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

PLAINTIFFS' BRIEF IN OPPOSITION TO INTERVENTION AND RESPONSES TO THE COURT'S QUESTIONS DURING THE MARCH 19, 2020 TELEPHONE STATUS CONFERENCE

We are in the midst of the worst national health emergency since at least the Great Influenza of 1918-20. The news grows progressively more frightening by the day. There were 155 confirmed cases of COVID-19 in Wisconsin as of 2 p.m. yesterday (March 19), and growing "evidence of community spread" in Dane, Milwaukee, Kenosha, and Brown Counties.[1] Governor Evers continues to "urge[] the public to stay home" and to take other actions to reduce public exposure.[2] Meanwhile, there are growing reports in Wisconsin and throughout the country that

[1] Wis. Dep't of Health Servs., Outbreaks in Wisconsin, https://www.dhs.wisconsin.gov/outbreaks/index.htm (last visited Mar. 19, 2020).

[2] Press Release, Gov. Evers Urges the Public to Help Keep Our Healthcare Workers Safe (Mar. 19, 2020), https://content.govdelivery.com/accounts/WIGOV/bulletins/282251a. Specifically, those who are "asymptomatic or experiencing mild symptoms" should "*stay home and self-isolate*." *Id.* (emphasis added). The Governor yesterday also directed Department of Health Services (DHS) Secretary-designee Andrea Palm to restrict the size of all child care settings. Press Release, Gov. Evers Orders Scaling Down of all Child Care Settings (Mar. 18, 2020), https://content.govdelivery.com/accounts/WIGOV/bulletins/281de9e. "Centers may not operate with more than 10 staff present at a time and may not operate with more than 50 children present at a time." *Id.*

voting locations are "hemorrhaging" poll workers and election judges because of COVID-19 fears; that many regular voting locations are closing for safety reasons (such as assisted-living facilities); that many voters who are in higher-risk groups (or who live with people who are in higher-risk groups) are terrified of having to go to the polls in person; and whether polling places will have sufficient hand sanitizers and cleaning supplies available to prevent the potential spread of COVID-19 in polling places. *See* Supplemental Declaration of Bruce V. Spiva, Exs. 1-7, which is being filed with this brief.

In the face of this once-in-a-century catastrophe, the Wisconsin Elections Commission (through the Wisconsin Department of Justice) and the proposed intervenor, the Wisconsin Legislature, argue that the statutory deadlines and proof requirements challenged in this litigation should not be modified one whit for the upcoming April 7th elections. They contend that Wisconsinites should be forced to exit the safety of their homes—contrary to the urgings of government officials and health experts—to make copies, scan documents, register, and vote. It is now clear that, if this Court does not take swift action on behalf of Wisconsin's eligible voters, no one else will. As a result, Wisconsinites will be faced with the unconscionable choice of having to risk their safety or lose their right to vote. And they will face this choice for no good reason. Not only is the relief requested by Plaintiffs limited and tailored to ensure safe registration and voting in this unprecedented time, but there is no *legitimate* question that it is needed.

Part I of this brief responds to the Wisconsin Legislature's motion to intervene as of right and/or by permission in this litigation. Part II responds to several questions raised by the Court during yesterday's telephone status conference.

I. This court should deny the Wisconsin Legislature's motion to intervene.

The Wisconsin Legislature's motion to intervene in this litigation is squarely barred by *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 384 F. Supp. 2d 982 (W.D. Wis.), *aff'd*, 942 F.3d 793 (7th Cir. 2019). Plaintiffs will not waste the Court's time with the usual background discussion or recitations of the obvious, given that this Court authored *Planned Parenthood* and was upheld in all respects by the Seventh Circuit. As in *Planned Parenthood*, the Legislature here has once again failed to "point to a direct, unique interest implicated by this lawsuit"; failed to demonstrate "that this lawsuit somehow threatens to impair that interest"; and failed to show that the Wisconsin Department of Justice is "inadequately represent[ing] that interest," which requires a showing of "gross negligence or bad faith" on the Department's part. *Id.* at 988.

If anything, the Legislature's argument for intervention here is far weaker here than in *Planned Parenthood. First*, the Legislature does not even attempt to rely on the sort of alleged issue conflicts it claimed in *Planned Parenthood.* There, the Legislature argued that it should be allowed to intervene because of, *inter alia*, the incumbent Attorney General's "endorsement by the political arm of Planned Parenthood during the election; his decision to join a lawsuit against the federal government challenging a regulation barring taxpayer-funded family planning clinics from referring patients to abortion providers"; and "his decision to withdraw Wisconsin from two, multi-state amicus briefs defending abortion regulations *unrelated* to those challenged here, nor adopted by Wisconsin." 384 F. Supp. 3d at 989 (emphasis in original). This Court held that, "[e]ven viewed collectively, this litany fails to demonstrate (or even come close to demonstrating) either gross negligence or bad faith." *Id.* Here the Legislature points to no such arguable issue conflict at all. Instead, it argues in its intervention brief that a conflict between the Legislature and the Attorney General *might* arise in the future. And it makes many similarly "silly" arguments this Court rejected in *Planned Parenthood. Id.* at 988 n.5.

Second, this Court denied permissive intervention in *Planned Parenthood* because, *inter alia*, "to allow intervention would likely infuse additional politics into an already politically-divisive area of the law and needlessly complicate this case." *Id.* at 990. So much more the case here. The state GOP Executive Director Mark Jefferson has branded this case as an attempt to "hijack a national health crisis to rig an election in [plaintiffs'] favor." https://madison.com/ct/news/local/govt-and-politics/amid-pandemic-democrats-sue-to-ease-absentee-voting-rules-in/article_b36c8820-c6b9-5fa2-bbda-74e1d86bfeaf.html. The best answer to this false and offensive claim is to quote Judge Walker's words in *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258-59 (N.D. Fla. 2016), ordering an extension of deadlines due to Hurricane Matthew:

> It has been suggested that the issue of extending the voter registration deadline is about politics. Poppycock. This case is about the right of aspiring eligible voters to register and to have their votes counted. Nothing could be more fundamental to our democracy.

The Legislature's intervention would only "needlessly complicate this case" and slow it down. 384 F. Supp. 3d at 990.

Third, the Legislature remarkably relies heavily on *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019)—a case decided after this Court's *Planned Parenthood* decision—without acknowledging that it made the *same* arguments about *Bethune-Hill* on appeal to the Seventh Circuit in *Planned Parenthood* or that the Seventh Circuit forcefully *rejected* those arguments. *See* 942 F.3d at 800 ("*Bethune-Hill* cannot bear the weight the Legislature puts on it."). "The Supreme Court was simply not addressing a situation, like this one, in which two state entities were trying to speak on behalf of the State *at the same time.*" *Id.* (emphasis added). "In fact, *every* decision the Legislature cites as favorable authority involves a situation in which a legislature intervened once the governmental defendant's default representative had dropped out

of the case," including *Bethune-Hill*. *Id.* (emphasis added). "The Legislature points us to no authority granting a state—or any party for that matter—the right to have two separate, independent representatives within the same suit." *Id.* All of these points apply with equal force here as in *Planned Parenthood.* The State argues it should be allowed to intervene *now* because the Department of Justice *might* not appeal an adverse decision. The answer to this purported concern is obvious: if the Department decides not to appeal, the Legislature can then move to intervene.

Fourth, the Legislature relies heavily on *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), in which the Supreme Court cautioned that "[c]ourt orders affecting elections, …can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." The underlying purpose of this so-called "*Purcell* Principle" is to avoid "changing the electoral *status quo* just before the election," which would cause "voter confusion and electoral chaos." Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2016).

Remarkably, the Legislature does not even attempt to respond to the arguments raised by Plaintiffs' counsel in yesterday's conference. Nor does the Legislature explain why the Wisconsin Department of Justice is incapable of raising the *Purcell* defense if it finds it meritorious. Moreover, the "electoral *status quo*" *already* has been upended—not by any judicial order, but by COVID-19 and the "voter confusion and electoral chaos" it is causing. Until recent days, Wisconsin voters reasonably expected that they would be able to safely register in person until the Friday before the election, or at the polls themselves on election day. Now they can't--not because of any court order, but because of the pandemic. And now, because of the challenged deadlines, those affected voters cannot register electronically or by-mail.

Likewise, the Supreme Court in *Purcell* was concerned that pre-election judicial orders might create a "consequent incentive to remain away from the polls." 549 U.S. at 5. Here again, the "incentive to remain away from the polls" in this case results not from federal judicial action, but by a deadly pandemic. Voter confusion and abstention from voting are "consequent" of COVID-19, not of anything this Court might do. Plaintiffs' requested relief would get more voters *to* the polls and ensure their ballots *will* be counted, rather than threatening to keep them away. Under proposed intervenors' reasoning, the natural disaster decisions cited by Plaintiffs would have come out the other way, because they involved changing state election procedures shortly before election day. That would be absurd and unjust—those cases (as here) involved efforts to mitigate the electoral impacts of natural disasters that interfered with voters' reasonable expectations and threatened to keep voters from voting. *See* Plaintiffs' Opening Br. at 8 (Dkt. 3).

II. Responses to the Court's questions.

During yesterday's conference, the Court, the Department of Justice, and proposed intervenors raised several issues that may be material to the decisions the Court will soon have to make. For the sake of completeness and to aid the Court's decision-making, Plaintiffs briefly address those issues in the following discussion.

A. The Election Day Receipt Deadline

There was some question during yesterday's conference about Wisconsin's Election Day Receipt Deadline, and whether the Court could wait until after the election to decide the issue. To clarify, absentee ballots must be *received* by 8:00 p.m. on Election Day in order to be counted. Wis. Stat. § 6.87(6). If they arrive after that time, they are not counted, even if they are post-marked before Election Day. *Id*. This receipt-deadline system is different from systems that rely on when a ballot is *sent*. In such systems, ballots that are postmarked on or before Election Day

but received after Election Day are still fully counted. That does not happen in Wisconsin. Instead, a Wisconsin voter could cast his or her ballot several days before Election Day, but, because of slower U.S. Postal Service deliveries and other pandemic-related service interruptions, the ballot may arrive after Election Day. Under these scenarios, the ballot "may not be counted" and that voter is disenfranchised. *Id.*

In the 2018 general election, Wisconsin reported to the Election Assistance Commission that 1,445 absentee ballots arrived after the deadline. Those votes were not counted; those voters were disenfranchised. "[T]he basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]" *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 244 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). Even more voters face disenfranchisement in the upcoming primary because of the Election Day Receipt Deadline. Circumstances are changing every day. There is no telling how many absentee ballots will be requested by the April 2 deadline, how many absentee ballots will be sent before the April 7 election, how many absentee ballots will arrive after 8:00 p.m. on April 7, or how the ongoing public health crisis will impact election workers processing absentee ballots or the U.S. Postal Service in delivering the mail.

A wait-and-see approach—holding off deciding the ballot receipt issue until closer to Election Day or even thereafter—would fail to provide sufficient relief in several respects. *First*, determining the eligibility of votes after an election presents due process concerns. *See, e.g.*, *Griffin v. Burns*, 570 F.2d 1065, 1070 (1st Cir. 1978) (holding that Rhode Island's "retroactive invalidation of absentee and shut-in ballots in this primary violated the voters' rights under the fourteenth amendment").

Second, as a practical matter, the number of late-arrived absentee ballots is not tracked in any centralized way that allows easy access on a condensed timeline. Under Wisconsin law,

municipal clerks must keep records of voters who apply for absentee ballots and have voted absentee. Wis. Stat. § 6.89. But because late-arrived absentee ballots are not counted, *see id*. § 6.87(6), the number of uncounted late-arrived absentee ballots are not systematically captured and publicly reported immediately. Thus, for Plaintiffs to independently demonstrate the full scope of the Election Day Receipt Deadline's disenfranchising effects to the Court, they must engage in a time-consuming public records requests to each municipal clerk or by waiting for the state's report to the Election Assistance Commission. With just nine days after April 7 for each municipality to complete its canvass, this is simply not possible. Rather, to avoid widespread disenfranchisement of Wisconsinites, this Court should enjoin the Election Day Receipt Deadline *before* the April 7 election, and allow ballots postmarked by Election Day and arriving within ten days after Election Day to be counted.

Third, a failure to give prompt assurances that every ballot mailed or emailed by a certain date *will* be counted will itself increase voter confusion and provide a further disincentive to going through the challenging act of registering and voting in the midst of the pandemic. If there is not even a basic assurance that an absentee ballot *will* be counted—even one mailed many days in advance of the election—why bother to send a ballot that has arrived just days before the deadline and that the voter knows they likely cannot mail in time for it to arrive before 8 p.m. on election day and be counted? The Court's order should at the very least clearly provide that voters' timely mailed absentee ballots *will* be counted, even if it leaves the implementation details until closer to or even after the election.

B. Proof and judicial notice issues

The principal basis for the Legislature's motion to dismiss (Dkt. 23) is that Plaintiffs have failed to submit "competent" evidence documenting any harm to any particular voter, in the form

of admissible declarations. Plaintiffs are in the process of gathering relevant evidence substantiating the adverse impacts caused by the challenged statutes in the wake of the coronavirus pandemic. *See* the accompanying declarations of Hannah Temes, Douglas Koop, Amia Bridgeford, and Linnea Stanton. These are students and older voters with health challenges, all of whom face significant obstacles to registering or voting because of the registration deadline and/or the photo ID and proof of residence document requirements. Plaintiffs are prepared to continue gathering and submitting such individualized proof if this Court deems it necessary.

But this Court need not and should not wait to take decisive action pending the submission of relevant voter declarations, a process that *itself* raises potential threats to human health and safety.[3] Most if not all of the relevant facts are judicially noticeable as either adjudicative facts or legislative facts. A court may take judicial notice of an adjudicative fact that is "not subject to reasonable dispute" and either (1) "generally known within the territorial jurisdiction of the trial court" or (2) "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997). "Judicial notice is premised on the concept that certain facts or propositions exist which a court may accept as true without requiring additional proof from the opposing parties. It is an adjudicative device that substitutes the acceptance of a universal truth for the conventional method of introducing evidence." Fed. R. Evid. 201 advisory

[3] Because of the coronavirus, just the act of obtaining signed declarations from Wisconsin voters is challenging. Voters who do not have scanners or copiers in their homes cannot provide signed declarations from their homes. And places of work are not an option for obtaining access to scanners and printers because most work places are now closed. The Department of Justice and proposed intervenors essentially ask the Court to leave common sense at the courthouse door by not recognizing these very real and serious obstacles—obstacles that make reliance on judicial notice even more compelling. It is no answer to argue, as the proposed intervenors do here, that "most" people have a printer or a scanner in their homes, or now use a smart phone. Many people do not, especially those with limited means and resources, as well as Wisconsin's elderly voters.

committee's note (1972). As Professor Thayer explained in his seminal analysis of judicial notice, which formed the backbone of Rule 201, there is a "wide principle … that courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows." James B. Thayer, *Judicial Notice and the Law of Evidence*, 3 Harv. L. Rev. 285, 304-05 (1890). "The application of such a principle must … leave a great range of discretion to the courts; only in a large and general way can any one say in advance what are and what are not matters of common knowledge." *Id.* at 305.

"Everybody knows" we are now in the midst of the worst pandemic in several generations, one that is likely to grow much worse between now and April 7. It is "common knowledge" that federal, state, and local officials as well as the medical community are telling us 24/7 to hunker down, take shelter, avoid leaving home as much as possible, avoid crowded places, avoid public transportation, and prepare for the situation to get much worse over the coming weeks and we provided examples of such pronouncements in our initial filing. *See* Exh. 1 to Initial Brief. "Everybody knows" there is widespread uncertainty, health and safety concerns, and fear of escalating catastrophe. *See, e.g.*, *United States v. Griffin*, 525 F.2d 710, 711 (1st Cir. 1975) (taking judicial notice that enforced busing in the South Boston public schools received substantial publicity and aroused widespread resentment); *Leatherback Sea Turtle v. Flagler Cty. Bd. of Cty. Comm'rs*, 359 F. Supp. 2d 1209, 1214 n.2 (M.D. Fla. 2004) (taking judicial notice of the "current forecast that has Flagler Beach in the path of Hurricane Jeanne" given projections from the "National Hurricane Center that within the next 72 hours Hurricane Jeanne will hit Flagler Beach with winds of 115 miles an hour").

The key facts relied upon by Plaintiffs are also "legislative" in character. "When a court, as a basis for making law, assumes or reaches a conclusion as to *a broad proposition of fact*, the

court is said to have taken 'judicial notice of legislative facts.'" 1 Jones on Evidence § 2:4 (7th ed.) (emphasis added). "Sometimes a court takes notice of such a fact, which may be far from indisputable, in a sweeping generalization," sometimes relying on "scientific, sociological and other data which itself may be disputed." *Id.*

There are no limits on "judicial access to legislative facts . . . in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however leave open the possibility of introducing evidence through regular channels in appropriate situations." *Id.*; *see generally Owens v. Duncan*, 781 F.3d 360, 364 (7th Cir. 2015) (Addressing appropriateness of relying on judicial notice, legislative facts, and stipulated facts, court states: "Not every fact on which a verdict is based must be found in or inferred from evidence introduced by a party."); *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 593–94 (7th Cir. 1991) (quoting authority suggesting that "[t]he attitude of the country" toward prospective deportation of various types of former residents is a question of legislative fact").[4]

C. State's technology and resource arguments.

Administrator Meagan Wolfe submitted a Declaration explaining some potential administrative difficulties with restarting the electronic registration system, extending the

[4] The proposed intervenors' other major argument for dismissal relies on *Burford* abstention, which "allows a federal court to dismiss a case only if it presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)) (emphasis added). This abstention doctrine only applies "in extraordinary circumstances." *Id.* When a case does not involve a state-law claim, as is the case here, "*Burford* did not provide proper grounds for an abstention-based dismissal." *Id.*

registration deadline and the deadline for receipt of absentee ballots. Many of the points raised by Administrator Wolfe appear to be issues that the current system can easily accommodate. The restarting of the online registration system does appear to entail some administrative burden, but based on her declaration alone, surmountable burdens. These are extraordinary times more than justifying the type of administrative burden she identifies. We briefly address the major concerns raised by Administrator Wolfe below:

- ***Reactivation of Online System***: Administrator Wolfe explains that re-activating the online registration system requires three steps – modifying MyVote code, testing the new code, and deployment – that will take 48-72 hours. Wolfe Decl. Para. 11. But even if re-activating the online registration system takes 72 hours, that would still allow people to begin registering again online on Monday, March 23 and continue to do so through April 3. That is a substantial improvement over the current alternative of no additional days of online registration.

- ***Poll Books***: Administrator Wolfe states in Paragraph 14 of her Declaration that the biggest effect of extending the registration deadlines would be on municipalities and counties, some of which send poll books to publishers for printing immediately after the online registration deadline passes. This does not appear to be a substantial concern. Registrations continue through April 3 at clerk's offices and of course on Election Day, and Administrator Wolfe recognizes that there are "supplemental" and "post-supplemental" poll books, so this is something the municipalities and counties deal with under the current system. Wolfe, Decl. Para. 17.

- ***Confusion***: Administrator Wolfe states that changing the registration deadlines risks confusion because WEC would need to get the word out to 72 county clerks and 1850 municipal clerks. But the WEC communicates with these local election officials already through clerk communications, Para. 4, and therefore can get the word to them that these deadlines have changed.

- ***Mail Time***: Administrator Wolfe states that they look to the postmark on by-mail registration applications to determine if they are timely, and raises the concern that clerks may not have time to mail the ballot back if they receive the registration and/or ballot application too close to the election, Decl. Para. 18. This may be so, but it does not justify disenfranchising those voters for whom there is still time to get their registration and ballot application in and returned. Moreover, this concern provides another reason for the Court to extend the Election Day receipt deadline for absentee ballots, so that those ballots mailed by Election Day will still be counted.

- ***Defects***: Administrator Wolfe states that by-mail registration applications are more likely to contain defects that need to be cured and that there will be less time to do this. Decl., Para. 19. She notes that these applications are often missing proof of residence. This concern provides an additional basis for the Court to order that the proof of residence requirement be waived. And the fact that some registration applications may be defective is not a good reason to deny those that are not.

- ***Confinement***: Administrator Wolfe points out that under Wisconsin law, people who are indefinitely confined, "meaning they may have difficulty getting to the polls for reason of age, infirmity, or disability are not required to provide photo ID," with their absentee ballot applications. Decl. Para. 33. This provides an additional reason for the Court to waive the photo ID requirement, because in essence a wide swath of the Wisconsin population is confined to their homes in order to avoid catching and spreading Covid-19.

- ***Election Day Receipt Deadline***: Administrator Wolfe states that if the Court grants Plaintiffs' request to extend the deadline for receipt of absentee ballots to 10 days after Election Day that municipalities and counties could not make their respective April 13 and April 17 canvassing deadlines. Decl. Para. 36. This is an issue that this Court can solve while preserving

the right of Wisconsinites to vote. The Court can extend the canvassing deadlines to permit the municipalities and counties to count the absentee votes that come in up to 10 days after Election Day. In the alternative, the Court could grant a shorter extension. But Plaintiffs submit that under these circumstances, simply allowing ballots that arrive after 8 p.m. on Election Day to be thrown out to preserve these purely administrative deadlines is inconsistent with the Constitution.

Moreover, as discussed in Plaintiffs' opening brief, numerous federal courts have held in the context of natural disasters and other emergencies that any administrative inconveniences or additional expenses faced by the State are vastly outweighed by the vindication of the constitutionally protected right to vote, and must yield to that fundamental right. In 2016, for instance, Hurricane Matthew bore down on the Southeastern United States, causing disruption and preventing thousands of voters from registering to vote. Two federal courts extended voter registration deadlines in two states and discounted the burdens that the extensions would cause the states. While extending the voter registration deadline "would present some administrative difficulty," "those administrative hurdles pale in comparison to the physical, emotional, and financial strain Chatham County residents faced in the aftermath of Hurricane Matthew. Extending a small degree of common courtesy by allowing impacted individuals a few extra days to register to vote seems like a rather small consolation on behalf of their government." *Ga. Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345–46 (S.D. Ga. 2016).

In Florida, meanwhile, a federal court extended the voter registration statewide. The court explained that Florida's deadline imposed a severe burden on individuals denied the right to vote. *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016). When weighed against administrative convenience, the court explained "it would be nonsensical to prioritize those deadlines over the right to vote, especially given the circumstances here." *Id*. at 1258. The

circumstances today in Wisconsin—and across the United States—are arguably far worse. Whereas a hurricane dissipates over the course of days, a global pandemic may last for months, if not longer.

Even when inclement weather less severe than a major destructive hurricane (or a spreading global pandemic) impacted voting, courts have not hesitated to extend deadlines or impose remedy to assist voters. During the 2008 Ohio primary, for instance, a federal court extended the hours polling places must be open by 90 minutes because of heavy rain, flooding, and election workers running out of ballots. *Obama for Am. v. Cuyahoga Cty. Bd. of Elections*, 1:08-cv-562-PAG, ECF No. 6 (N.D. Ohio Mar. 4, 2008). In Pennsylvania, "extreme weather conditions that caused extensive flooding, loss of electricity, heat, and water" led to multiple precincts being closed. *In re General Election-1985*, 109 Pa. Cmwlth. 604, 606 (1987). The Commonwealth Court affirmed the closures, explaining that election laws must "ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process." *Id*. at 608. But when unforeseen extreme weather prevented voters from making it to the polls, "members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control." *Id*. This Court should grant Plaintiffs' tailored and reasonable requests to further the safety of Wisconsin voters while still permitting them to exercise the most "precious" right. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

III. Conclusion

For the reasons set forth above, in Plaintiffs' prior submissions, and in Plaintiffs' arguments during yesterday's scheduling conference, the Wisconsin Legislature's motion to intervene should be denied and Plaintiffs' motion for a TRO and preliminary injunction should be granted with dispatch.

Respectfully submitted,

/s/ Bruce V. Spiva
Marc E. Elias
John Devaney*
Bruce V. Spiva
Amanda R. Callais
Zachary J. Newkirk*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@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
**Motions for Pro Hac Vice Forthcoming*