

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN

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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,

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

and

Republican National Committee,  
Republican Party of Wisconsin, and the  
Wisconsin State Legislature,  
Intervenor-Defendants.

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THE WISCONSIN LEGISLATURE'S BRIEF IN OPPOSITION TO  
PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

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## INTRODUCTION

The April 7, 2020 Election showed that the people of Wisconsin are fully capable of maintaining our democracy in these challenging times, notwithstanding relentless attacks on our State from the national press. Refuting baseless, pessimistic predictions, this election ended up with far greater voter turnout than comparable prior elections. Wisconsin citizens, poll workers, and National Guard members showed the responsibility and community spirit that Wisconsinites have come to expect from each other. To the extent that some aspects of Wisconsin's election machinery did not function as well as hoped, that fault lies with certain high-level local officials in some areas of the State, who failed to take the same responsible actions that the vast majority of officials took, including by inexplicably declining the help of hundreds of National Guard members at the polls. All that said, the overwrought claims about the health effects of declining to postpone democracy fell flat, as even pre-election critics have been unable to identify *any* change in Wisconsin's COVID-19 infection rate as a result of the election.

In the first round of this litigation, Plaintiffs asked this Court for a wholesale rewrite of Wisconsin's election laws, including by attacking a series of voter-integrity measures that they have long politically opposed. This Court rejected the vast majority of Plaintiffs' requests, but did order a couple of changes, under Plaintiffs' core theory that the April 7 Election day came too soon on the heels of the COVID-19 outbreak to permit all Wisconsinites to take advantage of Wisconsin's generous



absentee-voting options. As to the few reforms that this Court ordered, the Seventh Circuit stayed one, and the Supreme Court stayed another.

Having apparently gained no sense of modesty from their legal defeats and failed, sky-will-fall predictions about the ability of Wisconsinites to carry on their democracy, Plaintiffs now attempt to keep their case going. They have done so even though the foundational premise of their lawsuit—that the State and its citizens did not have sufficient time to adjust to COVID-19 in March, given the approaching April 7 Election day—does not even arguably apply. Plaintiffs ask this Court to speculate on the magnitude of the COVID-19 pandemic in both August (after three months of summer) and November, to guess at the types of treatments that will or will not be available at those times, and to predict the Wisconsin election procedures that will be in place by those months. Notably, Plaintiffs do not appear to believe what their lawyers are now arguing in this case, as lead Plaintiff Democratic National Committee has rescheduled its extremely large, in-person Democratic National Convention in Milwaukee for the week immediately after the August election.

Plaintiffs' motion to amend their Complaint a second time is futile for several independent reasons. Plaintiffs' claims are plainly unripe, as they are based upon premature speculation as to the state of the COVID-19 situation and Wisconsin's election administration months from now. Plaintiffs' proposed Second Amended Complaint also fails, as a matter of law, because it does not plausibly allege that any Wisconsin voter will be unable to vote in August or November with reasonable effort, let alone that a sufficient number of voters will be unable to vote to justify Plaintiffs'

requested facial relief. Wisconsin has a generous, no-excuses-required absentee-voting system, meaning that any voters not wishing to go to the polls in August or November will have *weeks* before each election to obtain and cast an absentee ballot.

Finally, this Court should hold off deciding Plaintiffs' motion and the Wisconsin Legislature's motion to dismiss, as both are implicated by, and intertwined with, the appeal still pending in the Seventh Circuit.

## BACKGROUND<sup>1</sup>

### A. Wisconsin's Regulation Of Elections

Voting in Wisconsin is readily available to all. "Registering to vote is easy in Wisconsin." *Frank v. Walker*, 768 F.3d 744, 748 (7th Cir. 2014) ("*Frank I*"). A voter need only submit a simple registration form and, in general, "an identifying document that establishes proof of residence," Wis. Stat. § 6.34(2), either in person, by mail, or online at the "MyVote" website operated by the Wisconsin Elections Commission ("Commission"), no later than the third Wednesday preceding the election, *see* Wis. Stat. §§ 6.28(1), 6.29(2)(a), 6.34(2). The proof-of-residence document requirement is satisfied if a voter registers online and provides a valid driver's license or state ID

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<sup>1</sup> In the Background of this brief, the Legislature cites government records found on government websites, as well as certain news articles and other publicly available sources. The Court can and should take judicial notice of the publicly available government websites. *See Denius v. Dunlap*, 330 F.3d 919, 926–27 (7th Cir. 2003); *see generally* Fed. R. Evid. 201. Notice is proper at the motion-to-dismiss stage, *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994), which correlates to the leave-to-amend stage here, *see Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008). Citations to non-government news articles and other publicly available sources, on the other hand, are provided solely for background and context. The Legislature does not cite these sources in the Argument section and explicitly asks this Court not to rely upon them in deciding the present Motion.

number. MyVote Wisconsin, *Proof of Residence*.<sup>2</sup> If registering in person, the voter may provide a proof-of-residence document in electronic format, such as with a photo taken on a smartphone, tablet, or computer. *Id.* Voters may, of course, register in person on Election Day at their polling places. *See* Wis. Stat. § 6.55.<sup>3</sup>

Once registered, voting is easy as well. To vote in person on Election Day, *see* Wis. Stat. §§ 6.77–78, 6.80, the voter must simply arrive at the polling place, “state his or her full name and address,” present a valid photo ID—which may take one of “several forms” that many voters “may already have,” MyVote Wisconsin, *Photo ID Required*<sup>4</sup>—and “enter his or her signature on the poll list,” Wis. Stat. § 6.79(a). Alternatively, any registered Wisconsin voter may vote absentee by mail for any reason. Wis. Stat. § 6.85(1), (3). To do so, the voter must simply request an absentee-ballot by “the 5th day immediately preceding the election” if by mail, fax, or online, or by “the Sunday preceding the election” if in person, Wis. Stat. § 6.86(1)(ac), (b); Wis. Elections Comm’n, *I Want To Vote Absentee*,<sup>5</sup> then the voter must provide a copy of their photo ID (which can be done with a smart phone or scanner), Wis. Stat.

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<sup>2</sup> Available at <https://myvote.wi.gov/en-us/ProofofResidence> (all websites last accessed on May 7, 2020).

<sup>3</sup> Easy registration is also readily available to disabled voters in Wisconsin. Disabled voters may complete same-day registration at the entrance to the polling place—such as from a parked vehicle—with the assistance of a polling-place inspector. Wis. Stat. § 6.82(1); Wis. Elections Comm’n, *Curbside Voting*, available at <https://elections.wi.gov/voters/accessibility/curbside-voting>. And any voter “who is hospitalized” may register to vote by agent and, “at the same time,” apply for an “official ballot by agent.” Wis. Stat. § 6.86(3)(a)(1)–(2).

<sup>4</sup> Available at <https://myvote.wi.gov/en-us/PhotoIDRequired>.

<sup>5</sup> Available at <https://elections.wi.gov/voters/absentee>.

§§ 6.86(1), 6.87(1); and finally the voter must fill out the ballot and obtain the signature of a witness, Wis. Stat. § 6.87(4). An absentee ballot must arrive by 8:00 p.m. on Election Day for it to be counted. Wis. Stat. § 6.87(6).

Wisconsin has adopted “the most decentralized” approach to election regulation in the country. *See* Memo of Administrator Meagan Wolfe to Members of the Wisconsin Elections Commission, *Summary of April 7, 2020 Election* (Apr. 2020) (“Wolfe Memo”);<sup>6</sup> *see generally* Dkt. 198-1 ¶ 51 (citing this source). The Commission, a state agency, has the general “responsibility for the administration” of the State’s “laws relating to elections and election campaigns,” and thus oversees elections statewide. Wis. Stat. § 5.05(1). To conduct these statewide elections, Wisconsin law empowers “1,850 municipal election officials and 72 county election officials” throughout the State. Wolfe Memo at 1; *see* Wis. Stat. §§ 7.10, 7.15. These local officials have the duty to “provide [the] ballots” for elections, Wis. Stat. § 7.10(1)(a); “establish[ ]” the “polling place[s]” for elections, Wis. Stat. § 5.25(2); staff “inspectors” to “serve” at those polling places, including by “[r]eassign[ing]” 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 standards, Wis. Stat. § 7.15(1)(e).

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<sup>6</sup> Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf>.

**B. The April 7, 2020 Election**

Two weeks before Wisconsin's April 7 Election, the Wisconsin Governor issued his "Safer at Home" Emergency Executive Order, limiting movement throughout Wisconsin in response to the COVID-19 pandemic. *See* Emergency Order #12, Safer At Home Order (Mar. 24, 2020) ("Emergency Order #12").<sup>7</sup> This Order exempted individuals "leav[ing]" their homes for "essential government functions," which allowed them to register to vote, vote, and complete other necessary election-related tasks. *See* Emergency Order #12 ¶¶ 1, 12; Dkt. 170 at 8–9.

The turnout for the April 7 Election was "extraordinarily high," Richard H. Pildes & Charles Stewart III, *The Wisconsin Primary Had Extraordinarily High Voter Turnout*, Wash. Post. (Apr. 15, 2020),<sup>8</sup> with 1,555,263 votes cast, Wis. Elections Comm'n, *Canvass Results for 2020 Spring Election and Presidential Preference Vote – 4/7/2020* (May 4, 2020),<sup>9</sup> representing 34.3% of eligible voters, *see* Wis. Elections Comm'n, *Unofficial Spring Election Turnout-34.3%-4/14/2020* (Apr. 14, 2020) (providing Wisconsin's estimated voting-age population as 4,524,066).<sup>10</sup> In comparison, the turnout for previous Spring Elections was 27.2% (2019), 22.3% (2019), 15.9% (2017), 47.4% (2016), 26.1% (2012), and 34.9% (2008). *Id.*; *compare*

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<sup>7</sup> Available at <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

<sup>8</sup> Available at <https://www.washingtonpost.com/politics/2020/04/15/wisconsin-primary-had-extraordinarily-high-voter-turnout/>.

<sup>9</sup> Available at [https://elections.wi.gov/sites/elections.wi.gov/files/Canvass%20Results%20Summary\\_spring%20election%20all%20contests\\_4\\_7\\_2020.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/Canvass%20Results%20Summary_spring%20election%20all%20contests_4_7_2020.pdf).

<sup>10</sup> Available at <https://elections.wi.gov/blog>.

Pildes & Stewart, *supra* (explaining that Wisconsin’s 2016 primary “was a complete outlier” in light of two “strongly contested” Presidential primary races).<sup>11</sup> Indeed, “overall turnout in Wisconsin’s 2020 primaries was even higher than in most Wisconsin primaries in the past 40 years.” Pildes & Stewart, *supra*.

Contrary to pre-election claims from some quarters, including from Plaintiffs, Dkt. 154 at 2, “[t]he number of COVID-19 cases [in Wisconsin] has not shown a marked increase” since the April 7 Election, *see* Daphne Chen & John Diedrich, *Two Weeks After Election, COVID-19 Cases Have Not Spiked In Wisconsin But Experts Urge Caution About Conclusions*, Milwaukee J. Sentinel (April 22, 2020).<sup>12</sup> One study concluded that “voting in Wisconsin on April 7 was a low-risk activity,” with “no detectable surge” in COVID-19 “transmission.” Kathy Leung, et al., *No Detectable Surge in SARS-CoV-2 Transmission due to the April 7, 2020 Wisconsin Election*, medRxiv (Apr. 29, 2020) (capitalization altered).<sup>13</sup> Another study likewise 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.” Andrew C. Berry, et al., *Wisconsin April 2020 Election Not Associated With Increase In COVID-19 Infection*

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<sup>11</sup> This explains why Plaintiffs’ comparison of Green Bay’s April 7, 2020 Election turnout to its outlier 2016 primary turnout, *see* Dkt. 198-1 ¶ 38, is inapt.

<sup>12</sup> Available at <https://www.jsonline.com/story/news/2020/04/22/covid-19-hasnt-spiked-after-wisconsin-election-experts-urge-caution/2997394001/>.

<sup>13</sup> Available at <https://www.medrxiv.org/content/10.1101/2020.04.24.20078345v1>

*Rates* at 2 (Apr. 23, 2020).<sup>14</sup> Rather, a “*reduction in daily new case rates in Wisconsin was observed compared to what would have been expected if the rates in Wisconsin had followed the pre-election [new-case] ratios.*” *Id.* at 7 (emphasis added). This absence of a “spike in COVID-19 cases attributable to in-person voting” during the April 7 Election—even “[t]hree weeks after” the election—has “surprise[d]” even those who expected a contrary, “major effect” in COVID-19 rates post-election.<sup>15</sup> John

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<sup>14</sup> Available at [https://madison.com/election-covid-19-study/pdf\\_647a9bf3-0646-5f61-913c-1d0a584824a5.html](https://madison.com/election-covid-19-study/pdf_647a9bf3-0646-5f61-913c-1d0a584824a5.html).

<sup>15</sup> Another press account, cited by Plaintiffs, states that 52 individuals who “voted in person or worked the polls” during the April 7 Election have “tested positive for COVID-19,” Scott Bauer, *52 People Who Took Part in Wisconsin’s Primary Have Tested Positive for Coronavirus*, *Time* (Apr. 29, 2020), <https://time.com/5829264/wisconsin-primary-coronavirus/>, out of the approximately 400,000 individuals who voted in person and many others who served as election-day workers, *compare* Wis. Elections Comm’n, *Canvass Results, supra* (full ballot count), *with* Wis. Elections Comm’n, *Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary*, <https://elections.wi.gov/node/6862> (absentee-ballot count). As this very press account itself recognizes, “[s]everal of the 52 people . . . also reported other ways they may have been exposed to the virus.” Bauer, *supra*. Indeed, “without really investigating closely and being clear that somebody really had no other potential exposure to infected people,” it is “speculative to say [w]hat was definitively the cause” of *any* particular infection. Diedrich, *Election Didn’t Lead To Spike In COVID-19, supra*. And, as already noted, at least two studies on this issue found no increase in infection rates after the election, with one of those studies concluding that “voting in Wisconsin on April 7 was a low-risk activity.” *Supra* p. 7. While Plaintiffs recite the 52-individuals figure, Dkt. 198-1 ¶¶ 3, 39, and made many failed pre-election claims that COVID-19 rates would spike, Dkt. 198-1 ¶ 2, they do not cite the post-election studies finding no such increase in infection rates, although both were published publicly before Plaintiffs filed their proposed Second Amended Complaint, *compare* Dkt. 198-1 (Apr. 30, 2020), *with* Leung, *supra* (Apr. 29, 2020), *and* Berry, *supra*, (Apr. 23, 2020).

Diedrich, Milwaukee J. Sentinel, *Election Didn't Lead To Spike In COVID-19; Experts Say Effect May Be Hidden In Numbers* (Apr. 29, 2020).<sup>16</sup>

Notably, any Election Day difficulties—such as long lines in certain areas of the State—were the result of irresponsible decisions made by high-ranking local officials, not any of the Defendants here. Officials in Milwaukee, for example, inexplicably decided “to dramatically cut [the city’s] number of voting sites from 180 to just five” for the April 7 Election, which forced in-person voters to wait in “long lines . . . for hours to cast their ballots.” Mary Spicuzza & Alison Dirr, Milwaukee J. Sentinel, *Why Did Milwaukee Have Just 5 Polling Places? Aldermen Want Answers* (Apr. 10, 2020);<sup>17</sup> see Wolfe Memo at 8; Wis. Elections Comm’n, *Special Teleconference Meeting* (noting “[d]iscussion of Milwaukee . . . Polling Place Consolidation” on agenda).<sup>18</sup> These officials failed to “open more voting locations once [they] learned Wisconsin National Guard members would be available to help staff the polls,” and even reduced their initial request for National Guard support from 500 members to 250 members. Spicuzza & Dirr, *supra*; see Briana Reilly, *Madison Has 66 Polling Sites On Election Day, Milwaukee Has Five. What’s The Deal?*,

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<sup>16</sup> Available at <https://www.jsonline.com/restricted/?return=https%3A%2F%2Fwww.jsonline.com%2Fstory%2Fnews%2F2020%2F04%2F29%2Fcoronavirus-wisconsin-no-bump-election-but-concerns-remain%2F3039357001%2F>.

<sup>17</sup> Available at <https://www.jsonline.com/story/news/politics/elections/2020/04/10/coronavirus-milwaukee-aldermen-want-answers-polling-places-primary-election/5127577002/>

<sup>18</sup> Available at <https://elections.wi.gov/node/6857>.



Capitol Times (Apr. 7, 2020).<sup>19</sup> Other major metropolitan areas, like Madison, acted responsibly and did not experience these difficulties. *See* Reilly, *supra*; *compare* Wis. Elections Comm’n, *Special Teleconference Meeting, supra*; Wolf Memo at 8. Madison maintained “66 of [the city’s] normal 92 polling sites,” such that “few, if any, voters [were] spotted waiting outside polling places across [the] city.” Reilly, *supra*; *see* Spicuzza & Dirr, *supra* (“Madison had many times the number of polling sites [that] Milwaukee did.”); City of Madison, *CORRECTED Polling Place Listing for April 7* (listing “all polling places for the April 7” Election in light of COVID-19).<sup>20</sup>

### C. Post-April 7 Developments

Wisconsin has several other elections scheduled for 2020, including the August 11, 2020 Partisan Primary, *see* Wis. Elections Comm’n, *2020 Partisan Primary*,<sup>21</sup> and the November 3, 2020 General and Presidential Election, *see* Wis. Elections Comm’n, *2020 General Election*.<sup>22</sup> Whether, or how, Wisconsin may adjust its election administration in response to COVID-19 for the elections occurring in August and thereafter cannot be known at this time.

The Federal Government has now issued guidelines for “opening up America again,” as the threat of COVID-19 lessens. *See* The White House, The Centers for

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<sup>19</sup> Available at [https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article\\_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html#tracking-source=home-top-story-1](https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html#tracking-source=home-top-story-1).

<sup>20</sup> Available at <https://www.cityofmadison.com/news/corrected-polling-place-listing-for-april-7>.

<sup>21</sup> Available at <https://elections.wi.gov/node/5799>.

<sup>22</sup> Available at <https://elections.wi.gov/node/5800>.

Disease Control and Prevention (“CDC”), & The Food and Drug Administration (“FDA”), *Testing Overview: Opening Up America Again* (Apr. 27, 2020);<sup>23</sup> The White House, CDC, & FDA, *Testing Blueprint: Opening Up America Again* (Apr. 27 2020);<sup>24</sup> *see also* Statement From The [White House] Press Secretary (Apr. 27, 2020).<sup>25</sup> These guidelines serve as a “[b]lueprint” for States to “reopen their economies and get people back to work, while protecting the health and safety of the American people.” The White House, CDC, & FDA, *Testing Blueprint* at 2, *supra*.

Plaintiff Democratic National Committee has similarly made plans to resume public events as early as the week of August 17, recently announcing that it will hold the extremely large Democratic National Convention “in-person . . . in Milwaukee,” in anticipation of the November 3 Presidential Election. *See* Bill Glauber, *Tom Perez: Democrats Still Plan In-Person Convention In Milwaukee Week Of Aug. 17*, Milwaukee J. Sentinel (May 6, 2020).<sup>26</sup> Plaintiff Democratic National Committee intends for this to be “a robust, in-person” national convention that will be held in a “safe” manner, despite “the fallout from the coronavirus pandemic.” *Id.*

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<sup>23</sup> Available at <https://www.whitehouse.gov/wp-content/uploads/2020/04/Testing-Overview-Final.pdf>.

<sup>24</sup> Available at <https://www.whitehouse.gov/wp-content/uploads/2020/04/Testing-Blueprint.pdf>.

<sup>25</sup> Available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-126/>.

<sup>26</sup> Available at <https://www.jsonline.com/story/news/politics/elections/2020/05/06/dnc-milwaukee-tom-perez-says-person-convention-still-plan/5178866002/>.

For Wisconsin's part, the Governor's original "Safer at Home" Order, issued on March 24, 2020, expired on April 24, 2020. *See* Emergency Order #12. The Governor's appointee has sought to renew that Order, with only minor modifications, but only until May 26, 2020, *see* Emergency Order #28, Safer At Home Order (Apr. 16, 2020) ("Emergency Order #28"),<sup>27</sup> and the Legislature is challenging the validity of that extension before the Wisconsin Supreme Court, *Wis. Legislature v. Palm*, No. 2020AP765-OA (Wis. *argued* May 5, 2020).

In light of this changing landscape, the Commission has already begun to investigate additional steps it may choose to take in order to ensure the State's readiness for Wisconsin's upcoming 2020 elections, based on the State's experience with the April 7 Election. *See generally* Wolfe Memo at 1. The Commission's proposals relate to providing better sanitation supplies and personal protective equipment for polling locations for upcoming elections, *id.*; enhancing the WisVote Database, *id.* at 3, and the MyVote Website, *id.* at 4; funding the purchases of envelopes and postage for absentee ballots, *id.* at 5; ensuring adequate levels of poll workers for future elections, *id.* at 5–6; issuing guidance and communications for clerks, *id.* at 6–7; studying polling-place consolidations, *id.* at 7–8; studying how better to use the National Guard and other groups as "last minute" poll workers, *id.* at 8–9; building an intelligent-barcode system into the absentee-ballot system, *id.* at 10; and issuing guidance on election-results-reporting systems, *id.*

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<sup>27</sup> Available at <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>.

#### D. Litigation History

In a series of lawsuits filed predominantly against the Commission and its members—both in this Court and elsewhere—multiple plaintiffs challenged both Wisconsin’s plan to hold its April 7 Election, as state law required, and the application of various other election laws during that election. *See* Dkt. 86 (three consolidated cases); *see also Taylor v. Milwaukee Election Comm’n*, No. 20-CV-545-PP, 2020 WL 1695454 (E.D. Wis. Apr. 6, 2020); *City of Green Bay v. Bostelmann*, No. 20-C-479, 2020 WL 1492975 (E.D. Wis. Mar. 27, 2020); *Edwards v. Vos*, No. 3:20-cv-340-wmc (W.D. Wis. *amended compl. filed* May 5, 2020) (“*Edwards*”). These plaintiffs generally alleged that holding the election on April 7 and the application of certain laws during that election impermissibly burdened their constitutional right to vote. *See* Dkt. 170 at 24–25; *Taylor*, 2020 WL 1695454, at \*1; *Green Bay*, 2020 WL 1492975 at \*3; *see also Edwards* Dkt. 5 ¶¶ 90–113 (amended complaint).

In the present case, this Court denied the requests to “delay the April 7, 2020 election,” Dkt. 170 at 28, 36, and it denied any relief as to the photo ID law, Dkt. 170 at 49. This Court also denied requests to extend by-mail registration and associated proof-of-residency requirements as moot. Dkt. 170 at 49–50. The Court did, however, grant preliminary relief that “extend[ed] the deadline by which an individual can register to vote electronically to March 30, 2020”; “extend[ed] the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020”; “extend[ed] the deadline for receipt of absentee ballot requests . . . to 5:00 p.m. on April 3, 2020”; and “enjoin[ed] the enforcement of Wis. Stat. § 6.87(2),” which required absentee voters to obtain a

witness's signature in order for their absentee ballot to be counted. Dkt. 170 at 4–5; *see also* Dkts. 179–180 (amending and clarifying preliminary injunction). Other courts rejected plaintiffs' election-law challenges across the board. *See Taylor*, 2020 WL 1695454, at \*9; *Green Bay*, 2020 WL 1492975 at \*3.

Appellate courts stayed several of this Court's changes to Wisconsin laws. The Seventh Circuit issued a stay of the portion of this Court's preliminary relief that "enjoin[ed] the enforcement of Wis. Stat. § 6.87(2)," which required absentee voters to obtain a witness's signature for their absentee ballot to be counted. Dkt. 189 at 4 (Seventh Circuit's stay order, citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)). The Supreme Court thereafter stayed the preliminary relief ordered by this Court in *DNC* "to the extent it require[d] the State to count absentee ballots postmarked [or hand delivered] after" Election Day. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

In *Edwards*, currently pending before this Court, the putative-class plaintiffs claim that Wisconsin's holding of the April 7 Election violated their constitutional right to vote and their rights under the Americans with Disabilities Act. *Edwards*, Dkt. 5 ¶¶ 90–132 (amended complaint). In particular, the *Edwards* plaintiffs allege a violation of (1) their First and Fourteenth Amendment right to vote, claiming that "refusal to postpone the election [due to COVID-19] completely deprived Plaintiffs" of this right, *id.* ¶ 109, and (2) Title II of the Americans with Disabilities Act ("ADA"), *id.* ¶ 114–32, claiming that the defendants violated the ADA "[b]y insisting on

allowing the Spring Election to proceed without consideration of that decision’s impact on individuals with disabilities,” *id.* ¶ 120.

Following the Legislature’s Motion To Dismiss Plaintiffs’ Amended Complaint in the case here, *see* Dkt. 197, Plaintiffs sought leave to amend their Complaint a second time, specifying that their attempts to broadly transform Wisconsin’s election system should extend “until the COVID-19 crisis is over,” Dkt. 198-1 at 39, “up to and including the November 3, 2020 General and Presidential Election,” Dkt. 198 at 6. Plaintiffs’ proposed Second Amended Complaint reiterates their challenges to Wisconsin’s “statutory requirements for registering to vote and absentee voting”—specifically the absentee-ballot-acceptance deadline, Wis. Stat. § 6.87, the absentee-ballot witness-signature requirement, Wis. Stat. § 6.87(2), the photo ID requirement for absentee-ballot applications, Wis. Stat. § 6.86, the proof-of-residency requirement for electronic and by-mail registration, Wis. Stat. § 6.34, and the deadlines for by-mail and electronic registration, Wis. Stat. § 6.28(1); Dkt. 198-1 ¶ 7. The proposed Second Amended Complaint also adds a new challenge to Defendants’ alleged “failure to provide sufficient financial, personnel, and other resources to ensure an adequate number of early in-person absentee voting sites and election-day polling places throughout the State to accommodate in-person voters in a safe and secure manner” for the upcoming 2020 elections. Dkt. 198-1 ¶ 7. In all, this new, proposed Complaint reasserts the same three claims that Plaintiffs brought before: an *Anderson/Burdick* right-to-vote claim, Dkt. 198-1 ¶¶ 77–84, a procedural-due-process claim, Dkt. 198-1 ¶¶ 85–90, and an equal-protection claim, Dkt. 198-1 ¶¶ 91–98.

## LEGAL STANDARD

A district court has “broad discretion to deny leave to amend . . . where the amendment would be futile.” *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, 870 F.3d 682, 693 (7th Cir. 2017) (citation omitted); see *Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015); Fed. R. Civ. P. 15(a)(2). Futility is measured by whether the amended complaint would survive a dispositive motion, such as a motion for summary judgment, *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007), or a motion to dismiss, *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

## ARGUMENT

### I. Plaintiffs’ Motion To Amend Is Futile Because Their New Claims Are Unripe

A. “A claim is not ripe for adjudication if 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). In other words, “[c]ases are unripe 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) (citation omitted). Dismissing a claim for lack of ripeness keeps courts from “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), allows the courts to steer clear from making any “unnecessary decision[s] of constitutional issues,” *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974), and enables the courts to hold off on the matter until after “further factual

development” sharpens the issue, *see Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733, 736–37 (1998). Lack of ripeness is a defect of subject-matter jurisdiction because “it implicates the possibility of this Court issuing an advisory opinion.” *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008).

The courts employ a two-factor test to determine whether a claim is ripe. First, the court must consider the “fitness of the issues for judicial decision.” *Abbott*, 387 U.S. at 149. On this fitness factor, unripe questions are those that “will [ ] be clarified by further factual development,” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citation omitted), or that are “uncertain or contingent” on future events, *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011), unlike “purely legal” disputes that are ripe for adjudication immediately, *Susan B. Anthony List*, 573 U.S. at 167–68 (citation omitted). Second, the court must consider “the hardship to the parties of withholding court consideration.” *Abbott*, 387 U.S. at 149. On this hardship factor, claims not involving present or immediate violations of the plaintiff’s rights are unripe, as opposed to claims where the plaintiff is already suffering a “substantial hardship,” *Susan B. Anthony List*, 573 U.S. at 167–68 (claim alleging ongoing First Amendment violation satisfied hardship factor); *accord Wis. Right to Life*, 664 F.3d at 148 (same).

B. Each of Plaintiffs’ claims for relief readily fail this two-part test for ripeness.

Plaintiffs have requested that this Court declare Wisconsin’s registration deadlines, Wis. Stat. § 6.28(1), proof-of-residence and photo ID requirements, Wis. Stat. §§ 6.34, 6.86, absentee-ballot-receipt deadline, Wis. Stat. § 6.87, and witness-



signature requirement, Wis. Stat. § 6.87(2), violative of voters' rights under the First and Fourteenth Amendments, Dkt. 198-1 at 38. Plaintiffs also request that this Court: enjoin each of those laws “until the COVID-19 crisis is over”; order Defendants to extend Wisconsin’s deadline for electronic and mail registration “to the Friday before each of the remaining 2020 elections”; and order Defendants “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. These requests for relief are plainly unripe.

Beginning with the fitness factor of the ripeness inquiry, Plaintiffs’ claims for relief for elections scheduled to take place in August 2020, November 2020, and beyond are not fit for judicial decision now because those claims depend on both the health risks that COVID-19 may cause during those elections and the government’s response to those risks. *See, e.g.*, Dkt. 198-1 ¶¶ 79–80, 82–83, 89–90, 97. The future course of the COVID-19 pandemic in Wisconsin, the types of treatments that may or may not be available, as well as the government’s responses, are “uncertain” and “contingent.” *Wis. Right to Life*, 664 F.3d at 148. The Federal Government—under the auspices of the CDC, the FDA, and the White House—issued guidelines for “opening up America again” in the months to come, as the risks posed by COVID-19 lessen. *See* The White House, CDC & FDA, *Guidelines: Opening Up America Again*, *supra*; The White House, CDC, & FDA, *Testing Blueprint*, *supra*. Governor Evers’ original “Safer at Home” Order expired April 24, 2020, and his appointee has sought

to extend that order only to May 26 (and that one-month extension is subject to legal challenge in the Wisconsin Supreme Court, *see Palm*, No. 2020AP765-OA). Further, the Commission has begun taking steps to investigate readiness for future elections and is exploring making numerous changes to on-the-ground election administration, absentee-voting envelopes and postage, its MyVote website, and so on. *See supra* pp. 5–6. Whatever steps the Commission takes will be shaped by these investigations, as well as the developments in the COVID-19 situation. Those changes, in turn, will impact the merits—if any—of Plaintiffs’ claims.

Plaintiffs now speculate that “it is highly likely that thousands of absentee ballots will arrive after the Election Day Receipt Deadline” in “the upcoming 2020 elections,” Dkt. 198-1 ¶¶ 47–48, necessitating an extension of the deadlines for receipt of absentee ballots in August and November, Dkt. 198-1 at 38–39. To support their conjecture, Plaintiffs assert that the level of funding for the U.S. Postal Service will be deficient, Dkt. 198-1 ¶¶ 42, 51, and that the Commission has “[n]o plans to hire more staff” and lacks an additional “budget for heightened ‘postage and envelope costs’ for absentee ballots,” Dkt. 198-1 ¶ 51. These claims are unripe, baseless conjecture and are, in some instances, contrary to the Commission’s own publicly stated plans for future elections. *See Wolfe Memo* at 5–6.

Plaintiffs’ challenges to the witness-signature requirement, Wis. Stat. § 6.87(2), the photo ID requirement, Wis. Stat. §§ 6.86, 6.87, and the proof-of-residency requirement, Wis. Stat. § 6.34, speculate on both the state of the COVID-19 pandemic and the election-administration landscape months into the future.

Plaintiffs claim that “many voters . . . will not have a witness to attest to their absentee ballots” or will not want to leave their homes to copy their photo IDs or various proof-of-residency documents due to “the requirements of the Safer-at-Home Order and the health risks of venturing out to find a witness,” Dkt. 198-1 ¶ 54, or to make copies, *see* Dkt. 198-1 ¶¶ 61, 67. But, even ignoring that the Safer at Home Order has never precluded citizens from engaging in the core democratic processes at issue here, the Governor’s appointee’s renewal of that temporary order extends only until May 26, 2020, *see* Emergency Order #28 at 21, well before the August and September elections, and this renewal is under legal challenge before the Wisconsin Supreme Court, *Palm*, No. 2020AP765-OA. Plaintiffs’ guess that “many workplaces, public libraries, and copy shops [will] remain closed,” Dkt. 198-1 ¶ 61, or be “unsafe to visit,” Dkt. 198-1 ¶ 67, come election time is conjecture and ignores the widespread efforts to “reopen [the States] economies and get people back to work, while protecting the health and safety of the American people,” The White House, CDC, & FDA, *Testing Blueprint* at 2, *supra*.

Plaintiffs’ challenge to the mail-in and electronic-registration deadlines is also unripe. *See* Dkt. 198-1 ¶¶ 69–76. Plaintiffs rely almost entirely on this Court’s recognition of “the excruciating dilemma” faced by voters in the April 7 Election who had missed the March 18 deadline to register and had to choose between “ventur[ing] into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote.” Dkt. 37 at 11; *see* Dkt. 198-1 ¶ 72 (quoting Dkt. 37 at 11). The scope of any “dilemma” in August and November is entirely speculative,

based upon contingent future events, such as the course of the pandemic, the development of medical advances, and the nature of the government's response.

Plaintiffs' amorphous request for the Court to order Defendants to "exercise their statutory authority and responsibility . . . 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, is similarly unripe. As noted above, *supra* pp. 5–6, the Commission is studying all available means to provide and administer safe elections in August and November, including by providing additional sanitation supplies and personal protective equipment at polling sites, improving processes for by-mail voting and registration, improving the public-facing website to account for increased interest in absentee voting, and much more, *see* Wolfe Memo at 1–10.

Moving to the hardship factor, Plaintiffs would suffer no hardship if the Court properly declined to adjudicate their unripe claims for relief for the August and November 2020 elections, and beyond, in this case. The right that Plaintiffs seek to vindicate in this lawsuit with respect to those elections is the right of Wisconsin voters to vote in those elections. *See* Dkt. 198-1 ¶ 9 ("[P]laintiffs file this Second Amended Complaint to ensure that Wisconsin voters . . . are able to fully exercise their right to vote in the midst of this unprecedented crisis."). As explained both in the Background section and below, voters in Wisconsin have ample avenues to vote, including under Wisconsin's generous absentee-voting regime.

## II. Plaintiffs' Motion To Amend Is Futile Because Their Claims Fail As A Matter Of Law

### A. Plaintiffs' *Anderson/Burdick* Claim Fails As A Matter Of Law

1. A party bringing an *Anderson/Burdick* claim, challenging election laws under the First and Fourteenth Amendments, *see* Dkt. 198-1 ¶¶ 77–84; *Burdick*, 504 U.S. 428; *Anderson*, 460 U.S. 780, must satisfy a heavy burden in a two-part inquiry.

At the first step of the *Anderson/Burdick* test, the Court examines the burden caused by an election regulation, considering the restriction that the law imposes “as part of [the State’s] electoral scheme” as a whole. *Burdick*, 504 U.S. at 441. A law does not create a substantial burden on the right to vote when it does not “represent a significant increase over the usual burdens of voting.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (controlling plurality of Stevens, J.) (“[T]he inconvenience of making a trip to the [D]MV, gathering the required documents and posing for a photograph surely do not qualify as a substantial burden on the right to vote[.]”); *accord Frank I*, 768 F.3d at 748. “[I]t is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting[.]” *Griffin*, 385 F.3d at 1130. Nor does the Constitution require “unlimited absentee voting.” *Id.* at 1130–32.

At the second step of the *Anderson/Burdick* inquiry, the court weighs any burden from the election regulation against the State’s interests, including its sovereign interests in regulating elections. *See Stone v. Bd. of Election Comm’rs for City of Chi.*, 750 F.3d 678, 681 (7th Cir. 2013). A State’s justification is generally treated as a “legislative fact” that must be accepted if reasonable. *Frank I*, 768 F.3d

at 750. “If the burden on plaintiffs’ constitutional rights is ‘severe,’ a state’s regulation must be narrowly drawn to advance a compelling state interest. If the burden is merely ‘reasonable’ and ‘nondiscriminatory,’ by contrast, the government’s legitimate regulatory interests will generally carry the day.” *Stone*, 750 F.3d at 681 (citing *Burdick*, 504 U.S. at 434).

Finally, and critically important here, a finding that an election regulation burdens some voters “[can]not prevent the state from applying the law generally.” *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (“*Frank II*”). A court examining a facial challenge to an election law must “consider only the statute’s broad application to all [of the State’s] voters.” *Crawford*, 553 U.S. at 202–03 (controlling plurality of Stevens, J.). A holding that certain voters cannot satisfy the regulation with “reasonable effort” cannot support facial relief. *See Frank II*, 819 F.3d at 386.

2. Plaintiffs’ *Anderson/Burdick* claim is a facial challenge against several Wisconsin election laws and practices, specifically: (a) the mail, electronic, and in-person registration deadlines, Wis. Stat. § 6.28(1), and the absentee-ballot election-day-receipt deadlines, Wis. Stat. § 6.87; (b) the proof-of-residence, Wis. Stat. § 6.34, photo ID, Wis. Stat. § 6.86, and witness-signature requirements, Wis. Stat. § 6.87(2); and (c) the alleged “failure” of Defendants “to ensure that all citizens have safe and sufficient opportunities to register and vote in person,” Dkt. 198-1 at 38–39, ¶¶ 81–83. These claims fail, as a matter of law, under the *Anderson/Burdick* test.

*a. Mail, electronic, and in-person registration deadlines, and absentee-ballot election-day-receipt deadlines.* In terms of the registration deadlines, Plaintiffs’

interests are insubstantial now, post-April 7 Election, since all voters wishing to register can know of the relevant deadlines *well* in advance of the upcoming 2020 elections. “Registering to vote is easy in Wisconsin,” *Frank I*, 768 F.3d at 758, and Wisconsin law provides generous deadlines for voter registration. “Registrations made by mail” and “[e]lectronic registration . . . for an election” must be submitted by “the 3rd Wednesday preceding the election,” Wis. Stat. § 6.28(1), which is July 22 for the August 11 Partisan Primary and October 14 for the November 3 General Election. Voters may also register in person at the clerk’s office until the close of business on the Friday before an election (August 7 and October 30), Wis. Stat. § 6.29, or at the polls on Election Day itself, Wis. Stat. § 6.55(2). Given that voters have many months to register for the remaining 2020 elections, Plaintiffs have failed to allege plausibly that any asserted interest in extending these deadlines *now* has any legal weight.

For similar reasons, Plaintiffs have alleged no meaningful burden resulting from Wisconsin’s absentee-ballot-receipt deadlines for the August and November elections (and beyond). Voters may request absentee ballots for any upcoming 2020 Election *immediately*, and need only submit requests by “the 5th day immediately preceding the election” if by mail, fax, or online (August 6 or October 29), or by “the Sunday preceding the election” if in person (August 9 or November 1), Wis. Stat. § 6.86(1)(ac), (b); Wis. Elections Comm’n, *I Want To Vote Absentee*, *supra*. Any voter even potentially concerned about submitting an absentee-ballot application by these deadlines can simply take action *today*, which is no meaningful burden. Plaintiffs’ *ipse dixit* about what they subjectively believe will “likely” happen if voters are

required to comply with these neutral, months-from-now deadlines, *see* Dkt. 198-1 ¶¶ 8, 42–44, 48, 52, 63, is entirely “speculative,” and thus does not “raise a right to relief,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs’ argument that “the Supreme Court relied on this [Court’s absentee-ballot-receipt] extension” when granting the Legislature’s stay application and thereby (somehow) approved of such a suspension in future elections is deeply misleading. Dkt. 198 at 3; Dkt. 198-1 ¶¶ 4, 50. In rejecting all of Plaintiffs’ arguments before it, the Supreme Court addressed the “sole,” “narrow, technical question” of whether, in light of this Court’s extension, “absentee ballots now must be mailed and postmarked by election day.” *Republican Nat’l Comm.*, 140 S. Ct. at 1206. The Court did not consider the merits of the absentee-ballot-receipt extension itself *even as to the April 7 Election*, let alone as applied to future elections in different public-health contexts. *See id.* at 1206–08. The Court expressly 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 State’s interests in the enforcement of its election-law deadlines are substantial, as a matter of law. The “State indisputably has a compelling interest in preserving the integrity of its election process,” *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and in the “orderly administration” of its elections, *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.). Clear, consistent deadlines like registration and absentee-ballot-receipt deadlines are



central to those interests, *see id.*; *Eu*, 489 U.S. at 21, which is why every State has such deadlines for all of these aspects of election administration.

Finally, Plaintiffs' limited allegations cannot support relief for any voters, let alone the broad, facial remedy that Plaintiffs seek. *See Frank II*, 819 F.3d at 386. If there are particular voters who, despite the lengthy time until the next elections, suffer more-than-usual burdens from these statutory deadlines, those hypothetical voters could pursue as-applied relief under the *Frank II* framework, including by putting forward the required evidentiary showing. *Id.* Notably, Plaintiffs have not identified any such voters in their proposed Second Amended Complaint.

*b. Proof-of-residence, photo ID, and witness-signature requirements.* Plaintiffs have made no plausible allegations that any voter cannot comply with these election-integrity measures for the upcoming 2020 elections after reasonable effort, especially in light of the many months until those elections arrive. This Court and the Seventh Circuit each concluded that voters could comply with all of these requirements with minimal burden at a date much closer to Election Day and with much more apparent difficulties from COVID-19. Dkt. 37 at 15–17; Dkt. 170 at 47–49; Dkt. 189 (Seventh Circuit overturning this Court's preliminary injunction of the witness-signature requirement). Specifically, for the proof-of-residence requirement, a voter need only present one of the many easily obtainable qualifying documents—such as a driver's license. MyVote Wisconsin, *Proof of Residence*, *supra*. This requirement may be satisfied by registering online and submitting a valid driver's license or state ID number, which “eliminat[es] the need to venture outside.” *See* Dkt. 37 at 15 & n.10;

MyVote Wisconsin, *Proof of Residence, supra* (explaining that an electronic copy of any qualifying document may also be provided if registering in person). Likewise with the photo ID requirement—which is satisfied with any of “several forms” of ID that many voters “may already have,” MyVote Wisconsin, *Photo ID Required, supra*—a voter may either submit an electronic copy if requesting an absentee ballot online, Dkt. 37 at 15 & n.10; Wis. Elections Comm’n, *I Want To Vote Absentee, supra*, or simply present it if voting in person, *see* Wis. Stat. § 6.79(2)(a); MyVote Wisconsin, *Photo ID Required, supra*. And for the witness-signature requirement, voters may utilize any of the “at least five concrete alternative suggestions” from the Commission to safely obtain a witness signature “in light of the extraordinary challenges presented by the COVID-19 crisis.” Dkt. 189 at 4 (citing Wis. Elections Comm’n, *Absentee Witness Signature Requirement Guidance COVID-19*<sup>28</sup>). This includes having a witness observe the voter “through a window” or “via video chat like Skype or FaceTime,” and then the voter leaving the ballot “on the door step” for the witness to sign after socially distancing. Wis. Elections Comm’n, *Absentee Witness Signature Requirement Guidance COVID-19, supra*. Whatever credibility Plaintiffs’ arguments had in the immediate runup to the April 7 Election—and they had none, given the facility with which voters may comply with these laws—they certainly lack plausibility now months before the next election.

The State has a compelling interest in the continued enforcement of these election-integrity measures. The State’s proof-of-residency requirement, Wis. Stat.

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<sup>28</sup> Available at <https://elections.wi.gov/index.php/node/6790>.

§ 6.34(2), furthers its compelling interest in “orderly administration and accurate recordkeeping . . . for carefully identifying all voters [who may] participat[e] in the election process,” thus legitimately ensuring that “only the votes of eligible voters” are tallied, *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.); *see also* Dkt. 37 at 16; Dkt. 189 at 3. The photo ID law likewise “carefully identif[ies] all voters [who may] participat[e] in the election process,” *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.); *accord Frank I*, 768 F.3d at 751; Dkt. 37 at 15–17, so as to promote the compelling interests in election integrity and public confidence in elections, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); Dkt. 189 at 3. And the absentee-ballot witness-signature requirement also advances these compelling election-integrity interests. *See Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.). This election-integrity measure limits the fraud that is especially “facilitated by absentee voting,” *Griffin*, 385 F.3d at 1130–31, since “voting by mail makes vote fraud much easier to commit,” *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004); *see Veasey v. Abbott*, 830 F.3d 216, 255–56 (5th Cir. 2016) (en banc) (recognizing examples of “people who harvest mail-in ballots from the elderly”); *Crawford*, 553 U.S. at 225 (Souter, J., dissenting) (noting that “absentee-ballot fraud . . . is a documented problem”). Indeed, the State’s compelling interest in this witness-signature requirement is a key reason why the Seventh Circuit overturned this Court’s preliminary injunction of this law for the April 7 Election. Dkt. 189 at 3.

Plaintiffs gets matters backwards when they argue that Wisconsin's exemption of "indefinitely confined voters" from the photo ID requirement eliminates any "sound basis" for the witness-signature requirement. Dkt. 198-1 ¶ 57. The balancing of "competing values" as the Legislature pursues "a particular objective is the very essence of legislative choice"—and striking a balance between two legitimate goals cannot undermine the rationality of either, since "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). So, Wisconsin's exemption of one class of voters from a particular election-integrity measure does not undermine the purpose of a different measure, as applied to any other class of voter. That latter measure would still obviously further Wisconsin's interests in combating voter fraud as to those voters, *see supra* pp. 27–29, even if the State chooses not to enforce the photo ID anti-voter-fraud measure as to indefinitely confined voters, given their unique hardships.

*c. Alleged failure to ensure safe and sufficient opportunities to register and vote in person/request for order to "develop and implement plans to coordinate available state, local and private resources."* Plaintiffs' final "challenge"/"[a]dditional requested relief" likewise fails to sufficiently allege a viable *Anderson/Burdick* claim. Dkt. 198 at 7 (emphasis removed); Dkt. 198-1 at 38–39. Plaintiffs' only constitutional interest here is the interest of voters casting their ballots with reasonable efforts, *Crawford*, 553 U.S. at 198 (controlling plurality of Stevens, J.); *accord Frank I*, 768 F.3d at 748, and their final, poorly defined "challenge" makes no plausible allegations that their requested judicial micromanaging is needed to protect that interest. As

explained above, registering to vote in Wisconsin “is easy,” *Frank I*, 768 F.3d at 748, given the numerous registration methods available, *supra* pp. 3–4. Further, as described above and below, the Commission has already begun substantial efforts to improve upon this success for upcoming elections, taking full advantage of the many months before the next 2020 election. *Supra* Part I; *infra* Part III. Thus, Plaintiffs have no plausible need for an order from this Court directing the “implement[ation] [of] plans to coordinate” election-related resources. Dkt. 198-1 at 39. Further, to the extent Plaintiffs have some unstated basis to believe that certain local officials will repeat their irresponsible actions on April 7 that caused long lines, they should bring a lawsuit against those officials. *See Frank I*, 768 F.3d at 755 (“[U]nits of government are responsible for *their own* discrimination but not for rectifying the effects of other persons’ discrimination.” (emphasis added)).

**B. Plaintiffs’ Due-Process Claim Fails As A Matter Of Law**

Plaintiffs’ procedural-due-process claim, Dkt. 198-1 ¶¶ 85–90, invokes the procedural-due-process standard from *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that standard, Plaintiffs must first establish a protected liberty/property interest and then prove that the State’s processes to protect that interest are inadequate given: (1) Plaintiffs’ “private interest” at stake; (2) “the risk of an erroneous deprivation,” which considers the current process afforded by the State, together with the “probable value” of any additional processes; and (3) the “Government’s interest.” *Id.* at 335.

Here, Plaintiffs’ assertion of their procedural-due-process claim fails for two related, but independently sufficient, reasons.

First, Plaintiffs’ procedural-due-process claim is wholly duplicative of their *Anderson/Burdick* right-to-vote claim under the First and Fourteenth Amendments, since that claim relies on a much more “specific guarantee[ ]” than the guarantees of the Due Process Clause. *Albright v. Oliver*, 510 U.S. 266, 273 (1994). In other words, the *Anderson/Burdick* right-to-vote analysis is “the guide for analyzing these [voting-rights] claims,” not “the more generalized notion” of procedural due process. *Id.*; compare, e.g., *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) (equal-protection and Eighth Amendment claims were duplicative of a more-specific Free Exercise Clause claim). Since Plaintiffs’ *Anderson/Burdick* claim fails as a matter of law, see *supra* Part II.A., their alleged procedural-due-process claim fails as well.

Second, even if the procedural-due-process claim were not wholly duplicative, the Court must still “reject [it] . . . for the same reasons” as the *Anderson/Burdick* claim. *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008) (applying *Burdick*, 504 U.S. at 434, and *Crawford*, 553 U.S. at 189–90 (controlling plurality of Stevens, J.), to reject procedural-due-process claim). Interests in registering to vote and casting a ballot are protected under existing Wisconsin election law, since voters need only expend reasonable effort to exercise these rights. See *supra* pp. 3–6; *Mathews*, 424 U.S. at 335 (“private interest”). Under these existing laws, there is minimal risk of an “erroneous deprivation,” *Mathews*, 424 U.S. at 335, since voters have many months to register, request absentee ballots, or plan to vote in person,

*supra* pp. 24–25. The “probable value” of any additional processes—such as an extension of deadlines, Dkt. 198-1 at 38–39—would be negligible and, in any event, substantially outweighed by the State’s compelling interests in “preserving the integrity of its election process,” *Eu*, 489 U.S. at 231, and in the “orderly administration” of its elections, *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.); *Mathews*, 424 U.S. at 335 (“Government’s interest”). Therefore, after applying the *Mathews* balancing test, Plaintiffs’ procedural-due-process claim fails.

### C. Plaintiffs’ Equal-Protection Claim Fails As A Matter Of Law

Plaintiffs reassert an equal-protection claim premised on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), Dkt. 198-1 ¶¶ 91–98, but this claim similarly fails.

“Even were *Bush* applicable to more than the one election to which the [Supreme] Court appears to have limited it,” *Lemons*, 538 F.3d at 1106, this claim would require movants to allege plausibly that specific election “procedures” result in “arbitrary and disparate treatment of the members of [the State’s] electorate.” *Bush*, 531 U.S. at 105. Plaintiffs have not pointed to any election procedures relevant to the forthcoming 2020 elections that are insufficiently uniform to violate the guarantee of equal treatment. *Id.* at 106–07. Plaintiffs claim that the “postmarked by election day” requirement resulted in “many absentee ballots [being] returned to local election officials by the Postal Service with either no postmarks at all, postmarks without dates, or illegible postmarks,” causing “local election officials throughout Wisconsin” to decide how these ballots should be treated “without any uniform standards ensuring consistent treatment throughout the State.” Dkt. 198-1 at ¶ 95.

But this postmark requirement was a *remedy* ordered and fashioned as a result of the first round of this litigation, Dkt. 170 at 5; compare *Republican Nat'l Comm.*, 140 S. Ct. at 1208, not a normal or expected *procedure* of Wisconsin's election system in any future election, *Bush*, 531 U.S. at 105. Given Plaintiffs' desire for prospective relief, Dkt. 198-1 at 38–39, and the one-off nature of that remedy, Plaintiffs' claims on this point are wholly baseless and fail as a matter of law.

Plaintiffs' equal-protection argument about the “indefinitely confined” provision of Wisconsin election law, Dkt. 198-1 ¶ 96, is similarly meritless. Plaintiffs claim that the Wisconsin Supreme Court's determination that the “[d]esignation of indefinitely confined status is for each individual voter to make based upon their current circumstances,” and that this determination “does not require permanent or total inability to travel outside of the residence,” will somehow lead to arbitrary and disparate treatment of voters. Dkt. 198-1 ¶ 96 (quoting Order, *Jefferson v. Dane Cty.*, 2020AP557-OA, at \*2 (Wis. Mar. 31, 2020) (emphasis omitted)). But this is much different than what the Supreme Court addressed in *Bush*, where the Court was concerned with the unequal treatment of ballots, “piece[s] of cardboard or paper,” because the “factfinder” was tasked with finding a person's intent by “confront[ing] a thing, not a person.” 531 U.S. at 106. Wisconsin law treats each voter equally by allowing each person to make their own good-faith determination if they are “indefinitely confined . . . based upon their current circumstances.” Order, *Jefferson*, No. 2020AP557-OA, at \*2. That is itself a “uniform rule[ ]” to be applied to all voters, “ensur[ing] uniform treatment.” *Bush*, 531 U.S. at 106.



Finally, this Court lacks jurisdiction over the remaining allegations in this equal-protection claim, even if Plaintiffs could have asserted it, since they complain only of the actions of independent third parties (“local elections officials” or “authorities” in “cities and counties”) and not the actions of the Commissioners or others that they have named as Defendants. Dkt. 198-1 ¶¶ 94, 95; *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (plaintiffs lack standing where they 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.

### **III. Plaintiffs’ Motion To Amend Is Futile Because Their Claims Should Be Dismissed Under *Burford* Abstention**

Under the Supreme Court’s *Burford* abstention doctrine, federal courts should dismiss a case, *see Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *E & E Hauling v. Forest Preserve District*, 821 F.2d 433 (7th Cir. 1987), whenever “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). “In other words, federal courts may abstain [under *Burford*] when principles of federalism warrant deference to a state’s regulatory regime.” *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011). State election law qualifies as one such “regulatory regime” under *Burford*, *id.*, given that election laws involve the most “substantial” of “public concern[s],” *NOPSI*, 491 U.S. at 361—the people’s right to govern themselves. A comprehensive system of state election laws furthers “the State’s important regulatory interests,” *Burdick*, 504

U.S. at 434 (quoting *Anderson*, 460 U.S. at 788), and is necessary to ensure “fair and honest” elections, rather than “chaos,” *Anderson*, 460 U.S. at 788. All of this is why, as this Court already recognized, “the administration of elections during a public health emergency is a matter of substantial public concern.” Dkt. 37, at 17 n.12.

This Court should abstain from adjudicating Plaintiffs’ claims under *Burford*, due to the extreme disruption that such intervention would cause to Wisconsin’s important interests in comprehensive election administration. *NOPSI*, 491 U.S. at 361; *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788. Plaintiffs have asked this Court not only to enjoin several laws that Wisconsin maintains 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). Plaintiffs’ extraordinary request would, if successful, seriously “disrupt[]” Wisconsin’s efforts to establish a “coherent” election-administration policy. *NOPSI*, 491 U.S. at 361. The State already ran a successful statewide election on April 7, processing record-breaking numbers of absentee ballots and managing a turnout much higher than comparable Spring Elections. *See supra* pp. 6–10. The Commission is further investigating and assessing all methods for improving election procedures to meet the changing needs of voters who may have concerns in light of the COVID-19 pandemic. *See generally* Wolfe Memo, *supra*.

An order from this Court requiring the State 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—subject to oversight and restrictions set by this Court alone, rather than the State’s own election-administration experts—would not exhibit “a sound respect for the independence of state action,” but rather would cause “needless federal conflict with the state policy,” *NOPSI*, 491 U.S. at 360 (citation omitted). It would insult the “principles of federalism,” *Adkins*, 644 F.3d at 504; cause voter confusion, *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam), during this already uncertain time, *see* Order, *Mays v. Thurston*, No. 4:20-cv-341 (E.D. Ark. Mar. 30, 2020); and critically undermine the State’s ongoing preparations for the upcoming elections in 2020, *Bowes v. Ind. Sec’y of State*, 837 F.3d 813, 821 (7th Cir. 2016).

Plaintiffs’ response on this point is that “the Court already has once rejected the Legislature’s *Burford* abstention arguments in the leadup to the April 7 election.” Dkt. 198 at 4 (citing Dkt. 37 at 17–18 n.12). But the Court’s prior order rejecting the Legislature’s *Burford* argument relied in part on “the narrow relief being fashioned by this court,” a temporary equitable order, Dkt. 37 at 17–18 n.12, whereas Plaintiffs now seek to enjoin nearly every election-integrity measure that Wisconsin has, as well as to install this Court as the primary administrator of Wisconsin’s elections “until the COVID-19 crisis is over.” Dkt. 198-1 at 38–39. This is not the “narrow relief” upon which this Court previously relied. In any event, and with respect, this

Court's principal reason for declining to apply *Burford* abstention before rested on a faulty premise: the claimed unavailability of "any state-court review." Dkt. 37, at 17 n.12. "The [Wisconsin] circuit courts are also 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). Notably, on March 27, a voter and the Republican Party of Wisconsin filed a petition for an original action in the Supreme Court of Wisconsin, asking that tribunal to clarify how one important election law (the photo ID law) should be applied in the circumstances of the COVID-19 pandemic. Order, *Jefferson*, 2020AP557-OA, at \*1–2; Tseytlin Decl. Ex. 8. The Court acted promptly, requiring a response from by 1:00 p.m. the following business day and issuing an opinion and order on March 31. Order, *Jefferson*, 2020AP557-OA, at \*1–2; Tseytlin Decl. Ex. 8. There is nothing stopping Plaintiffs, or any other parties, from similarly bringing any of the constitutional issues or concerns raised here to the Wisconsin Supreme Court. This Court should thus abstain.

#### **IV. The Court Should Stay This Case Until The Seventh Circuit Completes Its Work On Appeal**

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). "[T]he general test for imposing a stay requires the court to balance interests favoring a stay against interests frustrated by the action in light of the court's strict duty to exercise jurisdiction in a timely manner." *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010) (citation omitted); accord *Waterstone Mortg. Corp. v. Offit Kurman, LLC*, No. 17-cv-796-jdp, 2018 WL 993856, at \*1 (W.D. Wis.

Feb. 20, 2018). Use of this power “pending the outcome of litigation in another court between the same parties, involving the same or controlling issues” is a particularly “acceptable means of avoiding unnecessary duplication of judicial machinery.” *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 980 (7th Cir. 2005) (quoting *Aetna State Bank v. Altheimer*, 430 F.2d 750, 755 (7th Cir. 1970)). While “[d]istrict courts . . . have exercised the power to dismiss for failure to state a claim pending appeal,” including pending an appeal challenging the grant or denial of a motion for a preliminary injunction, “it would be advisable for the district court to determine whether the same issue has been presented on appeal, and to defer action when it seems reasonably probable that appellate decision of the same question is imminent.” 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3921.2 (3d ed.).

Pending before the Seventh Circuit is the Legislature’s interlocutory appeal of this Court’s orders granting in part Plaintiffs’ request for an injunction, amending that injunction, and denying the Legislature’s motion to intervene. *See Democratic Nat’l Comm., et al. v. Republican Nat’l Comm., et al.*, Nos. 20-1538, 20-1539, 20-1545, 20-1546 (7th Cir. *appeals filed* Apr. 2–3, 2020). Given these pending appeal, this Court has noted that “there is some question as to the scope of this court’s jurisdiction.” Dkt. 191 (Text Only Order). While the Legislature believes that this Court has jurisdiction over “aspects of the case” not involved in the specific orders on appeal, including retaining the power to dismiss Plaintiffs’ Amended Complaint and deny their motion to amend, *MillerCoors LLC v. Anheuser-Busch Cos.*, 940 F.3d 922,

923 (2019); *accord* Federal Practice and Procedure § 3921.2, the Legislature respectfully submits that “it would be advisable” for this Court to “defer action when it is reasonably probable that appellate decision on the same question is imminent,” Federal Practice and Procedure § 3921.2. During the appeal, the Legislature will argue that this case is moot (to the extent that it seeks relief for the April 7 Election) and unripe (to the extent that it seeks relief for the August and November elections), as well as raising many of the *Anderson/Burdick* arguments discussed above. *See Democratic Nat’l Comm., et al. v. Republican Nat’l Comm., et al.*, Nos. 20-1538, 20-1539, 20-1545, 20-1546 (7th Cir. *filed* May 11, 2020), 20-1538 Dkt. 42, 20-1539 Dkt. 41. The Seventh Circuit’s decision may well resolve many of the core disputes between the parties both on the Legislature’s pending motion to dismiss, and Plaintiffs’ motion to amend, at least as a matter of “law of the case.” Dkt. 191 (Text Only Order).

### CONCLUSION

The Court should deny Plaintiffs’ Motion For Leave To File A Second Amended Complaint.

Dated, May 11, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of May, 2020, a true and accurate copy of the foregoing Brief In Opposition To Plaintiffs' Motion To Amend The Complaint was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

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