

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

Sylvia Gear, et al.,

Plaintiffs,

v.

Marge Bostelmann, et al.,

Defendants,

Republican National Committee and
Republican Party of Wisconsin,

Intervenor-Defendants.

Case No. 20-cv-278-wmc
(consolidated with Nos. 20-cv-249-
wmc, 20-cv-284-wmc, 3:20-cv-340-
wmc, and 3:20-cv-459-wmc)

**JOINT RESPONSE OF INTERVENOR-DEFENDANTS TO *GEAR*
PLAINTIFFS' STATEMENT OF ADDITIONAL PROPOSED FACTS**

Under this Court's "Procedures to Be Followed on Motions for Injunctive Relief" Intervenor-Defendants, the Wisconsin Legislature, the Republican National Committee, and the Republican Party of Wisconsin (collectively "Intervenor-Defendants") submit the following joint response to the *Gear* Plaintiffs' Proposed Findings of Fact. Dkt. 422.¹

1. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

2. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

¹ All citations to the "Dkt." refer to the docket in *Democratic National Committee, et al. v. Bostelmann, et al.*, No. 3:20-cv-249-wmc, unless otherwise noted.

3. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

4. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

5. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

6. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

7. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

8. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

9. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, but do not dispute that COVID-19 infections present health issues worldwide.

10. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, but do not dispute that COVID-19 infections present health issues worldwide.

11. This paragraph cites orders that speak for themselves.

12. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

13. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

14. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence, and note that in-person voting during Wisconsin's April Election was not associated with an increase in COVID-19 Infection Rates. *See* Declaration of Misha Tseytlin ("Tseytlin Decl.") Ex. 19 at 1–2, 9; *see also* Tseytlin Decl. Ex. 18 at 1–2. The Centers for Disease Control and Prevention ("CDC") also confirmed in a July 31, 2020 report that "[n]o clear increase in cases, hospitalizations, or deaths was observed after the election." Supplemental Declaration of Misha Tseytlin ("Tseytlin Supp. Decl.") Ex. 1 at 1002. Intervenor-Defendants further note that Wisconsin's November Election will be even safer than the April Election, when the COVID-19 pandemic was still very new and unexpected. The Wisconsin Elections Commission ("WEC" or "Commission") has already taken numerous steps to enhance the State's readiness for the upcoming November 2020 Election. *See generally* Dkt. 227 at 2–14 (hereinafter "WEC Defendants' Status Report") (listing 15 detailed actions); Dkt. 247, Deposition of Meagan Wolfe 103:17–111:14, 121:2–122:20 (hereinafter "Wolfe Dep.").

15. *See supra* ¶ 14.

16. *See supra* ¶ 14.

17. *See supra* ¶ 14.

18. *See supra* ¶ 14.

19. *See supra* ¶ 14. Intervenor-Defendants further dispute the predictions in this paragraph as unsupported by any non-conjectural evidence.

20. Intervenor-Defendants dispute that municipal clerks do not have enough resources and money for the November Election. Intervenor-Defendants note that the Commission will provide up to \$4.1 million of a “CARES Act sub-grant to local election officials,” Tseytlin Decl. Ex. 28, “to help pay for increased election costs due to the COVID-19 pandemic.” WEC Defendants’ Status Report at 5; Tseytlin Decl. Ex. 29; Wolfe Dep. 75:3–16; *accord* Wolfe Dep. 68:10–69:6 (explaining that the Commission has begun securing supplies for the November 2020 Election and has not encountered shortages). And the Commission has made, and will continue to make, numerous upgrades to the MyVote Website and WisVote system, to “meet the needs of clerks experiencing a large increase in the demand for absentee ballots.” WEC Defendants’ Status Report at 8–9; Wolfe Dep. 70:9–73:14, 128:15–129:18; *see generally* WEC Defendants’ Status Report at 2–14 (discussing other efforts, like poll-worker-recruitment efforts); Wolfe Dep. 75:17–78:4 (similar).

21. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

22. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph. By way of further answer, Intervenor-Defendants state that the April Election was a success, with exceptionally high turnout. The April Election saw 1,555,263 votes cast, *see* Tseytlin Decl. Ex. 16, representing 34.3% of eligible voters, *see* Tseytlin Decl. Ex. 17 (providing

Wisconsin's estimated voting-age population as 4,524,066). In comparison, the turnout for previous Spring Elections was 27.2% (2019), 22.3% (2018), 15.9% (2017), 47.4% (2016), 26.1% (2012), and 34.9% (2008). *Id.*; *see also supra* ¶ 20.

23. *See supra* ¶¶ 20, 22.

24. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

25. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

26. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence.

27. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

28. This paragraph references a court ruling that speaks for itself. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining statements in this paragraph.

29. The Status Report referenced in this paragraph speaks for itself.

30. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the Status Report speaks for itself.

31. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the Status Report speaks for itself.

32. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the Status Report and other materials referenced in this paragraph speak for themselves.

33. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the Status Report speaks for itself.

34. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence. Intervenor-Defendants further note the WEC has elected to mail absentee-ballot applications and informational material to “all voters without an active absentee request on file,” making it even easier for voters to vote via absentee ballot for the November 2020 Election. Tseytlin Decl. Ex. 28; Tseytlin Decl. Ex. 29; WEC Defendants’ Status Report at 3–4; Wolfe Dep. 26:16–27:7. The Commission plans to implement “intelligent mail barcodes into the existing [absentee-ballot-envelope] design” for the November 2020 Election, which will facilitate more detailed absentee-ballot tracking. Tseytlin Decl. Ex. 28; WEC Defendants’ Status Report at 6; Wolfe Dep. 54:14–60:12 (noting that the Commission expects most clerks to use the intelligent barcodes for the November 2020 Election), 99:8–17, 105:11–15 (expressly stating that the Commission approved use of intelligent barcode system); *see also supra* ¶¶ 20, 22.

35. Intervenor-Defendants are without knowledge regarding the United States Postal Service's ("USPS") target for on-time delivery of Election mail. Intervenor-Defendants dispute the statements regarding the risk of untimely delivery in the November election as unsupported by any non-conjectural evidence. Intervenor-Defendants note that this paragraph is based upon the assumption that people who do not want to vote in person will wait until the last minute to request and mail in their absentee ballots. Those wishing to vote by absentee ballot will have months to request and mail in their ballots. Dkt. 475, Deposition of Ann Jacobs 22:11–17 (hereinafter "Jacobs Dep."); Dkt. 491, Deposition of Ronald Stroman (hereinafter "Stroman Dep.") 49:10–13, 52:9–12 (testifying that voters can address any issues with the timely receipt of absentee ballots by requesting and mailing their ballots early). Moreover, USPS has timely delivered Election mail in states where voting is conducted exclusively by mail for years. Stroman Dep. 34:2-35:2; *see also id.* 58:17-59:6 (acknowledging that, as of June 2020, "the Postal Service is fully prepared to deliver election and political mail in a timely manner.").

36. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence, and note that the statute referenced in this paragraph speaks for itself.

37. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

38. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

39. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

40. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence.

41. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

42. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

43. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence. Moreover, as Mr. Stroman has testified, any issues with the timely receipt of absentee ballots can be addressed by requesting and mailing their ballots early. *See Stroman Dep. 49:10-13, 52:9-12.*

44. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

45. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

46. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

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54. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

55. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves.

56. The Wisconsin Election Commission's responsibilities are governed by a statutory scheme that speaks for itself.

57. *See supra* ¶ 56.

58. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

59. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

60. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

61. Intervenor-Defendants dispute that “a back-up option (such as online access) would only require the municipal clerk’s staff to cancel the prior request for a mail-delivered ballot.” Permitting voters to download mail-in absentee ballots would require the Commission to “redesign the user interface in MyVote” and “build in a system for the voter to request cancellation” of the mail-delivered ballot. *See* Dkt. 483, Deposition of Robert Kehoe 50:5–7, 51:18–21 (hereinafter “Kehoe Dep.”). Mr. Kehoe testified that “then . . . the request would have to go the municipal clerk,

who would manually have to authorize the cancellation or reach out to the voter . . . and then we'd have to bounce back to the voter . . . and offer them the opportunity to download the ballot. So you know, as a practical matter I'd have some timeline concerns with that scenario." *Id.* at 52:16–53:4.

62. Intervenor-Defendants dispute that a photo identification, standing alone, is sufficient for the clerk's office. Mr. Kehoe testified that election officials would need a way "to validate the identity to make sure that I can't go in and cancel my neighbor's ballot. And that is a . . . mechanism that does not exist." *See* Kehoe Dep. 54:15–55:3.

63. Intervenor-Defendants dispute the statements set forth in this paragraph. Mr. Kehoe disputed Plaintiffs' assertion that election officials "have most of the building blocks in terms of the programming and logic," noting that he "wouldn't want to minimize the work that would have to be done." *See* Kehoe Dep. 60:9–15. Mr. Kehoe stated that election officials "consider it risky to tinker with the process as part of the election," and that doing so would "consume all of their time" at the "exclusion of other things that we're currently doing to prepare for the August election and the November general election." *See id.* at 70:2–72:8. Mr. Kehoe described Plaintiffs' requested relief as "more complex than the task that we were required to perform prior to the April election." *See id.* at 82:5–10.

64. *See supra* ¶ 63.

65. *See supra* ¶ 63.

66. Intervenor-Defendants dispute the statements set forth in this paragraph. Intervenor-Defendants note that previous attempts in 2018 to permit voter-initiated cancellations of previous ballot requests “turned out to be a disaster” that caused election officials to be “swamped with tens of thousands of cancellations” as well as “thousands upon thousands of duplicate ballot requests” which in turn “created a real tracking mess.” *See* Kehoe Dep. 14:22–16:1. Moreover, the code behind voter-initiated cancellations has changed since 2018. *Id.* at 22:1–4.

67. Intervenor-Defendants dispute this characterization of Mr. Kehoe’s testimony. With regard to the required technical development, Mr. Kehoe noted that “the devil is in the details.” Kehoe Dep. 50:1–2; *see also supra* ¶ 63. Mr. Kehoe also noted that election officials would need additional servers. *See* Kehoe Dep. at 53:20–21.

68. Intervenor-Defendants dispute this characterization of Mr. Kehoe’s testimony. Previous upgrades by the Commission took “in the neighborhood of eight weeks.” *See* Kehoe Dep 44:19–20. While load testing can take one week, Mr. Kehoe noted that “[t]esting is just one part of the process.” *See id.* at 67:17–18. The process also includes design, development, and training of election officials. *See id.* at 67:17–69:3. Importantly, the Commission imposes a “schedule change freeze” in September, which prohibits any further development after that date, because Commission officials “consider it risky to tinker with the process as part of the election.” *See id.* at 70:2–12. This means that, at most, the Commission would have “a development window of 30 days, and that’s if we drop everything and do nothing but this.” *See id.*

at 70:21–71:4. Even if the Commission ignored the schedule change freeze deadline, Mr. Kehoe expressed concern regarding “the workload on the staff.” *See id.* at 71:9–12. He described “a process that would take a couple hundred hours of work and I’d be dividing that probably between three or four people maybe and so this would consume all of their time,” all while assuming the risk of modifying the system that close to the election. *See id.* at 71:18–22.

69. Intervenor-Defendants dispute this characterization of Mr. Kehoe’s testimony. *See supra* ¶ 68. Furthermore, while the WEC believes that the system, as currently developed, can handle demand for the fall, “[t]he caveat is of course if we’re ordered to make any major changes to the system.” *See* Kehoe Dep. 117:17–118:4.

70. Intervenor-Defendants do not dispute that the municipal clerks referenced in this paragraph have expressed the referenced opinions. Intervenor-Defendants dispute the opinions set forth in this paragraph as unsupported by non-conjectural evidence.

71. Intervenor-Defendants do not dispute that Ms. Coolidge’s testimony includes these statements. To the extent these statements express an opinion, Intervenor-Defendants dispute that imposing measures not provided for under state law will benefit anyone. On the contrary, these proposed changes will impose irreparable harm on all citizens of Wisconsin.

72. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence.

73. Intervenor-Defendants dispute this characterization of Mr. Kehoe's testimony. While it is a possibility that absentee voters could be authenticated by a second round of photo identification verification, Mr. Kehoe's testimony makes clear that such a process would require significant changes to WisVote to do so. *See* Kehoe Dep. 117:17–118:4. Moreover, any such comparison would have to be done manually by the clerk. *See id.* 52:16–53:4. While Mr. Kehoe did not have concerns about the concept, he expressed serious concern “about the timeline.” *See id.* at 74:1–2.

74. To the extent the statements in this paragraph express an opinion, Intervenor-Defendants dispute the opinion as unsupported by non-conjectural evidence.

75. Intervenor-Defendants admit that absentee ballot certificates bear a unique identifying number and bar code. Intervenor-Defendants dispute the opinion that these measures, standing alone, prevent voter fraud.

76. Intervenor-Defendants dispute the statements in this paragraph as unsupported by any non-conjectural evidence. By way of further answer, Intervenor-Defendants state that voters will have months prior to the November Election to request their absentee ballots. *See* Jacobs Dep. 22:11–17; *see also supra* ¶ 43.

77. *See supra* ¶ 76.

78. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph.

79. *See supra* ¶ 14.

80. *See supra* ¶ 14.

81. *See supra* ¶ 14.

82. Intervenor-Defendants are without knowledge or information sufficient to form a belief as to the truth of the statements in this paragraph, and add that the materials cited in this paragraph speak for themselves. Intervenor-Defendants further note that the Commission does not have the authority to expand a statutory exemption.

Dated, August 4, 2020

/s/ Patrick Strawbridge

PATRICK STRAWBRIDGE
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(703) 243-9423
patrick@consovoymccarthy.com

JEFFREY M. HARRIS
CAMERON T. NORRIS
ALEXA R. BALTES
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209

*Counsel for Intervenor-Defendants
Republican National Committee and
Republican Party of Wisconsin*

Respectfully submitted,

/s/ Misha Tseytlin

MISHA TSEYTLIN
Counsel of Record
(State Bar No. 1102199)
ROBERT E. BROWNE, JR.
(State Bar No. 1029662)
KEVIN M. LEROY
(State Bar No. 1105053)
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
robert.browne@troutman.com
kevin.leroy@troutman.com
sean.dutton@troutman.com

KASIA HEBDA
TROUTMAN PEPPER HAMILTON
SANDERS LLP
600 Peachtree Street NE,
Suite 3000
Atlanta, GA 30308
(404) 885-3665
kasia.hebda@troutman.com

*Counsel for Legislature in DNC, Gear,
and Swenson and for Legislative
Defendants in Edwards*

/s/ Eric M. McLeod

ERIC M. MCLEOD
LANE E. RUHLAND
HUSCH BLACKWELL LLP
P.O. Box 1379
33 East Main Street, Suite 300
Madison, WI 53701-1379
(608) 255-4440
(608) 258-7138 (fax)
eric.mcleod@huschblackwell.com
lane.ruhland@huschblackwell.com

LISA M. LAWLESS
HUSCH BLACKWELL LLP
555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
(414) 273-2100
(414) 223-5000 (fax)
lisa.lawless@huschblackwell.com

Counsel for Legislature in DNC

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2020, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com