

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

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DEMOCRATIC NATIONAL COMMITTEE, et al.,  
Plaintiffs,

v.

MARGE BOSTELMANN, et al.,  
Defendants,  
and

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

REPUBLICAN NATIONAL COMMITTEE, et al.,  
Intervening Defendants.

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SYLVIA GEAR, et al.,  
Plaintiffs,

v.

MARGE BOSTELMANN, et al.,  
Defendants,  
and

Civil Action No.: 3:20-cv-278-wmc

REPUBLICAN NATIONAL COMMITTEE, et al.,  
Intervening Defendants.

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CHRYSTAL EDWARDS, et al.,  
Plaintiffs,

v.

ROBIN VOS, et al.,  
Defendants.  
and

Civil Action No. 3:20-cv-340-wmc

REPUBLICAN NATIONAL COMMITTEE, et al.,  
Intervening Defendants.

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JILL SWENSON, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Civil Action No. 3:20-cv-459-wmc

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants

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**WEC DEFENDANTS' RESPONSE TO THE DEMOCRATIC  
NATIONAL COMMITTEE PLAINTIFFS'  
SUPPLEMENTAL STATEMENT OF FACTS**

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The WEC Defendants respond to the Democratic National Committee Plaintiffs'

Supplemental Statement of Facts as follows:

**I. The pandemic's trajectory and magnitude.**

1. Confirmed coronavirus infections in the State of Wisconsin have been steadily increasing since April 7, 2020, with at least 4,637 hospitalizations and 934 deaths as of July 31, 2020. *See* Supplemental Declaration of Michelle M. Umberger, filed concurrently herewith ("Suppl. Umberger Decl."), Ex. 10.

**RESPONSE:** Not disputed.

2. Governor Evers declared a new Public Health Emergency on July 30, also issuing that day an Executive Order requiring individuals to wear face coverings when indoors other than in a private residence. *See* Suppl. Umberger Decl Ex. 38.

**RESPONSE:** Not disputed.

3. As of July 31, 2020, nearly 4.59 million Americans already have tested positive for the COVID-19 virus, and over 155,000 Americans have been killed by it (conservatively estimated), with the numbers growing by the day. Suppl. Umberger Decl., Exs. 35, 3.

**RESPONSE:** Not disputed.

4. Even the President now acknowledges the pandemic "will probably, unfortunately, get worse before it gets better," and "that's the way it is." Suppl. Umberger Decl., Ex. 3.

**RESPONSE:** Not disputed.

5. There are growing warnings that the pandemic’s toll will escalate in the coming months, potentially to catastrophic proportions. *See, e.g., id.*; Suppl. Umberger Decl., Exs. 10, 35; DNCFOF ¶¶ 32-35.

**RESPONSE:** Disputed to the extent that the cited sources do not support the proposed finding of fact. Ex. 35 is an article about absentee ballots being rejected, and Ex. 10 lists statistics in Wisconsin. Neither source discusses escalation in the pandemic.

## II. The continuing USPS service problems.

6. Since July 8, 2020, there have been further reports of postal delays in recent Texas and Louisiana elections and expressions of alarm about mail service in the numerous upcoming August primaries. *See* Suppl. Umberger Decl., Ex. 19 (Ahead of the Texas election on July 14, “some voters in Dallas who had mailed out their votes to the county were inexplicably receiving their ballots back in the mail just days before the election.”); *id.* at Ex. 20; *id.* at Ex. 21 (In Louisiana, “some 4,000 applications for mail-in ballots” (so not the returned ballots themselves) for the July 11 election “were improperly held due to short paid postage in New Orleans.”); *id.* at Ex. 18 (Michigan Secretary of State stating, a week from primary, that voters should avoid the mailbox altogether if they want their vote to count because of problems or delays with the mail); *id.* at Ex. 13 (Michigan county clerks have expressed concerns about mail service for the August 4 primary and the November 3 general election); *id.* (Ingham County Clerk Barb Byrum noting it’s recently taken more than three weeks for her to send death certificates and other mail even within a 15-mile radius—“If it’s grandma’s medication now, it’s likely going to be ballots later”—referring to mail delays. “It’s extraordinarily concerning when we’re coming into election season when any mail slows down.”); *id.* (Meanwhile, several clerks who spoke with Bridge said they’re hearing of unusually slow mail delivery. Kent County Clerk Lisa Posthumus Lyons, a Republican, and Macomb County Clerk Fred Miller, a Democrat, said some local clerks in their counties are reporting postal delays.); *id.* (New Baltimore City Clerk Marcia Shinska said she’s received around a dozen calls from voters in the last several weeks saying they hadn’t received a requested absentee ballot despite her office sending it out more than two weeks beforehand.); ECF No. 412-41 (Opening Umberger Decl. Ex. 91) (Questioning whether Postal Service can handle November election, sources including former USPS executive); *id.* at Ex. 14 (President of 200,000-member American Postal Workers Union saying that operational changes could delay delivering mail-in ballots); *id.* at Ex. 15 (Including statements of concern from Michigan county clerk, a senior adviser at the Democracy Fund, a nonprofit foundation, and an unidentified mail carrier in Pennsylvania); *id.* at Ex. 16 (in advance of November general election, “Senior Democrats on a House of Representatives oversight committee wrote to the new postmaster general on Monday to press him on reports the service was prepared to delay mail delivery if needed to cut costs, a move that could affect mail-in ballot results.”); *id.* at Ex. 17 (indicating U.S. Senator Joe Manchin, concerned about effect on voting, sent letter to new Postmaster General following reports that USPS was considering closing post offices across the country)

**RESPONSE:** Objection. This proposed finding of fact is actually multiple facts. As an additional objection, these proposed requests are duplicative of requests in plaintiffs’ initial filing and do not meet the court’s standing order requirements pursuant to sec. II. Without waiving these objections, it is not disputed that Texas voters got ballots back. It is not disputed that Louisiana had issues with applications for mail in ballots. Dispute the

allegation that the Michigan Secretary of State identified any problems with the post office in the cited article. It is not disputed that clerks in Michigan expressed concerns about the volume of mail for the primary and general election. It is not disputed that Barb Byrum made the comments attributed to her. It is disputed that the cited sources stand solely for the proposition that the Postal service cannot handle the November election. “Postal workers, for their part, say they’re sure that they can handle this year’s election mail, provided there’s proper planning and they are given enough staffing. (Umberger Decl. Ex. 91, P. DPW 000910; Dkt. 412-91); Not disputed that the postal union president said that changes to the post office could affect mail-in ballots; it is not disputed that the senior democrats wrote to the postmaster general; it is not disputed that Senator Joe Manchin sent a letter to the Postmaster General.

7. On top of this sobering new evidence, the new Postmaster General, Louis DeJoy, “established major operational changes Monday [July 13, 2020] that could slow down mail delivery” even further, thereby “imperil[ing] access to mailed and absentee ballots” to an even greater degree in the November general election. Suppl. Umberger Decl., Ex. 28.

**RESPONSE:** Disputed to the extent that the article is misquoted. The section relied on reads, “The changes also worry vote-by-mail advocates, who insist that any policy that slows delivery could imperil access to mailed and absentee ballots. It reinforces the need, they say, for Congress to provide the agency emergency coronavirus funding. (Dkt. 504-28 P. DPW00110).

8. This includes new restrictions on the ability of USPS employees to work overtime and instructions for mail trucks to leave loading stations at particularly prescribed times even when waiting a few minutes would allow the trucks to carry a fuller load and to avoid leaving mail overnight. *Id.*

**RESPONSE:** Not disputed.

9. There also are growing reports of USPS employees requiring local election clerks to sign acknowledgments that mailed absentee ballots may not be delivered and returned through the mail before election day. *See, e.g.*, Suppl. Umberger Decl., Ex. 23.

**RESPONSE:** Objection. The cited document does not support the claim of the plaintiff. Without waiving this objection, it is not disputed that the post office referenced provided this acknowledgement.

10. Mr. Ronald A. Stroman, the former Deputy Postmaster General and a preeminent expert in mail delivery and the USPS’ operations, has opined that without an extension of Wisconsin’s election day receipt deadline, “it is highly likely that in the November General Election, the absentee ballots of at least tens of thousands of voters will arrive at election offices after Election Day and will not be counted.” *See* Declaration of Ronald A. Stroman (“Stroman Decl.”), filed concurrently herewith, ¶ 10.

**RESPONSE:** It is not disputed that Mr. Stroman offered this opinion.

11. Given the USPS service standards, it is nearly impossible for a voter who lawfully

requests an absentee ballot within one week of an election to receive the ballot in the mail, complete it, and have that ballot delivered by a mail carrier to an election office by Election Day. *See Stroman Decl.*, ¶ 13.

**RESPONSE:** Not disputed.

12. In the April 7, 2020 Spring Election, officials mailed 246,139 absentee ballots to voters in the six days before Election Day. *See Opening Umberger Decl.*, Ex. 70 (WEC Response to Interrogatory No. 5).

**RESPONSE:** Not disputed.

13. Given the USPS' election mail service target of 96% on-time delivery, if approximately 2 million Wisconsin voters vote absentee in the November election, as is predicted, tens of thousands of voters will not even receive their ballots until somewhere between approximately six days (for election offices that use First Class mail) to more than 10 days (for election offices that use Marketing Mail) after election officials mail them. *See Stroman Decl.*, ¶ 12.

**RESPONSE:** Not disputed.

14. Nearly 6% of the mail-in ballots for Virginia's June primary were rejected for arriving too late. *See Supp. Umberger Decl.*, Ex. 35.

**RESPONSE:** Not disputed.

15. Pennsylvania rejected over 15,600 mail-in ballots for the same reason that month. *Id.*

**RESPONSE:** Not disputed.

16. The USPS has responded to a dramatic decline in mail volume over the last decade and, in particular, since the start of the pandemic, by taking the measures described above, including cutting costs, ending employee overtime, and requiring all trucks to leave plants on time, regardless of whether all mail is loaded onto the trucks, all of which will result in further mail delivery delays. *See Stroman Decl.* ¶¶ 16, 17.

**RESPONSE:** Disputed to the extent that this proposed fact implies that mail-in ballots will be delayed. The affidavit provides that mail-in ballots could be delayed.

17. The use of intelligent mail bar codes for absentee ballot envelopes easily facilitates relying on a postmark deadline instead of a receipt deadline, as the use of these bar codes will allow election officials to determine when a ballot entered the mail stream and function as the equivalent of a postmark, thereby eliminating the problem of ballot envelopes that lack postmarks or legible postmarks. *See Stroman Decl.* ¶ 18.

**RESPONSE:** Disputed. The intelligent mail bar codes will not work at small/rural offices as postmarks because they do not have the appropriate equipment. The bar codes will be

scanned once the mail gets to a larger facility. (DKT. 247 P 54:11-55:11; 59:4-60:12)

### III. Feasibility of deadline extensions.

#### A. The election-day ballot-receipt deadline.

18. Wisconsin's chief elections officials have testified they believe they can accommodate a similar extension to the election day receipt deadline in November that was implemented for the April 7, 2020 election without missing any certification deadlines. *See* ECF No. 475 (Jacobs Dep.) at 35:21-36:22.

**RESPONSE:** Objection. Defendant Jacobs's personal opinion is not relevant to any of the issues in this matter. The WEC acts only through motions that garner a majority. Wis Stats. sec. 5.05(1e). To the extent a response is required, not disputed.

19. *Fourteen* States other than Wisconsin (including some with "swing-state status") and the District of Columbia follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election so long as they are timely postmarked. Suppl. Umberger Decl., Ex. 4.

**RESPONSE:** Not disputed.

20. These fourteen States include Alaska (10 days following election); California (3 days following election); the District of Columbia (7 days); Illinois (14 days); Iowa (6 days if postmarked by the day before the election); Kansas (3 days); Maryland (no deadline for receipt so long as postmarked by election day); New Jersey (48 hours following closure of polls); New York (7 days following election if postmarked by the day before the election); North Carolina (3 days); Ohio (10 days if postmarked by the day before the election); Texas (1 day); Utah (7-14 days if postmarked by the day before the election); Vermont (3 days); and West Virginia (5 days). *Id.*

**RESPONSE:** Not disputed.

21. Unless otherwise noted in the previous paragraph, all of these States require that absentee ballots be postmarked by election day in order to be counted when received in the days following the election. *Id.*

**RESPONSE:** Not disputed.

22. The outcome of the November election could well be in "limbo" in several of these other jurisdictions while timely cast ballots are received and tabulated in the days following the November 3—which is a scenario that is thus not peculiar to Wisconsin. Suppl. Umberger Decl., Exs. 5 & 29.

**RESPONSE:** Objection. This proposed fact assumes Wisconsin will change its rules regarding mail-in ballots. Without waiving this objection, it is not disputed that other states count absentee ballots received after election day and that it takes longer for those states to have a final tally.

23. There have been numerous examples of “October surprises” over the past half-century, including President Lyndon Johnson’s October 31, 1968 announcement of a complete bombing halt over North Vietnam; National Security Advisor Henry Kissinger’s October 26, 1972 announcement that “peace is at hand” in Vietnam; President Jimmy Carter’s announcement on November 2, 1980, that he had been unable to negotiate an end to the Iran hostage crisis; the October 30, 1992 indictment of former Secretary of Defense Caspar Weinberger as part of the Iran-Contra proceedings; Governor George Bush’s November 2, 2000 acknowledgment of his 1976 DUI charge; the October 29, 2004 broadcast by Al-Jazeera of a videotaped message from Osama bin Laden denouncing President George Bush; and the October 29, 2012 landfall of Hurricane Sandy near Atlantic City, New Jersey, and the next several days of destructive weather in the Northeast. *See* Suppl. Umberger Decl., Exs. 39-40.

**RESPONSE:** Not disputed.

**B. Online and by-mail registration deadlines.**

24. Wisconsin election officials have testified that an extension of the by-mail registration deadline can be done without significant additional costs or difficulty so long as mailed-in registrations are received by the Friday before the election—October 30—the same day that in-person registration closes. *See* ECF No. 475 (Jacobs Dep.) at 26:9-28:21.

**RESPONSE:** Objection. Defendant Jacobs’s personal opinion is not relevant to any of the issues in this matter. The WEC acts only through motions that garner a majority. Wis Stats. sec. 5.05(1e). To the extent a response is required, not disputed.

25. Wisconsin’s election administrators acknowledge that this Court’s modest, 12-day extension of the online registration deadline prior to the April 7 election caused few additional administrative tasks or other problems. *See* ECF No. 247 (Wolfe 30(b)(6) Dep.) at 18:6-21:12.

**RESPONSE:** Not disputed.

**IV. Witness certification relief.**

26. WEC’s proposed alternatives for fulfilling the witness requirement proved woefully insufficient during the April 7 election, with over 14,000 ballots rejected for “insufficient certification” and many more never even returned because the process was simply too complicated for the voters who had requested them. *See* WEC Br. (ECF No. 378) at 11; DNCFOF ¶ 157; Suppl. Umberger Decl. Ex. 1.

**RESPONSE:** Objection. This proposed fact is argument and is speculative. Without waiving this objection, disputed in part. The WEC reported that the percentage of unreturned ballots was consistent with previous elections as was the percentage of rejected ballots (Dkt. 446-4, Tables 6 and 7).

27. The WEC has not further evaluated the witness-certification issue since April 7, 2020, or revised its guidance on this issue in any respect, or even addressed this critical issue in its June 25 Status Report (ECF No. 227) despite the Seventh Circuit’s urgings that it give the issue further attention. *See* ECF No. 475 (Jacobs Dep.) at 85:7-86:6; ECF No. 247 (Wolfe 30(b)(6)

Dep.) at 35:15-38:11.

**RESPONSE:** Objection. This proposed finding mischaracterizes the record. Without waiving this objection, disputed in part. The cited testimony of Ms. Wolfe makes it clear that the WEC plans to take up the issues raised by the court of appeals when they meet in September. (Dkt. 247, 36:19-38:1).

28. During the April 7, 2020 election, municipal clerks received guidance from the WEC stating that “[i]f you receive an absentee back with the certificate not correctly completed, you *can* contact the voter.” Suppl. Umberger Decl., Ex. 26 at 1 (emphasis added).

**RESPONSE:** Not disputed.

29. During the April 7, 2020 spring election, Wisconsin voters whose absentee ballots were received after April 7 had no opportunity to cure witness-related deficiencies. *See, e.g.*, Suppl. Umberger Decl. Exs. 24-25.

**RESPONSE:** Not disputed.

**V. Additional Supplemental Findings.**

30. The Supreme Court’s July 2 decision in *Merrill v. People First of Alabama*, to stay an Alabama federal district court’s injunction against the enforcement of Alabama’s certification requirement, gave no reasons for the stay and is now moot since Alabama’s July 14 primary has passed, and the State has dismissed its appeal, without seeking to vacate the district court’s opinion. *See* Suppl. Umberger Decl., Ex. 12.

**RESPONSE:** Objection. This proposed finding is a conclusion of law.

31. The WEC estimates that about 195,000 voters claimed to be “indefinitely confined” in the April 7 election, nearly 2-1/2 times the number who claimed that status the prior year. *See* Suppl. Umberger Decl., Ex. 37.

**RESPONSE:** Not disputed.

Dated: August 6, 2020

LAWTON & CATES, S.C.

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