No. 20-1539

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, ET AL.
PLAINTIFFS-APPELLEES,
v.
MARGE BOSTELMANN, ET AL.
DEFENDANTS,

APPEAL OF: WISCONSIN STATE LEGISLATURE.

SYLVIA GEAR, ET AL.
PLAINTIFFS-APPELLEES,
v.
DEAN KNUDSON, ET AL.
DEFENDANTS,

APPEAL OF: WISCONSIN STATE LEGISLATURE.

REVEREND GREG LEWIS, ET AL.
PLAINTIFFS -APPELLEES,
v.
DEAN KNUDSON, ET AL.
DEFENDANTS

APPEAL OF: WISCONSIN STATE LEGISLATURE.

On Appeal From The United States District Court
For The Western District of Wisconsin
Consol. Case Nos. 3:20-cv-249, -278, -284
The Honorable William M. Conley, Presiding

WISCONSIN LEGISLATURE'S EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION AND FOR AN ADMINISTRATIVE STAY

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INTRODUCTION

The district court changed the absentee-voting rules for Wisconsin's ongoing, statewide April 7 Election. And it ordered these significant changes *just five days* before election day. The Legislature moves for a stay of that order pending appeal and, further, asks for an ***administrative stay immediately, tonight if possible***, to avoid the confusion and chaos of having the rules of the present, ongoing election changed by the district court's erroneous order.[1]

This emergency motion involves two issues.[2]

First, most Wisconsinites are understandably choosing to vote in the April 7 Election by absentee ballot, using the State's generous, no-excuse-needed absentee-voting option, given the public-health crisis. *See* Wis. Stat. § 6.85(1). At the same time, Wisconsin understands that "[v]oting fraud is a serious problem in U.S. elections generally," and that fraud is especially "facilitated by absentee voting," *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004), because "voting by mail makes vote fraud much easier to commit," *Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004).

That is why the State requires a voter to sign an absentee ballot "before one witness who is an adult U.S. Citizen," who must also sign the ballot. Wis. Stat.

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[1] Given the emergency nature of this situation, if this Motion is denied, the Legislature respectfully suggests that *sua sponte*, en banc reconsideration of this motion is warranted.

[2] The Legislature does not discuss here, and does not ask for a stay of, the portion of the court's order extending the deadline to request absentee ballots by one day, to April 3.

§ 6.87(4)(b)1; *see* Wis. Stat. § 6.87(2). The benefits of such a law are well-recognized. "[A]n absentee voter can be coerced or pressured into voting the ballot in a certain way, whether through intimidation, other undue influence, or outright vote buying." Principles of Election Law § 103, cmt. c. (Am. Law Inst. 2018). This law thus furthers the "indisputably . . . compelling interest in preserving the integrity of [the State's] election process," *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), by ensuring that "only the votes of eligible voters" are counted, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (controlling plurality of Stevens, J.).

The district court here re-wrote Wisconsin's signature requirement just *five* days before the election. The district court's judicially crafted bypass—one that had not even been suggested by any party, let alone subject to any adversarial testing—flouts powerful equitable considerations against federal-court interference with imminent and ongoing state elections.

Five judges on this Court previously explained that "[c]hanging the rules so soon before the election is contrary not just to the practical realities of an impending election, but it is inconsistent with the Supreme Court's approach" under the *Purcell* principle—and "that is true whatever one's view on the merits of the case." *Frank v. Walker*, 769 F.3d 494, 498 (7th Cir. 2014) (citation omitted) (Williams, J., dissenting from denial of en banc reh'g). The Supreme Court has reaffirmed that principle time and again, *see infra*, Part I.A, including in *Frank v. Walker*, 574 U.S. 929 (2014),

itself, where the Court vacated a stay of an injunction that would have changed election rules shortly before an upcoming election.

Second, Wisconsin has set April 7 for election day, and requires all absentee ballots to be received by that day. *See* Wis. Stat. § 6.87(6). The district court rewrote that statute to *permit voters to vote after election day, so long as their ballots are received by April 13*. This remedy, too, was never requested by the parties. Further, the district court did not even consider that its unprecedented, post-election-day voting order will allow for unfair gamesmanship, where voters who sat on their absentee ballots can vote after seeing the results on election day. This would undermine Wisconsinites' belief in the integrity and fairness of the election.

This Court should stay the district court's injunction for several, independently sufficient reasons, as explained below: (1) The district court's decision to rewrite Wisconsin law violates the core principle that courts should not change the rules of ongoing elections. (2) The district court's bypass would render the signature requirement meaningless, while its decision to allow voters to vote after election day is entirely unprecedented and legally unjustified. (3) The district court violated basic principles of fairness with its inexplicable decision to deny the Legislature's motions to intervene. This meant that no party authorized to speak for the State was permitted to take part in yesterday's evidentiary hearing, which proved especially prejudicial because that is where the district court first raised its idea to add the bypass option, and because no party had previously asked to allowing voting by voters after election day.

STATEMENT OF THE CASE

Under Wisconsin law, a "[s]pring election" must be "held on the first Tuesday in April to elect judicial, educational and municipal officers, nonpartisan county officers and sewerage commissioners and to express preferences for the person to be the presidential candidate for each party" in a Presidential election year. Wis. Stat. § 5.02(21). All votes must be either received by election day (if by absentee ballot) or cast on election day. *See* Wis. Stat. § 6.87(6)

The voting in Wisconsin's April 7 Election has been in full swing for weeks. Under Wisconsin law, absentee ballots can be sent as soon as they are printed by the local clerk, which must begin "immediately upon receipt of the certified list of candidates' names from the commission," Wis. Stat. § 7.10(2), which certification occurred on March 3.[3] In the four weeks following that certification, more than 942,000 Wisconsinites received absentee ballots, and over 337,000 already returned them completed. R.(*Lewis*):89-1. So far as the record below reflects, the overwhelming majority of these absentee ballots complied with Wisconsin's long-standing witness-signature requirement. *See* Wis. Stat. § 6.87(2) (1965).

As relevant here, on March 18, the Democratic National Committee and Democratic Party of Wisconsin sued each of the Wisconsin Elections Commissioners, in the Western District of Wisconsin, seeking an injunction blocking Wisconsin's witness-signature requirements, as well seeking an extension of the statutory

[3] *See* Wisconsin Elections Commission, *Candidates on Ballot by Election* (rev. Mar. 3, 2020) available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Candidates%20on%20Ballot%20By%20Election_3_3_2020.pdf.

deadline for when absentee ballots must be received (without asking for voting after election day). R.1–2; R.55. Further, as relevant here, plaintiffs moved for a preliminary injunction to block the signature requirement and to extend the deadline for when absentee votes must be received. R.61. On March 26, another group of plaintiffs sued the Wisconsin Elections Commissioners and its Administrator in the Western District of Wisconsin (all defendants hereinafter, collectively, "Commission Officials"), also seeking a facial injunction against Wisconsin's signature requirement. R.(*Gear*)1, 8.

The Legislature repeatedly moved to intervene in these lawsuits to defend the State of Wisconsin's interests in the validity of state law. The Legislature filed its first intervention motion in *DNC* just days after plaintiffs' filing of their complaint, R.20, and renewed that motion the day after the Commission Officials refused to defend all of the challenged laws, R.118. The Legislature also moved to intervene in *Lewis*. R.137. The district court denied the Legislature's first intervention motion in *DNC* on the grounds that the Commission Officials adequately represented the State's interest. R.85:5. The court then "welcome[d]" the Legislature to "renew its motion" if "some new facts were to arise that established an actual conflict" with the Commission Officials' representation. R.85:11. Such "new facts" did "arise" two days later when the Officials disclosed that they were no longer willing to defend all of the challenged laws, but would only defend some. R.107:12–20. The Legislature renewed its motion to intervene, as the court had invited, R.85:7, but the court inexplicably denied this motion as well, *see* R.116; R.144:2; *see* R.163 at 2–3. The court did grant

the Republican National Committee and Republican Party of Wisconsin's (collectively "RNC") motion to intervene. R.85:12; R.122.

The district court held an evidentiary hearing on April 1, which the court barred the Legislature from taking part in. *See* R.144:2. It was at that hearing that the district court first raised its idea of creating a bypass to Wisconsin's longstanding signature requirement. The Court also briefly discussed allowing absentee votes cast after election day to be counted, even though no party had asked for this relief. The entirety of the adversarial process on these issues consisted of statements from RNC's counsel.

Earlier today, the district court entered a preliminary injunction order that mandates, as relevant here, that: (1) the State must allow any absentee voter to avoid Wisconsin's signature requirement by "provid[ing] a written affirmation or other statement that they [are] unable to safely obtain a witness certification despite reasonable efforts to do so." R.170:41–46; and (2) the State may no longer apply its 8:00 p.m. election-day deadline for the receipt of absentee ballots (moving the deadline to 4:00 p.m. on April 13), *meaning that voters can now send in their ballots after election day*. R.170:37–41. Thus, the State is now required to accept late-filed absentee ballots—cast after election day—and those ballots can lack one of the most important anti-fraud and anti-coercion measures that the State has maintained for such ballots. The district court denied a motion to stay its preliminary injunction.

JURISDICTION

The Legislature has standing to appeal from the district court's grant of a preliminary injunction under *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); *accord Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 393 (7th Cir. 2019), and it should have been permitted to intervene as of right, as explained below, *see infra* Part III.[4] As *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793 (7th Cir. 2019), concluded, Sections 13.365(3) and 803.09(2m) of the Wisconsin Statutes, "give[ ] the Legislature standing as an agent of the State of Wisconsin," *id.* at 798. And an agent with authority to litigate for the State has standing to appeal. *See Bethune-Hill*, 139 S. Ct. at 1951. Finally, RNC has appealed, and it has Article III standing, meaning that this Court has jurisdiction over this emergency appeal on that basis alone. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017); *Bethune-Hill*, 139 S. Ct. at 1950–51.

LEGAL STANDARD

"The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014); *accord Nken v. Holder*, 556 U.S. 418 (2009). The Court "consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *In re A & F Enters.*, 742 F.3d at 766 (citations omitted). "[A]

[4] Further, this Court should also permit the Legislature to appeal if the Commission Officials do not file an emergency appeal in time to prevent this action from becoming moot. See *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009).

sliding scale approach applies"—if the moving party shows a greater likelihood of success on the merits, "the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.* (citations omitted).

ARGUMENT

I. The Balance Of The Irreparable Harms, The Equities, And The Public Interest Require A Stay, Especially In Light Of The Principle That A Court Should Not Change The Rules Of An Ongoing Election, Particularly Days Before Election Day

A. Powerful equitable considerations counsel against federal-court interference with imminent and ongoing state elections. The Supreme Court has long cautioned against federal interference in impending state elections, *see Reynolds v. Sims*, 377 U.S. 533 (1964), and "has continued to look askance at changing election laws on the eve of an election," *Veasey v. Perry*, 769 F.3d 890, 894–95 (5th Cir. 2014) (citing *Frank*, 574 U.S. 929; *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014)). This is because "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," the risk of which "will increase" "[a]s an election draws closer." *Purcell*, 549 U.S. at 4–5. The courts of appeals have repeatedly denied relief or granted stays when faced with changing the rules of an imminent or ongoing election. *See, e.g.*, *Veasey*, 769 F.3d at 893–94; *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 376, 395 (9th Cir. 2016) (collecting cases). As the Sixth Circuit explained when granting Michigan's emergency motion to stay a preliminary injunction, "[t]iming is everything," and federal courts "will not disrupt imminent

elections" under the "*Purcell* principle[ ] or common sense." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).

Here, the district court plainly violated this core principle. The changes that the district court ordered to Wisconsin's signature requirement and the voting deadline (allowing voting *after* election day) come as the April 7 Election is in full swing. The deadlines for electronic registration and registration by mail have passed, Wis. Stat. § 6.28(1), and the deadline to request absentee ballots is now tomorrow. All forms of absentee voting are well underway, and the district court's signature bypass was not available to the hundreds of thousands of Wisconsinites who have voted absentee in this election already. Further, Wisconsin election officials have never administered any such bypass before. And those officials have never, so far as the Legislature is aware, had to count votes cast *after* election day. In all, the district court's belated judicial rewrite of Wisconsin's voting laws—in the middle of an election—is reason enough to grant the stay here.

B. Even apart from the timing of the district court's decision, that decision is deeply inequitable, after considering the irreparable harms and the equities.

On one end of the balance, the State and the people of Wisconsin will suffer deep, irreparable harm from the district court's decision. Any time a State is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018). Given that the "State indisputably has a compelling interest in preserving the

integrity of its election process," *Eu*, 489 U.S. at 231, the irreparable harm to the State and the public from an injunction would be especially grave here.

First, the signature requirement is necessary to stave off the "serious problem" of "[v]oting fraud," which is exacerbated by "absentee voting," *Griffin*, 385 F.3d at 1130–31, given that "voting by mail makes vote fraud much easier to commit," *Nader*, 385 F.3d at 734. The district court's bypass renders the signature requirement a nullity. The witness requirement prevents voter fraud in multiple ways, such as by adding an additional layer of protection, ensuring that the person filling out the absentee ballot is the actual voter listed on the ballot, and preventing undue influence or coercion. *See Veasey v. Abbott*, 830 F.3d 216, 255–56 (5th Cir. 2016) (en banc) (recognizing examples of "people who harvest mail-in ballots from the elderly"). Yet, under the district court's bypass, the signature requirement serves none of these functions. A fraudster can simply commit fraud twice on the same absentee ballot, falsely using the elector's name twice: once on the absentee ballot, and once on the bypass. No longer will the State have the additional security of a second name and address on the absentee ballot—the signer/witness—to deter and detect this fraud.

Second, the State will also suffer grave harm from allowing voters to submit ballots after election day. Wisconsin's law requiring that all voters vote by election day—either by absentee ballots received by that date, or by voting in person—ensures the "orderly administration" of Wisconsin's elections, *Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.), thereby advancing the State's "compelling interest in preserving the integrity of its election process," *Eu*, 489 U.S. at 231. The

district court's sweeping decision here goes beyond even what the plaintiffs asked for. Those parties asked to allow counting of votes postmarked by election day, while seeking relief from the requirement of election-day receipt of ballots because of concerns about the speed of the mail and voters sending ballots this upcoming weekend. R.55:19; R.(*Lewis*)1:66. The Legislature explained that this relief should await Election Day, as these concerns may prove illusory. R.90:24–26. The district court, however, went well beyond that and took the unprecedented, deeply disruptive step of allowing post-election day voting by federal-court order, which creates a new election day for certain voters.

On the other end of the equitable balance, the district court concluded that certain electors could not safely comply with the signature requirement, in light of the current public-health epidemic. As a threshold matter, plaintiffs entirely failed to prove that any meaningful number of such voters exist. As the district court properly concluded, the overwhelming majority of voters can satisfy this requirement easily, consistent with all public-health guidance. R.44. While the district court believed that there are some small number of people who lack such options, R.170:41–46, plaintiffs submitted no competent evidence to support this claim. *All* of the voters that plaintiffs pointed to could have obtained the needed signature safely, following all public-health guidelines, such as by: (1) "set[ting] the ballot down at a neighbor's door, knock[ing], stand[ing] six feet away, mak[ing] the request for the signature, and then hav[ing] the neighbor leave the now-signed ballot at the door," R.90:19; or (2) using readily available video-chat technology like Skype or Facetime—sliding the ballot to the

witness under the door for his signature, then collecting the ballot once the witness is six feet away, *see* R.63-16:6. Voters like plaintiffs' own declarants, R.69:1–2; *accord* R.75:2, are taking these easy steps, which can be accomplished in a couple of minutes. These minutes of effort, taken in full compliance with all public-health guidelines, require less time than the Supreme Court has said is permissible for getting a photo ID. *See Crawford*, 553 U.S. at 196 (controlling plurality of Stevens, J.). And these steps are safer than actions that the vast majority of voters are taking every day—including plaintiffs' own declarants—such as going to a grocery store or bank. R.(*Gear*)9:¶ 4; R.(*Gear*)11:¶ 3.

And even if there is some voter who cannot, for special reasons, take even these steps, *equity does not justify putting into place a bypass option that renders the signature requirement an ineffective nullity for all absentee voters*. The district court's remedy is not, by its nature, limited to those "immunocompromised and self-quarantining to protect their health, or who ha[ve] contacted COVID-19 and [are] in quarantine to protect others." R.170:15 (citation omitted). Instead, it allows *any* individual to merely say that "he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so," R.170:46, while creating serious administrability problems, never subjected to adversarial briefing, by leaving it "to the individual discretion of clerks as to whether to accept a voter's excuse," *id.*

Nor did the district court offer anywhere near sufficient equitable reasons for its decision to allow voters to vote *after* election day. The court expressed concern that ballots diligently returned may not be counted, under the April 7 statutory deadline.

R.170:38–39. But plaintiffs submitted this evidence to support their point that it would be hard for voters to get their ballots to clerks by election day, due to the speed of the mail, even though the ballots would—in fact—be postmarked by election day. Plaintiffs did not argue, and did not provide any evidence to justify, allowing voters to mail in their ballots *after* election day. And even if such arguments were made in this case, these equities cannot possibly justify forcing the State to allow post-election-day voting, especially when the district court did not permit adversarial process on this core issue.

II. The Legislature Is Exceedingly Likely To Succeed On Appeal

On appeal, the Legislature will need to show that plaintiffs did not carry their burden to obtain the preliminary injunction that the district court issued, under the same factors at issue in the stay application. *In re A & F Enters., Inc. II*, 742 F.3d at 766 ("The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction."). As a threshold matter, plaintiffs' showing on the equitable factors fails for the same reasons outlined immediately above, *see supra* Part I.B, including that plaintiffs sought to change the rules of an ongoing election. Since plaintiffs would need to prevail on these equitable considerations to obtain a preliminary injunction in the first place, this point is also sufficient to establish the Legislature's likelihood of success on appeal against that injunction.

Further, even as a matter of substance, plaintiffs have no likelihood of success on their claims. Under *Anderson/Burdick*, *see Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the movants must satisfy a two-

step inquiry, bearing a heavy burden on both steps. First, they must establish both a cognizable burden on the right to vote from a challenged law and that burden's severity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Second, they must show that this burden outweighs the State's interest. *Id.* "If the burden on the plaintiffs' constitutional rights is 'severe,' a state's regulation must be narrowly drawn to advance a compelling state interest." *Stone v. Bd. of Election Comm'rs*, 750 F.3d 678, 681 (7th Cir. 2014) (citation omitted). But "[i]f the burden is merely 'reasonable' and 'nondiscriminatory,' by contrast, the government's legitimate regulatory interests will generally carry the day." *Id.* The sufficiency of a State's justification is generally a "legislative fact," accepted as true so long as it is reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) ("*Frank I*"); *see also Crawford*, 553 U.S. at 194–97 (controlling plurality of Stevens, J.). The Supreme Court has held that "making a trip to the [D]MV, gathering the required documents and posing for a photograph surely do not qualify as a substantial burden on the right to vote." *Crawford*, 553 U.S. at 198 (controlling plurality of Stevens, J.). And a plaintiff is entitled to as-applied relief only upon a showing that specific voters or a specific category of voters cannot cast their ballot after undertaking "reasonable effort[s]." *Frank v. Walker*, 819 F.3d 384, 386–87 (7th Cir. 2016) (*"Frank II*"). Most closely analogous, this Court has stayed a district court's decision to require Wisconsin to provide an affidavit-bypass option to its photo ID law. *See Frank v. Walker*, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016), *stayed by*, 2016 WL 4224616 (7th Cir. Aug. 10, 2016) ("*Frank III*").

Plaintiffs' arguments with regard to the signature requirement fail on the merits in several respects. First, as explained above, plaintiffs have not shown that any voters cannot obtain a witness signature after undergoing "reasonable effort[s]," *Frank II*, 819 F.3d at 386–87, no greater than those for obtaining photo ID, *see supra* pp. 11–12. Further, the district court's remedy here is available to anyone who wants to commit voter fraud, and thus is not tailored to only those voters with reasonable burdens, just like the affidavit bypass that this Court stayed in *Frank III*. After all, as explained above, anyone wanting to commit voter fraud under the district court's injunction will be able to fraudulently sign the elector's name twice, thereby defeating the core operation of the signature requirement—having a second name and address on every absentee ballot. *See supra* p. 10. Finally, under, the second *Anderson/Burdick* step, the State's interest here is paramount, especially given the well-recognized problems of absentee-voter fraud and the lack of confidence in election results that these problems can cause.

As for allowing voting after election day, plaintiffs failed to carry their burden under *Anderson/Burdick* as well—*indeed, they did not even try, as they never sought such a drastic remedy*. The district court did not explain, beyond mere speculation, that a significant number of diligent voters cannot put their ballots into the mail by election day. And the State's interest in not allowing post-election day voting is paramount, as explained above, *see supra* pp. 10–11, and that applies for the same reason under step two of *Anderson*/*Burdick*.

III. The District Court's Indefensible Decision To Block The Legislature's Intervention, Leaving No Party With Authority To Speak For The State's Interests In Defending Its Laws, Warrants A Stay Of The Injunction

The district court rewrote Wisconsin election law without ever giving any party with the authority to speak for the State and its sovereign interests in the validity of state law the opportunity even to be heard on the issue. This violated basic principles of fundamental fairness, which also justifies a stay of the district court's injunction.

A. The Legislature sought repeatedly to intervene below, to speak for the State's interests in the validity of state law, but the court denied that intervention.

The Legislature plainly satisfied the standard for mandatory intervention, speaking here for the State of Wisconsin, where no other party speaks for that interest. *Planned Parenthood*, 942 F.3d at 797. The Legislature timely moved to intervene, R.85; R.163; the Legislature has a state-law right to speak for the State's interest in the constitutionality of its laws under Wis. Stat. §§ 13.365, 803.09(2m), as this Court recognized in *Planned Parenthood*, *see* 942 F.3d at 797; *Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013); that sovereign interest would be impaired were plaintiffs to succeed in the district-court action, *Lopez-Aguilar*, 924 F.3d at 385; and that interest was not adequately represented by any of the existing parties because, unlike in *Planned Parenthood*, no other agent with the authority to speak for the State—such as the Attorney General—appeared here to defend state law, *Planned Parenthood*, 942 F.3d at 797–98.

The district court nevertheless denied the Legislature's intervention motions based on the fourth mandatory-intervention element alone—adequacy of representation—but that denial was erroneous and an inexplicable bait-and-switch.

To begin, no other state party in the action has the "same goal" as the Legislature: to vigorously defend "the constitutionality of" *all* the "challenged statutes" *on behalf of* "*the State's interest*." *Id.* at 799 (emphasis added). The Commission Officials are *not* represented by the Wisconsin Attorney General, R.85:12, and they lack the statutory authority "to litigate on *the State's* behalf," *Bethune-Hill*, 139 S. Ct. at 1951 (emphasis added), as opposed to, at most, on behalf of the independent agency that they head. Indeed, the Officials effectively conceded this by withdrawing their opposition to the Legislature's intervention after the Attorney General had withdrawn and the Legislature presented this argument. R.71; R.82; R.85. Unsurprisingly, since they do not speak for the State, the Commission Officials have no obligation to defend state law and thus *explicitly abandoned* defense of several of the state laws. *See* R.107:16.

And RNC does not represent the State, thus it does not adequately represent the State's sovereign interests here. As a private political party, the RNC is not a "designated . . . agent" of the State, *Bethune-Hill*, 139 S. Ct. at 1952 (citation omitted), "'charged by law' with protecting the State's interest," *Planned Parenthood*, 942 F.3d at 799, 801–03. It is a private entity representing its "particular interest," not "the public interest" of Wisconsin. *Coal. of Ariz./N.M. Ctys. for Stable Econ.*

Growth v. Dep't of Interior, 100 F.3d 837, 845 (10th Cir. 1996); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001).

The district court's denial of intervention was not only legally erroneous but contravened basic principles of fairness to litigants. In denying the Legislature's initial motion to intervene, the court "welcome[d]" the Legislature to "renew its motion" if "some new facts were to arise that established an actual conflict" between the Legislature and the Commission Officials. R.85:11. Yet, when those new facts developed—namely, the Officials *expressly refusing to defend several of the challenged laws*—the district court denied the Legislature's renewed motion. R.163.

B. The district court's denial of the Legislature's intervention motion left no state party to defend the State's sovereign interest in the validity of its law. This is fundamentally unfair and justifies an immediate stay and, after a full appeal, reversal of the district court's injunction. *See Scott v. Donald* 165 U.S. 107, 117 (1897) ("[W]e do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented[.]"); *see also Shields v. Barrow*, 58 U.S. 130, 141 (1854) (if an "indispensable party [is] not before the court," and may be joined, then the court cannot "adjudicate directly upon [that] person's right"); *U.S. ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996) (Rule 24 "tracks" Rule 19).

Importantly, the district court's decision to keep the State out of a case where its laws were challenged proved deeply prejudicial in the context of the particular injunction on appeal here. That denial prohibited the Legislature from being heard

at the all-important evidentiary hearing, when the district court, for the first time in this case, raised the possibility that it would create the affidavit bypass to the signature requirement and where the issue of post-election day voting was first discussed by the parties. *Put another way, the State—speaking through the Legislature, under state law—was never given a chance even to be heard on these core issues*. The Officials, again, do not speak for the State and have no interest in battling against a federal court order blocking state law. Indeed, they did not say a word against the district court's remedy at the evidentiary hearing.

CONCLUSION

This Court should stay the preliminary injunction.

Dated: April 2, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,035 words, excluding the parts of the Motion exempted by Federal Rule of Appellate Procedure 32(f).

This Motion complies with all typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)–(6), because it has been prepared in a proportionally spaced typeface using the 2016 version of Microsoft Word in 12-point Century Schoolbook.

Dated April 2, 2020.

/s/ Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2020, I filed the foregoing Emergency Motion To Stay The Injunction Pending Appeal with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: April 2, 2020

/s/ Misha Tseytlin

MISHA TSEYTLIN

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,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

OPINION AND ORDER

20-cv-249-wmc

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

Plaintiffs,

v.

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

Defendants.

20-cv-278-wmc

REVERAND 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.

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.

In these three, consolidated cases, all filed in the last two weeks under the cloud of the emerging COVID-19 health crisis, plaintiffs[1] challenge a number of election-related, statutory requirements for the rapidly approaching April 7, 2020, election. Contrary to the view of at least a dozen other states, as well as the consensus of medical experts across the country as to the gathering of large groups of people, the State of Wisconsin appears determined to proceed with an in-person election on April 7, 2020. In the weeks leading up to the election, the extent of the risk of holding that election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers. As a result, state election officials are confronting a huge backlog in requests for absentee ballots made online, by mail or in person, including an unprecedented number of questions regarding how to satisfy certain registration requirements, properly request an

[1] For simplicity, all three groups of plaintiffs will be referred to simply as simply "plaintiffs" throughout this opinion unless otherwise indicated, while still recognizing that the three cases continue to retain their separate characters. *See Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 928 (7th Cir. 1983) ("[A]ctions which have been consolidated do not lose their separate identity.").

absentee ballot, and return a properly completed absentee ballot in time to be considered for the April 7 election. On top of the burdens this influx has created for the Wisconsin Election Commission, its Administrator, staff and local municipalities in the days leading up to the election, that same group has been improvising in real time a method to proceed safely and effectively with in-person voting in the face of increasing COVID-19 risks, loss of poll workers due to age, fears or sickness, the resulting consolidation of polling locations, and inadequate resources.

Despite these truly heroic efforts, the three most likely consequences of proceeding with the election on this basis are (1) a dramatic shortfall in the number of voters on election day as compared to recent primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19. Nevertheless, the Wisconsin State Legislature and Governor apparently are hoping for a fourth possibility: that the efforts of the WEC Administrator, her staff, the municipalities and poll workers, as well as voters willing to ignore the obvious risk to themselves and others of proceeding with in-person voting, will thread the needle to produce a reasonable voter turnout and no increase in the dissemination of COVID-19.

However unlikely this outcome may be, or ill-advised in terms of the public health risks and the likelihood of a successful election, the only role of a federal district court is to take steps that help avoid the impingement on citizens' rights to exercise their voting

franchise as protected by the United States Constitution and federal statutes. That is what the court attempts to do in this opinion and the order below, understanding that a consequence of these measures may be to further the public health crisis in this State. Unfortunately, that is beyond the power of this court to control.

In a prior opinion and order in the '249 case, the court granted plaintiffs the Democratic National Committee and the Democratic Party of Wisconsin's (jointly, the "DNC/DPW") motion for temporary restraining order in part, extending the deadline by which an individual can register to vote electronically to March 30, 2020. The court denied the other requests, but signaled to plaintiffs that the court would consider their request for extension of the date by which absentee ballots may be counted toward the election and other relief in a motion for preliminary injunction. On March 27, 2020, plaintiffs filed a motion for preliminary injunction and supporting evidence, seeking an extension of the deadline for receipt of absentee ballots and a suspension of the witness signature requirement on those ballots, as well as reconsideration of the court's ruling on the by-mail absentee deadline and documentation requirements. ('249 dkt. #61.) In addition, on March 28, 2020, plaintiffs in the '278 and '284 cases filed motions for temporary restraining orders, requesting postponement of the April 7, 2020, election and other relief duplicative of the relief requested in the '249 motion for preliminary injunction. ('278 dkt. #8; '284 dkt. #17.)

In response to these motions, the court consolidated the three cases, and set briefing on the various motions. After reviewing the opposition briefs filed by defendants the Commissioners and Administrator of the Wisconsin Election Commission ("WEC") and

the intervening defendants the Republican National Committee and the Republican Party of Wisconsin (jointly, the "RNC/RPW"), as well as amici briefs, the court further conducted an evidentiary hearing and oral argument on April 1, 2020, at which the parties appeared by counsel and WEC Administrator Meagan Wolfe provided extensive testimony in response to the court's questions, as well as those posed by counsel.[2]

For the reasons that follow and provided on the record during the hearing on plaintiffs' motions, the court will grant plaintiffs' motions in part, and provide the following preliminary relief: (1) enjoin the enforcement of the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted and extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020; (2) enjoin the enforcement of the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020, and extend the deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) to 5:00 p.m. on April 3, 2020; and (3) enjoin the enforcement of Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so, provided that the ballots are otherwise valid.[3]

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[2] Initially, the Commissioners were represented by the Attorney General of Wisconsin. But on March 26, 2020, the Governor appointed special counsel to represent them pursuant to Wis. Stat. § 14.11(2)(a).

[3] The court *will* reserve on the question as to whether the actual voter turnout, ability to vote on election day or overall conduct of the election and counting votes timely has undermined citizens' right to vote.

FACTS

A. Overview of the WEC and Voting in Wisconsin

The WEC is charged with overarching responsibility to administer and enforce Wisconsin's election laws. In administering elections, the WEC works with the state's 72 county clerks and 1,850 municipal clerks. The WEC issues clerk communications, training materials and forms for local clerks. In turn, local clerks are tasked with implementing any changes in policy or law in their community, including administering absentee ballot voting. About two-thirds of the clerks in Wisconsin municipalities are part-time.

After the polls close, election inspectors are charged with tabulating the votes received at the polling places; municipal clerks are to report the returns within two hours after tabulation; and the county clerks are to post the results within two hours after receiving the returns. Wis. Stat. §§ 7.51(1), (4), 7.60(1). Municipalities have two ways to count absentee ballots: (1) count absentee ballots at the polling places, Wis. Stat. §§ 6.88, 7.51; or (2) count absentee ballots at a central location by a municipal board of absentee ballot canvassers, Wis. Stat. § 7.52. Under either method, the election inspector or absentee ballot canvasser reviews the certification contained on the envelope, and if the certification is insufficient, the ballot is not counted. Wis. Stat. §§ 6.88(3)(b), 7.52(a).

For the upcoming April 7 election, municipal boards of canvass have until April 13 to certify the results to the county. The county boards of canvass also have 10 days after the election to certify their results to the WEC or April 17, 2020, for the upcoming election. Wis. Stat. § 7.60(5). The municipal boards of canvass must further publicly declare the results for municipal contests by the third Tuesday of April, or in the case of

the April 7 election, by April 21, 2020. Wis. Stat. § 7.53(2)(d). Finally, the WEC has until May 15, 2020, to certify the election results for state and federal contests. Wis. Stat. § 7.70(3)(a).

In addition to the presidential primaries, the April 7, 2020, election has the following state and local seats on the ballot: a Wisconsin Supreme Court justice; three Wisconsin Court of Appeals judges; 34 Wisconsin circuit court judges; 102 municipal court judges; 1,596 county positions; 763 city positions; 464 village positions; 391 town positions; 565 school board seats; and 12 sanitary district supervisory board positions. (Gov. Evers Amicus Br. (dkt. #151) 6.)

B. Current State of COVID-19 Health Crisis

As of March 27, the date the DNC/DPW plaintiffs filed their motion for preliminary injunction, the state was reporting more than 710 cases of COVID-19 and at least 12 deaths. As of the date of this opinion and order, there are 1,550 confirmed cases in Wisconsin and 24 deaths.[4] Wis. Dep. of Health Servs., "Outbreaks in Wisconsin" (as of Apr. 1, 2020), available at https://www.dhs.wisconsin.gov/outbreaks/index.htm. While Wisconsin and other parts of the country are taking steps to "flatten the curve," it is clear that the outbreak in Wisconsin is still somewhat near the beginning of that curve, with evidence of increasing community spread. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 56-57; *see also* Gov. Evers Amicus Br. ('249 dkt. #151) 8 ("[T]he COVID-19 epidemic in Wisconsin will

[4] Moreover, Wisconsin's Department of Health Services' chief medical officers and state epidemiologist for communicable diseases estimate that the actual number of Wisconsinites with COVID-19 is up to ten times higher than the number who have tested positive. (Gov. Evers Amicus Br. ('249 dkt. #151) 7 & n.12.)

get worse before it gets better," with the DHS Secretary-Designee estimating that "it could be '10-plus' days before the growth curve of COVID-19 flattens out in Wisconsin.").)

On Tuesday, March 24, Governor Evers issued a "Safer-at-Home Order," requiring all Wisconsinites to shelter in place to slow the spread of COVID-19 until April 24, 2020, or until a superseding order is issued. (Spiva Decl., Ex. 4 ('249 dkt. #63-4) (also known as "Emergency Order #12").) This order is consistent with the Centers for Disease Control and Prevention's ("CDC") recommendations that people in the at-risk category, which includes people who are 65 years old or older or who have underling health conditions and diseases, including chronic lung diseases, asthma, diabetes, serious heart conditions, and are otherwise immune-compromises, stay at home and avoid non-essential travel. (Pls.' PFOFs ('278 dkt. #16) ¶ 6.) According to U.S. Census Bureau 5-year estimates, 15 per cent of the 2,328,754 Wisconsin households include someone 65 years of age or older.[5]

C. Increased Reliance on Absentee Ballots

State actors have increasingly focused on encouraging individuals to vote by absentee ballot, with Governor Evers recently calling on the Legislature to enable all registered voters to receive a ballot by mail and extend the time for mailed-in absentee ballots to be counted. (Pls.' PFOFs ('284 dkt. #19) ¶ 67.) On March 24, the Governor issued an "EMERGENCY ORDER #12: SAFER AT HOME ORDER," directing all Wisconsinites to stay at their home and places of residence, but a week later amended that

[5] Although the number of those households occupied by those *only* 65 years or older is unclear, 675,000 households in the state are one-person, and 862,900 are two-person households. (Dkt. #166-4, Ex. 54.) By extrapolation, plaintiffs represent that 250,000 of these are over 65. (Pls.' PFOF ('278 dkt. #16) ¶ 20.)

order to explain that "the Safer at Home Order is not intended to eliminate in-person absentee voting for the April 7, 2020, election" or "in person voting on the scheduled election date." (Gov. Evers Amicus Br. ('249 dkt. #151) 5 & n.8.) In turn, the WEC indicated that it cannot cancel or postpone the election, and that "any change may require court intervention, an act of the Legislature, or an order of the Governor." (Pls.' PFOFs ('284 dkt. #19) ¶ 88.)

As a result, Governor Evers, the WEC Administrator, and the Mayor of Milwaukee, among other public officials, are encouraging voters to vote via absentee ballot. Ironically, while encouraging voting by absentee ballot, the options for in-person voting, either before the election day by absentee ballot or on election day are at risk of being eliminated or have been eliminated. In the City of Madison, 67% of poll workers are over 60 years of age, falling within the at-risk category for COVID-19, and 32% of poll workers have canceled their assigned, in-person voting shifts. Madison also limited in-person absentee voting to curbside voting and eliminated voting at other early voting locations. Similarly, the City of Milwaukee has reported that it no longer has sufficient staff to operate its three, in-person early voting locations, also eliminating the ability to register in-person before the election, although as the intervening defendants point out, drive-up early voting remains available through April 5. Milwaukee Elections Commission Website, available at https://city.milwaukee.gov/election#.XoFPkpNKiqA.

As of the date of the DNC/DPW plaintiffs' motion, 699,431 absentee ballots have been requested statewide. As of the latest available data, that number has increased to 1,119,439, with today being the last remaining opportunity for individuals to request the

mailing of an absentee ballot. WEC, "Absentee Ballot Report - April 7, 2020 Spring Election" (Apr. 2, 2020), available at https://elections.wi.gov/node/6806. As a point of reference, in the four spring elections from 2016 to 2019, the number of absentee ballots issued ranged from a low of 103,533 in 2017 to a high of 249,503 in 2016. (Burden Rept. ('249 dkt. #63-1) 7.)[6] In a March 23, 2020, hearing on the court's prior temporary restraining order, WEC Administrator Wolfe, stated "we're also seeing unprecedented traffic for people requesting their absentee ballot." (Pls.' PFOFs ('249 dkt. #62-1) ¶ 8.) Anticipating this growth in demand, the WEC has distributed 1.2 million absentee ballot envelopes to municipal clerks throughout the state. At the hearing, WEC Administrator Wolfe testified that for the 2012 and 2016 spring elections, approximately 80-85% of the absentee ballots sent to voters were returned in time to be counted.

As a result of the significant uptick in absentee ballot requests, Madison City Clerk Maribeth Witzel-Behl represents that Madison has received an "unprecedented number of requests for absentee ballots"; Milwaukee City Clerk Neil Albrecht estimates that "absentee ballot requests this election are ten times the normal number"; and Hudson City Clerk Becky Eggen avers that "[t]his election cycle is by far the busiest I have experienced in terms of volume and speed of requests for absentee ballots." (*Id.* ¶¶ 9-11 (citing Witzel-Behl Decl. ('249 dkt. #77) ¶ 7; Albrecht Decl. ('249 dkt. #73) ¶ 5); Eggen Decl. ('249 dkt. #65) ¶ 2).)

In light of these unprecedented numbers, at least some clerks are having trouble

[6] Moreover, in previous spring elections, absentee ballots were about as likely to be returned in person as by mail, a highly unlikely scenario for this election given the health risks and reduced options for doing so. (Burden Rept. ('249 dkt. #63-1) 7-8.)

processing the applications for absentee ballots. The Madison Clerk explains that "[a]ttempting to meet the extraordinary demand for absentee ballots and other requests from voters has strained the capabilities of the Clerk's office," and "[t]he ever increasing volume of requests for absentee ballots is threatening to overwhelm the staff available." (Pls.' PFOFs ('249 dkt. #62-1) ¶ 20 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶¶ 6, 8).) As of March 27, Madison had a backlog of more than 12,000 absentee ballots requests to process, and as a result it was experiencing at least a week-long delay in sending out absentee ballots. As of March 27, the City of Hudson had 2,000 pending requests for absentee ballots. The difficulty of processing the high volume requests is not limited to these cities, but extends to other municipal election offices across the state. Although WEC Administrator Wolfe represented at the April 1, 2020, hearing that the backlog had improved in recent days, she was unable to provide any specifics.

While recognizing the challenges in processing absentee ballot requests, the WEC maintains that "[i]t is not clear that the timely processing of requests for absentee ballots is impossible." (Defs.' PFOFs ('249 dkt. #109) ¶ 38.) In particular, the WEC represents that as of March 31, 2020, of the 972,232 absentee ballot requests, 942,350 have been sent out, leaving only a backlog of 30,000 statewide. WEC, "Absentee Ballot Report - April 7, 2020 Spring Election" (Mar. 31, 2020), available at https://elections.wi.gov/node/6794. As of April 2, the backlog was approximately 21,590. WEC, "Absentee Ballot Report - April 7, 2020 Spring Election" (Apr. 2, 2020), available at https://elections.wi.gov/node/6806.

Nevertheless, in light of the challenges in processing requests and mailing out

absentee ballots, the Madison City Clerk avers that "the 8:00 p.m. election day deadline for receipt of absentee ballots is completely unworkable." (Pls.' PFOFs ('249 dkt. #62-1) ¶ 29 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶ 13).) Specifically, the United States Postal Service estimates that two to three days are necessary for a ballot to arrive on time, although as the WEC points out during the past several years, USPS has advised voters to mail completed ballots one week before the election to ensure that they are received on or before election day, and since the beginning of the COVID-19 health crisis, the USPS is operating more slowly. (Defs.' PFOFs ('249 dkt. #109) ¶¶ 8-9.)

As a result, the City Clerks for Madison and Milwaukee represent that "[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request . . . will have the time to receive, vote and return their ballot by Election Day." (*Id.* ¶ 30 (quoting Cities' Amicus Br. ('249 dkt. #39) 5).) The Madison City Clerk estimates that more than 1,000 ballots will be received after the election day deadline; Milwaukee estimates that "thousands" will arrive late. Indeed, at the hearing, in light of the number of absentee ballot requests to date and with reference to the 2016 spring election as a point of comparison, Wolfe acknowledged that approximately 27,500 voters absentee ballots will be received *after* the receipt deadline of 8:00 p.m. on the day of the election, April 7, 2020, and, therefore, will not be counted. No doubt at least in part for this reason, the WEC informed the court on March 31, 2020, that it no longer objects to any absentee ballot postmarked by April 7, 2020, and received by 4:00 p.m. on April 13, 2020, being counted in the election. ('249 dkt. #152.) In their notice to the court, the WEC also represented that "If the votes received by 4:00 p.m. on April 13, 2020, are

counted it will not impact the ability to complete the canvass in a timely manner." (*Id.*) At the hearing, WEC Administrator Wolfe and her counsel reiterated this position..

D. Challenges to Absentee Voting Posed by Safer-At-Home Order

1. Absentee Ballot Witness Signature Requirement

The Safer-At-Home Order did not explain how its provisions would implicate any of the state's requirements for voting, including the witness signature requirement, although as the intervening defendants point out, there are numerous exceptions to the order including for "essential governmental functions" and "essential travel." The envelopes in which absentee voters enclose and send in their ballots include the following language in the "Certification of Voter" box:

> I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87 (5), Wis. Stats., if I requested assistance, could know how I voted.

Wis. Stat. § 6.87(2). (*See also* Defs.' PFOFs (dkt. #109) ¶ 16.) A box labeled "Certification of Witness" provides:

> I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

Id. (*See also* Defs.' PFOFs (dkt. #109) ¶ 17.)

On March 26, 2020, the Madison City Clerk issued a statement indicating that

"there is no exception to the witnessing and signature requirement for mail-in ballots," and referring voters to non-profit organizations who can assist with witness signatures while maintaining social distancing. (Pls.' PFOFs ('278 dkt. #16) ¶ 18 (quoting Aguilera Decl., Ex. T ('278 dkt. #15-20)).) On March 29, the WEC also issued guidance suggesting several options for voters to meet this requirement and avoid direct interaction, including a friend or neighbor may watch the voter mark their ballot through a window, open door or other physical barrier, and even may do so by video chat, like Skype or Facetime, with the voter then placing the ballot outside for the witness to sign and mail. WEC, "Absentee Witness Signature Requirement Guidance" (Mar. 29, 2020), available at https://elections.wi.gov/node/6790. The WEC even suggested that the voter could ask an individual delivering groceries or food to witness the ballot. *Id.* At the hearing, WEC Administrator Wolfe acknowledged that some of the guidance, in particular that concerning use of video chat, may not work for some elderly voters without access to or familiarity with the technology, and that the guidance may not account for all safety concerns about proper treatment of paper to avoid the spread of COVID-19. For its part, the City of Milwaukee has established five places where voters can drop off their completed absentee ballots and get them witnessed by staff, although obviously individuals would have to leave their home to access these services.

There are 675,850 single member households in Wisconsin, a substantial number of which are over the age of 65, including the four individual plaintiffs in the '278 case. (Pls.' PFOFs ('278 dkt. #16) ¶ 20.) Plaintiffs also submit declarations from several other individuals living alone, and in high risk groups, who explain the challenges they face in

complying with the witness signature requirement for absentee ballots and averring that they have been unable to secure the necessary signatures. (Pls.' PFOFs ('249 dkt. #62-1) ¶¶ 36, 39 (citing declarations); Pls.' PFOFs ('278 dkt. #16) ¶¶ 21-31 (citing plaintiffs' declarations); Pls.' PFOFs ('284 dkt. #19) ¶ 76 (citing declaration).) Plaintiffs' expert further opines "for a person who lives alone, is immunocompromised and self-quarantining to protect their health, or who has contacted COVID-19 and is in quarantine to protect others, it may be nearly impossible to secure a witness signature in a timely fashion." (*Id.* ¶ 37 (quoting Burden Rept. ('249 dkt. #63-1) 9).) The Madison City Clerk also avers that her office has received "numerous requests daily from individuals who have received an absentee ballot, but live alone and have no person to witness the ballot . . . [and] are afraid to leave their homes in search of a witness." (*Id.* ¶ 38 (quoting Witzel-Behl Decl. ('249 dkt. #77) ¶ 11); *see also* Eggen Decl. ('249 decl. #65) ¶ 6).)[7]

2. Photo ID and Proof of Residency Requirements

Plaintiffs similarly contend that the Safer-At-Home Order, and specifically the requirement that all non-essential business close, poses challenges to individuals who need a copy of a photo ID or proof of residency in order to register to vote and request an absentee ballot online or by mail. While the intervening defendants point out that the Safer-At-Home order exempts business from closure that may provide photocopying services, a question remains whether voters, especially the elderly or other high-risk individuals, will feel safe venturing out to those businesses. Plaintiffs' expert again opines

[7] As of March 31, 2020, the Milwaukee Clerk also avers that the city has received 450 absentee ballots that are missing the necessary witness signature. (Albrecht Decl. ('249 dkt. #135).)

that "[w]ithout the assistance of an election official and perhaps other friends or family who are separated physically due to 'social distancing' measures taken in response to the virus pandemic, [the copying and mailing in a copy of a photo ID or proof of residency] will be an administrative and technological hurdle for some prospective voters," especially given that absentee voting is a "new and foreign process" for many Wisconsin voters, although recognizing that absentee voting has been in place in Wisconsin for some time. (Pls.' PFOFs ('249 dkt. #62-1) ¶¶ 43-44 (quoting Burden Rept. ('249 dkt. #63-1) 12.)

One individual specifically avers that because of her lack of access to a copier or scanner, she will not be able to vote in this election. (*Id.* ¶ 45 (citing Love Decl. (dkt. #68) ¶ 4.) Moreover, the Dane County Clerk avers that he has received "many calls from elderly voters who are unable to provide a copy of their photo ID as required to request an absentee ballot." (McDonell Decl. ('249 dkt. #74) ¶ 6.)[8] In response, he has advised these voters "to indicate on their absentee ballot requests that they are 'indefinitely confined' due to illness," and on March 25, 2020, he advised all Dane County voters that they "should continue to follow the law requiring a photo ID but that they may indicate as needed that they are indefinitely confined due to illness." (*Id.* ¶¶ 6-7.)

In response, the WEC issued guidance for indefinitely confined electors on March 29, 2020, which provides in pertinent part:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current

[8] The intervening defendants dispute McDonell's account and other statements by clerks on hearsay grounds. At minimum, these statements are admissible for the impact they had on the declarants as voters. Fed. R. Evid. 803(3). To that extent, the court will at least credit the fact that some high risk voters have been paralyzed by the uncertain risks associated with venturing outside their homes.

> circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

WEC, "Guidance for Indefinitely Confined Electors COVID-19" (Mar. 29, 2020), available at https://elections.wi.gov/node/6788. This guidance goes on to explain:

> We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. *During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.* We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

Id. (emphasis added).[9]

E. Challenges to In-Person Registration and Voting

While the significant increase in absentee ballot requests should decrease

[9] In a March 31, 2020, order, the Wisconsin Supreme Court granted the Republican Party of Wisconsin's motion for temporary restraining order, directing the Dane County Clerk to "refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance." *Jeffersom v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). ('249 dkt. #130.) In so holding, the Supreme Court effectively adopted the WEC's guidance of the term "indefinitely confined" as quoted above.

significantly the number of in-person voters on April 7, assuming the total votes for this election fall somewhere in the mid-range of the total number of votes in the 2012 spring election (approximately 1.1 million) and the 2016 spring election (approximately 2.1 million), WEC Administrator Wolfe testified during the hearing that roughly 500,000 people would still need to vote in-person on April 7. In light of the COVID-19 health crisis and the various government orders, municipal clerks have expressed concerns about safely administering in-person voting and registration either before election day or on April 7. In response, the WEC has issued various communications, acknowledging concerns, including shortages of absentee ballot envelopes, polling locations, poll workers, hand sanitizer and cleaning products, as well as the real possibility that the clerks themselves may not be able to serve in the days leading up to election day and the election day itself. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 80-84.) Still, the WEC has directed municipal clerks to continue in-person registration and voting, while requiring at least six-feet of distance between voters and election workers.

As for election day, the WEC has directed that municipalities are required to conduct in-person election day voting and that local election officials and local elected officials are not authorized to terminate this option. (Defs.' PFOFs ('249 dkt. #157) ¶ 2.) After consulting the public health officials, the WEC recently provided guidance for polling stations on election day as well. (*Id.* ¶ 3; *see also* Wolfe Decl., Ex. F ('249 dkt. #106-6).) This guidance requires hand washing or sanitizing stations, wiping down tables, door handles, pens, etc., every ten minutes, ensuring at least six-feet distance between voters and between voters and election workers, and avoiding handling of photo IDs, among other

requirements. The WEC has purchased a large quantity of 70% ethyl alcohol liquid sanitizing product to provide clerks a disinfecting solution for use at polling sites, and is in the process of securing cleaning wipes. In addition, Governor Evers has indicated that he has agreed to use members of the Wisconsin Army National Guard to assist poll workers, although it is "anticipated that the assistance of the National Guard will not satisfy all of the current staffing needs." (Gov. Evers Amicus Br. ('249 dkt. #151) 9.)

Even so, WEC Administrator Wolfe testified at the hearing that in a recent survey, 111 municipalities indicated that they did not have the capacity to staff even one polling place. Moreover, plaintiffs in the '284 case submit more disturbing proposed findings of facts with respect to specific election preparations for the Cities of Milwaukee, Madison, Green Bay and Racine. In Milwaukee, the City has 592,000 residency, of which 439,000 are of voting age and approximately 298,000 are currently registered to vote. Approximately 40% of City residents are African-American; 17% are Hispanic/Latino; and 28% live in poverty, as compared to the state average of 13%. Milwaukee has 327 electoral wards and 180 polling stations, although 18 polling stations are unavailable due to risk of cross-contamination. In the 2016 spring presidential primary, Milwaukee documented 167,765 total ballots cast and processed 14,321 absentee ballots.

In preparation for the April 7, 2020, election, the City of Milwaukee will require some 300 staff members to assist in the processing of absentee ballots and 1,500 staff members for polling location operations. Due to the COVID-19 heath crisis, as of March 30, 2020, there are less than 400 election workers (without confirmation from all) and 50 central count workers available. An estimated 50% of the City's regular election workers

are over the age of 60, with approximately 33% over the age of 70. Milwaukee is concerned about training new poll workers due to the social distancing requirements. According to the City's Clerk, "[w]hether imposed *de jure* or *de facto*, the City of Milwaukee likely will be *unable* to conduct in-person voting in its 327 wards on April 7, leaving mail-in absentee voting as the only means currently [available] by which Milwaukee voters will be able to vote for the Spring Election scheduled to occur on April 7." (Pls.' PFOFs ('284 dkt. #19) ¶ 98 (citing Albrecht Decl. ('284 dkt. #12) ¶ 9) (emphasis added).) The WEC disputes this, pointing to its guidelines requiring municipalities to conduct in-person absentee and election day voting.

In addition, as of March 30, 2020, the City of Milwaukee has processed approximately 66,850 requests for absentee ballots. The Clerk estimates that if the City continues to receive approximately 5,000 requests per day until the last day such requests may be received, April 2, and assuming that 5% of the ballots mailed will not be returned, the City will process an additional 38,000 ballots for an estimated total of 90,000 ballots. Assuming in-person voting on election day is not possible, the Clerk estimates that the turnout for Milwaukee will be approximately 70,000 less than originally estimated.

In turn, the City of Madison has a population of approximately 255,650, with 213,725 of voting age, approximately 179,648 of which are registered to vote. The City has 152 voting wards and 92 polling stations, although 14 are not available due to COVID-19 health concerns, and the Madison Metropolitan School District is considering not allowing the City to use the 21 school facilities. Attempting to meet the demand for absentee ballots, other City of Madison employees have been reassigned to assist the City

Clerk, but even with that influx of employees, some staff have been working 12-17 hour days. As of March 24, the City has sent 40,275 absentee ballots by mail and 1,273 by email, by March 30, the total number of absentee ballots issued was over 69,000. Nonetheless, the City is having a difficult time processing the applications for absentee ballots, and it now has a backlog of over 12,000 requests. In the 2016 spring presidential primary, Madison voters cast 118,219 ballots, including 10,272 absentee ballots. The City is anticipating as many as 118,000 absentee ballots to be cast in the April 7 election.

As of March 24, 2020, 666 poll workers have also canceled their assigned shift at the polls in the City of Madison for the April 7 election. As such, 774 of the 1,500 morning shifts and 715 of the 1,500 evening shifts are vacant. In addition, approximately 67% of the City's poll workers were in the "at risk" category -- being over the age of 65. Accordingly, the City anticipates additional poll workers will opt not to work.[10]

As for Green Bay, as presented in the verified complaint in the Eastern District lawsuit, the City represents that it, too, is overwhelmed by the unprecedented demand for absentee ballots and has a backlog of over 4,000 requests with only six staff members, which includes employees from other departments, available to process the requests. As for election day, Green Bay currently lacks access to hand sanitizer or sanitation wipes, which are necessary to ensure cleanliness of polling places and limit potential exposure of

[10] Dane County filed an amicus brief, in which it argues that the April 7 election should be postponed, including a statement from its Director of Public Health Madison & Dane County, in which she advises that a failure to postpone the election "would put all Wisconsin communities at greater risk of illness due to COVID-19, and puts our health care systems at risk of becoming overwhelmed and depleted of resources." ('249 dkt. #150-3 (quoting Ex. C. (dkt. #150-5)).)

COVID-19.[11] Moreover, 90% of its 278 poll workers are age 60 or older, and only 54 have agreed to work on election day. Of the 54 poll workers who have agreed to work, only 11 are chief inspectors. The City avers that with these staff shortages, proceeding with the April 7 election is "not only impractical, it is wholly irresponsible given that the integrity of the election will be jeopardized." (Pls.' PFOFs ('284 dkt. #19) ¶ 125.)

Finally, with respect to Racine, like Milwaukee, it is more ethnically diverse than other cities in Wisconsin, with approximately 23% of its residents are African-American and 21% are Hispanic/Latino. In addition, 20% of Racine residents lives below the poverty level. Of Racine's more than 34,000 registered voters, the City typically sends approximately 1,500 absentee ballots. As of March 26, 2020, Racine has sent 4,500 ballots, which while a significant number, represents a small percentage of Racine's voters. (Coolidge Decl. (dkt. #7) ¶ 6.) For early voting, Racine has developed a process to ensure social distancing and attempt to limit exposure to COVD-19, but it does not believe these same protections will be viable on election day. Of the 135 poll workers who routinely and reliably work elections, fewer than 25 are under the age of 60, and as of March 31, 2020, only 50 are willing to work the April 7 election. Moreover, many of the chief election officials previously scheduled to work have also notified the City that they will not work the April 7 election.

In addition to considering the challenges faced by these four cities, plaintiffs in the

[11] In its complaint in the Eastern District of Wisconsin, the City of Green Bay and the City Clerk, described the typical, in-person voting process on election day, noting several places where poll workers and voters will be closer to one another than the recommended six-feet separation for proper social distancing. (Pls.' PFOFs ('284 dkt. #19) ¶ 78.)

'284 case also contend that African-American and Latino voters are particularly burdened by the impact of the COVID-19 health crisis with respect to the April 7 election. Since the 2008 election in Wisconsin, between 10 to 15% of all registrations have occurred at a polling place on the election day. (Pls.' PFOFs ('284 dkt. #19) ¶ 74.) For Milwaukee, approximately 20% of the total turnout for spring elections involve same-day registrants. (*Id.* ¶ 159.) Plaintiffs in the '284 case further aver that a "significant number of African-American voters have historically participated in same-day registration at the polls on election day, and will be unable to do this year due to the COVID-19 pandemic." (*Id.* ¶ 153.) Furthermore, due to the digital divide, registering to vote online or requesting an absentee ballot online may present more of a barrier for low-income African-American and Latino voters.

The burdens posed by this election will also likely disproportionately impact elderly voters, who are most vulnerable to the COVID-19 threat. On March 25, Bryan Boland, a Canvass Lead for SEIUWI, one of the plaintiffs in the '284 case, spoke with 43 people aged 60 and older living in the western part of Wisconsin. (Pls.' PFOFs ('284 dkt. #19) ¶¶ 163-68 (citing Boland Decl. ('284 dkt. #2) ¶¶ 3-8); *see also* Lizotte Decl. ('284 dkt. #3) ¶¶ 3-10 (detailing additional concerns raised by voters ages 60 or older).) He avers that about half of the people that he spoke with were planning on voting in-person and would not request an absentee ballot, but a number of them recognized that if the coronavirus risks amplified, they might not be able to vote. A number of the people Boland spoke with also expressed difficulty in requesting a ballot on-line because of technical problems or lack

of a computer or smart phone.[12]

OPINION

The standard for determining whether a preliminary injunction or a temporary restraining order is appropriate is the same. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 865 (W.D. Wis. 2013) (citing *Winnig v. Sellen*, 731 F. Supp. 2d 855, 857 (W.D. Wis. 2011)). Specifically, a plaintiff must first show "(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable likelihood of success on the merits." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)). Then, if this initial showing is successfully made, "the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.* (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016)).

I. Irreparable Harm & Inadequate Remedies at Law

The threatened loss of constitutional rights constitutes irreparable harm. *See Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."); *Elrod v. Burns*, 427 U.S.

[12] The WEC offered detailed facts about how postponing the election altogether would cause technical / logistics issues with respect to conducting the Special Election in the 7th Congressional District in particular (dkt. #157 at ¶¶ 8-17), but since the court does not believe this power lies within its purview, the court will not recite those here.

347, 373 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"). More specifically, courts have held that infringement on the fundamental right to vote amounts to an irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon").

Further, infringement on a citizens' constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies would be inadequate in this case. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress."). Accordingly, at least to the extent that they have demonstrated a likely constitutional violation as discussed below, plaintiffs have satisfied the first two prongs of the initial showing -- irreparable harm and inadequate remedies at law.

II. Likelihood of Success on the Merits & Balance of Equities

The court now turns to the heart of the matter -- whether plaintiffs have demonstrated a likelihood of success, and whether the balance of equities favors any of their requested relief. In the three motions, plaintiffs seek an order from the court restraining enforcement of the following six election-related requirements: (1) the current election day, April 7, 2020; (2) the current mail-in registration deadline under Wis. Stat.

§ 6.28(1); (3) the requirement that copies of proof of residence and voter ID accompany electronic and by-mail voter registration, under § 6.34; (4) the requirement that copies of photo identification accompany absentee ballot applications, under §§ 6.86, 6.87; (5) the requirement that absentee ballots be signed by a witness, under § 6.87(2); and (6) the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, under § 6.87.

In these consolidated cases, the merits question is whether any of the challenged provisions impose an unconstitutional burden on the right to vote. The right to vote is fundamental, and any alleged infringement on this right "must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). This right, however, is not absolute, *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986), and "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Challenges to election laws are governed by the framework set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428

(1992).[13] 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." *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016) (citing *Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428). When voting rights are severely restricted, a law "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). But even "slight" burdens must be "be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 288-89).

Even if plaintiffs are able to show that the challenged laws are likely unconstitutional, however, that does not automatically entitle them to the relief that they seek. Instead, the court must proceed "to weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (citing *Ty, Inc. v. Jones Grp., Inc.,* 237 F.3d 891, 895 (7th Cir. 2001)). "In addition, the court must ask whether the preliminary injunction is in the public interest." *Id.* (citing *Jones*, 842 F.3d at 1057). This latter consideration is

[13] A citizen's right to vote, and the *Anderson-Burdick* balancing test, is grounded in the First and Fourteenth Amendments. *See Burdick*, 504 U.S. at 434. So, while plaintiffs' separately argue that the challenged provisions violate the equal protection clause and the due process clause of the Fourteenth Amendment, (*see* Pls.' Br. ('249 dkt. #62) 18-22), these concerns are properly addressed within the more specific *Anderson-Burdick* framework. *See Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017) (the *Anderson-Burdick* framework addresses "the constitutional rules that apply to state election regulations"); *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (the constitutionality of an election law is governed by the *Anderson-Burdick* standard).

particularly critical here, as the Supreme Court has cautioned that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion . . . . As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

A. Postponement of Election Date

The court will begin with plaintiffs' broadest request: that the court delay the April 7, 2020, election. They assert that "if the election remains on April 7, it will disenfranchise hundreds of thousands or more Wisconsin voters." (Pls.' Br. ('284 dkt. #18) 2.) Although plaintiffs recognize that the decision to enjoin an impending election is serious, they maintain that such a measure is warranted given the immense burdens that will befall voters who attempt to exercise their franchise during the ongoing pandemic. (*Id.* at 8.)

First, plaintiffs contend that the burden that will be placed on citizens' right to vote will not only be severe, but unprecedented. (*Id.* at 6.) Plaintiffs write that "[n]ever has an electorate in our state or country of this magnitude confronted the extreme burden of literally risking their health and lives in order to cast a vote." (*Id.*) Moreover, they predict that in-person voting will be either cancelled or dysfunctionally understaffed as a result of poll workers' decisions to stay home rather than risk their own health to operate the polls. (*Id.* at 2, 6.) Next, plaintiffs argue that the state has "no compelling interest justifying keeping the April 7 election date." (*Id.* at 7.) According to plaintiffs, the election of candidates "by a mere fraction of qualified electors, under circumstances where a public crisis barred voters from participating, undermines the Defendants' claims that adherence to the election schedule is essential to public confidence in the democratic process." (*Id.* at 7-8.) Indeed, plaintiffs suggest that the state itself has an interest in postponing the

election since it is in the state's interest to hold a "meaningful" election which does not exclude significant number of eligible voters from the polls. (*Id.* at 8.)

Defendants, for their part, argue against delaying the election. The Commissioners maintain that they are capable of conducting an in-person election on April 7, despite the fact that certain unorthodox measures will need to be taken, such as consolidating polling stations and even possibly calling on Wisconsin National Guard members to serve as poll workers. In particular, the Commissioners voice concern over the cascading effects that may be caused by a delay in the scheduled election, including problems with processing ballots for upcoming elections and staying in compliance with federal laws regarding electronic tabulating equipment. (Defs.' Opp'n (dkt. #155) 3-4.) More forcefully, the RNC/RPW argue that delaying the April 7 election would throw the state's election preparations into turmoil and would harm those candidates who have spent time and resources campaigning. (RNC/RPW Opp'n ('249 dkt. #138) 3-4.) Further, they note that such interference would be unprecedented, and urge that this court "should not be the first to grant that drastic relief." (*Id.* at 4.)[14]

On the one hand, it is undeniable that the asserted state interests are strong. "The public interest in the maintenance of order in the election process is not only important, it is compelling." *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008). "Preventing

[14] The RNC/RPW also argue that plaintiffs' claims should be denied because the additional burdens placed on voters are due not to state action, but the COVID-19 pandemic itself. (*See* RNC/RPW Opp'n ('249 dkt. #96) 3; ('249 dkt. #138) 2-3.) This argument is quickly dismissed. The state action challenged here is the enforcement of Wisconsin's election laws; just as a state may not enforce an apportionment scheme that, although once constitutional, has through the passage of time resulted in uneven representation, *Reynolds*, 377 U.S. at 587, Wisconsin here cannot enforce laws that, even due to circumstances out of its control, impose unconstitutional burdens on voters.

ambiguity and confusion serves" this compelling state interest. *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at948. Moreover, more generally states have "a strong interest in their ability to enforce state election law requirements." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011)

On the other hand, there is no doubt that the rapidly approaching election date in the midst of the COVID-19 pandemic means that citizens will face serious, and arguably unprecedented, burdens in exercising their right to vote in person. In-person absentee voting and pre-election, in-person registration has already been limited or even eliminated in some voting areas. An alarming number of poll workers have, understandably, cancelled their shifts, which is almost certain to lead to some degree of dysfunction on election day. Numerous polling stations have been ordered to close.

Although the Governor and other public officials have encouraged citizens to vote absentee, this is easier said than done. As plaintiffs have argued and as discussed below, the COVID-19 pandemic has raised concerns even for those seeking to vote absentee, particularly for those without access to the necessary technology. Further, unregistered voters at this point have no other option but to go in person to their clerk's office or polling place on election day in order to register and thereby vote. Finally, voters who did not or could not vote absentee will be forced on election day to choose between exercising their franchise and venturing into public spaces, contrary to the public message to "stay home" delivered by countless public officials during the course of this pandemic. And this dilemma must be considered not only as an individual burden, but as a collective public health concern as the state continues to recommend limiting in-person interactions as

much as possible. Indeed, most at risk will be poll workers themselves, who may well be exposed to large number of voters throughout the day, and, as described in the facts above, the majority of which fall within the 60+ age range that is most at risk for serious complications due to COVID-19.

In light of these competing interests, the court cannot say with confidence that the state's asserted interests -- although strong -- are so compelling as to overcome the severe burdens that voters are sure to face in the upcoming election. Therefore, plaintiffs have demonstrated at least *some* likelihood of success on the merits of this claim. Even so, plaintiffs must further show that the balance of equities supports their requested relief.

In the balancing phase, "the court must compare the potential irreparable harms faced by both parties to the suit -- the irreparable harm risked by the moving party in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted." *Girl Scouts*, 549 F.3d at 1100 (citing *Ty, Inc.*, 237 F.3d at 895). Here, failing to delay the election day may well subject voters to unconstitutional burdens on their right to vote. The possibility that any law might disenfranchise qualified voters "would caution any district judge to give careful consideration to the plaintiffs' challenges." *Purcell*, 549 U.S. at 4.

Yet an injunction delaying the election altogether is not without harm to defendants. As a general matter, "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). More specifically, the Commissioners have expressed serious concerns about the impacts of a delayed election. (*See* Defs.' Opp'n ('249 dkt. #155).) WEC Administrator Wolfe

has explained that "changes to one aspect of the elections system have downstream impacts on voters, subsequent processes, and the ability of election officials to comply with statutory requirements and deadlines." (Third Wolfe Decl. ('249 dkt. #156) ¶ 9.) In particular, she has expressed concern that a delay to the April 7 election would interfere with the May election to be held in the 7th Congressional District, causing problems with "overlapping voter registration deadlines, overlapping absentee ballot procedures and time periods, voting equipment programming, and official canvass procedures." (*Id.* ¶ 11.) Indeed, at the hearing, she testified that there are *no* other dates available that would not have some impact on another election to be held through September.

Crucially, "[w]hen conducting this balancing, it is also appropriate to take into account any public interest, which includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation." *Girl Scouts*, 549 F.3d at 1100 (citing *Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Ty, Inc.*, 237 F.3d at 895). Here, the public interest cuts both in favor and against court involvement. As a general matter, "[e]nforcing a constitutional right is in the public interest." *Whole Woman's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019). And, certainly, the public interest "favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

That being recognized, a decision enjoining the election would not be an unequivocal benefit to all voters. As amicus Disability Rights Wisconsin points out, delaying the election day so that an all-mail election may be conducted, as has been suggested by some, may well adversely affect voters, including those with disabilities who

may require accommodations only possible via in-person voting. (Disability Rights Wis. Amicus Br. ('249 dkt. #121-1) 14.) Further, WEC Administrator Wolfe's testimony regarding the administrability of a delayed April 7 election suggest that such an order could potentially hamper registration efforts, undermine absentee voting, and confuse voters. Finally, a court "is entitled to and should consider the proximity of a forthcoming election" when considering the propriety of equitable relief. *Reynolds*, 377 U.S. at 585. This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion . . . . As an election draws closer, that risk will increase." *Purcell*, 540 U.S. at 4-5.

Plaintiffs argue that the pandemic "has prompted a burgeoning chorus of calls by the general public, public health experts, Mayors, Clerks, and local election commissions to postpone the April 7 election." (Pls.' Br. ('284 dkt. #18) 9.) And indeed the court has received numerous amicus briefs urging the court to take action. (*See, e.g.*, Dane Cty. Amicus Br. (dkt. #150); City of Green Bay Amicus Br. (dkt. #112); City of Milwaukee Amicus Br. (dkt. #100).) Yet there is also a "chorus of calls" to keep the April 7 election date, including those from the Governor (Gov. Evers Amicus Br. (dkt. #151)) and the Legislature (Wis. Legislature Amicus Br. ('249 dkt. #90)), who have both filed amicus briefs requesting that the court decline to stay the election. At the center of this maelstrom is the WEC, whose governing body was reconstituted relatively recently from a group of non-partisan judges to six Commissioners appointed equally by the two major political parties. As a consequence, the WEC's Administrator Meagan Wolfe has been expressly charged with the near impossible task of accomplishing a viable *and* safe election through

a combination of processing an unprecedented number of absentee ballots and an in-person election. If there is a hero to this story, it is the Administrator, her staff and municipal workers, all of whom continue to improvise election practices.

In doing so, the WEC retained the services of a medical expert approximately 3 weeks ago to advise how both can be accomplished under the threat of a COVID-19 outbreak and continued to consult with the Wisconsin State Emergency Operations Center ("SEOC") established by the Governor on March 12, 2020, as the magnitude of the COVID-19 threat began to emerge. Among the exhibits provided this court is a copy of a memorandum prepared by the Administrator, which outlines the steps that have been taken so far to accomplish that task, some of which has been disseminated out to municipalities for implementation by its clerks and poll workers. On a rolling basis, the Administrator and her staff have been trying to update that advice and gather supplies for use by poll workers on election day. Indeed, during yesterday's hearing, Administrator Wolfe learned for the first time that 25,000 masks were going to be provided at central locations for pick up by municipalities to be used during the local election next Tuesday. Until that moment, the advice by the Commissioner to municipalities was that masks would be unnecessary, apparently based on the previous advice of the medical expert and the fact that the CDC has not yet adopted the wearing of masks as a practice for the general public.

Because 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, it appears that no medical expert has been retained by the Commission to advise

as to whether an in-person election *can* be conducted safely under any circumstances, nor even more remarkably does it appear that medical experts at SEOC have been asked to opine on this subject, despite the obvious risks of further dissemination of the coronavirus on election day, including the handling of recently submitted absentee ballots. The Administrator and her staff, as well as local municipalities and others are to be commended for their remarkable efforts to accomplish an in-person election that may well be unwise, not just for poll workers, but for voters and the general public given the crucial moment this state seems to be confronting in the COVID-19 growth curve.

This leaves the broader concern as to the propriety of a federal court taking the extraordinary step of delaying a state-wide election at the last minute, and the federalism problems that are necessarily implicated, which weigh heavily in favor of denying the plaintiffs' broadest, requested relief. Plaintiffs argue that "it is not uncommon for federal courts to enjoin state authorities from holding elections when doing so would violate the rights of voters that are protected by the Constitution." (Pls.' Reply ('249 dkt. #162) 2-3.) However, none of the cases cited by plaintiffs authorize what plaintiffs are asking the court to do in this circumstance: delay the date of an impending, state-wide election.

In contrast, the Supreme Court has endorsed district court decisions to refrain from action, even in the face of undisputed constitutional violations. In *Ely v. Klahr*, 403 U.S. 108 (1971), the Supreme Court upheld a district court's decision not to enjoin an election even under an unconstitutional apportionment plan. *Id.* at 113-14. Faced with an election that was "close at hand," the district court explained that an injunction delaying the vote would "involve serious risk of confusion and chaos." *Id.* at 133. In allowing the election

to proceed, the Supreme Court recognized that the district court "chose what it considered the lesser of two evils," and affirmed the judgment of the court. *Id.* at 113-14; *see also Reynolds*, 377 U.S. at 586 (holding that the district court "acted in a most proper and commendable manner" in declining to enjoin Alabama's impending primary election, even under an unconstitutional apportionment scheme).

Without doubt, the April 7 election day will create unprecedented burdens not just for aspiring voters, but also for poll workers, clerks, and indeed the state. 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. Nor is it appropriate for a federal district court to act as the state's chief health official by taking that step for them.

At most, the court can only act in good faith to allow the WEC, local municipalities and poll workers to take what steps they can to vindicate the constitutional right to vote. Accordingly, the court must conclude that plaintiffs have not met their burden of showing that the balance of equities favors enjoining the upcoming election day. As the Supreme Court held in *Purcell*, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction." 549 U.S. at 5-6.

B. Extension of Deadline for Receipt of Absentee Ballots

Plaintiffs next request that the court extend the deadline by which absentee ballots may be received. Under current law, clerks will not count an absentee ballot that is received after 8:00 p.m. on election day. Wis. Stat. § 6.87(6). Plaintiffs argue that this statutory

deadline imposes an undue burden on voters because "it is a certainty that thousands of ballots will arrive after the April 7, 2020 deadline due to no fault of the voter." (Pls.' Br. ('249 dkt. #62) 12.)

In support, plaintiffs point to *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Maryland 2010), in which the district court found that the statutory deadline for the receipt of absentee ballots imposed a severe burden on absent uniformed services and overseas voters that was not justified by the state's interest in finality and certainty in elections. *Id.* at 678-80. The court found that due to long international mail delivery times, "even the most diligent absent uniformed services or overseas voter might be unable to return his ballot" in time to be counted. *Id.* at 678-79.[15]

Initially, the Commissioners maintained that the court should deny plaintiffs' requests for any extension. (*See* Defs.' Opp'n ('249 dkt. #107) 9.) Later, however, the Commissioners submitted a notice to the court stating that they "do not object to any absentee ballot postmarked by April 7, 2020 and received by April 13, 2020 by 4:00 p.m. being counted in the Spring Election." (Defs.' Notice Mar. 31, 2020 ('249 dkt. #152) 1.) They further represented that "[i]f the votes received by 4:00 p.m. on April 13, 2020 are

[15] Plaintiffs also cite to *In re Holmes*, 788 A.2d 291 (N.J. Super. Ct. 2002), but this case is largely unhelpful. There, anthrax attacks had caused a particular postal facility to close shortly before an election, delaying their receipt by the Board of Elections. *Id.* at 293. The court ordered that the ballots cast on or before election day but trapped in the facility and not received until after election day, should be counted. *Id.* The court's holding, however, was based on its interpretation of the state election law that set the deadline; the holding did not rely on or even discuss the federal constitutional analysis applicable to plaintiffs' argument, making it of limited use here. *See generally id.* at 292-95. Similarly, plaintiffs' citation to *United States v. Cunningham*, No. CIV. A. 3:08CV709, 2009 WL 3350028 (E.D. Va. Oct. 15, 2009), is unhelpful as that court bases its decision to extend the deadline by which absentee ballots should be received entirely on the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20401, *et seq*.

counted it will not impact the ability to complete the canvass in a timely manner." (*Id.*)

The RNC/RPW and the Wisconsin Legislature contend generally that deadlines ensure the orderly administration of elections and also provide certainty and reliability that minimizes disorder. (*See* RNC/RPW Opp'n ('249 dkt. #96) 2-3 (citing *Diaz* , 541 F. Supp. 2d at1335; Wis. Legislature Amicus Br. ('249 dkt. #90) 24 (citing *Crawford*, 553 U.S. at 196).) The RNC/RPW also argue that plaintiffs' requested relief should be rejected because voters "face no imminent harm until those ballots are cast, do not arrive on time, are not counted, and are deemed material to the outcome." (RNC/RPW Opp'n ('249 dkt. #96) 6.) Similarly, the Wisconsin Legislature suggests that the court "wait until after election day to determine whether any remedy is necessary or appropriate." (Wis. Legislature Amicus Br. ('249 dkt. #90) 25.)

At the outset, the Legislature's and RNC/RPW's invitation to postpone deciding this issue must be declined. The record now contains sufficient evidence to show that the asserted harm is imminent, and a timely resolution is necessary if there is any hope of vindicating the voting rights of Wisconsin citizens in an April 7 election. Indeed, the evidence is nearly overwhelming that the WEC, local election units and poll workers will need additional time to address the avalanche of absentee ballots, still arriving daily, much less to do so safely.

Turning then to the merits, the court first considers the burden that the absentee receipt deadline will place on voters. Here, as in *Doe*, 746 F. Supp. 2d at 678-79, the evidence presented by the parties and amici demonstrates that even the most diligent voter may be unable to return his or her ballot in time to be counted. Wisconsin clerks are facing

a record number of absentee ballot requests, and despite diligent efforts, as of April 2, 2020, they are still working on sending out a backlog of over 21,000 absentee ballot applications. Both the Madison and Milwaukee City Clerks have represented that "[t]here is no practical way that a person submitting a request for an absentee ballot on the deadline for submitting the request . . . will have the time to receive, vote and return their ballot by Election Day." (Pls.' PFOF ('249 dkt. #62-1) ¶ 30 (quoting Cities' Amicus Br. ('249 dkt. #39) 5).) Under these circumstances, the court finds that the burden placed on absentee voters is severe. Thus, defendants must demonstrate that the state has a compelling interest in enforcing the challenged law. *See Norman*, 502 U.S. at 280. They have not done so here.

Certainly, deadlines do generally provide certainty and reliability, and protect the orderly administration of elections. Yet election deadlines have already been disrupted, with the evidence showing that many voters who *timely* request an absentee ballot will be unable to receive, vote, and return their ballot before the receipt deadline. The state's interest in deadlines surely also extends to preserving the rights of those voters who themselves relied on those deadlines. More to the point, the state's general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law.

Most persuasive is, of course, the fact that the WEC itself does not oppose extending the deadline and specifically averred that a receipt deadline of 4 p.m. on April 13, 2020, would "not impact the ability to complete the canvass in a timely manner." (Defs.' Notice Mar. 31, 2020 ('249 dkt. #152).) Thus, the court concludes that plaintiffs have shown a

likelihood of success on the merits of their challenge to the absentee ballot receipt deadline. Moreover, the balance of harms favors preliminary injunctive relief. Specifically, an injunction moving the receipt deadline from 8 p.m. on April 7 to 4 p.m. on April 13 sufficiently accommodates canvassing deadlines while preserving citizens' rights.[16]

Similarly, the court will *not* add a postmarked-by date requirement; it is simply moving the statutory absentee receipt deadline. No persuasive evidence suggests that further altering statutory requirements will impose tangible benefits or harms, and indeed the amicus briefs from various local governments suggest that an extension of the deadline would be heartily welcomed by many local officials. (*See, e.g.*, City of Madison and Milwaukee Amicus Br. (dkt. #39); Dane Cty. Amicus Br. (dkt. #150).) Moreover, the WEC Administrator testified that the process of eliminating anyone who proceeded to vote in person after mailing an absentee ballot is already in place as part of the standard post-election canvassing of absentee ballots, and is not likely to create a substantial burden in this election. Finally, this relief is more generally in the public interest, which "favors permitting as many qualified voters to vote as possible." *Obama for Am.*, 697 F.3d at 437.

In light of the court's decision to extend the deadline for receipt of absentee ballots, the court will also extend slightly the receipt-deadline for absentee ballot requests.[17] As

[16] As such, this deadline addresses the concern raised in the Wisconsin Counties Association and Washington County's amicus brief, expressing concern about the expiration of county board supervisor's terms on the third Monday or Tuesday of April. ('249 dkt. #133.)

[17] The court assumes that because the MyVote Wisconsin website still allows requests of absentee ballots online at the time this opinion issues, the WEC will be able to simply extend the clock until April 3, 2020, without having to engage in complex or risky computer changes. To the extent this assumption is incorrect, the WEC Administrator is empowered in her discretion not to implement this relief online, although municipalities are still required to accept requests locally through

described above, the general deadline for which an absentee ballot request must be received is today, April 2, 2020. In an effort to expand absentee voting to as many Wisconsin individuals as possible and reduce the number of people who will face the difficult choice of voting in-person on April 7, the court will extend the deadline by one day, until 5:00 p.m., April 3, 2020. This slight extension aligns with the deadline by which indefinitely confined and military voters' requests must be received. *See* Wis. Stat. § 6.86(1)(c), (2). Moreover, the increased flexibility on the back-end, extending the receipt deadline to April 13, should allow individuals whose absentee ballot request by 5:00 p.m. on Friday, April 3, 2020, to receive the ballot via mail, complete it, and return it via mail in time to meet the April 13, 2020, deadline.

C. Relief from Requirement of Witness Signature for Absentee Ballots

According to plaintiffs, the requirement that an absentee ballot be signed by a witness should also be enjoined because it imposes an unconstitutional burden under the current circumstances and is currently being applied in a way that violates the equal protection clause. Plaintiffs argue that for voters who do not have another adult U.S. citizen in their household, the witness requirement compels them to interact with a non-household member and "that interaction -- both the witnessing and signing of the ballot -- would require the individuals to come within six feet of each other" in violation of the Governor's Safer-at-Home Order. (Pls.' Br. ('249 dkt. #62) 13.) Even aside from the Governor's order, plaintiffs urge that interacting with another person to receive the

tomorrow, April 3, 2020.

necessary signature creates serious health risks due to the ongoing pandemic, especially for those who are elderly or immunocompromised. (*Id.* at 13; Pls.' Br. ('278 dkt. #17) 6-7.)

In support, plaintiffs have submitted a number of declarations by aspiring voters who have testified that they have been unable to secure a witness signature for their absentee ballot. (*See* Wilson Decl. ('249 dkt. #75); Larson Decl. ('249 dkt. #67); Keel Decl. ('249 dkt. #66); Trapp Decl. ('249 dkt. #70); Gear Decl. ('278 dkt. #9); Ginter Decl. ('278 dkt. #10); Hakami Decl. ('278 dkt. #11); Whelan Decl. ('278 dkt. #12); Ott Decl. ('278 dkt. #13).) For example, Ben Wilson stated that he was "facing difficulty in finding a witness" because he lived alone and felt that "[k]nocking on a neighbor's door or asking a gas station clerk would have me violate social distancing guidelines." (Wilson Decl. (dkt. #75) ¶¶ 4-5.) Similarly, Jeff Trapp explained that he was "finding it difficult to get a witness" for his ballot, conceding that he "could sit on [his] doorstep and ask someone passing by," but that he "really [did] not want to put someone else in the position of possible contact with the virus." (Trapp Decl. (dkt. #70) ¶ 4.) Thus, plaintiffs conclude, the signature "requirement severely burdens individuals' voting rights because, absent disobeying state law and severely compromising their health, it results in disenfranchisement." (Pls.' Br. ('249 dkt. #62) 14; *see also* Pls.' Br. ('278 dkt. #17).)

In contrast, plaintiffs maintain that the state has no compelling interest in enforcing this requirement, and therefore the severe burden cannot be justified. Plaintiffs contend that "the witness requirement is an incredibly weak, borderline ineffectual, anti-fraud tool." (Pls.' Br. ('278 dkt. #17) 7.) Moreover, according to plaintiffs, the state itself has an interest in encouraging individuals to observe social distancing guidelines, and the witness

requirement undermines the state's own interest in protecting the public health. (*Id.* at 9-10.)[18]

The RNC/RPW and Wisconsin Legislature oppose enjoining the witness requirement at all, arguing first that the burden on voters is not so severe as plaintiffs suggest. First, they point out that, if a voter can satisfy an election requirement with "reasonable effort," then that requirement does not qualify as a substantial burden. (RNC/RPW Opp'n ('249 dkt. #96) 5; Wis. Legislature Amicus Br. ('249 dkt. #90) 20-21 (citing *Frank*, 819 F.3d at 386-87).) In particular, they argue that a voter can complete the requirement while abiding by the Governor's orders and social distancing guidelines by, for example, having a witness observe through a window or even a videocall, then passing the ballot under a closed door to be signed and returned. (Wis. Legislature Amicus Br. ('249 dkt. #90) 20-21.)

Second, the RNC/RPW and Wisconsin Legislature argue that any burdens imposed by the witness requirement are overcome by legitimate state interests. They both point to *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), in which the Seventh Circuit explained that voting fraud is a "serious problem" and is "facilitated by absentee voting." (RNC/RPW Opp'n ('249 dkt. #96) 2 (quoting *Griffin*, 385 F.3d at 1130-31); Wis. Legislature Amicus Br. ('249 dkt. #90) 18 (quoting *Griffin*, 385 F.3d at 1130-31).) As to the specific

[18] Plaintiffs also suggested that the requirement is not narrowly tailored because the state's interests may be satisfied by other, less risky means. In particular, plaintiffs argued that the remote presence of a witness -- either through a live audio or video feed -- sufficiently accommodates the state's asserted interests. (Pls.' Br. ('249 dkt. #62) 14-15, 20-21.) On March 29, 2020, however, the WEC issued guidance specifically confirming that a voter may complete their ballot in the remote presence of a witness. While the witness will still have to sign the physical certificate, this can be accomplished without a direct interaction with the age or health compromised voter.

witnessing requirement, they contend that it helps to prevent voter fraud "by adding an additional layer of protection, ensuring that the person filling out the absentee ballot is the actual voter listed on the ballot, and preventing undue influence or coercion." (Wis. Legislature Amicus Br. ('249 dkt. #90) 18.)

While generally arguing that the court should not enjoin the witnessing requirement, the Commissioners do not explicitly explain how the burdens imposed by the requirement are justified by state interests. (Defs.' Opp'n ('249 dkt. #107) 9.) Instead, they simply provide the court with the guidance developed by the WEC "for meeting the witness requirement . . . while either self-isolating or in quarantine." (*Id.* at 17.)

It is undeniable that the COVID-19 pandemic and social distancing orders will make it harder for some aspiring absentee voters to satisfy the witness requirement. At the same time, for many voters, this requirement may easily be met by a fellow household member, with whom the strict social distancing guidelines discussed by plaintiffs do not apply. And even for those who do not reside with an adult U.S. citizen, in general the additional barriers they face may be overcome with some reasonable effort. In particular, the guidance published by the WEC suggests a variety of witnessing options for voters. (Aguilera Supp. Decl., Ex. W (dkt. #105-1) 2.) For example, the WEC suggests that a "family member, friend or neighbor" or even a "mail delivery person[]" or "food delivery person[]" "may watch the voter mark their ballot through a window, open door or other physical barrier." (*Id.*) They also note that the "process can be done via video chat like Skype or Facetime with the ballot left outside of the door or in a mailbox for the witness to sign and provide their address after the fact." (*Id.*) These options do not require the

voter or their witness to violate the Governor's Safer-at-Home Order, which allows individuals to interact so long as they "maintain social distancing of at least six (6) feet." (Spiva Decl., Ex. 4 ('249 dkt. #63-4) 2.)

Understood in this way, the state's asserted interests in the witness requirement as a tool against voter fraud justify the general application of the requirement. *See Crawford*, U.S. at 191 (preventing voter fraud is an important state interest); *Griffin*, 385 F.3d at 1130-31 (same); *Frank*, 768 F.3d at 750 (same). As such, plaintiffs have not met the "heavy burden of persuasion" needed to enjoin the requirement "in all its applications." *Crawford*, 553 U.S. at 200.

Even so, given the current unknowns regarding COVID-19 infection and transmittal risks, plaintiffs have shown that at least some isolated voters, and in particular those who are immunocompromised or elderly, will likely not be able to secure a witness certification safely even with reasonable efforts, or at minimum have reasonable concerns about their ability to do so and, therefore, may be particularly burdened by this requirement. To be clear, while this requirement may impose severe burdens on some limited subset of voters, that burden does not justify a wholesale rejection of the requirement. *See Crawford*, 553 U.S. at199-200 (a conclusion that a burden "may not be justified as to a few voters" is not sufficient to strike down an election law). However, it may entitle those particular voters facing unreasonably high burdens to specific relief. In *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016), the Seventh Circuit considered a similar question related to Wisconsin's requirement that a voter present a valid photo ID in order to vote. After arguing unsuccessfully that the photo ID requirement should be struck down entirely, plaintiffs in

Frank returned to court with a different argument: that "high hurdles for *some* persons eligible to vote entitle those *particular* persons to relief." *Id.* at 386 (emphasis added). The court reasoned that "[p]laintiffs' approach is potentially sound if even a single person eligible to vote is unable to get acceptable photo ID with reasonable effort. The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily." *Id.*

Here, the particularly high hurdles faced by this subset of voters are not overcome by the state's general anti-fraud goals, and some limited relief is therefore appropriate. In particular, the court will order defendants to accept an unwitnessed ballot that contains a written affirmation or other statement by an absentee voter that due to the COVID-19 pandemic, he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so, provided that the ballot is otherwise valid. No magic words are required by a voter to successfully make this affirmation, and it will be left up to the individual discretion of clerks as to whether to accept a voter's excuse for not completing the witness certification requirement based on the written affirmation by the individual voter.

Moreover, the balance of harms favors this approach. Plaintiffs have adequately demonstrated that the harm some voters are likely to face includes unjustified burdens in the exercise of their right to vote. On the other side, the WEC already has the ability to communicate this new exception rapidly to the various clerks across the state. While the additional burden on the election process is not minimized, it is overcome by voters' right to exercise their franchise without undue burdens, especially as the court has given local

canvassers additional time to complete the review of absentee ballots and to follow up as to any written affirmation or statement they believe to be suspect, just as is already done with respect to the exceptions for Wisconsin IDs as discussed immediately below.

D. Relief from Proof of Identification Provision

Third, plaintiffs argue that the court should enjoin the statutory requirement that a photo ID be submitted with an absentee ballot. Wisconsin law provides that an individual requesting an absentee ballot for the first time must submit proof of a valid photo ID. Wis. Stat. § 6.86. Plaintiffs contend that many aspiring voters do not have in their homes the means necessary to submit the required proof, such as a copier, scanner, printer, and/or smartphone. Further, plaintiffs point out that while under normal conditions, individuals might be able to go to a library or copyshop to access these machines, due to the Safer-at-Home Order issued on March 24, 2020, most if not all of these locations have closed. Moreover, plaintiffs contend that even if such locations were still open, the Safer-at-Home order prohibits individuals from venturing outside of their homes in an attempt to find a machine that would allow them to submit their photo ID. The burden imposed by the proof of ID requirement for first-time absentee voters, plaintiffs argue, is severe because it requires voters without access to the necessary technology to disobey a statewide order to satisfy the requirement.

According to plaintiffs, any asserted state interest in preventing voter fraud or ensuring electoral integrity cannot justify the severe burden currently imposed by the requirement. First, plaintiffs suggest that the state's interests may be satisfied by less risky means, such as having a voter complete a certificate -- subject to penalties for false

statements -- affirming his or her identity. Second, plaintiffs point out that "state law already recognizes that there may be a need for exceptions to these types of rules, finding that voters who are 'indefinitely confined' due to age, illness, infirmity, or disability do not have to comply with the absentee photo ID requirements." (Pls.' Br. ('249 dkt. #62) 17.)

The RNC/RPW and Wisconsin Legislature oppose enjoining the absentee ID requirement, arguing first that the burden on voters is not so severe as plaintiffs suggest. They point out that, if a voter can satisfy an election requirement with "reasonable effort," then that requirement does not qualify as a substantial burden. (RNC/RPW Opp'n ('249 dkt. #96) 5; Wis. Legislature Amicus Br. ('249 dkt. #90) 15 (citing *Frank*, 819 F.3d at 386-87; *Crawford*, 553 U.S. at 198).) Here, according to the RNC/RPW and the Legislature, a voter could use their smartphone to upload proof of their ID or with reasonable effort could locate a person who could help them to do so, all while abiding by the Governor's Stay-at-Home Order which permits interacting with others while staying six feet apart. (RNC/RPW Opp'n ('249 dkt. #96) 5-6; Wis. Legislature Amicus Br. ('249 dkt. #90) 15-16.) They further argue that any potential burdens are outweighed by the state's interest in deterring fraud, which is particularly acute in the absentee ballot context. (RNC/RPW Opp'n ('249 dkt. #96) 3; Wis. Legislature Amicus Br. ('249 dkt. #90) 9.)

Again, under current conditions, there is little question that for some voters satisfying the proof of ID requirement will become more difficult, especially if fearful of any contact with others because of age or other high risk factor. At the same time, the court recognizes that for many if not most voters the requirement may be satisfied easily, and even for voters who face barriers those may be overcome with only reasonable effort.

(*See* Strang Decl. ('249 dkt. #76) ¶¶ 6, 9 (testifying that he initially had difficulty in attempting to provide proof of identification in requesting his absentee ballot, but that he was able to successfully upload his photo ID after spending 40 to 45 minutes on the effort).) Further, two days ago the Wisconsin Supreme Court issued an order in *Jefferson v. Dane County*, 2020AP557-OA, adopting the WEC's guidance of the term "indefinitely confined." The guidance provides in relevant part that the "[d]esignation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence." In light of these developments, the court is satisfied that the current proof of ID requirement, as being applied under the WEC guidance and state court order, does not impose an undue burden on the right to vote, and accordingly will deny plaintiffs' requested relief as to this requirement.

E. Extension of Mail-In Registration Deadline and Relief from Proof of Residence Provision

Plaintiffs also argue that the court should extend the by-mail registration deadline until April 2, 2020. (Pls.' Br. ('249 dkt. #62) 18.) The court will not dwell long on this question, because even if plaintiffs were to demonstrate a strong likelihood of success on the merits, the balance of equities does not favor the injunction they seek. Even given the best efforts of the court to expedite this case, as well as the diligent advocacy of all parties involved, the evidentiary hearing was held on April 1, 2020, and this court's opinion and order is being issued the following day, on April 2, 2020. Plaintiffs' requested injunction as to the by-mail registration deadline would open the registration window for less than

one day. Given this timeline, it is implausible that the order could be implemented in a way that would provide relief to any meaningful number of voters, but it *would* be sure to add additional burdens on an already overwhelmed state election apparatus. Accordingly, plaintiffs' request as to the by-mail registration deadline will be denied. Finally, plaintiffs ask the court to enjoin the requirement that copies of proof of residence be submitted with their mailed registration application. Because voters are no longer able to register by-mail for the upcoming election, this claim will be denied as moot.

III. Oral Motion for Stay

One final note. At the end of yesterday's hearing, counsel for the intervening defendants RNC and Republican Party of Wisconsin requested that if the court grants plaintiffs' request for preliminary relief, the court also stay its order for a limited amount of time to allow the intervening defendants to seek emergency relief from the Seventh Circuit Court of Appeals under Federal Rule of Civil Procedure 62(c). While the court is sympathetic to the intervening defendants' request, the relief being granted is not of the sweeping nature sought by plaintiffs and the court is also cognizant of the impending election, and the immediate steps the WEC and local clerks will need to take to implement the court's narrow injunction, along with the numerous other changes being made in real time by the WEC Administrator, her staff, local counties and municipalities, and poll workers in response to the current COVID-19 crisis. Regardless, the most significant relief provided at this time does not kick in until the evening of April 7, 2020, when, under the court's order, local municipalities may continue to count absentee ballots received after

8:00 p.m.[19] As such, the preliminary injunction implicitly contains a window of time during which the intervening defendants may seek an emergency appeal and relief from the injunction. The court, therefore, will deny defendants' oral motion for a stay. At the same time, both defendants WEC and its Administrator, as well as intervening defendants, are encouraged to return to this court if some modification of the preliminary injunction is necessary to accomplish the goals set out in this opinion.

ORDER

IT IS ORDERED that:

1) In Case No. 20-cv-249, plaintiffs' motion for preliminary injunction and motion for reconsideration ('249 dkt. #61) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.

2) In Case No. 20-cv-278, plaintiffs' motion for temporary restraining order ('278 dkt. #8) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.

3) In Case No. 20-cv-284, plaintiffs' motion for temporary restraining order ('278 dkt. #17) is GRANTED IN PART AND DENIED IN PART as set forth below in the order.

4) Wisconsin Legislature's motion for leave to file an amicus curiae brief in opposition to the motions for preliminary injunction and temporary restraining order ('249 dkt. #89) is GRANTED.

5) Honest Elections Project's motion for leave to file amicus brief ('249 dkt. #94) is GRANTED.

[19] The extension of the deadline by which individuals may request absentee ballots is a more immediate action, but even then, it is unlikely that the requests for absentee ballots received on April 3, 2020, would be processed, mailed, received by the voter, completed, and returned before April 7, 2020, and, therefore, in appealing the extension of the deadline for receipt of absentee ballots, the intervening defendants necessarily would also be able to appeal the extension of the deadline for requesting an absentee ballot online.

6) The City of Milwaukee's motion for leave to file an amicus brief ('249 dkt. #98) is GRANTED.

7) The City of Green Bay's motion for leave to file an amicus brief ('249 dkt. #111) is GRANTED.

8) American Civil Liberties Union of Wisconsin, Disability Rights Wisconsin, Inc., and Wisconsin Conservation Voters' motion to file amici curiae brief (dkt. #121) is GRANTED.

9) Governor Tony Evers' motion for leave to file amicus brief (dkt. #125) is GRANTED.

10) City of Racine's motion for leave to file amicus brief (dkt. #129) is GRANTED.

11) Washington County and Wisconsin Counties Association's motion for leave to file amicus brief (dkt. #131) is GRANTED.

12) Plaintiffs Democratic National Committee and Democratic Party of Wisconsin's motion for leave to file a reply brief (dkt. #153) is GRANTED.

13) Plaintiffs American Federal of Teachers Local, 212, AFL-CIO, Black Leaders Organizing for Communities, League of Women Voters of Wisconsin, Greg Lewis, SEIU Wisconsin State Council, Souls to the Polls, Voces De La Frontera's motion to supplement brief addressing remedies (dkt. #161) is GRANTED.

14) Defendants the Commissioners of the Wisconsin Election Commission and its Administrator are ENJOINED as follows:

a) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted. The deadline for receipt of absentee ballots is extended to 4:00 p.m. on April 13, 2020.

b) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020. The deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) is extended to 5:00 p.m. on April 3, 2020.

c) Defendants are enjoined from enforcing Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so, provided that the ballots are otherwise valid.

15) Intervening defendants' oral motion to stay this order and preliminary injunction is DENIED.

Entered this 2nd day of April, 2020.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

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,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

PRELIMINARY INJUNCTION ORDER

20-cv-249-wmc

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

Plaintiffs,

v.

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

Defendants.

20-cv-278-wmc

REVERAND 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.

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.

IT IS ORDERED that defendants the Commissioners of the Wisconsin Election Commission and its Administrator are ENJOINED as follows:

a) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted. The deadline for receipt of absentee ballots is extended to 4:00 p.m. on April 13, 2020.

b) Defendants are enjoined from enforcing the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020. The deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the WEC Administrator, online) is extended to 5:00 p.m. on April 3, 2020.

c) Defendants are enjoined from enforcing Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so, provided that the ballots are otherwise valid.

Entered this 2nd day of April, 2020.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

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,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants

OPINION AND ORDER

20-cv-249-wmc

In this case, the Democratic National Committee and the Democratic Party of Wisconsin (jointly, "the DNC/DPW") seek to enjoin defendants' enforcement of certain election laws, arguing that due to the COVID-19 public health emergency these laws impose unconstitutional burdens on citizens' right to vote in the upcoming April 7, 2020, primary election. Now, the Republican National Committee and the Republican Party of Wisconsin (jointly, "the RNC/RPW") have joined the Wisconsin Legislature in moving to intervene to defend enforcement of the challenged laws. (Dkts. #20, 41.) Plaintiffs oppose these motions. For the reasons set forth below, the court will deny the Wisconsin Legislature's motion, but will permit the RNC/RPW to intervene permissively. The Wisconsin Legislature and other, interested non-parties may continue to participate by filing timely amicus curiae briefs as this court attempts to resolve the difficult questions posed by this lawsuit consistent with Federal Rule of Civil Procedure 1.

BACKGROUND

On March 18, 2020, plaintiffs filed the present lawsuit, arguing that the spread of the novel coronavirus in the state of Wisconsin presents new and unprecedented problems for the upcoming April 7, 2020, election. In particular, plaintiffs point out that state and federal officials have both urged individuals to stay at home and out of public spaces as much as possible. In light of these concerns, plaintiffs requested emergency injunctive relief from this court, arguing that certain of Wisconsin's elections laws now impose undue burdens on citizens' right to exercise their voting franchise.

Plaintiffs named the six current members of the Wisconsin Election Commission as defendants. Initially, the defendants were represented by the Attorney General of Wisconsin. Two days ago, however, the Governor appointed special counsel to represent the defendants in this case under Wis. Stat. § 14.11(2)(a), and the three assistant attorneys general originally assigned to work on this case have moved to withdraw as counsel for defendants. (*See* dkts. #56, 57, 58.)

The day after the lawsuit was filed -- March 19, 2020 -- the Wisconsin Legislature filed a notice with the court expressing its intent to intervene. Later that afternoon, the court held a telephonic hearing with all parties, in which counsel for the Wisconsin Legislature was included as representative of a proposed intervenor. The next day, the court issued an order, granting in part plaintiffs' request for a temporary restraining order, and denying without prejudice the remainder of their motion. Shortly before the court issued this order, the RNC/RPW informed the court that they, too, intended to move to intervene as defendants in the suit; they then formally did so two days later on March 22,

2020.

The court held another telephonic hearing on March 23, 2020, at which plaintiffs, defendants, and all of the proposed intervenors were permitted to appear. At the hearing, the court set an expedited briefing schedule for both intervention motions, among other matters. Initially, both plaintiffs and defendants opposed the proposed interventions; however, defendants have since withdrawn their opposition. Having now received all briefing from the parties, the court will address both intervention motions in this opinion.

OPINION

I. Motions to Withdraw as Attorneys

As an initial matter, the court will address the three motions to withdraw filed by assistant attorneys general Brian P. Kennan (dkt. #56), Jody J. Schmelzer (dkt. #57), and S. Michael Murphy (dkt. #58). The ABA *Model Rules of Professional Conduct* provide that an attorney may withdraw from a case if "good cause for withdrawal exists." *See Fid. Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.*, 310 F.3d 537, 540 (7th Cir. 2002) (citing *Model Rules of Professional Conduct*, Rule 1.16(b)(7)). Here, the Governor ordered that the attorneys be replaced by private counsel, which certainly constitutes "good cause." Although the Wisconsin Legislature questions the validity of the Governor's order under state law (*see* Wis. Legislature Reply (dkt. #71) 3), that issue is not before this court. Accordingly, the motions of the assistant attorneys general to withdraw as counsel will be granted.

II. Motions to Intervene

The proposed intervenors argue that they are entitled to intervene as a matter of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, that permissive intervention under Rule 24(b) is warranted. Under the Rules of Civil Procedure, a court *must* permit intervention when: "(1) the application is timely; (2) the applicant has an 'interest' in the property or transaction which is the subject of the action; (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and (4) no existing party adequately represents the applicant's interest." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995) (citing Fed. R. Civ. P. 24(a)(2)).

Plaintiffs and defendants primarily argue that the proposed intervenors cannot establish the fourth element -- adequacy of representation -- and so this court will begin its discussion there.[1] As an initial matter, the applicable standard of review as to this element must be determined. The Seventh Circuit has "recognized three standards for the adequacy of representation under Rule 24 depending on the context of each case." *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019).

> The default rule is a liberal one: The requirement of the Rule is satisfied if the applicant shows that representation of his interest may be inadequate. Where the prospective intervenor and the named party have the same goal, however, there is a rebuttable presumption of adequate representation that requires a showing of some conflict to warrant intervention. This presumption of adequacy becomes even stronger when the

[1] Plaintiffs specifically note that they do *not* concede that the RNC/RPW have established the other elements, but explain that their "brief, prepared in the rush of events, focuses only on the most obvious reasons to deny both intervention of right and by permission." (Pls.' Opp'n to RNC/RPW Mot. to Intervene (dkt. #52) 3 n.3.)

> representative party is a governmental body charged by law with protecting the interests of the proposed intervenors; in such a situation the representative party is presumed to be an adequate representative unless there is a showing of gross negligence or bad faith.

Id.

As an initial matter, the default liberal standard is plainly inapplicable. Defendants and proposed intervenors currently share the same goal: to uphold the constitutionality of the challenged laws. *See Planned Parenthood*, 942 F.3d at 799 (holding that the defendants and the proposed intervenor shared the same goal where both sought "to uphold the constitutionality of the challenged statutes"); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) ("*WEAC*") (holding that defendant and proposed intervenor "share the same goal: protecting Act 10 against the Unions' constitutional challenge"). Thus far in the litigation at least, defendants have actively defended all of the challenged laws, and they have indicated that they will continue to do so. (Defs.' Opp'n (dkt. #51) 5-6.)

The proposed intervenors' arguments to the contrary are not persuasive. The RNC/RWP argue for the first time in their reply brief that they do not share the same goal as defendants, whose "broader interests" make them less likely to pursue an emergency appeal. (RNC/RWP Reply (dkt. #78) 4.)[2] Similarly, the Legislature couches its arguments in hypotheticals, writing that the liberal standard "may well" apply "if" the defendants

[2] In their initial brief, the RNC/RWP fail to even recognize the three standards applied in the Seventh Circuit, erroneously asserting instead (and concluding without citation) that they need only show that the representation "may be" inadequate. (RNC/RPW Mot. to Intervene (dkt. #42) 8.)

decline to defend some of the challenged laws or "if" defendants do not choose to pursue an appeal. (Wis. Legislature Br. (dkt. #21) 8.) Certainly, if defendants do fail to appeal any future decision, one or both of the proposed intervenors may well be entitled to intervene as of right. Indeed, in *Flying J., Inc. v. Van Hollen*, 578 F.3d 569 (7th Cir. 2009), the Seventh Circuit held that even a private association seeking to defend a challenged state statue was permitted to intervene as a matter of right where the state attorney general failed to appeal a court order enjoining enforcement of the statute. *Id.* at 573-74. But in that same case, the court also noted:

> Had the association sought to intervene earlier, its motion would doubtless (and properly) have been denied on the ground that the state's attorney general was defending the statute and that adding another defendant would simply complicate the litigation. For there was nothing to indicate that the attorney general was planning to throw the case -- until he did so by failing to appeal.

Id. at 572. So, too, here.

Having concluded that the default, liberal standard is inapplicable, the next question is whether the middle "some conflict" standard or the heighted "gross negligence or bad faith" standard apply. Certainly, if the Attorney General continued to represent defendants, the Seventh Circuit's decision in *Planned Parenthood*, upholding the application of the "gross negligence or bad faith" standard, would appear to control. 942 F.3d 793. There, the Wisconsin Legislature sought to intervene in a suit filed against the Attorney General and other state officials challenging the constitutionality of certain state abortion regulations. *Id.* at 796. The court held that, absent a showing that the Attorney General was acting with bad faith or gross negligence, the Wisconsin Legislature had not

demonstrated inadequate representation and was not entitled to intervene. *Id.*

However, the Attorney General no longer represents defendants, as the Governor has apparently ordered him to be substituted by private counsel. This is at least arguably significant because, while the "Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes," *Helgeland v. Wis. Municipalities*, 307 Wis.2d 1, 745 N.W.2d 1, 24 (2008), no such express statutory obligation would appear to exist for the defendants or their newly-appointed private counsel. Even so, the Wisconsin Election Commissioners are charged generally with the "administration" of election laws. *See* Wis. Stat. § 5.05(1). Accordingly, as members of the governmental body charged by law with administering the law that protect the interests of the proposed intervenors seek to be enforced their interests appear to be fully protected. In an abundance of caution, however, the court will not hold the proposed intervenors to this heightened "gross negligence or bad faith" standard, as even under the more lenient "some conflict" standard the propose intervenors have not demonstrated that they are entitled to intervene in this case.

Under the "some conflict" standard, a proposed intervenor must still overcome the presumption of adequate representation by showing "a concrete, substantive conflict." *Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring). Here, both proposed intervenors have failed to do so. As noted already, the Legislature argues that "if" defendants do not fully defend the constitutionality of any of the challenged laws, then it would "plainly" show inadequate representation (Wis. Legislature Br. (dkt. #21) 9), but this mere hypothetical has obviously not yet come to pass. To the contrary, defendants

have and continue to actively and competently oppose plaintiffs' challenges. If anything, in no longer objecting to intervention by either group, the Commissioners seem to have taken a more favorable position to the proposed intervenors since the Attorney General withdrew its representation.

This leaves the proposed intervenors' joint argument that they do not share the same interests as defendants and, therefore, are inadequately represented. Specifically, the RNC/RPW note that defendants represent the "public interest," and have to consider the expense of defending state laws, the social and political divisiveness of elections issues, their own desires to remain politically popular, and the interests of opposing parties. (RNC/RPW Br. (dkt. #42) 7-8.) They contrast this with their "particular interests," including the election of particular candidates, the mobilization of particular voters, and the costs of both. (*Id.* at 8.) Similarly, the Legislature argues that the defendants only represent the views and interests of the Wisconsin Election Commission and not that of the state as a whole. (Wis. Legislature Reply (dkt. #71) 1.)

However, different political considerations held by the proposed intervenors and defendants are not sufficient by themselves to show inadequate representation. *See Am. Nat. Bank & Tr. Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989) (differing "political considerations" between City and prospective intervenor not enough to make requisite "concrete showing of inadequacy of representation"); *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (proposed intervenor's different political and moral justifications for defending a statute regulating abortion did not create conflict sufficient to rebut presumption of adequate representation). Thus far, the proposed intervenors have

not shown that any of their divergent interests has resulted in "a concrete, substantive conflict," as is still required to overcome the "medium" presumption of adequate representation. *See Planned Parenthood*, 942 F.3d at 810 (Sykes, J., concurring).

The RNC/RPW also speculates that the replacement of the Attorney General with private counsel evinces a conflict, noting that the Governor may appoint special counsel to "act instead of the attorney general in any action or proceeding, if the attorney general is . . . interested adversely to the state." (RNC/RPW Reply (dkt. #78) 5 (citing Wis. Stat. § 14.11(2)(a)(2)). Interestingly, the Wisconsin Legislature takes the exact opposite interpretation of the Governor's actions, arguing that the Governor "believes that the Attorney General represents the State's sovereign interests." (Wis. Legislature Reply (dkt. #71) 3-4.) The speculative nature of these arguments belies any possible argument that the Governor's action evinces a concrete conflict, and they are accordingly rejected. *See Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 962 (E.D. Wis. 2009) (speculation that a defendant's interests "could conceivably differ" from proposed intervenor's was insufficient to demonstrate "that any current conflict exists"). If anything, the Attorney General's office substitution appears to be exactly what the statute requires: a recognition that it has a conflict with the position of the Commissioners, who are charged with administering the statutes as written, again the very position of the proposed

intervenors.[3]

Because neither the RNC/RPW nor the Wisconsin Legislature has demonstrated any "concrete conflict," they have not overcome the presumption of adequate representation, and therefore have failed to demonstrate that they are entitled to intervene as of right under Rule 24(a). However, this is not the end of the analysis, since the proposed intervenors alternatively argue that the court should allow them to intervene as a matter of discretion under Fed. R. Civ. P. 24(b), which provides that a court may permit an applicant to intervene in the exercise of its own discretion if: (1) the motion is timely and (2) the applicant "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In exercising its discretion, "[t]he Rule requires the court to consider 'whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights,' Fed. R. Civ. P. 24(b)(3), but otherwise does not cabin the district court's discretion." *Planned Parenthood*, 942 F.3d at 803.

Here, given that both the RNC/RPW's and the Wisconsin Legislature's motions to intervene were filed within mere days of the lawsuit, the motions are certainly timely. Moreover, there is no reasonable dispute that their proposed defense of the challenged laws shares common questions of law and fact with the main action.

[3] The Legislature suggests that, now that the Attorney General has withdrawn from the case, the state of Wisconsin "has the sovereign right to have at least *one* of its chosen representatives defend its laws." (Wis. Legislature Reply (dkt. #71) 4-5.) However, the Seventh Circuit in *Planned Parenthood* specifically declined the Legislature's request to lower its burden for it to intervene, 942 F.3d at 796, and without any compelling reason to do so here, the court will apply the standard as it would to any other party, especially since, by the Legislature's reasoning, it would then also have to allow the Governor and Attorney General to intervene as well should they wish to express their own unique position as representatives of the "state," only further complicating an already complicated lawsuit.

Still, a court may deny permissive intervention where "adding the proposed intervenors could unnecessarily complicate and delay all stages of this case." *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015); *see also United States v. 36.96 Acres of Land*, 754 F.2d 855, 860 (7th Cir. 1985) (upholding district court's denial of permissive intervention "in order to avoid the likelihood of undue delay and prejudice to the rights of the original parties" and to avoid prolonging "an already lengthy and tired lawsuit"). Here, where time is of the essence, the court will deny the Wisconsin Legislature's motion to intervene in an effort to expedite and not overly complicate the proceedings. *See* n.3 *supra.* Although the same is arguably true for the RNC/RPW, the court will nevertheless permit those entities to intervene as they are uniquely qualified to represent the "mirror-image" interests of the plaintiffs, as direct counterparts to the DNC/DPW. *See Builders Ass'n of Greater Chicago v. Chicago*, 170 F.R.D. 435, 441 (N.D. Ill. 1996) (permissive intervention is appropriate where "applicants' interest in the litigation is the mirror-image" of an original party's interest). Of course, if some new facts were to arise that established an actual conflict -- such as a decision by the current *or* intervening defendants not to appeal -- then the Wisconsin Legislature is welcome to renew its motion. Moreover, the court again emphasizes that the Wisconsin Legislature and other interested non-parties are free to offer their views as amici.

ORDER

IT IS ORDERED that:

1) The motions of the assistant attorneys general to withdraw as counsel (dkts. # 56, 57, 58) are GRANTED;

2) The Wisconsin Legislature's motion to intervene (dkt. #20) is DENIED; and

3) The Republican National Committee and the Republican Party of Wisconsin's motion to intervene as defendants (dkt. #41) is GRANTED.

Entered this 28 day of March, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

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,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
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Intervening Defendants.

OPINION AND ORDER

20-cv-249-wmc

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20-cv-278-wmc

REVERAND 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,

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

The court is in receipt of the Wisconsin Legislature's renewed motions to intervene. ('249 dkt. ##118, 137.)[1] As indicated during the scheduling conference earlier today, these motions will be denied.

As an initial matter, the Legislature argues only that one group of defendants -- the Commissioners of the Wisconsin Elections Commission -- no longer adequately represent their interests. (Dkt. ##137, 141.) To the extent that the Commissioners have attempted to find a middle ground with respect to the upcoming election, the Legislature ignores that its interests are now fully represented by the Republican National Committee and the Republican Party of Wisconsin (jointly, the "RNC/RPW"). (*See* dkt. ##85, 122 (granting

[1] All docket entries are to the '249 docket.

permissive intervention).) Rule 24(a) provides that intervention as of right is not appropriate where "existing parties" adequately represent the proposed intervenor's interest. The Legislature fails to address how the RNC/RPW, as existing parties, do not adequately represent its interests. Nor could they, as the RNC/RPW has expressly incorporated the arguments made by the Legislature in both of its recent briefs. (*See* dkt. #96 at 2 n.1 ("To the extent that Defendants or the Legislature raise additional arguments for denying Plaintiffs' motion, [the RNC/RPC] adopt those arguments as well."); dkt. #138 at 1 n.* ("Intervenors [the RNC/RPW] also adopt any arguments that Defendants or the Legislature raise for denying Plaintiffs' motions.").)

Moreover, permissive intervention under Rule 25(b) is still inappropriate as the court's earlier concern not to "overly complicate the proceedings" (dkt. #85 at 11) remains, and indeed is stronger than ever given the surge of briefing expected to be received this evening from the many parties in these three consolidated cases, not to mention the amici filings that have been and continue to be docketed. Indeed, the Governor has now joined the Legislature in wading in on the issues before the court by an amicus brief.

Accordingly, the court will instead grant the Legislature's request to accept its proposed opposition to plaintiffs' motion (dkt. #143) as an amicus brief.

ORDER

IT IS ORDERED that:

1) The Wisconsin Legislature's renewed motions to intervene (dkt. ##118, 137) are DENIED.

2) The Wisconsin Legislature's motion for leave to file an amicus brief (dkt. #137) is GRANTED.

Entered this 1st day of April, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge