UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Sylvia Gear, Malekeh K. Hakami, Patricia Ginter, Claire Whelan, Wisconsin Alliance for Retired Americans, League of Women Voters of Wisconsin,

Plaintiffs,

v.

Dean Knudson, Julie M. Glancey, Robert F. Spindell, Jr., Mark L. Thomsen, Ann S. Jacobs, Marge Bostelmann, in their official capacity as members of the Wisconsin Elections Commission, Meagan Wolfe, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants,

and

Republican National Committee, Republican Party of Wisconsin, and the Wisconsin State Legislature,

Intervenor-Defendants.

No. 3:20-cv-278-wmc

(consolidated with Nos. 3:20-cv-249-wmc, 3:20-cv-284-wmc, 3:20-cv-340-wmc, and 3:20-cv-459-wmc)

THE WISCONSIN LEGISLATURE'S MOTION TO DISMISS THE *GEAR* PLAINTIFFS' AMENDED COMPLAINT

Under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and this Court's inherent authority to stay a case, Intervenor-Defendant the Wisconsin Legislature ("Legislature") hereby submits this Motion to Dismiss the *Gear* Plaintiffs' Amended Complaint. The Legislature sets forth the grounds for this Motion in its Omnibus Brief, filed in these consolidated cases. For the reasons set forth in this supporting Omnibus Brief, the Legislature respectfully requests that this Court grant its motion.

Dated this 20th day of July, 2020.

Respectfully submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2020, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Jill Swenson, Melody McCurtis, Maria Nelson, Black Leaders Organizing for Communities, Disability Rights Wisconsin,

Plaintiffs,

v.

Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., and Mark L. Thomsen, *Commissioners of the Wisconsin Elections Commission*; Meagan Wolfe, *Administrator of the Wisconsin Elections Commission*,

Defendants

and

Republican National Committee, Republican Party of Wisconsin, and Wisconsin Legislature,

Intervenor-Defendants.

No. 3:20-cv-459-wmc

(consolidated with Nos. 3:20-cv-249-wmc, 3:20-cv-278-wmc, 3:20-cv-284-wmc, and 3:20-cv-340-wmc)

THE WISCONSIN LEGISLATURE'S MOTION TO DISMISS THE *SWENSON* PLAINTIFFS' AMENDED COMPLAINT

Under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and this Court's inherent authority to stay a case, Intervenor Defendant the Wisconsin Legislature ("Legislature") hereby submits this Motion to Dismiss the *Swenson* Plaintiffs' Amended Complaint. The Legislature sets forth the grounds for this Motion in its Omnibus Brief, filed in these consolidated cases. For the reasons set forth in this supporting Omnibus Brief, the Legislature respectfully requests that this Court grant its motion.

Dated this 20th day of July, 2020

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Democratic National Committee *and* Democratic Party of Wisconsin,

Plaintiffs,

v.

Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., *and* Mark L. Thomsen, *in their official capacities as Wisconsin Elections Commissioners*,

Defendants,

and

Republican National Committee, Republican Party of Wisconsin, *and* the Wisconsin State Legislature,

Intervenor-Defendants.

No. 3:20-cv-249-wmc (consolidated with Nos. 3:20-cv-278-wmc, 3:20-cv-284-wmc, 3:20-cv-340-wmc, and 3:20-cv-459-wmc)

WISCONSIN LEGISLATURE AND LEGISLATIVE DEFENDANTS' OMNIBUS BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF THEIR MOTIONS TO DISMISS

(Signature block for Intervenor-Defendant Wisconsin Legislature and Legislative Defendants on following page)

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INTRODUCTION[1]

Several of the Plaintiffs here have already unsuccessfully brought a wholesale challenge to the application of Wisconsin's longstanding election laws leading up to the April 7 Election, in light of COVID-19. In the first round of litigation, the *only* relief that this Court ordered was premised on the sudden, unexpected onset of COVID-19 in the weeks preceding the election—which, this Court emphasized, "no one saw" coming, such that voters did not have time to adjust their behavior in certain respects. Dkt. 181 at 127:19–128:7.[2] Even as to that limited relief, the Seventh Circuit overturned one part, and the Supreme Court overturned another.

Now various Plaintiffs challenge many of the same provisions of Wisconsin's election laws for the November Election, while adding still more claims against additional state statutes. These claims, taken together, ask this Court to use COVID-19 as a license to take Wisconsin's comprehensive election regime into federal-court receivership. But all of Plaintiffs' sweeping claims have no likelihood of success, which is reason enough to deny their preliminary injunction requests. As a threshold matter, Plaintiffs still refuse to sue the correct defendants—the high-ranking local

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[1] This Omnibus Brief is filed on behalf of Intervenor-Defendant Wisconsin Legislature in *Democratic National Committee v. Bostelmann*, No. 3:20-cv-249-wmc ("*DNC*"), *Gear v. Knudson*, No. 3:20-cv-278-wmc, and *Swenson v. Bostelmann*, 3:20-cv-459-wmc, and Legislative Defendants Speaker Robin Vos, Majority Leader Scott Fitzgerald, the Wisconsin State Assembly, and the Wisconsin State Senate in *Edwards v. Vos*, No. 3:20-cv-340-wmc. This Omnibus Brief will collectively refer to Intervenor-Defendant Wisconsin Legislature and Legislative Defendants as "the Legislature," unless context indicates otherwise.

[2] All citations to the "Dkt." refer to the docket in *Democratic Party v. Bostelmann*, No. 3:20-cv-249-wmc, unless otherwise noted.

election officials in Milwaukee and Green Bay who unnecessarily injected difficulties into the April 7 Election—ignoring this Court's admonitions that Plaintiffs should bring the proper defendants before the Court. More broadly, both the law and the facts have worsened substantially for Plaintiffs' position since April. Incredibly, Plaintiffs declare that the relief that this Court ordered in April around the onset of COVID-19 "should be the Court's jumping-off point" for analyzing claims about the November Election seven months later. Dkt. 420 at 7. But a realistic assessment of the legal and factual landscape leads to only one inescapable conclusion: all of Wisconsin's duly enacted laws can constitutionally govern the November Election.

Developments in the law have shifted the ground even further against Plaintiffs since April, making clear that they are entitled to no possible relief.

Most recently, the Seventh Circuit issued *Luft v. Evers*, ___ F.3d ___, No. 16-3003, 2020 WL 3496860 (7th Cir. June 29, 2020), which upholds dozens of Wisconsin election laws against sweeping *Anderson/Burdick* challenges similar to Plaintiffs' central claims here. *Luft* devastates Plaintiffs' core theories, which seek to challenge various provisions of Wisconsin's election law, in isolation. *Luft* holds that a court must consider the burden of a specifically challenged election provision against "the state's election code *as a whole*"; that is, by "looking at the whole electoral system," rather than "evaluat[ing] each clause in isolation." *Id.* at *3, *6. Even more to the point, *Luft* "stresse[s]" that "Wisconsin's [election] system as a whole is accommodating," that it has "lots of rules that make voting easier," and that it is "easy to vote" here. *Id.* at *3, *6–7. Under *Luft*'s controlling analysis, all of Plaintiffs'

Anderson/Burdick claims fail, as do their parallel claims brought under other constitutional and statutory provisions. All of these claims are nonstarters, as Wisconsin voters will have multiple, readily available voting options in November.

Developments in election case law, specifically those cases related to COVID-19, further undermine Plaintiffs' case. While Plaintiffs project legal confidence, they cannot hide the uncomfortable fact that in *every* case challenging voting laws due to COVID-19 that has reached federal appellate review that Plaintiffs cite, the court of appeals either rejected any court-ordered changes or, if any survived there, the Supreme Court blocked the district court's order. *See* Dkt. 420 at 45 & n.16. In the first round of this case, the Seventh Circuit blocked this Court's injunction of the witness-signature requirement, Dkt. 189 at 3, and the Supreme Court then blocked the injunction requiring Wisconsin to count absentee ballots postmarked after Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206–08 (2020) (per curiam). In *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *application to vacate stay denied*, No. 19A1055 (June 26, 2020), the Fifth Circuit overturned a district court's injunction requiring Texas to offer absentee voting to certain voters. *Id.* at 409. And in *Merrill v. People First of Alabama*, No. 19A1063 (U.S. July 2, 2020), the Supreme Court stayed a district-court injunction that had paved the way for curbside voting in Alabama and had blocked photo-ID and witness-signature requirements for absentee ballots. *See People First of Ala. v. Sec'y of State*, No. 20-12184, 2020 WL 3478093 (11th Cir. June 25, 2020).

The changed facts since April also greatly undermine Plaintiffs' lawsuits and preliminary injunction requests. The premise of the limited relief that this Court granted in the immediate runup to the April Election—the sudden, unexpected onset of COVID-19—is no longer even arguably applicable to November. Unlike the short window before the April Election, *every* Wisconsin voter now has *months* to register to vote and to request/cast an absentee ballot in light of the current COVID-19 situation. The Wisconsin Elections Commission ("Commission") has taken significant measures to increase the ease and safety of voting both via absentee ballot and in person, and is going to mail absentee ballot applications to 2.7 million registered voters. The municipalities that inexplicably closed numerous polling locations in April are now taking measures to avoid repeating those needless mistakes in November. The United States Postal Service ("USPS") is correcting the April absentee-ballot-delivery errors. And while Plaintiffs have offered no credible evidence of *any* COVID-19 spread from in-person voting on April 7, these numerous developments will make voting even safer in November.

In April, this Court expressed concern that Wisconsinites and their election officials would be unable to "thread the needle to produce a reasonable voter turnout and no increase in the dissemination of COVID-19." Dkt. 170 at 3. Wisconsinites pulled together and laudably achieved both of those twin aims. Now, the voters of Wisconsin and the State's hardworking election officials have *many* months to prepare for even better performance in November. This Court should deny the

motions for a preliminary injunction, as well as dismiss the operative complaints, leaving the running of Wisconsin's November Election to the State of Wisconsin.[3]

BACKGROUND

A. Wisconsin's Regulation Of Elections

Wisconsin makes voting easy and readily available to all eligible voters, in that it has "lots of rules that make voting easier" than the processes in "many other states." *Luft*, 2020 WL 3496860, at *3; *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014) ("*Frank I*"). The "net effect" of these rules is that, in Wisconsin, there "ha[s] been a higher turnout rate" "for voters of all races." *Luft*, 2020 WL 3496860, at *3.

1. Registering To Vote

"Registering to vote is easy in Wisconsin." *Frank I*, 768 F.3d at 748. To register, a voter need only complete a simple registration form and, for most voters, provide "an identifying document that establishes proof of residence." Wis. Stat. § 6.34(2). "[M]any acceptable forms of proof of residency" satisfy this requirement, and a voter may submit a proof-of-residency document "as a hard copy, paper document or an electronic document on a smartphone, tablet, or computer." Dkt. 24 ("Wolfe Decl.") ¶¶ 23–24; Declaration of Misha Tseytlin ("Tseytlin Decl.") Ex. 1.

[3] The Legislature did not move to dismiss the *DNC* Plaintiffs' Second Amended Complaint because the Court rejected the Legislature's pre-*Luft* arguments supporting dismissal, which the Legislature presented in its opposition to the *DNC* Plaintiffs' motion to amend their complaint. Dkt. 217. However, especially after *Luft*, the *DNC* Second Amended Complaint must be dismissed for many of the same reasons supporting dismissal of the operative complaints in *Gear* and *Swenson*. *Infra* Part II. Given the current press of time, however, the Legislature believes it prudent for this Court to sort out the pending preliminary injunction motions and pending motions to dismiss in *Edwards*, *Swenson* and *Gear*, and to deal with the *DNC* Second Amended Complaint thereafter.

Voters may register in person at the clerk's office, by mail, or online using the Wisconsin Election Commission's ("Commission") "MyVote" website. Wis. Stat. §§ 6.28(1), 6.29(2)(a); *Luft*, 2020 WL 3496860, at *3. Voters must register via these methods by the third Wednesday preceding the election, *see* Wis. Stat. §§ 6.28(1), 6.29(2)(a), which is October 14, 2020, for the November 2020 Election; or they may complete "[l]ate registration" in person at the clerk's office up to the Friday before the election, Wis. Stat. § 6.29(1)–(2), which is October 30 for the November Election, *see* Tseytlin Decl. Ex. 2. If a voter registers online, the voter may satisfy the proof-of-residence requirement by submitting a valid driver's license or state-ID number through the MyVote website. Tseytlin Decl. Ex. 1. Additionally, voters may also "register at the polling place immediately before casting a ballot," using Wisconsin's "generous . . . same-day registration" regime. *Luft*, 2020 WL 3496860, at *3, *7; Wis. Stat. § 6.55(2).

2. Voting

Voting itself is also easy in Wisconsin, as Wisconsin offers broad, no-excuses-needed absentee and election-day voting options. *See Luft*, 2020 WL 3496860, at *3.

a. Absentee Voting

Wisconsin "extends the privilege of voting by absentee ballot to [all] otherwise qualified electors who, for any reason, are unable or unwilling to appear at the polls." *Id.*; *see* Wis. Stat. § 6.85. To obtain an absentee ballot, voters need only submit a request by "the 5th day immediately preceding the election" if requesting by mail, fax, or online, or by "the Sunday preceding the election" if requesting in person, Wis.

Stat. § 6.86(1)(ac), (b); Tseytlin Decl. Ex. 3. For the November 2020 Election, those dates are October 29, 2020, and November 1, 2020, respectively. Along with the absentee-ballot-request form, voters must provide a copy of their photo ID to obtain an absentee ballot, which can be done with a smart phone or scanner. Wis. Stat. §§ 6.86(1), 6.87(1); Wolfe Decl. ¶ 31; Tseytlin Decl. Ex. 3.

As relevant to these cases, voters who have not already opted to vote absentee for the entirety of 2020 may request an absentee ballot for the November Election *immediately*, and municipal clerks will start delivering such ballots by mail once the ballots have been prepared, which will be well over a month in advance of the election. *See* Wis. Stat. § 7.15(1)(cm); Tseytlin Decl. Ex. 4. "When a request for an absentee ballot is made by mail," the clerk must mail the absentee ballot "to the elector within one day of the request." Tseytlin Decl. Ex. 4; *see* Wis. Stat. § 7.15(1)(cm). For "military [and overseas] voters," who often "face special problems" in accessing "regular voting methods," the clerk will "fax or email" the absentee ballots after receiving a valid absentee-ballot request. *Luft*, 2020 WL 3496860, at *8; *see* Wis. Stat. § 6.87(3)(d); Dkt. 247, Deposition of Meagan Wolfe 130:21–133:18 (hereinafter "Wolfe Dep."); *see* Tseytlin Decl. Ex. 5.

To cast an absentee ballot, voters need only fill out the ballot and obtain the signature of a witness on the absentee-ballot envelope. Wis. Stat. § 6.87(4)(b); *see* Wis. Stat. § 6.87(2). Those witnesses may observe absentee voters through a window or over free, readily available video-call applications like FaceTime or Skype, so they

need not have physical contact with the voters and can maintain social distancing. Wolfe Dep. 36:5–9; *see* Tseytlin Decl. Ex. 6 at 2.

Then, the voters must return the ballot by 8:00 p.m. on Election Day. Wis. Stat. § 6.87(6). The voters may return completed absentee ballots through the mail; drop them off in a "drop box," if available; hand deliver them to the clerk's office or another designated site; or even bring it to their polling place on election day. *See* Tseytlin Decl. Ex. 7 at 1–2. "A family member or another person may [ ] return the ballot on behalf of the voter." *Id.* at 1. Once the appropriate clerk receives a completed absentee ballot, the clerk ensures its delivery to "the same room where votes are being cast at the polls" for canvassing on Election Day. Wis. Stat. §§ 6.88(1)–(2), 7.51(1). Alternatively, a municipality may pass an ordinance enabling a "municipal board of absentee ballot canvassers" to "canvass all absentee ballots" cast in an election, rather than having polling-place inspectors canvass the absentee ballots at each polling place. Wis. Stat. § 7.52(1)(a).

Voters may also use the in-person absentee-voting procedure to simultaneously request and cast an absentee ballot at the clerk's office or another location designated by the clerk. Tseytlin Decl. Ex. 3; *see* Wis. Stat. §§ 6.855, 6.86(1)(a)2. A municipality may "designate multiple sites for in-person absentee voting," in addition to the clerk's office. *Luft*, 2020 WL 3496860, at *5; *see* Wis. Stat. § 6.855. The in-person absentee-voting procedure can begin as early as two weeks before the election until "the Sunday preceding the election," Wis. Stat. § 6.86(1)(b), which is November 1, 2020 for the November 2020 Election.

Wisconsin law has procedures for absentee voters to correct errors with their absentee ballots. *See* Wis. Stat. §§ 6.86(5), 6.869, 6.87(9); Tseytlin Decl. Ex. 8. For voters who "improperly complete" or omit the witness-signature certificate, "the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot." Wis. Stat. § 6.87(9); Tseytlin Decl. Ex. 4 (instructing clerks, if "time permits," to "make an effort to contact the elector and make arrangements for correcting the problem, whenever possible"). If absentee voters "make an error while marking [the] ballot or otherwise require a replacement ballot," they may contact their municipal clerk to replace the spoiled ballot with a new ballot. Tseytlin Decl. Ex. 8; *see* Wis. Stat. § 6.86(5). The clerk may send that replacement ballot by fax or email. Tseytlin Decl. Ex. 8. And if the poll worker counting an absentee ballot finds it deficient, the poll worker will "[s]et [it] aside" and only "process [it] after 8 p.m. on Election Day to give the voter an opportunity to correct the[ ] errors." Tseytlin Decl. Ex. 9.

b. Election Day Voting

Wisconsinites can, of course, vote at their polling places on Election Day. Wis. Stat. §§ 6.76–78, 6.80. To do so, voters simply arrive at the polling place, state their "full name and address," present a valid photo ID, and sign "the poll list." Wis. Stat. § 6.79(2)(a); Tseytlin Decl. Ex. 10; *see also Luft*, 2020 WL 3496860, at *3 (noting that Wisconsin "keeps the polls open for thirteen hours, and longer if voters are waiting in line at closing time"). Although in-person polling places are traditionally "brick and mortar" operations, municipalities may choose to allow "[d]rive-through voting"

at a polling location, or even "mov[e] [their] polling place operations outside," so long as they "substantially meet the procedures normally reserved for voting" in person. Tseytlin Decl. Ex. 11 at 2–5.

c. Disabled, Indefinitely Confined, And Hospitalized Electors

Wisconsin's laws contain numerous provisions to make voting even easier for individuals with disabilities, indefinitely confined voters, and hospitalized electors.

Any voters who are "indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period" may elect to "automatically" receive absentee ballots "for every election," Wis. Stat. § 6.86(2)(a), and may further submit a signed witness statement that "verifies" the voter's name and address "in lieu of [the voter] providing proof of identification," Wis. Stat. § 6.87(4)(b)2. Guidance from the Commission explains these requirements in further detail, noting that "[d]esignation of indefinitely confined status is for each individual voter to make based upon current circumstance[s]," and "shall not be used . . . simply as a means to avoid the photo ID requirement." Tseytlin Decl. Ex. 12; Wolfe Dep. 40:12–19.

For voters with disabilities and senior citizens, Wisconsin "funds specialized transportation assistance programs" to help these individuals "get to the polls." *Luft*, 2020 WL 3496860, at *3; Wis. Stat. § 85.21. Both the polling place itself and "the voting system used at each polling place" must be accessible to individuals with disabilities. Wis. Stat. § 5.25(4)(a). And if disabled voters cannot access the polling place, those voters may register and vote outside the polling place from their vehicles with the help of a polling-place inspector, under the "curbside voting" procedure. Wis.

Stat. § 6.82(1); Tseytlin Decl. Ex. 13. Beyond these specific accommodations, "[e]ach municipal clerk shall make reasonable efforts to comply with requests for voting accommodations made by individuals with disabilities whenever feasible," Wis. Stat. § 7.15(14).

And hospitalized voters, including those quarantined as a result of COVID-19 exposure, may register to vote by agent and, "at the same time," apply for an "official [absentee] ballot by agent." Wis. Stat. § 6.86(3)(a)(1)–(2); *see* Tseytlin Decl. Ex. 14 at 1.

3. Election Administration

Wisconsin has the most "decentralized" election-regulation system in the country. *See* Dkt. 227-1 at 1 (Memorandum from Administrator Meagan Wolfe to Members of the Wisconsin Elections Commission, Summary of April 7, 2020 Election (Apr. 2020)) (hereinafter "Wolfe Memo"); Dkt. 227-2 at 10 (hereinafter "WEC Absentee Voting Report"), and Wisconsin has enjoyed "a higher turnout rate" of voters "than other states for voters of all races," *Luft*, 2020 WL 3496860, at *3.

Wisconsin vests the legal duty and authority to administer elections in election officials at the county or municipal level. Wolfe Memo at 1; Wolfe Dep. 114:8–3; *see* Wis. Stat. §§ 7.10, 7.15. As relevant to this case, these municipal and county election officials "provide ballots" for elections, Wis. Stat. § 7.10(1)(a); "establish[ ]" the polling places for elections, Wis. Stat. § 5.25(2)–(3); staff "inspectors" to work at those polling places, who each must "be a qualified elector of a county in which the municipality where the official serves is located," Wis. Stat. § 7.30(2)(a); "[r]eassign" these

inspectors "to assure adequate staffing at all polling places," Wis. Stat. § 7.15(1)(k); "[e]quip" polling places with "sufficient election supplies," Wis. Stat. §§ 7.10(1)(b), 7.15(1)(a)–(b); and "[t]rain election officials" according to the Commission's guidelines and standards, Wis. Stat. § 7.15(1)(e).

The Commission, in turn, is a state agency with the "responsibility for the administration" of the State's "laws relating to elections and election campaigns." Wis. Stat. § 5.05(1); *see also* Wolfe Dep. 11:15–18. The Commission has no legal "authority to be able to mandate" local election officials' exercise of these power and duties, *e.g.*, Wolfe Dep. 57:3–5, and instead, provides advice and funding to help local officials satisfy their statutory obligations. The Commission can provide guidance on how polling places should operate, but it cannot mandate the opening of polling locations, designate in-person-absentee voting locations, or prohibit the consolidation of polling locations. *E.g.*, Tseytlin Decl. Ex. 11 at 2–5; Dkt. 438, Second Deposition of Meagan Wolfe 157:9–12 (hereinafter "Wolfe Dep. II") 176:8–15 ("We do not have a role in approving or reviewing any type of in-person absentee plan."). It can facilitate the staffing of extra polling-place inspectors (such as National Guard members, Wolfe Dep. II 170:3–12), but cannot order local election officials to accept those staffers. Wolfe Memo at 8–9; Wolfe Dep. II 158:23–25 ("[A]t the end of the day [local officials are] the ones that have the responsibility to staff their polling places[.]"); *see also* Wolfe Dep. II 172:13–17. And it can secure funds for local officials to acquire sanitation supplies, but cannot require local officials to adopt particular sanitation procedures. Dkt. 227 at 4–5 (hereinafter "WEC Defendants' Status Report").

B. The April 7, 2020 Election

Wisconsin's April 7 Election saw "extraordinarily high" voter turnout, Tseytlin Decl. Ex. 15—with 1,555,263 votes cast, comprising 34.3% of eligible Wisconsin voters, Tseytlin Decl. Ex. 16; Tseytlin Decl. Ex. 17. In comparison, the turnout for previous Spring Elections was 27.2% (2019), 22.3% (2018), 15.9% (2017), 47.4% (2016), 26.1% (2012), and 34.9% (2008). Tseytlin Decl. Ex. 17; *compare* Tseytlin Decl. Ex. 15 (explaining that the 2016 primary "was a complete outlier," given two "strongly contested" Presidential primary races). The "overall turnout in Wisconsin's 2020 primaries was even higher than in most Wisconsin primaries in the past 40 years." Tseytlin Decl. Ex. 15. As for absentee voting, 1,157,599 voters cast such ballots by mail, which was an "unprecedented level[ ]." WEC Absentee Voting Report at 4–5, 24; Wolfe Dep. 83:14–21. "[T]he final election data conclusively indicate[d] that the election did not produce an unusual number [of] unreturned or rejected [absentee] ballots." WEC Absentee Voting Report at 24.

Contrary to the pre-election claims of some, including various Plaintiffs here, *e.g.*, Dkt. 154 at 2, there is no evidence the April 7 Election increased the number of COVID-19 cases in Wisconsin. One study concluded that "voting in Wisconsin on April 7 was a low-risk activity," with "no detectable surge" in COVID-19 "transmission." Tseytlin Decl. Ex. 18 (capitalization altered). A second study similarly found that "[t]here was no increase in COVID-19 new case daily rates observed for Wisconsin or its 3 largest counties following the election on April 7, 2020, as compared to the US, during the post-incubation interval period." Tseytlin Decl.

Ex. 19 at 2. Wisconsin saw a "*reduction* in daily new case rates . . . compared to what would have been expected if the rates . . . had followed the pre-election [new-case] ratios." *Id.* at 8 (emphasis added). And while there have been "71 confirmed cases of Covid-19 among people who may have been infected during the election," Dkt. 370 ¶ 60 (Dr. Murray); Dkt. 420 at 11; *Swenson* Dkt. 44 at 10 n.34 (Dr. Remington), "[i]t is possible that these people may have been infected elsewhere[,] although it is difficult to verify," Dkt. 370 ¶ 60 (Dr. Murray). The Wisconsin Department of Health Services has also explained that it is "not clear how many of the infections may have been caused by the spring election because many of the people had other exposures." Tseytlin Decl. Ex. 20; *see Swenson* Dkt. 44 at 10 n.34 (Dr. Remington).

Difficulties experienced during the April 7 Election, such as long lines in municipalities like Milwaukee and Green Bay, *e.g.*, Dkt 198-1 ¶ 36 (*DNC* operative complaint); *Swenson* Dkt. 37 ¶ 3 (*Swenson* operative complaint), were attributable only to the ill-advised decisions of high-ranking *local* officials. Green Bay—like other municipalities—could have avoided long lines at the polls. However, instead of resolving its purported staffing issue, it declined the help of National Guard members and drastically cut and consolidated its voting locations. Wolfe Dep. II 172: 13–17 (stating that she "d[id] not believe" that Green Bay requested "National Guard" members to "staff [its] polling locations"); Dkt. 198-1 ¶ 36; *Swenson* Dkt. 37 ¶ 3; *see* Dkt. 413, Deposition of Robert Spindell 138:17–140:10 (hereinafter "Spindell Dep."); Wolfe Memo at 7–8; Tseytlin Decl. Ex. 21 (noting "[d]iscussion of Milwaukee . . . Polling Place Consolidation" on agenda). In contrast, other major municipalities in

Wisconsin, like Madison, did not unreasonably close polling locations, so they did not experience these Election Day difficulties. *See* Wolfe Memo at 8; Tseytlin Decl. Ex. 22; *Swenson* Dkt. 37 ¶ 122.

C. Post-April 7 Developments

Wisconsin's "Safer at Home" orders are no longer in force. Secretary Palm's original order expired on April 24, 2020, Tseytlin Decl. Ex. 23, and the Wisconsin Supreme Court invalidated the attempted extension of that order, *Wis. Legislature v. Palm*, 942 N.W.2d 900, 905 (Wis. 2020)—an extension that was set to expire by its own terms in late May 2020, in any event, *id.* at 906. The Governor does not intend to pursue additional statewide emergency restrictions due to COVID-19. *See* Tseytlin Decl. Ex. 24 (withdrawing emergency-rule scope statement related to COVID-19).

Wisconsin's Seventh Congressional District successfully held a special election on May 12, 2020, with 94,007 voters voting absentee, Tseytlin Decl. Ex. 25—or over 22% of the district's registered voter population, *see* Tseytlin Decl. Ex. 26. Clerks received over 69,000 of those absentee ballots by the afternoon of May 8. Tseytlin Decl. Ex. 27. And almost every voter who requested an absentee ballot received one. Tseytlin Decl. Ex. 25.

The Commission has made tremendous strides to enhance the State's readiness for the upcoming November 2020 Election, and it plans to take still more steps in the coming months. *See generally* WEC Defendants' Status Report at 2–14 (listing 15 detailed actions); Wolfe Dep. 104:1–111:16, 121:2–122:20. For example, the Commission has elected to mail absentee-ballot applications and informational

material to "all voters without an active absentee request on file," making it even easier for voters to vote via absentee ballot for the November 2020 Election. Tseytlin Decl. Ex. 28; Tseytlin Decl. Ex. 29; WEC Defendants' Status Report at 3–4; Wolfe Dep. 26:16–27:7. The Commission plans to implement "intelligent mail barcodes into the existing [absentee-ballot-envelope] design" for the November 2020 Election, which will facilitate more detailed absentee-ballot tracking. Tseytlin Decl. Ex. 28; WEC Defendants' Status Report at 6; Wolfe Dep. 54:14–60:12 (noting that the Commission expects most clerks to use the intelligent barcodes for the November 2020 Election), 99:8–17, 105:11–15 (expressly stating that the Commission approved use of intelligent barcode system). The Commission will spend up to $4.1 million of a "CARES Act sub-grant [for] local election officials," Tseytlin Decl. Ex. 28, "to help pay for increased election costs due to the COVID-19 pandemic," WEC Defendants' Status Report at 5; Tseytlin Decl. Ex. 29; Wolfe Dep. 75:3–16; *accord* Wolfe Dep. 68:10–69:6. And the Commission has made, and will continue to make, numerous upgrades to the MyVote Website and WisVote system, including to "meet the needs of clerks experiencing a large increase in the demand for absentee ballots." WEC Defendants' Status Report at 8–9; Wolfe Dep. 70:9–73:14, 128:15–129:18; *see generally* WEC Defendants' Status Report at 2–14 (discussing other efforts, like poll-worker-recruitment efforts); Wolfe Dep. 75:17–78:4 (similar).

Both Milwaukee and Green Bay are already working to avoid the long lines that occurred in April, after those municipalities inexplicably and irresponsibly closed many polling places. Milwaukee has already begun to recruit more poll

workers for the general election, utilizing the "more time" that it has until November, and "officials hope to be able to open all 180 polling sites in November's presidential election." Tseytlin Decl. Ex. 30. Milwaukee has also approved "16 in-person early voting locations for the August and November elections," which is "a sharp increase from prior years." Tseytlin Decl. Ex. 31. And Milwaukee will also have help from volunteers recruited by the *DNC* Plaintiffs themselves. *See* Tseytlin Decl. Ex. 32 (requesting that its supporters "[v]olunteer for the Voter Protection team to make sure our elections are safe & fair this fall," and specifically mentioning that "voting locations were closed in April"). Green Bay has also begun significant poll-worker recruitment efforts, and it will have at least 13 polling locations open for November—up from the two locations the city had in April. Tseytlin Decl. Ex. 33.

Finally, the Inspector General for the United States Post Office ("USPS") released a report outlining the results of the investigation into "timeliness of ballot mail in the Milwaukee processing [and] distribution center service area" relating to the April 7 Election. Dkt. 433-1, Office of Inspector General, USPS, *Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area,* Report No. 20-235-R20 (July 7, 2020). The report concluded that "tubs" of ballots from Appleton and Oshkosh were not delivered because those municipalities dropped the ballots off at USPS at the end of the day on April 7, 2020—*i.e.*, Election Day itself. *Id.* at 3–4. A low absentee-ballot return rate for certain ballots in Milwaukee resulted from a computer glitch identified by "Milwaukee Election Office staff" and was exacerbated by the lack of "Intelligent Mail Barcodes," which "would have enabled

the Postal Services and election offices to track ballots." *Id.* at 4; *see also* Wolfe Dep. at 128:15–129:18 (explaining that this glitch has been solved). A single mail carrier's negligence caused the delivery issues in Fox Point, the failure to properly log political mailings per USPS policy, and flaws in the address labels. Dkt. 433-1 at 4–5. The report issued several recommendations, which USPS staff agreed to implement: "communicate with the Wisconsin Election[s] Commission and associated election offices" about deadlines for timely delivery, the use of barcodes, and proper address labels; "ensure" relevant USPS staff and facilities are using the "political mail log to record ballot mail"; and "coordinate" with local "election offices" on "proper ballot mailing processes." *Id.* at 5–6, 8.

D. Plaintiffs' Complaints And Preliminary Injunction Motions

These consolidated cases consist of four separate actions, each of which challenges large portions of Wisconsin's election operations for the upcoming November 2020 Election. Below is a brief summary of the claims and requests for relief in each consolidated case's operative complaint.

1. The DNC Plaintiffs' Second Amended Complaint brings three claims: an *Anderson/Burdick* claim, an equal-protection/*Bush v. Gore* claim, and a procedural due process claim. Dkt. 198-1 ¶¶ 77–98.[4] The *DNC* Plaintiffs ask this Court to: enjoin Section 6.28(1)'s by-mail and electronic registration deadlines, extending them

[4] The *DNC* Plaintiffs are the Democratic National Committee and the Democratic Party of Wisconsin. Dkt. 198-1 ¶¶ 16, 18. They named Commissioners Bostelmann, Glancey, Jacobs, Knudson, Spindell, and Thomsen ("the Commissioners") as defendants. This Court granted the Legislature's and the Republican National Committee and the Republican Party of Wisconsin's ("RNC") motions to intervene. Dkts. 85 & 191.

to the Friday before the November 3, 2020 Election, Dkt. 198-1 at 39 ¶ C; extend Section 6.34's proof-of-residence requirement, Dkt. 198-1 at 39 ¶ E; enjoin Section 6.86's photo ID requirement for requesting an absentee ballot, Dkt. 198-1 at 39 ¶ D; extend Section 6.87's deadline for clerks to receive absentee ballots from 8:00 p.m. on Election Day to 10 days after Election Day, Dkt. 198-1 ¶ 9 & at 38 ¶ A; and enjoin Section 6.87's witness-signature requirement (or, at the very least, order that this requirement is satisfied if a witness observes the voter over Skype of FaceTime, but does not physically sign the ballot). Dkt. 198-1 ¶ 55 & at 39 ¶ C. The *DNC* Plaintiffs also request that the Court order the Commission to "coordinate" resources with all relevant state, federal, and private entities to ensure the safety of voting. Dkt. 198-1 at 39 ¶ G. The *DNC* Plaintiffs have moved for a preliminary injunction on all of their claims for the November 2020 Election. *See* Dkt. 420 at 6–10.

2. The Gear Plaintiffs' First Amended Complaint asserts *Anderson/Burdick* claims and a claim under Title II of the Americans with Disabilities Act ("ADA"). Dkt. 213-1 ¶¶ 113–53.[5] They ask the Court to enjoin Section 6.87's witness-signature requirement as to disabled voters, allowing them to submit an absentee ballot without such a signature if they attest that they could not safely locate a witness.

[5] The *Gear* Plaintiffs are Sylvia Gear, Claire Whelan, the Wisconsin Alliance for Retired Americans, the League of Women Voters of Wisconsin, Katherine Kohlbeck, Diane Fergot, Gary Fergot, Bonibet Bahr Olsan, Sheila Jozwik, and Gregg Jozwik. Dkt. 230-1 ¶¶ 22–30, 37–38. They named the Commissioners and Administrator Wolfe as defendants. Dkt. 230-1 ¶¶ 49–50. This Court granted the Legislature's and the RNC's motions to intervene. Dkts. 85 & 191.

Dkt. 213-1 at 77 ¶ (g). The *Gear* Plaintiffs also ask the Court to order the Commission to deliver absentee ballots via email or fax to any Wisconsin voter, not just to military voters, under Section 6.87(3), Dkt. 213-1 at 75 ¶¶ (b)–(c), at 76 ¶ (d), or to allow any Wisconsin voter to use the "Federal Write-in Absentee Ballot," Dkt. 213-1 at 77 ¶ (e). The *Gear* Plaintiffs have moved for a preliminary injunction on all of their claims for the November 2020 Election. Dkt. 421 at 2–7.

3. The Edwards Plaintiffs' Amended Complaint also brings claims under *Anderson/Burdick* and the ADA, although these plaintiffs' claims are premised on the State's "failure" to postpone the April 7 Election. *Edwards* Dkt. 5 ¶¶ 90–132.[6] They ask the Court to order universal mail-in voting, forcing the Commission to mail absentee ballots to the address of each registered voter without even requiring any voter to submit an application requesting such a ballot. *Edwards* Dkt. 5 ¶ 8.b; *see generally Edwards* Dkt. 5 at 50 ¶¶ a–d. The *Edwards* Plaintiffs also ask the Court to enjoin, without limitation, any election law that is not "fair, reasonable, and constitutionally sufficient" in their view. *Edwards* Dkt. 5 at 50 ¶ b. The *Edwards* Plaintiffs have also moved for a preliminary injunction on both of their claims for the November 2020 Election. *See* Dkt. 397 at 34, 38. The Legislature's motion to dismiss the Amended Complaint in *Edwards* is pending before the Court. *Edwards* Dkt. 12.

[6] The *Edwards* Plaintiffs are Chystal Edwards, Terron Edwards, John Jacobson, Catherine Cooper, Kileigh Hannah, Kristopher Rowe, Katie Rowe, Charles Dennert, Jean Ackerman, William Laske, Jan Graveline, Todd Graveline, Angela West, and Douglas West. *Edwards* Dkt. 5 ¶¶ 13–22. They named Speaker Robin Vos, Majority Leader Scott Fitzgerald, the Wisconsin State Assembly, the Wisconsin State Senate, the Commission, the Commissioners, and Administrator Wolfe as defendants. *Edwards* Dkt. 5 ¶¶ 23–34. This Court granted the RNC's motion to intervene. *Edwards* Dkt. 27.

4. The Swenson Plaintiffs' Amended Complaint asserts five claims: an *Anderson/Burdick* claim, an equal-protection/*Bush v. Gore* claim, a procedural due-process claim, an ADA claim, and a voter-intimidation claim under Section 11(b) of the Voting Rights Act (VRA). *Swenson* Dkt. 37 ¶¶ 195–242.[7] They ask the Court to: enjoin Section 6.87's witness-signature requirement, *Swenson* Dkt. 37 at 68 ¶ C.2; extend Section 6.87's absentee-ballot-acceptance deadline to seven days after Election Day, *Swenson* Dkt. 37 at 68 ¶ C.4; enjoin Sections 6.88 and 7.50–.51's requirement that absentee ballots be counted on Election Day, rather than before Election Day, *Swenson* Dkt. 37 at 69 ¶ C.5; enjoin the requirement in Section 6.855 that municipalities designate alternative in-person absentee-voting locations by June 11, 2020, *Swenson* Dkt. 37 at 68 ¶ C.3; and enjoin Section 7.30(2)'s requirement that election officials be electors of a municipality in the county in which they are staffed, *Swenson* Dkt. 37 at 68 ¶ C.1. Plaintiffs further request a litany of additional relief, some of which is only tangentially related to their claims.[8] Plaintiffs moved for

[7] The *Swenson* Plaintiffs are Jill Swenson, Melody McCurtis, Maria Nelson, Black Leaders Organizing for Communities, and Disability Rights Wisconsin. *Swenson* Dkt. 37 ¶¶ 10–14. They named the Commissioners and Administrator Wolfe as defendants. *Swenson* Dkt. 37 ¶¶ 15–16. This Court granted the Legislature's and the RNC's motions to intervene. *Swenson* Dkt. 38.

[8] Specifically, the *Swenson* Plaintiffs additionally request that the Court order the Commission to: "[t]ake all appropriate actions to ensure . . . [voting is] safely conducted"; require accessible voting machines at each polling place; ensure adequate numbers of poll workers; guarantee timely absentee-ballot delivery and notice of any rejection of an absentee-ballot request; provide adequate registration and absentee voting opportunities for residents of care facilities; upgrade online registration and absentee-ballot-request systems; mandate more drop boxes throughout the State for the submission of absentee ballots; and engage in a public-education campaign. *Swenson* Dkt. 37 at 67–68 ¶ B.

preliminary injunctive relief on their claims for the November 2020 Election. *Swenson* Dkt. 41 at 25.

ARGUMENT

I. Plaintiffs Are Not Entitled To Any Preliminary Injunctive Relief

Preliminary-injunctive relief "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking such relief must sufficiently show that: "(1) without such relief, it will suffer irreparable harm before final resolution of its claims; (2) traditional legal remedies would be inadequate; and (3) it has some likelihood of success on the merits." *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018) (citations omitted). Then, if the plaintiff meets this burden, the Court weighs the harm that the plaintiff will suffer without a preliminary injunction, against the harm the other party will suffer if one is granted. *Id.* Finally, the Court must consider how the preliminary injunction serves the public interest, if at all, which includes considering the effects of the injunction on non-parties. *Id.* The plaintiff bears the burden of "*a clear showing*" that the case warrants preliminary injunctive relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted). In the present case, Plaintiffs have made none of these necessary showings.

A. Plaintiffs Have No Likelihood Of Success On The Merits

1. *Anderson/Burdick* Claims

Under *Anderson/Burdick*, the court must "weigh 'the character and magnitude of the asserted injury to the [voting] rights protected by the First and Fourteenth

Amendments" against "'the precise interests put forward by the State as justification for the burden imposed by its rule.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This test sets a high bar, given the State's sovereign and compelling interests in election integrity and orderly administration. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190, 198 (2008) (controlling plurality op. of Stevens, J.); *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989); *accord Luft*, 2020 WL 3496860, at *11 ("The state's interest in the 'integrity and reliability of the electoral process' is strong." (quoting *Crawford*, 553 U.S. at 204)). The Court generally treats the State's interests as a "legislative fact" that must be accepted if reasonable. *Frank I*, 768 F.3d at 750.

An election law is constitutional under *Anderson/Burdick* if the burden imposed by the law does not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198 (controlling plurality op. of Stevens, J.); *accord Luft*, 2020 WL 3496860, at *3; *Frank I*, 768 F.3d at 748. If a burden is "merely 'reasonable' and 'nondiscriminatory,'" the State's interests in election integrity and orderly administration "will generally carry the day." *Stone v. Bd. of Election Comm'rs*, 750 F.3d 678, 681 (7th Cir. 2014) (quoting *Burdick*, 504 U.S. at 434). This test affords the "States significant flexibility in implementing their own voting systems," *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010) (citing *Burdick*, 504 U.S. at, 433–434), recognizing that "States have a major role to play in structuring and monitoring the election process," *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). Indeed, "as a practical matter, there must be a substantial regulation of

elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson*, 460 U.S. at 788 (citation omitted); *Burdick*, 504 U.S. at 433 ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections[.]"). Further, as discussed more fully below, *infra* Part I.A.1.a., *Anderson/Burdick* requires considering a given election law's burden in light of "the state's election code *as a whole*," rather than "evaluat[ing] each clause in isolation." *Luft*, 2020 WL 3496860, at *3; *accord Anderson*, 460 U.S. at 788.

Even if an election regulation does unconstitutionally burden certain particularly vulnerable voters—as opposed to merely imposing an "inconvenience," *Luft*, 2020 WL 3496860, at *7—this "[can]not prevent the state from applying the law generally," *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"). Rather, voters who cannot vote with "reasonable effort" are eligible for at most targeted, as-applied relief, not statewide relief for all voters generally. *Id.* Importantly, to obtain even this narrow relief, these voters' burdens must *objectively* exceed the constitutional threshold—a voter cannot just "make his or her [own] choice about how much effort [to comply with the law] was too much." *Luft*, 2020 WL 3496860, at *9.

Here, Plaintiffs' *Anderson/Burdick* claims attack scores of Wisconsin election laws, alleging that they impose more-than-reasonable burdens on Wisconsinites' right to vote, and Plaintiffs' operative complaints seek correspondingly sweeping relief. *See supra* pp. 18–22. Below, the Legislature first offers a detailed discussion of the Seventh Circuit's decision in *Luft*, explaining why that recent decision

forecloses all Plaintiffs' *Anderson/Burdick* claims, without need for this Court to engage in a more granular analysis. *Infra* Part I.A.1.a. The Legislature then explains that even when evaluating each challenged law "in isolation"—contrary to *Luft*'s controlling rule—each of the five categories of challenges fails. *Infra* Part I.A.1.b.

a. *Luft* Forecloses These Claims Because Wisconsin Voters Have Multiple Readily Available Voting Options

The Seventh Circuit's *Luft* decision shows that Plaintiffs have no likelihood of success on their *Anderson/Burdick* claims. 2020 WL 3496860 at *1, 6–8. As relevant here, *Luft* held that Wisconsin's "adjustments to the number of days and hours for in-person absentee voting, the state's durational residence requirement, . . . the prohibition on sending absentee ballots by email or fax," *id.* at *11, and the "requirement for documentary proof of residence," *id.* at *7 were all constitutional under the *Anderson/Burdick* balancing test. Additionally, the Court overturned a district court order allowing individuals to bypass the photo-ID law by certifying "that reasonable effort failed to yield acceptable photo ID," concluding that this subjective, individualized bypass certification violated *Frank II*. *Id.* at *9.

The central feature of the Seventh Circuit's reasoning in *Luft* was the Court's admonition that *Anderson/Burdick* requires consideration of "the state's election code *as a whole*," rather than "evaluat[ion] [of] each clause in isolation." *Id.* at *3; *see also id.* at *6, *7. This means that *Anderson/Burdick* does not invalidate an election law, viewed in isolation, where the State offsets that law with provisions making voting with reasonable effort available in other respects or by other methods. *Id.* at *3. So, for example, a State may "offset" "stringent verification of [voter] eligibility" with

"liberal access to absentee ballots." *Id.* Failure to consider "all parts of the electoral code" under *Anderson/Burdick*, *id.* at *7, impermissibly "allows a political question—whether a rule is beneficial, on balance—to be treated as a constitutional question and resolved by the courts rather than by legislators," *id.* at *3.

Luft makes clear that, after considering Wisconsin's "election code *as a whole*," rather than "evaluat[ing] each clause in isolation," none of Plaintiffs' *Anderson/Burdick* claims has any chance of success. *Id.* at *3. Wisconsin "has lots of rules that make voting easier," and its "system as a whole is accommodating." *Id.* at *3, *6. "These facts matter when assessing challenges to a handful of rules that make voting harder," *id.* at *3, and defeat Plaintiffs' claims here.

Remarkably, the *DNC* Plaintiffs claim that *Luft*, on balance, "*reinforces*" its *Anderson/Burdick* claims on the basis that *Luft* reaffirms the as-applied challenge approach discussed in *Frank II* and requires the State "to demonstrably provide eligible voters with a genuine 'path to cast a vote.'" Dkt. 420 at 5–6 (quoting *Luft*, 2020 WL 3496860, at *8). *Luft*'s treatment of *Frank II* merely reaffirms that the rare, individual voter who *objectively* demonstrates that he or she cannot comply with a voting provision *with reasonable effort* is entitled to, at most, individual, as-applied relief as to that provision. *Luft*, 2020 WL 3496860 at *9. The *DNC* Plaintiffs have not pursued this narrow, as-applied relief on behalf of any identifiable voter, and nothing in the evidence that they have presented even indicates that such a voter exists. As for *Luft*'s statement that all voters must have a "path to cast a vote," *id.* at

*8, Wisconsin already has "lots of rules that make voting easier" and "that make it easy to vote," as *Luft* itself repeatedly explained, *id.* at *3, *6.

As the Legislature details below, Wisconsin's mail-in absentee voting option, *infra* Part I.A.1.a.i., and its multiple in-person voting options, *infra* Part I.A.1.a.ii, are each constitutionally adequate "path[s] to cast a vote," *Luft*, 2020 WL 3496860 at *9. That alone is sufficient to defeat Plaintiffs' *Anderson/Burdick* claims. If an extremely rare series of events transpires to make those paths reasonably unavailable to a specific voter in November, that voter may seek targeted, as-applied relief under *Frank II* at that time. *Infra* Part I.A.1.a.iii.

i. Wisconsin's Mail-In Absentee Voting Options Are Independently Constitutionally Adequate

Wisconsin has a generous, no-excuses-needed mail-in absentee-voting regime, Wis. Stat. §§ 6.85–6.88, which, as Plaintiffs' own expert explains, "Wisconsin residents are fortunate" to have "available," Dkt. 418 at 6 (Dr. Barry Burden). Since any voter can take advantage of this absentee voting regime, Plaintiffs' criticisms of Wisconsin's in-person voting regime (which are, in any event, erroneous, *see infra* Part I.A.1.a.ii.), are legally irrelevant under *Luft* because Wisconsinites can fully vindicate their right to vote with reasonable effort through absentee voting.

Any Wisconsinite can exercise the franchise for the November Election by using Wisconsin's generous mail-in absentee voting regime. Any voter may request an absentee ballot for any reason by submitting a form online, by mail, or in person. Wis. Stat. § 6.86(1)(ac), (b); *see supra* pp. 6–9. A voter can submit this request *now*,

and municipal clerks will begin mailing absentee ballots well over a month before the election. *See* Wis. Stat. § 7.15(1)(cm); *supra* p. 7.

Indeed, many of Plaintiffs' declarants have, or presumably very soon will, submit such requests. *See* Dkt. 259 (Milton Bartelme Decl.) ¶ 5 ("We applied for absentee ballots for the rest of the year . . . and won't have to go through the process again."); see also Dkt. 270 (Pamela Brown Decl.) ¶ 8 (similar); Dkt. 353 (Patricia Sherman-Cisler Decl.) ¶ 9 (similar); Dkt. 352 (Paul Schinner Decl.) ¶ 5 (similar); Dkt. 396 (Blair Braun Decl.) ¶ 10 ("I have signed up for absentee ballots to be sent to me in all future elections."); Dkt. 393 (Cheryl Riley Decl.) ¶ 10 (similar); Dkt. 392 (Meghan Lorenz Decl.) ¶ 9 (similar); Dkt. 391 (Haley Newby Decl.) ¶ 10 (similar); *see also* Dkt. 372 (Katherine Kohlbeck Decl.) ¶ 11 ("For the November election, I want to request an absentee ballot be delivered to my home by mail."); *Swenson* Dkt. 49 (Maria Nelson Decl.) ¶ 12 (similar); Dkt. 373 (Diane Fergot Decl.) ¶ 9 (similar); Dkt. 374 (Gary Fergot Decl.) ¶ 9 (similar); Dkt. 378 (Claire Whelan Decl.) ¶ 9 (similar); Dkt. 379 (Sylvia Gear Decl.) ¶ 7 (similar); Dkt. 377 (Gregg Jozwik Decl.) ¶¶ 8, 10 (similar, and he safely voted in person); Dkt. 376 (Sheila Jozwik Decl.) ¶ 10 (similar); Dkt. 375 (Bonibet Bahr Olsan) ¶¶ 8, 10 (similar, and she shops at the grocery store every two weeks taking safety precautions, which she could use to vote safely in person); Dkt. 349 (Sue Rukamp) ¶¶ 4–5 (complaining of "technological issues and difficulty uploading her driver's license to MyVote," but stating that she "successfully requested her ballot despite her technological difficulties"). And multiple named Plaintiffs have already requested their absentee ballots for

November, Tseytlin Decl. Exs. 34; 35; 36; 37, or intend to do so, Tseytlin Decl. Exs. 38; 39; 40.

The *DNC* and *Gear* Plaintiffs attack the sufficiency of Wisconsin's mail-in absentee-voting regime by claiming that some absentee-ballot requests may be lost or delayed, but they present only speculative evidence that this is likely to happen in November. *See* Dkt. 420 at 13, 18, 25, 31–33; *Swenson* Dkt. 41 at 42–43, 49–50. Both the Commission and the USPS have already taken significant steps to ensure timely absentee-ballot delivery in November. The Commission will mail absentee-ballot request forms to millions of Wisconsin voters, which will encourage voters to request ballots early. *Supra* pp. 15–16. Further, the Commission is implementing "intelligent mail barcodes" and other "tools to allow [clerks] to make sure that ballots have gone out," further mitigating any concerns of "lost" ballots. Wolfe Dep. 129:3–18; *compare Swenson* Dkt. 41 at 50 (requesting that the Court order barcode implementation). The USPS, for its part, has already studied the errors that *DNC* Plaintiffs complain of. *Compare* Dkt. 433-1, at 4–6, *with* Dkt. 420 at 31–32. In light of this study, the USPS will take measures to ensure that these isolated issues do not recur in November, such as increasing communications between the USPS and Wisconsin election officials, correcting discrete absentee-ballot label concerns, and enforcing already-existing USPS policies. Dkt. 433-1, at 4–6, 8.

In any event, a prudent voter wishing to avoid the speculative problem hypothesized by Plaintiffs regarding lost absentee ballots can simply request an absentee ballot *now*, especially if the voter does not wish to vote in person in light of

personal concerns about COVID-19. *See supra* pp. 28–29. That minimal, "[a]dministrative step[ ]," *Luft*, 2020 WL 3496860, at *10 (citing *Crawford*, 553 U.S. at 198 (controlling plurality op. of Stevens, J.)), is a "reasonable effort" under *Frank II*, 819 F.3d at 386–87, and *Luft*, 2020 WL 3496860, at *8–9. Of course, not every voter will request absentee ballots now and, as explained immediately below, in-person voting in November is a safe, constitutionally adequate option. *Contra* Dkt. 421 at 32 (*Gear* Plaintiffs asserting, with no citation to *any* case law, that "[i]n-person voting of course is not a reasonable alternative"). But for those falling within the extremely narrow category of voters who, due to special circumstances, personally believe that they cannot safely vote in person due to COVID-19, requesting an absentee ballot immediately is a wholly viable path to casting a ballot. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207. This fully protects the constitutional right to vote, which means that Plaintiffs cannot succeed on their *Anderson/Burdick* claims. *See Luft*, 2020 WL 3496860, at *3.

The *Swenson* Plaintiffs, for their part, entirely ignore the constitutional import of Wisconsin's mail-in absentee-voting system when they claim that Wisconsin's administration of in-person voting for the April Election violated *Anderson/Burdick*. *Swenson* Dkt. 41 at 38–42. Even if the *Swenson* Plaintiffs could demonstrate that in-person voting was unsafe in some respects, *but see infra* Part I.A.1.a.ii, Wisconsin's "liberal access" to safe "absentee ballots" would "offset" whatever burdens that imposed, under *Luft*'s controlling rule that Wisconsin's system "*as a whole*" must be considered in the *Anderson/Burdick* analysis. 2020 WL 3496860, at *3.

ii. Wisconsin's Multiple In-Person Voting Options Are Independently Constitutionally Adequate

Wisconsin also has a comprehensive in-person voting regime. For those voters who choose not to take advantage of Wisconsin's generous absentee voting regime—or for the extremely rare individual who requests an absentee ballot early, experiences a delay in delivery, and does not receive a replacement absentee ballot in time—in-person voting in November (either two weeks before Election Day with the in-person absentee procedure, Wis. Stat. § 6.86(1)(b), or on Election Day itself, Wis. Stat. §§ 6.76–78, 6.80) is a safe and entirely constitutionally adequate option. Most of Plaintiffs' *Anderson/Burdick* arguments rest on the erroneous, unsupported assumption that, in light of COVID-19, Wisconsin must provide some additional special level of absentee voting beyond its existing, broad absentee and in-person voting options. But as described below, there is no general constitutional right to absentee voting, in light of COVID-19, and, further, Plaintiffs have not shown that Wisconsin's November Election is likely to be so uniquely unsafe for in-person voting as to require a different conclusion. Thus, Wisconsin's generous in-person voting options render Wisconsin's voting regime entirely constitutional under *Luft*'s requirement that a plaintiff must demonstrate that Wisconsin's election system "*as a whole*"—including Wisconsin's multiple in-person voting options—does not permit Wisconsinites to vote in person after reasonable efforts. *See* 2020 WL 3496860, at *3.

Both the Supreme Court and the Seventh Circuit have unambiguously held that the Constitution does not require States to provide *any* level of absentee voting, thus absentee-ballot restrictions "do not themselves deny [voters] the exercise of the

franchise" or implicate the "fundamental right to vote." *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–08 (1969). "[A]bsentee voting" is a "privilege[ ]," *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974), which States may extend to some, or to none at all, *see Griffin v. Roupas*, 385 F.3d 1128, 1129–30 (7th Cir. 2004); *accord Tex. Democratic Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. 2020); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). So, since "there is no constitutional right to an absentee ballot," *Mays*, 951 F.3d at 792, "it is obvious that a federal court is not going to decree . . . all-mail voting" or "Internet voting," *Griffin*, 385 F.3d at 1130.

As the Fifth Circuit recently explained in a challenge to Texas' absentee-voting regime—which (unlike Wisconsin's) does not offer absentee voting options to all voters—COVID-19's "emergence has not suddenly obligated [the State] to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail." *Tex. Democratic Party*, 961 F.3d at 409. Wisconsin, like Texas, is "not suddenly obligated" by the Constitution to offer *any* special level of absentee voting due to "[t]he Virus's emergence." *Id.* Even after the onset of COVID-19, absentee voting remains a privilege that States may decline to extend. This constitutional rule holds true even in States, like Texas, confronting more serious COVID-19 outbreaks than Wisconsin. *See id.*; *compare* Tseytlin Decl. Ex. 41, *with* Tseytlin Decl. Ex. 42. All Wisconsin must do, consistent with the Constitution, is "permit[ ] [voters] to vote in person," *Tex. Democratic Party*, 961 F.3d at 404, which it does.

Nothing in Plaintiffs' submissions shows that in-person voting in Wisconsin, either two weeks before the election under the in-person absentee procedure or on Election Day itself, is likely to be so uniquely unsafe in November as to make it a constitutionally impermissible option, contrary to controlling caselaw. Even in April—when the election officials and the country were new to the COVID-19 situation, which "no one saw" coming, Dkt. 181 at 127:19–128:7—many of Plaintiffs' declarants demonstrated that in-person voting could be done safely and responsibly. Dkt. 257 (Thomas Barnum Decl.) ¶ 5 ("I used hand sanitizer and put on a mask," "there was a lot of space [at the polling location]," "people were wiping down the ballot machine after each use, being very careful."); Dkt. 261 (Anthony Berg Decl.) ¶¶ 12–17 (similar); Dkt. 284 (Linda Duffey Decl.) ¶ 9 (similar); Dkt. 264 (Thomas Binder Decl.) ¶ 4 (similar); Dkt. 285 (Curtiss Engstrom Decl.) ¶¶ 5–6 (similar); Dkt. 280 (Neil Daniels Decl.) ¶ 4 (similar); Dkt. 281 (Brian Davis Decl.) ¶ 5 (similar); Dkt. 299 (Peter Hable Decl.) ¶ 7 (similar); Dkt. 309 (Brenna Hughes Decl.) ¶¶ 4–5 (similar); Dkt. 319 (Nicholas Lemin Decl.) ¶ 6 (similar); Dkt. 325 (Leroy Maxfield Decl.) ¶¶ 5–6 (similar); Dkt. 368 (Delany Zimmer Decl.) ¶ 7 (similar); Dkt. 348 (Katherine Ruh Decl.) ¶ 4 (similar); Dkt. 403 (Jan Graveline Decl.) ¶ 6 (similar); Dkt. 302 (Sharon Harris Decl.) ¶ 8 (similar); *see also* Dkt. 283 (Kimberly Diaz Decl.) ¶¶ 5–6 ("I ran in[to the polling location] and dropped off my [absentee] ballot as quickly as possible," where other people were also "leaving quickly"); Dkt. 294 (Sharon Gamm Decl.) ¶ 6 (similar); Dkt. 296 (Joanne Glasser Decl.) ¶ 5 (similar). Further, the Institute for Health Metrics and Evaluation (IHME) model that the *Swenson* Plaintiffs rely upon, *Swenson* Dkt.

42 ¶ 216, predicts that infection rates in Wisconsin for November will be *substantially* lower than they were in April, improving this situation further. *See* Tseytlin Decl. Ex. 43.

To the extent that some of Plaintiffs' other declarants articulate examples of local officials not taking prudent steps to conduct safe, in-person voting in April—problems which were almost entirely confined to Milwaukee and Green Bay, *Swenson* Dkt. 41 at 14; *e.g.*, Dkt. 365 (Lisa Whiteman Decl.) ¶ 5 (complaining of "not much social-distancing"); Dkt. 377 (Gregg Jozwik Decl.) ¶ 8 (complaining that "about half of the voters were not" "wearing masks")—the Commission and local election officials are all working diligently to improve those conditions, such that there is no reason to believe they will recur during the November Election.

The Commission has prepared detailed, "comprehensive reports," based on the April Election, to guide the planning of the November Election, in order to allow for safe in-person voting. WEC Defendants' Status Report at 2–3. It has dedicated significant grant funds "to secure and distribute sanitation supplies and other materials" throughout the State, *id.* at 4, and millions of dollars more for local clerks to purchase (among other things) "additional cleaning supplies" and "cleaning services and protective equipment," *id.* at 5–6. It has engaged in recruitment efforts to eliminate the risk of understaffed polling places, and therefore overcrowded, non-socially-distanced in-person voting locations. *See id.* at 11–12. And it has "worked with public health officials to produce over 20 public health guidance documents for

clerks, poll workers, and the public," and will "continue" this work to keep these materials "current and create additional guidance as needed." *Id.* at 13.

As for Milwaukee and Green Bay, while those parties have not yet fully responded to the Legislature's discovery requests, public information reveals that they are planning to open and staff vastly more polling places than they did in April. Milwaukee is planning to open all 180 polling sites and 16 in-person-absentee sites, taking advantage of the "more time" before the election by recruiting polling-place workers now. *Supra* pp. 16–17. And Green Bay is planning for at least 13 polling places, a marked increase from the two locations it provided in April. *Supra* pp. 16–17. *DNC* Plaintiffs' volunteers will help solve staffing issues in Milwaukee for the November 2020 Election. *See* Tseytlin Decl. Ex. 32 (requesting that *DNC* Plaintiffs' supporters "[v]olunteer for the Voter Protection team to make sure our elections are safe & fair this fall," and specifically mentioning that "voting locations were closed in April"). In any event, to the extent that any local conditions would remain a concern in November, Plaintiffs have made the decision not to sue the local officials that would be responsible, especially those officials in Milwaukee and Green Bay. *Infra* Part I.A.6.a. And, regardless, longer lines do not present a constitutional problem, *Frank I*, 768 F.3d at 748, and Plaintiffs have not presented any evidence that those lines caused any COVID-19 spread, *see infra* pp. 37–39.

Even if this Court were to consider the claimed COVID-19 impacts of the April Election—which, again, occurred at the outset of the COVID-19 outbreak, when election officials and voters all had far less time to prepare than they will for

November—Plaintiffs have failed to show *any* COVID-19 spread occurred during that Election. Despite the vast resources of Plaintiffs in these consolidated cases—including their multiple expert reports and *voluminous* declarations—*they cannot identify anyone who claims that they were either exposed to, or infected by, COVID-19 from the April Election (or who even suspects that might be the case)*. While there were "71 confirmed cases of Covid-19 among people who may have been infected during the election," Dkt. 370 ¶ 60 (Dr. Murray); Dkt. 420 at 11; *Swenson* Dkt. 44 at 10–11 & n.34 (Dr. Remington), this suggests nothing in particular, as "[i]t is possible that these people may have been infected elsewhere[,] although it is difficult to verify," Dkt. 370 ¶ 60 (Dr. Murray).

Researchers have found that "voting in Wisconsin on April 7 was a low-risk activity." Tseytlin Decl. Ex. 18. Dr. Leung and her colleagues "analyzed confirmed cases [of COVID-19] and new hospitalizations in Wisconsin in the weeks surrounding the April 7, 2020 election." *Id.* at 1. Based on this analysis, the study concluded that there was "no detectable spike" in infection rates. *Id.* The "number of [COVID-19] tests performed in Wisconsin has been relatively stable," and "hospitalizations are much less than testing capacity," meaning that these factors did not confound the analysis. *Id.* Given these results, this study concluded that "voting in Wisconsin on April 7 was a low-risk activity." *Id.* at 2. Dr. Berry and his colleagues concurred, in a study entitled, *Wisconsin April 2020 Election Not Associated with Increase in COVID-19*, Tseytlin Decl. Ex. 19 at 1. This study analyzed "daily new [COVID-19] case reports" from April 12–21, which was the relevant "incubation period" post-April

7, and compared them to "new case activity in the rest of the [United States]." *Id.* The study found that Wisconsin's "daily new case rates were lower than those of the rest of the [United States]" for both "the 10-day period before the election" and "during the post exposure incubation period." *Id.* at 2. "No evidence was found to support an increase in COVID-19 new daily case rates for the state of Wisconsin . . . following live voting on April 7, 2020." *Id.* at 9.

Plaintiffs' experts rely on a single, contrary study to conclude that the April 7 Election was associated with an increase in the number of COVID-19 cases in Wisconsin. *See Swenson* Dkt. 44 at 10 (Dr. Remington) (citing Chad D. Cotti, et al., *The Relationship Between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on Covid-19: Evidence From The Wisconsin Primary*); Dkt. 440, Deposition of Dr. Megan Murray 109:18–119:3 (hereinafter "Murray Dep.") (admitting that she had no other basis for this conclusion). This study is methodologically flawed in numerous respects. Although this study purported to find a "statistically and economically significant association between in-person voting and the spread of COVID-19 two to three weeks after the election," *Swenson* Dkt. 44 at 11 & n.35 (Dr. Remington); *see also* Dkt. 370 ¶ 63 (Dr. Murray), the study's dependent variable was the positive COVID-19 *test rate* in a county, not the COVID-19 *infection rate* in a county (i.e., positive cases per capita). Murray Dep. Ex. 2; Murray Dep. 59:6–9. Two counties with equal COVID-19 infection rates could show different positive COVID-19 test rates, simply because one county tested more individuals than the other. *See* Murray Dep. 61:3–7. As Dr. Murray conceded, it is possible that

such differences in testing availability could lead to biased results in the authors' study, *see* Murray Dep. 60:6–61:2. Thus, this association between in-person voting at the April 7 and the spread of COVID-19 could be the spurious result of differences in the availability of testing. Further, this study did not account for important county-level factors that could well lead to different COVID-19 rates, making the study unreliable. *See* Murray Dep. Ex. 2; Murray Dep. 67:1–22.[9] In particular, the study does not control for what the Centers for Disease Control and Prevention ("CDC") calls the "primary and more important mode of transmission" of COVID-19: "close contact from person-to-person." Dkt. 370 ¶ 33 (Dr. Murray); *see* Murray Dep 86:14–87:14. Finally, the authors included observations from the week *before* the April 7 Election in their data. For those observations, any causal relationship, if there were one, might operate in the opposite direction, with fewer voters deciding to vote in person in counties with higher COVID-19 positive test rates. Including this data when trying to determine whether in-person voting on April 7 led to an increase in COVID-19 *after* the election could well lead to unreliable results. *See* Murray Dep. 79:1–80:17.

[9] The authors of this study, perhaps recognizing these flaws, updated their paper with a new version in June 2020. *See* Murray Dep. Ex. 3 (Chad D. Cotti, et al., *The Relationship Between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on Covid-19: Evidence From The Wisconsin Primary*). However, although this new version of the study included model specifications in which the dependent variable was the number of cases per capita and included county fixed effects, the authors also added sources of potential error by including two additional weeks of data from *before* the April 7 Election. *See* Murray Dep. Ex. 3 at 13, 24.

Finally, the remaining evidence that Plaintiffs rely upon does not support the conclusion that voting in person in November will be unsafe. The *Gear* Plaintiffs present testimony from a poll worker regarding an allegedly unsafe polling location in April, Dkt. 421 at 32–33, but this shows that polling places can, in fact, be set up safely, even under that poll worker's standards. Regardless, "[t]hat some local [election officials] may disagree with the state's approach does not permit them to enlist a federal court to override the state's judgment." *Luft*, 2020 WL 3496860, at *5. The *Edwards* Plaintiffs claim that voting in November will be unsafe because "churches, governmental buildings, and schools are routinely used as polling stations—and these are the buildings that assist viral spread." Dkt. 397 at 10. But buildings cannot "assist viral spread"; it is the individuals and activities within these buildings and the lack of appropriate safeguards that cause such spread, and all buildings can be modified to safely support voting on Election Day. The *DNC* Plaintiffs similarly claim that "[w]idely accepted predictions anticipate that public-health conditions in November are likely to be similar to, if not worse than, the April 7 Election," Dkt. 420 at 3, but that assertion is *directly* contradicted by the *Swenson* Plaintiffs' own tool, the IHME model that the *Swenson* Plaintiffs rely upon, which predicts that the COVID-19 situation in Wisconsin will much *better* in November than it was in April, Tseytlin Decl. Ex. 43.

iii. If Some Extremely Rare Series Of Events Renders All Of These Options Reasonably Unavailable To Some Unfortunate Voter In November, That Voter Can Seek As-Applied Relief Then

Any Wisconsin voter can easily vote with "reasonable effort[s]," *Frank II*, 819 F.3d at 386, either by utilizing Wisconsin's generous, no-excuses-needed mail-in absentee-ballot regime, *supra* Part I.A.1.a.i, or through the multiple, safe in-person voting methods, opening fourteen days before Election Day or on Election Day itself, *supra* Part I.A.1.a.ii. Those readily available paths to vote defeat Plaintiffs' claims against "the general application of [Wisconsin's election laws] to the millions of persons" in Wisconsin statewide. *Frank II*, 819 F.3d at 387.

In all events, the as-applied failsafe that the Seventh Circuit discussed in *Frank II* and *Luft* remains available for *individual* voters challenging a specific provision of Wisconsin law that, even after considering Wisconsin's election system "*as a whole*," *Luft*, 2020 WL 3496860, at *3, *actually prevents* the voter from casting a ballot after expending "reasonable effort," *Frank II*, 819 F.3d at 386. That hypothetical voter would be exceedingly unfortunate to be unable to use any available voting avenue: he would have to know that he does not wish to vote in person, prudently request an absentee ballot well in advance of November, have that ballot lost in delivery due to some error by the USPS, be unable to request a replacement ballot, *and* be so compromised that he cannot safely vote in person. If that parade of unlikely hypotheticals were to afflict a specific, extremely unlucky voter, that voter can then seek—at the very most—narrow, as-applied relief under *Frank II*, limited to that voter, for this election. *Frank II*, 819 F.3d at 386–87; *see also Luft*, 2020 WL

3496860, at *8–9. Such a plaintiff could seek that remedy without any need for broadly applicable changes in Wisconsin law, thereby avoiding any confusion for other voters. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

b. Even If This Court Looks At Each Provision "In Isolation," Contrary To *Luft*, Each Is Constitutional

i. The Election-Integrity Provisions

Wisconsin's election-integrity measures—the witness-signature requirement, *see* Wis. Stat. § 6.87, the proof-of-residence requirement, Wis. Stat. § 6.34(2), and the photo-ID requirement, Wis. Stat. § 6.86(1)—satisfy the *Anderson/Burdick* balancing test, even if viewed in isolation from Wisconsin's permissive voting regime.

These measures each serve the State's "indisputably . . . compelling interest[s]" in the integrity, legitimacy, and security of its elections. *Eu*, 489 U.S. at 231. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," since "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Therefore, the State has a paramount interest in "carefully identifying all voters [who may] participat[e] in the election process," which ensures that the State counts "only the votes of eligible voters." *Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.).

Wisconsin's election-integrity measures are especially important in the context of the State's broadly available no-excuses-needed mail-in absentee-voting regime.

As the bipartisan Carter-Baker Commission explained, mail-in absentee voting is "the largest source of potential voter fraud." Tseytlin Decl. Ex. 44. Or, as the Seventh Circuit has explained, "[v]oting fraud is a serious problem in U.S. elections . . . and it is facilitated by absentee voting." *Griffin*, 385 F.3d at 1130; *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004) ("[V]oting by mail makes vote fraud much easier to commit."); *accord Tex. Democratic Party*, 961 F.3d at 413 (Ho, J., concurring) (collecting cases); *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc); *Wrinn v. Dunleavy*, 440 A.2d 261, 270 (Conn. 1982) ("[T]here is considerable room for fraud in absentee voting . . . ."). Even Justices who would have held other election-integrity measures unconstitutional have recognized that "absentee-ballot fraud . . . is a documented problem." *Crawford*, 553 U.S. at 225 (Souter, J., dissenting).

(I) The Witness-Signature Requirement

Wisconsin's witness-signature requirement is constitutional, consistent with the Seventh Circuit's stay decision before the April 7 Election. Dkt. 189 at 3–4.

Under Section 6.87(4), absentee voters in Wisconsin must complete their absentee ballots "before one witness who is an adult U.S. Citizen," who must also sign the ballot's witness certification. Wis. Stat. § 6.87(4)(b)1; *see* Wis. Stat. § 6.87(2). This step, too, requires only "reasonable effort" from Wisconsin voters. *Frank II*, 819 F.3d at 386. Even considering COVID-19, there are "at least five concrete alternative suggestions for how voters can [safely and easily] comply with the state's witness and signature requirements." Dkt. 189 (citing Wis. Elections Comm'n, *Absentee Witness Signature Requirement Guidance COVID-19* (Mar. 29, 2020)). This includes using a

family or household member and mail-delivery persons or medical professionals, having a witness observe over Skype or FaceTime, and signing after sanitizing and social distancing. *See* Tseytlin Decl. Ex. 45. Further, this requirement is especially easy to satisfy since absentee voters may receive their ballots well in advance of the November Election. *See supra* p. 7.

The witness-signature requirement furthers the State's interests in election integrity, which plainly outweigh its reasonable burdens. By requiring an absentee voter to obtain the signature of a witness, that witness helps ensure that the person who actually casts the ballot is the qualified voter who requested the absentee ballot. *See Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.). Or, as the Seventh Circuit held in this case, the witness-signature requirement promotes "[c]onfidence in the integrity of our electoral processes," which is "essential to the functioning of our participatory democracy," because "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." Dkt. 189 at 3 (quoting *Purcell*, 549 U.S. at 4 (brackets in original)).

The *DNC* Plaintiffs claim that a witness-certification bypass is needed for those absentee voters who cannot safely secure a witness. Dkt. 420 at 34–45. But this does nothing more than ask this Court to flout the Seventh Circuit's and Supreme Court's recent stay decisions on this very issue. Back in April, the Seventh Circuit stayed this Court's proposed bypass procedure, even though the electoral timeframe was much more compacted and the COVID-19 situation much more novel and unknown. Dkt. 189. And more recently, the Supreme Court stayed an Alabama

district court's order enjoining a witness-signature provision requiring voters to have their absentee ballot signed by a notary or two lay witnesses, a law requiring voters to expend more effort than Wisconsin's. *See Merrill*, No. 19A1063 (U.S. July 2, 2020); *see also* Ala. Code § 17-11-10(b).

None of the declarations that Plaintiffs have submitted demonstrates the inability to obtain a witness signature with "reasonable effort" for November. *Frank II*, 819 F.3d at 386. Leah Mann says that she cannot "safely" obtain a witness because she "live[s] alone," but there are numerous, safe alternatives that do not rely on a household member. Dkt. 324 ¶ 6; *see supra* pp. 42–43. Dolores Marie Garm notes that she "could have maybe found a witness and returned [her] ballot" even back in April if she only had an extra week—extra time she has (and many *months* more) before the November Election. Dkt. 295 ¶¶ 5, 7. Quintin Nulley provides no details explaining why he could not find a witness for April, and does not even claim that he cannot safely find a witness between now and November. Dkt. 334. The same is true of Elizabeth Trogdon. Dkt. 359. Debra Conmiller, the Executive Director of the League of Women Voters, Dkt. 380 ¶ 1, demonstrates the ease of compliance with the witness-signature requirement, as she explains the League of Women Voters volunteers have already worked to help absentee voters satisfy this requirement, *e.g.*, Dkt. 380 ¶ 9. Finally, while Plaintiff Jill Swenson describes circumstances relating to some difficulties that she encountered obtaining a signature on short notice in April, she fails to explain why she cannot obtain a witness signature for November,

given the many weeks she has to prepare for this requirement and the numerous avenues available to her and all Wisconsin voters. *See Swenson* Dkt. 47.

And the *DNC* Plaintiffs' preferred bypass procedure is, at bottom, not meaningfully different from the procedure a district court in *Luft* imposed with respect to photo ID requirements, which the Seventh Circuit rejected. *See* 2020 WL 3496860 at *9. The *DNC* Plaintiffs' discussion of "Indiana's affidavit option" is thus self-defeating, Dkt. 420 at 35, as the district court in *Luft* also relied on that procedure, 2020 WL 3496860, at *2—and *Luft* still rejected it as a permissible remedy, emphatically, *id.* at *9–10. Even that aside, the Seventh Circuit *already* upheld the witness-signature requirement this past April—in the face of far more uncertainty, Dkt. 189. The *DNC* Plaintiffs' requests for "modest adjustments" in this Court's prior, invalidated order cannot mask their invitation to flout the Seventh Circuit's prior decision, Dkt. 420 at 8, 34.

The *DNC* Plaintiffs attempt to analogize current circumstances to the "ID Petition Process" ("IDPP") at issue in *Luft* is deeply misleading. Dkt. 420 at 36–40. As an initial matter, Wisconsin created that petition process itself, as its sovereign prerogative, and *Luft* holds only that a district court can monitor this process to ensure that it is available even as to the rare individual, such as Mr. Randle, described in that decision—not that the Court can simply order such a procedure itself. *Luft*, 2020 WL 3496860, at *8, *10–11. In any event, Wisconsin's IDPP process is far different than the bypass procedure that the *DNC* Plaintiffs offer. Under Wisconsin's IDPP procedure, an individual can obtain a photo ID only if he or she

"show[s] up at a DMV," brings "as much [required documentation] as he or she has," *Frank v. Walker*, 835 F.3d 649, 651 (7th Cir. 2016) (per curiam) ("*Frank III*"), and then "fill[s] out two forms" with information, Tseytlin Decl. Ex. 46. This process allows the State to verify specific individuals after acquiring as much information as possible (a feature of the process that *DNC* Plaintiffs do not mention, Dkt. 420 at 37–38), while also providing those individuals a receipt to temporarily satisfy the photo-ID requirement. *See Luft*, 2020 WL 3496860, at *4, *10–11. The *DNC* Plaintiffs' process, in contrast, requires only that voters state that they cannot safely find a witness, provide their contact information (which the State already has, since the voter received an absentee ballot), and then promise to assist the State if "any questions or concerns" arise. Dkt. 420 at 34.

And, of course, the *DNC* Plaintiffs' reliance on *People First of Alabama v. Secretary of State*, No. 20-12184, 2020 WL 3478093 (11th Cir. 2020), *stayed* No. 19A1063, 2020 WL 3604049 (U.S. July 2, 2020), Dkt. 420 at 44, backfires, *since the Supreme Court stayed that erroneous injunction of state election laws.* Thus, the *DNC* Plaintiffs ask this Court to enter an injunction that is sure to be stayed by the Seventh Circuit or Supreme Court once again.

The *Gear* Plaintiffs present no evidence of anyone at risk for not obtaining a witness for November with reasonable efforts. *See* Dkt. 421 at 52–53. Rather, as already mentioned, one of their declarants explains that her organization has engaged in efforts to assist absentee voters in this regard. *Supra* pp. 44–45. And while the *Gear* Plaintiffs argue that they have standing to challenge this

requirement, owing to their diversion of resources, Dkt. 421 at 29, that does not establish—*on the merits*—that any *individual voter* cannot satisfy this provision with "reasonable effort." *Frank II*, 819 F.3d at 386. While the *Gear* Plaintiffs mention the Seventh Circuit's "suggestion" that "remote witnessing" could be used, Dkt. 421 at 56, the Seventh Circuit did not condition its upholding of the witness-signature requirement on that "suggestion," *see* Dkt. 189 at 4. And the *Gear* Plaintiffs' lengthy "unconstitutional conditions" argument, Dkt. 421 at 58–63, is a legally irrelevant distraction: Wisconsin's witness-signature requirement does not impose an "unconstitutional condition[ ]" on any Wisconsin voter, since all voters may satisfy this law with "reasonable effort[s]," *Frank II*, 819 F.3d at 386, or alternatively, safely vote in person on Election Day, *see supra* Part I.A.1.a.ii.

The *Edwards* Plaintiffs' arguments are similarly unpersuasive. To begin, their requested bypass of the witness-signature requirement fails for the same reasons as the *DNC* Plaintiffs' request, Dkt. 397 at 35–36—this is just what this Court ordered last time, which was stayed by the Seventh Circuit, Dkt. 189, just like the affidavit procedure condemned in *Luft*. These Plaintiffs further rely on a consent decree invalidating a witness-signature requirement from the Western District of Virginia, Dkt. 397 at 36, without even discussing the stay decisions *in this very case* from the Seventh Circuit approving of the witness-signature requirement, Dkt. 189—or the multiple Court of Appeals and Supreme Court decisions overturning COVID-19-related election-law injunctions, *see supra* pp. 2–3. Notably, a district court in Minnesota, which had the benefit of these later decisions, rejected an identical

consent decree, *see League of Women Voters of Minn. Educ. Fund v. Simon*, Dkt. 52, No. 0:20-cv-1205 (D. Minn. June 23, 2020). And Plaintiffs' reliance on *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020), Dkt. 397 at 37, is of no help, as the court ordered relief from a witness-signature requirement as to an election that was one month away, *id.* at *30, while the November Election is over three months away. Further, South Carolina neither appealed nor asked the Supreme Court for a stay in *Thomas*, which the Supreme Court very likely would have granted, given that it granted a stay in the virtually identical case from Alabama. *Merrill*, No. 19A1063 (U.S. July 2, 2020). And *Thomas* was not bound by the Seventh Circuit's caselaw, including its stay decision in this very case, and *Luft*.

(II) The Proof-Of-Residence Requirement

The proof-of-residence requirement for registration found in Section 6.34(2) "do[es] not violate the Constitution." *Luft*, 2020 WL 3496860, at *7.

This requirement "impose[s] slight burdens on voters," *Luft*, 2020 WL 3496860, at *7, and is "easy" to satisfy, *see Frank I*, 768 F.3d at 748. Section 6.34(2) provides simply that "upon completion of a [voter] registration form," a voter "must provide an identifying document that establishes [their] proof of residence." Wis. Stat. § 6.34(2). "[M]any acceptable forms of proof of residency" satisfy this requirement, and a voter may submit a form "as a hard copy, paper document or an electronic document on a smartphone, tablet, or computer." Wolfe Decl. ¶¶ 23–24; Tseytlin Decl. Ex. 1. And if the voter registers online, the voter may satisfy the proof-of-residence requirement by simply entering a Wisconsin driver's license or state-ID number. Tseytlin Decl.

Ex. 1. Such "[a]dministrative step[s]"—"gathering documents" or perhaps "making a trip" to a government office—impose only "reasonable" or "slight burdens." *Luft*, 2020 WL 3496860, at *7, *10 (citing *Crawford*, 553 U.S. at 198); *accord Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("fil[ing] a form" to register to vote requires only "minimal effort").

The State's interests in Section 6.34(2) outweigh its minimal burdens on voters. The "[p]roof of residence" requirement furthers the State's compelling election-integrity interests because it "helps assign voters to their proper districts"—and, as *Luft* held, that makes this requirement "valid for that reason alone." *Luft*, 2020 WL 3496860, at *7; *accord supra* Part I.A.1.a. That is, because "a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot," the State may constitutionally require proof that voters meet residence-eligibility requirements. *Id.* (quoting *Marston v. Lewis*, 410 U.S. 679, 680 (1973)); *accord Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.).

The *DNC* Plaintiffs (the only parties challenging this law) failed to offer *any* evidence that this requirement imposes anything more than reasonable burdens. They do not offer even a single declarant that claims that complying with this requirement would be burdensome at all, let alone so burdensome as to outweigh the State's interest in election integrity. So, because voters may satisfy this requirement with "reasonable effort" between now and November's Election Day, this provision is constitutional. *Frank II*, 819 F.3d at 386. For this reason, the *DNC* Plaintiffs' claims that this requirement needs a certification-bypass procedure also fail, Dkt. 420 at 46–

47, as the Legislature discussed more fully above in the context of the witness-signature requirement, *supra* Part I.A.1.b.i.(I).

(III) The Photo-ID Requirement

The photo-ID requirement for absentee voting found in Section 6.87(1) likewise satisfies the Constitution, consistent with binding Supreme Court and Seventh Circuit precedent. *Crawford*, 553 U.S. at 198 (controlling plurality op. of Stevens, J.); *Luft*, 2020 WL 3496860 at *9; *Frank I*, 768 F.3d at 748.

Wisconsin's photo-ID law imposes only reasonable burdens. *Frank I*, 768 F.3d at 748 (citing *Crawford*, 553 U.S. at 198 (controlling plurality op. of Stevens, J.)); *see also Luft*, 2020 WL 3496860 at *9. Section 6.87(1) provides that an "absent elector shall enclose a copy of his or her proof of identification . . . with his or her application" for an absentee ballot. Wis. Stat. § 6.87(1). If the voter "applies for an absentee ballot in person at the clerk's office," then the voter must "present[ ] proof of identification" to the clerk. Wis. Stat. § 6.86(1)(ar). The vast majority of absentee voters may satisfy this requirement without leaving their homes. If the voter already has a photo ID on file, then the voter already satisfies this requirement. Tseytlin Decl. Ex. 3; Wolfe Decl. ¶ 31; *see* Wolfe Dep. 102:2–11. For voters who do not have a photo ID on file, they can upload a picture of it to the MyVote website using a "computer, tablet, or phone" when they request their absentee ballot online. Wolfe Decl. ¶ 31. Thus, "[t]he entire process of requesting a[n] [absentee] ballot, taking a picture of an ID, and uploading the picture can be done with a smart phone." Wolfe Decl. ¶ 31. These

"[a]dministrative step[s]" are only "reasonable" or "slight burdens." *Luft*, 2020 WL 3496860, at *7, *10.

The photo-ID law furthers the State's compelling interests in election integrity and security, which easily outweigh the minimal burdens the law imposes, and so satisfies *Anderson/Burdick*. The State must "carefully identify[ ] all voters [who may] participat[e] in the election process," *Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.), as there is no "right to walk up to a voting place on election day and demand a ballot," *Luft*, 2020 WL 3496860, at *7 (*Marston*, 410 U.S. at 680). Requiring voters to present a photo ID obviously furthers that identification goal, thus "promot[ing] confidence" and "mak[ing] elections cleaner." *Frank I*, 768 F.3d at 750–51. This is why the Supreme Court, the Seventh Circuit, and this Court have consistently recognized the constitutionality of such laws. *Crawford*, 553 U.S. at 204 (controlling plurality op. of Stevens, J.); *Luft*, 2020 WL 3496860 at *9; *Frank I*, 768 F.3d at 755; Dkt. 217:13–14; *see also* Dkt. 37 at 16–17.

The *DNC* Plaintiffs failed to offer any evidence, even from their multitude of declarants, that a voter exists who could not satisfy the photo ID requirement for the November Election without "reasonable effort[s]." *Frank II*, 819 F.3d at 386. While Shirley Powell notes that she failed to provide a copy of her photo ID when requesting an absentee ballot by mail, she does not explain why she could not obtain assistance copying her photo ID or uploading it to the MyVote Website herself. *See* Dkt. 341 at 2–4. Further, she does not claim that voting will be difficult in the November 2020 Election, instead stating that she "think[s] voting by absentee ballot may be the best

way for [her] to vote." Dkt. 341 at 3. And while the *DNC* Plaintiffs complain that voters are confused by the "indefinitely confined" exception to the photo ID requirement, Dkt. 47–49, all citizens are presumed to know the law, *see Cochran v. Ill. State Toll Highway Auth.*, 828 F.3d 597, 600 (7th Cir. 2016), and the Commission has published clear guidance on this point, *supra* p. 10; *see* Tseytlin Decl. Ex. 12; Wolfe Dep. 40:12–19. In any event, even if this provision could confuse some voters, that does not support Plaintiffs' *Anderson/Burdick* claim here, as nothing in the record indicates that any Plaintiff cannot utilize this exception due to any sort of confusion. Notably, none of the *DNC* Plaintiffs' numerous declarants even so much as claims that he or she cannot vote in November after reasonable efforts because of some confusion as to the indefinitely-confined-voter exception.

ii. Registration Deadlines

"Registering to vote is easy in Wisconsin." *Frank I*, 768 F.3d at 748. Under Wisconsin law, voters have until October 14, 2020, to register for the November Election in person at the clerk's office, by mail, or online at the MyVote website—or until October 30 using late registration at the clerk's office. Wis. Stat. §§ 6.28(1), 6.29(1)–(2)(a); *see* Tseytlin Decl. Ex. 2 (first link). Wisconsin also has "generous . . . same-day registration" available. *Luft*, 2020 WL 3496860, at *3, *7; *see* Wis. Stat. § 6.55(2).

These registration deadlines impose only reasonable burdens on Wisconsin voters. *See Luft*, 2020 WL 3496860, at *3. Wisconsin voters have months to register online or by mail for the November Election—with no need to leave their homes—*and*

they may register today. *See* Wis. Stat. §§ 6.28(1), 6.29(1)–(2)(a). Voters have months to register in person before Election Day, *see* Wis. Stat. § 6.28(1)(a), and may even register in person on Election Day itself right before casting a ballot, Wis. Stat. § 6.55(2). If any qualified elector fails to "act" in accordance with such "mere[ ] [ ] time limitation[s]," that would be due solely to "their own failure to take timely steps to effect their [registration]." *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *see also Burdick*, 504 U.S. at 436–37 (giving "little weight to the interest [of voters] . . . in making a later rather than early decision" (citation omitted)); *accord Republican Nat'l Comm.*, 140 S. Ct. at 1207 ("[E]ven in ordinary elections, voters who request an absentee ballot at the deadline for requesting ballots, will usually receive their ballots on the day before the election or day of the election . . . .").

Wisconsin's "valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral process from possible fraud" justify the registration deadlines' miniscule burdens under *Anderson/Burdick*. *Luft*, 2020 WL 3496860, at *7 (quoting *Marston*, 410 U.S. at 680) (emphasis in original). Indeed, the State "inevitably must" enact such deadlines, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), to ensure the "orderly administration," *Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.), and "efficient[ ]" operation of its elections, *Burdick*, 504 U.S. at 433; *accord Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020).

The only parties challenging the registration deadlines are the *DNC* Plaintiffs, and their arguments are insufficient. Dkt. 420 at 28–30. The *DNC* Plaintiffs ask the

Court to extend the by-mail and electronic registration deadlines, yet they do not even attempt to explain—let alone provide any evidence for—why any qualified elector needs more than *months already available* to register via these methods. *See* Dkt. 420 at 28–30. Indeed, the *DNC* Plaintiffs are unable to present a single declarant or any other evidence to suggest that *any* voter will be unable to register for the November Election with more than "reasonable effort[s]." *Frank II*, 819 F.3d at 386. The interests of those persons who voluntarily fail to act—even if due to the "human nature to procrastinate," Dkt. 420 at 32—have "little weight" in the *Anderson/Burdick* analysis. *Burdick*, 504 U.S. at 436–37; *see also Rosario*, 410 U.S. at 758; *accord Republican Nat'l Comm.*, 140 S. Ct. at 1207.[10] In any event, even these "procrastinat[ing]," unregistered voters may still vote in November by simply completing same-day registration at the polling place itself. Wis. Stat. § 6.55(2). Thus, contrary to *DNC* Plaintiffs' arguments, *no* "unregistered but eligible voters" will "face the same 'excruciating dilemma' [previously] identified by this Court," so long as they simply do not make the personal "deci[sion] to register and vote shortly before the November election," Dkt. 420 at 30 (quoting Dkt. 37 at 11), even assuming there could be similar mailing problems come November.

The Court's justification for extending registration deadlines on March 20 for the April 7 Election is no longer applicable. The Court concluded that this extension

[10] The fact that Wisconsin's electronic and by-mail registration deadlines fall "before voters have even evaluated the candidates in the second and third scheduled Presidential debates" is constitutionally irrelevant. Dkt. 420 at 29. Any unregistered voter relying on those debates to determine how to cast a ballot in the November Election can obviously still *register* to cast that ballot by these deadlines.

was warranted in light of the sudden onset of COVID-19 in the immediate weeks leading up to the election, *see* Dkt. 37 at 2, 4–5, in which "the State of Wisconsin and the CDC" had "urged" everyone "to avoid public spaces altogether," Dkt. 37 at 11. Now, voters have *months* to register in advance of the November Election, and they are fully aware of the need to take COVID-19 precautions if necessary. Further, while the government is advising certain precautions, it is no longer urging individuals to avoid the public sphere entirely, as Wisconsin has largely reopened. *See supra* p. 15.

iii. Absentee-Ballot Related Provisions

Multiple Plaintiffs challenge Wisconsin's absentee-ballot-receipt deadline, and the *Gear* Plaintiffs challenge Wisconsin's decision to afford only military and overseas electors the ability to receive absentee ballots via email or fax. These aspects of Wisconsin's election administration are constitutional.

(I) Absentee-Ballot Delivery Deadline

Under Section 6.87(6), absentee ballots must be "delivered to the polling place serving the elector's residence before 8 p.m. on election day," while "[a]ny ballot not mailed or delivered as provided . . . may not be counted." Wis. Stat. § 6.87(6).

Section 6.87(6)'s deadline, like the registration deadlines, impose only minimal burdens. An elector may return an absentee ballot through a variety of easy methods. *See generally Luft*, 2020 WL 3496860, at *3. All voters may simply mail the absentee ballot in a timely manner, which is particularly reasonable given that clerks may begin mailing ballots well over a month in advance of the election. *Supra* p. 7. Voters may leave completed absentee ballots in a designated drop box utilized by their

municipality, hand deliver them to the clerk's office (or another designated site), or even bring them to the polling place on Election Day. *See supra* p. 7. And a proxy for the voter may complete any of those delivery methods on behalf of the voter under the Commission's interpretation of Wisconsin law. *See supra* p. 8. Additionally, many voters may use the in-person absentee procedure from 14 days before the election through the Sunday prior (October 20–November 1), which procedure municipalities may offer "without any restriction on the number of hours per day that a municipality may choose to keep its office open." *Luft*, 2020 WL 3496860, at *1; *see supra* p. 8.

Voters need only expend minimal effort to timely deliver an absentee ballot. This "[a]dministrative step[ ]" requires little of the voter, *Luft*, 2020 WL 3496860, at *7, *10 (citing *Crawford*, 553 U.S. at 198), and—given the time and multiple avenues available to comply—a voter's "failure to take timely steps to" meet this deadline lies with the voter alone. *Rosario*, 410 U.S. at 758; *Burdick*, 504 U.S. at 436–37. "[E]ven in an ordinary election" the State may expect voters to act *in advance* of these deadlines to vote absentee; for example, "voters who request an absentee ballot at the deadline for requesting ballots[ ] will usually receive their ballots on the day before the election or day of the election," potentially requiring them to cast that absentee ballot at the polling place. *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

The State has a strong interest in Section 6.87(6)'s absentee-ballot-receipt deadline. The State "inevitably must" enact an absentee-ballot-receipt deadline, *Timmons*, 520 U.S. at 358, which necessarily furthers its compelling interests in the

"orderly administration" and integrity of its elections, *Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.); *Eu*, 489 U.S. at 231. The election-day deadline allows for adequate time to canvass the election results, so as to accurately and timely report election-day winners. *See* Tseytlin Decl. Ex. 48. As Administrator Wolfe explained, local officials experienced "an extremely tight turnaround," requiring "incredible efforts . . . on the part of local election officials," to meet certification deadlines after this Court extended the absentee-ballot-receipt deadline for the April 7 Election. Wolfe Dep. 48:12–16. While the cost of missing certification or reporting deadlines for the April Election may have been bearable—were this "extremely tight turnaround to prove" too restrictive—missing such deadlines *for the Presidential election in November* would be intolerable.

Extending this deadline for the November Election would be far more harmful to the State's and the Nation's interests than the extension that this Court ordered in April, given that the November Election includes the Presidential race. As this Court previously recognized, an order extending the absentee ballot receipt deadline must be paired with an order prohibiting the release of any election results until the new, court-imposed deadline, in order to ensure election integrity and public confidence in the results. *See* Dkt. 179. Imposing this gap in November would delay the public announcement and completion of Wisconsin's election results, including as to the Presidential race, for more than a week, potentially leaving the State and the Nation in needless limbo, given Wisconsin's swing-state status.

Further, "[c]ommon sense . . . compels the conclusion that government" may "structure" its election administration to require the receipt of all ballots by the date of the election: *Election Day*. *Burdick*, 504 U.S. at 433, 441. The State has adopted this eminently reasonable requirement, already engaging for itself in the "difficult" "balancing [of] the competing interests involved." *Griffin*, 385 F.3d at 1130. Upsetting that considered balance with a federal-court order would be nothing more than "federal judicial micromanagement of state regulation of elections," which *Anderson/Burdick* does not allow. *Stevo v. Keith*, 546 F.3d 405, 409 (7th Cir. 2008); *accord Republican Nat'l Comm.*, 140 S. Ct. at 1207 (avoiding "judicially created confusion" from such orders is "the wisdom of the *Purcell* principle").

This Court's basis for extending this deadline for the April 7 Election, which was ultimately reversed in part by the Supreme Court, Dkt. 170 at 38, is now plainly inapplicable to the November Election. This Court's concern in April was that "even the most diligent voter may be unable to return his or her ballot in time to be counted." Dkt. 170 at 38. This does not apply to the November Election, as any diligent voters who wish to vote mail-in absentee can request absentee ballots even *now* and return them *far* in advance of the November Election Day deadline, thereby avoiding all but the most extreme and unlikely series of mailing scenarios. *See supra* pp. 40–41. As noted above, many of Plaintiffs' own declarants have already sent in a request, or will presumably do so soon. *See supra* pp. 28–29.

The Plaintiffs' various counterarguments are unpersuasive.

To begin, the *DNC* Plaintiffs imply that the Supreme Court tacitly approved this Court's week-long extension of the absentee-ballot deadline, but any such suggestion would be erroneous. Dkt. 420 at 2. None of the Intervenor Defendants presented this issue to the Supreme Court. Accordingly, the Court did not consider the merits of that extension, even as to the April 7 Election, to say nothing of its application to the November 2020 Election. *Republican Nat'l Comm.*, 140 S. Ct. at 1207. Rather, the Court focused on the "sole," "narrow, technical question" of whether "absentee ballots now must be mailed and postmarked by election day," given this Court's one-week extension. *Id.* at 1206. And the Court refused to "express[ ] an opinion on . . . whether other reforms or modification of election procedures in light of COVID-19 are appropriate," a point that "cannot be stressed enough." *Id.* at 1208.

The *DNC* Plaintiffs' reliance on the number of absentee ballots returned during the one-week extension does not justify an identical extension in November. Dkt. 420 at 31; *see also Swenson* Dkt. 41 at 42–43. The massive, unexpected, and sudden shift of would-be in-person voters to absentee voters for the April Election caused that large number of returned ballots in that one-week period. *See* Dkt. 170 at 8–13, 38–39; Dkt. 181 at 127:19–128:7. Those circumstances are not even arguably present now, in the months leading to November. Instead, individuals now have ample time before the November Election to vote absentee if they desire. As noted, those voters may immediately request an absentee ballot, which leaves them with more than enough time to deliver the ballot come November 3. *See supra* p. 7. Expecting these

voters to prudently plan in this manner requires nothing more than their "reasonable effort," which is sufficient to satisfy *Anderson/Burdick*. *Frank II*, 819 F.3d at 386.

The *DNC* Plaintiffs claim that the Commission implemented this Court's one-week extension "without causing any administrative problems for elections officials," Dkt. 420 at 31; *see also* Dkt. 420 at 33, but that is refuted by Administrator Wolfe, as already noted above. Because of this extension, local officials operated with "an extremely tight turnaround," requiring "incredible efforts" to certify the results on time. Wolfe Dep. 48:12–16.

The references by the *DNC* Plaintiffs to mistakes by the USPS in the delivery of absentee-ballots in April also do not justify enjoining Wisconsin's absentee-ballot deadline. Dkt. 420 at 12–13, 17–18, 31–32. Wisconsin does not control that federal agency, thus its actions could not support facially enjoining provisions of Wisconsin's election law. That unfair result would violate fundamental standing principles. *See* Part I.A.6.a. Regardless, the USPS has investigated these discrete absentee-ballot-delivery issues, issued a report detailing its findings, and proceeded to implement recommendations to prevent their recurrence in November. *Supra* pp. 17–18.

The *DNC* Plaintiffs further argue that an extension is necessary because the "third and final 2020 Presidential Debate" occurs "only 12 days before election day," but that debate is of no constitutional import, Dkt. 420 at 32, as absentee voters almost *always* cast their votes without "information . . . that surfaces in the late stages of the election campaign," *Griffin*, 385 F.3d at 1131.

Also unconvincing are the *DNC* Plaintiffs' recitations of difficulties experienced by other States for elections held in early June. Dkt. 420 at 31–32. Those States' experiences have no bearing on the operation of *Wisconsin's* election laws, and Wisconsin successfully held an election in May—with no claims of difficulties from any quarters. *Supra* p. 15. And the November Election is still months away, further negating any comparative value to those out-of-state June elections.

The *Edwards* Plaintiffs generally requested their absentee ballots close to the April Election, Dkt. 397 at 17–18, 20–23 (two voters not mentioning any request), so presumably they—and all those like them—can take the "reasonable effort," *Frank II*, 819 F.3d at 386, of planning ahead and ordering their ballots *now*, assuming they do not want to vote in person in November. Expecting voters who do not want to vote in person to take such prudent measures is a "reasonable" burden, *id.*, and the *Edwards* Plaintiffs have not argued that voters are constitutionally entitled to wait until the absentee-ballot-request deadline approaches before submitting their requests. And even if a voter fails (or declines) to request an absentee ballot with sufficient time, in-person voting remains a safe and constitutionally sufficient option.

As for the *Swenson* Plaintiffs, their absentee-ballot-deadline-extension arguments suffer from the same flaws already discussed above, *Swenson* Dkt. 41 at 42–43: They focus on the exigent circumstances immediately leading up to the April 7 Election, which exigency no longer exists, given the months until the November Election. *See supra* pp. 7, 15–16. So, while these Plaintiffs assert that "Wisconsin's statutory deadline for receipt of mail-in absentee ballots is again likely to

disenfranchise thousands of voters," *Swenson* Dkt. 41 at 37, they have no evidence to substantiate that claim. Although these Plaintiffs argue that voters who wait *until the last day available* to request absentee ballots may not receive them in time, *Swenson* Dkt. 41 at 43, "voters who request an absentee ballot at the deadline" are well aware of this possibility, and can be expected to request their ballots further in advance (including now). *Republican Nat'l Comm.*, 140 S. Ct. at 1207. Indeed, there is no constitutional requirement that Wisconsin allow absentee voters to request absentee ballots only five days before an election. *McDonald*, 394 U.S. at 807; *O'Brien*, 414 U.S. at 530; *Griffin*, 385 F.3d at 1129–30. Plaintiffs' attempts to turn this capacious privilege on its head, characterizing it as a burden to be overcome, *Swenson* Dkt. 41 at 42–43, misses the mark.

Finally, the *Swenson* Plaintiffs' various arguments about the rejection of absentee ballots do not implicate COVID-19, and they lack any record evidence supporting their assertions that Wisconsin's existing procedures are constitutionally burdensome. *Swenson* Dkt. 41 at 51–54. The Legislature addresses these arguments in the procedural-due-process section of this Brief. *Infra* Part I.A.2.

(II) Emailing Or Faxing Absentee Ballots

Section 6.87(3) requires municipal clerks to deliver absentee ballots via fax or email upon request from military or overseas electors, but not to "regular" absentee voters. Wis. Stat. § 6.87(3)(d). Wisconsin's reservation of email/fax delivery to military and overseas voters, thus requiring all other "regular" voters to receive absentee ballots by mail, poses no *Anderson/Burdick* concerns.

As *Luft* held, Wisconsin "could reasonably conclude that members of the military [and overseas voters] face special problems," such as the inability "to return to the state to use its regular voting methods, which justify willingness on the state's part to accept the burdens that fax or email cause for the vote-counting process." 2020 WL 3496860, at *8. In other words, these voters' special circumstances make the State willing to establish and manage the logistics of email/fax delivery, as well as the burdens of processing these voters' mailed returns of home-printed absentee ballots and witness certificates. *See id.*; Wolfe Dep. 139:3–19 (explaining that "a lot of work" went into developing this system, which "automatically" generates ballots for these voters). That latter burden on the State is particularly notable: because military and overseas voters return faxed/emailed absentee ballots "on regular printer paper," not "official ballot stock," the clerks must "remake the ballot [on official paper] so that it can be counted by the voting equipment on election day." Wolfe Dep. 153 at 3–9; *see Luft*, 2020 WL 3496860, at *8.

Even placing *Luft*'s dispositive holding aside, Wisconsin's Section 6.87(3) does not impose *any* constitutionally meaningful burden on Wisconsin voters. Wisconsin grants "liberal access to absentee ballots" for *every* voter, allowing any qualified elector to receive such ballots in the mail. *Luft*, 2020 WL 3496860, at *3. Any elector may request an absentee ballot *immediately*, the Commission has facilitated such requests by mailing absentee-ballot-request forms to a large number of electors, and municipal clerks will begin mailing requested absentee ballots well in advance of the November Election. *Supra* p. 7.

The State's interests in Section 6.87(3) outweigh any burdens. The State may legitimately "control errors arising from the fact that faxed or emailed ballots cannot be counted by machine," thereby furthering its compelling election-integrity interests, *Luft*, 2020 WL 3496860, at *7, and "it is obvious that a federal court is not going to decree . . . Internet voting," *Griffin*, 385 F.3d at 1129–30. That "some voters might be inconvenienced by this rule—road warriors who may be out of state, or leisure travelers who don't plan ahead"—"does not permit a court to override the state's judgment that other interests predominate." *Luft*, 2020 WL 3496860, at *7; *Griffin*, 385 F.3d at 1129–30.

The arguments of the *Gear* Plaintiffs, the only Plaintiffs challenging this particular provision, run contrary to *Luft*. Before engaging their specific arguments, it is important to emphasize that the *Gear* Plaintiffs' argument here is based on the hypothetical that some voter might need "a fail-safe option" if all of Wisconsin's generally available voting procedures are somehow futile. Dkt. 421 at 33. But these Plaintiffs' various catalogue of "solutions" only become relevant if there is some constitutional violation. Under *Anderson/Burdick*, the Court "weigh[s] . . . burdens against the state's interests by looking at the whole electoral system," *Luft*, 2020 WL 3496860, at *3, not the proposed remedy from a challenger to the law. To do otherwise allows the Court to substitute "judicial judgment for legislative judgment," picking which individual election clauses are "beneficial" and which are too burdensome, "on balance." *Id.* But this is what *Luft* foreclosed, which means the *Gear* Plaintiffs' various "solutions" are irrelevant because Wisconsin's overall electoral system

"make[s] voting easier"—a "fact[ ]" that "matter[s] when assessing challenge to a handful of rules that [may] make voting harder." *Id.*

The *Gear* Plaintiffs claim that sending "automated" ballots via email or fax adds no work for municipal clerks, and thus there is no burden to the State. Dkt. 421 at 36. But as *Luft* already concluded, Wisconsin is constitutionally permitted "to control errors arising from the fact that faxed or emailed ballots cannot be counted by machine." 2020 WL 3496860, at *7. And these Plaintiffs' contentions that ordering municipal officials to send such email and fax ballots is presently possible and endorsed by a handful of local election officials, Dkt. 421 at 36–38, 41–42; *but see Luft*, 2020 WL 3496860, at *5, betrays Plaintiffs' aim: they are not seeking a *constitutional* remedy, but rather their own preferred election reform. "[A]s far as national government is concerned," however, "which decisions a state wishes to make statewide, and which locally, are for the state to decide." *Luft*, 2020 WL 3496860, at *5. In any event, Plaintiffs have cited no examples of courts creating hypothetical "fail-safe" remedies to be employed only as a last resort like the kind they now seek.

The *Gear* Plaintiffs' assertion that "the Wisconsin election code does not contain any other provisions that ameliorate or negate the threat of disenfranchisement when a ballot does not arrive in the mail," Dkt. 421 at 30–31, is false. Any voter who needs a replacement ballot because they never received their first one can contact the voter's municipal clerk to receive a replacement, Tseytlin Decl. Ex. 8. And, of course, voters who, for any reason, do not receive an absentee

ballot and did not leave themselves enough time for another request can safely vote in person at their polling places on Election Day. Wis. Stat. §§ 6.76–78, 6.80.

iv. The Commission's Provision Of Voter Education

Section 5.05(12) authorizes the Commission to promulgate "educational programs to inform electors about voting procedures, voting rights, and voting technology," and Section 6.869 requires the Commission to publish uniform absentee-voting procedures. Consistent with Section 5.05(12), the Commission has provided "a great deal of guidance" to the voting public. Wolfe Dep. 40:12–19. "[S]ince the implementation of the photo ID law," for example, the Commission has "put out documentation" and "public information," and it has the "bringit.wi.gov website" and numerous other online pages. Wolfe Dep. 40:12–19; *e.g.*, MyVote.wi.gov; *supra* p. 6. The Commission has "develop[ed]" other "voter outreach tools," including "videos and documentation for voters to understand the mechanics of the voting process," "including absentee [voting]." Wolfe Dep. 109:13–19. And the Commission has approved the mail voting information, including absentee-ballot-request forms, to a large number of Wisconsin voters in advance of the November Election. *Supra* pp. 15–16. The Commission has also satisfied Section 6.869's mandate, publishing uniform absentee-voting instructions for Wisconsin voters, that meticulously detail, in easy-to-understand language: the requirements for requesting an absentee ballot, including as to the photo ID requirement; completing a ballot in front of a witness and obtaining the witness's signature; timely returning the ballot; and requesting a replacement ballot to correct errors. Tseytlin Decl. Ex. 8 at 1–2.

The *Swenson* Plaintiffs claim that the Court should order the Commission to engage in a broader public-education campaign to apprise Wisconsin citizens of their voting rights. *Swenson* Dkt. 41 at 50–51, 64, 66. But while they cite Section 5.05(12) of the Wisconsin Statutes, they do not discuss the existing educational efforts of the Commission (including those just described above) or why those efforts are insufficient. Further, Plaintiffs have not cited any case holding that a state agency's failure to educate the electorate sufficiently unreasonably burdens any voting rights under the *Anderson/Burdick* framework. *See Swenson* Dkt. 41 at 50–51, 64, 66. In fact, the opposite proposition is true: the Constitution places the "onus [ ] on citizens to inform themselves of the laws and regulations of the state." *Cochran*, 828 F.3d at 600.

Relatedly, the *DNC* Plaintiffs reference the public-education component of the district-court order in *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016), *aff'd in part, vacated in part, rev'd in part sub nom. Luft*, 2020 WL 3496860, which had ordered the State to "inform the general public that those who enter the IDPP will promptly receive a credential valid for voting," *id.* at 964; Dkt. 420 at 38–39. The *One Wisconsin* order was a *remedy* for an underlying constitutional violation that the district court there had found, *One Wisconsin*, 198 F. Supp. 3d at 948–49, 963–64—a finding that the Seventh Circuit ultimately vacated, *Luft*, 2020 WL 3496860, at *10–*11. The absence of a particular public-education campaign was not itself a constitutional violation. *See One Wisconsin*, 198 F. Supp. 3d at 948–49, 963–64. As explained throughout this brief, none of the Plaintiffs has established

any underlying constitutional violation that would justify such a public-education remedy here, thus there is no need to order the Commission to engage in any such campaign.

v. Deadline For Designating In-Person-Absentee Locations And The Residency Requirement For Polling-Place Inspectors

The remaining Wisconsin election law provisions under challenge here, dealing with the designation of in-person-absentee voting locations, residency requirements for poll workers, and centralizing the counting of absentee ballots, are entirely reasonable under *Anderson/Burdick*, even if viewed in isolation.

a. Section 6.855 requires municipalities to have designated locations for in-person-absentee voting beyond the clerk's office "14 days prior to the time that absentee ballots are available for the primary," Wis. Stat. § 6.855(1), which was June 11, 2020, for the November Election. This furthers Wisconsin's interests in election integrity and orderly administration, while making voting easier. *Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.); *Eu*, 489 U.S. at 231. By requiring the designation of in-person-absentee locations well in advance of the election, voters will learn well before they must cast their ballots whether this convenient voting option is available, and local municipalities will have adequate time to prepare staffing and other logistics for these sites.

The *Swenson* and *Edwards* Plaintiffs briefly challenge this requirement of Section 6.855. *Swenson* Dkt. 41 at 41–42; Dkt. 397 at 52–53. They do not claim that this section imposes a burden *on voters*, fail to cite *any* record evidence demonstrating

that this section imposed any difficulties for the April 7 Election, and do not cite any case supporting their argument. *See Swenson* Dkt. 41 at 41–42; Dkt. 397 at 52–53. Instead, they claim that allowing municipalities to designate additional locations after June 11 would be good policy because, for example, existing locations "could be closed" due to COVID-19 or other locations may prove "better." *Swenson* Dkt. 41 at 42; Dkt. 397 at 52–53. Those arguments invite the sort of "judicial micromanagement" that *Anderson/Burdick* forbids. *Stevo*, 546 F.3d at 409; *see Luft*, 2020 WL 3496860, at *8.[11]

b. Section 7.30(2) provides that a polling-place inspector must "be a qualified elector of a county in which the municipality where the official serves is located." Wis. Stat. § 7.30(2)(a). This provision ensures that officials who are truly local administer the polling places, furthering the State's desire to take a "decentralized" approach to election administration. *See supra* pp. 11–12. Since that policy decision does not impose any meaningful burden on any voter, the Court cannot second-guess the State's "willingness" to "accept the burdens." *Luft*, 2020 WL 3496860, at *8; *see also Stevo*, 546 F.3d at 409 ("judicial micromanagement").

[11] Beyond challenging Section 6.855(1)'s deadline to designate alternate in-person-absentee-voting sites, the *Edwards* Plaintiffs also claim to challenge Section 6.86(1)(b)'s limitation of in-person-absentee voting to 14 days prior to Election Day. Dkt. 397 at 51–52. *Luft* squarely forecloses that challenge, 2020 WL 3496860, at *6, which, remarkably, the *Edwards* Plaintiffs appear to both recognize *and somehow ask this Court to disregard*. Dkt. 397 at 51–52. Additionally, nowhere does the *Edwards* Plaintiffs' Amended Complaint allege that Section 6.86's limitation on the number of days of in-person-absentee voting imposes an unreasonable burden on the right to vote, further demonstrating the boundless sweep of the *Edwards* Plaintiffs' request that this Court enjoin any election law that they consider "[un]reasonable." *Edwards* Dkt. 5 at 50 ¶ b.

Here, too, only the *Swenson* and *Edwards* Plaintiffs challenge this provision. *Swenson* Dkt. 41 at 41; Dkt. 397 at 53. Yet, just as with the previous provision, neither group of Plaintiffs cites any record evidence suggesting that this provision (rather than, for example, the staffing decisions of certain local officials) contributed to any poll-worker shortages. *See Swenson* Dkt. 41 at 41; Dkt. 397 at 53. Rather, this provision imposed no barrier, as the Commission was able to staff National Guard members "to serve as [supplemental] poll workers [in the April 7 Election] *in their local counties of residence*." Wolfe Memo at 8 (emphasis added). And while both sets of Plaintiffs claim (with no case law support) that Wisconsin needs a "compelling state interest" to justify Section 7.30(2), *Swenson* Dkt. 41 at 41; Dkt. 397 at 53, this provision need not satisfy that higher test, *see supra* pp. 23–24. Section 7.30(2) is simply a "reasonable" regulation that is fully justified by the State's interests in the orderly administration of its elections. *Stone*, 750 F.3d at 681.

2. Procedural Due Process Claims

A procedural due process claim under *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires the court to weigh: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. Within the *Mathews* framework, the Court must first "determine if the plaintiff has been deprived of a liberty or

property interest" protected under the Clause. *Knutson v. Vill. of Lakemoor*, 932 F.3d 572, 576 (7th Cir. 2019). And second, the Court must "determine if the plaintiff was provided constitutionally sufficient process." *Id.* Thus, "what is required in the name of due process depends . . . on the costs as well as the benefits of process." *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006).

a. As an initial matter, the Seventh Circuit has held that the *Anderson/Burdick* "test applies to *all* First and Fourteenth Amendment challenges to state election laws," necessarily including Fourteenth Amendment procedural due process claims. *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019); *see also Albright v. Oliver*, 510 U.S. 266, 273 (1994) (concluding that the *Anderson/Burdick* right-to-vote analysis is "the guide for analyzing [voting-rights] claims," rather than "the more generalized notion" of due process). This Court previously noted that the *DNC* Plaintiffs have failed to "explain how, if at all, their separate procedural due process claim is distinguished from their undue burden claims," and that the two "appear[ ] to be duplicative." Dkt. 217 at 14–15. Plaintiffs have not heeded this Court's warning that they must "articulate a specific legal or factual rationale for applying the *Mathews* [balancing] test over the *Anderson-Burdick* test in evaluating a challenged provision," *id.* at 15, and, therefore, this Court should cabin its analysis to *Anderson/Burdick*. The Seventh Circuit adopted this same paring approach in *Luft*, concluding that it was "not necessary to analyze" the plaintiffs' Twenty-Sixth Amendment and "partisan fencing" claims to certain Wisconsin voting laws separately from their *Anderson/Burdick* claims. *Luft*, 2020

WL 3496860, at *5. And because Wisconsin's electoral system, as a whole, does not place an undue burden on voters' rights under *Anderson/Burdick*, *see supra* Part I.A.1., Plaintiffs' procedural due process claim necessarily fails as well.

The *DNC* Plaintiffs half-heartedly contend that there remains some play in the joints between the *Anderson/Burdick* framework and procedural due process in challenges to voting laws, before ultimately giving up on this point. Dkt. 420 at 53–56. They admit that they "have not yet found a decision in which a court accepted an *Anderson-Burdick* claim while rejecting a due process challenge to the same provision; or rejected an *Anderson-Burdick* challenge while striking down the same provision as violating due process." Dkt. 420 at 54. And they further concede that they only want this Court to "use both an *Anderson-Burdick* and a due process analysis . . . *to confirm that the two analyses both lead to the right result*." Dkt. 420 at 56 (emphasis added). Thus, the *DNC* Plaintiffs agree that their procedural due process claim is duplicative of the *Anderson/Burdick* framework, and it is "not necessary to analyze" the laws separately under this framework. *Luft*, 2020 WL 3496860, at *5.

The *Swenson* Plaintiffs similarly claim that they are entitled to an independent analysis under the procedural due process clause, without citing any supporting case, because "procedural [due process] rights are analytically distinct from the *Anderson/Burdick* framework." *Swenson* Dkt. 41 at 47 n.188. This unsupported assertion fails to either meet this Court's requirement that Plaintiffs "articulate a *specific* legal or factual rationale for applying the *Mathews* [balancing]

test," Dkt. 217 at 15 (emphasis added), or to circumvent the Seventh Circuit's clear rule that *Anderson/Burdick* "applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo*, 925 F.3d at 948.

b. Even if Plaintiffs' procedural due process merited independent analysis, those claims would fail.

Requesting Absentee Ballots. The *Swenson* Plaintiffs first contend that "[a]dditional procedural protections are necessary to avoid erroneous denials of absentee-ballot requests" because many "voters who requested absentee ballots in the April election never received one." *Swenson* Dkt. 41 at 48.

As an initial matter, Plaintiffs make no effort to explain why any specific problems that arose in the fast-paced run up to the April 7 Election, when COVID-19 was still new and unexpected, are likely to repeat. In late March, when the pandemic fears increased in Wisconsin, there was little time to receive and respond to absentee-ballot requests—even though election officials in most areas of the State did yeoman's work to accommodate all requests, despite the unprecedented numbers of such absentee-ballot requests. *See* WEC Absentee Voting Report at 24 ("[T]he final election data conclusively indicate[d] that the election did not produce an unusual number [of] unreturned or rejected [absentee] ballots."); *id.* at 3, 5; Wolfe Dep. 83:14–21. And voters can all request absentee ballots right now, months in advance of the November Election, Wis. Stat. § 7.15(1)(cm); Tseytlin Decl. Ex. 4; *see* Dkt. 259 (Milton Bartelme Decl.) ¶ 5, giving all local election officials plenty of time to plan and prepare for all such absentee requests. The Commission is already planning to mail

absentee-ballot applications to "all voters without an active absentee request on file," *see* Tseytlin Decl. Ex. 28, beginning around September 1, 2020, Wolfe Dep. II 129:3–15, and the USPS has engaged in substantial efforts to identify and correct possible errors in the Milwaukee area that caused some voters not to receive their absentee ballots before, Dkt. 433-1. The *Swenson* Plaintiffs fail to engage with these post-April 7 efforts, simply noting without support that the Commission's actions "will not correct the failures exposed by the April 7 Election." *Swenson* Dkt. 41 at 48. This bare assertion is insufficient to meet their burden of showing the "risk of an erroneous deprivation" of their interest in absentee voting through the existing procedures used, *Mathews*, 424 U.S. at 335.

Plaintiffs' proposed additional safeguards for requesting absentee ballots are also unlikely to provide additional value to voters. The *Swenson* Plaintiffs demand that the Commission "ensure[ ] well in advance that there [is] sufficient bandwidth and server resources to manage the volume of requests anticipated for the November elections, and [that] the system [is] configured to track not just ballot requests, but delivery of ballots through the mailing process as well"; procedures for notifying voters if their ballot request is defective; and an "[e]ffective public education" campaign giving voters "adequate notice of their rights, and the procedures they must follow." *Swenson* Dkt. 41 at 49–50. But none of these additional procedures provides any noticeable benefit above what the Commission and State have already done to ensure the successful administration of the November Election.

On Plaintiffs' arguments about server and bandwidth resources to manage absentee-ballot requests, such efforts are already in the works. The Commission has made, and will continue to make, upgrades to the MyVote website and WisVote system, including addressing the "large increase in the demand for absentee ballots." WEC Defendants' Status Report at 8–9; Wolfe Dep. 70:9–73:14, 128:15–129:18.

Plaintiffs' request for directives and systems "to provide prompt, effective notice to a voter if their ballot request is defective or if it will not be filled within one day as required by law . . . and clear, uniform procedures to cure any defect in a ballot request or replace an undelivered ballot," *Swenson* Dkt. 41 at 49, fail both to protect a liberty or property interest and to provide any noticeable benefit. Requiring a voter "to comply with the requirements of state law" by properly filling out an absentee-ballot application does not implicate any "right of liberty or property." *Protect Marriage Ill.*, 463 F.3d at 608. And Plaintiffs do not explain how these procedures will improve any interest they have in voting absentee. Every registered voter in Wisconsin has already either successfully applied to vote absentee or will receive both an absentee-ballot application and information on voting in the near future. *See* Tseytlin Decl. Ex. 28; Wolfe Dep. II 129:3–15. And any voter who so requests an absentee ballot now will be sent one within one day of the ballots becoming available, well over a month in advance of the November Election. *See* Wis. Stat. § 7.15(1)(cm); Tseytlin Decl. Ex. 4. Therefore, even if an odd request is delayed or lost, any affected voter will have plenty of time to reach out to their municipal clerk for help via

telephone, fax, mail, or the MyVote Wisconsin website, among other sources, well in advance of the November Election. *See, e.g.*, Tseytlin Decl. Ex. 47.

Plaintiffs' demands that the Commission (1) coordinate with the USPS and (2) establish safe and sufficient in-person voting sites, would provide no additional benefits to voters and are directed at the wrong party. Both the Commission and the USPS have audited their respective processes and provided concrete solutions to problems that arose in April. Tseytlin Decl. Ex. 28; WEC Defendants' Status Report at 6; Wolfe Dep. 54:14–60:12 (Commission expects most clerks to use the intelligent barcodes for the November 2020 Election), 99:8–17, 105:11–15 (Commission approved use of intelligent barcode system); Dkt. 433-1. Furthermore, Wisconsin law already provides that municipalities may "designate multiple sites for in-person absentee voting," *Luft*, 2020 WL 3496860, at *5; *see* Wis. Stat. § 6.855, but the authority to decide how many to open lies with local officials, Wis. Stat. § 6.855(1). In any event, the Commission has already provided local officials with guidance on in-person absentee voting for future elections. *See, e.g.*, Spindell Dep. 19:1–8.

And Plaintiffs' request for "[e]ffective public education . . . to provide voters with constitutionally adequate notice of their rights, and the procedures they must follow," *Swenson* Dkt. 41 at 50, fares no better. Section 6.869 of the Wisconsin Statutes mandates that the Commission "prescribe uniform instructions for municipalities to provide to absentee electors," including "the specific means of electronic communication that an absentee elector may use to file an application for an absentee ballot," the means "to request a registration form or change his or her

registration," and "information concerning the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot." Wis. Stat. § 6.869. And the Commission has complied with this directive. *See* Tseytlin Decl. Ex. 8. The Commission has also developed voter outreach tools, including "videos and documentation for voters to understand the mechanics of the voting process including absentee." Wolfe Dep. 109:13–19. Plaintiffs fail to adequately address why these numerous, state-mandated educational tools are insufficient.

Absentee Ballot Counting. Plaintiffs also contend that the State's procedures for counting absentee ballots violate voters' procedural due process rights. This is so, they claim, because absentee voters have no "opportunity to be heard on whether [ ] rejections [of absentee ballots on numerous grounds] are incorrect." *Swenson* Dkt. 41 at 52. As a result, Plaintiffs demand that the Court invalidate Sections 6.88, 7.51, and 7.52 of the Wisconsin Statutes, all of which preclude canvassing of absentee ballots before election day, and require the Commission to give all voters notices and "explanations of the applicable procedures with a statewide mailing of absentee-ballot request forms." *Swenson* Dkt. 41 at 53–54. As an initial matter, Plaintiffs do not explain how these "problems" and remedies relate to COVID-19. The State's procedures for counting absentee ballots on Election Day apply in all elections, Wis. Stat. §§ 6.88(1)–(2), 7.51(1), and Plaintiffs provide no explanation for why COVID-19 impacts the constitutionality of this procedure, *see Tex. Democratic Party*, 961 F.3d at 409 ("The Virus's emergence has not suddenly obligated [the State] to do what the Constitution has never been interpreted to command . . . .").

Plaintiffs' requested remedies also add little value for voters. *See Mathews*, 424 U.S. at 335. Wisconsin law already provides procedures for absentee voters to correct errors with their absentee ballots. *See* Wis. Stat. §§ 6.86(5), 6.869, 6.87(9); Tseytlin Decl. Ex. 8. Clerks can return improperly completed ballots "to the elector . . . whenever time permits the elector to correct the defect and return the ballot," Wis. Stat. § 6.87(9); Tseytlin Decl. Ex. 4, and any voter who believes that they made an error in completing their ballot may request a new one, Tseytlin Decl. Ex. 8; Wis. Stat. § 6.86(5), which the clerk may send by fax or email, Tseytlin Decl. Ex. 8. And the Commission has decided to send informational materials to all voters that are not yet registered to vote absentee, Tseytlin Decl. Ex. 28; Wolfe Dep. II 129:3–15, as well as providing legally required guidance on absentee voting and fixing ballot errors that all municipalities can provide to voters, Tseytlin Decl. Ex. 8; Wis. Stat. § 6.869.

On the other hand, the costs and "administrative burdens," *Mathews*, 424 U.S. at 335, of requiring the State to individually provide more than "tens of thousands" of potential voters notice and to demand a determination on their individual ballot "would be disproportionate to the benefits, which would be slight," given all of the State's other protections for voters. *Protect Marriage Ill.*, 463 F.3d at 608. And requiring early canvassing of ballots, before voting is complete, risks "disclosure of election results," which "would gravely affect the integrity of the election process." *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

3. Equal Protection/*Bush v. Gore* Claims

The *DNC* and *Swenson* Plaintiffs' Equal Protection Claim under *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), is meritless.

Because the Supreme Court acknowledged that "the problem of equal protection in election processes generally presents many complexities," the Court expressly limited its "consideration" in that decision to those "present circumstances" surrounding the 2000 Florida recount. *Bush*, 531 U.S. at 109. Thus, other courts have concluded that the *Bush* opinion is not "applicable to more than the one election to which the [Supreme] Court appears to have limited it." *Lemons v. Bradbury*, 538 F.3d 1098, 1106 (9th Cir. 2008). And here, Plaintiffs are challenging laws relating to voting, not post-election recount procedures that were the focus of the *Bush v. Gore* Court's "consideration." *Bush*, 531 U.S. at 109. The present circumstances find no similarities to those in *Bush v. Gore*.

Even if that decision were more broadly applicable, Plaintiffs would have to prove that specific election "procedures" will result in "arbitrary and disparate treatment of the members of [the State's] electorate." *Bush*, 531 U.S. at 105. At least in the particular context of the Florida recount's attempts to discern voter intent from inanimate ballots, the Court held that those "procedures" require "specific rules designed to ensure uniform treatment." *Id.* at 106. The *DNC* and *Swenson* Plaintiffs have not identified any election procedures for which the Commission is responsible that are likely to result in arbitrary or disparate treatment of voters in November.

Both the *DNC* and *Swenson* Plaintiffs contend that the April Election resulted in unconstitutionally unequal treatment, *see* Dkt. 420 at 56–59; *Swenson* Dkt. 41, in terms of poll closings and poll-worker shortages, lack of adequate personal protective equipment at some polling locations, and disparate treatment regarding voter registration and requests for absentee ballots. None of these claims identify any specific election procedures that apply unequally or have any bearing on the upcoming November Election. Instead, Plaintiffs merely contend that "Wisconsin's April 7 election abounded with many examples of unfair, unequal, and disparate treatment of Wisconsin voters depending on where they live," Dkt. 420 at 57, or "Defendants' administration of the April 7 election violated" the Equal Protection Clause, *Swenson* Dkt. 41 at 55, and that "the same equal-protection violations experienced during the April 7 election are all but certain to recur [in November]," *id.* at 60; *see also* Dkt. 420 at 58–59. These unspecified and unsupported allegations are insufficient to allege a likely equal protection violation in *future* elections, *Bush v. Gore*, 531 U.S. at 105, and Plaintiffs do not mention the extensive efforts of Defendants and others to improve upon the generally successful administration of the April 7 Election going forward into November.

On poll closings and poll-worker shortages, Plaintiffs do not identify any election *procedures* administered by the Commission that produced this allegedly "arbitrary and disparate treatment," or explain any basis for any such procedure to apply during the November Election. *Id.* Under Wisconsin's "decentralized" approach to election regulation, "1,850 municipal election officials and 72 county

election officials" throughout the State are equally responsible for administering elections in their individual jurisdictions, including by staffing and reassigning poll workers. Wolfe Memo at 1, 6; *see* Wis. Stat. §§ 7.10, 7.15. Furthermore, all evidence shows that the Commission provided ample guidance to local election officials to help recruit staff and support polling locations. Spindell Dep. 16:1–8; Wolfe Dep. 76:16–77:8, 109:2–6. These efforts included helping local officials coordinate with political parties for paid election judges, as well as providing plain-clothes National Guardsmen to assist with staffing polling locations. Spindell Dep. 16:1–13; Wolfe Dep. 109:2–6; Wolfe Memo at 8–9. The Commission alerted municipalities about the equal availability of these members of the National Guard to serve as supplemental poll workers, *see* Wolfe Memo at 8–9, even though some municipalities like Green Bay chose not to accept this aid, Wolfe Dep. II 173:13–17. And they are at the ready to do so again if poll-worker shortages should recur in November. Wolfe Dep. 109:2–6. Further, decisions on numbers and staffing of polling locations are necessarily based on differences in geography and population, and are not amenable to a one-size-fits-all standard like the ballot counting at issue in *Bush v. Gore*. 531 U.S. at 106. Wisconsin law imposes the equal burden on local election officials to staff polling locations, and, to the extent the Commission acted in this arena, it offered supplemental staff on an equal basis.

And whatever concerns Plaintiffs raise about specific precincts in the April Election, such as in Milwaukee and Green Bay, they have no reasonable basis to contend that such problems will recur in November. Milwaukee is presently adding

additional poll workers—including volunteers recruited by the *DNC* Plaintiffs, *see* Tseytlin Decl. Ex. 32—with the intent of "open[ing] all 180 polling sites in November's presidential election." Tseytlin Decl. Ex. 30. Similarly, Green Bay is successfully engaging in its own recruitment efforts, and it already has sufficient staff to open 13 polling locations in November, substantially more than the two it offered in April. Tseytlin Decl. Ex. 3.

The same is true with regard to Plaintiffs' claims about personal protective equipment at various polling locations. Again, Wisconsin law places municipal and county officials in charge of such decisions. Wolfe Memo at 1, 6; *see* Wis. Stat. §§ 7.10, 7.15. The Commission has supported these duties by granting municipalities $500,000 "to purchase such items as sanitizer, masks, gloves, [and] tape," and has issued "some 22 different policies, memos and training" "to make sure that the in-person voting and the election day voting is as safe as possible and certainly safer than going to the grocery store." Spindell Dep. 14:6–15; *see also* Wolfe Dep. 68:13–69:6 (noting that the Commission is purchasing adequate supplies to provide to local election officials for the August and November Elections). And a $4.1 million "CARES Act sub-grant to local election officials," Tseytlin Decl. Ex. 28, is similarly earmarked "to help pay for increased election costs due to the COVID-19 pandemic," WEC Defendants' Status Report at 5. Whatever difficulties some jurisdictions might have had with adequate personal protective equipment in April, Plaintiffs have not shown any likelihood that those difficulties will repeat.

Plaintiffs' equal protection challenge to the State's voter registration and absentee-ballot-request measures similarly fails. The Commission will soon mail an absentee-ballot-request form and informational materials to registered voters without an absentee request already on file. Tseytlin Decl. Ex. 28; Wolfe Dep. II 129:3–15. It has also implemented "intelligent mail barcodes into the existing [absentee-ballot-envelope] design" for the November 2020 Election, thereby improving ballot tracking. *Id.* And the Commission has upgraded, and will continue upgrading, its websites to "meet the needs of clerks experiencing a large increase in the demand for absentee ballots." WEC Defendants' Status Report at 8–9; Wolfe Dep. 70:9–73:14, 128:15–129:18.

The *DNC* Plaintiffs also challenge both the "indefinitely confined" standard under Wisconsin law, *see* Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(2); *Jefferson v. Dane Cty.*, 2020AP557-OA (Wis. Mar. 31, 2020), and the interpretation of the Supreme Court's ballot postmark date standard, Dkt. 420 at 57–58, but these challenges are obviously meritless. The *DNC* Plaintiffs' complaint that voters are confused by the "indefinitely confined" exception, Dkt. 420 at 58, is lacking. The law presumes that citizens know and apprise themselves of applicable legal rules, *see Cochran*, 828 F.3d at 600, and the Commission has published clear guidance on this point, *see* Tseytlin Decl. Ex. 12. That the standard allows individual voters to make their own determination as to "indefinitely confined status" does not mean the procedure is arbitrary or disparate, and it applies equally to all voters. Nor do Plaintiffs point to any case suggesting that "voter confusion" due to alleged lack of guidance can be an Equal Protection Clause

violation. Instead, the State's standard for "indefinitely confined"—as interpreted by the Wisconsin Supreme Court, *Jefferson*, 2020AP557-OA—adequately apprises and applies to all Wisconsin voters equally.

The *DNC* Plaintiffs' challenge to the "postmarked by election day" requirement does not challenge any election procedures either. That "requirement" resulted from a series of court orders extending the deadline for receipt of absentee ballots to April 13, 2020, Dkt. 170 at 52, and then subsequently clarifying on appeal that such ballots must be postmarked by April 7, *Republican Nat'l Comm.*, 140 S. Ct. at 1208. Wisconsin election *law* and *procedures* do not have a postmarked-by-election-day requirement, because all ballots, absentee or otherwise, must arrive at the polling location by 8:00 p.m. on Election Day. Wis. Stat. § 6.87(6).

Finally, as explained below, this Court lacks jurisdiction over many of these equal-protection arguments because Plaintiffs complain only of the actions of independent third parties and not the actions of the Commissioners or others named as Defendants. *Infra* Part I.A.6.a.; *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (plaintiffs lack standing to complain of "the independent action of some third party not before the court," as opposed to "the defendant" (citation omitted)); accord *Frank I*, 768 F.3d at 755. And Plaintiffs have not cited a single case, anywhere in the country, that holds that local differences in election administration, for which local officials hold the legal authority, violate the Equal Protection Clause.[12]

[12] Plaintiffs' unanchored contentions about differences in availability of drop boxes, *Swenson* Dkt. 41 at 10–11, do not make out a *Bush v. Gore* violation either, as the decision

4. Americans With Disabilities Act Claims

Title II of the ADA 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 the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Under Title II, a "public entity must reasonably accommodate a qualified individual with a disability by making changes in rules, policies, practices, or services when needed." *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 782–83 (7th Cir. 2002). The *Swenson*, *Gear*, and *Edwards* Plaintiffs all bring claims under the ADA, yet none of these Plaintiffs is entitled to preliminary-injunctive relief.

To succeed on a Title II failure-to-accommodate claim, a plaintiff must prove three essential elements.

First, the plaintiff must show that he or she "is a qualified individual with a disability." *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (citations omitted). This requires that the plaintiff prove that he "meets the essential eligibility requirements," 42 U.S.C. § 12131(2), "for participating in [a state] program with or without *reasonable* accommodations" or modifications, *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (emphasis added; citation omitted). An accommodation or modification that "fundamentally alter[s] the nature of the service," program, or activity is by law unreasonable. *Tennessee v. Lane*, 541 U.S.

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to implement such drop boxes is also reserved to local election officials under the law. *See* Tseytlin Decl. Ex. 7.

509, 532 (2004); *accord P.F. by A.F. v. Taylor*, 914 F.3d 467, 472 (7th Cir. 2019). And if the State *already* provides accommodations that are reasonable, a plaintiff's preference for a different accommodation does not require the State to provide it. *Hildreth v. Butler*, 960 F.3d 420, 431 (7th Cir. 2020). Modifications that successfully span the divide between disabled voters and a State's voting systems are reasonable, *see, e.g.*, *Wagoner*, 778 F.3d at 593, because, at its core, "Title II is about access to public services," *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 878 (7th Cir. 2006).

Second, a plaintiff must assert that he was or will be "denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such an entity." *Wagoner*, 778 F.3d at 592 (citations omitted).

Third, the plaintiff must show that "the denial or discrimination was *by reason of* his disability." *Id.* (citation omitted; emphasis added). The requires a plaintiff "to prove that, *but for* his disability," he would have been able to access the services or benefits desired. *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 593 (7th Cir. 2018) (citation omitted; emphasis added). That is, "the ADA requires proof of causation": to obtain any relief, the ADA plaintiff *must* demonstrate that, had he not been disabled, he would have obtained the benefit of the government program for which he was denied. *Id.* ("[B]ut for [plaintiff's] learning disability, he would have been eligible to play sports in his junior year." (citation omitted)).

None of the *Swenson, Gear*, or *Edwards* Plaintiffs' ADA claims will likely succeed, as all fail to satisfy at least one essential element (and, as to one claim, the *Swenson* Plaintiffs fail to establish standing, *infra* Part I.A.6.b.).

a. The *Swenson* Plaintiffs' ADA Claims

The *Swenson* Plaintiffs bring two ADA claims. For their first ADA claim, they argue that individuals especially vulnerable to (or already infected by) COVID-19 cannot safely comply with the witness-signature requirement; thus they are entitled to "substitut[e]" this requirement for "a self-certification." *Swenson* Dkt. 41 at 32–34. This claim fails at each of the three ADA elements.

Beginning with the first element, the *Swenson* Plaintiffs have not shown that their requested accommodation is reasonable, *Love*, 103 F.3d at 560, as opposed to a fundamental alteration of Wisconsin's absentee-ballot regime, *Lane*, 541 U.S. at 532.

The *Swenson* Plaintiffs' requested accommodation is that "[t]he Court [ ] waive the in-person witness requirement for this limited class of voters who are unable to secure a witness safely, replacing it with a self-verification on penalty of perjury." *Swenson* Dkt. 41 at 33. But that is what this Court ordered in April, Dkt. 170 at 52, which the Seventh Circuit stayed, Dkt. 189 at 3. The Seventh Circuit determined that the witness-signature requirement was necessary to further the State's "*substantial* interest in combatting voter fraud," and that eliminating that requirement with a *self-certification* procedure would seriously undermine that interest. Dkt. 189 at 3; *see supra* p. 42 (explaining heightened fraud concerns with absentee ballots). Stated in ADA terms, eliminating this safeguard for absentee voting with a self-certification procedure would fundamentally alter Wisconsin's electoral system, *Lane*, 541 U.S. at 532, and is thus not a *reasonable* accommodation, *Love*, 103 F.3d at 560.

The *Swenson* Plaintiffs are also not entitled to this accommodation because Wisconsin law *already* sufficiently accommodates disabled voters, such that they may readily exercise their right to vote. *See Hildreth*, 960 F.3d at 431; *Wagoner*, 778 F.3d at 593. Wisconsin provides numerous safe avenues for voting for disabled individuals, even those who may be especially susceptible to COVID-19. Such a voter could use the curbside-voting procedure, allowing the disabled voter to vote in front of the polling place from the safety of their car, thereby avoiding any crowds. *See* Wis. Stat. § 6.82(1); Tseytlin Decl. Ex. 13. A disabled voter could use the "hospitalized electors" provision to safely vote from his or her home. Wis. Stat. § 6.86(3)(a)(1)–(2); *see* Tseytlin Decl. Ex. 14 at 1. A voter could complete in-person-absentee voting, which similarly allows the voter to avoid crowds, while still complying with the witness-signature requirements. Tseytlin Decl. Ex. 3; *see* Wis. Stat. §§ 6.855, 6.86(1)(a)2. Finally, disabled voters have the opportunity to vote in person on Election Day, which can be accomplished safely with minimal effort; thus that avenue fully accommodates Plaintiffs. Several of Plaintiffs' declarants—including those with conditions that place them at risk from COVID-19—explain that they were able to vote safely even back in April, while wearing personal protective equipment and practicing social distancing. Dkt. 257 (Barnum Decl.) ¶¶ 4–5; Dkt. 377 (Gregg Jozwik Decl.) ¶ 8; Dkt. 403 (Graveline Decl.) ¶ 6. And voting in person will be even safer in November, for the reasons detailed extensively above. *See supra* Part I.A.1.a.ii.

Moving to the second element, the *Swenson* Plaintiffs have not shown that the witness-signature requirement is likely to deny any disabled voters the right to vote.

Wagoner, 778 F.3d at 592. Indeed, the *Swenson* Plaintiffs *do not offer any evidence, from any of the multitude of declarants, demonstrating that any voter cannot obtain a witness's signature in November with reasonable effort*. *See* Dkt. 41 at 32–34. While Plaintiff Swenson claims that she was unable to get a witness *in April*, she does not state that she is unlikely to obtain a witness *in November* with reasonable effort. *Swenson* Dkt. 47 (Swenson Decl.) ¶¶ 11–14, 19. That is unsurprising, since there are many "concrete alternative suggestions for how voters can [safely and easily] comply with the state's witness and signature requirements." Dkt. 189.

As for the causation element, the *Swenson* Plaintiffs' only discussion of this is a cursory, unsupported statement in a footnote. *Swenson* Dkt. 41 at 36 n.164. They simply assert, using *ipse dixit*, that "[t]here is no question that, but for their disabilities, Plaintiffs would have had equal access to the franchise." *Id.* That abbreviated argument constitutes waiver. *See United States v. Stadfield*, 689 F.3d 705, 712 (7th Cir. 2012) ("Undeveloped arguments are considered waived.").

The *Swenson* Plaintiffs' second ADA claim fares no better. The *Swenson* Plaintiffs argue that voters "with vision and other disabilities" cannot vote independently or privately via absentee ballot, thus the ADA entitles these voters to "[a]ccessible online ballots" that would allow them to use online ballot marking tools built for those with vision impairments. *Swenson* Dkt. 41 at 34.

As an initial matter, the *Swenson* Plaintiffs do not have standing to assert this claim, as the Legislature explains below. *Infra* Part I.A.6.b.

Standing aside, this claim also fails because the *Swenson* Plaintiffs again do not explain why Wisconsin's existing accommodations are unreasonable, even as to those with visual impairments. *Hildreth*, 960 F.3d at 431. Wisconsin law requires both the polling place itself and "the voting system used at each polling place" to be accessible to individuals with disabilities, including those with visual impairments. Wis. Stat. § 5.25(4)(a). Further, "[e]ach municipal clerk shall make reasonable efforts to comply with requests for voting accommodations made by individuals with disabilities whenever feasible." Wis. Stat. § 7.15(14). A visually impaired individual with a particular concern of contracting COVID-19—and who does not wish to vote with a paper absentee ballot—could arrange with their local clerk to vote in-person, using an accessible machine, while taking extra sanitary and social-distancing precautions. *See* Wis. Stat. §§ 5.25(4)(a), 7.15(14). Nothing about that bespoke accommodation is unreasonable, especially since it would maintain the privacy of voting, *see Swenson* Dkt. 41 at 34–35 (citing *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 199 (2d Cir. 2014), and *Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1232 (N.D. Cal. 2013)); thus the *Swenson* Plaintiffs are not entitled to any relief on their second ADA claim either.

Notably, none of the Legislature's arguments for dismissing the *Swenson* Plaintiffs' two ADA claims asks the Court to conduct "a balancing test" for the State's and the *Swenson* Plaintiffs' interests, thus the *Swenson* Plaintiffs' explanation that the ADA does not require such an analysis, unlike the *Anderson/Burdick* test, is irrelevant. *Swenson* Dkt. 41 at 34 n.160.

b. The *Gear* Plaintiffs' ADA Claim

The *Gear* Plaintiffs' ADA claim argues that because Plaintiffs suffer from conditions that make them especially vulnerable to COVID-19, Dkt. 421 at 63–65, Wisconsin must allow these Plaintiffs to receive absentee ballots by email or fax, rather than through the mail, so that they may "avoid the risk of infection at a polling place and still vote in the general election," Dkt. 421 at 65–66.[13]

The *Gear* Plaintiffs' argument on the merits of its ADA claim is exceedingly abbreviated—comprising a single paragraph—and, unsurprisingly, fails at each element. *See* Dkt. 421 at 65–66 (merits argument); *compare* Dkt. 421 at 63–65 (arguing only that Plaintiffs have qualified disabilities); Dkt. 421 at 66 (arguing only that the Organizational Plaintiffs have standing under the ADA).

First, the *Gear* Plaintiffs have not shown that this accommodation is reasonable. *Love*, 103 F.3d at 560. As explained above, faxed/emailed absentee ballots are "on regular printer paper"—since the voter herself printed the ballot—not "official ballot stock." Wolfe Dep. 153:3–9. This means that local clerks must "remake the ballot [on official ballot stock] so that it can be counted by the voting equipment on election day," which is an additional administrative delay that could become quite burdensome. Wolfe Dep. 153:3–9. Further, this accommodation would require the Commission to update the WisVote/MyVote system to allow these voters to obtain these ballots, a process that requires "a lot of work" and must proceed cautiously so

[13] Plaintiffs alternatively claim that they are entitled under the ADA to cast a "Federal Write-in Absentee Ballot," which is another online-accessible ballot available only to military electors. Dkt. 421 at 65; Wolfe Dep. 135:3–136:19.

as to not compromise the security of that essential system. Wolfe Dep. 139:3–19. And even if this accommodation were reasonable, the State already sufficiently accommodates the *Gear* Plaintiffs in numerous ways, thus the ADA does not compel the State to offer email/faxed absentee ballots, rather than mail ballots, as an additional accommodation. As explained in the Legislature's response to the *Swenson* ADA claim, disabled voters may safely vote via curbside voting; in-person-absentee voting; as a hospitalized elector; or simply in-person at the polls, following all safety precautions. *Supra* pp. 87–88.

Second, the *Gear* Plaintiffs have not argued that their receipt of mailed absentee ballots is likely to prohibit them from voting, *see* Dkt. 421 at 65–66, thus they have waived this essential element of their claim, *Stadfield*, 689 F.3d at 712. Given their lack of developed argument, the *Gear* Plaintiffs have failed to present *any evidence* that any voter will likely be unable to vote if required to obtain an absentee ballot through the mail, rather than via fax or email. *See* Dkt. 421 at 65–66. Nor is there any reason to believe that such evidence exists: voters may request absentee ballots *immediately*, and clerks will begin delivering them well over a month before the November Election. *Supra* p. 7. That is ample time for any voter—including those with disabilities—to timely request, receive, and cast an absentee ballot by mail, which fully protects their constitutional right to vote on equal grounds with non-disabled voters. *See Luft*, 2020 WL 3496860, at *3; *Wagoner*, 778 F.3d at 592. Even were a problem to arise, given the capacious timelines that all voters have to get their ballot requests in order, there is no real, non-speculative chance that any

voter would be denied the opportunity to vote absentee. *See supra* pp. 40–41; *infra* p. 109.

Third, and relatedly, the *Gear* Plaintiffs fail to show how any denial in timely receipt of a by-mail absentee ballot would be "*by reason of*" their disabilities. *A.H. by Holzmueller*, 881 F.3d at 593 (emphasis added). Even if, contrary to all indications, a voter that has timely requested an absentee ballot does not receive it (and does not receive a requested replacement), nothing would tie that exceedingly unlikely mail delivery failure to any disability status of the requesting voter. *See id.* Indeed, the *Gear* Plaintiffs do not make any argument on this required element either, *see* Dkt. 421 at 65–66, which is reason alone to reject this claim, *Mazurek*, 520 U.S. at 972 ("clear showing"); *accord Stadfield*, 689 F.3d at 712 (waiver).

c. The *Edwards* Plaintiffs' ADA Claims

The *Edwards* Plaintiffs do not meaningfully develop any arguments supporting their ADA argument claim, *see* Dkt. 397 at 38–43, thus the Court should deny their motion on this basis alone, *Stadfield*, 689 F.3d at 712. Instead, in the ADA section of the *Edwards* Plaintiffs' brief, they recite the ADA's history at length, Dkt. 397 at 38–40, present statistics about voters with disabilities in 2012 and 2017, Dkt. 397 at 40–41, and assert that certain Plaintiffs have qualifying disabilities, Dkt. 397 at 42. Then, without developing *what* their ADA claim is or making any specific request for a reasonable accommodation, the *Edwards* Plaintiffs argue that the Commission cannot defeat their (unexplained) claim by accommodating them solely "on one occasion," by arguing that Wisconsin election law somehow limits the scope of the

ADA, or by claiming that their (unnamed) accommodation fundamentally alters Wisconsin election law. Dkt. 397 at 43. Plaintiffs have the burden to establish a likelihood of success on every element of their ADA claim in order to obtain relief, *Wagoner*, 778 F.3d at 592–93 including the requirement that they present a specific, reasonable accommodation, *Love*, 103 F.3d at 560. The *Edwards* Plaintiffs have not done that here, thus the Court should deny their motion for a preliminary injunction.

5. Voter-Intimidation Claim Under The Voting Rights Act

a. Section 11(b) of the VRA provides that "[n]o person . . . shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). A plaintiff must show both that a "person"—the defendant—committed "an act of intimidation or attempt to intimidate," and "that the act was done with the specific intent to intimidate or attempt to intimidate" another for voting. *See Parson v. Alcorn*, 157 F. Supp. 3d 479, 498–99 (E.D. Va. 2016) (discussing the need to show that the defendant "undertook any acts of intimidation") (citing *Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985), and *United States v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967)). Thus, to succeed on a Section 11(b) voter-intimidation claim, a plaintiff must establish that the defendant's actions actually intimidated voters and that the defendant intended to intimidate those voters with those actions. *Olagues*, 770 F.2d at 804.

Further, proving *intimidation, threats, or coercion,* rather than some lesser infraction, is critical. The Seventh Circuit has recounted Section 11(b) of the VRA as a "sweeping prohibition of official acts of *harassment* against equal civil rights."

Fenton v. Dudley, 761 F.3d 770, 777 (7th Cir. 2014) (emphasis added) (quoting *Whatley v. City of Vidalia*, 399 F.2d 521, 525 (5th Cir. 1968)). Similarly, courts have noted that this statute "does not protect voters against inadvertent or technical violations of voting procedures but against conduct intended to 'intimidate, threaten, or coerce.'" *Willingham v. Cty. of Albany*, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006) (quoting 42 U.S.C. § 1973i(b), subsequently renumbered without substantive change to 52 U.S.C. § 10307(b)); *see also Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 602 (D.N.J. 2009) (describing the predecessor statute, 42 U.S.C. § 1973i(b) as prohibiting "attempts to prevent qualified voters from casting their ballots through intimidation or screening mechanisms"); *Powell v. Power*, 436 F.2d 84, 87 (2d Cir. 1970) (declining to turn the Voting Rights Act into "a general mandate by which Federal courts may correct election deficiencies of any sort"). Thus, even intentional government conduct done without malicious or wrongful intent—such as using voter rolls to populate jury-duty lists—"does not constitute coercion or intimidation within the meaning of [52 U.S.C. § 10307(b)'s predecessor statute]." *Bershatsky v. Levin*, 99 F.3d 555, 557 (2d Cir. 1996) (per curiam).

b. The *Swenson* Plaintiffs contend that the State violated, and will continue to violate in November, Section 11(b) "by failing to take objectively reasonable precautions to enable Wisconsin citizens to vote free of fear of contracting COVID-19." *Swenson* Dkt. 37 ¶ 197; *see also id.* ¶¶ 201, 207. But Plaintiffs have wholly failed to allege or prove that (1) any person (2) intentionally (3) intimidated by any Defendant, and their claim fails as a matter of law.

First, the *Swenson* Plaintiffs have not alleged or shown that they or other voters were or will be intimidated by any "person." 52 U.S.C. § 10307(b); *see Parson*, 157 F. Supp. 3d at 498–99. Plaintiffs allege only feelings of fear, intimidation, and threats *from COVID-19*, *Swenson* Dkt. 37 ¶¶ 202–04, and have presented no evidence of acts of intimidation initiated by *any Defendant*. Plaintiffs point to no precedent, and the Legislature is aware of none, where a court found a violation of Section 11(b) without any affirmative human act of intimidation, threat, or coercion.

Second, Plaintiffs fail to show that any Defendant likely acted with an intent to "intimidate, threaten, or coerce," or would do so in the future. 52 U.S.C. § 10307(b). Plaintiffs affirmatively pleaded, and evidence shows, that Wisconsin's "election officials" "worked hard to manage the challenges [COVID-19] posed." *Swenson* Dkt. 37 ¶ 7; *accord* Dkt. 170 at 34 ("If there is a hero to this story, it is the Administrator, her staff and municipal workers, all of whom continue to improvise election practices."); Wolfe Dep. 12:4–8 ("Q. Okay. Do – do you also agree the mission is what I asked before which is to maximize the number of Wisconsinites who can vote and participate in the democratic process? A. Yes."); *see also id.* 20:20–21:12. Furthermore, Wolfe testified in her deposition that one of the Commission's core missions is "to maximize the number of Wisconsinites who are able to vote and participate in the democratic process," and noted that the Commission is already acting on that mission by coordinating and sending a mailer to all voters who have not placed a request for an absentee ballot, in order "to provide voters with information on their options to cast a ballot, including absentee by mail." Wolfe Dep.

11:15–12:8, 26:16–27:1, 27:6–7; Wolfe Dep. II 129:3–15. In the run up to the April 7 Election, Commission employees worked "very, very quickly" to implement necessary changes to deal with the then-unforeseen COVID-19 pandemic. *Id.* at 20:18–21:5. Plaintiffs acknowledge as much: "Wisconsin election officials have made heroic efforts." Dkt. 421 at 4. Because Plaintiffs have not presented any evidence of intent by Defendants to intimidate or coerce any voter—instead, affirmatively acknowledging election officials' praiseworthy intent to aid Wisconsinites, *Swenson* Dkt. 37 ¶ 7; *see also* Wolfe Dep. 11:15–12:8—Plaintiffs' voter-intimidation claim under Section 11(b) of the VRA fails as a matter of law.

Third, Plaintiffs have not alleged or shown any acts of past or future *intimidation* sufficient to sustain a claim under Section 11(b). Instead, Plaintiffs merely contend that "large numbers of people (caused by consolidation of polling places), inadequate social distancing, and insufficient personal protective equipment" were the "conditions" that caused them to fear for their safety. *Swenson* Dkt. 41 at 28; *see also Swenson* Dkt. 37 ¶¶ 199–204. At most, these assertions amount to no more than the "inadvertent or technical violations of voting procedures," *Willingham*, 593 F. Supp. 2d at 462, or general "election deficiencies" that are outside the scope of the VRA, *Powell*, 436 F.2d at 87. And even if such long lines and large groups of people were legally sufficient to show intimidation under Section 11(b), then Plaintiffs' claims lie with the local election officials in Milwaukee and Green Bay who created those conditions. *See supra* pp. 14–15. Thus, Plaintiffs' claim under Section 11(b) of the VRA fails as a matter of law.

Even if the Legislature were somehow incorrect about all three points above, there is nothing intimidating or fear-inducing about Wisconsin's generous electoral regime, which offers all voters ample means to cast their vote in November. *See supra* Part I.A.1.a.i.–ii. Between in-person absentee voting, mail-in absentee voting, curbside voting, and in-person voting on Election Day, all voters have sufficient means to safely exercise their franchise in Wisconsin, without any reasonable fear. *See supra* p. Part I.A.1.a.i.–ii.

c. Plaintiffs erroneously rely on *LULAC – Richmond Regulation Council v. Public Interest Legal Foundation*, No. 1:18-cv-00423, 2018 WL 3848404 (E.D Va. Aug. 13, 2018), for the contention that Section 11(b) applies "regardless whether the defendant intended the intimidation." *Swenson* Dkt. 41 at 26. There, the court compared Section 11(b) to Section 131(b) of the VRA, and concluded that Section 11(b) had no mens rea element because, unlike Section 131(b), it did not require a plaintiff to show that the defendant intimidated them "*for the purpose of* interfering with the right of such other person to vote." *LULAC*, 2018 WL 3848404, at *3–4 (quoting 52 U.S.C. § 10101(b)) (emphasis in original). This single, unpublished decision fails to grapple with the very similar language that Congress *did* include in Section 11(b): "No person . . . shall intimidate, threaten, or coerce . . . any person *for voting or attempting to vote*." 52 U.S.C. § 10307(b) (emphasis added). Thus, just as in Section 131(b), Section 11(b) does not encompass all acts of alleged intimidation regardless of intent—the threats or intimidation must be *for voting*.

In any event, even under the *LULAC* decision's erroneous reasoning, the virus-related claims Plaintiffs present here still fail on the merits. In *LULAC*, the plaintiffs alleged that a nonprofit group published two national media reports, titled *Alien Invasion I* and *Alien Invasion II*, accusing hundreds of Virginia voters of numerous felonies, including casting ineligible ballots, based upon lists of voters who had been purged from the rolls. 2018 WL 3848404, at *1. The plaintiffs filed suit, claiming that defendants intimidated and harassed them on the basis of their participation in the electoral process, by asserting that voting by members of the Latino community was an "alien invasion" worthy of prosecution. *Id.* But this affirmative conduct by members of a nonprofit group, directed at the plaintiff's participation in the electoral process, is a far cry from this case, where Plaintiffs allege they are intimidated by *only* the COVID-19 virus. *See Swenson* Dkt. 37 ¶¶ 202–04.

Next, the *Swenson* Plaintiffs argue—relying on *United States v. Clark*, 249 F. Supp. 720 (S.D. Ala. 1965), and *U.S. by Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965)—that a Section 11(b) claim may be premised on a mere failure to act in the plaintiff's desired way to mollify any exterior "threat." *Swenson* Dkt. 41 at 27–28. These authorities cannot bear the weight of that contention. In *Clark*, while the court noted that "a city cannot effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be," in the next breath it also concluded that any "good faith" attempts by the city "to perform its duties and responsibilities under the law" sufficed to avoid a judgment against the city. 249 F. Supp. at 739–30 (citation

omitted). Thus, the evidence of the Commission's efforts, both in April's Election and beyond, *see* Wolfe Dep. 20:18–21:12; Dkt. 421 at 4; Dkt. 170 at 34, distinguishes *Clark*. The *Katzenbach* decision is even less helpful for Plaintiffs. There, the court held that intimidation by private persons—in that case, unabashed members of the Ku Klux Klan—falls within the reach of the Civil Rights Act. *Katzenbach*, 250 F. Supp. at 334; *see also LULAC*, 2018 WL 3848404, at *3 (same). In *Katzenbach*, the Klansmen admitted engaging in horrific affirmative acts of violence and intimidation against black voters and their supporters. 250 F. Supp. at 337. Thus, *Katzenbach* does not support Plaintiffs' extraordinary contention that amorphous fears of an external, inanimate virus, coupled with a contention that *more* should have been done to combat it, creates a Section 11(b) violation.

6. The Court Lacks Jurisdiction In Various Respects

a. Plaintiffs Continue To Seek Relief That They Could Only Obtain Against Nonparty Local Election Officials

i. Article III standing's "irreducible constitutional minimum" requires Plaintiffs to prove, among other things, a causal connection between their asserted injuries and "the challenged action of the defendant," rather than "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (citation omitted); *accord Frank I*, 768 F.3d at 755. Under controlling precedent, "units of government"—including localities within a state—"are responsible for their own discrimination." *Frank I*, 768 F.3d at 753 (emphasis added).

ii. Plaintiffs continue to attack the actions and responsibilities of local election officials that they have declined to name as defendants, as well as the alleged actions

of non-party USPS. They have asked the Court to order the Commission to ensure an adequate number of poll workers to administer safe polling places, *see, e.g.*, *Swenson* Dkt. 41 at 38–42, 56–58; Dkt. 397 at 51; Dkt. 420 at 49–53, even though the law imposes such staffing responsibilities on local officials, *see* Wis. Stat. §§ 7.10, 7.15; Wolfe Memo at 1, 6; Spindell Dep. 14:16–15:22. And they similarly request that the Court require municipalities to coordinate with the USPS to ensure the timely delivery, return, and counting of absentee ballots, *Swenson* Dkt. 41 at 48–54, 57–58; Dkt. 421 at 65–66, and require municipalities to establish secure drop boxes for in-person return of absentee ballots and to increase safe and accessible in-person absentee voting opportunities, Dkt. 395 at 4–5; Dkt. 397 at 52–53. All of these requests for relief are properly directed at local officials and, in some cases, the USPS, not the Commission.

Wisconsin's election-regulation system is decentralized, Wolfe Memo at 1, with the Commission responsible only for "the administration" of Wisconsin's "laws relating to elections and election campaigns." Wis. Stat. § 5.05(1); *see also* Wolfe Dep. 11:15–18. Wisconsin law charges local and municipal officials throughout Wisconsin with day-to-day oversight of election administration. Wolfe Memo at 1; Wolfe Dep. 114:8–115:3; *see* Wis. Stat. §§ 7.10, 7.15. Thus, *local* and municipal election officials, not the Commission, are explicitly tasked with "establish[ing]" polling places, Wis. Stat. § 5.25(2), "[e]quip[ping] polling places," "[p]rovid[ing] for the purchase and maintenance of election equipment," "[p]repar[ing] ballots," including "official absentee ballots for delivery to electors requesting them," "[r]eassign[ing]

inspectors" between "polling place[s] within the municipality," Wis. Stat. § 7.15(1)(a), (b), (c), (cm), (k), and "conducting educational programs . . . to inform electors about the voting process," Wis. Stat. § 7.10(7), among many other things; *see also* Wolfe Dep. II 157:9–159:19.

The Commission has no lawful ability to wrest this authority away from these local election officials, and certainly cannot control the actions of the USPS. Under Wisconsin law, agencies cannot issue rules, even during COVID-19, without explicit statutory authorization. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900. Agency powers must be "explicitly required or explicitly permitted by statute or by a [valid] rule," *id.* ¶ 52 (citation omitted)—all such agency powers *require* explicit authority. Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law[.]"); Wis. Stat. § 227.10(2m) ("No agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute[.]"). Nor can an agency escape this limit on its authority "by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority," as Wisconsin law requires courts "to narrowly construe imprecise delegations of power to administrative agencies," *Palm*, 2020 WI 42, ¶ 52 (citations omitted); Wis. Stat. § 227.11(2)(a)1.–3. Here, the Commission could not adopt or enforce any rules on polling locations, polling workers, ballot drop boxes, and the like, as all authority on these issues falls expressly to local election officials. *See* Wis. Stat. §§ 7.10, 7.15; Wolfe Memo at 1, 6; Spindell Dep. 14:16–15:22;

Tseytlin Decl. Ex. 7 at 1–2. Therefore, the *Edwards* Plaintiffs' argument that the Commission has "enforcement power," "may prosecute civil violations of election law," and can "promulgate rules . . . including emergency rules when necessary, to implement or interpret the laws regarding the conduct of elections as well as their proper administration," Dkt. 397 at 28 (citations and emphasis omitted), is incorrect under Wisconsin law.

This distinguishes Plaintiffs' sought-after relief from Judge Adelman's inapposite conclusion in *Frank v. Walker*, 196 F. Supp. 3d 893 (E.D. Wis. 2016), *aff'd in part and rev'd in part, Luft*, 2020 WL 3496860, which the *DNC* Plaintiffs attempt to rely upon, Dkt. 420 at 51–53. There, Judge Adelman concluded that the Commission "has th[e] power" to order municipal officials to accept affidavits in lieu of photo ID, based upon the Commission's broad "'responsibility for the administration of [the Wisconsin Statutes governing elections] and other laws relating to elections.'" *Id.* at 918 (quoting Wis. Stat. § 5.05(1)) (brackets in original). Even assuming Judge Adelman's vacated decision could be persuasive authority on points not discussed by the Seventh Circuit in *Luft*, whatever enforcement authority the Commission has on statewide rules like photo ID has no bearing whatsoever on those aspects of election administration unambiguously allotted only to local officials, such as those for staffing and equipping polling places, preparing and delivering ballots, and the like, *see, e.g.*, Wis. Stat. §§ 5.25(2), 7.15(1)(a), (b), (c), (cm), (k). None of these powers falls under the Commission's general authority relied upon by Judge Adelman.

Plaintiffs and their experts largely acknowledge the municipalities' authority over these aspects of Wisconsin's electoral system. The *DNC* Plaintiffs admit that the State "has delegated its authority to 'establish[ ]' polling places and 'conduct' elections to local governing bodies." Dkt. 420 at 53 (citing Wis. Stat. §§ 5.25(2), 7.15(1)). The *Swenson* Plaintiffs acknowledge that Madison and many towns across the State successfully "mitigate[d]" the effects of COVID-19 through adequate staffing and sufficient polling locations. *Swenson* Dkt. 41 at 15. On the other hand, "Milwaukee closed 175 out of 180 polling sites, leaving voters to face wait-times of up to two-and-a-half hours, and in Green Bay, only 2 of 31 polling sites remained open and voters faced up to four-hour long waits." *Id.* at 40. Despite acknowledging the differences in *local* administration of the April 7 Election, Plaintiffs misdirect their efforts at the Commission, which is not responsible for the problems that arose in Milwaukee and Green Bay. Plaintiffs' expert, Kevin J. Kennedy, admits that Wisconsin has "the most decentralized" system in the country, and recommends adjustments directed at *municipalities*. *See Swenson* Dkt. 45 ("Kennedy Report") 2–6, 15–21, 29–31.

iii. The *DNC* and *Edwards* Plaintiffs' contention that seeking relief against the parties in error would be "chaotic," Dkt. 420 at 50, "impractical, and likely impossible to join [those] nearly two thousand defendants into this action," Dkt. 397 at 32, does not support their cause. Even if there were substantial difficulty in naming the proper defendants, there is no difficulty exception to the "irreducible constitutional minimum[s]" of Article III standing. *Lujan*, 504 U.S. at 560. Furthermore, none of

the Plaintiffs lodged complaints with the administration of the April Election in the vast majority of Wisconsin's jurisdictions, largely limiting their concerns to Milwaukee and Green Bay. *See, e.g.*, Dkt. 397 at 29–30, 52; Dkt. 420 at 14, Dkt. 421 at 19; *Swenson* Dkt. 41 at 4, 8–9, 11, 14, 16, 40, 56–59. Surely Plaintiffs could have sued the election officials in these two jurisdictions to ensure that the problems those voters faced in April do not recur in November.

Finally, the *Swenson* Plaintiffs cite inapposite caselaw for the proposition that the "right to vote can be unjustifiably burdened . . . through deficient election administration, not only problematic statutory requirements." *Swenson* Dkt. 41 at 38 n. 168. While this is true, in both cases Plaintiffs cite, the defendants were *actually responsible* for administering the deficient procedures. *See Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) ("Because the Secretary is the state's chief election officer with the authority to relieve the burden on Plaintiffs' right to vote, she was appropriately sued for prospective injunctive relief."); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 289–90 (S.D.N.Y. 2020) (noting that defendants served as the co-executive directors of New York's State Board of Elections, which was responsible for maintaining the voter lists at issue). Here, Plaintiffs have sued the Commission for actions of local officials, as well as the USPS.

b. The *Swenson* Plaintiffs Lack Standing To Assert Their ADA Claim Regarding "Accessible Online Ballots"

The *Swenson* Plaintiffs fail to establish standing to assert their second ADA claim, which contends that voters "with vision and other disabilities" cannot vote independently or privately via absentee ballot, meaning that the ADA compels the

State to provide these voters with "accessible online ballots." *Swenson* Dkt. 41 at 34; *see supra* Part I.A.4.a. (arguing that the *Swenson* Plaintiffs are not entitled to any relief on this same claim on the merits).

To have standing, a plaintiff must have an "injury in fact," a "causal connection between the injury and the defendant's conduct," and a "likel[ihood]" of "redressability through a favorable decision." *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir. 2008) (citations omitted). An organization like Plaintiff Disability Rights Wisconsin may have standing to sue on behalf of its members if it demonstrates that: "(1) its members would otherwise have standing [under Article III] to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claims asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Id.* at 801.

The *Swenson* Plaintiffs have not met their burden to demonstrate standing to assert their second ADA claim. None of the individual *Swenson* Plaintiffs claim to have "vision and other disabilities," *see Swenson* Dkt. 41 at 31–32, 34, so none of them have even attempted to demonstrate an Article III injury for this claim. *Swenson* Dkt. 41 at 34. Further, DRW cannot demonstrate associational standing to assert this claim either, since it cannot establish the first or third essential elements of that test. *See Disability Rights Wis.*, 522 F.3d at 800.

On the first element, DRW has not sufficiently demonstrated that any of its members have a "vision [or] other disabilit[y]" that makes independent voting via

absentee ballot impossible without an "[a]ccessible online ballot[ ]." *Swenson* Dkt. 41 at 34; *see Disability Rights Wis.*, 522 F.3d at 800. The *only* factual allegation that DRW makes on this score is that it "was in contact with" a single "blind voter who was both unable to safely vote in person . . . and who lacked a private and independent at-home voting option." *Swenson* Dkt. 41 at 13, 32; *see Swenson* Dkt. 42 ¶ 96 (making same allegation); *see also Swenson* Dkt. 42 ¶ 207 (stating only that this affected "some voters, particularly those with visual impairment," with no further details). This is not "sufficient to establish that any of *its members* have sustained their own injury in fact." *Disability Rights Wis.*, 522 F.3d at 802 (emphasis added). Nowhere does this single allegation state that this blind voter is *a member of DRW*, such that DRW could serve as the voter's "representative" in court. *Id.* (citations omitted). Neither does this single allegation show an "injury in fact," *id.*, as it does not sufficiently develop *why* this individual was "unable to safely vote in person," *Swenson* Dkt. 41 at 32, as other Plaintiffs at least attempted to do by submitting declarations from the voters themselves, *supra* pp. 28–29, 33–34. Finally, this single allegation does not state that this voter wishes to vote via absentee ballot in November, thus this voter has no basis to seek any such relief for the upcoming election. *See Hummel v. St. Joseph Cty. Bd. of Comm'rs*, 817 F.3d 1010, 1019 (7th Cir. 2016) (looking for "record" evidence to demonstrate a future injury).

For the third associational-standing element, the "participation" of the voter with a vision or other disability is "require[d]" for the Court to grant meaningful relief under the ADA. *Disability Rights Wis.*, 522 F.3d at 801 (citation omitted). For

example, the voter's presence is needed to explain the nature of his or her disabilities and, if required by the ADA, which accommodation would be reasonable. Without these crucial details, the Court would be left to speculate as to the kinds of vision impairments and other disabilities that prevent a voter from completing a paper absentee ballot, *compare Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 506 (4th Cir. 2016) (considering whether "individuals *such as plaintiffs*" were entitled to relief (emphasis added)), and whether "online ballot marking tools," *Swenson* Dkt. 41 at 34, would actually ameliorate these unknown voters' concerns, *Lamone*, 813 F.3d at 508 ("Determination of the reasonableness of a proposed modification is generally fact-specific."). This explains why all of the cases that the *Swenson* Plaintiffs cite here, *Swenson* Dkt. 41 at 34–35, included individual voters as plaintiffs, *Lamone*, 813 F.3d at 498, 500; *Drenth v. Boockvar*, No. 1:20-cv-829, 2020 WL 2745729, at *1 (M.D. Pa. May 27, 2020); *Cal. Council of the Blind*, 985 F. Supp. 2d at 1232, or at least had "deposition testimony" from "individuals with [the relevant] disabilities," unlike the case here, *Disabled in Action*, 752 F.3d at 193. In all, rather than engage in the speculation that this claim calls for, the Court must wait to consider these claims until a voter "who ha[s] actually suffered an injury . . . bring[s] suit on [his or her] own behalf, or represented by DRW." *Disability Rights Wisconsin*, 522 F.3d at 803.

c. Plaintiffs' Claims Remain Unripe

To avoid "entangling themselves in abstract disagreements," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), or making "unnecessary decision[s] of constitutional

issues," *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974), courts routinely dismiss claims that are not yet ripe for adjudication. A claim is unripe when "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all," *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted), or "when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts," *Lehn v. Holmes*, 364 F.3d 862, 867 (7th Cir. 2004) (citations omitted). This is especially true when a challenge is to the validity or application of a state law, as a statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914).

Plaintiffs all continue to *assume* that both the COVID-19 pandemic and Wisconsin's electoral readiness in November will be as they were back in April—when the pandemic was still quite novel, and when, again, the Commission acted heroically, *see* Wolfe Dep. 20:18–21:12; Dkt. 421 at 4; Dkt. 170 at 34, to conduct an ultimately safe and successful election. *See, e.g.*, Dkt. 420 at 3–4; *Swenson* Dkt. 41 at 20–24. But all evidence shows that the Commission's heroic efforts have not abated since April 7. It has taken a top-down review of the election procedures from April 7, identifying any problems and seeking solutions. *See supra* pp. 15–16. The Commission has already gotten ahead of the estimated increase in absentee-voter requests for the November Election by preparing to mail "all voters without an active absentee request on file" both an absentee-ballot application and informational materials. *See* Tseytlin Decl. Ex. 28; Tseytlin Decl. Ex. 29; WEC Defendants' Status

Report at 3–4; Wolfe Dep. 26:16–27:7; Wolfe Dep. II 128:19–129:17. The Commission and the USPS have worked together to identify problems and solutions relating to the mailing of ballots in April, resulting in the Commission's decision to implement intelligent barcodes for ballot tracking and the USPS's administrative recommendations to improve ballot delivery. Tseytlin Decl. Ex. 28; WEC Defendants' Status Report at 6; Wolfe Dep. 54:14–60:12; Dkt. 433-1.

The Commission has both made improvements to its internal and public-facing websites and earmarked $4.1 million to provide increased safety measures at polling locations. Tseytlin Decl. Ex. 28; WEC Defendants' Status Report at 5, 8–9; Tseytlin Decl. Ex. 29; Wolfe Dep. 74:21–75:16; *see generally* WEC Defendants' Status Report at 2–14 (discussing other efforts, like poll-worker-recruitment efforts).

Speculation about the course of COVID-19 in November is also unripe. The *Swenson* Plaintiffs admit as much, claiming that any request to predict "the future course of the COVID-19 pandemic" is impossibly vague, barring any response. *See, e.g.*, Tseytlin Decl. Ex. 37 at 4 ¶ 5. The impossibility of this prediction is precisely the point; Plaintiffs do not know what will occur with COVID-19, let alone how Wisconsin's election administration will respond to the virus. Indeed, even the IHME reporting tool that the *Swenson* Plaintiffs rely upon, *Swenson* Dkt. 42 ¶ 216, predicts a much lower infection rate in Wisconsin for November than in April, while admitting of some uncertainty, Tseytlin Decl. Ex. 43. This is textbook unripeness. *Texas*, 523 U.S. at 300.

d. *Burford* Abstention Bars Plaintiffs' Claims

Burford abstention, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *E & E Hauling, Inc. v. Forest Preserve Dist.*, 821 F.2d 433 (7th Cir. 1987), cautions courts to dismiss a suit when "the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*") (citation omitted), which matters of public concern include a federal court's "deference to a state's regulatory regime," *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011). Wisconsin's state election laws count as such a "state regulatory regime." *Id.* Plaintiffs' efforts to undercut or completely remove Wisconsin's election-integrity laws clearly disrupt the State's efforts to establish a coherent and consistent system of voting. Plaintiffs variously ask this Court not only to enjoin numerous laws that Wisconsin requires to protect its fair and honest elections, *Anderson*, 460 U.S. at 788, but also to "[o]rder[ ] defendants to exercise their statutory authority and responsibility to develop and implement plans to coordinate available state, local, and private resources to ensure that all voters throughout the State are able to cast early in-person absentee ballots and to vote in-person on election day in a safe and secure manner," Dkt. 198-1 at 39 (citation omitted). This would not only "disrupt[ ]" Wisconsin's entire electoral system, but also impede upon the Commission's impressive and ongoing efforts to improve the State' electoral processes based upon the experience gained from the April 7 Election and subsequent races. *See supra* pp. 15–16. The undisputed

testimony of Administrator Wolfe shows that the Commission needs ample flexibility and room to address problems and adopt solutions. Wolfe Dep. 28:22–29:12, 36:19–37:8. Thus, this Court should abstain under *Burford* from deciding this case, and allow all Plaintiffs to take their claims to the Wisconsin courts, which are "fully capable of resolving any federal constitutional arguments that [Plaintiffs] might make." *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 681 n.6 (7th Cir. 2010).

B. Plaintiffs Fail To Meet Their Burden On The Equitable Elements

1. Plaintiffs Have Ample Means To Vote In The November 2020 Election, Thus They Suffer No Irreparable Harm

"[E]quitable relief depends on irreparable harm, even when constitutional rights are at stake." *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012). And Plaintiffs seeking such relief have the burden of demonstrating that "irreparable injury is *likely* in the absence of an injunction," not just a mere "possibility." *Winter*, 555 U.S. at 22. Thus, a plaintiff must show that he or she "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (citations omitted).

Here, Plaintiffs have established no likelihood of irreparable harm in the absence of an injunction. All Wisconsin voters have ample, easy means to register and vote in November's Election. *See Frank I*, 768 F.3d at 748. "Wisconsin has lots of rules that make voting easier" than the process in "many other states," with the "net effect" being that Wisconsin "ha[s] . . . a higher turnout rate than other states

for voters of all races." *Luft*, 2020 WL 3496860, at *3. And this is truer now than ever, given the Commission's recent efforts to increase no-excuses-needed absentee voting and improve nearly every facet of the State's electoral system in light of the April 7 Election. *See supra* p. 15–16. Further, ripeness aside, the uncertainties surrounding the risks of COVID-19 in November, *see supra* p. 39–40, 110, make Plaintiffs' injuries "too speculative" to constitute irreparable harm. *See Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 2020 WL 2145350, at *9–10 (W.D. Mo. May 5, 2020) (explaining that harms that stem from "potentially contracting COVID-19," "the spread of COVID-19," or the "[inability] to contain it" are simply "too speculative" to warrant a preliminary injunction). Plaintiffs cannot show that Wisconsin voters are unable to vote in the upcoming elections with only reasonable efforts, and Plaintiffs have not established any likelihood of irreparable harm in the absence of the widespread injunctions they seek. *See supra* p. 18–21.

2. Enjoining The Commission From Complying With The Numerous Election Laws Challenged Here Irreparably Harms The State, And Is Not In The Public Interest

A court considering preliminary-injunctive relief must weigh the plaintiffs' irreparable harm against the defendant's irreparable harm and the public interest. *Winter*, 555 U.S. at 20. When the defendant is the State, the public-interest and defendant's-harm factors merge together. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Enforcement of validly enacted laws is presumed to be in the public interest, *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018); *F.T.C. v. Elders Grain, Inc.*, 868

F.2d 901, 904 (7th Cir. 1989), and "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State," *Abbott*, 138 S. Ct. at 2324 n.17.

Plaintiffs challenge numerous Wisconsin election laws that are part of the State's efforts to "orderly administ[er]" its elections, including bolstering the critical functions of protecting election integrity, safeguarding the public's belief in that integrity, and setting predictable, date-certain deadlines for election administration. *Crawford*, 553 U.S. at 196 (controlling plurality op. of Stevens, J.); *accord Eu*, 489 U.S. at 231. The State has a "substantial interest" in these laws designed to "combat[ ] voter fraud." Dkt. 189, at 3. And even beyond the grave harm of enjoining individual laws, *Abbott*, 138 S. Ct. at 2324 n.17, the *DNC* Plaintiffs also ask this Court to essentially take Wisconsin's in-person election system into a federal receivership, whereby the Court maintains ongoing jurisdiction and requires the Commission to routinely report back on its progress, Dkt. 420 at 53. This request would gravely harm the State's interests, with no commensurate value to Plaintiffs, who have every reasonable opportunity to exercise their franchise under the current system. *See supra* Part I.A.1.a.i.–ii.

II. The Court Should Dismiss The *Gear* And *Swenson* Operative Complaints[14]

Rule 12(b) of the Federal Rules of Civil Procedure provides that a court must dismiss a lawsuit for, among other things, "lack of subject-matter jurisdiction" or

[14] In deciding the Legislature's Motion to Dismiss, the Court should take judicial notice of the facts in the publicly available government websites. *See Denius v. Dunlap*, 330 F.3d 919, 926–27 (7th Cir. 2003); *see generally* Fed. R. Evid. 201. The Legislature does not rely in its arguments in support of its Motions to Dismiss on the other facts that it has submitted to the Court for its decision on Plaintiffs' motions for preliminary injunctions.

"failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(1), (6). Under either provision, the court accepts as true the well-pleaded allegations in the complaint. *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010); *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009). However, the court need not accept as true a simple recitation of the elements of a claim, because any complaint "must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The court is tasked with concluding whether, after "disregard[ing] any portions that are 'no more than conclusions,' [the complaint] 'contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 678–79) (third brackets in original). "'Plausibility' is not a synonym for 'probability' in this context, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015) (citations omitted).

In the present consolidated case, the Legislature has pending a Motion To Dismiss the *Edwards* Plaintiffs' Complaint. *Edwards v. Vos*, No 3:20-cv-340-wmc, Dkts. 12, 13. The Legislature now moves to dismiss the operative complaints in *Swenson*, *Swenson* Dkt. 37, and *Gear*, Dkt. 213-1, for the reasons stated below.

A. *Luft* Requires Dismissal Of All Of The *Anderson/Burdick* Claims

Under *Luft*, a court considering challenges to a State's election laws must consider the "the state's election code *as a whole*," not merely the individual

provisions challenged by the plaintiffs. 2020 WL 3496860, at *3 (emphasis in original). Even a burdensome *individual* election law passes constitutional muster if other provisions in the State's election code allow voters to exercise their franchise by other means, with reasonable efforts. *See id.* Thus, even "*stringent* verification of eligibility" laws can be sufficiently offset with, for example, "liberal access to absentee ballots," as Wisconsin plainly offers. *Id.* (emphasis added). Applying this holistic, whole-code approach to Wisconsin's election laws, the Seventh Circuit in *Luft* held that the State's "adjustment of the number of days and hours when [in-person absentee] voting occurs," *id.* at *5, "the state's durational residence requirement," *id.* at *7, "the prohibition on sending absentee ballots by email or fax", *id.* at *11, and the "requirement for documentary proof of residence," *id.* at *7, were all constitutional under the *Anderson/Burdick* balancing test, while also overturning a district court's order permitting individuals to bypass Wisconsin's photo-ID law with a certification stating that "reasonable effort failed to yield acceptable photo ID," because this individualized-bypass certification violated *Frank II*'s admonition against individual-voter difficulties invalidating statewide election laws, *id.* at *9. The Court came to this conclusion because, overall, "Wisconsin has lots of rules that make voting easier" than the process in "many other states." *Id.* at *3.

After *Luft*, the *Gear* Plaintiffs' Complaint plainly fails to state a claim under *Anderson/Burdick*. As an initial matter, the *Gear* Complaint violates *Luft*'s admonition not to consider only challenged individual election laws under the *Anderson/Burdick* framework. *See, e.g.*, Dkt. 213-1 ¶¶ 12 (claiming a lack of a single

"fail-safe option" imposes "an undue burden on [Plaintiffs'] right to vote"), 107 (alleging that "[t]he burdens imposed on voters forced to comply with the witness requirement during the COVID-19 pandemic far outweigh any benefit Defendants derive from it"); *see supra* pp. 25–27. And their request for a "reasonable efforts certification" in lieu of a witness signature on absentee ballots, *see, e.g.*, *id.* ¶ 16, is near-identical to what the Seventh Circuit rejected in *Luft*, as a bypass to the State's similarly reasonable photo-ID law. 2020 WL 3496860, at *9; *see supra* p. 45. In any event, Plaintiffs' challenges to Wisconsin's election laws necessarily fail because Wisconsin's entire electoral system, overall, "make[s] voting easier" than in "many other states," *Id.* at *3, and COVID-19 does nothing to change that, *see Tex. Democratic Party*, 961 F.3d at 409.

The *Swenson* Plaintiffs' Amended Complaint also fails to state a claim for relief after *Luft*. The *Swenson* Plaintiffs challenge numerous Wisconsin election laws, but nowhere allege any specific burdens these laws pose, instead only claiming that "Defendants' actions unduly burdened Plaintiffs." Dkt. 37 ¶ 220. But this is no more than a mere legal conclusion, which the Court should "disregard[ ]." *W. Bend Mut. Ins. Co.*, 844 F.3d at 675. The *Swenson* Plaintiffs' Complaint nowhere alleges sufficient factual matter to assert a plausible claim under *Anderson/Burdick*, as necessary to survive a motion to dismiss. *Bible*, 799 F.3d at 639. Nor could they. Wisconsin's electoral system, *as a whole*, offers generous and capacious protections for voters' franchise rights, such that the entire system presents no undue burden on Plaintiffs' right to vote. *Luft*, 2020 WL 3496860, at *3.

B. The *Gear* And *Swenson* Plaintiffs' ADA Claims Fail As A Matter Of Law

The *Gear* Plaintiffs' Complaint alleges that Defendants have failed and will continue to fail to accommodate them by requiring them to obtain a witness signature on their absentee ballots, rather than allowing disabled voters to simply sign a certification on their own ballot. Dkt. 213-1 ¶¶ 145–50; *id.* at 76–77. But this request is not a *reasonable* accommodation, *Love*, 103 F.3d at 560, as it would fundamentally alter Wisconsin's electoral system, *Lane*, 541 U.S. at 532, by undercutting the State's "*substantial* interest in combatting voter fraud," Dkt. 189 at 3 (emphasis added); *see supra* pp. 41–42. And Plaintiffs fail to acknowledge that Wisconsin law already affords disabled voters ample accommodations to vote, *Hildreth*, 960 F.3d at 431; *Wagoner*, 778 F.3d at 593, even if they do not want to comply with the witness-signature requirement, *supra* pp. 87–88. Disabled voters can take advantage of curbside-voting procedures, allowing them to vote in front of the polling place from the safety of their cars, thereby avoiding any crowds. *See* Wis. Stat. § 6.82 (1); Tseytlin Decl. Ex. 13. They can also engage in in-person-absentee voting. Tseytlin Decl. Ex. 3; *see* Wis. Stat. §§ 6.855, 6.86(1)(a)2. And Wisconsin law also allows quarantining voters to use an agent to vote safely from home under the "hospitalized electors" provision. Wis. Stat. § 6.86(3)(a)(1)–(2); *see* Tseytlin Decl. Ex. 14 at 1. Finally, in-person voting on Election Day is readily available and safe with minimal efforts, fully accommodating Plaintiffs. Therefore, Plaintiffs' claim fails as a matter of law because Wisconsin law already amply accommodates disabled voters' right to the franchise.

The *Swenson* Plaintiffs' ADA claims similarly fail as a matter of law. These Plaintiffs' Complaint alleges that Defendants violated the ADA by failing to ensure immunocompromised individuals will receive the absentee ballots they request and can circumvent the witness-signature requirement, and failing to guarantee blind voters the right to vote privately and independently with assistive technology. *Swenson* Dkt. 37 ¶¶ 238–40. Each variation fails. First, the *Swenson* Plaintiffs' requested remedies for absentee voting are not reasonable as a matter of law. *Supra* p. 87. Waiving the witness-signature requirement in favor of a certification is just what the Seventh Circuit stayed back in April. Dkt. 189 at 3. Plaintiffs cannot avoid the Seventh Circuit's conclusion by bringing the same claim but under the ADA, since the Seventh Circuit concluded the witness-signature requirement was necessary to Wisconsin's absentee-voting protections, *id.*, requiring the conclusion that mandating this change would fundamentally alter Wisconsin's system, *Lane*, 541 U.S. at 532, and be unreasonable, *Love*, 103 F.3d at 560. Second, their claims for blind voters fail because they have no standing to raise such claims, and all blind voters already have sufficient accommodations under the law. *Supra* pp. 89–90, 105–08. Finally, this Complaint make no allegations *whatsoever*, on either iteration, that they would be able to vote *but for* their disabilities. *A.H. by Holzmueller*, 881 F.3d at 593; *see* Dkt. 37 ¶¶ 234–42. Therefore, this Court should dismiss the *Gear* and *Swenson* Plaintiffs' ADA claims for failure to state a claim.

C. The *Swenson* Plaintiffs' Procedural-Due-Process Claim Fails As A Matter Of Law

The *Swenson* Plaintiffs' procedural-due-process count fails to state a claim on which relief can be granted. As this Court well understands, "*all* First and Fourteenth Amendment challenges to state election laws" are analyzed under the *Anderson/Burdick* framework, *Acevedo*, 925 F.3d at 948; *see also Albright*, 510 U.S. at 273, making this claim wholly duplicative of their meritless *Anderson/Burdick* claim. *See supra* Part I.A.2.

But even if this could be a legally independent claim, it still fails. The *Swenson* Plaintiffs' challenge to the procedures for requesting absentee ballots alleges no serious risk of erroneous deprivation of Plaintiffs' rights in the November Election, given both Wisconsin's generous absentee-by-mail, absentee-in-person, and in-person voting options, as well as the Commission's extensive efforts to further provide safe and reliable voting options to all voters who want them. *Mathews*, 424 U.S. at 335; *see supra* pp. 73–74. And Plaintiffs' requested "remedies" offer little, if any, additional safeguards, *Mathews*, 424 U.S. at 335, given all of the Commission's extensive efforts to ensure that all voters who want to vote absentee can. *See supra* pp. 74–77.

Similarly, Plaintiffs' challenge to Wisconsin's procedures for absentee ballot counting similarly fails to state a claim on which relief can be granted. First, Plaintiffs' challenge here has seemingly nothing to do with COVID-19. *Supra* p. 77. Plaintiffs' requested remedies offer little-to-no additional value to voters, given the existing procedures for voters to correct errors with their absentee ballots under

Wisconsin law. *See* Wis. Stat. §§ 6.86(5), 6.869, 6.87(9); Tseytlin Decl. Ex. 8. But imposing these additional procedures "would be disproportionate to the benefits, which would be slight" given all of the State's other protections for voters, *Protect Marriage Ill.*, 463 F.3d at 608, and requiring the State to canvass ballots before voting is complete risks "disclosure of election results," which the Supreme Court has already acknowledged "would gravely affect the integrity of the election process," *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

D. The *Swenson* Plaintiffs' Equal Protection/*Bush v. Gore* Claim Fails As A Matter Of Law

The *Swenson* Plaintiffs' Equal Protection Clause claim, premised on *Bush v. Gore*, fares no better. First, both the Supreme Court and lower courts have expressly limited that decision to its own particular circumstances, which circumstances have absolutely no similarities here. *Bush*, 531 U.S. at 109; *Lemons*, 538 F.3d at 1106. But even assuming, arguendo, that *Bush v. Gore* could apply here, Plaintiffs challenge only the acts of independent third parties they have chosen not to name as defendants. *See Lujan*, 504 U.S. at 560; *see supra* pp. 84, 100–05.

E. The *Swenson* Plaintiffs' VRA Voter Intimidation Claim Fails As A Matter Of Law

The *Swenson* Plaintiffs' claim under Section 11(b) of the VRA is legally meritless for three independent reasons. *Supra* pp. 93–100. First, despite the statutory text prohibiting only "*person[s]*" from "intimidat[ing] . . . any person for voting or attempting to vote," 52 U.S.C. § 10307(b) (emphasis added), Plaintiffs allege only that they were intimidated by *COVID-19*. *See Swenson* Dkt. 37 ¶¶ 202–04.

Plaintiffs also fail to plausibly allege that any Defendants intended to intimidate them, even though the statute only prohibits acts of intimidation specifically "*for voting or attempting to vote*." 52 U.S.C. § 10307(b) (emphasis added); *see also Parson*, 157 F. Supp. 3d at 498–99 (citing *Olagues*, 770 F.2d at 804; *McLeod*, 385 F.2d at 740–41). Finally, Plaintiffs allege only that Defendants failed "to take objectively reasonable steps" to administer the election, *Swenson* Dkt. 37 ¶¶ 197–99, 201, but this falls far short of alleging acts of *intimidation* under the statute, given that Section 11(b) does not cover "inadvertent or technical violations of voting procedures," *Willingham*, 593 F. Supp. 2d at 462, or general "election deficiencies," *Powell*, 436 F.2d at 87.

F. This Court Lacks Jurisdiction Over Both Complaints In Various Respects

Plaintiffs' claims, all directed at the future elections, are unripe. The *Gear* and *Swenson* Plaintiffs' claims all rest on assumptions and contingencies about the future of COVID-19 and Wisconsin's electoral preparedness. The *Swenson* Plaintiffs, for example, admit that they cannot predict "the precise course of the pandemic between now and the coming elections," *Swenson* Dkt. 37 ¶ 4, and they can only guess that Wisconsin's electoral process "is likely" to violate Plaintiffs' rights, *id.* ¶ 9. The *Gear* Plaintiffs similarly admit that they believe it only "likely" that "Wisconsin election officials will remain unable to satisfy . . . demand for mail-in absentee ballots in the fall." Dkt. 213-1 ¶ 5. But these claims remain entirely "contingent" upon future events, *Texas*, 523 U.S. at 300, which are entirely speculative, *Lehn*, 364 F.3d at 867, making them quintessentially unripe claims.

In addition, this Court lacks jurisdiction over both sets of Plaintiffs' Complaints, to the extent they lack standing for challenging the actions of third parties not named in this lawsuit. Plaintiffs *must* prove, as an "irreducible constitutional minimum," a causal connection between "action[s] of the defendant" and their alleged injuries. *Lujan*, 504 U.S. at 560. And specific units of government are responsible only "for their own discrimination," not the discrimination of other government officials. *Frank I*, 768 F.3d at 753. Here, both sets of Plaintiffs claim harm from the actions of local election officials, not the Commission, claims for which they have no standing. For example, the *Gear* Plaintiffs widely challenge Wisconsin's procedures for delivery of absentee ballots and processing and counting absentee ballots. Dkt. 213-1 ¶¶ 112–19, 135–36. But they also admit that "[m]unicipal clerks prepare absentee ballots for delivery to voters that request them," that municipal clerks and the USPS are responsible for delivery and return of mailed ballots, Dkt. 213-1 ¶¶ 71, 74, as is clear under Wisconsin law, *see, e.g.*, Wis. Stat. § 7.15(1)(a), (b), (c), (cm), (k). And the *Swenson* Plaintiffs similarly challenge Wisconsin procedures for establishing, managing, and staffing polling locations; delivery and return of absentee ballots, and educating the voting public, *Swenson* Dkt. 37 ¶ 8, although all of these procedures are administered under Wisconsin law by local election officials, Wis. Stat. §§ 7.15(1)(a), (b), (c), (cm), (k); 7.10(7). Because these allegations all fall at the feet of local election officials, Plaintiffs have no Article III standing to press these claims against Defendants. *Lujan*, 504 U.S. at 560; *Frank I*, 768 F.3d at 753.

Finally, the *Swenson* Plaintiffs lack Article III standing to bring their ADA vision-impairment claims because, as explained above, they do not allege that they are visually impaired and do not allege that they have visually impaired members harmed by Wisconsin law. *See supra* Part I.A.6.b.

G. This Court Should Dismiss Both Complaints Under *Burford* Abstention

Finally, this Court should dismiss both Complaints under *Burford* and its progeny, because Plaintiffs' efforts will disrupt Wisconsin's extremely critical efforts to maintain election integrity during a statewide election. Under *Burford* and its progeny, federal courts should dismiss a suit when deciding the matter "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern," *NOPSI*, 491 U.S. at 361, which clearly includes the enforcement of state election laws and the administration of a statewide election, *see id.*; *see also* Dkt. 37 at 17 n.12. The *Gear* and *Swenson* Plaintiffs both seek to enjoin numerous election laws and develop and implement additional election processes under this Court's supervision, *Swenson* Dkt. 37 at 67–69; Dkt. 213-1 at 74–77, including a specific request that this Court "monitor Defendants' compliance" with any specific procedures ordered, Dkt. 213-1 at 77. Such requests will not only "disrupt[ ]" Wisconsin's entire electoral system, *NOPSI*, 491 U.S. at 361, but also impede the Commission's ongoing efforts to improve the State's electoral processes based upon the experience gained from the April 7 Election and subsequent races, *see supra* at pp. 15–16. Therefore, *Burford* abstention requires this Court to dismiss

Plaintiffs' complaints, which dismissal will still permit them to resort to the "fully capable" Wisconsin courts, *SKS & Assocs., Inc.*, 619 F.3d at 681 n.6.

CONCLUSION

The Court should deny the motions for preliminary injunction in all cases. And the Court should dismiss the operative complaints in *Gear* and *Swenson*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2020, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

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