

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

Democratic National Committee and
Democratic Party of Wisconsin,
Plaintiffs,

v.

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

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.

**THE WISCONSIN LEGISLATURE'S REPLY BRIEF IN
SUPPORT OF ITS MOTION TO DISMISS THE FIRST
AMENDED COMPLAINT IN *DNC***

INTRODUCTION

This Court now has before it both the Legislature's Motion to Dismiss the First Amended Complaint, Dkt. 197, and the Legislature's Brief In Opposition To Plaintiffs' Motion To Amend The First Amended Complaint, Dkt. 200. These filings explain why this lawsuit must be dismissed. To the extent that Plaintiffs seek relief only for the April 7 Election, as their First Amended Complaint does, their lawsuit is moot, as a matter of law. And to the extent that Plaintiffs seek relief for the August and November elections (as they do in their proposed Second Amended Complaint), their lawsuit is plainly unripe, as a matter of law.

ARGUMENT

I. This Court Should Dismiss The First Amended Complaint As Moot, But To The Extent Plaintiffs Are Correct That This Complaint Sought Relief After April 7, The Court Should Dismiss As Unripe

As the Legislature explained in its Motion to Dismiss, this Court should dismiss Plaintiffs' First Amended Complaint as moot. Dkt. 197 at 2–6. Once an “election ha[s] come and gone by,” challenges to that election often become moot, since a post-election remedy “would have no impact on the parties to th[e] suit or on the results of the [now-past] election.” *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001). Here, the First Amended Complaint’s three claims sought relief only for the April 7 Election, given its repeated references to “the upcoming April 7, 2020 election,” Dkt. 55 ¶ 47; *see* Dkt. 55 ¶ 57; the Governor’s original “Safer-At-Home-Order,” which was set to expire in April, Dkt. 55 ¶¶ 48–50; the “current circumstances” surrounding the election, Dkt. 55 ¶ 56; and government officials’ responses to the COVID-19 pandemic for this election, Dkt. 55 ¶¶ 61–63. Since this election has “come and gone by,” these claims are now moot. *Tobin*, 268 F.3d at 528.

Plaintiffs appear to concede that their claims are moot for the April 7 Election, and they agree that the capable of repetition, yet evading review exception to mootness does not apply. *See* Dkt. 199 at 6; Dkt. 197 at 5–6. Notably, Plaintiffs seek to distinguish the mootness cases upon which the Legislature relies solely on the grounds that plaintiffs there limited their challenges to a completed election, Dkt. 199 at 6–7, which is just the case with the First Amended Complaint here.

Plaintiffs now claim that a few stray references in their First Amended Complaint to post-April 7 relief save their lawsuit from a mootness dismissal. Dkt. 199 at 4–7 (citing Dkt. 55 ¶¶ 7, 44; Dkt. 55 at 19, ¶¶ C–E). These “scattered references” do not “ple[a]d with sufficient clarity and specificity” claims for relief as to future elections. *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (7th Cir. 1997); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is especially so given how separated and anomalous these references are. One is in a parenthetical statement at the Complaint’s beginning, Dkt. 55 ¶ 7, one is within a section entitled “Coronavirus and the April 7, 2020 Election,” Dkt. 55 ¶ 44 (emphasis added), and the last two merely state, in a conclusory manner, “until the COVID-19 crisis is over,” Dkt. 55 at 19, ¶¶ C–E. This is in marked contrast to the numerous and comprehensive references to the April 7 Election throughout the Complaint, including within each claim for relief. *See, e.g.*, Dkt. 55 ¶¶ 47–50, 56–57, 61–63.

To the extent that this Court disagrees with the Legislature’s reading of the First Amended Complaint and concludes that this Complaint does challenge upcoming elections in 2020, the Court should dismiss the Complaint as unripe for much the same reasons articulated in the Legislature’s Brief In Opposition To Plaintiffs’ Motion To Amend The Complaint. Dkt. 200 at 16–21.¹ The Legislature explicitly incorporates those arguments here. COVID-19-based challenges to

¹ Because ripeness is jurisdictional, the Legislature could not have waived this argument as to the First Amended Complaint by failing to raise it in its opening support for its Motion To Dismiss. *See Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008); *Royce v. Michael R. Needle P.C.*, 950 F.3d 939, 950 (7th Cir. 2020).

Wisconsin elections in August and November are unripe, as a matter of law, as they rest upon speculation about the progress of COVID-19 months from now, the status of treatments then, and any changes in election administration that the Wisconsin Elections Commission (“Commission”) may make. *See* Dkt. 200 at 10–12, 18–21.

Developments in just the last week further underscore the constantly evolving COVID-19 and election-administration situation, making lack of ripeness unavoidable. Wisconsin successfully completed its Special Election for the Seventh Congressional District on May 12, with such robust absentee and in-person voting that even Plaintiffs did not argue that any of their requested relief could be justified for that Election. Wis. Elections Comm’n, *7th Congressional District Special Election Today*;² *see* Wis. Elections Comm’n, *More Than 69,000 Absentee Ballots Already Returned for May 12 Special Election* (May 8, 2020);³ *Denius v. Dunlap*, 330 F.3d 919, 926–27 (7th Cir. 2003) (judicial notice of government websites). Indeed, almost every voter who requested an absentee ballot in the May 12 Special Election got one. Wis. Elections Comm’n, *Absentee Ballot Report – May 12, 2020 Special Election for Congressional District 7*.⁴ And, the next day, the Wisconsin Supreme Court invalidated the Governor’s designee’s extension of the “Safer at Home” Order, on state-law grounds. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 3.

² Available at <https://elections.wi.gov/node/6577> (all websites last accessed May 15, 2020).

³ Available at <https://elections.wi.gov/node/6897>.

⁴ Available at <https://elections.wi.gov/node/6904>.

II. This Court Should Dismiss The First Amended Complaint Under *Burford* Abstention

This Court should also dismiss the First Amended Complaint based on *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *see New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (“*NOPSI*”); Dkt. 197 at 1–2. Abstention is warranted because Wisconsin has a comprehensive election-regulation system—which is a matter of substantial public concern, *see NOPSI*, 491 U.S. at 361; Dkt. 37 at 17 n.12—that would be significantly disrupted by a judgment from this Court ordering the sweeping relief that Plaintiffs seek, *see NOPSI*, 491 U.S. at 361.

Plaintiffs argue that this Court’s denial of the Legislature’s *Burford* arguments in its Order granting a TRO should foreclose the *Burford* arguments here. Dkt. 199 at 8; *see* Dkt. 37 at 17 n.12 (TRO Order). But this Court’s TRO Order is not determinative, as the Court entered that Order in the context of a grant of temporary, “narrow relief.” Dkt. 37 at 17–18 n.12; *see* Dkt. 200 at 36. In any event, and with respect, the prior rejection of the *Burford* arguments rested on a legally faulty premise—the claimed unavailability of “any state-court review.” Dkt. 37, at 17 n.12. Yet Wisconsin “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), as evidenced by the Wisconsin Supreme Court’s quick action on an absentee-ballot-related issue in the runup to the April 7 Election. *See* Order,

Jefferson v. Dane Cty., 2020AP557-OA, at *2 (Wis. Mar. 31, 2020); Tseytlin Decl. Ex. 8.⁵

Finally, Plaintiffs argue that *Burford* abstention is categorically inapplicable to election-law cases, Dkt. 199 at 9, but that is incorrect, *see Seider v. Hutchison*, No. 3:06CV215, 2007 WL 320964, at *3 (E.D. Tenn. Jan. 30, 2007) (invoking *Burford* to abstain from ordering a new election because a state election issue was “more effectively addressed through the formulation and implementation of Tennessee state policies versus court interference”), *aff’d in part, rev’d in part and remanded*, 296 F. App’x 517 (6th Cir. 2008) (affirming *Burford* abstention as to non-damages claims). The only Seventh Circuit case that they cite, *Ryan v. State Board of Elections*, 661 F.2d 1130 (7th Cir. 1981), provides no support, as that case “involve[d] no state regulatory issues” or “issues of state law whatsoever,” since it dealt solely with the question of whether a congressional map contained malapportioned districts. *Id.* at 1136. The present case involves myriad questions of state election law and election administration, *see* Dkt. 200 at 3–5, 10–12, all of which relate to the State’s “indisputably . . . compelling interest in preserving the integrity of its election process, *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

⁵ Plaintiffs’ assertion that the state forum must “be special” and have “exclusive jurisdiction over the [state regulatory] matter [at hand]” to trigger *Burford* abstention, Dkt. 199 at 9–10 n.7, relies upon a dated four-factor analysis that Plaintiffs’ own authority concluded has dubious “continuing validity . . . after the Supreme Court’s decisions in *NOPSI* and *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).” *Hammer v. U.S. Dep’t of Health & Human Servs.*, 905 F.3d 517, 532 (7th Cir. 2018).

CONCLUSION

The Court should dismiss Plaintiffs' First Amended Complaint.

Dated: May 18, 2020.

Respectfully Submitted,

/s/ Misha Tseytlin

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2020, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

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