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

| | |
|---|---|
| DEMOCRATIC NATIONAL COMMITTEE, *et al.*,<br>Plaintiffs,<br>v.<br>MARGE BOSTELMANN, *et al.*,<br>Defendants,<br>and<br>REPUBLICAN NATIONAL COMMITTEE, *et al.*,<br>Intervening Defendants. | Civil Action No. 3:20-cv-249-wmc |
| SYLVIA GEAR, *et. al.*,<br>Plaintiffs,<br>v.<br>MARGE BOSTELMANN, *et al.*,<br>Defendants,<br>and<br>REPUBLICAN NATIONAL COMMITTEE, *et al.*,<br>Intervening Defendants. | Civil Action No. 3:20-cv-278-wmc |
| REVEREND GREG LEWIS, *et al.*,<br>Plaintiffs,<br>v.<br>MARGE BOSTELMANN, *et al.*,<br>Defendants,<br>and<br>REPUBLICAN NATIONAL COMMITTEE, *et al.*,<br>Intervening Defendants. | Civil Action No. 3:20-cv-284-wmc |

**REPLY BRIEF IN SUPPORT OF MOTION OF PLAINTIFFS DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN FOR LEAVE TO FILE SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**

**TABLE OF AUTHORITIES**

**CASES** **PAGE(S)**

**TABLE OF AUTHORITIES**

**CASES** **PAGE(S)**

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**



**STATUTES AND OTHER AUTHORITIES**

## INTRODUCTION

The original defendants do not oppose plaintiffs' routine motion for leave to file their Second Amended Complaint (SAC) in this case that was commenced just two months ago. The intervening defendant Wisconsin Legislature, however, has unleashed a 40-page barrage of arguments, innuendo, and accusations that supposedly justify denying leave to amend at this early stage. *See* ECF No. 200 [hereafter "Opp."].[1] It is telling that the Legislature nowhere in those 40 pages quotes the underlying standard that governs here: "The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Instead, the Legislature tells the Court that Wisconsin "ran a successful statewide election on April 7," despite "overwrought claims" to the contrary; argues that "any Election Day difficulties … were the result of irresponsible decisions made by high-ranking local officials"; and complains about "relentless attacks on our State from the national press" over the conduct of that election. Opp. at 1, 9, 35. These assertions are false, but their recitation helps illustrate how far the Legislature strays from arguments that the Court may properly consider at this juncture in the proceedings, when the factual assertions in plaintiffs' proposed amended pleading must be accepted as true. Instead of accepting this blackletter standard, the Legislature spends the majority of its brief setting up a parallel factual universe, which even it seems to recognize may not be properly considered in deciding this motion. *See id.* at 3 n.1 ("explicitly ask[ing] this Court not to rely upon" the majority of the Legislature's recitation of facts "in deciding the present Motion"). The Legislature also gravely mischaracterizes plaintiffs' request for relief, falsely asserting that plaintiffs, through their pending motion for leave to amend, "now seek to enjoin nearly every election-integrity measure that Wisconsin has, as well as to install

[1] The other two intervening defendants, the Republican National Committee and the Republican Party of Wisconsin, have joined in the Legislature's opposition to plaintiffs' motion for leave to amend, without offering any additional arguments of their own. *See* ECF No. 201.

this Court as the primary administrator of Wisconsin's elections 'until the COVID-19 crisis is over.'" *Id.* at 36 (citations omitted).

That is not, of course, even remotely what plaintiffs Democratic National Committee (DNC) and Democratic Party of Wisconsin (DPW) are seeking. As the Legislature acknowledges elsewhere in its brief, the proposed SAC, lodged at ECF No. 198-1, for the most part simply "reiterates the[] challenges" to the same five Wisconsin election-law statutes set forth in the original (ECF No. 1) and amended (ECF No. 55) complaints—*i.e.*, Wis. Stats. §§ 6.28(1), 6.34, 6.86, 6.87, and 6.87(2) [hereafter the "Challenged Provisions"]. Opp. at 15. And the Legislature concedes the SAC "reasserts the same three claims that Plaintiffs brought before"—*i.e.*, an *Anderson-Burdick* claim, a due process claim, and an equal protection claim. *Id.* The only new request is for injunctive relief requiring the defendants to take steps "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." SAC ¶ 7; *see also id.* ¶¶ 9, 83.

The SAC and leave to file it are particularly appropriate here since the parties now have the benefit of lessons learned from the April 7 election and at least partial data about the actual impacts of some of the Challenged Provisions. The new pleading alleges in much more specific detail how these provisions operate to interfere unduly with voting, and it fine-tunes plaintiffs' claims and requested relief to take account of the rulings over the past two months by this Court, the Seventh Circuit, and the Supreme Court. This is not a situation where plaintiffs filed a complaint and belatedly thought of new legal theories they could have included in the original pleading. Instead, the SAC is a direct outgrowth of new facts learned in the Spring Election. And plaintiffs timely moved for leave to amend very soon after the relevant data from that election—including data on the numbers of voters who were disenfranchised—became available.

Why, then, does the Legislature object to this new pleading in its entirety? It claims (at 2-3, 22-34) that plaintiffs fail to allege even a single "plausible" claim, even though this Court already has awarded partial injunctive relief based on several of the same claims in the context of the April 7 election—relief that was upheld in part by the Seventh Circuit and the Supreme Court, and that resulted in over 80,000 Wisconsin voters being able to cast absentee ballots by April 7 and have their ballots counted provided they were received by the Monday following the election.[2] *See Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) ("The right to vote is not just the right to put a ballot in a box but also the right to have one's vote counted."). The Legislature also argues that the entire SAC is either "moot" (to the extent it involves the April election) or not yet "ripe" (to the extent it involves the upcoming August and November elections). Opp. 2, 16-21, 39; *but see Midrad, LLC v. Dane Cty.*, 676 F. Supp. 2d 795, 799 (W.D. Wis. 2009) (Crabb, J.) ("A claim cannot be moot and unripe at the same time because the two doctrines mean opposite things."). And the Legislature claims, as it has several times before, that this Court must dismiss on *Burford* abstention grounds, contending that plaintiffs should be required to take their *federal* "constitutional issues or concerns raised here ***to the Wisconsin Supreme Court***" by way of "a petition for an original action." Opp. at 37 (emphasis added).

As noted above, the Legislature's attempts to rewrite the facts of this case are not properly before this Court. But before turning to a point-by-point refutation of the Legislature's arguments against granting leave to amend, plaintiffs briefly respond to the Legislature's repeated claims that the April 7 election was "successful" and "refut[ed]" the plaintiffs' pre-election "baseless,

[2] The WEC's May 15, 2020 report on absentee voting states that 79,054 ballots that were mailed and postmarked by April 7 and received by election officials between April 8 and April 13 were counted. https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf.

pessimistic predictions," "overwrought claims," and "failed, sky-will-fall predictions." Opp. at 1-2. Simply put, the Legislature paints a picture of the election that cannot be sustained by reality. The conduct of the April 7 election was shameful—countless Wisconsin citizens had to choose between exercising their right to vote and risking exposure to the COVID-19 virus. The State of Wisconsin's management of that election has been widely condemned throughout our country and abroad as a voting rights and public health fiasco, as detailed at length in the SAC at ¶¶ 1-3, 34-74. Thousands were forced to stand in long lines for hours in order to cast their ballots, many wearing masks, gloves, and other protective gear as they congregated together to vote in the midst of the worst pandemic in over a century. As of the filing date of this reply, 71 in-person voters and poll workers have tested positive for COVID-19 statewide.[3] The Legislature cites to two studies questioning the connection between in-person voting and COVID-19 cases. *See* Opp. at 7-9. There are other studies going the other way; one concludes that Wisconsin counties with more in-person voters per voting location—often counties with insufficient numbers of polling locations—had significantly higher rates of COVID-19 transmission after the election than counties with lower voter density.[4] And due to the still insufficient lack of widespread testing, the significant spread by symptomless carriers, and the fact that Wisconsin announced on May 1 that it would stop attempting to determine whether or how many people contracted the virus as a result

[3] David Wahlberg, *71 people who went to the polls on April 7 got COVID-19; tie to election uncertain*, Wis. State Journal (May 16, 2020), https://madison.com/wsj/news/local/health-med-fit/71-people-who-went-to-the-polls-on-april-7-got-covid-19-tie-to/article_ef5ab183-8e29-579a-a52b-1de069c320c7.html?utm_medium=social&utm_source=email&utm_campaign=user-share.

[4] Chad D. Cotti *et al.*, *The Relationship between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on COVID-19: Evidence from the Wisconsin Primary*, SSRN (May 10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597233.

of their participation in the election, we likely will never know the full extent of infection that followed.[5]

But regardless of how many voters and poll workers actually caught the coronavirus by participating in in-person voting in the Spring Election, the fears of contracting it and either becoming ill or becoming an unwitting carrier for its spread were both legitimate and wide-spread. We can only wonder how many people stayed home, couldn't navigate the absentee ballot process, and simply did not vote because they could not or would not take the risk, rolling the dice on their health or the health of their loved ones or neighbors. There also were critical breakdowns in Wisconsin's absentee-voting process, with thousands of voters never even receiving their requested ballots in time to vote by election day, thus forcing them either to go to the polls during the pandemic and risk exposure to the COVID-19 virus or be disenfranchised altogether. Over 14,000 absentee ballots that were received and returned were rejected for having "insufficient" witness certifications, and 2,659 more were rejected because they were not received by election officials until after the April 13 deadline for receipt.[6] One investigation "into Wisconsin's missing ballot crisis reveals a system leaking from all sides," including through "[i]nadequate computer systems, overwhelmed clerks and misleading ballot information [that] hampered Wisconsin's historic—and historically troubling—spring election."[7]

---

[5] Scott Bauer & Todd Richmond, *No spike, but no certainty on fallout of Wisconsin election*, StarTribune (May 6, 2020), https://www.startribune.com/no-spike-but-no-certainty-on-fallout-of-wisconsin-election/570244112/.

[6] J.R. Ross, *22,820 Wisconsin absentee ballots were rejected for various reasons*, WISN 1130 (Apr. 18, 2020), https://newstalk1130.iheart.com/content/2020-04-18-22820-wisconsin-absentee-ballots-were-rejected-for-various-reasons/; *see also* https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/Exhibit%20A%20Absentee%20Voting%20Data%202016-2020.pdf

[7] Daphne Chen *et al.*, *'They should have done something': Broad failures fueled Wisconsin's absentee ballot crisis, investigation shows*, Milwaukee Journal Sentinel (Apr. 21,

It is deeply disturbing how the Wisconsin Legislature treats voter safety, and equally disturbing that the Legislature views the conduct of the April 7 election as a "success." That said, one of the things that *was* successful resulted directly from what the Legislature characterizes as plaintiffs' "legal defeats" in the pre-primary proceedings before this Court, the Seventh Circuit, and the Supreme Court. In fact, it was plaintiffs' success in this litigation that enabled nearly 80,000 Wisconsin voters to have their timely cast absentee ballots counted rather than summarily rejected under the election day receipt deadline. This Court's injunctive relief allowed thousands of additional citizens to register on line and thereby avoid having to register in-person at the polls or an early voting site. But, here, too, the Legislature's brief breaks companionship with reality, instead urging the Court to accept its alternative version of the facts, at a stage in the proceedings when the Court is obligated to accept plaintiffs' well-pleaded facts as true. For all of the reasons that follow, plaintiffs' motion for leave to file the SAC should be granted.

## ARGUMENT IN REPLY

A court may deny leave to amend a pleading under Rule 15(a)(2) "where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Holder v. Fraser Shipyards, Inc.*, 288 F. Supp. 3d 911, 933 (W.D. Wis. 2018). The Legislature relies on only one of these grounds: its argument that any amendment would be "futile." But a proposed amended pleading is "futile" only if it would "fail[] to state a claim upon which relief can be granted" under Rule 12(b)(6). *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi.*, 786 F.3d 510, 524 (7th Cir. 2015). This Court has

2020), https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/. The investigation was conducted by the Milwaukee Journal Sentinel, the PBS series FRONTLINE, and Columbia Journalism Investigations.

emphasized that the Rule 12(b)(6) inquiry does not allow for factfinding or the weighing of competing evidence:

> [D]ismissal is warranted only if no recourse could be granted under any set of facts consistent with the allegations. … As this court has emphasized before, the motion to dismiss phase of proceedings 'is not an opportunity for the court to find facts or weigh evidence.' When reviewing a motion to dismiss under Rule 12(b)(6), the court must accept all well-pleaded factual allegations as true and draw all inferences in the light most favorable to the non-moving party.

*Tzakis v. Wright Med. Tech., Inc.*, No. 19-cv-545-wmc, 2020 WL 955016, at *2 (W.D. Wis. Feb. 27, 2020) (citations omitted); *see also Mayr v. Husky Energy, Inc.*, No. 18-cv-917-wmc, 2019 WL 4849579, at *4 (W.D. Wis. Oct. 1, 2019). A claim "must include sufficient facts showing a *plausible*—not merely 'conceivable'—entitlement to relief," and may not rely on "sheer speculation" or "mere possibilit[ies]" of a legal violation. *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 469 (7th Cir. 2020) (citations omitted); *see generally Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Unless it is *certain* from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend." *Runnion*, 786 F.3d at 519-20 (emphasis in original). "[A]pplying the liberal standard for amending pleadings, especially in the early stages of a lawsuit, is the best way to ensure that cases will be decided justly and on their merits." *Id.* at 520 (citations omitted).

The Legislature argues that plaintiffs' claims are "futile"—that they are either moot or unripe, that they fail to state a claim, and that they are barred under the *Burford* abstention doctrine, named after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Legislature also argues it is entitled to a stay. Plaintiffs address each of these arguments in turn.

## I. Plaintiffs' Second Amended Complaint is not "futile" for lack of ripeness.

Having previously argued that plaintiffs' claims are moot, the Legislature now changes course and argues they are not ripe because "they are based upon premature speculation" about the upcoming August and November elections. Opp. at 2; *see id.* at 16-21. This is the first time in this litigation the Legislature has ever raised a ripeness defense, even though plaintiffs clearly and repeatedly have made clear from the outset that they seek injunctive relief for "the upcoming April 7, 2020 [election], *as well as other elections taking place during the COVID-19 crisis*." ECF No. 55 ¶ 44 (emphasis added); *see also id*. ¶ 7 (seeking relief for both the April 7 election and for "any election that occurs while this crisis continues"); *id.* at 19, ¶¶ C-E (asking for various injunctive relief to extend "until the COVID-19 crisis is over").[8]

"A claim is ripe if it is fit for judicial decision and not resolving it will cause hardship to the plaintiff." *E.F. Transit, Inc. v. Cook*, 878 F.3d 606, 610 (7th Cir. 2018) (citation omitted); *see also Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011) ("Whether a claim is ripe for adjudication depends on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'") (citations omitted); *see generally Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The Legislature repeatedly points to three supposedly "unripe" issues that, it says, require denial of leave to amend:

[8] On the same day the Legislature first raised its ripeness defense in this Court—May 11—the Legislature also asked the Seventh Circuit not to dismiss the interlocutory appeals on *mootness* grounds so that the Legislature instead could raise its new *ripeness* arguments *de novo* on appeal. *See* Joint Status Report Regarding Mootness, Case No. 20-1538, Doc. 42, at 6-11. The Legislature argued that the Seventh Circuit should decide a variety of jurisdictional and substantive issues, "a decision [that] will help inform the district-court proceedings" by giving this Court "the benefit of [the Seventh Circuit's] resolution of the purely legal issues that the Legislature intends to raise in this appeal, especially as to ripeness." *Id.* at 9-10. The Seventh Circuit has now dismissed in their entirety the Legislature's appeals from the preliminary injunction orders as moot.

- It claims that "Plaintiffs ask this Court to speculate on the magnitude of the COVID-19 pandemic in both August (after three months of summer) and November." Opp. at 2; *see id.* (arguing that plaintiffs' claims are "based upon premature speculation as to the state of the COVID-19 situation … months from now"); *id.* at 18 (questioning "[t]he future course of the COVID-19 pandemic in Wisconsin" and "the health risks that COVID-19 may cause during those elections"); *id.* at 20-21.
- It contends that, to resolve plaintiffs' claims, this Court will need "to guess at the types of treatments that will or will not be available at those times" (*i.e.*, the August and November elections). Opp. at 2; *see also id.* at 18 (suggesting that "treatments" may be "available" by then); *id.* at 21 (speculating about "the development of medical advances" between now and November).
- It argues that plaintiffs' claims, most of which are addressed to the enforcement of plain statutory language, ask this Court "to predict the Wisconsin election procedures that will be in place by those months" (*i.e.*, August and November). *Id.* at 2; *see id.* ("premature" to "speculat[e]" about "Wisconsin's election administration months from now"); *id.* at 10 ("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."); *id.* at 19 (plaintiffs' claims are based on speculation about "the election-administration landscape months into the future"); *id.* at 20-21.

As this Court has emphasized, the motion-to-dismiss stage "is not an opportunity for the court to find facts or weigh evidence." *Tzakis*, 2020 WL 955016, *2. That said, on the scientific and public health merits, the Legislature has it backwards. It is the *Legislature*, not plaintiffs, that is engaged in "sheer speculation" and "mere possibilit[ies]." *Taha*, 947 F.3d at 469 (citations

omitted). Consider the facts. The federal government is preparing for the COVID-19 crisis to last 18 months and has repeatedly warned the pandemic could come in "multiple waves."[9] The Director of the Centers for Disease Control and Prevention (CDC) recently warned that the country may encounter a second, more deadly wave of COVID-19 in the fall, which will "be even more difficult than the one we just went through."[10] Similarly, the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, was asked at a White House press conference whether the United States was "prepared for [coronavirus] to strike again, say, in the fall?" Dr. Fauci responded, "[i]n fact, I would anticipate that that would actually happen because of the degree of transmissibility."[11] And Dr. Rick Bright, who until last month was the Director of the Biomedical Advanced Research and Development Authority, recently testified:

> While it is terrifying to acknowledge the extent of the challenge that we currently confront, the undeniable fact is there will be a resurgence of the COVID19 this fall, greatly compounding the challenges of seasonal influenza and putting an unprecedented strain on our health care system. Without clear planning and implementation of the steps that I and other experts have outlined, 2020 will be the darkest winter in modern history.[12]

---

[9] Peter Baker *et al.*, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, New York Times (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html.

[10] Zack Budryk, *CDC director warns second wave of coronavirus might be 'more difficult'*, The Hill (Apr. 21, 2020), https://thehill.com/policy/healthcare/493973-cdc-director-warns-second-wave-of-coronavirus-might-be-more-difficult.

[11] The White House, *Remarks by President Trump and Members of the Coronavirus Task Force in a Press Briefing* (Mar. 30, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-members-coronavirus-task-force-press-briefing/.

[12] Statement of Rick Bright, Ph.D., *Scientific Integrity in the COVID-19 Response* at 3, House Committee on Energy and Commerce, Subcommittee on Health (May 14, 2020), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/200511 Testimony of Dr. Rick BrightRevised.pdf. Dr. Bright also served until recently as the Deputy Assistant Secretary for Preparedness and Response in the U.S. Department of Health and Human Services. *Id.*

Numerous other authorities are projecting "recurrent wintertime outbreaks" and the potential need for "prolonged or intermittent social distancing … into 2022."[13] Moreover, a recent modeling study by the Center for Infectious Disease Research and Policy (CIDRAP) at the University of Minnesota found that seven of the eight most recent pandemics "had a second substantial peak about six months after the first one," with some having "smaller waves of cases over the course of 2 years" after the initial outbreak.[14]

The Legislature's suggestions that the pandemic might be over by the time of the August and November elections, or that there might be effective and available "treatments" by then, are sheer fantasy—and irresponsible. In any event, the factual and expert testimony in this litigation will establish that the Legislature is wrong. The human health and voting rights dangers are clear, present, and urgent. The Legislature is free to dismiss these warnings as "pessimistic" and "sky-will-fall predictions" (Opp. at 1-2), but it cannot require a dismissal simply because it disagrees and believes the danger might be over by November, or even August. And it cannot, contrary to the evidence, require dismissal by speculating there *might* be "treatments" for COVID-19 by August and November that will alleviate the dangers.[15] At the very least, these are precisely the

---

[13] Stephen M. Kissler *et al.*, *Projecting the transmission dynamics of SARS-CoV-2 through the postpandemic period*, Science (Apr. 14, 2020), https://science.sciencemag.org/content/early/2020/05/11/science.abb5793.

[14] Christopher Brito, *New report says coronavirus pandemic could last for two years – and may not subside until 70% of the population has immunity*, CBS News (May 4, 2020), https://www.cbsnews.com/news/coronavirus-pandemic-update-two-years-70-percent-immunity/.

[15] The CDC emphasizes on its website that "[t]here is currently no vaccine to prevent coronavirus disease 2019 (COVID-19)." CDC, *How to Protect Yourself & Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#:~:text=There%20is%20currently%20no%20vaccine,%2Dto%2Dperson (last visited May 18, 2020). The Mayo Clinic website reports that, "[r]ealistically, a vaccine will take 12 to 18 months or longer to develop and test in human clinical trials," and that "we don't know yet whether an effective vaccine is possible for this virus." Mayo Clinic, *COVID-19 (coronavirus) vaccine: Get the facts*, https://www.mayoclinic.org/diseases-

kinds of arguments that will require this Court "to find facts [and] weigh evidence," thereby precluding a Rule 12(b)(6) dismissal. *Tzakis*, 2020 WL 955016, at *2.[16]

As for the Legislature's repeated insistence that plaintiffs are simply speculating about what Wisconsin's "election administration" and "procedures" will be like three to six months from now, most of plaintiffs' case continues to focus on the application and enforcement of five statutory provisions in the upcoming elections. No one has suggested those statutes might be repealed or amended in the next several months. Nor has anyone suggested these statutes might go unenforced. The WEC took the position last time around that it has *no authority* to bend or relax these clear statutory requirements, ECF No. 37 at 17 n.12, and there is no reason to believe the Commission will believe any differently now. It is the Legislature itself that can change those requirements, and it has shown no inclination to do so.

---

conditions/coronavirus/in-depth/coronavirus-vaccine/art-20484859 (last visited May 18, 2020).

[16] The Legislature claims that the DNC is planning to proceed with its national convention in Milwaukee as usual in August, Opp. at 2; *see also id.* at 12, which supposedly shows that the plaintiffs don't believe what they are arguing here. But the convention already has been postponed from July to August, and the Democratic National Convention Committee has committed to proceeding with a convention that "protects the health of participants" and "is in line with public health recommendations." Letter from Tom Perez to Fellow DNC Members at 1, https://wiki.democratsabroad.org/download/attachments/53217234/TEP%20Cover%20Letter%20to%20DNC%20Members.pdf?version=1&modificationDate=1589612114000&api=v2 (last visited May 18, 2020). The Committee has repeatedly recognized the importance of the health and safety of Convention participants, and the DNC will be prepared to take any steps necessary to protect the safety and wellbeing of its members, delegates, and the general public. Accordingly, the Committee is now seeking from DNC members the authority "to be flexible during the pandemic," including allowing work done "by the rules, platform and credentials committees . . . be done in different formats." Bill Glauber, *2020 DNC: Resolution will give local team authority to change format, size, dates of Milwaukee convention*, Milwaukee Journal-Sentinel (May 11, 2020), https://www.jsonline.com/story/news/politics/elections/2020/05/11/dnc-organizers-gain-flexibility-run-milwaukee-convention/3112747001/. This public health-minded flexibility is near-perfectly aligned with the relief plaintiffs seek here for the voters of Wisconsin—civic engagement without the fear of contracting a deadly virus.

The Fourth Circuit's decision in *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), is illustrative. The case involved a Republican challenge to Virginia's open primary law, which would allow Democrats to vote in the Republican primary in the event there was a primary contest. The challenge was filed in April 2005, two years before the *potential* primary would take place in the event that two Republican candidates ran against each other. The district court dismissed on ripeness grounds because there were too many uncertainties and contingencies about an election two years away. But the Fourth Circuit reversed, even though it recognized there may not even be a primary in 2007 because there might only be one candidate. *Id.* at 319. The Fourth Circuit found that waiting until then "would provide insufficient time to decide the case" and would "seriously disrupt the election process." *Id.* at 319, 321; *see also id.* at 319 ("The primary election likely would be resolved before an action brought that late could reach final decision."); *id.* at 320 ("Providing only thirty days for briefing, argument, and decision of a novel constitutional question before the courts is troublesome."). Since there was nothing to "suggest[] that the open primary law will *not* be enforced," and since important First Amendment voting rights were in issue, the Fourth Circuit "remanded for consideration of the merits." *Id*. at 321 (emphasis added).

Where there is "no doubt" that a registration or voting requirement will be enforced and the challenge involves "predominantly legal questions," courts have routinely recognized that voting rights plaintiffs need not wait until the requirement is actually enforced because "there may not be enough time to reach a decision on the merits before the actual election." *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008). Although plaintiffs must show "imminent harm" to establish ripeness, "imminence" is "somewhat elastic," requiring "only that the anticipated injury occur with[in] some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or

months." *Id*. at 1161 (citation omitted); *see also Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 943 (W.D. Va. 2018) (finding relaxed ripeness principles "apply with particular force to cases involving election laws"); *Utah Republican Party v. Herbert*, 144 F. Supp. 3d 1263, 1272 (D. Utah 2015) (finding challenge to newly enacted election law was ripe even though an election had not yet been conducted under the new law and "it is uncertain *exactly* how [the new law] would affect the upcoming election," where the application of the law was "inevitable").

To the extent that plaintiffs are challenging the WEC's failure to take action where it has the authority and discretion to do so, the Legislature's response similarly fails. The Legislature's argument boils down to repeated assurances throughout its 40-page brief that the Commission is busily "studying," "investigating," and "assessing" various options; that it "may choose" to take action or may not, something that "cannot be known at this time"; and that Article III ripeness doctrine requires this Court "to hold off on the matter" until the WEC "sharpens the issue" by "clarify[ing]" what, if anything, it will do avoid another trainwreck like the one that occurred on April 7, 2020. Opp. at 10, 12, 16-17, 19, 21, 35.

We have seen this movie before. As this Court put it on April 2, "the only direction from an equally split group of Commissioners to the Administrator and her staff is to do the best they can in conducting a safe, in-person election." ECF No. 170 at 34; *see id.* at 36 ("As much as the court would prefer that the Wisconsin Legislature and Governor consider the public health ahead of any political considerations, that does not appear in the cards."). This gridlock has continued since the election. For example, the WEC refused on a 3-3 vote even to adopt uniform standards for implementing the "postmark requirement" that the Supreme Court majority had imposed, thus leaving those issues to hundreds of local election officials who, the record will show, followed

inconsistent rules and practices. SAC ¶ 95. Thousands of absentee ballots were rejected over perceived postmark problems, most of them no fault of the individual voters.[17]

The newly introduced "ripeness" defense is especially galling because the August primary is only about three months away, and the November general election comes only three months after that. If plaintiffs' challenges are deemed "unripe" at this moment and we must wait several more months while they ripen, there can be no doubt that the Legislature will then turn around and raise a *Purcell* defense that it is too late to make any changes before those elections. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300-01 n.12 (1979) ("Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment."). The Legislature appears to seek a rule in which it is always either "too soon" or "too late" when it comes to the enforcement of constitutionally protected voting rights—where voting rights suits are either not yet ripe or have become moot. *Compare Midrad, LLC*, 676 F.Supp.2d at 799 ("A claim cannot be moot and unripe at the same time because the two doctrines mean opposite things.").

[17] Amy Gardner et al., *Unexpected outcome in Wisconsin: Tens of thousands of ballots that arrived after Election Day were counted, thanks to court decisions*, The Washington Post (May 3, 2020), https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9dcc71fc_story.html. If the WEC does take further steps, depending on what they are they might moot one or more of plaintiffs' claims. Plaintiffs would welcome such action by the WEC. But the fact that the WEC *might* do what plaintiffs what it to do in the future is no reason to prohibit plaintiffs from bringing suit and litigating their claims now. There is *always* a chance in election law cases that state officials might change course and agree to changes, but that does not mean a challenge is not ripe because the defendants might moot it in the future.

## II. Plaintiffs' Second Amended Complaint is not "futile" for failure to state a claim.

### A. The *Anderson-Burdick* claim is not futile.

Begin with the obvious question: How can the Legislature call the *Anderson-Burdick* claim "futile" when the prior, virtually identical version of that same claim resulted in an order enjoining in part several of the Challenged Provisions, injunctive relief that was narrowed on appeal by both the Seventh Circuit and Supreme Court but even after that enabled nearly 80,000 Wisconsin voters to cast absentee ballots on or before April 7 and have those ballots counted (if received by April 13)? A claim that saved the votes of at least 79,054 Wisconsin citizens is not a "futile" claim.

As this Court discussed in its April 2 Opinion and Order:

> Under the *Anderson-Burdick* standard, the court must (1) determine the extent of the burden imposed by the challenged provision; (2) evaluate the interest that the state offers to justify that burden; and (3) judge whether the interest justifies the burden. When voting rights are severely restricted, a law must be narrowly drawn to advance a state interest of compelling importance. But even slight burdens must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.

ECF No. 170 at 27 (citations and quotation marks omitted); *see Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). This is a "flexible" balancing standard, one in which a court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Multi-factor balancing standards and sliding-scale analyses are, by their very nature, generally inappropriate for Rule 12(b)(6) dismissal for failure to state a claim. This Court's decision in *Mayr*, 2019 WL 4849579, illustrates the point. Defendants moved under Rule 12(b)(6)

to dismiss a complaint alleging they had engaged in "abnormally dangerous" activities, a legal determination that turns on the balancing of a variety of factors (*e.g.*, "the degree of risk, the likelihood of harm, the ability to eliminate the risk with the exercise of reasonable care, and the value of the activity to the community, among other factors"). *Id.* at *3. This Court denied the motion to dismiss, emphasizing it was "distinctly ill-informed to engage in this inquiry, much less undertake to balance the relevant factors," to determine whether the challenged activity was "extrahazardous" in the absence of "a developed evidentiary record following discovery." *Id.* at *4; *see also Thomas v. Kaven*, 765 F.3d 1183, 1196 (10th Cir. 2014) ("fact-intensive" balancing analysis "does not easily lend itself to dismissal on a Rule 12(b)(6) motion"); *Decotiis v. Whittemore*, 635 F.3d 22, 35 n.15 (1st Cir. 2011) (same).

The *Anderson-Burdick* analysis is similarly ill-suited for Rule 12(b)(6) dismissal, especially in cases where the burdens are severe. *Soltysik v. Padilla*, 910 F.3d 438 (9th Cir. 2018), is closely on point. A Socialist candidate for local office challenged California's requirement that his name appear on the primary ballot with the label "Party Preference: None," despite his demand to be labeled a member of the Socialist Party USA, because that party was not a "qualified political party" under California law. *Id*. at 442. Under this regime, a candidate could use party-preference labels like Democratic, Republican, Green, Libertarian, and a few others because they were "qualified," but not other parties' labels because they were not "qualified." Mr. Soltysik brought an *Anderson-Burdick* suit under the First and Fourteenth Amendments, but the district court dismissed under Rule 12((b)(6). The Ninth Circuit reversed, emphasizing that the *Anderson-Burdick* balancing analysis does not lend itself to dismissals on the pleadings. "[W]ithout any factual record at this stage, we cannot say that the Secretary's justifications outweigh the constitutional burdens on Soltysik as a matter of law." *Id.* at 447. *Anderson-Burdick*'s "sliding-

scale, 'means-end fit analysis'" usually requires a "fully developed evidentiary record." *Id.* at 447-48.[18]

The Legislature tries to sweep this fact-bound balancing inquiry aside by insisting that the facts are clear and there is nothing to be balanced—that the burdens on plaintiffs are "insubstantial" and not "meaningful," whereas the State's interests are "compelling" and "substantial, *as a matter of law*." Opp. at 23-28 (emphasis added). This Court rejected similar arguments before and the Legislature has presented no reason why it should not do so again.

Further, nothing in the prior rulings in this case makes it "futile" to request the relief specified in the SAC. While it is true that, with regard to some of plaintiffs' claims, this Court and the Seventh Circuit expressed some skepticism, it was in the context of a very fast TRO/preliminary injunction schedule having no preclusive effect on the merits. And the Seventh Circuit's stay of this Court's partial relief from the statutory witness certification requirement did not foreclose further relief from that requirement. Instead, the Seventh Circuit held that "the district court did not give adequate consideration to the state's interests in suspending this requirement," and expressed "concern[] with the overbreadth of the district court's order, which categorically eliminates the witness requirement[.]" *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538 & 20-1546, Doc. No. 30 at 3 (7th Cir. Apr. 3, 2020), *stayed in part on other grounds*, 140 S. Ct. 1205 (2020). The Seventh Circuit emphasized there may be "other ways for voters to satisfy the statutory signature requirement (if possible, for example, by maintaining the

[18] The Ninth Circuit distinguished *Soltysik* in *Tedards v. Ducey*, 951 F.3d 1041 (9th Cir. 2020), on the ground that, "compared to the burden at issue here, the burden in *Soltysik* fell higher on the *Burdick* sliding scale between 'reasonable, nondiscriminatory' and 'severe.'" *Id*. at 445-46. Like the burden in *Soltysik*, the burdens here are "severe"; they include potential if not actual disenfranchisement as well as potential exposure (as well as the *fear* of potential exposure) to the COVID-19 virus.

statutory presence requirement but not requiring the witness's physical signature)." *Id.* at 4. Thus, the witness certification challenge remains entirely "plausible" under Rules 12(b)(6) and 15(a)(2) and may now be evaluated on a fuller evidentiary record as these proceedings move forward, including using the actual April 7 election data. Over 14,000 absentee ballots were rejected for lack of proper certifications.[19] There is no basis for foreclosing plaintiffs from pursuing this claim (or any of the other claims contained in the SAC). This Court will ultimately have to decide whether plaintiffs can succeed on their proof, but this is neither the time nor the place to prejudge their likelihood of doing so.

**B. The due process claim is not futile.**

The Legislature's lead argument for why the plaintiffs' due process claim is supposedly "futile" is that it is "wholly duplicative of their *Anderson/Burdick* right-to-vote claim under the First and Fourteenth Amendments[.]" Opp. at 31. This Court suggested in a footnote in its April 2 Opinion and Order that due process concerns "are properly addressed within the more specific *Anderson-Burdick* framework." ECF No. 170 at 27 n.13. But plaintiffs do not read the Court to have said it is "futile" to include a due process claim, especially since it is common practice to plead constitutional violations on alternative grounds simply to avoid inadvertent waiver. It may be that, on a fully developed evidentiary record, this Court concludes that relief under *Anderson-Burdick* fully encompasses any relief to which plaintiffs may be entitled under the Fourteenth Amendment's due process clause, but that does not mean it is "futile" to include a due process claim in an amended pleading.

[19] See *2020 Spring Election and Presidential Preference Vote Ballot Status as of April 17, 2020*, Wis. Elections Comm'n, https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/Ballot%20Data%20as%20of%20April%2017%202020.pdf (last visited May 18, 2020).

The due process claim rests on discrete, longstanding protections embodied in the Fourteenth Amendment. "[D]ue process … requires that the state accomplish [the regulation of the electoral process] narrowly and fairly to avoid obstructing and diluting" fundamental liberties. *Briscoe v. Kusper*, 435 F.2d 1046, 1054 (7th Cir. 1970). Among those fundamental liberties is the right to vote. *See Burdick*, 504 U.S. at 433 ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (citation omitted); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("The . . . political franchise of voting . . . is regarded as a fundamental political right, because [it is] preservative of all rights.").

Nor is plaintiffs' procedural due process claim futile under the three-part framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which this Court must determine "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The right to vote is unquestionably a liberty interest that cannot be "confiscated without due process." *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990). This liberty interest extends to by-mail voting in Wisconsin. *See, e.g.*, *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 215 (D.N.H. 2018) ("voter has a sufficient liberty interest once 'the State permits voters to vote absentee.'") (citation omitted)). Moreover, the degree of deprivation resulting from the Challenged Provisions is extraordinarily high. This deprivation is neither hypothetical nor speculative. The April 7 election resulted in thousands of Wisconsinites being deprived of their liberty interest in voting because of one or more of the Challenged Provisions.

The Challenged Provisions are neither fair nor reliable in the context of a simmering global pandemic. The administrative burden on Wisconsin in modifying the proof of residency requirement and extending the deadline for by-mail voter registrations, modifying the photo identification requirement for absentee ballot applications, modifying the absentee witness requirement, and extending the time in which a likely avalanche of absentee ballots may be received and counted is marginal compared to the deprived liberty interest. *Mathews*, 424 U.S. at 335. In short, plaintiffs' procedural due process claim is the opposite of futile—it is necessary to ensure that every Wisconsin voter has adequate notice and opportunity to vindicate their liberty interests in voting.

**C. The equal protection claim is not futile.**

The Legislature suggests that the equal protection principles embodied in *Bush v. Gore*, 531 U.S. 98 (2000), apply to only "the one election" involved there. Opp. at 32 (quotation marks and citation omitted). Nonsense. Courts repeatedly have relied on the equal protection principles enunciated in *Bush v. Gore* in a variety of election law circumstances. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 337 (4th Cir. 2016) (redistricting); *Obama for Am. v. Husted*, 697 F.3d 423, 428–29 (6th Cir. 2012) (restrictions on early voting); *Fla. State Conference of N.A.A.C.P.*, 522 F.3d at 1185–86 (Barkett, J., concurring in part) (voter registration).

Equally untenable is the Legislature's argument that the equal protection principles of *Bush v. Gore* are "concerned with the unequal treatment of *ballots*," as opposed to the "arbitrary and disparate treatment of *voter*s" themselves. Opp. at 33. But ballots are the means by which eligible voters express their will. Framed in terms of "ballots," the injuries alleged in this case include:

- Over 9,300 absentee ballots that were timely requested but not even mailed out by election officials as of election day, and an untold number of additional absentee ballots that were mailed out too late to be received by the voters by election day;
- Over 14,000 ballots that were rejected for lack of witness certifications or improper/incomplete certifications;
- Thousands of ballots rejected under the "postmark rule," which is interpreted differently and enforced unevenly among local voting officials; and
- Nearly 80.000 ballots that were cast by voters on or before election day that would have been discarded because they were not received by the election day deadline, had it not been for this Court's preliminary injunction enabling those ballots to be counted.

The Legislature claims that "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." Opp. at 32. But the face of the SAC shows otherwise:

> The April 7 election abounded with many examples of unfair, unequal, and disparate treatment of Wisconsin voters depending on where they live. Safe and sufficient in-person registration, absentee voting, and election-day voting opportunities were available to some Wisconsin voters but not to others, depending on where they resided. Voters of color and the urban poor were disproportionately denied sufficient opportunities for safe in-person registration, early voting, and election-day voting. Similarly, the application of the documentation requirements for registering to vote and requesting an absentee ballot varied broadly across cities and counties, resulting in some voters being subject to these requirements while others were not. Voters also received conflicting guidance on the witness requirement for absentee ballots depending on where they lived and who they called.

SAC ¶ 94 (numerous evidentiary record cites omitted). The Legislature's response entirely ignores these well-pled allegations of disparate treatment and impacts.

The SAC also details how a divided WEC was unable to agree on standards to govern the many situations in which absentee ballots were returned to local election officials by the Postal

Service with either no postmarks at all, postmarks without dates, or illegible postmarks, leaving local election officials to make these decisions themselves exercising standardless discretion. *Id.* ¶ 95. The SAC also alleges that the "indefinitely confined" exception to many of the absentee voting restrictions and conditions is disparately defined and enforced by local elections officials. *Id.* ¶ 96. Respectfully, these are "plausible" allegations and easily pass muster under Rule 15(a)(2)'s liberal amendment standards.

**III. Plaintiffs' Second Amended Complaint is not "futile" on *Burford* abstention grounds.**

The Legislature's *Burford* abstention defense grows increasingly shopworn every time it is raised. "[T]he power to dismiss recognized in *Burford* represents an 'extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (citations and quotation marks omitted). *Burford* gives a court the *discretion*, but not the obligation, to dismiss a federal case in exceptional circumstances where it unduly interferes with "complex state administrative processes." *Id.* at 727. It is a sharply limited exception to the "virtually unflagging obligation" of federal courts "to exercise the jurisdiction given them"; abstention always is "the exception, not the rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976).

Since *Burford* is a *discretionary* doctrine, there is no way plaintiffs' federal constitutional claims can be deemed "futile" at the leave-to-amend stage simply because this Court *might*, after full consideration, decide to exercise its "narrow" discretion under *Burford* to abstain. And the Legislature's futility argument is especially strained given that this Court already has ruled unambiguously that "*Burford* abstention is not an appropriate reason to duck this court's obligation to protect voters' rights." 2020 WL 1320819, at **7-8 n.12. The Legislature argues that the Court's earlier rejection of *Burford* is distinguishable because of "'the narrow relief [that was]

fashioned by this court,'" whereas here plaintiffs are seeking "to install this Court as the primary administrator of Wisconsin's elections 'until the COVID-19 crisis is over.'" Opp. at 36 (citation omitted). That of course is not what plaintiffs are seeking, and that is not how the Legislature has characterized this Court's earlier relief in its filings with the Seventh Circuit and the Supreme Court.[20] To reiterate, plaintiffs' proposed SAC includes the same challenges to the same statutes based on the same claims as before, with only a few additional requests for relief.

The Legislature also argues that this Court, in its previous *Burford* ruling, operated on the "faulty premise" that plaintiffs could not obtain state court review of any WEC action or inaction in a sufficiently timely manner. Opp. at 37. The Legislature explains "[t]here is nothing stopping Plaintiffs, or any other parties, from … bringing any of the constitutional issues or concerns raised here to the Wisconsin Supreme Court" by way of "a petition for an original action," which the Legislature has used to obtain lightning-fast action on several occasions during the current pandemic. *Id.* at 37.

The suggestion that federal voting rights claims should be entrusted to the Wisconsin Supreme Court through the device of original actions is, to put things mildly, a non-starter for

[20] *See, e.g.*, Wisconsin Legislature's Emergency Motion to Stay the Preliminary Injunction and for an Administrative Stay, Seventh Cir. No. 20-1539, Doc. 4-1 at 2, 9, 16-17 (Apr. 2, 2020) (accusing this Court of granting relief "that had not even been suggested by any party, let alone subject to any adversarial testing"; of engaging in a "belated judicial rewrite of Wisconsin's voting laws"; and of reaching "[i]ndefensible" and "inexplicable" results); Emergency Application for Stay, SCOTUS No. 19A1016 at 1-2, 7-8, 14, 18-19 (Apr. 4, 2020) (repeatedly accusing this Court of granting relief that "no party asked the court to grant" and of going "far beyond" plaintiffs' requests). These mischaracterizations swayed five Justices in their *per curiam* decision on April 6 (the day before the election), which chided this Court for "unilaterally order[ing]" relief that had not been requested and "on its own" granting "extraordinary relief [that] would fundamentally alter the nature of the election." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 140 S. Ct. 1205, 1207-08 (2020). Plaintiffs emphasized this was a gross mischaracterization because they *had* very clearly requested the relief granted by the Court, a point that was also emphasized in the dissent. *Id.* at 1210 (Ginsburg, J., dissenting).

several reasons. Just because a State has an administrative process like the WEC's regulation of elections and state court review of regulatory decisions does not suggest that federal abstention is appropriate. "While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362 (1989); *see also Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) ("the mere existence of a statewide regulatory regime is not sufficient" for *Burford* to apply).

Moreover, to the extent the Legislature claims the exercise of federal jurisdiction over federal claims would disrupt its "efforts to establish a coherent policy with respect to a matter of substantial public concern," Opp. at 34 (citation omitted), *Burford* abstention requires not only the existence of a state forum "in which claims may be litigated," but also that the state forum "be special—it must stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims." *Prop. & Cas. Ins. Ltd. v. Cent. Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 323 (7th Cir. 1991). The "specialized tribunal" must have "*exclusive* jurisdiction over the matter." *Wis. Term Limits v. League of Wis. Municipalities*, 880 F Supp. 1256, 1261 (E.D. Wis. 1994) (emphasis added). These requirements are "a *prerequisite* of, not a factor in," this type of *Burford* abstention. *Property & Cas.*, 936 F.2d at 323 (emphasis added); *see also Hammer v. U.S. Dep't of Health & Human Servs.*, 905 F.3d 517, 534-35 (7th Cir. 2018). Neither the WEC, Wisconsin's courts of general jurisdiction, nor (especially) the Wisconsin Supreme Court meet these mandatory criteria for *Burford* abstention, particularly with respect to *federal* constitutional claims. They are neither "specialized tribunal[s]" nor do they have "exclusive jurisdiction" over voting rights issues.

There is another dispositive reason for rejecting *Burford* abstention once again: This is precisely the type of case in which the "strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court" outweighs any alleged countervailing state interests. *Quackenbush*, 517 U.S. at 728. "[T]he federal issues in this case eclipse any state issues that might arise." *Hammer*, 905 F.3d at 532. The Seventh Circuit and numerous other courts have emphasized that, where the issue is a State's "adherence" to federal constitutional requirements regarding voting rights, "*Burford* abstention is inapplicable." *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1136 (7th Cir. 1981) (reapportionment claim).[21] This Court should, once again, reject the Legislature's *Burford* abstention defense and decline to leave plaintiffs' federal constitutional claims to the tender mercies of the Wisconsin Supreme Court.

In response to all of the decisions plaintiffs have cited rejecting *Burford* abstention in election law cases dealing with federal rights, the Legislature has combed through the case law and finally come up with a decision supposedly going the other way, which it reported to the Court in another filing today: *Seider v. Hutchison*, No. 3:06CV215, 2007 WL 320964 (E.D. Tenn. Jan. 30, 2007), *aff'd in part, rev'd in part, and remanded*, 296 F. App'x 517 (6th Cir. 2008); *see* ECF

[21] *See also Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) ("voting rights cases are particularly inappropriate for abstention"); *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981) (abstention inappropriate where the issue was "nothing less than the fundamental right to vote"); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971) ("We take *Harman v. Forssenius* to mean that the delay which follows from abstention is not to be countenanced in cases involving such a strong national interest as the right to vote."); *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1283 (N.D. Fla. 2018) ("Federal courts do not abstain when voting rights are alleged to be violated."); *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 943 (W.D. Mich. 2016) (*Burford* abstention inappropriate in federal voting rights case that "does not involve a state law claim" and seeks to protect federally guaranteed rights; "federal review of similar cases has never been overly disruptive of state efforts to develop a coherent voting policy"); *Bogaert v. Land*, 675 F. Supp. 2d 742, 747 (W.D. Mich. 2009) (citing additional cases holding that *Burford* abstention is "wholly inapplicable" to federal constitutional challenges to state election laws).

No. 202 at 6. *Seider* has nothing to do with our case. The dispute involved how to implement a Tennessee Supreme Court decision upholding, under the Tennessee Constitution, the validity of the term limits provision of the Knox County Charter. Several county officials had to leave office as a result of this decision through a transition process defined in the state supreme court's decision, and Knox County was implementing this process. It was in that context that a federal judge exercised his discretion to abstain under *Burford* because the dispute "deals primarily with state law issues" and the "federal issues presented by [the] case are minor when considered within the larger context of the case as a whole." 2007 WL 320964, at *2. The plaintiff's action, after all, was grounded on the Knox County Charter's term limits provision. *Id.* Thereafter, the Sixth Circuit expressly *rejected* the district court's *Burford* analysis and instead dismissed the case as moot. *See* 296 F. App'x at 518. If this overruled Tennessee district court decision somehow helps the Legislature here, plaintiffs fail to see how. The cases before this Court seek to enforce federal constitutional rights, not state or local laws; the federal issues here are not "minor," but transcendent.

**IV. This Court should not stay proceedings in this case.**

The final part of the Legislature's brief in opposition has nothing to do with the pending motion for leave to file the SAC. Instead, without bothering to file a motion to stay proceedings, the Legislature argues it would be "advisable" for this Court, apparently on its own motion, to "stay this case" in its entirety "[u]ntil [t]he Seventh Circuit [c]ompletes [i]ts [w]ork" in the interlocutory appeals from this Court's April 2 and 3 preliminary injunction orders. Opp. at 37, 39. The Legislature reasons that the interlocutory appeals "may well resolve many of the core disputes between the parties." *Id.* at 39. The Seventh Circuit has now completed its work, dismissing the interlocutory appeals as moot in their entirety on May 14. Thus, the Legislature's

suggestion is itself moot. These proceedings should now move forward, and this Court should begin that process by denying the Legislature's pending motion to dismiss (ECF No. 197) and granting plaintiffs' motion for leave to file their proposed SAC (ECF No. 198).

## CONCLUSION

Because the interests of justice favor leave to amend, this Court should grant plaintiffs' motion and order that the SAC (ECF No. 198-1) be accepted for filing.

Dated this 18th day of May, 2020.

Respectfully submitted,

*/s/ John Devaney*
Marc E. Elias
John Devaney
Bruce V. Spiva
Amanda R. Callais
Zachary J. Newkirk
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
jdevaney@perkinscoie.com
bspiva@perkinscoie.com
acallais@perkinscoie.com
znewkirk@perkinscoie.com

Charles G. Curtis, Jr.
Sopen B. Shah
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, Wisconsin 53703-3095
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
CCurtis@perkinscoie.com
SShah@perkinscoie.com

*Counsel for the Plaintiffs*