person. (PFOF 119.) Instead, she chose to vote by absentee ballot. (PFOF 120.) She ordered her absentee ballot on or about March 22, 2020. (PFOF 121.) This was the first time she had ever voted by absentee ballot. (PFOF 122.)

Kileigh’s absentee ballot never arrived. (PFOF 123.) She called the Fox Point Town Hall, and they told her to call the post office. (PFOF 124.) She called the post office, and they said she would find it in the mail. (PFOF 125.) The absentee ballot never came. (PFOF 126.) She debated voting in person on the day of the Spring Election, but in the end, she decided that it was not worth risking her life. (PFOF 127.) She further hoped that someone would remedy the situation by permitting her to cast a late absentee ballot to be counted. (PFOF 128.) This did not occur. (*Id.*)

Had she been provided with an absentee ballot in time, or a safe method to vote in person, Kileigh would have exercised her right to vote in the Spring Election. (PFOF 129.) Instead the defendants failed her and she was disenfranchised.

d. Todd Graveline and Jan Graveline.

Todd and Jan Graveline are married registered voters who reside in Milwaukee and regularly vote in their state and local elections. (PFOF 130.) Because of the COVID-19 pandemic, Jan requested absentee ballots for both of them a few weeks prior to the Spring Election. (PFOF 131.) Jan does not typically vote absentee. (PFOF 132.) When Todd and Jan had not received

their ballots by April 3, 2020, Jan called and spoke to someone who said she would mail out new absentee ballots. (PFOF 133.) Neither of their absentee ballots ever arrived. (PFOF 134.)

On the day of the Spring Election, Todd and Jan were conflicted as to whether to vote in person. (PFOF 135.) They feared being exposed to the coronavirus and contracting COVID-19, or spreading the illness to one another. (PFOF 136.) However, each of them valued their right to vote, and did not want to be disenfranchised. (PFOF 137.)

Todd and Jan decided to go to Milwaukee's Riverside High School to vote in person. (PFOF 138.) They waited in line outside of the school before following the line inside, a process that took roughly 30 minutes. (PFOF 139.) They followed social distancing principles and Jan wore a mask and gloves. (PFOF 140.) While waiting in line, Todd grew very anxious about the number of people in line and how close they were standing to him, and he became increasingly worried about being exposed to the coronavirus. (PFOF 141.) He left the polling place out of fear for his health and safety, afraid he might become ill or die; Todd never got to vote. (PFOF 142.) Jan successfully voted in person. (PFOF 143.)

Had they been timely provided an absentee ballot, Todd and Jan would have voted by absentee ballot. (PFOF 144.) Absent that, had Todd been provided a safe method to vote in person, he would have exercised his right to vote in the Spring Election. (PFOF 145.) Instead, he was disenfranchised.

e. Jean Ackerman.

Jean Ackerman is an 89-year-old registered voter who resides in Madison with her daughter. (PFOF 146.) Jean has physical health issues and is not mobile. (PFOF 147.) She has degenerative disc disease of the spine and spondylitis, an inflammatory disorder of the vertebrae. (PFOF 148.) These conditions cause pain and weakness in her legs. (*Id.*) She also has arthritis in

her knees, preventing her from being able to walk or stand for any more than a few steps. (PFOF 149.) Jean has high blood pressure, high cholesterol, and is in renal failure, meaning her kidneys are in a state of dysfunction. (PFOF 150.)

On account of her health conditions, the risk of her being exposed to the coronavirus at the polling place, and her limited mobility, Jean decided that she could not vote in person. (PFOF 151.) She instead ordered an absentee ballot. (PFOF 152.) The absentee ballot never came. (PFOF 153.)

On the day before the election, she learned that Governor Evers extended the deadline to mail in absentee ballots. (PFOF 154.) She then learned that the courts overruled Governor Evers' extension. (*Id.*) Even though Jean had not received an absentee ballot, she could not risk going out and standing in line to vote, and it was physically impossible for her to do so. (PFOF 155.) Had she been timely provided with an absentee ballot, or a safe method to vote in person, Jean would have exercised her right to vote. (PFOF 156.)

f. John Jacobson.

John Jacobson is a registered voter residing in Milwaukee who regularly votes in state and local elections. (PFOF 157.) He is employed by Shorewood High School as a teacher of social studies, politics, and history. (PFOF 158.) John temporarily moved into the home of his elderly parents to care for them during the COVID-19 pandemic, and he resided there on the day of the Spring Election. (PFOF 159.) This was possible because Governor Evers closed all public schools as part of efforts to promote social distancing. (*Id.*)

John timely requested an absentee ballot on or around March 18, 2020. (PFOF 160.) The absentee ballot never arrived. (PFOF 161.) Had he timely received the ballot, he would have exercised his right to vote in the Spring Election.³ (PFOF 162.)

g. Kristopher Rowe and Katie Rowe.

Kristopher and Katie Rowe are registered voters residing in Glendale, Wisconsin. (PFOF 163.) They highly value their right to vote. (PFOF 164.) Because they feared contracting the coronavirus and spreading it to one another and to their family, Kristopher and Katie ordered absentee ballots. (PFOF 165.) They completed their absentee ballots and mailed them back on April 1, 2020. (PFOF 166.) However, the Wisconsin voter online database does not reflect that either of their votes was counted. (PFOF 167.) Consequently, Kristopher and Katie do not believe that their absentee ballots were counted. (PFOF 168.) They rightly find this revelation disturbing. (*Id.*)

h. Douglas West and Angela West.

Douglas and Angela West are married African American registered voters also residing in Glendale, Wisconsin. (PFOF 169.) Douglas has diabetes, high blood pressure, coronary artery disease, and chronic obstructive pulmonary disease, and he needs to use supplemental oxygen on a regular basis. (PFOF 170.) Angela has high blood pressure. (PFOF 171.) According to the CDC, their conditions place them at an increased risk of severe illness due to COVID-19. (PFOF 172.) They usually vote at a school just three blocks from their home, but would have had to travel to Washington High School to vote in the Spring Election. (PFOF 173.) Because they feared contracting the coronavirus and were concerned about illness or death, and the impact of COVID-

³ Two days before the filing of this brief, plaintiffs' counsel learned that John Jacobson has contracted COVID-19 and has been rendered incapacitated by the disease.

19 on their family, they ultimately decided not to vote. (PFOF 174.) Had they been provided with a safe method to vote in person, they would have exercised their right to vote. (PFOF 175.)

i. Charles Dennert.

Charles Dennert is a registered voter who, since early April 2020, had temporarily resided at his family's home in Waukesha. (PFOF 176.) He had fractured his leg and was unable to drive a vehicle. (PFOF 177.) Charles timely requested an absentee ballot on March 24, 2020. (PFOF 178.) However, the absentee ballot never came. (PFOF 179.) Because Charles had no way to commute to his Milwaukee polling station, he was unable to vote in person. (PFOF 180.) Had he been timely provided an absentee ballot, Charles would have exercised his right to vote. (PFOF 181.)

2. Vulnerable Voters and Previously Underserved Voters.

Vulnerable Voters

Many of the plaintiffs have individual characteristics or circumstances that make them especially vulnerable to COVID-19; indeed, many of their ailments qualify as disabilities under the Americans with Disabilities Act ("ADA"), entitling them to special consideration pursuant to federal law. Each of the following five characteristics or circumstances applies to one or more of the plaintiffs and represents a distinct group of vulnerable voters in Wisconsin:

1. Voters with immune system compromise and/or conditions that place them at increased risk of severe illness if they contract COVID-19. Voters with certain medical conditions, or taking particular medications, have compromised immune systems and are, thus, at a higher risk of contracting illnesses, including COVID-19. (PFOF 182.) Many of the plaintiffs have compromised immune systems. Terron Edwards has diabetes. (PFOF 183.) William Laske has COPD and OB, necessitating the need for supplemental oxygen. (PFOF 184.) Kileigh Hannah

takes a medication, Ocrevus, for MS. (PFOF 185.) Jean Ackerman has heart and kidney disorders, including renal failure. (PFOF 186.) Douglas West has diabetes, high blood pressure, coronary artery disease, and chronic obstructive pulmonary disease; he needs to use supplemental oxygen on a regular basis. (PFOF 187.) Angela West has high blood pressure. (PFOF 188.) All of these plaintiffs have compromised immune systems and/or are highly susceptible to severe illness from COVID-19. (PFOF 189-194.)

2. Voters with degenerative disease affecting mobility. Voters with certain progressive physical conditions have limited mobility and are, thus, less able to tolerate long lines such as those experienced in the Spring Election. For example, Jean Ackerman has degenerative disc disease of the spine as well as spondylitis, causing weakness in the legs and preventing her from walking more than a few steps. (PFOF 195.) She is functionally immobile as a consequence. (PFOF 196.)

3. Voters of advanced age. Elderly voters are more likely to have mobility and immune system problems. (PFOF 197.) Ms. Ackerman is 89 years old and, as mentioned above, has issues with her mobility and immune system. (PFOF 198.)

4. Voters with transient conditions affecting mobility. Voters with temporary injuries may have limited mobility. Charles Dennert fractured his leg prior to the Spring Election. (PFOF 199.) This prevented him from driving and forced him to rely upon others for transportation.

5. Voters residing with at-risk persons. Residing with someone whose immune system is compromised and/or someone who has a condition that places them at an increased risk of severe illness if they contract COVID-19 is a special circumstance; for the at-risk person to remain safe and healthy, the voter must be mindful of whether his or her actions will spread a contagion. (PFOF 200-01.) Chrystal Edwards resides with her husband, Terron, who has diabetes. (PFOF 202.)

Furthermore, the Edwards have a 14-year-old daughter with asthma-like symptoms, who regularly requires an inhaler. (PFOF 203.) They also have a 5-year-old son with spina bifida, a congenital defect for which he had an impending surgery scheduled at the time of the Spring Election, and an unvaccinated 16-year-old for whom they are guardian. (PFOF 204-05.) John Jacobson had temporarily moved in with his elderly parents at the time of the Spring Election to care for them during the COVID-19 pandemic. (PFOF 206.) Angela and Douglas West reside together, and as mentioned above, have multiple conditions placing them both at higher risk of severe illness if they contract COVID-19. (PFOF 207.) All of these plaintiffs are voters attending to special circumstances affecting their ability to exercise their voting rights.

Previously Underserved Voters

An electoral system in which eligible voters fail to have their votes counted is underserving its electorate. The Spring Election saw a surge in underserved voters on account of COVID-19 and other election mishaps. One or more of the plaintiffs was underserved in one of the following five ways:

1. Voters who requested, but did not receive, absentee ballots. Chrystal Edwards, Terron Edwards, William Laske, Kileigh Hannah, Todd Graveline, Jan Graveline, Jean Ackerman, John Jacobson, and Charles Dennert all timely requested absentee ballots. (PFOF 208.) None of them received one, either timely or otherwise. (PFOF 209.)

2. Voters whose properly-submitted absentee ballots were not counted. Kristopher Rowe and Katie Rowe timely mailed their absentee ballots but, because Wisconsin's online database does not reflect that they voted, they do not believe that their ballots were counted. (PFOF 210-11.)

3. Voters who did not vote in person out of concern for their own or their family's health.

Chrystal Edwards, Terron Edwards, William Laske, Kileigh Hannah, Jean Ackerman, Douglas West, and Angela West decided not to vote in person because they feared contracting COVID-19 or spreading it to loved ones. (PFOF 212.)

4. Voters who did not vote in person because of lack of transportation. Charles Dennert,

who lived with his parents in Waukesha while recovering from a broken leg, was unable to secure transportation to one of the five Milwaukee polling places. (PFOF 213.)

5. Voters who declined to vote in person after observing polling place conditions. Todd

Graveline went to vote in person but, anxious about the number of people in line and how close they stood to him, left the polling place out of fear for his health and safety. (PFOF 214.)

Plaintiffs are all Wisconsin residents who wanted to vote in the Spring Election and whose government failed them, placing obstacles in the way of exercising their fundamental right to vote. This case seeks to avoid that same calamity in the November Election.

ARGUMENT

I. THE EDWARDS PLAINTIFFS MEET THE STANDARD FOR ISSUING A PRELIMINARY INJUNCTION PROTECTING THE RIGHT TO VOTE DURING AN UNPRECEDENTED PUBLIC HEALTH EMERGENCY.

The basic requirements for preliminary injunctive relief are well-known: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The argument that follows demonstrates why and how plaintiffs satisfy each of these requirements.

II. THE COURT HAS THE POWER TO ORDER THE WEC DEFENDANTS TO PROVIDE THE RELIEF SOUGHT BY THE EDWARDS PLAINTIFFS.

In the June 29, 2020 hearing establishing the schedule for briefing and resolving this motion, the Court questioned whether the relief sought by plaintiffs here and in the companion lawsuits could be granted without the presence of thousands of local officials as parties. A review of Wisconsin's election statutes, the WEC's powers to administer them, and the proper role of this Court in enforcing core Constitutional and statutory rights compel the answer: "Yes."

Under Wis. Stat. § 5.05, WEC has "the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws related to campaign financing." These statutory chapters include general provisions, balloting, and voting systems (chapter 5); electors (chapter 6); election officials, boards, selection and duties, canvassing (chapter 7); nominations, primaries, and elections (chapter 8); post-election actions and direct legislation (chapter 9); election notices (chapter 10) and prohibited election practices (chapter 12).

Other sources of law include federal statutes such as the Help America Vote Act, 52 U.S.C. §§ 20901 *et seq.*; the ADA as it pertains to voting, 42 U.S.C. § 12101 *et seq.*; the Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. § 20101 *et seq.*; and the National Voter Registration Act of 1993, 42 U.S.C. § 1971 *et seq.* State and federal court decisions binding on the WEC and the state furnish additional sources of law. *See* Wis. Stat. § 5.05(5t). In fact, the WEC has enforcement power and may prosecute civil violations of election law, Wis. Stat. § 5.05(2m), and may promulgate rules under Chapter 227, **including emergency rules** when necessary, to implement or interpret the laws regarding the conduct of elections as well as their proper administration.⁴ *See* Wis. Stat. § 5.05(1)(f).

⁴ While the WEC is tasked with enforcement and interpretation of election law, it may not act beyond the bounds of its statutory authority as an administrative agency. Changes to law must come from the Legislature, or through judicial action. The relief proposed by plaintiffs here acknowledges this fundamental principle and therefore seeks what the Court may do—ordering the WEC Defendants to take specified actions to protect voters during the November Election

The WEC was presented with a gargantuan task in administering the Spring Election in the face of a Legislature that refused to legislate amid a global, deadly pandemic. The WEC itself issued a memorandum on March 18, 2020, outlining shortages of poll workers, polling locations, absentee ballot envelopes, and supplies for cleaning and sanitation. (PFOF 215.)

Alarming from a public health standpoint, local elections officials were advised through that memorandum that, with some local exceptions, “there appears to be no hand sanitizer or sanitation wipes available through local, state or federal channels. Other products such as bleach and rubbing alcohol are also difficult to obtain.” (PFOF 216.) The WEC advised municipal clerks to recruit backup elections inspectors and implement contingency plans for shortages, as well as plans for their own absence should they be unable to serve up to and on Election Day. (PFOF 217.) The Commission also declined to apply Wis. Stat. § 6.87(2), a statute providing a procedure for electors hospitalized on election day to vote from the hospital, to individuals restricted to their homes due to the pandemic. (PFOF 218.)

As this Court well knows, the Pre-Election Litigation and a last-ditch effort by Governor Evers to postpone the Spring Election through executive action resulted. Nevertheless, decisions by the Wisconsin Supreme Court and the United States Supreme Court forced the election to proceed on April 7, 2020, leading to increased COVID-19 transmission as described above, as well as wildly inconsistent elections procedures, and the suppression of votes, especially in urban areas and among people of color and those with disabilities.

Recent research bears this out. Kevin Morris and Peter Miller at the Brennan Center for Justice at the NYU School of Law recently released *Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin* on June 23, 2020. (PFOF 219.) This study finds that

and enjoining all defendants from enforcing specified laws that will assuredly and irreparably lead to the disenfranchisement of Wisconsin voters.

polling place consolidation due to lack of poll workers and equipment reduced overall turnout in Milwaukee County by approximately 8.5 percentage points, but by 10.2 for the African American population in the City of Milwaukee. (PFOF 220.) Moreover, turnout in the City was depressed by roughly 8.6 percentage points compared to suburban voters. (*Id.*) “[I]ncreased absentee voting did not **entirely** offset the effect of polling place consolidation.” (PFOF 221.) The study also concluded that COVID-19 itself likely depressed turnout, especially among Milwaukee residents. (PFOF 222.) The study noted that as of April 7, 2020, there were roughly 14 positive COVID-19 tests per 10,000 residents of Milwaukee County (or 140 per 100,000); its suburbs had a far lesser rate—7.5 per 10,000 (75 per 100,000) in Ozaukee County; 4.4 per 10,000 (44 per 100,000) in Washington; 4.2 per 10,000 (42 per 100,000) in Waukesha, and 3.2 per 10,000 (32 per 100,000) in Racine. (PFOF 223.)

Cases have continued to increase since, but not at the same rate. As of July 3, 2020, only three months following the Spring Election, Milwaukee County’s infection rate has increased ninefold, from 140 cases per 100,000 to 1,266.3. (PFOF 224.) Racine County, another county with significant urban and minority population, has seen its cases increase to 1,123.9 per 100,000. (PFOF 225.) The primarily suburban counties of Waukesha, Ozaukee, and Washington have seen far more modest increases, to 330.2, 286.6, and 313.7 cases per 100,000 people, respectively. (PFOF 226.) The rapid increases in COVID-19 infections, as well as remedial measures urban centers in particular will need to take absent the statewide remedies the plaintiffs request, illustrate why such remedies are necessary.

Since April 7, 2020, the WEC has taken many important steps within its authority to help make the upcoming elections safer and more accessible. As indicated in its June 25, 2020 filing (the “June 25 report”) in the *DNC v. RNC*, 20-CV-249 case, the WEC will spend federal CARES

Act funds, approximately \$2.25 million, to “develop, print, and send an informational mailing to approximately 2.7 million registered voters in Wisconsin that provides information about the options for voting at the 2020 general Election.” (PFOF 227.) The mailing will be sent to registered voters who do not have an active absentee ballot request form on file, and who are not on a list of voters believed to have moved since their registration was last updated, as compiled by the Electronic Registration Information Center (ERIC). (PFOF 228.) Additional staff or contractors will be assisting with data entry and follow up with absentee voters who submit an incomplete application, reducing the burden on municipal clerks “so they can focus on final review of the application and getting absentee ballots out to voters as soon as practicable after receiving the request.” (PFOF 229.)

The June 25 report also states that WEC has provided or will provide \$500,000 in CARES Act funding for sanitation and personal protective equipment (PFOF 230); up to \$4.1 million in CARES subgrants to municipalities for increased election administration costs, generally (PFOF 231); and Help America Vote Act subgrants to counties (up to \$3.9 million) and municipalities (up to \$2.1 million) to improve election security (PFOF 232). Intelligent mail barcodes will also be developed and implemented so that elections officials and mail-in absentee voters will have more accurate information about the status and location of absentee ballots through the postal system. (PFOF 233.) Additionally, the myvote.wi.gov system (accessible to voters) and the WisVote system (accessible to elections officials) are or will be upgraded to handle the increase in absentee ballot requests. (PFOF 234.) The WEC staff also will “continue to urge counties and municipalities to solicit election inspectors” and has created or will create poll worker recruitment and voter outreach tools. (PFOF 235.) The latter are designed to “explain the mechanics of how to vote by absentee ballot how state and local election officials ensure that voting by absentee

ballot is secure.” (*Id.*) Finally, WEC staff has produced public health guidance documents and will continue to offer election official and inspector training in advance of the elections. (PFOF 236.)

Notwithstanding the WEC Defendants’ efforts to learn from the massive failings of the Spring Election, it is becoming abundantly clear that these steps, while necessary, will not ensure a fair and accessible November Election for all voters. Accordingly, the plaintiffs in this case are seeking the 13 remedies set forth in their accompanying motion paper. Additionally, the WEC Defendants cannot implement all of those remedies on their own. Because the WEC Defendants are bound by statutes as well as other law, and the Legislative Defendants refuse to act, this Court’s intervention is necessary to avoid irreparable harm to the plaintiffs and all people like them as the defendants avoid the constitutional repercussions of acting like business as usual amidst the most severe public health crisis in a century.

This Court, on June 29, 2020, recommended that plaintiffs in these consolidated cases focus on whether the WEC could grant the relief sought. The Edwards Plaintiffs certainly acknowledge that Wisconsin operates elections on a decentralized, local basis, and there are 1,853 voting localities in the state and 1,922 local election officials. (PFOF 237.) It would be at best impractical, and likely impossible, to join nearly two thousand defendants into this action. For this reason, we ask the Court to take statewide – not local – action. Because the WEC is responsible for implementing, enforcing, and interpreting election law, and this Court has the power to enjoin or otherwise modify law, the WEC Defendants are appropriate parties to this action.

Finally, this Court is not overstepping its bounds by granting the relief requested by the Edwards Plaintiffs. Plaintiffs cannot be required to choose between exercising their fundamental right to vote and preserving their health and safety. Yet the Legislative Defendants refuse to act,

and the WEC cannot take measures adequate to preserve plaintiffs' voting rights while keeping them safe. This Court can solve the dilemma by exercising its equitable powers to forge extraordinary relief based on extraordinary facts—truly a once-in-a-lifetime decision.

“[W]here fundamental constitutional rights are violated, and where the Legislature fails to remedy the constitutional deficiencies after having had the opportunity to do so, and where an aggrieved litigant files suit seeking remedial relief for the constitutional violations, the judiciary must provide such a remedy.” *Goldstein v. Sec’y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560, 571 (2020) (applying Massachusetts law). The United States Supreme Court recognizes that citizens’ mental and physical health “is a **public good of transcendent importance.**” *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996) (emphasis added) (interpreting evidentiary privileges). The police power is a traditional area for governments to act for the protection of their citizens’ health and safety. *See, e.g., Sinclair Refining Co. v. City of Chicago*, 178 F.2d 214, 216 (7th Cir. 1949) (government has “paramount obligation to promote and protect the public health, safety, morals, comfort, and general welfare of the people”).

There are no precedents before 2020 addressing how federal courts approach the protection of voting rights in a pandemic, because the COVID-19 pandemic is itself unprecedented. That fact does not restrict the judicial power; the opposite is true. This Court should not stay its hand for fear of exceeding its powers. COVID-19 has created a once-in-a-lifetime health and safety crisis that impairs and even destroys the fundamental right to vote if the status quo is maintained. The greater harm will result if the Court does **not** act.

It is no answer to say that elections are matters of state concern that require federal courts to tread lightly, if at all. When the facts are extreme and egregious, Federal courts are empowered to take actions extreme enough to ensure an effective remedy. For example, after California

repeatedly failed to obey court orders directing it to provide adequate mental health care to prison inmates suffering from serious mental disorders, the United States Supreme Court upheld the extraordinary remedy imposed by a three-judge court ordering the state to reduce its prison population by thousands of inmates within two years. *Brown v. Plata*, 563 U.S. 493 (2011). The Court reached this result notwithstanding the significant deference ordinarily owed to a state in its operation of correctional facilities. *Id.* at 511. The facts of the COVID-19 pandemic will likely never be before America's courts again. If those facts demand a remedy to protect voters' health and safety, this Court should order whatever it takes.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT THE DEFENDANTS' ACTS AND OMISSIONS WILL DEPRIVE THEM OF THEIR FUNDAMENTAL RIGHT TO VOTE.

"[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Specifically, the right to vote is protected by the First Amendment and the Fourteenth Amendment.

In deciding whether state-imposed restrictions unlawfully burden the constitutionally guaranteed right to vote, Federal courts apply what has become known as the *Anderson-Burdick* balancing test, from the United States Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takashi*, 504 U.S. 428 (1992). Under this test, this Court must weigh "the character and magnitude of the asserted injury" to the right to vote against "the precise interests put forward by the State as justifications for the burden." *Anderson*, 460 U.S. at 789.

This Court is well aware of *Anderson-Burdick* balancing, *see DNC v. Bostelmann*, 2020 WL 1638374 at *11, and it will surely get even more exposure to the test through the preliminary injunction motions to be filed by the other plaintiff groups in these consolidated cases, as well as

the opposition materials from the defendants. Accordingly, the Edwards Plaintiffs will strive to avoid restatement of basic points, focusing instead on authorities and issues that we have not seen extensively emphasized or cited to date.⁵

The most important of these is the unique analytical framework for performing the *Anderson-Burdick* balance to the facts of this case. This Court must never lose sight of the fact that the heart of plaintiffs' claims is the COVID-19 pandemic. The ordinary "burdens" that the defendants will emphasize – for example, that it is not especially difficult to obtain a person to witness an absentee ballot signature, or to plan around limited in-person absentee voting hours – are completely irrelevant in this case, but they will spring back to relevance once the pandemic is over. **For this case**, the burden is not merely that a prospective absentee voter who lives alone must locate a witness; it is that the voter must interact with other people, either at home or somewhere else, and in so doing expose herself to a deadly virus. It is simply beside the point that the act of finding a potential witness is a physical act that is easy to complete even now; the burden lies in the added risk that a prospective voter must take on under the status quo Wisconsin election regime.

This enhanced risk is grave enough for healthy prospective voters. It becomes near-intolerable when citizens under disabilities, like most of the plaintiffs in this case, must expose themselves to COVID-19 in order to comply with Wisconsin's election rules. As difficult as it is for healthy citizens to weigh their fundamental right to vote against their health and safety, imagine how hard it is for a person with a suppressed immune system, or severely impaired pulmonary capacity, to decide whether it is worth risking life to comply with Wisconsin's rules to perform an

⁵ We, of course, join in the arguments advanced by the plaintiffs in the companion cases consolidated for purposes of the injunctive relief the Edwards Plaintiffs seek.

act that was comparatively simple to do in all previous years. 2020 is different in a factually and legally significant way.

That, at any rate, is what the U.S. District Court for the Western District of Virginia ruled in approving a consent decree that negated Virginia’s requirement that absentee ballots are valid only when signed by a witness, over the objections of the Republican Party of Virginia, in *League of Women Voters v. Virginia State Bd. of Elections*, 2020 WL 2158249 (W.D. Va., May 5, 2020)(“*LWV*”). Specifically, the court ruled that the COVID-19 pandemic fundamentally transformed the nature of the *Anderson-Burdick* balance:

In ordinary times, Virginia’s witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household the burden is substantial for a substantial and discrete class of Virginia’s electorate. **During this pandemic**, the witness requirement has become “both too restrictive and not restrictive enough to effectively prevent voter fraud.”

LWV, 2020 WL 2158249 at *8 (citation omitted) (emphasis added).

The *LWV* court went on to specify that the witness requirement was too restrictive because it forced many Virginia voters

to face the choice between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right-and indeed, their civic duty-to vote in an election. **The Constitution does not permit a state to force such a choice on its electorate.**

Id. (Emphasis added.)

The Virginia Republicans argued that these health risks were “either overblown or could be mitigated,” by adopting recommended social distancing measures, *id.*, but the court rightly shredded that cynical contention: “[F]or many—especially the elderly, immunocompromised, and others at greatest risk of medical complications or death if they contract the virus—such measures come up far short.” *Id.* The court reviewed the medical evidence demonstrating how widely and

easily and widely the virus spreads, and concluded – as this Court should – that the “substantial burden on the right to vote has not been justified by countervailing, demonstrated interests in the witness requirement.” *Id.*

In other words, what the defendants here have historically used to justify election laws that impose hurdles to voting don’t hold water during this pandemic, because the burden of compliance is so much higher. Defendants’ arguments are based on a fundamental misunderstanding that the context is different in dispositive ways.

Thomas v. Andino, 2020 WL 2617329 (D.S.C., May 25, 2020), employs the same reasoning as *LWV* to invalidate – temporarily – South Carolina’s witness requirement⁶ for absentee ballots for a primary election to be held in early June. *Id.* at *17-*19. Central to its *Anderson-Burdick* balancing was its accurate recognition that “the court is faced with an unusual fact pattern, which is a function of unusual times.” *Id.* at *18. The *Thomas* court also found it significant that many of the plaintiffs – like the Plaintiffs here – “have individual characteristics or conditions that are regarded by the CDC as placing them, at a higher risk for contracting COVID-19, including being over 65 years of age, having underlying medical conditions (including scleroderma, interstitial lung disease, hypertension, gout, history of breast cancer, emphysema, infection), being disabled, and/or being African American.” *Id.* at *19. In light of the plaintiffs’ enhanced susceptibility to COVID-19 and the unique facts surrounding the pandemic, the court had no trouble in *Thomas* concluding that the scant evidence that the witness requirement actually prevented voter fraud was

⁶ While the case law offered here concerns a witness requirement, the same rationale applies to the other relief the plaintiffs’ requests for relief outlined in their motion and in **Section G** of the Background Facts section of their brief. If the burden to comply with the witness requirement is unacceptably high because doing so exposes vulnerable electors to a deadly disease, then the burden to comply with a voter identification requirement (which may necessitate waiting in line at a DMV or passport office) is similarly excessive.

easily outweighed by the burden imposed under the circumstances of the pandemic. *Id.* at *20-*22.

The Edwards Plaintiffs urge this Court to follow the path of *LWV* and *Thomas*, recognizing that COVID-19's threat to life and health places a heavy weight on the scale for *Anderson-Burdick* balancing. Under these circumstances, it is difficult to imagine how any of the garden-variety rationales proffered to justify voting restrictions can pass muster.

IV. PLAINTIFFS WILL SUCCEED IN PROVING THAT DEFENDANTS VIOLATED THE AMERICANS WITH DISABILITIES ACT DURING THE SPRING ELECTION AND WILL CONTINUE TO DO SO WITHOUT JUDICIAL INTERVENTION.

In 1990, Congress enacted the ADA to remedy widespread discrimination that existed against individuals with disabilities. Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C §12101(a)(2). For example, as recently as 1979, most states categorically disqualified “idiots” from voting, regardless of individual capacity, and discretion of who could vote was left to low-level election officials. *Cleburne v. Cleburne Living Center, Inc.* 473, U.S. 432, 464 (1985) (Marshall, J. concurring).

Congress further found that “discrimination against individuals with disabilities persists in such critical areas as . . . voting, and access to public services,” a finding that was reiterated in the 2008 Americans with Disabilities Amendments Act. *See* 42 U.S.C §12101(a)(3) Further, in both 1990 and in 2008, Congress found that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of . . . [the] failure to make modifications to existing facilities and practices;” 42 U.S.C §12101(a)(5) and that “census data, national polls, and other studies have documented that people with disabilities,

as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.” 42 U.S.C §12101(a)(6)

In passing the ADA, Congress sought “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C §12101(b)(1). President George H.W. Bush, in signing the ADA, stated, “The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.” (PFOF 238.)

The ADA prohibits discrimination in three major areas: employment, which is covered by Title I; public services, programs, and activities, which are covered by Title II; and public accommodations, which is covered by Title III. Title II, §§12131-12134, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” In the research leading to the passage of the ADA, Congress learned that approximately 76 percent of public services and programs were inaccessible and unusable to individuals with disabilities, even where the programs or services restructured or relocated to other parts of the buildings. U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 39 (1983).

The United States Supreme Court has documented a history of discriminatory treatment of individuals with disabilities by states and local governments. *See Jackson v. Indiana* 406 U.S. 715 (1972) (unjustified commitments); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (documenting abuse and neglect of persons committed to mental institutions); *Cleburne*, 473 U.S. at 432

(discriminatory zoning).⁷ One of the ADA's central purposes was to sweep that history aside and allow citizens with disabilities to fully participate in American life.

Thus, the ADA was crafted "to advance equal-citizenship stature for persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 536, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (Ginsburg, J., concurring). Unsurprisingly, voting is among the rights safeguarded by the ADA. *Nat'l Federation of the Blind v. Lamone*, 813 F.3d 494, 503-04 (4th Cir. 2016); *see also Lacy v. Cook Cnty.*, 897 F.3d 847, 852 (7th Cir. 2018) This is logical, because the right to vote is a fundamental right, "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

In addition to the ADA, Congress passed the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.*, which requires each polling place in a federal election to have a voting system that is accessible to individuals with disabilities. Specifically, §15301(b)(1)(G) provides federal financial assistance to ensure that polling locations are accessible to individuals with disabilities.

Despite the progress made in public services as a result of the ADA, including in the area of voting, challenges for voters with disabilities continue to exist. One study, funded by the U.S. Election Assistance Commission entitled, *Disability, Voter Turnout, and Voting Difficulties in the 2012 Elections*, concluded that:

- 30.1% of voters with disabilities reported difficulty in voting at a polling place (compared to 8.4% of voters without disabilities) with the most common problems being difficulty in reading or seeing the ballot, or understanding how to vote or use voting equipment (PFOF 239);

⁷ At times, the Supreme Court has even been complicit in this discrimination, as it was in *Buck v. Bell* 274 U.S. 200 (1927) when it upheld the forced sterilization of thousands. "A mere five paragraphs long, *Buck* . . . could represent the highest ratio of injustice per word ever signed on to by eight Supreme Court Justices, progressive and conservative alike." Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 Pepp. L. Rev. 101, 101 (2011).

- Almost one-third of voters with disabilities required assistance in voting, most commonly given by election officials or family members; and
- 6.5% of voters with disabilities used extra features or devices in voting, such as large displays and accessible voting machines (PFOF 240).

Five years later, in October 2017, the Government Accountability Office (“GAO”) issued a report on the accessibility of polling places for individuals with disabilities in the 2016 election. Among its many findings, the GAO study found that 95 percent of polling locations observed had an accessible voting location, however, 65 percent had accessible voting stations that could impede casting a private and independent vote. (PFOF 241.)

It is with this background that we now approach the November Election and the particular impact COVID-19 is having on individuals with disabilities. In addition to its general guidance for safely conducting elections during the pandemic summarized in **Section E** of the Background Facts found in this brief and as appended at **Exhibit Z** to the Declaration of Joseph S. Goode submitted herewith, the CDC has specifically found that individuals suffering from significant underlying medical conditions may also be at an increased risk for severe illness from COVID-19. These include:

- People with chronic lung disease or moderate to severe asthma
- People who have serious heart conditions
- People who are immunocompromised

(PFOF 242.) Many conditions can cause a person to be immunocompromised, including cancer treatment, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications

- People with diabetes

- People with chronic kidney disease undergoing dialysis
- People with liver disease
- People living in nursing homes

(PFOF 243.)

These significant medical conditions are all physical impairments, which substantially limit one or major life activities, as defined by the Section 12102(1)(A), which now requires the definition of disability to be construed in favor of broad coverage. 42 U.S.C. §12102(4)(A). We encourage the Court to review **Section F** of the Background Facts to appreciate how many of the plaintiffs in this case fall into a protected group under the ADA to understand why this claim is being pursued.

Governments violate the ADA not only when their procedures completely deny the right of individuals with disabilities to cast their ballots; instead, they also violate the statute when their election apparatus does not provide “meaningful access” to the exercise of the franchise. *California Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013); *see also Disabled In Action v. Bd. of Elections in the City of New York*, 752 F.3d 189, 199 (2d Cir. 2013). A government cannot satisfy the requirements of the ADA by providing voters with disabilities “merely the opportunity to vote at some time and in some way.” *Disabled In Action*, 752 F.3d at 199. Governments have an affirmative obligation to ensure that disabled voters have a voting experience that gives them “an equal opportunity to participate in and enjoy the benefits of” voting that is enjoyed by non-disabled voters. *California Council*, 985 F. Supp. 2d at 1239, quoting 28 C.F.R. § 35.160(b)(1). Moreover, “the right to vote should not be contingent on the happenstance that others are available to help.” *Disabled In Action*, 753 F.3d at 199-200. Therefore, a government must take affirmative steps to ensure that each voter under disability has

the same rights as a non-disabled voter, and cannot defeat an ADA voting rights claim by pointing to individual circumstances that might on one occasion have alleviated the burden of that government's failure to provide required accommodations.

The defendants cannot assert the requirements of Wisconsin's statutes governing voting to limit plaintiffs' rights under the ADA. "A discriminatory state law is not a *defense* to liability under federal law; it is a source of *liability* under federal law." *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (applying Age Discrimination in Employment Act; emphasis in original).⁸ Thus, "the ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision." *Mary Jo C*, 707 F.3d at 163.

Finally, defendants cannot defeat plaintiffs' ADA claim by contending that the accommodations plaintiffs seek would "fundamentally alter" Wisconsin's election procedures. *See Lamone*, 813 F.3d at 508-09. As the numerous recent cases in this Court and others over amendments to Wisconsin's election laws demonstrate, the recently-passed laws, like strict voter identification requirements and limited early voting hours cannot be "fundamental" elements of Wisconsin elections, because Wisconsin held elections for decades under different procedural rules.

V. DENIAL OF THE FUNDAMENTAL RIGHT TO VOTE CAUSES PLAINTIFFS IRREPARABLE HARM.

This Court's April 2, 2020 order rightly follows clear authority holding that a deprivation of the right to vote works an irreparable harm, and that it cannot be redressed by money damages, meaning there is no adequate remedy at law. *DNC v. Bostelmann*, 2020 WL 1638374 at *11 (W.D.

⁸ *Quinones* has been cited to apply the ADA to protect voting rights. *Mary Jo C v. New York State & Local Retirement Sys.*, 707 F.3d 144, 164 (2d Cir. 2013)

Wis, April 2, 2020). There is no reason to revisit that result because the record in this case supports it in full.

VI. THE HARM TO PLAINTIFFS IF AN INJUNCTION IS DENIED FAR OUTWEIGHS THE HARM DEFENDANTS WOULD SUFFER IF AN INJUNCTION IS GRANTED.

As the Amended Complaint, this brief, the declarations submitted to support it, and the myriad submissions from the other plaintiffs in the companion lawsuits all demonstrate, the Legislative Defendants evince at best a callous indifference to the Wisconsin Electorate's ability to vote safely, including the plaintiffs in this case. These plaintiffs represent a broad cross-section of the electorate; some, including Chrystal Edwards, Terron Edwards, William Laske, Kileigh Hannah, Todd Graveline, Jan Graveline, Jean Ackerman, John Jacobson, and Charles Dennert did not receive their absentee ballots in the mail, despite timely requests. (PFOF 208-09.) Charles Dennert was convalescing at his parents' house in Waukesha and did not have transportation to his polling place in Milwaukee, and could not vote despite timely requesting an absentee ballot. (PFOF 213.) Kristopher Rowe and Katie Rowe received and timely cast theirs, but their votes are not reflected in the MyVote.Wi.Gov system and they have reasonable reasons to believe their ballots were not counted. (PFOF 210-211.)

Several plaintiffs, including Chrystal Edwards, Terron Edwards, William Laske, Kileigh Hannah, Jean Ackerman, Douglas West, and Angela West did not vote in person because they feared contracting COVID-19 or spreading it to at-risk loved ones (PFOF 212); Todd Graveline attempted to vote in person but saw a massive line with inadequate social distancing and left the polling place without voting, fearing for his safety (PFOF 214).

The WEC Defendants have taken **some** steps to mitigate **some** of these problems ahead of the upcoming elections, including voter education, ballot tracking through smart barcodes,

upgrading software and hardware to accommodate increased absentee balloting, and mailing of absentee ballots applications to most registered voters who have not already requested them. However, these steps, while necessary, are wholly insufficient in the face of a worldwide pandemic unlike any other infectious disease in the last century.

Injunctive relief is needed now in order to avoid repeating in the November Election the violations of the U.S. Constitution and ADA that occurred in the April Election. These injunctive measures are required now, well ahead of the November Election, to provide certainty and avoid last-minute confusion.⁹ See *Republican National Committee et al. v. Democratic National Committee et. al.*, 589 U. S. ____ (2020) (April 6, 2020) (generally declining to alter election law on the eve of the Spring Election)(citing *Purcell v. Gonzalez*, 548 U.S. 1 (2006) (per curiam)); *Frank v. Walker*, 574 U.S. 929 (2014).

The CDC recommends that election officials implement “**any** ... feasible options for reducing the number of voters who congregate indoors in polling locations at the same time.” (PFOF 244.) To do so, mail-in absentee balloting must be widely available and, importantly, effective, so as to avoid the disenfranchisement that occurred on April 7, 2020, as thousands of Wisconsin voters, including several of the plaintiffs in this case, did not receive their ballots. However, this is not enough. For individuals who cannot or will not vote via absentee ballot, the CDC recommends longer in-person voting periods as well as strict hygiene measures at the polling places. (PFOF 254.) The plaintiffs in this case request, at a minimum, the Court order the WEC Defendants to promulgate written guidance and condition its CARES Act and HAVA grants to municipal authorities only upon implementing the safety protocols set forth by the CDC.

⁹ Plaintiffs’ Amended Complaint seeks class certification and damages for the ADA claim; however, as damages will redress past violations of the ADA, adjudicating them here is not as time sensitive and will be handled at a later date as the Court so orders.

A. Voting From Home in the November Election.

An ideal and reasonable remedy here given the uncontroverted transmissibility concerns with COVID-19 would be to enjoin Wis. Stat. §§ 6.86 and 6.87. These statutory provisions prevent municipal clerks from issuing absentee ballots without written or electronic application and proof of identification if these materials are not already on file. While this Court cannot write new laws, it can enjoin laws that in practice violate the Constitution and in so doing order the WEC Defendants to direct clerks to send absentee ballots by mail to all registered voters, as the WEC has already done with absentee ballot **applications**. This would, in essence, transform the November Election to a vote-by-mail election with in-person absentee and election day balloting available for voters who are not registered in time to receive an absentee ballot, or who are unable or unwilling to vote via mail-in absentee ballot for whatever reason.

Several states—Utah, Colorado, Oregon, Washington, and Hawaii—already have all-mail elections. (PFOF 245.) California, pursuant to an order by its Governor Gavin Newsom, has implemented mail-in voting for November 3, 2020, whereby every eligible voter will receive a mail-in ballot, with in-person voting continuing for those who want or need it. (PFOF 246.) This approach could easily be implemented here when weighed against the constitutional deprivations experienced by plaintiffs (and others like them) in the Spring Election.

Defendants, particularly the Legislative Defendants and the intervening Republican National Committee (“RNC”), will no doubt complain as they normally do that mail-in elections favor one party or countenance fraud. Neither of these complaints have merit, particularly with the once-in-a-lifetime situation before us: a global and deadly pandemic where Wisconsin presently has the highest transmission rates of any state in the country. According to an April 15, 2020 paper from Stanford University’s Democracy & Polarization Lab, mail-in voting does not increase any

party's share of turnout or any party's vote share; what it does is increase overall average turnout rates. (PFOF 247.) Importantly, the Brennan Center for Justice reports that there is "no evidence that voting by mail results in significant fraud. As with in-person voting, the threat is infinitesimally small." (PFOF 248.)

We acknowledge that Wisconsin requires voters to submit identification to vote generally (2011 Wis. Act 23), and with absentee ballot requests if identification with current address has not previously been provided for an absentee ballot (Wis. Stat. § 6.87(4)(b)3), when obtaining an absentee ballot. For voters who have in the past requested absentee ballots by mail or electronic means and have not moved, this requirement has already been met, so at the very least ballots may be sent to these electors without substantial fanfare.

Obtaining adequate voter identification presents a substantial burden to many voters, even under normal circumstances. This burden is well documented; see, e.g. *Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election*. (PFOF 249.) During a pandemic like COVID-19, the burden is even greater; voters who cannot appear in person or wait in lines at a polling place cannot appear in person or wait in lines at the Department of Motor Vehicles or a passport office, for the same reasons. We are not asking the Court to enjoin all voter identification laws for this election; however, in recognition of the extraordinary circumstances we ask that the Court enjoin enforcement of voter identification laws to the extent that they unduly burden persons with disabilities, and, instead, allow them to submit a statement under penalty of perjury that they were unable to safely obtain identification suitable for voting.

This is actually just an extension of current law and a remedy that meets the realities before the Court. Present law exempts identification to vote absentee where electors self-identify as indefinitely confined, due to age, illness, or disability. Under current law, such electors may avoid

the identification requirement by providing a statement with their absentee ballot from a witness verifying the name and address of the elector. *See* Wis. Stat. § 6.87(4)(b)2. This could be an appropriate mechanism for voters who, due to disability in light of the COVID-19 pandemic, may not be indefinitely confined but at present cannot obtain appropriate identification but are able to safely have their ballot witnessed by a household member or caregiver. However, not everyone will be able to safely have their ballots witnessed, and in those cases a statement under penalty of perjury is appropriate and reasonable.

Should the Court decline to require mail-in ballots be sent to some or most electors, then steps must be taken to ensure that all absentee ballot requests that are submitted timely are fulfilled, with sufficient time for the ballot to arrive and be returned. Last week, *Luft v. Evers*, 2020 U.S. App. LEXIS 20245, __ F.3d __, 2020 WL 3496860, held that Wis. Stat. § 6.87(3), which prohibits clerks from faxing or emailing absentee ballots to most voters, was acceptable under the U.S. Constitution and the Voting Rights Act, and reversed the trial court's contrary conclusion. If *Luft* is not stayed or otherwise altered, military and overseas voters will be entitled to faxed or emailed ballots but domestic voters will not. (PFOF 250.) This means even voters who timely request absentee ballots—voters like Chrystal Edwards, Terron Edwards, William Laske, Kileigh Hannah, Todd Graveline, Jan Graveline, Jean Ackerman, John Jacobson, and Charles Dennert—and do not receive them in the days leading up to the November Election cannot contact their clerks and obtain a reasonable replacement, leading to the same Hobson's choice of risking their health or giving up their franchise that they faced in April.

Luft, which may be subject to *en banc* petition, was argued February 24, 2017, nearly three years before anyone had heard of COVID-19, and the decision was made based on a record from a universe that does not exist right now and will not for the November Election. Needless to say,

circumstances have drastically changed, and the plaintiffs in this case ask for a limited order, enjoining Wis. Stat. § 6.87(3) solely for the November Election to allow electors who have timely requested absentee ballots but do not receive them in time to cast and return them to be provided with ballots via email or fax, which was allowed in Wisconsin up until last week and then disallowed based on a record that did not anticipate a global pandemic.

Defendant Wolfe testified in this case that emailed ballots have numerous security measures in place, and she considers email a secure method of “making sure only lawfully—lawfully issued ballots are counted.” (PFOF 251.) In fact, emailed ballots had been allowed for non-military, non-overseas voters for a few years before the *Luft* decision was issued, without incident. (PFOF 252.) This is a reasonable, commonsense solution to ensure that voters who request absentee ballots and do not receive them can still vote from the privacy of their homes.

Wis. Stat. § 6.87(2) requires substantially all absentee ballots to be witnessed by an adult citizen of the United States. Under normal circumstances and for most people, this is not a problem—they may live with a qualified witness or interact with one while going about their day. However, during this extraordinary time, this requirement acts as an undue and excessive burden on individuals who are immunocompromised or who have mobility limitations and do not reside with a qualified witness, as well as a burden on individuals who are infected with COVID-19 or are quarantining or isolating due to exposure, suspected infection, or another state or local order.

This Court previously acknowledged this burden, and on April 2, 2020, entered an injunction allowing voters to submit unwitnessed ballots if they contained a statement averring that the voter was unable to safely obtain a witness certification despite reasonable efforts. *Democratic Nat’l Comm. v. Bostelmann*, 2020 U.S. Dist. LEXIS 57918. We acknowledge that this request was rejected by the Seventh Circuit, which stayed this Court’s injunction. *DNC v.*

Bostelmann, No. 20-1538 (7th Cir. Apr. 3, 2020). However, the Seventh Circuit’s decision did not reject wholesale the waiver of the witness certification, but criticized the “overbreadth” of this Court’s order, which it viewed as “categorically eliminat[ing] the witness requirement applicable to absentee ballots.” The Seventh Circuit also relied on *Purcell v. Gonzalez*, 548 U.S. 1,4 (2006) (per curiam) for the proposition that court orders affecting elections can cause voter confusion, especially close to an election. The Court of Appeals suggested that the WEC Defendants’ cumbersome work-arounds for the witness requirement were sufficient for the time being, and indicated that the WEC will “continue to consider yet other ways for voters to satisfy the statutory signature requirement” *DNC v. Bostelmann*, No. 20-1538 *4 (7th Cir. Apr. 3, 2020).

Here, we are not requesting that the witness requirement be waived in its entirety. For a very limited subset of the population, however, obtaining a witness signature may be a matter of life and death; in addition to immunocompromised individuals who cannot safely interact with other persons and do not have any other way of obtaining a witness certification (such as through a window or on video), unfortunately, any of the plaintiffs or any member of the population may find themselves in that class. Individuals diagnosed with COVID-19 are instructed to isolate in their homes and avoid contact with others for at least 10 days, regardless of symptoms. (PFOF 253.) A voter who timely requests an absentee ballot but falls ill will not be able to obtain a witness signature if they are isolated or quarantined. In those limited situations where a voter simply cannot obtain a witness signature without risking their health or that of a witness, a sworn statement under penalty of perjury is a necessary and sufficient substitute.

Finally, we join the Swenson Plaintiffs’ motion for preliminary injunction with regard to Wis. Stat. §§ 6.88, 7.51-.52 (see 20-CV-459, Docket No. 41, pp. 51-54), which prohibit municipalities from reviewing absentee ballots prior to election day, in its entirety. Clerks are

directed to simply place the ballot in a carrier envelope and ignore it until election day, preventing electors from being able to cure even defects that are readily apparent on the transmittal envelope, let alone on the ballot. An in-person voter may be afforded the opportunity to cure an overvote rejected by the voting machine, or to ask a poll worker for assistance; an absentee voter is not.

B. Voting In Person in the November Election.

Not everyone will want to or be able to vote via mail or other remote means, so in-person opportunities must be expanded and safeguarded. These include, as the CDC recommends, longer periods in which to vote in person. (PFOF 254.) Safeguarding the right to vote also includes ensuring flexibility at voting places and with regard to election staffing, whether for in-person absentee or on election day.

With regard to implementing longer in-person voting periods, we acknowledge the holding in *Luft* that recently reinstated the portion of Wis. Stat. § 6.86(1)(b), which limited in-person absentee voting (commonly though perhaps erroneously referred to as early voting) to the period beginning 14 days preceding the election and ending the Sunday before the election. The Seventh Circuit's decision found that these limits did not violate the Voting Rights Act¹⁰ or the First Amendment of the U.S. Constitution when read with Wisconsin's elections system as a whole.

While the Seventh Circuit's conclusion in *Luft* may be the law in ordinary circumstances, the Court was not presented with this question: how do you avoid disenfranchising voters in the face of public health crisis unlike anything that has occurred in the last 100 years and, in fact, has never happened in a presidential election in the history of the United States?

Circumstances have radically changed since the plaintiffs in *Luft* made their record and we ask the Court to review Wis. Stat. § 6.86(1)(b) under this reality. While the time limits may be

¹⁰ The plaintiffs here are no longer pursuing relief under the Voting Right Act.

constitutionally allowable under normal circumstances, as the Seventh Circuit has signaled, they create unneeded and unnecessary obstacles for municipalities who want to spread out in-person voting as much as possible, to avoid the lines and crowds, and the increase in COVID-19 correlated with in-person voting, that befell urban centers like Milwaukee and Green Bay in the Spring Election. There simply is no compelling state interest in strict time limits for in-person absentee ballots in the midst of a pandemic. Accordingly, and assuming that the *Luft* order is not stayed or modified in the interim, we move the Court to enjoin enforcement of Wis. Stat. § 6.86(1)(b) for the November Election.

Plaintiffs also seek an order enjoining enforcement of Wis. Stat. § 6.855(1), which requires municipalities choosing to offer in-person absentee voting at a site or sites other than the clerk or board of election commissioners' office to designate such sites "no fewer than 14 days prior to the time that absentee ballots are available for the primary . . . and [site selection] shall remain in effect until at least the day after the election." Ballots are required to be available 47 days before a partisan primary pursuant to Wis. Stat. § 7.15(1)(cm); this year, that date was June 25, 2020 for the August 11, 2020 primary. This means municipalities designated their in-person absentee sites as of June 11, 2020, and these sites are fixed through the November Election. By law, they cannot be changed even if circumstances at the time so dictate—none can be added to provide for additional distancing or to compensate for deficiencies in the mail-in ballot process, nor can they be moved should circumstances dictate (i.e. should a location need to close following an outbreak). Again, there is little state interest in enforcing this statute in the midst of a pandemic; while voter confusion may potentially occur if sites are added or moved *ad hoc* under normal circumstances, any such potential is far outweighed by the needs of municipalities to be able to adapt to changing

conditions where necessary, and can be offset through appropriate signage and voter outreach. We therefore move the Court for an order enjoining Wis. Stat. § 6.855(1).¹¹

Finally, the plaintiffs here move for an order enjoining Wis. Stat. § 7.30(2), which requires all election officials and poll workers to be a qualified elector of the county in which they are serving. Poll worker shortages were well documented in the Spring Election, requiring consolidation of polling places and activation of the National Guard. (PFOF 255.) There is no compelling state interest in requiring poll workers to hail from the same county in which they serve, and this statute is likely to exacerbate poll worker shortages in counties with outbreaks, as resident poll workers may be sick, quarantining, or socially distancing themselves. Enjoining this statute for the November Election will allow municipalities to pull from a statewide pool of poll workers and would allow more effective deployment of National Guard members (who were generally restricted to serving in their home counties).

VII. THE PUBLIC INTEREST SUPPORTS AN INJUNCTION.

Enforcing constitutional rights is in the public interest, as is “permitting as many qualified voters to vote as possible.” *DNC v. Bostelmann*, 2020 WL 1638374 at *14. The Edwards Plaintiffs easily clear this final threshold for the entry of a preliminary injunction.

CONCLUSION

For the reasons stated above, and on the basis of the record developed by the Edwards Plaintiffs and the parties in the companion cases, the Court should order injunctive relief as outlined in the accompanying motion.

¹¹ Moreover, as provided in Wis. Stat. § 6.855(4), all in-person absentee voting sites “shall be accessible to **all** individuals with disabilities.” (Emphasis added.) This by necessity requires the same accessibility provisions set forth in Wis. Stat. § 6.82, which includes curbside voting for electors who cannot enter the polling place, as well as aid in marking the ballot if the elector cannot do so due to a disability. In addition, HAVA mandates that voting systems be accessible to individuals with disabilities, including visual disabilities, and requires at least one such system be available at each polling place. 42 U.S.C. § 15301 *et seq.*

Dated this 8th day of July 2020.

Respectfully submitted,

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