IN THE UNITED STATES DISTRICT COURT
FOR THE 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,

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF WISCONSIN,

Intervenor-Defendants.

Case No. 3:20-cv-249-wmc

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND RECONSIDERATION OF THE COURT'S RULING ON THE BY-MAIL ABSENTEE DEADLINE AND DOCUMENTATION REQUIREMENTS

A preliminary injunction is always an extraordinary remedy. It is particularly extraordinary in the middle of an election, with key deadlines rapidly approaching. And it should be even more extraordinary during an ongoing pandemic. COVID-19 presents challenges for *all* Americans—individuals who must take reasonable steps to stay healthy, and state officials who must keep citizens safe, allocate scare resources, and keep democracy functioning. During these trying times, States have a *greater* interest in avoiding judicial interference with the laws and processes they put in place to protect the integrity of elections. Plaintiffs have not made the kind of legal or factual showing needed to suspend Wisconsin's concededly valid laws in the middle of an ongoing election. Their motion should be denied.

ARGUMENT

A preliminary injunction is "never awarded as of right," but only on "a clear showing" that the plaintiff is entitled to this "extraordinary remedy." *Winter v. NRDC*, 555 U.S. 7, 24, 22 (2008). The plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20; *accord* Order (Doc. 37) 9. Plaintiffs cannot do that here. Their constitutional claims lack merit, and the remaining equitable factors tilt decisively against injunctive relief.[1]

I. Plaintiffs are not likely to succeed on the merits.

Plaintiffs ask this Court to enjoin, for *all* Wisconsin voters and for various durations, six of Wisconsin's election laws: the by-mail registration deadline, the proof-of-residency requirement for registration, the photo-ID requirements for absentee-ballot requests, the witness requirement for absentee ballots, and the deadline for accepting absentee ballots. *See* Br. 1-2. Plaintiffs contend that these laws violate the right to vote and the equal-protection principle described in *Bush v. Gore*, 531 U.S. 98 (2000). Br. 11-21. Both theories are misguided.

A. Plaintiffs' right-to-vote claims fail.

On their face, none of the challenged laws abridges the right to vote. As the Seventh Circuit has explained, "[v]oting fraud is a serious problem" that can be "facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004). Registration deadlines promote the State's "valid and sufficient interests in … prepar[ing] adequate voter records and protect[ing] its electoral processes from possible frauds." *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (upholding a registration deadline 50 days before the election). These deadlines also "provide[] a certainty and reliability that enable election

[1] Consistent with their promise to "confer with Defendants and the Legislature to avoid any duplicative arguments or filings," Doc. 78 at 9, Intervenors worked to keep this brief short and focused on nonduplicative arguments. To the extent that Defendants or the Legislature raise additional arguments for denying Plaintiffs' motion, Intervenors adopt those arguments as well.

officials to direct their efforts to the essential tasks of election preparation and thus minimize[] the degree of disorder and the risk of error and even chaos." *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008). Similarly, laws that require voters to prove their identity "deter[] fraud," "promote[] accurate record keeping," and "promote[] voter confidence." *Frank v. Walker* (*Frank I*), 768 F.3d 744, 750 (7th Cir. 2014). Plaintiffs do not argue otherwise.

The question, according to Plaintiffs, is whether the challenged laws *became* unconstitutional once COVID-19 reached Wisconsin. While the coronavirus has dramatically changed the everyday lives of Wisconsinites, "these circumstances are not impediments created *by the State*." *Bethea v. Deal*, 2016 WL 6123241, at *2 (S.D. Ga. Oct. 19, 2016) (emphasis added). The only affirmative action that the State took is the Governor's Safer-at-Home order, which Plaintiffs do not challenge. Instead, Plaintiffs challenge Wisconsin's failure to change its valid laws in response to a public-health crisis that it did not create. That theory lacks any allegation of "purposeful discrimination," which is required to prove a violation of the Fourteenth Amendment "no less in a case involving political rights than in any other." *Snowden v. Hughes*, 321 U.S. 1, 8-11 (1944). And Plaintiffs' theory of passive liability is a far cry from the kinds of claims that the *Anderson-Burdick* and *Mathews* balancing tests were designed to address. *See Bethea*, 2016 WL 6123241, at *2-3 (stressing the lack of "any precedent that would constitutionally or statutorily mandate that Defendants provide an extension in the absence of any actual government action that burdens an individual's right to vote").

Even if this Court were to apply those balancing tests here, it must consider how COVID-19 affects *both* sides of the balance—the interests of the State and the individual. True, COVID-19 has complicated many public activities, including voting. But "States" also "have important interests … in the wake of election emergencies": they must "focus their resources on recovering from the emergency, ensuring the accuracy of voter registrations they have received, relocating polling places as needed, ensuring adequate staffing for the voting period, and otherwise minimizing the likelihood

of errors or delays in voting." Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 593 (2018) (Morley). As emergencies complicate the exercise of individuals' voting rights, they also enhance the State's interest in maintaining orderly, inexpensive processes that help restore "'some sort of order, rather than chaos'" to the democratic process. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). An "election emergency" should thus "seldom warrant" any "large-scale" changes to election laws by courts. Morley 593. "[T]he burden some voters face[] c[an]not prevent the state from applying the law generally." *Frank v. Walker* (*Frank II*), 819 F.3d 384, 386 (7th Cir. 2016).

Indeed, "errors and irregularities" around election day are "inevitable," yet "state election laws must be relied upon to provide the proper remedy." *Hennings v. Grafton*, 523 F.2d 861, 865 (7th Cir. 1975). Even in the face of catastrophes, courts have long avoided intrusions into States' efforts to navigate the crisis and to craft solutions that restore democratic processes. *See, e.g.*, *Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020) (declining to intervene in Florida's ongoing primary election in the face of COVID-19); *Bethea*, 2016 WL 6123241 (declining to extend Georgia's voter-registration deadline in the wake of Hurricane Matthew); *ACORN v. Blanco*, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006) (denying request "to extend the deadline for counting absentee ballots received by mail" in New Orleans in the wake of Hurricane Katrina); *State ex rel. Sch. Dist. No. 56 Traverse Cty. v. Schmiesing*, 66 N.W.2d 20 (Minn. 1954) (refusing to invalidate an election despite a "severe snowstorm" that blocked roads and closed three out of ten polling places); *Peterson v. Cook*, 121 N.W.2d 399 (Neb. 1963) (similar). Plaintiffs rely heavily on *Florida Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016). But that decision is an extreme outlier—and should remain that way. *See* Morley 574-85 (explaining that *Scott*'s "one-sided" analysis split with two sister courts without explanation, "misapplied the Constitution, misconstrued Florida law, and wholly overlooked important remedial issues").

Here, too, Plaintiffs' crisis-motivated request for broad judicial interference in an ongoing election should be rejected. Their right-to-vote claims suffer from at least three major defects.

First, Plaintiffs have not shown that Wisconsin's laws severely burden the right to vote. Because there is no constitutional right to vote absentee, *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004), restrictions on absentee voting do not implicate the right to vote at all because in-person voting remains available. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). If Wisconsin officials conclude that in-person voting is safe—as other States have, with appropriate social distancing and other protocols—neither Plaintiffs nor this Court has the scientific or medical expertise to second-guess that decision. *See Griffin*, 385 F.3d at 1131 ("[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry."); *Schmiesing*, 66 N.W.2d at 28 ("It is the prerogative of the [state officials] to exercise their judgment and discretion" to schedule elections during crises, "and the courts have no right to … pass[] upon their wisdom or lack of it").

On a more granular level, Plaintiffs have not explained why complying with the challenged laws requires "[un]reasonable effort." *Frank II*, 819 F.3d at 386. Their declarations provide no credible, nonconclusory explanation for why voters cannot take advantage of smartphones, open UPS stores, videochatting, social distancing, and other available means of uploading documents and providing signatures. *See* Leg. Amicus Br. (Doc. 31) 11-24. Indeed, the Safer-at-Home order permits travel and business operations for voters to comply with ID requirements. *See* Spivak Decl. (Doc. 63) Ex. 4 ¶¶13g, 13l, 13o, 13q, 13r, 13v; Tseytlin Decl. (Doc. 25) Ex. 10.[2]

[2] Plaintiffs' repeated use of the term "disenfranchisement" is question-begging. *See, e.g.*, Br. 11-15, 17, 4-6. "Any" regulation of voting—including registration, polling hours, and polling locations—"is going to exclude, either de jure or de facto, some people from voting." *Griffin*, 385 F.3d at 1130; *see* Morley 575. "[T]he constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin*, 385 F.3d at 1130.

Second, Plaintiffs have not shown that any increase in the burden on voting rights wrought by this pandemic outweighs the State's increased (or preexisting) interests. Again, Plaintiffs do not dispute that, in normal times, the challenged laws further important interests like maintaining orderly elections and deterring fraud—interests that outweigh any burdens the laws impose on voting rights. "The public interest in the maintenance of order in the election process is not only important, it is compelling." *Diaz*, 541 F. Supp. 2d at 1335. This compelling interest does not disappear in times of crisis—it grows exponentially. Plaintiffs' requested relief "would burden unprepared … officials by requiring them to immediately reallocate time and resources" better spent elsewhere. *Bethea*, 2016 WL 6123241, at *3. When "public morale" is already low, "last minute" changes to election laws "pose[] a realistic possibility that the public's confidence in the state's ability to competently administer elections and protect against disorder would be undermined and dissuade them from going to the ballot box." *Ariz. Democratic Party v. Reagan*, 2016 WL 6523427, at *10 (D. Ariz. Nov. 3, 2016). That some voters will need to use technology or practice the same social distancing they do when buying groceries does not outweigh "the State's important interests in the orderly, accurate, and reliable administration of elections." *Id.* at *11.

Third, Plaintiffs cannot bridge the gap between their narrow assertions of harm and the broad relief they're seeking. It is well-established that "'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Courts can only "provide relief to claimants … who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Yet Plaintiffs ask the Court to prohibit Defendants "from rejecting ballots … that arrive within ten days of Election Day," Br. 25, even though Plaintiffs face no imminent harm until those ballots are cast, do not arrive on time, are not counted, and are deemed material to the outcome. *See* Leg. Amicus Br. 24-26. Plaintiffs also ask the Court to enjoin the photo-ID requirements "until the COVID-19 crisis is over," Br. 25,

even though that open-ended relief could extend to future elections for which Plaintiffs have submitted no evidence. And Plaintiffs ask the Court to enjoin the challenged laws for *all* Wisconsin voters, even though the laws are facially constitutional and could be validly applied to many categories of voters. *See Frank II*, 819 F.3d at 386-87; Leg. Amicus Br. 6-7, 13-14, 16, 18, 21, 23-24. Because Plaintiffs make no attempt to narrow their relief, this glaring overbreadth is a sufficient basis to deny their motion.

B. Plaintiffs' *Bush v. Gore* claim fails.

Plaintiffs also allege an equal-protection violation based on the "unfair, unequal, and disparate treatment" they allegedly face in light of COVID-19. Br. 20. They cite the different availability of in-person voting locations from city to city, the conflicting advice that municipal officials are allegedly giving on absentee witness requirements, and the conflicting statements that some municipalities have provided on the meaning of "indefinitely confined" under Wisconsin Statutes §§6.86(2)(a) and 6.87(4)(b)(2). *See* Br. 20-21. This claim is unlikely to succeed on the merits, for at least three reasons.

First, Plaintiffs fail to allege that *Defendants* are responsible for this alleged violation. All of the cited actions or statements are attributed to municipal officials. *Id.*[3] Any "confusion" or "conflicting information" cannot be attributed to or remedied by Defendants, and this Court lacks jurisdiction to address "the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see* Leg. Amicus Br. 8, 17, 21.

Second, *Bush v. Gore* is famously limited to a specific factual context—the "special instance of a statewide recount under the authority of a single state judicial officer." 531 U.S. at 105. Plaintiffs have not alleged such a violation here. As a result, "the Democrats' reliance on *Bush v. Gore* is at best

[3] The Wisconsin Election Commission, for its part, has issued guidance on all these questions. *See* Memo. from Meagan Wolfe (Mar. 29, 2020), bit.ly/2xxMfTG (providing guidance on application of absentee witness procedures); WEC, Guidance for Indefinitely Confined Electors COVID-19 (Mar. 29, 2020), elections.wi.gov/node/6788 (providing guidance on meaning of "indefinitely confined").

an unsteady footing for" their claims. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 836 (S.D. Ind. 2006); *see* Leg. Amicus Br. 8, 17, 22.

Third, the evidence mustered by Plaintiffs to prove their alleged disparate treatment is speculative. For example, Plaintiffs wrongly imply that cities have entirely eliminated in-person voting. But the evidence they cite does not come close to supporting that claim. *See* Spivak Decl, Ex. 10 (quoting Wood County Clerk saying that "[p]olls will be open in Wood County for those who need them on Election Day"); Ex. 12 (noting that "[e]arly in person absentee voting will be held" from "March 23rd – April 3rd"); Ex. 14 (noting availability of "curbside voting"). The other assertions of voter confusion or conflicting standards are similarly thin and underdeveloped. Leg. Amicus Br. 17.

Finally, Plaintiffs' allegation that "voters are receiving 'radically conflicting advice" on the meaning of "indefinitely confined" under Wisconsin Statutes §§6.86(2)(a) and 6.87(4)(b)(2) is based on a single paragraph of a declaration submitted by the Dane County Clerk. Br. 21. His reading of the statute is implausible on its face. Section 6.86(2)(a), in conjunction with §6.87(4)(b)(2), excuses an absentee voter from providing a photo ID if he or she "is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." The statute sets out two conditions: the absentee voter must be "elderly, infirm or disabled *and* indefinitely confined." *Frank v. Walker*, 17 F. Supp. 3d 837, 844 (E.D. Wis. 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744. Interpreting §6.86(2)(a) to apply to *each and every* Wisconsin voter, regardless of whether the voter is actually infected by COVID-19, runs afoul of the "physical illness or infirmity" condition. The clerk's reading also ignores the "confinement" condition imposed by §6.86(2)(a). Section 6.86(2)(a) requires "confine[ment]," and the Safer-at-Home order does not confine all absentee voters to their homes.

Even setting aside these issues, this Court should temporarily abstain from interpreting the reach of the "indefinitely confined" exception. That very issue is now pending before the Wisconsin Supreme Court, *see Jefferson v. Dane Cty.*, No. 2020AP557 (Wis. pet. filed Mar. 27, 2020), and may be

decided within days. Ordinary abstention principles require deference to that state judicial proceeding concerning an ongoing election. *See FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 596 (7th Cir. 2007).

II. Plaintiffs cannot satisfy the other preliminary-injunction requirements.

Not only do Plaintiffs' claims lack merit, Plaintiffs fail to satisfy the other requirements for a preliminary injunction: irreparable harm, balance of equities, and public interest. Plaintiffs' claims fail on the merits, *supra* I, so their theories of irreparable harm fail too. *See* Br. 22. And "in a case such as this," involving laws enacted to "reduce voting fraud," "the right to vote is on both sides of the ledger." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). The balance of equities and public interest, which "merge" in this case, also strongly favor Defendants. *Nken v. Holder*, 556 U.S. 418, 435 (2009). As explained, Wisconsin has compelling interests in enforcing its election laws, which outweigh any incidental burdens on voting rights; and Wisconsin's interests are heightened, not diminished, by the ongoing COVID-19 pandemic. *Supra* I.A.

Because Wisconsin's primary elections are ongoing and its "election machinery is already in progress," the State's already powerful interests become insurmountable. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Courts "[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election" must "weigh … considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *accord Bethea*, 2016 WL 6123241, at *3 (same for registration deadlines). Specifically, courts must consider that injunctions "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 5. "As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4; *see FreeEats.com*, 502 F.3d at 598 n.9 ("'emergency relief in a suit filed on the eve of an election is unwarranted'"). This principle justifies denying injunctive relief even if "the existing [law] [i]s found invalid." *Reynolds*, 377 U.S. at 585. The "disruption to the electoral process" and the "impair[ment] [to] the State's ability guarantee the integrity of its

elections" increase "exponentially" when laws are enjoined at this late stage. *Bethea*, 2016 WL 6123241, at *3; *Ariz. Democratic Party*, 2016 WL 6523427, at *11.

Intervenors appreciate that this Court has already enjoined one of the challenged laws, *see* Order 15, but that relief was limited in scope and brief in duration. Since then, Wisconsin's primary elections have progressed even further, key registration deadlines are even closer, and election day is right around the corner. Plaintiffs have not presented the Court with sufficient factual or legal justification for a much broader intrusion into Wisconsin's electoral process, especially as state officials are navigating a global pandemic. *See* HEP Amicus Br. (Doc. 95). "At some point, [Wisconsin's] constitutionally valid [election laws] must be respected. Otherwise, [its] ability to conduct efficient and accurate elections at the local, state, and national level becomes irrevocably compromised." *Bethea*, 2016 WL 6123241, at *3; *see* Order 16 (recognizing Wisconsin's "interests" in enforcing its "proof of residency and identification requirements"). That point is now.

CONCLUSION

Plaintiffs' motion should be denied. If the Court nevertheless grants Plaintiffs any relief, Intervenors respectfully ask the Court to stay its decision for 24 hours so that Intervenors can pursue an emergency appeal in the Seventh Circuit.

Dated: March 30, 2020

Respectfully submitted,

/s/ Patrick Strawbridge

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