

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

DEMOCRATIC NATIONAL COMMITTEE and
DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

vs.

Civil Action No. 3:20-cv-249-wmc

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.

RESPONSIVE BRIEF ON BEHALF OF AMICUS CURIAE CITY OF MADISON

NOW COMES counsel for Amicus Curiae, the City of Madison, Wisconsin, Michael P. May, City Attorney, and Steven C. Brist, Assistant City Attorney, to submit this Responsive Brief pursuant to the Court's Order of March 27, 2020¹.

On March 27, 2020, the Plaintiffs submitted a Motion for Reconsideration and for Preliminary Injunction, together with a supporting Brief and Declarations. This Responsive Brief is filed on behalf of the City of Madison ("City" or "Madison").

A. Interests of the City.

The City of Madison is the second largest city in the state, with a population well over 250,000. The City, and in particular the Madison City Clerk, is charged with conducting elections pursuant to Wisconsin law. (See Declaration of Maribeth Witzel-Behl [#77], hereafter "Clerk Declaration"). As such, the primary goal of the City is being

¹ On March 28, 2020, the Court combined this action with cases 20-cv-278 and 20-cv-284 [Docket #86]. Although the City had appeared as an amicus in this case, it had not appeared in the other actions. By this filing, which will be jointly filed in all three actions, the City seeks amicus status in the combined cases.

able to conduct a full and fair election².

In addition, the City is part of a public health agency, Public Health Madison and Dane County (“PHMDC”). The Public Health Director has issued several directives at blunting the effect of the coronavirus pandemic.

The information in the Clerk Declaration and in a recent report from PHMDC demonstrates that, not only is it unlikely that the City will be able to conduct a full and fair election, attempting to do so without some relief from this Court will endanger the health of many Wisconsin residents.

B. The Dire Consequences Facing the Madison City Clerk.

The Clerk Declaration can hardly be starker: Due to the COVID-19 epidemic and the resulting “Safer at Home” order of Wisconsin Governor Tony Evers, half of the City’s poll workers are no longer working on the date of the Spring Election (Clerk Declaration, ¶4). Numerous polling locations are unavailable (*Id.* ¶5), raising the possibility that with less than two weeks to the election, polling locations – assuming they can be opened at all – will have to be combined. With this type of dislocation, and more threatened as the date of the Spring Election nears, the City faces the very real possibility that half or more of the eligible voters who would normally go to the polls on Election Day will be unable to do so³.

An election where half the voters who would normally vote are unable to do so is not a full and fair election.

Compounding this disaster is the deluge of requests for absentee ballots coming

² The due process clause is violated when an election is “fundamentally unfair,” empowering courts to step in to assure constitutional standards are met. See the extensive analysis of cases in Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory Law Journal 545, at 585 *et seq.*, (2018). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160436, accessed March 29, 2019.

³ As of Monday, March 30, 2020, about 60% of Madison’s needed poll workers have cancelled their shifts, and the number of available polling locations is 68 out of 92 needed.

to the Clerk's office. Logically responding to the threat of contracting a deadly disease if they were to venture to the polls, tens of thousands of voters are requesting absentee ballots. (*Id.* ¶7). The City Clerk has already issued over 40,000 absentee ballots, and – despite fulfilling those unprecedented requests -- continues to have a backlog of absentee requests exceeding 10,000. These requests continue to come in daily⁴. We are thus left with the inevitable conclusion that the Clerk will be unlikely to fulfill all requests under current statutory deadlines, and that many responses will be received after the deadline for submission of absentee ballots. Thousands of eligible voters will be denied their right to vote.

An election where thousands of eligible voters will be denied their right to vote is not a full and fair election.

A third factor impacting the election is the inability of voters to actually obtain or return the absentee ballot. The Clerk has received many e-mails from persons in these situations; they often are older, sometimes in quarantine, but almost always living alone. These eligible voters often have no way to upload their identification to request an absentee ballot, and have no person they can ask to accomplish this for them. Those who are able to obtain a ballot then are often unable to submit the ballot because they need a witness. Again, living alone, afraid of contacting a person they do not know, they cannot find a witness for the ballot, and thus cannot return it for counting. The Clerk cannot estimate the number of eligible voters in this position; if the e-mails received are any indication, it must be hundreds if not thousands. These eligible voters are alone and often elderly or infirm.

An election where eligible voters who are alone, elderly, or infirm are denied the

⁴ As of Monday, March 30, 2020, the total number of absentee ballots issued is over 69,000.

right to vote is not a full and fair election.

C. The Health Risks and Consequences.

The information in the Clerk Declaration is magnified by a recent report from PHMDC, attached as an appendix to this brief. The report shows the increase in reported COVID-19 cases in relation to the time elections were held or postponed in a number of U.S. states. Wisconsin would be the only state that failed to postpone its election this far into the pandemic in our state. As the Report concludes:

We strongly recommend that the April 7 election in Wisconsin be postponed and changed to all mail-in voting. To do otherwise would put all Wisconsin communities at greater risk of illness due to COVID-19, and puts our health care systems at risk of becoming overwhelmed and depleted of resources.

The unmistakable conclusion from this report is that it would be reckless from a health standpoint to proceed with an in-person election on April 7.

D. Remedies.

The information before this Court is compelling: The City Clerk needs some relief. The extraordinary, indeed, the unprecedented confluence of the COVID-19 epidemic and a City election has created consequences that must be remedied. The existing statutory deadlines and restrictions guarantee, in this unprecedented time, that the election will not be a full and fair election and will recklessly place the health of numerous voters and poll workers at risk. The proper party to give this relief would be the Wisconsin Legislature, but the Legislature has taken no steps to do so.

Thus, it is left to this Court to assure that the right to vote in the Spring Election is not denied to thousands of eligible voters. The Court must provide adequate relief to the City so that as many voters as is possible will have their votes count and that they are

able to do so without endangering the health of themselves, the dedicated poll workers, or their families.

This Court must act to assure that the Spring Election will be a full and fair election and that it is conducted in a manner that protects the health of Wisconsin residents. Under these dire circumstances, the City requests that the Court meet its obligation by:

- (a) Postponing the April 7 election, and all related deadlines, for a period of not less than three weeks;
- (b) Providing that all officeholders remain in office until their successors are elected and qualified; and,
- (c) Considering ordering a full paper mail-in ballot, in light of the health exigencies.

Dated this 30th day of March, 2020.

CITY OF MADISON

/s/ Michael P. May

Michael P. May, City Attorney
State Bar No. 1011610
Steven C. Brist, Assistant City Attorney
State Bar No. 1005479

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APPENDIX

Public Health Madison & Dane
County Memorandum Dated March
30, 2020 with Attached Letter from
Applied Population Laboratory



City-County Building, Room 507
210 Martin Luther King, Jr. Boulevard
Madison, WI 53703

Phone (608) 266-4821
Fax (608) 266-4858
www.publichealthmdc.com

MEMORANDUM

DATE: March 30, 2020

TO: Michael May, City of Madison Attorney; Satya Rhodes-Conway, City of Madison Mayor

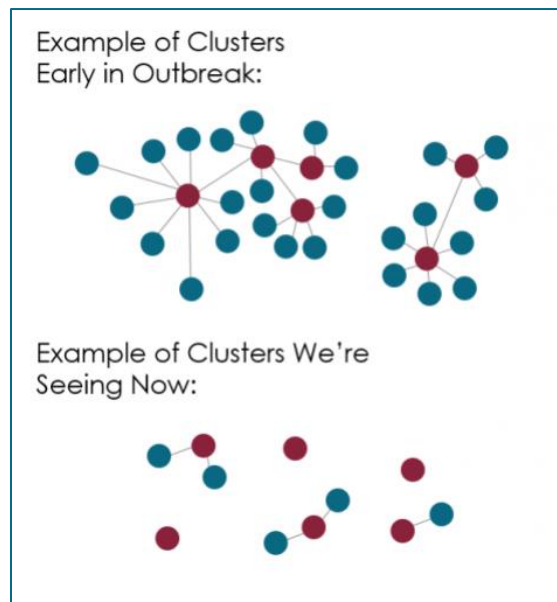
FROM: Janel Heinrich, Director, Public Health Madison & Dane County

SUBJECT: **April 7th election and COVID-19: Urgent need to postpone and move to mail-in ballots only**

The in-person elections scheduled for April 7th present a serious challenge to controlling the spread of COVID-19. In absence of a vaccine or cure, our public health tools to combat this epidemic are few: **preventing exposure** to the virus is the best way to prevent illness, and **flattening the curve** of cases that are occurring is the best way to prevent exceeding the capacity of our health care system. Hosting an in-person election that would promote gathering of people throughout the state is in direct conflict with critical steps the state has taken, through closures and iterations of Safer at Home orders, to require social distancing to protect its population.

Every day, Public Health Nurses at Public Health Madison & Dane County interview people who test positive—we do this primarily to understand with whom they have been in contact so that we can intervene with contacts to prevent further spread. As social distancing orders were strengthened, the size of our contact investigations has decreased. This means that the number of contacts someone has looks very differently compared to even a few weeks ago.

Rather than entire workplaces or restaurants needing follow-up, it is more common now for someone newly diagnosed to name only household contacts. At this point in the progression of illness of COVID-19 in WI, an in-person election has the potential to reverse this progress by expanding the network of contacts surrounding a person who is asymptomatic but contagious. Our case counts have been increasing steadily—but not exponentially—since mid-March. Holding elections is a walk back to the fragile, but effective, system of social distancing we have established in Wisconsin and a risk we should not willingly take.



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In addition to the public health risk of holding in-person elections, the strain on polling logistics is significant. Currently, Madison is down from the needed 1,500 poll workers to 600. The number of polling locations have gone from 92 to 68. Communities of all sizes across the state are in similar situations. The engine of polling infrastructure is powered by older adults. People aged 65 and older are at high risk for severe illness from COVID-19. Poll workers are often adults over 60, and many are understandably cancelling the shifts they have signed up for. In the City's recruitment of poll workers to adequately cover the polls on April 7, the focus would be on younger, healthy adults. However, adults ages 20-44 currently account for 52% of all positive COVID-19 cases in Dane County. The percentage is even higher for the City at 61%. Younger people are more likely to have mild symptoms and may not even be aware they are infected with COVID-19, so having poll workers from this age group still poses a significant risk of transmission to voters, particularly if adequate safety materials are unable to be obtained due to national and global shortages.

The City of Madison is scrambling to find and even fabricate plastic face shields and plexiglass barriers to protect both poll workers and voters from interfacing directly with each other. We're making sure each polling location can accommodate curbside voting to the extent possible, and supplying each polling station team with hand sanitizer, disinfectant spray, and gloves. We're stressing the importance of maintaining at least 6 feet between poll workers and between voters in line to obtain ballots. As a City, we're doing all we can to promote absentee voting and to keep up with the absentee requests, including dedicating staff from several agencies to support the Clerk's Office during this time. Clerk's staff working around the clock and foregoing sleep to support election preparation, which can be detrimental to their own immune systems. The Clerk's Office is receiving hundreds of calls from frustrated voters—mostly older adults without the technological capacity to request absentee ballots on-line—who feel disenfranchised, as if they have to make a choice between obeying public health advice to stay safe at home and going to the polls on April 7 to vote. **Instead, mailing ballots to every Wisconsin resident and extending the election deadline is the urgent step to take now.** This is both an act of public health best practice as well as a preservation of civic engagement.

Wisconsin has been a leader at enacting statewide public health interventions throughout this epidemic. While it took other states critical time to restrict gatherings to 50 people, Wisconsin implemented this restriction early—merely days after reaching 20 cases (*Figure 1*).

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ACTIONS: Restrict gatherings to 50

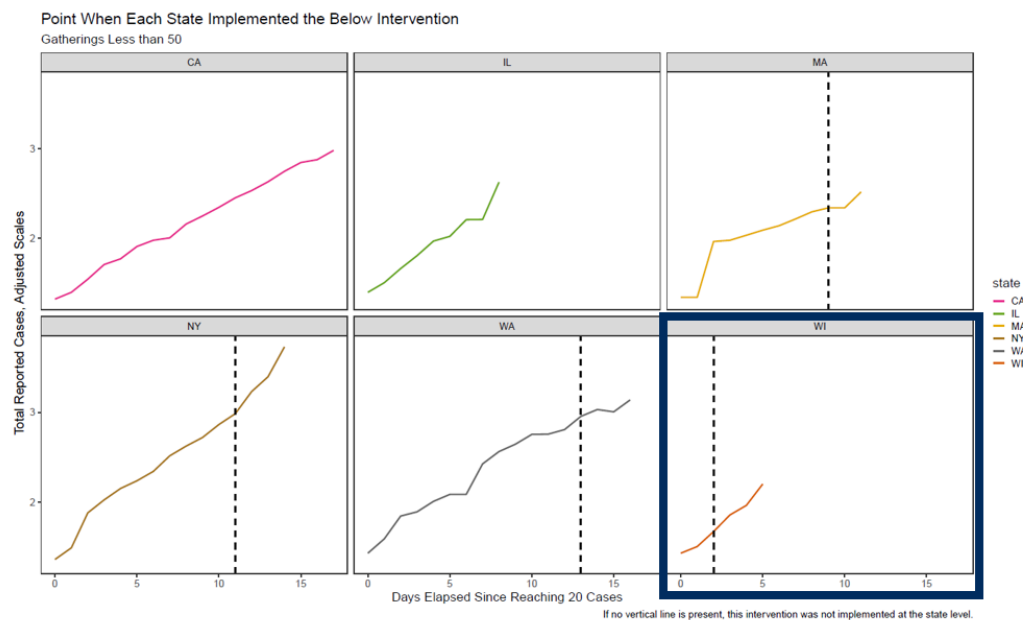


Figure 1: Timeline of state orders restricting gatherings to 50 people or less (Wisconsin in blue box)

Compared to other states, Wisconsin was also a leader in school (Figure 2) and restaurant (Figure 3) closures.

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ACTIONS: School closure

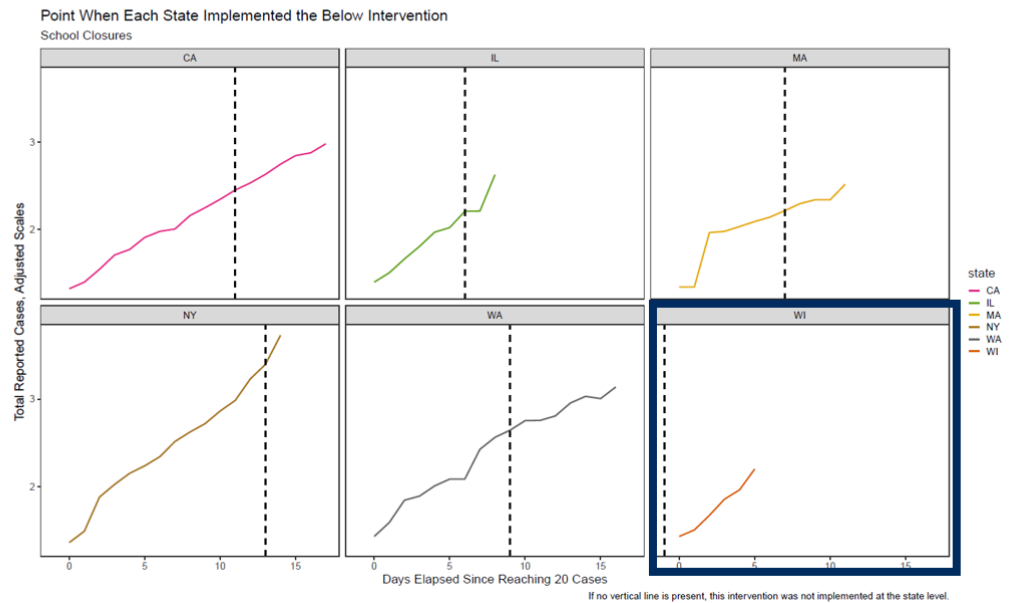


Figure 2: Timeline of state orders closing school (Wisconsin in blue box)

ACTIONS: Restaurant closure

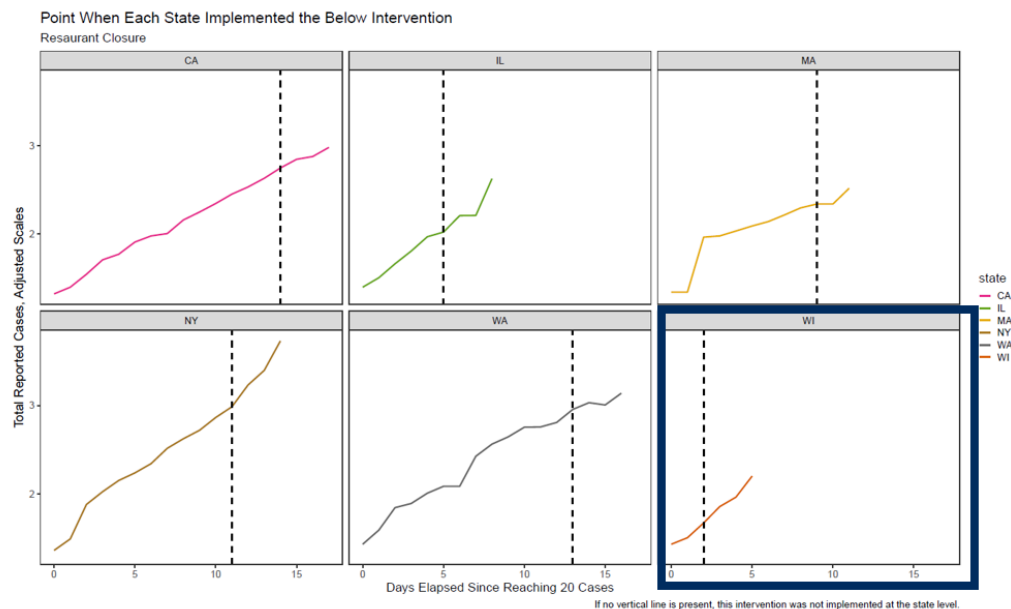


Figure 3 Timeline of state orders closing restaurants (Wisconsin in blue box)

When it comes to elections, Wisconsin would be a significant outlier if it hosted an in-person election on the scheduled date of April 7th.

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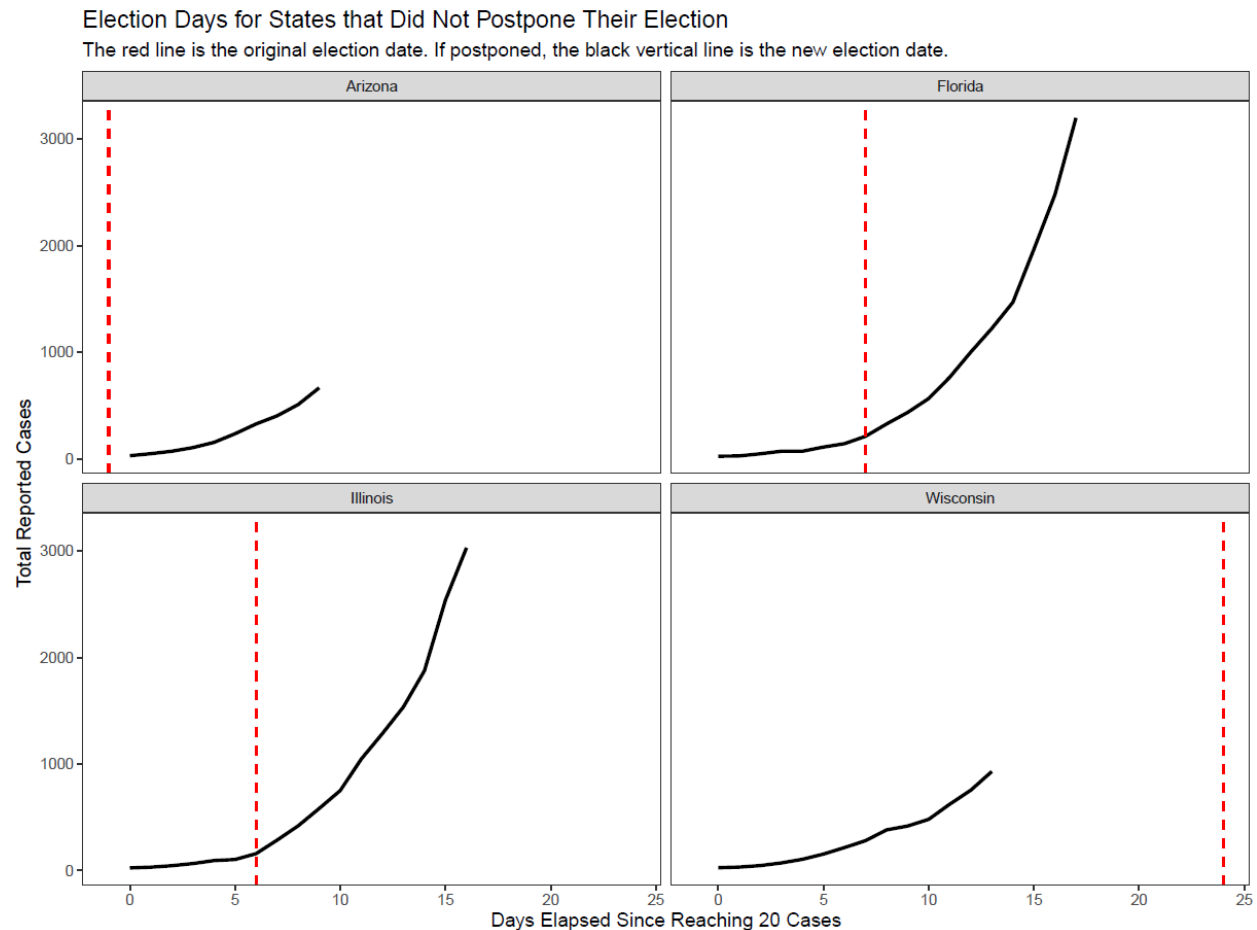


Figure 4: Election dates for states that did not postpone their election^{1,2}

Three other states with primaries after the start of the epidemic (March 17th) did not postpone their elections. Illinois, Florida, and Arizona went forward with their primary elections, but did so far earlier in the epidemic (6 days past 20 cases, 7 days past 20 cases, and 0 days past 20 cases respectively) and had far fewer cases and less community spread (*Figure 4*). On March 17 when they voted, Illinois had 159 confirmed cases of COVID-19, Florida had 210 confirmed cases, and Arizona had 20 confirmed cases. Wisconsin had 1,112 cases as of March 29th, which will only increase before the scheduled election on April 7th. **Wisconsin's election is planned to take place 24 days after we reached 20 confirmed cases—putting Wisconsin out of alignment with election practices actively being implemented across the country.**

¹ Election dates sourced from <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>

² State COVID-19 data sourced from <https://github.com/nytimes/covid-19-data>

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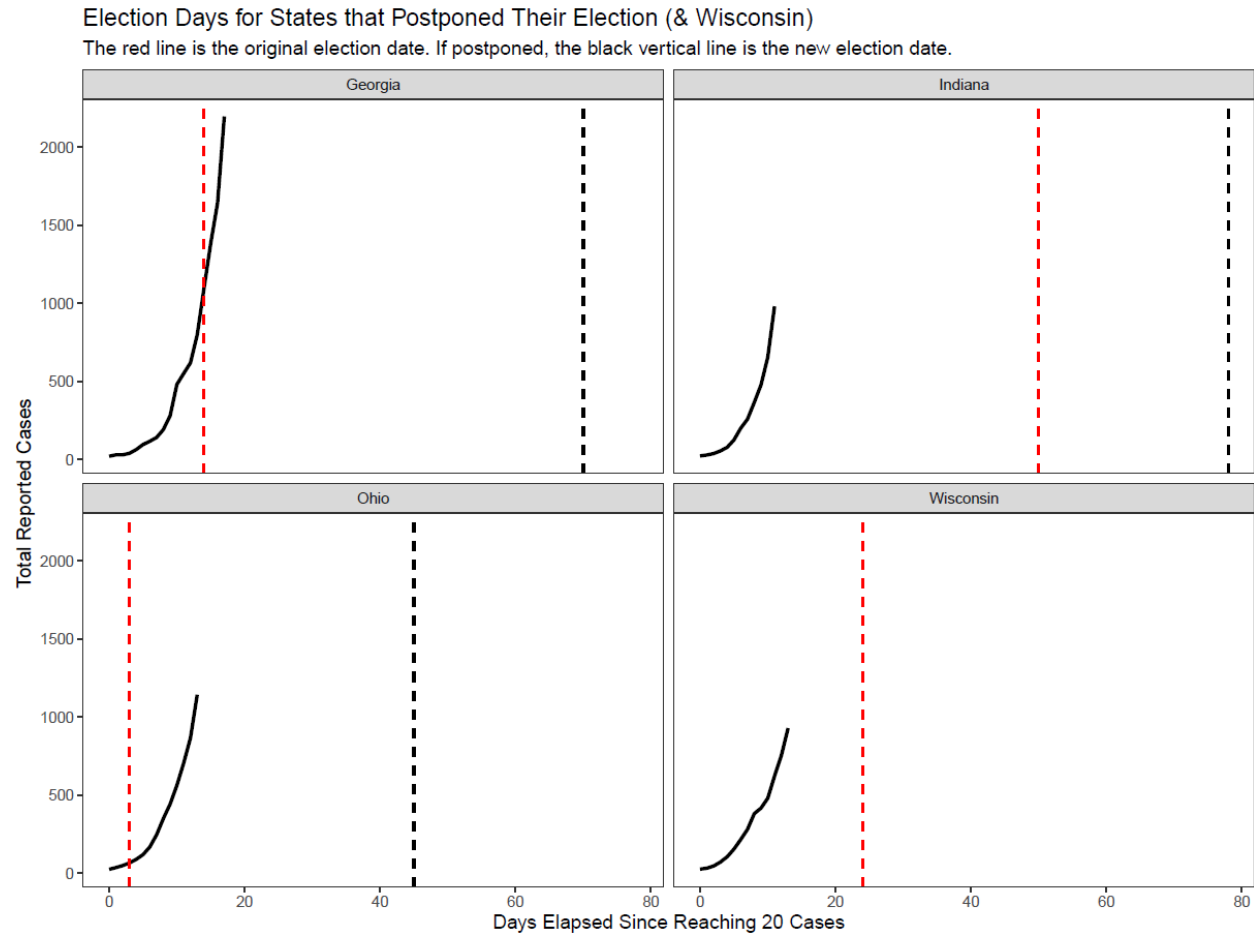


Figure 5: Election days for states that postponed their election^{3,4}

Georgia, Ohio, and Indiana are examples of states (out of a total of 14 states) that postponed their primary elections (Figure 5). Georgia's election was originally scheduled for March 24th, 14 days after they reached 20 cases, when their confirmed case count was 1,094. Ohio's election was originally scheduled for March 17th, three days after they reached 20 cases, when their confirmed case count was 67. Both states chose to postpone their elections, scheduled earlier than Wisconsin's, when they had fewer cases than Wisconsin currently does. Because these states had less information when making the decision, it is possible that they will further postpone. Indiana's election was originally scheduled for

³ Election dates sourced from <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>

⁴ State COVID-19 data sourced from <https://github.com/nytimes/covid-19-data>

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May 5th, and they postponed it to June 2nd; Indiana had 982 cases as of March 27th. Indiana is an example of a state that postponed an election originally later than Wisconsin's, and other states that have done the same include Connecticut, Delaware, Maryland, Pennsylvania, Kentucky, and New York.

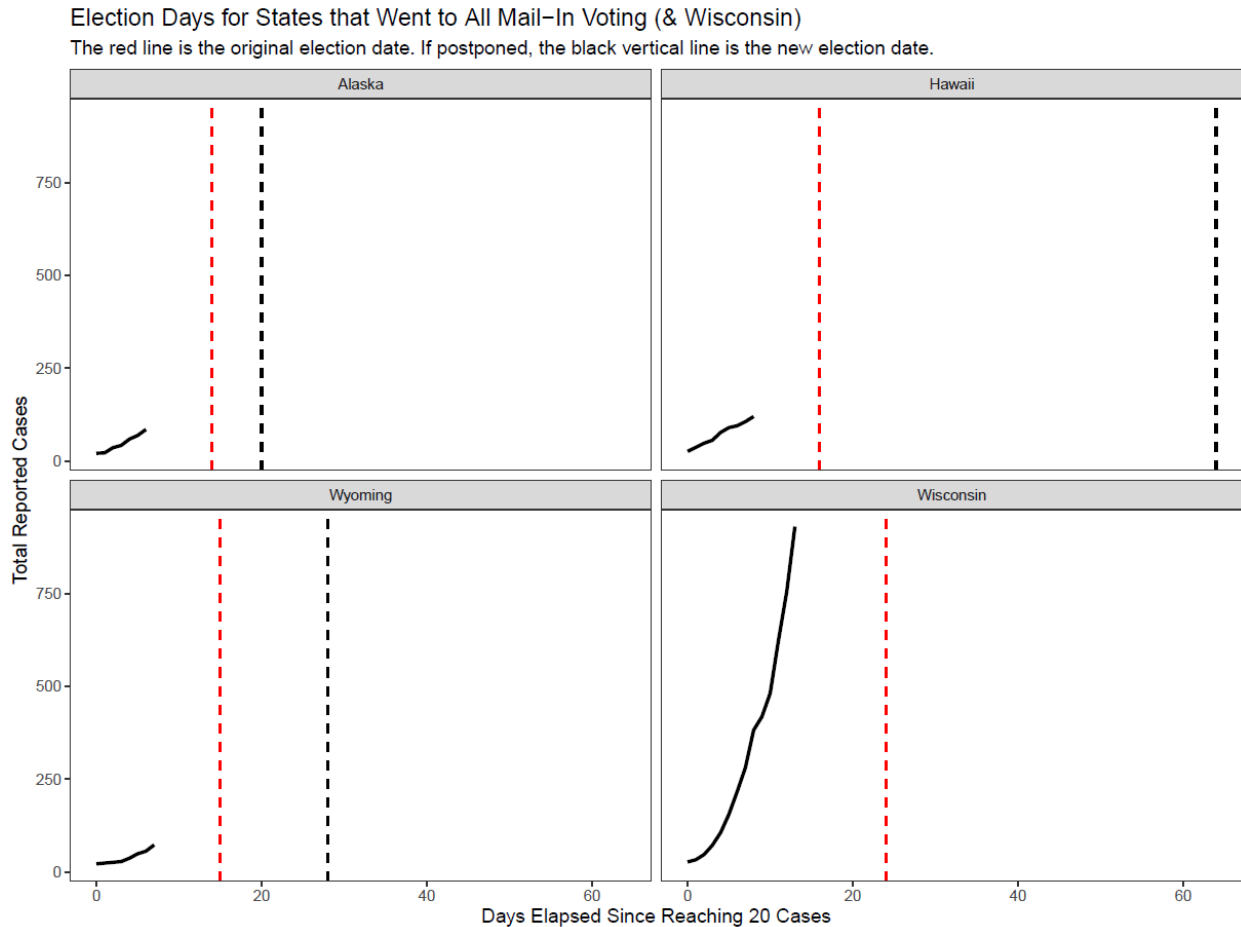


Figure 6: Election days for states that went to all mail-in voting^{5,6}

Alaska, Hawaii, and Wyoming went to all mail-in voting in their primary elections (Figure 6). Each of these states chose to do so early in their epidemics, when case counts were low. In each case, the states paired the choice to go to mail-in ballots with extending the deadline by which ballots needed to be received.

We strongly recommend that the April 7 election in Wisconsin be postponed and changed to all mail-in voting. To do otherwise would put all Wisconsin communities at greater risk of illness due to COVID-19, and puts our health care systems at risk of becoming overwhelmed and depleted of resources.

⁵ Election dates sourced from <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>

⁶ State COVID-19 data sourced from <https://github.com/nytimes/covid-19-data>

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Sincerely,

A handwritten signature in black ink, appearing to read "Janel Heinrich". The signature is written in a cursive, flowing style.

Janel Heinrich, MPH, MA
Director, Public Health Madison & Dane County



APPLIED POPULATION LABORATORY

Department of Community and Environmental Sociology
College of Agriculture and Life Sciences
University of Wisconsin - Madison

Satya Rhodes-Conway, Mayor of Madison
Mike May, City of Madison Attorney

May 30, 2020

Dear Mayor Rhodes-Conway and City Attorney May,

We are a group of quantitative data scientists, clinicians, and infectious disease specialists coordinating work within the academic community in response to the COVID-19 pandemic.

We write to you today to support proposals to allow all voters to submit a mail-in ballot for Wisconsin's April 7th election, and to extend the ballot deadline for that election.

Given the speed of COVID-19's spread within Madison, Dane County, and the State of Wisconsin at this time, we feel strongly that **asking voters to attend in-person voting as usual presents an unreasonable risk to individual voters, poll workers, and the general public.**

Polling places are inherently high-contact settings which involve many individuals coming into close contact and touching the same objects over the course of a day. Paper ballots, equipment used to mark ballots, the ballot processing machine, government issued identification & verification, queuing to cast a vote, and signing the poll book are all high contact activities that cannot be easily or rapidly adapted to maintain social distancing and sanitary surface contact. It is our belief that asking people to vote under such circumstances is too high risk at this time.

In particular, we are especially concerned about the safety of election workers, who tend to be older and in the highest-risk categories for contracting COVID-19 and having serious complications arise. Those workers would be exposed to hundreds of voters per day, with no reasonable way to protect themselves. Even if it were possible to arrange voting lines in accordance with public health social distancing measures, poll workers cannot avoid contact as they check hundreds of ID's per day, handle the poll book, and handle ballots themselves.

We have already made tremendous social and economic sacrifices in order to protect our community from the pandemic. Asking voters to show up at polling places in person would undermine those other efforts substantially. **Extraordinary measures should be taken to safeguard the public health during the election.**

We believe that a reasonable alternative to in-person voting exists. Mail-in voting is safer and in line with public health recommendations to prevent further spread of COVID-19 in our community. All voters should be allowed to vote by mail in this election. In addition, in order to process such an extraordinary change to voting procedures, we believe it is necessary to delay the ballot deadline for this election.

Thank you for your consideration.

Signed,

Malia Jones, PhD, MPH, Assistant Scientist in Health Geography, Applied Population Laboratory, UW-Madison

Ajay Sethi, PhD, MHS, MPH Faculty Program Director & Associate Professor of Population Health Sciences, UW-Madison

Kristen Malecki, PhD, Associate Professor, Population Health Sciences, University of Wisconsin-Madison

Steve Goldstein, PhD, Department of Botany, University of Wisconsin-Madison

Brian S. Yandell, PhD, Professor, Statistics & Horticulture, University of Wisconsin-Madison

Alison M. Bутtenheim, PhD MBA, Associate Professor of Nursing and Health Policy, University of Pennsylvania

Shoshana Aronowitz, PhD, FNP-BC, Postdoctoral Fellow, University of Pennsylvania

Lindsey Leininger, PhD, Clinical Professor, Tuck School of Business at Dartmouth College

Ashley Z. Ritter, PhD, CRNP, Postdoctoral Fellow, University of Pennsylvania

Additional co-signatories can be found at this link.

<https://docs.google.com/spreadsheets/d/1BngXftVUynzA3ua7cF8ivT3USdEgEyydhw1Tcd6y-Z8/edit?usp=sharing>