IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v. 20-cv-249-wmc

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR. and MARK L. THOMSEN,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

SYLVIA GEAR, MALEKEH K. HAKAMI, PATRICIA GINTER, CLAIRE WHELAN, WISCONSIN ALLIANCE FOR RETIRED AMERICANS and LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Plaintiffs,

v. Case No. 20-cv-278-wmc

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, and MEAGAN WOLFE,

Defendants.

REVEREND GREG LEWIS, SOULS TO THE POLLS, VOCES DE LA FRONTERA, BLACK LEADERS ORGANIZING FOR COMMUNITIES, AMERICAN FEDERATION OF TEACHERS LOCAL, 212, AFL-CIO, SEIU WISCONSIN STATE COUNCIL, and LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Plaintiffs,

v. Case No. 20-cv-284-wmc

MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, and MEAGAN WOLFE,

Defendants.

GEAR PLAINTIFFS' RESPONSE TO WISCONSIN ELECTIONS COMMISSION DEFENDANTS' MOTION TO DISMISS

The *Gear* Plaintiffs[1] respond to the Wisconsin Elections Commission ("WEC" or "Commission") Defendants' motion to dismiss as follows:

1. **The *Gear* Plaintiffs conferred with the WEC Defendants' counsel regarding their motion to add and drop plaintiffs in an attempt to proactively and efficiently manage the case and were operating under the good-faith belief that leave was not required to amend the substance of their Complaint.**

Given there was a pending motion to dismiss, the *Gear* Plaintiffs now appreciate that they should have clarified the procedure with the Court in this novel situation and want to sincerely apologize to this Court for not doing so in advance. The *Gear* Plaintiffs appreciate the opportunity the Court has provided to respond to the WEC Defendants' motion to dismiss at this time, and begin by setting forth the reasons why they proceeded as they did.

[1] Plaintiffs in this action are Sylvia Gear, Dr. Malekeh K. Hakami, Patricia Ginter, Claire Whelan, Wisconsin, Alliance for Retired Americans ("Wisconsin Alliance"), and League of Women Voters of, Wisconsin ("LWVWI") (collectively, "Plaintiffs").

Even before the WEC Defendants filed their motion to dismiss the *Gear* Complaint on May 26, dkt. 141, 142,[2] Plaintiffs' counsel, in an effort to efficiently and proactively manage the litigation and move the case forward, communicated with counsel for the WEC Defendants to attempt to reach an understanding about how the case would proceed on remand from the Seventh Circuit with respect to the pleadings. On May 21, Plaintiffs' counsel informed the WEC Defendants' counsel that they intended to file a First Amended Complaint. The following day, the WEC Defendants' counsel offered to prepare a stipulation that Plaintiffs could file their First Amended Complaint, and that the WEC Defendants would respond to that amended complaint within 30 days. After further considering some procedural issues, however, Plaintiffs' counsel determined that the WEC Defendants should respond to the Complaint, and that Plaintiffs would then file their First Amended Complaint as a matter of course, as is their right under Federal Rule of Civil Procedure 15(a)(1)(B). The WEC Defendants, so informed, subsequently filed their motion to dismiss on May 26, and the Plaintiffs were prepared to file their First Amended Complaint under Rule 15(a)(1)(B) as a matter of course, as they had planned.

Shortly before they did so, however, Plaintiffs' counsel discovered that the U.S. Court of Appeals for the Seventh Circuit is an outlier when it comes to amendments as a matter of course under Rule 15(a)(1)(B). Although other federal circuit courts of appeal hold that amendment as of right under Rule 15(a)(1)(B) ***includes*** the right to amend a complaint to add or drop parties without the consent of the other parties or leave of court, the Seventh Circuit follows a different rule. The Seventh Circuit instead follows the unique rule that Federal Rule of Civil Procedure 21 – not Rule 15(a)(1)(B) – governs whether parties may be added to or dropped from a case through an amendment to a complaint. *See* dkt. 148 ¶ 15; *id.* at 6. Consequently, Plaintiffs' counsel recognized that they could not simply file their First Amended Complaint under Rule 15(a)(1)(B), as they had

[2] For ease of review, unless otherwise indicated, all docket references are to the 20-cv-278 case.

planned. Rather, they recognized that Seventh Circuit authority ***first*** required them to move under Rule 21 (following the process set forth in Federal Rule of Civil Procedure 20) to obtain the Court's leave to add and drop Plaintiffs from the case, and ***then***, only after obtaining the Court's leave to add and drop parties, could they exercise their right to one free amendment of the complaint as a matter of course under Rule 15(a)(1)(B) by filing their First Amended Complaint, without being required to first obtain the defendants' consent or the Court's leave. Dkt. 148 ¶ 16; *id.* at 6-7.

Having discovered that they needed to first move under Rule 21 before amending as a matter of course under Rule 15(a)(1)(B), Plaintiffs' counsel met and conferred with all of the Defendants regarding their motion under Rule 21 for leave to add and drop parties. Dkt. 148 ¶ 18. The WEC Defendants conveyed their non-opposition to the motion for leave, and the Intervenor-Defendants Republican National Committee ("RNC"), Republican Party of Wisconsin ("RPW") and the Wisconsin Legislature reserved their decision until they had seen the filed motion for leave with the proposed First Amended Complaint. *Id.* Having so met and conferred with Defendants' counsel, on May 29, 2020 – only three days after the WEC Defendants filed their motion to dismiss – Plaintiffs moved this Court in accordance with Federal Rules of Civil Procedure 20 and 21 for leave to drop two current Plaintiffs as parties from this action and to add six new Plaintiffs as parties to this action, dkt. 148, as reflected in the proposed First Amended Complaint that was attached to the Motion as Exhibit A, dkt. 148-1. No opposition was filed by the June 5 deadline to respond to the motion and, therefore, as of the next business day, June 8, 2020, the motion for leave to add and drop parties stood unopposed.

As noted above, Plaintiffs understood the controlling Seventh Circuit precedent to layer Rule 21 on top of Rule 15(a)(1)(B), not to displace Rule 15(a)(1)(B) altogether. As Plaintiffs' counsel read the cases, the Seventh Circuit's rule requiring plaintiffs to seek leave to add or drop parties is layered upon Rule 15(a)(1)(B)'s grant to plaintiffs of a right to amend the substance of

the complaint as a matter of course within 21 days of the filing of a responsive pleading or, in this case, a motion to dismiss. Put differently, counsel interprets the controlling authority as imposing a two-step process for plaintiffs seeking to add parties to an action or drop parties from an action as part of the process of amending a pleading: the first step, under Rule 21, requires a plaintiff to obtain the district court's leave to add and/or drop parties; if that motion is granted, the second step, under Rule 15(a)(1)(B), allows a plaintiff to then file the amended complaint (reflecting the addition and dropping of parties granted by the court) as a matter of course, without the need for other parties to consent, or for the court to grant further leave.

Further, because Plaintiffs' motion for leave was unopposed as of the June 5 deadline to respond to the motion for leave to add or drop parties, based on prior experiences, Plaintiffs believed that this Court would rule on their unopposed motion for leave as soon as the Court could do so. Since the *Gear* Plaintiffs' proposed First Amended Complaint is directed at the November 3, 2020 general election, dkt. 155-1 at 74–77, and because all such substantive amendments to the original Complaint—beyond adding and dropping parties—could be made as a matter of course under Rule 15(a)(1)(B), the granting of the unopposed motion for leave would have necessarily mooted the WEC Defendants' motion to dismiss. That is why the *Gear* Plaintiffs did not respond to the WEC Defendants' motion to dismiss, though, in hindsight, Plaintiffs recognize that they should have clarified this point with the Court. At all times, the *Gear* Plaintiffs and their counsel have sought to act in good faith and in accordance with their understanding of the procedural rules and the interests of judicial efficiency in these consolidated proceedings. They certainly did not intentionally neglect any of their obligations; nor have they sought to delay these proceedings in any way. Quite to the contrary, they sought to amend the pleadings in the case on remand as quickly and efficiently as possible under the controlling law so that the case may proceed expeditiously. If, however, counsel for the *Gear* Plaintiffs erred in their reading of the requirements, the

governing law, or the Court's expectations, they sincerely apologize to this Court and appreciate the opportunity the Court has provided to respond to the WEC Defendants' motion to dismiss at this time.

2. Plaintiffs' Complaint is not moot, or their claimed constitutional violations are capable of repetition but evading review.

a. Plaintiffs' claims in their original Complaint were pegged to the facts known about COVID-19 at the time and not intended to expire at any time definite.

In the original Complaint, Plaintiffs based their claims and prayer for relief upon specific and objective facts, events, and orders, including but not limited to the upcoming election and Emergency Order #12, dkt. 1 at 22-23. The complete phrase was "for ***at least*** such time as Emergency Order #12 remains in place, ***subject to further extension***," *id*. (emphasis added), signaling that the emergency order's duration should be the minimum, not the maximum, duration of the injunction Plaintiffs asked the Court to enter. The prayer for relief identified an election that Plaintiffs knew would feel the impact of COVID-19 and used the Emergency Order #12 as an approximate but objective proxy or metric for the danger voters were facing. Yet, as Plaintiffs believe is clear from the express language used in the prayer for relief ("at least") and throughout the brief, *see* dkt. 1, Compl. ¶ 60 ("Given the circumstances of the COVID-19 pandemic . . . ."), they did not intend that relief be cut off upon the expiration of the emergency order or the end of the April 7 election, without consideration for whether the underlying circumstances that led to the constitutional violation were ongoing and would continue to impact voters' ability to safely cast ballots.

Therefore, the WEC Defendants are wrong to argue that "[t]he fact that the safer at home order is no longer in place in Wisconsin negates the central argument of the complaint." Dkt. 142 at 5. The fact that Plaintiffs would be required to violate Emergency Order #12 to comply with the witness requirement was always a secondary, if not tertiary, point in this case. As is clear from the

sole cause of action, Plaintiffs' central argument has always been that voters would be exposed to the dangers of COVID-19 by being forced to comply with the witness requirement. *See* dkt. 1, Compl. ¶ 58 ("*Under the circumstances of the COVID-19 pandemic*, which has led both the federal and Wisconsin state government to declare emergencies and has led Governor Evers to issue Emergency Order #12, ordering Wisconsin residents to stay at home (with limited exceptions) and banning '[a]ll public and private gatherings of any number of people that are not part of a single household or living unit,' it is not safe, reasonable, or even logical to require mail-in absentee voters who live alone or do not have an adult U.S. citizen living in their household to seek out and obtain a witness's signature in order for the ballot to be validly cast and counted.") (emphasis added); *id*. ¶ 60 ("*Given the circumstances of the COVID-19 pandemic*, eligible Wisconsin voters who live alone or who do not have an adult U.S. citizen living in their household simply cannot comply with the requirements of Wis. Stat. § 6.87(4)(b)1. and still cast a mail-in absentee ballot that will count. Therefore, under these circumstances, Section 6.87(4)(b)1. now creates an undue burden on mail-in absentee voters' right to vote in violation of the First and Fourteenth Amendments to the U.S. Constitution as construed by *Anderson* and *Burdick*.") (emphasis added). The WEC Defendants are focused exclusively on the prayer for relief, ignoring other statements throughout the Complaint that Plaintiffs believe make it clear, as they intended, that the duration of the Emergency Order #12 was a minimum, not a maximum, period for the requested injunction. At one point, the WEC Defendants do state that Plaintiffs' "claim is limited to the circumstances surrounding the pandemic," dkt. 142 at 4, seemingly admitting that as long as the pandemic is ongoing, Plaintiffs' constitutional rights will continue to be injured. Similarly, the WEC Defendants concede that "[t]he COVID-19 virus will likely still pose a threat" in future elections, dkt. 142 at 5, and, therefore, the burdens imposed upon voters and the constitutional violations are ongoing. The harm to Plaintiffs will continue unabated, absent some kind of relief from this Court.

Furthermore, the Complaint was filed in late March, during the early days of the pandemic when much less was known about COVID-19. Far more is known about the transmission dynamics of the COVID-19 pandemic now, and Plaintiffs plan to introduce an expert witness declaration and testimony from an epidemiologist that will establish on the record what has been learned about the pandemic since that time. It is that scientific evidence that has informed Plaintiffs' decision to pursue relief for the November 2020 general election. Because leave to amend is either allowed as a matter of course once, and is otherwise "freely give[n] when justice so requires," Fed. R. Civ. P. 15(a)(2), especially in light of new information, the *Gear* Plaintiffs anticipated that they might well have to amend the complaint in the future to seek relief for subsequent elections in 2020 and to add information relevant to the projected transmission of COVID-19 through the end of 2020. However, the *Gear* Plaintiffs were reluctant to do so until more information about the long-term dynamics of COVID-19, including the various factors that inform epidemiologists' modeling of this pathogen's transmission dynamics through the fall of 2020, was known.

Instead of understanding the Complaint as an initial statement of the facts known to the Plaintiffs at the time and the invocation of the Emergency Order #12's duration as the *minimum* duration of the pandemic's danger and the *minimum* duration of the requested injunction, the WEC Defendants now seek to *confine* Plaintiffs to those original factual allegations. The *Gear* Plaintiffs[3] will continue to suffer injuries from the constitutional and federal statutory violations caused by the interaction of Wisconsin's witness requirement and the pandemic that the WEC Defendants themselves concede will still pose a risk to voters in November.[4]

---

[3] Four of the six Plaintiffs have been included in the proposed First Amended Complaint. Dkt. 155-1 at 24-33.

[4] The WEC Defendants' full statement is: "The COVID-19 virus will likely still pose a threat, but that is not a governmental action that this court has any control over." Dkt. 142 at 5. The WEC Defendants can raise their state action defense on the merits, but that is not an argument for mootness. In any event, in issuing the preliminary injunction, dkt. 107, 115, this Court has presumably already rejected these state action arguments, which were raised in the preliminary

b. In the alternative, the constitutional violations at issue would still be capable of repetition but would evade this Court's review.

If the Court nevertheless believes the action was confined to the April 7 election or Emergency Order #12 and is now moot, in the alternative, the *Gear* Plaintiffs submit that their claimed violations, so limited, would still be capable of repetition in each election in Wisconsin during the COVID-19 pandemic but would continue to evade this Court's complete and final review. This exception to application of the mootness doctrine applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (citations and quotation marks omitted); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The Seventh Circuit and district courts in this Circuit have applied this exception to mootness in election law cases. In *Tobin for Governor v. Illinois State Board of Elections*, the Seventh Circuit noted that "[t]he cases that traditionally have fallen within the 'capable of repetition' exception have involved challenges to the validity of statutory provisions that will continue to operate past the election in question." 268 F.3d 517, 528–29 (7th Cir. 2001). Similarly, in *Acevedo v. Cook County Officers Electoral Board*, an *Anderson-Burdick* challenge to an election law, the Seventh Circuit concluded that "[t]hough the election is over, [the plaintiff's] claim is not moot because it is capable of repetition, yet evading review." 925 F.3d 944, 947–48 (7th Cir. 2019). And lastly, in a case decided by the U.S. District Court for the Northern District of Illinois, the Court found that a challenge to ballot access restrictions was not moot following the election: "The fact that the November 2012 election has long since been decided does not render Plaintiffs' claims moot, as the ballot restrictions they challenge prevented Fox and the Libertarian Party from appearing on the ballot

injunction briefing directed at the April 7 election and rebutted by Plaintiffs in their reply brief. *See* dkt. 160.

and continue to restrict the political activities of potential new parties and their members." *Libertarian Party of Ill. v. Ill. Bd. of Elections*, 164 F. Supp. 3d 1023, 1028 n.2 (N.D. Ill. 2016) (citing *Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006); *Storer v. Brown*, 415 U.S. 724, 737 (1974)).

As to the first factor, the Seventh Circuit has stated that an election is "one of those inherently transitory situations . . . that will run its course faster than courts can usually act to provide complete review on the merits." *Ciarpaglini v. Norwood*, 817 F.3d 541, 547 (7th Cir. 2016). In the abortion context, it is generally accepted that the window of a pregnancy is sufficiently short that challenged abortion restrictions cannot be fully litigated before those restrictions no longer apply to a pregnant plaintiff. *Roe v. Wade*, 410 U.S. 113, 125 (1973) ("[T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."). Longer windows can still be deemed too short to prevent full litigation. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (one-year period found too short); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18-month period). The Seventh Circuit has stated that:

> A suit by a pregnant woman challenging a state law limiting the right to an abortion is unlikely to be decided before the pregnancy ends one way or another, and so the termination of the pregnancy is held not to terminate jurisdiction. *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Challenges to election rules are treated the same way. *Norman v. Reed*, 502 U.S. 279, 287–88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n. 2, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *Stewart v. Taylor*, 104 F.3d 965, 969–70 (7th Cir.1997).

Majors v. Abell, 317 F.3d 719, 722 (7th Cir.), *certified question accepted*, 785 N.E.2d 226 (Ind. 2003), *and certified question answered*, 792 N.E.2d 22 (Ind. 2003). If constitutional challenges to Wisconsin's witness requirement in the context of the COVID-19 pandemic are found moot after the conclusion of each election or the termination of each emergency order, then a couple months' time is too short a period in which to litigate these claims to completion, including all appeals of preliminary and permanent injunctive relief.

As to the second factor, an action is reasonably expected to recur when the plaintiff demonstrates a real, rather than hypothetical, possibility that the same plaintiff will face a substantially similar situation in the future. A real possibility is demonstrated when a plaintiff establishes a "reasonable expectation," "demonstrated probability," or "reasonable showing" that the challenged action will recur. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). In *Stotts v. Community Unit School District No. 1*, the Seventh Circuit stated that "the particular plaintiff must have a reasonable expectation of suffering from the same harm again." 230 F.3d 989, 991 (7th Cir. 2000); *see also Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957, 970–71 (S.D. Ind. 2017) ("[T]he 'capable of repetition yet evading review' exception requires a plaintiff to show that *he* risks being subjected again to the offending behavior. . .").

Here, the second requirement would clearly be satisfied if this Court concludes the original complaint was time-limited. The individual voters named as Plaintiffs will be forced to comply with the witness requirement in the November 2020 general election and subsequent elections during the pandemic. While they cannot reasonably seek facial invalidation in light of the Seventh Circuit's stay order, they are entitled to pursue narrower relief to alleviate the undue burden and unconstitutional condition imposed on their right to vote. As the WEC Defendants concede, "[t]he COVID-19 virus will likely still pose a threat" to Wisconsin voters in future elections. Dkt. 142 at 5. Therefore, the burdens imposed upon voters and the constitutional violations are recurring in every election in Wisconsin during the COVID-19 pandemic.

As to the organizational Plaintiffs, both League of Women Voters of Wisconsin ("LWVWI") and Wisconsin Alliance for Retired Americans ("Wisconsin Alliance") will continue to be forced to divert resources and staff time to educating voters about and helping voters with the witness requirement in the November 2020 general election. *See* dkt. 155-1, Compl. ¶¶ 30–48.

These injuries do not cease with the April 7 election. What Plaintiffs and their counsel have learned about the virus since the original Complaint was filed in late March makes clear that the pandemic's threat to voters will be ongoing through the fall and will make it very difficult or impossible for voters to safely comply with the witness requirement through reasonable efforts. While voters are unduly and unconstitutionally burdened, organizations, such as LWVWI and Wisconsin Alliance, that take it as their core mission to educate and assist these voters will be correspondingly unduly and unconstitutionally burdened.

Accordingly, if the Court concludes that this case is moot as originally pled, the original Complaint's claims would nevertheless be capable of repetition but evading final adjudication and review. Plaintiffs would respectfully request that they be afforded the opportunity to amend their Complaint—for the first time in this litigation—to direct their existing and new claims at the November 2020 general election, as is now well-supported by the epidemiological evidence.

Conclusion

The *Gear* Plaintiffs respectfully request that this Court grant their motion for leave to add and drop plaintiffs from the 20-cv-278 action and deny the WEC Defendants' motion to dismiss as moot. If, however, the Court grants the WEC Defendants' motion to dismiss, such dismissal on mootness grounds would typically be without prejudice. *See, e.g., Dixon v. ATI Ladish LLC*, 667 F.3d 891, 894 (7th Cir. 2012) ("Yet a good defense to liability is a reason why defendants prevail on the merits rather than a reason why the litigation should be dismissed without prejudice—which is the consequence of mootness."). In that event, Plaintiffs respectfully would renew their request for leave to file their proposed First Amended Complaint on the docket.

Failing that, Plaintiffs will have to resort to filing the proposed First Amended Complaint as a new action related to the 20-cv-249 case, move for consolidation, and move for a preliminary injunction.

Dated: June 18, 2020

Respectfully submitted,

/s/ Jon Sherman
Jon Sherman*
D.C. Bar No. 998271
Michelle Kanter Cohen*
D.C. Bar No. 989164
Cecilia Aguilera*
D.C. Bar No. 1617884
FAIR ELECTIONS CENTER
1825 K St. NW, Ste. 450
Washington, D.C. 20006
(202) 331-0114 (telephone)
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org

Douglas M. Poland
State Bar No. 1055189
David P. Hollander,
State Bar No. 1107233
RATHJE WOODWARD LLC
10 E Doty Street, Suite 507
Madison, WI 53703
(608) 960-7430 (telephone)
(608) 960-7460 (facsimile)
dpoland@rathjewoodward.com
dhollander@rathjewoodward.com

Attorneys for Plaintiffs in Case No. 20-cv-278-wmc

**Admitted to the U.S. District Court for the Western District of Wisconsin*