

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

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DEMOCRATIC NATIONAL COMMITTEE  
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v.

Case No. 20-cv-249-wmc

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.

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SYLVIA GEAR, CLAIRE WHELAN, WISCONSIN  
ALLIANCE FOR RETIRED AMERICANS, LEAGUE  
OF WOMEN VOTERS OF WISCONSIN, KATHERINE  
KOHLEBECK, DIANE FERGOT, GARY FERGOT,  
BONIBET BAHR OLSAN, SHEILA JOZWIK, and  
GREGG JOZWIK,

Plaintiffs,

v.

Case No. 20-cv-278-wmc

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

Defendants.

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CHRYSTAL EDWARDS, TERRON EDWARDS, JOHN  
JACOBSON, CATHERINE COOPER, KILEIGH HANNAH,  
KRISTOPHER ROWE, KATIE ROWE, CHARLES DENNERT,  
JEAN ACKERMAN, WILLIAM LASKE, JAN GRAVELINE,

TODD GRAVELINE, ANGELA WEST, DOUGLAS WEST,  
and all others similarly situated,

Plaintiffs,

v.

Case No. 20-cv-340-wmc

ROBIN VOS, SCOTT FITZGERALD, WISCONSIN STATE  
ASSEMBLY, WISCONSIN STATE SENATE, WISCONSIN  
ELECTIONS COMMISSION, MARGE BOSTELMANN,  
JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON,  
ROBERT F. SPINDELL, JR., MARK L. THOMSEN, and  
MEAGAN WOLFE,

Defendants.

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JILL SWENSON, MELODY McCURTIS, MARIA NELSON,  
BLACK LEADERS ORGANIZING FOR COMMUNITIES,  
DISABILITY RIGHTS WISCONSIN

Plaintiffs,

v.

Case No. 20-cv-459-wmc

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

Defendants.

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**MEMORANDUM IN SUPPORT OF *GEAR v. BOSTELMANN*, 20-CV-278, PLAINTIFFS’  
MOTION FOR PRELIMINARY INJUNCTION**

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**INTRODUCTION AND SUMMARY**

The Covid-19 pandemic has changed the way we vote. Of the many concerns that voters might have had prior to March, their physical safety was not usually among them. Confronted with a highly lethal virus marked by asymptomatic and airborne transmission, in-person voting has become fraught with peril for voters at elevated risk from Covid-19. Even were the application of

Covid-19 safety measures or compliance with public health guidance consistent, the evidence does not demonstrate that these countermeasures can make indoor places where people congregate substantially safe. With Covid-19 spreading exponentially once again, there is every reason to believe that the danger to voters will be real and substantial, if not greater than at present, when early voting for the November general election begins in a little over 100 days.

As a direct consequence of the pandemic's onset, in the April 7 election, nearly 62 percent of Wisconsin's electorate chose to vote by mail. This unprecedented demand for mail-in voting strained and then broke the systems by which absentee ballots are prepared and delivered to voters. At least thousands of voters, including six of the Plaintiffs in this action, never received their timely-requested ballots in the mail, due to administrative overload at municipal clerks' offices, still-unexplained U.S. Postal Service ("USPS") delivery failures, and even a software update glitch. Wisconsin's municipal clerks' offices were barely able to keep up with one million mail-in absentee ballot requests, even as they worked overtime and, in desperation, enlisted other city departments' employees, as well as volunteers from Plaintiff League of Women Voters of Wisconsin ("LWVWI"). November will be the first time in over a century that Wisconsin has held an election during a global pandemic. If this year's turnout is comparable to the level seen in the 2016 presidential election, the state will face 1.8 to 2 million mail-in absentee ballot requests for the November general election. That the Wisconsin Elections Commission ("WEC" or "the Commission") has voted to mail absentee ballot applications and information on how to request an absentee ballot online to 2.7 million registered Wisconsin voters all but guarantees that.

Defendants, the WEC Commissioners, concede that they and their municipal clerks' offices face a steep climb in processing the anticipated volume of mail-in ballot requests: "If voting patterns from April hold true, the state could see more than 1.8 million requests for absentee ballots by mail. This kind of volume would present terrific challenges for Wisconsin election officials at

all levels.”<sup>1</sup> Wisconsin election officials have made heroic efforts, but they are feeling the pressure and uncertain whether they have the resources, funding, tools, and staff necessary to timely complete this gargantuan task. Intervenor-Defendant the Wisconsin Legislature has done nothing since the April 7 election to remedy this problem. For its part, WEC has announced a few reforms, but, according to municipal clerks, these will not be sufficient to reduce the crushing administrative burden on their offices, let alone the USPS.

Fortunately, there are solutions to the problem of absentee ballot delivery failures. Indeed, Wisconsin’s election officials largely already have the tools and procedures to solve this problem; they just need to extend their availability from overseas civilian and military voters only to all regular Wisconsin voters who do not receive a requested absentee ballot in the mail on time. This extension, if ordered by this Court,<sup>2</sup> will not require Defendants and municipal clerks to do something they have never done before; they need only offer existing alternative methods of *replacement* absentee ballot delivery to additional voters who face disenfranchisement. All three of these options would still require that the voter request a ballot by mail delivery in the first instance, and that the voted replacement ballot be mailed in or dropped off. This proposed remedy would simply give Plaintiffs other ways to access a blank mail-in absentee ballot and the certificate for the ballot envelope.

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<sup>1</sup> Sherman Decl., Ex. 1, Wisconsin Elections Commission, April 7, 2020 Absentee Voting Report (“Post-Election Absentee Voting Report”), at 12 (May 15, 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf>.

<sup>2</sup> Once the U.S. Court of Appeals for the Seventh Circuit issues the mandate in *Luft v. Evers*, No. 16-3003, 2020 WL 3496860 (7th Cir. June 29, 2020), only overseas civilian and military voters will be able to use the alternative absentee ballot delivery methods proposed as relief in this case. That pre-pandemic case, of course, does not foreclose this lawsuit though because the former was premised merely on the alleged discriminatory treatment of regular voters, on the one hand, and overseas and military voters on the other. *Id.* at \*7–8. That case predates the Covid-19 pandemic and, unlike this case, the record in *Luft* contained no epidemiological evidence related to the danger the pandemic poses to voters and how long that danger may persist.

The best option is to extend the availability of the online access and download option through myvote.wi.gov from just overseas civilian and military voters to domestic civilian voters who do not timely receive a requested absentee ballot in the mail. This option would put a *replacement* mail-in ballot in the hands of voters who do not receive one in the mail and is significantly less burdensome for municipal clerks' offices than mailing the replacement ballot. Crucially, because this means of absentee ballot preparation and delivery is fully automated, it would not require the WEC or municipal clerks to invent a new web portal or an entirely new process, but merely to enable all registered voters in the statewide voter registration WisVote system to use this preexisting option if they certify on the myvote.wi.gov (hereinafter, "MyVote") portal<sup>3</sup> that they have not received an absentee ballot in the mail and confirm the last four digits of their Social Security Number. The previously-requested mail-in ballot would be cancelled by the municipal clerk's office. Because any regular absentee voter using this back-up option to obtain a *replacement* absentee ballot would have already submitted their photo ID, the required verification will have already taken place or can be fully automated. Wis. Stat. § 6.87(1).

The next best option for voters to receive a replacement mail-in absentee ballot is email delivery. When a voter contacts a municipal clerk's office to inform them that they have not received a ballot in the mail, staff members typically seek to mail out a replacement ballot, even if Election Day is less than a week away, or to inform voters of in-person voting options before and on Election Day. Up until the Seventh Circuit's decision last week, email delivery was an option, though it was discretionary for clerks to offer it and only offered sporadically across and within municipalities. This absentee ballot delivery option was extended to all regular absentee voters in

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<sup>3</sup> "MyVote . . . is just kind of . . . the pretty face of WisVote. . . . WisVote is where all the data is, where everything happens, is created. MyVote is just the user interface for voters to be able to interact with that data." Sherman Decl, Ex. 2, Deposition of Meagan Wolfe Transcript (July 3, 2020) ("Wolfe Tr.") at 147:11-16.

2016 by the district court's opinion in *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016), and that availability to all absentee voters will continue until the Seventh Circuit issues the mandate reversing that part of the decision. But Wisconsin does have experience with this method of absentee ballot delivery. In the 2016 presidential election, 9,619 mail-in absentee ballots were delivered by email to voters without incident. That comprised about 5 percent of the 178,996 mail-in ballots delivered to absentee voters statewide.<sup>4</sup>

The final fail-safe option that this Court could afford to regular absentee voters who do not receive a requested ballot in the mail is the Federal Write-In Absentee Ballot ("FWAB"). Wisconsin already accepts and processes the FWAB for overseas civilian and military voters, even if they have not previously requested a ballot be delivered by mail. Sherman Decl, Ex. 2, Wolfe Tr. at 185:4-186:12. This is the only option that does not give the voter an official absentee ballot with all the offices and candidates listed, but at least it would permit voters to download a fail-safe ballot that they can use to write in their choices.

All of these measures are last, not first, resorts. To cure the constitutional and federal law violations identified by Plaintiffs, Defendants would only need to make these alternatives available to voters who have previously requested a mail-in absentee ballot, and only in the last week or even just the last few days before Election Day. These limitations on the relief will ensure it is used only as a last resort and keep the numbers of voters exercising these fail-safe options manageable. Defendants may argue that these measures increase election officials' burdens and costs, but any administrative burden on the back end when these ballots are received is far outweighed by the reduced burden on the front end when clerks will struggle to mail out replacement ballots while conducting in-person absentee voting and preparing for Election Day,

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<sup>4</sup> Sherman Decl., Ex. 3, Wisconsin Elections Commission, Absentee Ballot Report (Nov. 8, 2016), <https://elections.wi.gov/node/4397>.

and by the voters' interest in casting a ballot safely. They may argue that in-person voting is safe, but voting in a confined space with other people cannot be made anywhere near as safe as voting by mail—no matter what precautions are taken—and many voters are at heightened risk of complications and death from Covid-19. Finally, all of these fail-safe measures will alleviate the strain on early voting and Election Day polling sites, which in turn will have cascading benefits for election administrators and voters alike.

Finally, the Organizational Plaintiffs LWVWI and Wisconsin Alliance for Retired Americans (“Wisconsin Alliance”) seek to enjoin the witness requirement. This requirement has such minimal value to law enforcement that it cannot justify forcing voters at high risk from Covid-19 to take unreasonable steps to secure a witness. Enforcing this law during a pandemic in turn compels LWVWI and Wisconsin Alliance to divert resources and time from their core missions to educate and help voters comply with this requirement. There are alternatives, some suggested by the Seventh Circuit panel in April, and they can and should be ordered as alternatives for voters.

Plaintiffs meet each of the requirements for entry of a preliminary injunction, and respectfully request that this injunction be issued as to the November general election.

### **LEGAL STANDARD**

Under Federal Rule of Civil Procedure 65(b), a court may issue a temporary restraining order without notice to Defendants if “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b). “Where the adverse party has received notice of a motion for a temporary restraining order and a hearing has been held on the motion, it is proper for the court to consider the motion as one for a preliminary injunction.” *Milwaukee Cty. Pavers Ass’n v. Fielder*, 707 F. Supp. 1016, 1018 n.3 (W.D. Wis. 1989); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 865 (W.D. Wis. 2013).

“[T]he same showing is required to obtain either” a temporary restraining order or a preliminary injunction. *Van Hollen*, 963 F. Supp. 2d at 865 (citing *Winnig v. Sellen*, 731 F. Supp. 2d 855, 857 (W.D. Wis. 2011)). ““To win a preliminary injunction, a party must show that it has (1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits.”” *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011)). “If the moving party makes this threshold showing, the court ‘weighs the factors against one another, assessing whether the balance of harms favors the moving party or whether the harm to the nonmoving party or the public is sufficiently weighty that the injunction should be denied.’” *Id.* (quoting *Ezell*, 651 F.3d at 694). This Court “applies a sliding scale in weighing whether preliminary relief is warranted.” *Van Hollen*, 963 F. Supp. 2d at 864. “[T]he more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while supporting some preliminary relief.” *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

## ARGUMENT

### **I. Plaintiffs have standing to bring their claims.**

Article III standing consists of three elements: an injury in fact, traceability, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Under the Supreme Court’s decision in *Havens Realty Corp. v. Coleman*, an organization has standing, and has demonstrated an injury in fact, when a defendant’s actions impede the organization’s efforts to carry out its mission and cause a “consequent drain on the organization’s resources.” 455 U.S. 363, 379 (1982); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (holding voter advocacy organizations had standing where organizational missions would be thwarted and need to combat confusion would displace other projects normally undertaken, and agreeing with sister



circuits which “upheld the standing of voter-advocacy organizations that challenged election laws...[and] demonstrated the necessary injury in fact in the form of the unwanted demands on their resources.”)

**a. Absentee ballot delivery failures**

**i. Injury in fact**

**1. The Covid-19 Pandemic**

The individual Plaintiffs in this action would face a severe risk to their physical health and lives if they were forced to vote in person. This risk is a concrete and imminent injury for the purposes of their undue burden claim. *See, e.g., Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at \*21 (D.S.C. May 25, 2020) (“Thomas/Middleton Plaintiffs are likely to prevail on their constitutional challenge to [the voting requirement] under the *Anderson-Burdick* balancing test because the character and magnitude of the burdens imposed on Thomas/Middleton Plaintiffs in having to place their health at risk during the COVID-19 pandemic likely outweigh the extent to which [the voting requirement] advances the state’s interests of voter fraud and integrity.”); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (noting that “Florida’s signature-match scheme subjects vote-by-mail and provisional electors to the risk of disenfranchisement”) (emphasis added).

The threat of airborne transmission of SARS-CoV-2, the virus that causes Covid-19, in indoor settings where people congregate, like a polling place, is real, substantial, and not meaningfully mitigated by any of the available protective measures. Murray Decl. ¶¶ 6-20, 32-44. The risk of in-person voting facilitating the transmission of Covid-19 was on full display after the April 7 election in Wisconsin. As Dr. Murray concludes after analyzing several studies on the post-election Covid-19 transmission dynamics, “despite labor-intensive and costly efforts to maintain the safety of in-person voting during the [April 7] Wisconsin election, a rigorous study provides

support for the contention that this election increased Covid-19 transmission.” *Id.* ¶ 65; *see also id.* ¶¶ 60-65. And COVID-19 continues to spread at an unprecedented pace within the United States and in Wisconsin. There are currently more than 3 million confirmed cases in the United States, and there have been 131,285 deaths nationwide.<sup>5</sup> As of the early morning of July 8, 2020, the Wisconsin Department of Health Services had confirmed 32,556 positive cases of coronavirus in Wisconsin, 3,639 hospitalizations, and 805 deaths.<sup>6</sup>

COVID-19 appears to be much more contagious than other respiratory illnesses, in significant part because of its capacity for asymptomatic transmission, and highly lethal, particularly for people with underlying health conditions or comorbidities that put them at severe risk of complications or death. According to the U.S. Centers for Disease Control and Prevention, (“CDC”), individuals are at higher risk of severe complications and death from Covid-19 if they are 65 years old or older or have underlying health conditions and diseases, including Chronic kidney disease, COPD (chronic obstructive pulmonary disease), immunocompromised state (weakened immune system) from solid organ transplant, obesity (body mass index [BMI] of 40 or higher), serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies, sickle cell disease, and Type 2 diabetes mellitus.<sup>7</sup> The CDC also notes that individuals with the following conditions or diseases *may* be at increased risk from Covid-19: asthma (moderate to severe), cerebrovascular disease (affects blood vessels and blood supply to the brain), cystic fibrosis, hypertension or high blood pressure, immunocompromised state

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<sup>5</sup> Sherman Decl., Ex. 4, Mitch Smith et al, *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed July 8, 2020).

<sup>6</sup> Sherman Decl., Ex. 5, Wisconsin Department of Health Services, *COVID-19: Wisconsin Summary Data*, <https://www.dhs.wisconsin.gov/outbreaks/index.htm> (last accessed July 8, 2020).

<sup>7</sup> Sherman Decl., Ex. 6, CDC, Coronavirus Disease 2019 (COVID-19), *People of Any Age with Underlying Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated June 25, 2020).

(weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines, neurologic conditions, such as dementia, liver disease, pregnancy, pulmonary fibrosis (having damaged or scarred lung tissues), smoking, thalassemia (a type of blood disorder), and Type 1 diabetes mellitus.<sup>8</sup> *See also* Murray Decl. ¶¶ 6-13, 28, 79-81.

This virus spreads through respiratory droplets that are attached to the surfaces of objects or are suspended in air and transmitted via inhalation and “emitted during coughs, sneezes or even talking.” *Id.* ¶¶ 8-13. Since it can be transmitted “by symptomatic and asymptomatic people” alike, individuals can spread the disease before realizing they are infected and self-quarantining. *Id.* ¶¶ 8-9, 32-33, 42. The CDC has also warned that asymptomatic COVID-19-positive individuals can transmit the disease to others.<sup>9</sup> As a result, voters can spread the disease at a polling place before they even realize they are infected.

Though Covid-19 typically begins with “a flu-like illness that starts out with fever, cough, sore throat and shortness of breath,” some people “develop much more serious illness, characterized by respiratory compromise due to pneumonia that can be gradual or sudden.” Murray Decl. ¶¶ 6, 21, 22. The major complication in patients with severe disease is acute respiratory distress syndrome (“ARDS”), which commonly requires patients to be put on a ventilator. *Id.* ¶¶ 7, 23. People who develop severe complications and require mechanical ventilation to survive ARDS “are likely to develop lung scarring that may permanently impair their pulmonary function” or, in the case of stroke, “long term neurological deficits from these events.” *Id.* ¶¶ 7, 26. In critical cases, Covid-19 can be fatal. Murray Decl. ¶¶ 27-31. Infections are more common in people

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<sup>8</sup> *Id.*

<sup>9</sup> Sherman Decl., Ex. 7, *Coronavirus 2019 (COVID-19): How to Prepare*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (last updated Mar. 4, 2020).

younger than 50. Murray Decl. ¶ 31. Even young individuals, including children, are at risk of severe complications and death from COVID-19. Murray Decl. ¶¶ 24-25. In fact, because 66 percent of the U.S. population is under 50, Dr. Murray notes that “deaths among people under 50 will not be uncommon as the epidemic progresses over time.” Murray Decl. ¶ 31.

It is highly likely that COVID-19 will continue to circulate at its current level or at an even higher level in October and November of 2020. *Id.* ¶¶ 10, 66. The COVID-19 pandemic is expected to produce steady or increased transmission in the United States through the fall, as voters seek to cast their ballots on or before Election Day. Dr. Megan Murray notes in her declaration that within the range of different possible scenarios for COVID-19 epidemic trajectories, “all of these scenarios are similar in that they predict that it is highly likely that Covid-19 will continue to circulate at its current level or at an even higher level than currently in October and November of 2020.” Murray Decl. ¶ 66. Likewise, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, has said a second wave of infections in the United States is “inevitable,” and CDC Director Robert Redfield has said that wave may “be even more difficult than the one we just went through.”<sup>10</sup> In his recent testimony to Congress, Dr. Redfield stated: “I want to make it clear we are going to experience significant coronavirus infection in the fall and winter of 2020.”<sup>11</sup>

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<sup>10</sup> Sherman Decl., Ex. 8, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, White House (Mar. 25, 2020), at 84, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-11/>; Sherman Decl., Ex. 9, H. Rept. 116-420, *Authorizing Remote Voting by Proxy in the House of Representatives and Providing for Official Remote Committee Proceedings During a Public Health Emergency Due to a Novel Coronavirus, and For Other Purposes*, at 7, <https://www.congress.gov/congressional-report/116th-congress/house-report/420/1>.

<sup>11</sup> Sherman Decl., Ex. 10, House Committee on Energy and Commerce, *Oversight of the Trump Administration's Response to the COVID-19 Pandemic*, 3:54:02, YOUTUBE (June 23, 2020), <https://www.youtube.com/watch?v=TX-x9tAmx6Q>.

While seasonal changes as to temperature and humidity may or may not ultimately have a significant impact on Covid-19's transmission, the risk of transmission in the fall and winter will track "differences in the ways people congregate," as "people tend to spend more time indoors with less ventilation and less personal space than they do in the summer." Murray Decl. ¶ 72. With additional contacts, particularly in indoor settings, comes increased risk of infection. Murray Decl. ¶¶ 58, 71-72. Based on studies of previous influenza epidemics, Dr. Murray notes that the "most likely scenario" is that "the current first wave of Covid-19 will be followed by a larger wave in the fall or winter of 2020 and one or more smaller subsequent waves in 2021," and that "most epidemiologists expect that incidence will increase in the fall/winter months of 2020-2021." *Id.* ¶¶ 74-75. "In the period prior to the widespread use of an effective vaccine, this spread will continue to lead to serious disease and death in at-risk groups." *Id.* ¶ 77. Progress towards herd immunity and vaccine development and production are unlikely to advance sufficiently quickly to significantly alter the trajectory of the COVID-19 outbreak. *Id.* ¶¶ 68, 82-83.. Finally, there are no known pharmaceutical treatments that substantially reduce the danger of Covid-19. *Id.* ¶¶ 9, 43, 85.

According to Dr. Murray's report, "There is a substantial risk that an infection with Covid-19 acquired during voting at a poll place in Wisconsin in the fall of 2020 could result in symptomatic disease, hospitalization or death." That is because "[t]o the extent that polling places are crowded, require people to wait in lines, involve interacting with polling staff or other voters at a close distance, move people through the process slowly, are poorly ventilated and/or involve people touching objects like pens, paper, or surfaces within the voting booth, they constitute a risk to voters." Murray Decl. ¶¶ 11, 47. Despite precautions taken during the April 7, 2020 election to protect in-person voters, "the Wisconsin department of health services detected 71 cases that they consider may have resulted from in-person voting, and a recent study found that counties with

higher than average in person voting had twice the rate of Covid-19 positive tests in the weeks that followed the election.” Murray Decl. ¶¶ 13, 65.

A Kaiser Family Foundation analysis found that “37% of adults over age 18 in Wisconsin are at risk for serious disease with older adults making up 59% of those at high risk.” Murray Decl. ¶ 81.

## **2. Mail-in Absentee Ballot Delivery Failures During the April 7 Election**

The threat of contracting COVID-19, particularly in confined spaces like polling sites and the long lines of voters who waited for their turn to access them on April 7, along with the precipitous reduction in election administration resources (including poll workers) for in-person voting both on and before Election Day, have forced a seismic shift towards mail-in absentee voting in Wisconsin. Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 3-6; Plaintiffs’ Proposed Findings of Fact (“PPFOF”) Nos. 1-2, 7-9, 25. According to the WEC’s “Post-Election Absentee Voting Report,” mail-in absentee ballots have been cast by 4.8 to 8.1 percent of voters in spring and fall general elections going back to the 2016 fall general election, but in the April 7, 2020 election, they comprised a stunning 61.8 percent of votes cast.<sup>12</sup> In that election, voters submitted an unprecedented total of 1,239,611 absentee ballot requests to municipal clerks, clerks issued 1,282,097 absentee ballots (which, of course, includes replacement ballots), and voters returned 1,157,599 of those ballots, or 73.2 percent of the total turnout in the election, 1,555,263.<sup>13</sup> Only a fraction of these were in-person absentee ballots, as 964,433 or 83.3 percent of the 1,157,599 absentee ballots were mail-in absentee ballots.<sup>14</sup> Based on these figures, 42,486

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<sup>12</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 6 (Table 4).

<sup>13</sup> Sherman Decl., Ex. 11, Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary (updated Apr. 21, 2020), <https://elections.wi.gov/node/6862>; see Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 4 (Table 2), 5 (Table 3).

<sup>14</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 4 (Table 1).

of the mail-in absentee ballots were replacement ballots, many chasing previously-requested ballots that were delayed or lost in the mail, and 124,498 mail-in absentee ballots were ultimately never returned.<sup>15</sup>

Notwithstanding municipal clerks' heroic efforts to prepare and mail out an unprecedented volume of absentee ballots, voters in the April 7th election faced a systemic and catastrophic failure to timely prepare and deliver absentee ballots by mail. Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 13-20. The total number of voters disenfranchised in this way is unknown, but as recounted by Defendants in their Post-Election Absentee Voting Report, at least several thousand voters never received their ballots in the mail. PPFOF Nos. ; Sherman Decl., Ex. 2, Wolfe Tr. at 88:1-4 (noting Post-Election Absentee Voting Report does not include all absentee ballot delivery failures, just those that rose "to the level of a trend"). According to Defendants' own rolling absentee ballot reports, as of the morning of April 7, the last day to postmark a ballot for delivery or drop it off, it appears that 9,388 ballots had not yet been mailed out.<sup>16</sup> Some voters received their ballots too late to cast and deliver or postmark them by April 7th, Ackerbauer Decl. ¶ 11, Thompson Decl. ¶¶ 5, 7, while some voters never received them at all, even weeks or months later. Kohlbeck Decl. ¶ 9; Diane Fergot Decl. ¶ 7; Gary Fergot Decl. ¶ 7; Bahr Olsan Decl. ¶ 6; Sheila Jozwik Decl. ¶ 7; Gregg Jozwik Decl. ¶ 7; Harrell Decl. ¶ 5; Krejci Decl. ¶ 7; Lohrenz Decl. ¶ 5; Newby Decl. ¶ 5; Wood Decl. ¶ 6. Absent any fail-safe alternatives for these voters who diligently and timely requested absentee ballots, their remaining options were to play Russian roulette with their health at the polls or lose their right to vote. Kohlbeck Decl. ¶ 9; Diane Fergot Decl. ¶ 7; Gary Fergot Decl. ¶ 7; Bahr Olsan Decl. ¶ 8; Sheila Jozwik Decl. ¶ 8; Gregg Jozwik

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<sup>15</sup> Sherman Decl. Ex. 11, Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary (updated Apr. 21, 2020), <https://elections.wi.gov/node/6862>.

<sup>16</sup> Sherman Decl., Ex. 12, Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary (updated Apr. 7, 2020 at 7:30 a.m.), <https://elections.wi.gov/node/6825>.

Decl. ¶ 8; Harrell Decl. ¶ 8; Krejci Decl. ¶ 8; Lohrenz Decl. ¶ 9; Newby Decl. ¶ 8; Thompson Decl. ¶ 6; Wood Decl. ¶ 6.

This debacle was fueled by the Legislature's and Governor's inaction, Defendants', municipal clerks', and the USPS's systemic administrative incapacity to meet the demand for absentee ballots in a timely manner, flaws or weaknesses in Defendants' computer systems and database management, and the burdens of enforcing Wisconsin's myriad legal requirements, such as the photo ID requirement for absentee voters and the mandatory 24-hour turn-around for mailing out ballots. PPFOF Nos. 28-73. All of these factors made it extremely difficult to process and deliver so many ballots to voters. As Defendants put it in their post-mortem report, "The most fundamental challenge faced by election officials was simply meeting the unprecedented demand."<sup>17</sup> That same report notes that:

Absentee voting remains a largely manual, labor-intensive process administered by each individual jurisdiction across the state. While voters can request a ballot and upload a photo ID on their smart phone in just a few minutes, behind the scenes clerks must still manually verify the IDs, stuff and seal envelopes by hand, apply postage, carry boxes of envelopes to the post office, and physically check off each request. . . . When mail volume is up to ten times higher than anticipated, clerks must complete the same tasks without the benefit of having more staff, additional supplies or more hours to meet statutory deadlines.<sup>18</sup>

Given the complex and labor-intensive procedures for processing and mailing out absentee ballots, Wisconsin election offices are simply not adequately staffed or funded to cope with an unprecedented shift to mail-in absentee voting by the majority of the electorate. Given these circumstances and the meager funding received from Congress, it is far more likely than not that Wisconsin election officials will remain unable to satisfy a much greater demand for mail-in absentee ballots in the fall.

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<sup>17</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 13.

<sup>18</sup> *Id.* at 3.



The April 7, 2020 election set the record for most mail-in ballots ever cast in any Wisconsin election ever.<sup>19</sup> The Commission reports that “[a]s the enormous quantity of absentee ballots began entering the mail system, voters began asking more questions and expressing concerns about ballot deliveries. With nearly six times more ballots in circulation, the number of complaints and concerns increased by a similar amount. Some voters also reported not receiving their absentee ballots . . . .”<sup>20</sup> Voters who requested their mail-in absentee ballots weeks in advance of April 7th, such as Plaintiffs Katherine Kohlbeck, Diane Fergot, Gary Fergot, Bonibet Bahr Olsen, Sheila Jozwik, and Gregg Jozwik, as well as Declarants Michele Harrell, Marina Krejci, Megan Lohrenz, Halee Newby, and Christopher Wood, never received their ballots in the mail, even after Election Day. Kohlbeck Decl. ¶ 9; Diane Fergot Decl. ¶ 7; Gary Fergot Decl. ¶ 7; Bahr Olsan Decl. ¶ 6; Sheila Jozwik Decl. ¶ 7; Gregg Jozwik Decl. ¶ 7; Harrell Decl. ¶ 5; Krejci Decl. ¶ 7; Lohrenz Decl. ¶ 5; Newby Decl. ¶ 5; Wood Decl. ¶ 6. All of these Plaintiffs and Declarants were in Wisconsin at the time of the election and requested the ballots be mailed to their residential addresses. Kohlbeck Decl. ¶¶ 5, 9; Diane Fergot Decl. ¶¶ 5-6; Gary Fergot Decl. ¶¶ 5-6; Bahr Olsan Decl. ¶ 6; Sheila Jozwik Decl. ¶ 4; Gregg Jozwik Decl. ¶ 4; Ackerbauer Decl. ¶ 8; Harrell Decl. ¶ 5; Lohrenz Decl. ¶ 6; Newby Decl. ¶ 6; Krejci Decl. ¶ 7; Thompson Decl. ¶ 6; Wood Decl. ¶ 6. Many voters like Plaintiffs Katherine Kohlbeck, Diane Fergot, and Gary Fergot, as well as Declarants Diane Ackerbauer, Michele Harrell, Megan Lohrenz, and Halee Newby, contacted their municipal clerks’ offices to inquire about their missing absentee ballots, all to no avail. Kohlbeck Decl. ¶ 8; Diane Fergot Decl. ¶ 6; Gary Fergot Decl. ¶ 6; Ackerbauer Decl. ¶ 8; Harrell Decl. ¶ 5; Lohrenz Decl. ¶ 6; Newby Decl. ¶ 6. Others believed they would arrive by Election Day, allowing them time to

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 12.

vote the ballots and postmark or drop them off. Bahr Olsan Decl. ¶ 7; Sheila Jozwik Decl. ¶ 7; Gregg Jozwik Decl. ¶ 7; Krejci Decl. ¶ 7; Thompson Decl. ¶ 6; Wood Decl. ¶ 6.

The Commission has released a report on absentee voting in the April 7, 2020 election, which recounts the multifarious and alarming failures to put absentee ballots in voters' hands. "Oshkosh and other Fox Valley communities all reported voters complaining that their ballots were arriving late or not arriving at all," but Defendants could not ascertain why this had occurred.<sup>21</sup> The day after the election, USPS notified WEC that it had found three tubs of approximately 1,600 absentee ballots destined for Appleton and Oshkosh; no explanation was given, and none has been discovered or provided since then.<sup>22</sup> Sherman Decl., Ex. 2, Wolfe Tr. at 89:20-91:19; 95:9-95:18; 127:11-22. In the Village of Fox Point, USPS bizarrely and repeatedly returned absentee ballots to the clerk's office without explanation as to any defect precluding delivery, culminating in the return of 100 to 150 returned ballots *per day* in the week leading up to Election Day and 175 returned in a plastic mail bin on Election Day.<sup>23</sup> The WEC's report notes that "[r]esidents who did not receive an absentee ballot in the mail were advised to vote in person at their polling place on Election Day," but that was not a viable, safe option for at-risk voters.<sup>24</sup> USPS was also unable to explain what happened in Fox Point. Sherman Decl., Ex. 2, Wolfe Tr. at 93:15-94:18; 127:19-22. WEC's Administrator Meagan Wolfe has testified that she had "significant concerns" with these USPS problems. Sherman Decl., Ex. 2, Wolfe Tr. at 89:10-15.

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<sup>21</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 16.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Id.* at 16-17. In response to these inexplicable failures, both of Wisconsin's U.S. Senators called upon the Inspector General of the U.S. Postal Service to investigate "absentee ballots not being delivered in a timely manner." See Sherman Decl., Ex. 13, Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr. 9, 2020), [https://www.ronjohnson.senate.gov/public/\\_cache/files/9485956c-0c16-4f38-9be0-f8d45e926aac/baldwin-johnson-letter-to-usps-ig-on-wisconsin-absentee-ballots.pdf](https://www.ronjohnson.senate.gov/public/_cache/files/9485956c-0c16-4f38-9be0-f8d45e926aac/baldwin-johnson-letter-to-usps-ig-on-wisconsin-absentee-ballots.pdf).

<sup>24</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 16-17.

Finally, in Milwaukee, on March 22, 2020, as a result of human and computer error or delay, “2,693 requested ballots were never sent to City of Milwaukee residents. Of the affected voters, 52.5% voted in the election either on a replacement absentee ballot or at the polls on election day.”<sup>25</sup> This shocking incident therefore disenfranchised approximately 1,279 voters, who lost their right to vote through no fault of their own. They had timely requested their ballots more than two weeks before Election Day and, with no other alternatives for ballot delivery likely known to them, watched the days elapse and finally Election Day go by without receiving an absentee ballot in the mail.

If the preceding narrative shows the level of ballot delivery failures and disenfranchisement when a total of 1,555,263 of Wisconsin’s voters—less than half of all registered voters—turn out to vote,<sup>26</sup> it is inevitable that the state’s 1,850 municipal clerks’ offices, *see* Sherman Decl., Ex. 2, Wolfe Tr. at 152:7-8, will not be able to handle nearly double that volume of absentee ballot requests in a timely fashion for the November 3, 2020 general election. Wisconsin had 3,406,952 registered voters as of July 1, 2020.<sup>27</sup> In 2016, 2,976,150 voters cast ballots for President.<sup>28</sup> If the same number of voters who voted in the 2016 presidential election vote in the fall general election, and, as in the April 7 election, 61.8 percent of those ballots cast are mail-in absentee ballots, municipal clerks will need to process a *minimum* of 1,839,260 absentee ballot requests and

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<sup>25</sup> *Id.* at 19-20.

<sup>26</sup> Sherman Decl., Ex. 14, Wisconsin Elections Commission, Canvass Results for 2020 Spring Election and Presidential Preference Vote, [https://elections.wi.gov/sites/elections.wi.gov/files/Canvass%20Results%20Summary\\_spring%20election%20all%20contests\\_4\\_7\\_2020.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/Canvass%20Results%20Summary_spring%20election%20all%20contests_4_7_2020.pdf); Sherman Decl., Ex. O, Wisconsin Elections Commission, July 1, 2020 Voter Registration Statistics, <https://elections.wi.gov/node/6948>.

<sup>27</sup> Sherman Decl., Ex. 15, Wisconsin Elections Commission, July 1, 2020 Voter Registration Statistics, <https://elections.wi.gov/node/6948>.

<sup>28</sup> Sherman Decl., Ex. 16, Wisconsin Elections Commission, Canvass Results for 2016 General Election, <https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28post-Presidential%20recount%29.pdf>.

successfully deliver the same number by mail. Assuming the 1 to 1.129 ratio of returned mail-in ballots to total issued mail-in absentee ballots holds from the April 7 election, then clerks will need to process over 2 million mail-in absentee ballot requests and issue the same number of ballots this fall.<sup>29</sup> This stands in stark contrast to the 2016 fall general election, in which just 162,445 absentee ballots were returned by mail and other means such as special voting deputies (excluding *in-person* absentee voting), and which constitutes about one-sixth of the total such ballots cast in the April 7 election and just 8.83 percent of the projected total for the 2020 fall general election.<sup>30</sup> All but guaranteeing another unprecedented surge in absentee voting, Defendants have voted to send absentee ballot request forms to approximately 2.7 million registered Wisconsin voters, excluding the who have already requested absentee ballots and those on the Electronic Registration Information Center's "movers" list because they are suspected of moving to a different municipality or state.<sup>31</sup>

Further, many of these requests are submitted in the final days before the deadline, when municipal clerks' offices will be busy conducting in-person absentee voting and making other preparations for Election Day. The Commission notes in its report that: "Statewide, the volume of absentee requests received remained high in the week prior to April 7. Clerks received over 60,000 requests alone on the Friday before election day. Even if all these requests were mailed on Saturday, it is unknown how long those ballots took to reach voters."<sup>32</sup> With significant USPS

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<sup>29</sup> This calculation assumes that all or almost all in-person absentee ballots are returned.

<sup>30</sup> Sherman Decl., Ex. 3, Wisconsin Elections Commission, Absentee Ballot Report (Nov. 8, 2016), <https://elections.wi.gov/node/4397>; Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 4.

<sup>31</sup> Sherman Decl., Ex. 17, Wisconsin Elections Commission, Meeting Agenda, Memorandum re: Voter Mailing Proposal and Mailer (June 10, 2020), at 145-50, [https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/Open%20Session%206.10.2020.Final\\_.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/Open%20Session%206.10.2020.Final_.pdf); Sherman Decl., Ex. 2, Wolfe Tr. at 27:2-7; Sherman Decl., Ex. 18, Wisconsin Elections Commission, Notice of Open Meeting, Wisconsin Elections Commission Special Teleconference-Only Meeting (May 27, 2020), at 8.

<sup>32</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 17.

delays, it is likely that a substantial portion did not arrive in time for voters to cast them. Furthermore, 80,593 requests were submitted on March 31, 2020, 66,482 on April 1, 79,921 on April 2, and 62,172 on April 3, which, by this Court's order, was the last day to request a *mail-in* absentee ballot.<sup>33</sup> See *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 1638374, at \*22 (W.D. Wis. Apr. 2, 2020). The overwhelming majority of these 289,168 requests, which municipal clerks received on just those four days alone, were requests for mail-in absentee ballots, which by law must be mailed out to voters within a day of receiving them. Wis. Stat. § 7.15(1)(cm).

Wisconsin election officials at the state and local level will not be able to handle such an enormous increase in mail-in absentee ballot requests. The WEC Defendants seem to concur with this assessment: "If voting patterns from April hold true, the state could see more than 1.8 million requests for absentee ballots by mail. This kind of volume would present terrific challenges for Wisconsin election officials at all levels."<sup>34</sup> In her declaration, Madison City Clerk Maribeth Witzel-Behl describes an incredibly "challenging" situation, with her staff "work[ing] around the clock, including on weekends, struggling to meet the unprecedented demand for mail-in absentee ballots." Witzel-Behl Decl. ¶ 3. She explains that they

were barely able to send all these requested ballots out, and it took all of the city's resources, as well as volunteer help, to accomplish this. Absentee ballot request processing and data entry were handled by my full-time and part-time staff, with just a few other trained employees from the city's Planning and Library departments. Other City of Madison municipal departments' employees worked on absentee ballot mailings, specifically the manual work of affixing labels and mailing out the ballots. The staff and other departments' employees worked over the weekend to complete these mailings and were compelled to rely on outside help from League of Women Voters of Dane County volunteers. For the April 7 election, we had over 100 city employees from other departments helping us; now we only have 7 available to us.

*Id.* Ms. Witzel-Behl notes that the city clerk's office was barely able to meet its obligation to mail ballots within 24 hours of receiving the request under Wis. Stat. § 7.15(1)(cm), and the backlog

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 12.

grew “as high as 12,000 absentee requests” but was ultimately cleared. *Id.* ¶ 4. Unfortunately, however, notwithstanding all of their efforts, their office still “received thousands of calls and emails from voters in Madison informing us that they had never received their requested absentee ballot in the mail” and still “sent thousands of replacement ballots to such voters in the weeks before the election.” *Id.* Ms. Witzel-Behl adds that “most of the voters who called [her] office in late March and early April had been waiting over a week since their ballot had been placed in the mail, and it had not yet been delivered.” *Id.* Shockingly, she also notes that her office is still “receiving ballots back from the Post Office, marked as undeliverable,” some twelve weeks after the April 7 election ended. *Id.*

Racine was similarly inundated. The City Clerk Tara Coolidge notes that: “In previous election years, my office typically received about 1,500 requests for absentee ballots, per election. For the April 7 election, we received 11,083 timely requests for absentee ballots, meaning they were requested by the Friday before election day.” Coolidge Decl. ¶ 3. Ms. Coolidge explains that:

In order to meet the demand for processing absentee ballots for the April 7 election, I had to recruit approximately 40 City employees from other departments to assist my staff in the days and weeks leading up to the election, including nights and weekends. At this time, I do not know how many other City employees will be available to assist with the August and November elections. This does not include the additional number of workers needed to process absentee ballots at the polls on Election Day, many of whom were members of the National Guard, who may or may not be required to assist with the August and November elections.

*Id.* ¶ 6. For November, Ms. Coolidge makes clear that “[i]n order to timely process these requests, I will again need additional assistance from members outside of my office.” *Id.* ¶ 7. She also notes that many ballots arrived too late to be counted: “[h]undreds of ballots were returned to my office after the deadline, none of which could be processed.” *Id.* Despite processing all of the absentee ballot requests, Ms. Coolidge notes that “[i]n the days and weeks leading up to the April 7 election, my office received hundreds of phone calls, emails and text messages from voters complaining

that they never received their absentee ballots as requested. It is unclear how many of those people eventually received their ballots, returned them, or went to the polls to vote in person.” *Id.* ¶ 4.

For Kenosha, former City Clerk-Treasurer Debra Salas notes that her office depended upon “roughly fifteen City of Kenosha municipal employees from the Libraries, Museums and Parks Departments” and “[a]pproximately 3 to 4 poll workers . . . each day” to process the onslaught of absentee ballots. Salas Decl. ¶ 4. This of course detracted from the city clerk’s office’s other duties and responsibilities. *Id.* It even detracted from in-person absentee voting and Election Day planning. *Id.* (“Due to the volume of absentee ballot requests and the Covid-19 precautions we were taking, in-person absentee voting was limited to the two weeks before the election by appointment only during a limited number of hours from 7:00 a.m. to 9:00 a.m.”); *id.* ¶ 5. She underscores that for the November election “the City Clerk/Treasurer’s office will need to hire and train substantially more people than were involved in the April 7 election.” *Id.* ¶ 4.

The above narratives of the clerks April 7 election difficulties are consistent with what the Commission reported:

Nearly every community experienced unprecedented absentee request volume, and many hired temporary staff to cope with demand. Many small and medium size jurisdictions learned to use WisVote absentee batch processing tools for the first time, having never previously needed any automation assistance to manage their workload. Larger cities, while used to higher volumes, were forced to work around the clock and conduct much larger batch mailings then [*sic*] previously experienced. For all jurisdictions, the statutory requirement to mail ballots within 24 hours of receiving a request presented a significant challenge.<sup>35</sup>

### **3. November 2020 General Election**

On June 25, 2020, the WEC Defendants submitted a status report outlining the various measures they are taking in advance of the August and November elections. 20-cv-249, dkt. 227. Only a few of these proposed or ongoing reforms can have any impact on the administrative

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<sup>35</sup> See Sherman Decl., Ex. 1, Post-Election Absentee Voting Report, at 13.

burdens of absentee ballot preparation, data entry, and delivery. They include: (1) funding to municipal clerks through subgrants for additional staffing for processing higher levels of absentee ballots, *id.* at 5; (2) a still-developing plan to modify the state’s voter information database, WisVote, “to identify which method of processing absentee ballot requests, ballot records, and absentee address labels is best in managing high volumes of requests, and [to] train exclusively on this method,” *id.* a 9; and (3) a further WisVote modification “to implement additional tracing procedures and audit tools in WisVote to enable early detection of issues that could occur during the high volume of absentee ballot request processing,” *id.* Defendants expressly disclaim that intelligent mail barcodes (“IMBs”) will have a meaningful impact on the burden of processing and mailing so many ballots: “Use of IMBs will not change the preparation of absentee ballots in any significant way, but they will allow for more precise population of tracking information in WisVote/MyVoteWI.” *Id.* at 6.

Additional funding, a single common procedure for absentee ballot processing, and better visibility on potential WisVote problems notwithstanding, Defendants cannot guarantee that the labor-intensive tasks of processing over 2 million absentee ballot requests, entering data in WisVote, verifying photo IDs, printing labels, affixing these labels, and then mailing the ballots and certificate envelopes off will not once again cause the system to break down. Defendants also cannot guarantee that USPS will timely deliver ballots to absentee voters. Indeed, WEC Administrator Wolfe has testified that she does not know what, if any, steps USPS is or will be taking to address its past failures to deliver absentee ballots on time or at all in Wisconsin. Sherman Decl., Ex. 2, Wolfe Tr. at 101:2-5. None of Defendants’ proposals for new data entry procedures, tracking tools, and other measures can cure this shortfall in resources and staff. When WEC states the coming onslaught will pose “terrific challenges for Wisconsin election officials at all levels,”<sup>36</sup>

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<sup>36</sup> *Id.* at 12.



this is not a statement of confidence; it is a statement of trepidation—that, even if municipal clerks marshal all city employees, resources, and efforts, they still will not be able to process and mail absentee ballots in a timely manner. Given that nearly 300,000 ballot requests came in over the course of the last four days before the deadline, the concern that they may not be able to fulfill their obligations under Wisconsin law is understandable.

Madison City Clerk Ms. Witzel-Behl states that her office “has not been given the resources and money necessary to meet the anticipated demand for mail-in absentee ballots in November” and that “with other departments going back to work, [her] staff now only has a few dozen League of Women Voters volunteers available to help.” Witzel-Behl Decl. ¶ 6. With respect to IMBs, she states that “better tracking of ballots with anticipated delivery dates listed on myvote.wi.gov can only do so much to alleviate the burden on [her] staff. Although we anticipate that the intelligent bar codes may reduce the number of telephone inquiries we receive, this will not make it easier to process a massive volume of absentee ballot requests—according to the WEC, an estimated 1.8 million statewide.” *Id.*; Salas Decl. ¶ 8.

Absentee ballot delivery failures were experienced by voters statewide, including Plaintiffs. Even without comprehensive statewide data, the record shows that voters did not receive their absentee ballots on time, or at all, in many Wisconsin municipalities, including Fox Point, Oshkosh, Appleton, Milwaukee, Brookfield, and Sun Prairie. Diane Fergot Decl. ¶¶ 1, 7 (Oshkosh); Gary Fergot Decl. ¶¶ 1, 7 (Oshkosh); Harrell Decl. ¶¶ 1, 5 (Oshkosh); Bahr Olsan Decl. ¶¶ 1, 5 (Appleton); Kohlbeck Decl. ¶¶ 1, 5 (Milwaukee); Krejci Decl. ¶¶ 1, 6 (Milwaukee); Lohrenz Decl. ¶¶ 1, 5 (Milwaukee); Newby Decl. ¶¶ 1, 5 (Milwaukee); Thompson Decl. ¶¶ 1, 5 (Milwaukee); Wood Decl. ¶¶ 1, 6 (Milwaukee); Greg Jozwik Decl. ¶¶ 1, 7 (Brookfield); Sheila Jozwik Decl. ¶¶ 1, 7 (Brookfield); Ackerbauer Decl. ¶¶ 1, 11 (Sun Prairie). Absent any fail-safe, these voters saw their most fundamental right of U.S. citizenship denied or severely burdened.

These individual Plaintiffs all suffered a concrete injury and stand to lose their right to vote again if a similar systemic overload delays their ballots or prevents their delivery. And while Plaintiffs Claire Whelan and Sylvia Gear received their ballots in April, as both cannot risk voting in person at the polls, they too run the risk of disenfranchisement if their ballots do not arrive in time for them to be cast in the November election. Whelan Decl. ¶¶ 4-5, 7, 9; Gear Decl. ¶¶ 4, 6-7.

Finally, the Organizational Plaintiffs LWVWI and Wisconsin Alliance are also severely burdened by the failure to provide voters with back-up options if their ballots do not arrive timely in the mail. When voters do not receive requested absentee ballots in the mail, they turn to civic engagement organizations for information and assistance. This necessarily diverts organizational resources away from core mission activities to helping voters navigate a broken absentee ballot process that leaves them with few and bad options. *Havens Realty*, 455 U.S. at 379; *see also Common Cause Indiana*, 937 F.3d at 952 (agreeing with sister circuits which “upheld the standing of voter-advocacy organizations that challenged election laws . . . [and] demonstrated the necessary injury in fact in the form of the unwanted demands on their resources.”). LWVWI and Wisconsin Alliance have already expended resources, time, and money educating and helping voters that would not need help but for the unconstitutional failure to offer back-up delivery options to them and will continue to do so through the November general election. Cronmiller Decl. ¶¶ 10-11, 13; Mitchell Decl. ¶¶ 11-14.

## **ii. Traceability**

Plaintiffs’ injury is traceable to Defendants’ failure to offer a back-up option to voters who do not receive an absentee ballot in the mail. Ultimately, it does not matter *why* the ballot does not arrive in the voter’s mailbox, because (a) under Wisconsin law, Defendants hold the ultimate responsibility to ensure delivery, and (b) Defendants could but do not offer alternatives to regular

domestic civilian voters in Wisconsin to cast a ballot, should their absentee ballot not arrive on time.

The Supreme Court has held that causation, in the context of Article III, does not mean proximate causation, but rather that the plaintiff's injury must "be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). The traceability requirement does not bar standing in cases where the alleged injury is most immediately caused by a third party but is also fairly traceable to the government's failure to regulate that party. *See, e.g., Massachusetts v. E.P.A.*, 549 U.S. 497, 521–26 (2007). Put simply, the defendant's actions need not be "the very last step in the chain of causation" for standing to exist. *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also Warth v. Seldin*, 422 U.S. 490, 504–05 (1975) ("The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing."). Rather, the traceability requirement may be satisfied when the injury is "produced by [a] *determinative or coercive effect* upon the action of someone else." *Bennett*, 520 U.S. at 169 (emphasis added).

The Seventh Circuit's traceability doctrine allows for standing when the injury is caused by multiple parties or government inaction. The Court has held that a plaintiff does not "lack standing merely because the defendant is one of several persons who caused the harm." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 500 (7th Cir. 2005). To establish Article III standing, "the complaint need only allege that 'but for' some act or omission of the defendant, the injury would not have occurred." *Boyden v. Conlin*, No. 17-CV-264-WMC, 2018 WL 2191733, at \*3 (W.D. Wis. May 11, 2018) (Conley, J.). Accordingly, this Court has noted "Article III causation is a fairly modest bar." *Boyden* 2018 WL 2191733 at \*3; *see also Bennett*, 520 U.S. at 171.

Importantly, the Seventh Circuit allows for standing when multiple actors are responsible for the plaintiff's injury. In *Lac du Flambeau*, for instance, an Indian tribe sued the Secretary of the Interior to void a compact between a second tribe and the state of Wisconsin. 422 F.3d at 493-94. The Secretary disputed the plaintiffs' standing on the grounds that it was the action of the third-party tribes and state—not the Interior Department—that had caused the plaintiff's harm. However, the court held that “the Secretary's silent approval caused that potential [harm] to become a reality because, but for her approval, the compact would have no effect.” *Id.* at 501. Hence, although the Secretary was not the sole cause of injury, the court found that plaintiffs had standing to sue U.S. Secretary of Interior because the regulable third party would not have harmed the plaintiffs *but for* the Secretary's inaction. *Cty. of Cook v. HSBC N. Am. Holdings Inc.*, 136 F. Supp. 3d 952, 960 (N.D. Ill. 2015) (noting that where “the alleged conduct plausibly contributed to the harm, Article III standing exists”); *see also Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 315-316 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 681 (2013). (holding that “if the witness residency requirement is at least in part responsible for frustrating [a candidate's] attempt to fully assert his First Amendment rights in Virginia, the causation requirement is satisfied”). *Lac du Flambeau* establishes that the WEC's failure to provide voters with fail-safe options to safeguard against disenfranchisement when ballot preparation and delivery procedures fail to put a ballot in the voter's hands, constitutes a “but-for” link in the causal chain leading to Plaintiffs' injuries. But for failure to offer regular absentee voters alternative ballot delivery options, no voter would be disenfranchised because of municipal clerk offices' or USPS's systemic overload or error.

### **iii. Redressability**

Finally, Plaintiffs' injuries are redressable by the requested injunction. If Defendants were compelled to offer regular voters one or more of these absentee ballot delivery methods as a fail-safe to request a replacement mail-in ballot when the requested ballot does not come in the mail,

that would certainly redress the legal violations identified in this case. Redressability is not just likely, but certain in this case. *Lujan*, 504 U.S. at 561.

**b. Witness requirement**

The Organizational Plaintiffs LWVWI and Wisconsin Alliance move for injunctive relief against the witness requirement.<sup>37</sup> Again, under *Havens Realty* and *Common Cause Indiana*, 937 F.3d at 952, the Organizational Plaintiffs LWVWI and Wisconsin Alliance are also burdened by the witness requirement. Voters, particularly those who are at higher risk from Covid-19 and who live alone, struggle with how to safely comply with this requirement and often require assistance. Civic engagement organizations have been compelled to divert organizational resources away from their core mission activities to educate and help voters comply with this requirement that is ill-suited to a pandemic. *Havens Realty*, 455 U.S. at 379; *see also Common Cause Indiana*, 937 F.3d at 952 (agreeing with sister circuits which “upheld the standing of voter-advocacy organizations that challenged election laws . . . [and] demonstrated the necessary injury in fact in the form of the unwanted demands on their resources.”). LWVWI and Wisconsin Alliance have already expended resources, time, and money educating and helping voters that would not need help but for the unconstitutional enforcement of the witness requirement and will continue to do so through the November general election. Cronmiller Decl. ¶¶ 9, 11-12; Mitchell Decl. ¶¶ 11-14.

**2. Plaintiffs are likely to succeed on the merits of their claims.**

**a. Undue Burden under *Anderson-Burdick***

**i. Absentee ballot delivery failures**

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<sup>37</sup> Plaintiffs Claire Whelan and Sylvia Gear do not move for a preliminary injunction on this claim at this time.

Under the First and Fourteenth Amendments to the U.S. Constitution, any burden on the right to vote must be balanced against a state's interest in that requirement. The Supreme Court has set forth the following test:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions. *Anderson*, 460 U.S., at 788, 103 S.Ct., at 1569–1570; *see also id.*, at 788–789, n. 9, 103 S.Ct., at 1569–1570, n. 9.

*Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 904 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), *and aff’d in part, vacated in part, rev’d in part sub nom. Luft v. Evers*, No. 16-3003, 2020 WL 3496860 (7th Cir. June 29, 2020), *and aff’d in part, vacated in part, rev’d in part sub nom. Luft v. Evers*, No. 16-3003, 2020 WL 3496860 (7th Cir. June 29, 2020) (“This analysis proceeds under what is known as the *Anderson–Burdick* framework, which sets out a three-step analysis. First, I determine the extent of the burden imposed by the challenged provision. Second, I evaluate the interest that the state offers to justify that burden. Third, I judge whether the interest justifies the burden.”). Even as modified or clarified by the Seventh Circuit’s recent opinion in *Luft v. Evers*, *Anderson–Burdick* always requires a balancing of interests and burdens, as well as a holistic analysis to see if any other parts of the election code or system ameliorate or negate the challenged laws’ burdens: “Courts weigh these burdens against the state’s interests by looking at the whole electoral system.” *Luft*, 2020 WL 3496860, at \*3. For instance, if a restriction on voter registration is challenged, then it might be relevant that Election Day registration is available in Wisconsin. In this case, however, the Wisconsin election code does not contain any other provisions that ameliorate or

negate the threat of disenfranchisement when a ballot does not arrive in the mail. If there were, this lawsuit would not have been filed.

Plaintiffs must establish that they are burdened by a particular election law, but the state must, in turn, substantiate its claimed interest with concrete evidence: “[w]hile states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent ‘evidence that such an interest made it necessary to burden voters’ rights.’” *Thomas*, 2020 WL 2617329, at \*20 (quoting *Fish v. Schwab*, 957 F.3d 1105, 1133, (10th Cir. 2020) (affirming injunction against Kansas’s documentary proof of citizenship requirement for voter registration)).

Wisconsin’s election administration system, as managed by Defendants, is not equipped to handle the unprecedented surge in mail-in absentee balloting that the COVID-19 pandemic is causing. The November general election will be conducted under conditions of persistent and substantial Covid-19 transmission and will see an estimated 2 million-plus absentee ballot requests. As recounted above, given the current systems, procedures, laws, and resources for absentee voting and mail delivery, there is simply no way that Defendants, the municipal clerks who take their marching orders from them, and the USPS can meet that demand for all voters who intend to vote by absentee ballot. Inevitably, some portion of voters who must vote by mail due to the risk Covid-19 poses to their health and the health of their family and/or household members will not receive a ballot in the mail.

Because of Defendants’ failure to provide them with a fail-safe option if their absentee ballots do not arrive in the mail on time Plaintiffs Katherine Kohlbeck, Diane Fergot, Gary Fergot, Bonibet Bahr Olsan, and Sheila Jozwik were all disenfranchised in the April 7 election and stand to be disenfranchised again in the November general election, Kohlbeck Decl. ¶ 9; Diane Fergot Decl. ¶ 7; Gary Fergot Decl. ¶ 7; Bahr Olsan Decl. ¶¶ 6, 8; Sheila Jozwik Decl. ¶¶ 7-8, and Plaintiff

Gregg Jozwik was forced to risk exposure to the novel coronavirus by voting in person. Gregg Jozwik Decl. ¶¶ 7-8. Plaintiffs Claire Whelan and Sylvia Gear are exposed to the same risk of ballot delivery failure in November. Organizational Plaintiffs LWVWI and Wisconsin Alliance are also injured because they have diverted and will continue to divert resources, staff time, and money to educate and help voters who do not receive a requested absentee ballot in the mail.

In-person voting of course is not a reasonable alternative, as that would require these Plaintiffs to enter a confined and crowded space where they run a significant risk of contracting Covid-19 through airborne transmission. PPFOF Nos. 1-2, 7-9, 25. Because Covid-19 appears to be transmitted by airborne viral particles, in addition to respiratory droplets, the danger of in-person voting is not meaningfully reduced by interventions like wearing masks, hand-washing, and maintaining six feet of separation from other voters. PPFOF No. 1 (citing Murray Decl. ¶¶ 6-20, 32-44). Even if these methods were effective and there is no evidence that they substantially reduce the risk of transmission, voters' and poll workers' non-compliance with safeguards and public health guidance would still make in-person voting very risky, particularly for voters with comorbidities. One poll worker, Barbara Keresty from Madison, describes her experience working the April 7 election. She notes the polling place was so cramped and crowded that "made it impossible to maintain six feet of distance," and that those who assisted curbside voters were unable to maintain 6 feet of distance. Keresty Decl. ¶¶ 3, 7. She notes that "[v]oting stations were also set up back-to-back in a small circle, not six feet apart" and that "[v]oters were therefore within two feet of each other when filling out their ballots." *Id.* ¶ 3. Additionally, she observed that some poll workers and "many voters" failed to wear masks or gloves. *Id.* ¶ 4. Additionally, "[p]oll workers had to sit approximately two feet apart throughout the day. There were four tables for poll workers: two with plexiglass for assisting registered voters; one without plexiglass for assisting new registrants; and one without plexiglass for poll workers collecting absentee ballots.



Poll workers had the use of only one unisex bathroom, which was never cleaned throughout the day. This set-up meant that poll workers were forced to come in close contact with both each other and voters.” *Id.* ¶ 5.

The failure to prepare and deliver absentee mail-in ballots timely or at all constitutes a complete denial of a voter’s right to cast a ballot, where voters cannot safely vote in person due to the Covid-19 pandemic. Accordingly, the burden on the right to vote is the most severe imaginable, while the state has zero legitimate interest in disenfranchising a voter who does not timely receive an absentee ballot in the mail. Indeed, it is the state’s statutory obligation to process that absentee ballot request and timely delivery a ballot via the method requested by the voter. Under the circumstances of the Covid-19 pandemic, there is no “compelling,” “important,” or “legitimate” interest, *Burdick*, 504 U.S. at 434, that can justify this disenfranchisement. The only legitimate state interests that can be asserted here must be directed to Plaintiffs’ proposed remedies for the failure to afford voters a fail-safe option, and we anticipate and address some of those arguments in the subsequent section on Plaintiffs’ proposed remedies.

Plaintiffs, and all voters who timely request an absentee ballot by mail delivery but who do not receive that ballot in the mail, must be granted one or more of the following fail-safes, without which they will not be able to vote safely and free of undue risk and burden. Wisconsin Statutes Section 6.87(3)(d)’s restriction of electronic transmission of mail-in absentee ballots to military and overseas voters—either through the MyVote portal or email delivery—is unconstitutional, given the circumstances of the Covid-19 pandemic. These alternative and fail-safe ballot delivery methods include: (a) the option to request that an absentee ballot be made available to them for electronic access and downloading; (b) the option to request that the ballot be emailed to them; and/or (c) the option to cast a Federal Write-in Absentee Ballot (“FWAB”). Absent this relief,

Defendants have deprived and will continue to deprive Plaintiffs of their rights under the First and Fourteenth Amendments to the U.S. Constitution.

## **ii. Remedies for absentee ballot delivery failures**

The following proposed remedies for the disenfranchisement caused by ballot preparation and delivery failures are intended to serve as last resorts or fail-safes for voters such as Plaintiffs. They should not be used by voters or election officials in the first instance, but rather only after a timely-requested mail-in absentee ballot does not arrive in the mail. In that event, voters such as Plaintiffs must be afforded a fail-safe alternative: (a) accessing and downloading a mail-in absentee ballot, *e.g.* through myvote.wi.gov, (b) delivery of the ballot by email, or (c) permission to vote the FWAB used already by overseas civilian and military voters. Granted, these solutions to the constitutional problem of ballot preparation and delivery failures that continue to threaten Wisconsin voters with disenfranchisement will not work for all voters. This remedy is necessary, but not sufficient, to address all absentee ballot delivery failures. Voters who lack access to a computer, a printer, the Internet, or friends, family, and neighbors with the same will not be able to avail themselves of these proposed remedies. However, these remedies would cure the constitutional violation as to *many* voters and allow those voters to cast a ballot safely and timely.

Replacement absentee ballots can be requested up until the Thursday deadline for requesting absentee ballots generally. Wis. Stat. § 6.86(5); Wis. Stat. § 6.86(1)(b); Sherman Decl., Ex. 2, Wolfe Tr. at Wolfe Tr. at 145:9-20. All absentee ballot certificate envelopes bear a unique identifying number and bar code, and clerks will cancel the previously-requested absentee ballot, so there is a safeguard that prevents the voter from casting two ballots. Sherman Decl., Ex. 2, Wolfe Tr. at 149:15-151:7; 169:20-170:6; Salas Decl. ¶ 13 (“When a military or overseas voter accesses their absentee ballot online at myvote.wi.gov, they also access the statutorily prescribed certificate according to Wis. Stats. 6.87(2) which contains their name, address and ward. This

certificate contains a unique identification number and bar code assigned by the WisVote system.”); *id.* ¶ 13 (“In the rare instance where more than one certificate envelope containing a marked ballot is received from an individual voter, the unique identification number assigned by the WisVote system in addition to multiple procedural safeguards in place according to WEC rules and Wisconsin Statutes prevent more than one ballot from being counted.”); *id.* ¶ 11 (“The WisVote system allows only one ballot to be recorded as returned.”). A voter is entitled to up to three replacement ballots. Wis. Stat. § 6.80(2)(c).

### **1. Accessing and Downloading Mail-In Absentee Ballots**

Mail-in absentee ballots are delivered or made available to voters in a few different ways. Domestic civilian voters can receive mail-in ballots by mail delivery only. Wis. Stat. § 6.87(3)(a); Wolfe Tr. at 133:5-11. Military and overseas civilian voters can receive an absentee ballot by fax or email delivery. Wis. Stat. § 6.87(3)(d).<sup>38</sup> In addition to these delivery methods, since 2012, all overseas civilian and military voters have been able to access their mail-in absentee ballots themselves online at myvote.wi.gov, download them for marking, and return them by mail. Wis. Stat. § 6.87(3)(d); Wolfe Tr. at 130:21-131:14.<sup>39</sup> Wisconsin law restricts the ability to electronically access and download a mail-in absentee ballot to military and overseas voters. Wis. Stat. § 6.87(3)(d). Requests for online access to a mail-in absentee ballot must be selected at myvote.wi.gov; a municipal clerk’s office cannot facilitate the online access. Wolfe Tr. at 130:21-131:14; 136:20-139:19.

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<sup>38</sup> Technically, as previously noted, until the Seventh Circuit issues the mandate in *Luft v. Evers*, email and fax delivery will continue to be available to regular absentee voters.

<sup>39</sup> Sherman Decl., Ex. 19, Wisconsin Elections Commission, MyVote Wisconsin: A Guide to the MyVote Wisconsin Website for Voters and Clerks, at 20-21, [https://elections.wi.gov/sites/elections.wi.gov/files/publication/65/myvote\\_manual\\_sept\\_2016\\_pdf\\_21316.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/publication/65/myvote_manual_sept_2016_pdf_21316.pdf).

This process is automated and does not require municipal clerks to do any work to deliver a mail-in absentee ballot and the envelope's certificate to a military or overseas voter. This method of ballot "delivery" shifts the burden from the municipal clerk's office staff to the voter by permitting the voter to access their ballot at any time after their request is completed and processed. *See generally supra* note 39; Sherman Decl., Ex. 2, Wolfe Tr. at 134:2-135:20 (outlining online access and downloading process step by step from voter's perspective); 151:8-152:9 (same). When asked what work, if any, the municipal clerk's office has to do when a request for online access and downloading is made, Meagan Wolfe, WEC's Administrator, responded: "Nothing. They do nothing. So it's all a voter initiated process." Sherman Decl., Ex. 2, Wolfe Tr. at 137:5-12. Ms. Wolfe also testified that the ballot and the certificate are automatically generated by the MyVote portal and also testified that this online access and downloading function at myvote.wi.gov draws on geocoded districts and wards, as well as pre-loaded candidate slates, in WisVote and can therefore automatically generate a ballot specific to the voter's residence and a certificate for the envelope, without necessitating any further work from the municipal clerk's office. Sherman Decl., Ex. 2, Wolfe Tr. at 137:16-139:19, 140:8-143:17. The Commission has already geocoded districts and imported candidate data for each election, so the ballot and certificate can be produced automatically, without any action by the municipal clerks' offices. *See id.*; *id.* at 139:18-19 ("We're able to generate it using data that we have."). The municipal clerks' offices do not have to create a mailing label, provide or stuff an envelope, pay for postage, enter any data, or deliver a ballot. Wolfe Tr. at 146:14-147:6.

Current and former municipal clerks in Madison, Racine, and Kenosha concur with this assessment. Maribeth Witzel-Behl in Madison writes that:

There is nothing that our office needs to do to enable online access and download of a mail-in absentee ballot through myvote.wi.gov. The real benefit of this method is that it puts the burden on the voter to access their ballot; we do not have to send it to them and it will not get caught in email spam filters. In processing the ballot request and making the ballot

available for download through myvote.wi.gov, the system automatically draws on the voter's records in the WisVote database and generates a ballot for that voter's residential address and ward. So we do not need to assemble the ballot and certificate, print a mailing label, affix a label, or affirmatively mail or email the ballot.

Witzel-Behl Decl. ¶ 10. All three current and former clerks from Madison, Racine, and Kenosha endorse extending online access and downloading to regular absentee voters. Ms. Witzel-Behl in Madison writes: "Of the three methods Plaintiffs have proposed to ensure voters have a way to safely cast a ballot during this pandemic, I prefer extending the online access and download option to all registered Wisconsin voters, but any of the methods will be preferable to mailing replacement ballots." *Id.* ¶ 15. Tara Coolidge in Racine and former Kenosha City Clerk-Treasurer<sup>40</sup> Debra Salas endorses this method of ballot delivery for all the same reasons. Coolidge Decl. ¶¶ 8-12; Salas Decl. ¶¶ 11-13, 17-18. The sole task the municipal clerk's office would need to complete for a regular absentee voter to secure a replacement ballot through online access on the MyVote portal online is to cancel the prior request for a mail-delivered ballot. Sherman Decl., Ex. 2, Wolfe Tr. at 143:22-144:17; *see also* Witzel-Behl Decl. ¶ 12 ("[W]e would need to cancel the outstanding ballot in the state system and deactivate the voter's absentee request. The voter could then go to myvote.wi.gov to submit a new request and request a ballot by online access and downloading."). Ms. Coolidge in Racine notes that this would be a simple and quick task: "If a voter has previously requested that the ballot be delivered by mail, for example, but did not receive it, a member of my staff would have to log onto WisVote to manually cancel the outstanding ballot. This would take just a few minutes for each voter." Coolidge Decl. ¶ 11.

The former Kenosha City Clerk-Treasurer helpfully describes the process from end to end as follows:

When a military or overseas voter accesses their absentee ballot online at myvote.wi.gov, they also access the statutorily prescribed certificate according to Wis. Stats. 6.87(2) which contains their name, address and ward. This certificate contains a unique identification

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<sup>40</sup> This is the same as a City Clerk.

number assigned by the WisVote system. The voter is instructed to affix this certificate to the sealed envelope containing their voted ballot. No matter how many times the ballot is accessed and printed, the identification number on the certificate will be the same. When the envelope containing the voted ballot is received, the unique identification number is scanned into the WisVote system confirming that the ballot has been received. On election day, the envelopes received, containing the voted ballots, are submitted to the Absentee Board of Canvassers for counting. The canvassers view the certificate, announce the name and address of the voter, assign a number, write the number on the certificate envelope and in the ballot log next to the voter's name and address. They view each envelope, one at a time, and perform the same procedure for each certificate envelope. The certificate envelopes are then opened. The canvassers remove the ballots and place the envelopes in a sealed container. Then ballots are then inserted into the voting machines for tabulation. Once tabulated, the ballots are removed from the voting machine and placed into the ballot container according to Wisconsin Statutes Section 7.52(4)(g).

Salas Decl. ¶ 13.

WEC Administrator Wolfe has represented that permitting regular absentee voters who are not in the military or overseas to access replacement mail-in ballots at myvote.wi.gov will require these voters to submit photo IDs and municipal clerks to verify photo IDs. Wolfe Tr. at 133:13-134:1; 154:2-5 (“There would have to be a measure in there where the clerk verifies their photo ID and makes sure that they're able to access a ballot.”); 155:10-17 (“[T]hey would have to be able to upload their photo ID which would then have to be sent to the clerk to be able to review . . . before the voter would be able to complete actually getting their ballot electronically.”); 159:2-3 (“Yes, that’s correct plus the transmission of the photo ID.”). This is not so. These requests are for replacement mail-in ballots, so all of the regular voters who utilize this option will have already had their uploaded or submitted photo IDs verified. Otherwise, they would never have had their initial request for a mail-delivered ballot processed. *See* Salas Decl. ¶ 14 (“If this online access system is extended to domestic civilian absentee voters when requesting a replacement mail-in ballot, acceptable photo ID will already be on file in the WisVote system because their previous request for a mail-delivered ballot was processed.”). All the clerk’s staff need to do is cancel that prior request, permitting the voter to submit a new request, but the voter’s previously-submitted photo ID will still be on file in WisVote, the statewide voter information database, and will show

as previously-verified. Ms. Wolfe also testified that the MyVote portal and WisVote workflows for online access and downloading would need to be bifurcated because regular voters must submit photo ID, but military and overseas voters are exempt. Wolfe Tr. at 165:18-166:1; Wis. Stat. § 6.87(1). Plaintiffs agree that the system would need to be able to distinguish regular from military and overseas voters, but since all regular absentee voters taking advantage of this delivery method would be requesting a replacement ballot, the WisVote and MyVote systems can simply confirm that there is already a verified photo ID on file for regular domestic civilian voters. Even if it is bifurcated on the back end, the process can still be fully automated as to photo ID verification.

Furthermore, this system is secure. As election security and cybersecurity expert Matthew Bernhard explains in his declaration, Plaintiffs’ proposed relief of online access and downloading a ballot through MyVote “does not pose any additional security risk to Wisconsin elections.” Bernhard Decl. ¶ 8. Mr. Bernhard bases this opinion

on four facts: (1) the subset of voters who will have access to the proposed relief is limited; (2) the voters who can use the proposed relief will have been authenticated already and will also have to authenticate to MyVote using additional credentials; (3) the WEC has robust, defense-in-depth procedures for preventing fraud in absentee ballots; and (4) fraud in elections in the United States and in Wisconsin in particular is so rare as to be functionally non-existent.

*Id.* ¶ 9.

First, “[v]oters who gain the ability to download a ballot through MyVote will only be able to do so if they have previously requested and not received an absentee ballot via mail, and only if they do so within a specified window of time. Limiting the use of MyVote’s mail-in absentee ballot portal in this way is a well-established security practice in election security literature.” Bernhard Decl. ¶ 10.

Second, voters using the system will already be authenticated and then provided more authenticating information. “While there is no evidence that voter ID requirements have an impact on the prevention of voter fraud, voters who will use MyVote to access a replacement absentee

ballot will have already met the voter ID requirements in Wisconsin. These voters will thus have reached a higher bar of authentication than military and overseas voters, who are exempt from the photo identification verification requirement.” Bernhard Decl. ¶ 10. Additionally, MyVote portal users must enter their name, date of birth, and the last four digits of their Social Security Number in order to access their ballot online at myvote.wi.gov. Wolfe Tr. at 156:16-21. As Mr. Bernhard explains, “[t]he MyVote portal already uses standard identity authentication information by requiring the voter input their name, date of birth, and the last four digits of their Social Security Numbers (which have been established as the most secure part of SSNs by Acquisti and Gross).” Bernhard Decl. ¶ 12.

Asked whether she thought MyVote’s online ballot access portal was secure, Ms. Wolfe responded: “Yes, and there’s only, you know, one point of that data exchange, right, for them because there isn’t that intermediary step but, yes, we -- we consider it to be very secure.” Sherman Decl., Ex. 2, Wolfe Tr. at 157:2-9. However, because photo ID will already be on file and will already have been verified for a voter requesting a *replacement* ballot, it is unclear why Ms. Wolfe thinks the system will need an “intermediary step” to verify ID or be less secure if MyVote and WisVote are reprogrammed simply to confirm that this is a replacement ballot for a voter who (necessarily) has a photo ID on file. Sherman Decl., Ex. 2, Wolfe Tr. at 158:16-21. As Mr. Bernhard concludes, the MyVote website could be programmed to require only one data transaction that verified the voter’s identity and voter ID on file in one step. For a voter whose ballot does not arrive in the mail and requests online access, “[t]he MyVote page would then have to confirm that a photo ID verification had already taken place, which it can do in the same check it performs on the voter’s name, date of birth, and the last 4 digits of their SSN, and then build and send a ballot back to the voter. This should only require one transaction of PII, not two as indicated by Administrator Meagan Wolfe in her deposition.” Bernhard Decl. ¶ 13. He adds: “Since the



proposed relief would require only one transaction with personally identifiable information (PII), it will be functionally the same as the existing workflow.” Bernhard Decl. ¶ 14.

Third, Mr. Bernhard believes a few other features of the MyVote portal create additional security: (1) “The MyVote portal prohibits the ability to download the ballot more than three times. While this does not preclude the ability to copy the ballot once downloaded, it is a robust safeguard that balances the voter’s right to ballot access against the risk of any security breach, however remote or unlikely to affect the election,” Bernhard Decl. ¶ 15; (2) “Voters’ requests to use the portal will also result in their clerk cancelling their existing mail ballot request, eliminating the possibility that a voter can have multiple live ballots issued at once, and therefore eliminating any opportunity for double voting,” *id.* ¶ 16; and (3) “[A]ccess to the portal for replacement ballots could be further limited in time restricts the access to the system even more. It is unlikely that actors seeking to commit fraud would be able to take advantage of the MyVote portal, for the aforementioned reasons, but also because a week is not enough time to fraudulently access and submit a substantial number of fraudulent ballots,” *id.* ¶ 17.

Finally, Ms. Wolfe testified that she knows of no instance in which a ballot was fraudulently accessed and/or voted using MyVote’s online access portal. Sherman Decl., Ex. 2, Wolfe Tr. at 160:17-161:4. The municipal clerks also agree that the system is secure and go farther to say that modification would not undermine its security. Racine City Clerk Tara Coolidge concurs that the system is secure: “I believe this to be a very secure and reliable method for voters to obtain their absentee ballots.” Coolidge Decl. ¶ 8; *see also* Salas Decl. ¶ 11 (“The voter securely accesses their certificate in PDF format, bearing their name, address and voter number and the PDF ballot for their ward and the instructions.”).

All online-accessed and downloaded ballots must be “duplicated or re-made” or “re-create[d]” on an official absentee ballot in order for it to be scanned by a voting machine. Witzel-

Behl ¶ 14; Coolidge Decl. ¶ 9; Salas Decl. ¶ 16. However, current and former clerks from Madison, Racine, and Kenosha do not believe this additional back-end work should preclude a front-end solution to the problems observed with absentee ballot delivery across Wisconsin. Racine City Clerk Tara Coolidge contends that as long as her office has some “advance notice of how many downloaded absentee ballots have been requested and are to be expected for each polling location,” then she “do[es] not foresee any difficulties in staffing polling places to adequately process such ballots once they are cast.” Coolidge Decl. ¶ 9. She adds that while “[t]his alternative would pose some minor inconvenience on the back end,” she “believe[s] that any inconvenience to [her] staff and poll workers would be far outweighed by the value to voters.” *Id.* ¶ 10. Ms. Witzel-Behl in Madison strongly dismisses the notion that administrative burden should outweigh voters’ access to an absentee ballot in a safe and secure manner: “We already do this for many ballots, but the volume will increase if these back-up options are required by the Court. This would pose some minor inconvenience on the back end, but I want to state clearly that, in my view, the value to voters who are trying to vote—and vote safely—would far outweigh any inconvenience or burden to my staff and those canvassing ballots at polling places.” Witzel-Behl Decl. ¶ 14; *see* Salas Decl. ¶ 16 (noting additional ballot duplication would “only pose minor inconvenience”).

Finally, Ms. Witzel-Behl and Ms. Coolidge in Madison and Racine, respectively, both note that every voter they can help successfully cast an absentee ballot is one less voter who needs to vote in person, adding to long lines and straining election administration resources that are in short supply. Witzel-Behl Decl. ¶ 14 ; Coolidge Decl. ¶ 10 (“[E]very voter we permit to vote by mail is a voter who does not show up at the polls, straining our already-taxed in-person voting resources in an environment with far fewer poll workers and potentially increasing the risk of Covid-19 transmission.”); Salas Decl. ¶ 17.

## 2. Email Delivery of Mail-In Absentee Ballots

If a voter uses myvote.wi.gov, then mail delivery of the absentee ballot is the default and only option for a domestic civilian voter. If, however, a voter fills out the statewide absentee ballot request form, Form EL-121, seeking a mail-in absentee ballot, then the voter is offered a selection of three methods of delivery: mail, fax, or email.<sup>41</sup> For each delivery option, the voter is required to write in the address to which the ballot should be mailed, their fax number, or their email address.<sup>42</sup> Some registered voters will have already provided their email address upon registering to vote, such that it is in their voter registration record.<sup>43</sup>

Wisconsin's municipal clerks gained the authority to deliver mail-in absentee ballots to domestic civilian voters by email or fax in this Court's decision in *One Wisconsin Institute v. Thomsen* in 2016. 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016), which invalidated the statutory ban on emailing or faxing mail-in absentee ballots to domestic civilian voters and is on appeal. That decision has been reversed, restoring the ban, and will be officially vacated once the Seventh Circuit issues the mandate. While it was in effect though, *One Wisconsin Institute* appears to have left the decision as to whether to email or fax ballots to the sole discretion of Wisconsin's 1,850

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<sup>41</sup> Sherman Decl., Ex. 20, Wisconsin Elections Commission, Form EL-121, Wisconsin Application for Absentee Ballot, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/EL-121%20Application%20for%20Absentee%20Ballot%20%282018-10%29.pdf>; Sherman Decl., Ex. 21, Wisconsin Elections Commission, Clerk Instructions for Emailing and Faxing Ballots to Mail-in Absentee Voters (last updated June 2018), [https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/faxing\\_or\\_emailing\\_absentee\\_ballots\\_to\\_uocava\\_vote\\_83593.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/faxing_or_emailing_absentee_ballots_to_uocava_vote_83593.pdf).

<sup>42</sup> Sherman Decl., Ex. 20, Wisconsin Elections Commission, Form EL-121, Wisconsin Application for Absentee Ballot, <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/EL-121%20Application%20for%20Absentee%20Ballot%20%282018-10%29.pdf>.

<sup>43</sup> Sherman Decl., Ex. 22, Wisconsin Elections Commission, Form EL-131, Wisconsin Voter Registration Application, [https://elections.wi.gov/sites/default/files/publication/154/el\\_131\\_voter\\_registration\\_application\\_pdf\\_23730.pdf](https://elections.wi.gov/sites/default/files/publication/154/el_131_voter_registration_application_pdf_23730.pdf).

municipal clerks—it struck down a ban, but did not mandate anything.<sup>44</sup> Even though it appears from the face of Form EL-121 that a voter can request email delivery upon their initial request, *i.e.* in the first instance and not just as a back-up, WEC construes these emailed ballots as replacement ballots and, therefore, only permits requests for email or fax delivery up until the regular deadline for mail-in absentee ballots, *i.e.* 5:00 p.m. on the Thursday before Election Day.<sup>45</sup>

According to municipal clerks, regular absentee voters really valued and came to rely on the availability of email delivery. Recently-retired Kenosha City Clerk-Treasurer Debra Salas expects the office will continue to receive email delivery requests for the November election: “Despite the Seventh Circuit’s recent decision, once again restricting email delivery of absentee ballots to military and overseas voters, it is anticipated that many regular voters will request email delivery of absentee ballots for the November general election. For some regular voters, particularly voters temporarily away, or in counties with unreliable mail delivery, receiving a ballot via email was the only way to guarantee the voter would have an adequate amount of time to send their ballot back to the City Clerk’s Office.” Salas Decl. ¶ 10.

The procedure for emailing absentee ballots requires municipal clerks to “print their initials in the endorsement section of the ballot and on the face of the ballot and scan the initialed ballot” and then email the voter the initialed ballot, the absentee ballot certificate envelope, and the Uniform Instructions for Absentee Voters.<sup>46</sup> WEC’s instructions on how the voter should be directed to print, cast, and mail the ballot state:

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<sup>44</sup> Sherman Decl., Ex. 23, Wisconsin Elections Commission, Uniform Instructions for Absentee Voting, at 2, <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Uniform%20Instructions%20for%20Absentee%20Voting%20-%20All%20Voters%20%20%28Rev.%202-2019%29.pdf>.

<sup>45</sup> *Id.* (“A voter may request that a replacement ballot be faxed or emailed to him or her. The ballot must be returned to the municipal clerk no later than 8:00 p.m. on Election Day. The ballot may not be returned to the municipal clerk by fax or email.”) (emphasis added).

<sup>46</sup> Sherman Decl., Ex. 21, Wisconsin Elections Commission, Clerk Instructions for Emailing and Faxing Ballots to Mail-in Absentee Voters (last updated June 2018),

The elector should be instructed to print the ballot, vote the ballot in the presence of a witness, fold the ballot and seal it inside a regular, non-window envelope, complete and sign the absentee certificate. An adult U.S. citizen witness must sign and provide his or her address on the certificate. Military or permanent overseas voters should provide their birthdate. The certificate should be affixed (with glue or tape) to the envelope containing the voted ballot. The envelope with the certificate attached should be placed into another, larger, envelope, sealed and mailed to the municipal clerk. The ballot must be received by 8 p.m. on Election Day.<sup>47</sup>

The WEC's instructions continue to explain that "[t]he absentee elector must return the hard copy of the ballot and the completed certificate to the municipal clerk in time so that the clerk can deliver the ballot to the polling place before the close of the polls."<sup>48</sup> Ms. Salas, the former Kenosha City Clerk, provides additional detail for this process:

To send an absentee ballot by email, the absentee ballot label which bears the voter's name, address and voter registration number, generated from WisVote, is applied to a scan of the front of the certificate envelope. After the label is applied to the certificate it is scanned as a PDF. Then the appropriate ballot for the voter's ward is initialed and scanned as a PDF. These two PDF documents, along with a PDF containing instructions are delivered as attachments to an email message. The voter is instructed to print out all of the attachments, mark their ballot, insert it in a plain envelope, and seal it. Then the voter is instructed to affix the certificate to the outside of that envelope. Once the voter has signed the certificate and obtained the signature and address of a witness, they must place the envelope with the certificate attached to the outside, into a larger envelope and mail it to the City Clerk's Office. One benefit of this delivery method is it ensures delivery to the voter, and the voter receives the ballot much faster.

Salas Decl. ¶ 10.

The WEC's instructions on email delivery of ballots notes that USPS does not think it can guarantee on-time delivery unless it is afforded a week. The USPS recommends that ballots be mailed one week prior to the date of the Election to arrive on time.<sup>49</sup> The elector may choose overnight delivery to assure that their ballot arrives on time.<sup>50</sup> The municipal clerk is not

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[https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/faxing\\_or\\_emailing\\_absentee\\_ballots\\_to\\_uocava\\_vote\\_83593.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/faxing_or_emailing_absentee_ballots_to_uocava_vote_83593.pdf).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

responsible for return postage of a faxed or e-mailed absentee ballot.<sup>51</sup> “When absentee ballots are returned to the clerk’s office, the municipal clerk records the information is recorded in WisVote or their WisVote Provider.”<sup>52</sup> “The municipal clerk records the date absentee ballots are faxed or e-mailed to voters in WisVote or forwards the information to their WisVote Provider.”<sup>53</sup> The clerk encloses the envelope holding the ballot into a certificate envelope and attaches the completed certificate to the outside. The clerk then delivers the ballot to the appropriate polling place in a carrier envelope.”<sup>54</sup> “At the polling place, the election inspectors follow the procedures for processing absentee ballots. The ballot may be remade by 2 election inspectors in order for the ballot to be accepted by electronic tabulating equipment.”<sup>55</sup>

Upon information and belief, every one of Wisconsin’s 1,850 municipal clerks exercises their discretionary authority on email delivery of absentee ballots differently. Some advertise this delivery option; some do not. Some will deliver ballots by email; some will not, even close to Election Day or the effective deadline to mail the ballot so that it is received in time to be counted. And there are of course variances between staff members within a municipal clerk’s office.

Nevertheless, in the 2016 fall general election, Wisconsin municipal clerks emailed voters 9,619 absentee ballots, and 7,231 voters returned those absentee ballots by mail.<sup>56</sup>

The municipal clerk is required to enter absentee applications and ballot information into the WisVote system maintained by the Commission within 48 hours after mailing or receiving an in-person absentee ballot application. Wis. Stat. § 6.33(5). Or, in the case where the municipality relies on the county or another municipality, the clerk shall submit the information to the clerk’s

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Sherman Decl., Ex. 3, Wisconsin Elections Commission, Absentee Ballot Report (Nov. 8, 2016), <https://elections.wi.gov/node/4397>.

WisVote provider, and the provider shall enter the absentee information into the WisVote system within 24 hours. Wis. Stat. § 6.33(5).

The failures of Defendants, municipal clerks, and the USPS to keep up with the unprecedented, gargantuan demand for mail-in absentee ballots during this COVID-19 pandemic cries out for the alternative option of email delivery of absentee ballots. It need not and should not be a first resort; it is a last resort. However, to prevent disenfranchisement when ballots fail to arrive timely in the mail such that voters can timely vote and return them, Plaintiffs respectfully request that this Court order Defendants to instruct municipal clerks to email absentee ballots to voters who timely requested those ballots be delivered by mail but did not receive them in time to return them.

Email delivery will greatly alleviate the administrative burden on municipal clerks' offices in mailing out replacement absentee ballots for those previously-issued ballots that did not arrive timely in the mail.

### 3. Federal Write-In Absentee Ballots

There is one other element of absentee voting in Wisconsin that is relevant to the relief Plaintiffs request: the Federal Write-in Absentee Ballot ("FWAB").<sup>57</sup> This is another fail-safe option that would solve the problem of disenfranchisement by delayed delivery. Federal law and Wisconsin law set forth a procedure for military and overseas civilian voters to request and cast absentee ballots. Under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et seq.*, military and overseas civilian voters are able to register to vote and request an absentee ballot with a federal postcard application. 52 U.S.C. § 20301(b)(2).<sup>58</sup> Under

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<sup>57</sup> Sherman Decl., Ex. 24, Federal Write-in Absentee Ballot, <https://www.fvap.gov/uploads/FVAP/Forms/fwab2013.pdf>.

<sup>58</sup> Sherman Decl., Ex. 25, Federal Postcard Application, <https://www.fvap.gov/uploads/FVAP/Forms/fpca2013.pdf>.

UOCAVA, military and overseas voters also must be permitted to cast FWABs as an “Official Backup Ballot”<sup>59</sup> or “back-up measure”<sup>60</sup> to vote in federal races if they do not receive their regular absentee ballot. 52 U.S.C. §§ 20302(a)(3), 20303(a)(1) (“The Presidential designee shall prescribe a Federal write-in absentee ballot (including a secrecy envelope and mailing envelope for such ballot) for use in general, special, primary, and runoff elections for Federal office by absent uniformed services voters and overseas voters who make timely application for, and do not receive, States, absentee ballots.”). State legislatures have the discretion to permit UOCAVA voters to use FWABs to vote in state and local offices or not. 52 U.S.C. § 20303(a)(1).

The ballot is downloadable and printable from this url: <https://www.fvap.gov/uploads/FVAP/Forms/fwab2013.pdf>. The envelope must be assembled by the voter, and the voter fills out both a voter information sheet and the official back-up ballot. “[A] Federal write-in absentee ballot shall be submitted and processed in the manner provided by law for absentee ballots in the State involved.” 52 U.S.C. § 20303(b). If the voter later casts an official state absentee ballot after casting their FWAB, they are instructed to “make every reasonable effort to inform the appropriate State election official that the voter has submitted more than one ballot.” 52 U.S.C. § 20303(d). Wisconsin already accepts and processes the FWAB for overseas civilian and military voters, *even if* they have not previously requested a ballot be delivered by mail. Sherman Decl., Ex. 2, Wolfe Tr. at 185:4-186:12.

Because these are write-in ballots, federal law sets forth specific rules for processing and counting FWABs, specifically:

(1) In completing the ballot, the absent uniformed services voter or overseas voter may designate a candidate by writing in the name of the candidate or by writing in the name of

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<sup>59</sup> Sherman Decl., Ex. 24, Federal Write-in Absentee Ballot, <https://www.fvap.gov/uploads/FVAP/Forms/fwab2013.pdf>, at 3.

<sup>60</sup> 52 U.S.C. § 20303(a)(2).



a political party (in which case the ballot shall be counted for the candidate of that political party).

(2) In the case of the offices of President and Vice President, a vote for a named candidate or a vote by writing in the name of a political party shall be counted as a vote for the electors supporting the candidate involved.

(3) Any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained.

52 U.S.C. § 20303(c).

Regardless, both Wisconsin residents who are temporarily overseas and permanently overseas voters who were last domiciled in Wisconsin can both use FWABs as ballots, at least for federal races, while domestic civilian voters cannot cast FWABs for any race. The principle behind this is that a voter who is overseas will face hardship or potential disenfranchisement if this back-up option is not made available to them. The COVID-19 pandemic now threatens many *domestic* civilian voters with hardship and potential disenfranchisement—their right to vote is entitled to the same protection, given these extreme circumstances.

Affording domestic civilian voters the right to cast FWABs to the same extent as overseas civilian voters and allowing them to use the FWAB for all federal, state, and local races would also cure the constitutional and federal statutory violations caused by the lack of a fail-safe option for voters who request absentee ballots during this pandemic because they cannot safely vote in person and whose absentee ballots never arrive in the mail. Plaintiffs respectfully request that this Court order this as relief in the alternative or in addition to the email delivery of ballots in the narrow circumstance where a voter timely requests a mail-in absentee ballot be delivered by mail but does not receive that ballot.

Both Ms. Witzel-Behl and Ms. Salas represent that “[i]t is not cumbersome or difficult to process these write-in absentee ballots.” Witzel-Behl Decl. ¶ 13; Salas Decl. ¶ 15.

#### **4. Limiting the availability of these remedies by time**

Because these proposed remedies are last resorts, their availability can and should be limited by time—for instance, to the last week before Election Day or even the last few days. This is the busiest time for clerks. With respect to online access and downloading, former City Clerk Ms. Salas notes that the WisVote system can be used to enforce temporal limitations:

The WisVote database records whether a particular voter has previously requested a ballot or not and, because of the U.S. Post Office Intelligent Bar Code, the system identifies whether that ballot is in the mail, and if so, for how long. There are ways to limit the use of this feature for domestic civilian voters and make it available only to those who request a replacement ballot for one that did not arrive in the U.S. mail . . .

Salas Decl. ¶ 13. Municipal clerks are still processing mail-in absentee ballot requests that come in until 5:00 p.m. on the Thursday before Election Day;<sup>61</sup> administering in-person absentee voting through the Sunday before Election Day, Wis. Stat. § 6.86(1)(b); and making preparations for Election Day. Salas Decl. ¶¶ 4-5. Ordering these alternative delivery methods, especially online access and downloading of mail-in ballots through the MyVote portal, would cure the constitutional violations caused by absentee ballot delivery failures during the Covid-19 pandemic, while also alleviating strain on municipal clerks' offices. Municipal clerks would not need to mail any replacement mail-in ballots, unless the voter could not access a ballot online, and USPS advises WEC that it takes seven days for a ballot to be delivered so a replacement ballot might not arrive in time if it is mailed. Sherman Decl., Ex. 2, Wolfe Tr. at 51:7-9.

It should be noted though that many voters will continue to believe their ballot is still in the mail, even after the deadline to request a replacement ballot has passed. Salas Decl. ¶ 17. This deadline is the same as the deadline for any other request for a mail-in absentee ballot: 5:00 p.m. on the Thursday before Election Day. *Id.*; Wis. Stat. § 6.86(5); Wis. Stat. § 6.86(1)(b). For this

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<sup>61</sup> This is the deadline to make any request for an absentee ballot. Wis. Stat. § 6.86(5); Wis. Stat. § 6.86(1)(b); Wolfe Tr. at 139:3-14. If the Court orders this relief to cure the federal constitutional violation for voters who need replacement absentee ballots, it of course need not be bound by this deadline in Wisconsin law.

reason, Ms. Witzel-Behl, Madison's City Clerk, contends that Plaintiffs' proposed "back-up options should also be made available to voters through Election Day." Witzel-Behl Decl. ¶ 15. Racine City Clerk Ms. Coolidge's office "received hundreds of requests for absentee ballots after the cut-off date allowed by law," and these were rejected. Coolidge Decl. ¶ 5. Ms. Coolidge does suggest a deadline earlier than Election Day so that she can reallocate staff to polling places that will need to duplicate more of these online-accessed ballots, but that deadline, if the Court adopted it, need not be long before Election Day. *Id.* ¶ 9.

Additionally, if the Court wanted to preclude a voter from requesting a ballot by mail delivery soon before the deadline and then quickly turning around and requesting a replacement ballot through online access or email delivery, it could limit the ordered relief to voters who requested their ballots via mail delivery a certain number of days in advance of the replacement ballot request seeking online access through the MyVote portal or email delivery. MyVote, which contains the voter's absentee ballot request date, and WEC's adoption of intelligent mail bar codes, which will record when the ballot was mailed to the voter, will enable such an automatic limitation.

### **iii. Witness requirement**

The witness requirement for mail-in absentee ballots has become unduly burdensome because of the Covid-19 pandemic. The key word is "unduly": a voting regulation is unconstitutional if the burdens it imposes far outweigh its efficacy in advancing the state's interests. *See Thomas*, 2020 WL 2617329, at \*21 ("Thomas/Middleton Plaintiffs are likely to prevail on their constitutional challenge to the Witness Requirement under the *Anderson-Burdick* balancing test because the character and magnitude of the burdens imposed on Thomas/Middleton Plaintiffs in having to place their health at risk during the COVID-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity."); *see also id.* at \*19 ("[T]he Witness Requirement further burdens [Plaintiffs] from

exercising their right to vote by absentee ballot by requiring them to expose themselves to other people in contravention of maintaining safe social distancing practices”). Here, the Organizational Plaintiffs, not the Individual Plaintiffs, seek to enjoin the witness requirement.

All absentee ballots must be witnessed and signed by an adult U.S. citizen (other than those cast by military and overseas voters, whose absentee ballots may be witnessed by an adult who is not a U.S. citizen), but that individual need not be a resident of Wisconsin or a registered voter in the state. Wis. Stat. § 6.87(4)(b)1.<sup>62</sup> The witness requirement applies to all absentee voters, regardless of the particular method by which the voter cast that absentee ballot. *Id.* The absentee ballot certificate contains both a voter certification and a witness certification, which the voter and witness must respectively sign under penalty of perjury.<sup>63</sup>

Because Wisconsin law requires that mail-in absentee ballots’ certifications be signed by the voter and by a witness who is an adult U.S. citizen,<sup>64</sup> this requirement forces voters to engage someone outside their household and thereby take a risk with their health in order to cast a ballot that will be counted. All eligible Wisconsin voters who live alone or who do not have an adult U.S. citizen in their household, but particularly those who are at higher risk from Covid-19, will struggle to safely satisfy the witness requirement through reasonable efforts. According to the U.S. Census Bureau’s 2018 American Community Survey 5-Year Estimates, there are over 675,000 single-member households in Wisconsin, and many other households that include only one adult, and more than 250,000 of these single-member households are individuals over the age of 65.<sup>65</sup>

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<sup>62</sup> Sherman Decl., Ex. 26, Wisconsin Elections Commission, Form EL-122, Standard Absentee Ballot Certificate, WIS. ELECTIONS COMM’N, *available at* [https://elections.wi.gov/sites/elections.wi.gov/files/gab\\_forms/4/el\\_122\\_standard\\_absentee\\_ballot\\_certificate\\_portra\\_17554.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/gab_forms/4/el_122_standard_absentee_ballot_certificate_portra_17554.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> As noted previously, for military and overseas voters, the witness need not be a U.S. citizen.

<sup>65</sup> Sherman Decl., Ex. 27, U.S. Census Bureau, *2018 American Community Survey 5-Year Estimates*, Table S2501, Occupancy Characteristics, *available at* <https://data.census.gov/cedsci/all?q=S2501&hidePreview=false&tid=ACST1Y2018.S2501>.

The Organizational Plaintiffs LWVWI and Wisconsin Alliance move for injunctive relief against the witness requirement.<sup>66</sup> Under *Havens Realty* and *Common Cause Indiana*, 937 F.3d at 952, the Organizational Plaintiffs LWVWI and Wisconsin Alliance are severely burdened by the witness requirement. Voters, particularly those who are at higher risk from Covid-19 and who live alone, struggle with how to safely comply with this requirement and often require assistance to navigate the process and secure a signed witness certification. Civic engagement organizations like Plaintiffs LWVWI and Wisconsin Alliance have been compelled to divert organizational resources away from their core mission activities to educate and help voters comply with this requirement that is ill-suited to a pandemic. *Havens Realty*, 455 U.S. at 379; *see also Common Cause Indiana*, 937 F.3d at 952 (agreeing with sister circuits which “upheld the standing of voter-advocacy organizations that challenged election laws . . . [and] demonstrated the necessary injury in fact in the form of the unwanted demands on their resources.”). LWVWI and Wisconsin Alliance have already expended resources, time, and money educating and helping voters that would not need help but for the unconstitutional enforcement of the witness requirement and will continue to do so through the November general election. Cronmiller Decl. ¶¶ 9, 11-12; Mitchell Decl. ¶¶ 11-14. “For the April 7, 2020 election, LWVWI fielded calls, texts, emails, and social media messages from voters who were struggling to comply with the witness requirement, and LWVWI members offered to help voters by serving as Plaintiffs’ witnesses.” Cronmiller Decl. ¶ 9. For the November election, “LWVWI will be working with local Leagues and municipal clerks to identify volunteers to serve as witnesses and possibly staff absentee drop-off locations.” *Id.* ¶ 12. And Wisconsin Alliance will be diverting staff time and resources “to produce, publish, and distribute educational literature and materials on voting in the November election,” which will

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<sup>66</sup> Plaintiffs Claire Whelan and Sylvia Gear do not move for a preliminary injunction on this claim at this time.

discuss how to navigate the witness signature requirement. Mitchell Decl. ¶ 14. None of these actions would be necessary if Defendants were not enforcing this requirement during a global pandemic.

It is patently unreasonable to require voters to engage in such a process to comply with the witness requirement when there are reasonable alternatives such as this Court’s own injunction providing a certification alternative or the Seventh Circuit’s panel suggestion of remote witnessing with the recording of a witness name, without a physical signature from that witness. Because the enforcement of the requirement during a pandemic is unreasonable as compared to its potential benefits to the state, the Organizational Plaintiffs LWVWI and Wisconsin Alliance are likewise injured because these organizations have diverted and will continue to divert resources, staff time, and money to educate and help voters who are struggling and/or unable to safely comply with the witness requirement through reasonable efforts.

The burdens imposed on voters forced to comply with the witness requirement during the Covid-19 pandemic far outweigh any benefit Defendants derive from it in seeking to deter, prevent, detect, or prosecute electoral fraud. Restrictions on voting must, *at a minimum*, further a legitimate state interest—it must be “necessary to burden the plaintiff’s rights.” *Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983). The prevention of voter fraud is an important regulatory interest of Defendants, but any law designed to prevent voter fraud must be tailored to the burdens it imposes. *See Norman v. Reed*, 502 U.S. 279, 289 (1992); *Fish v. Schwab*, 957 F.3d 1105, 1132 (10th Cir. 2020) (observing that “the Secretary points to no concrete evidence that ‘[its] interests make it necessary to burden the plaintiff’s rights’ in this case”). Here, the witness requirement is not an effective tool to safeguard election integrity and, therefore, the state’s interest is greatly attenuated.

More specifically, preventing and prosecuting voter fraud are legitimate interests, but the witness requirement has extremely limited law enforcement value. In his declaration, Marshall Tutor, a long-time election fraud investigator in North Carolina, debunks the notion that the witness requirement prevents absentee ballot fraud or can substantially assist law enforcement in detecting and prosecuting fraud. Tutor Decl. ¶ 9 (“I do not believe a two-witness signature requirement in any way prevents potential fraud such as that conducted by Mr. Dowless’ illegal ballot fraud activities. In my 15 years’ experience as an investigator with the State Board of Elections, I cannot think of a time or situation in which two absentee ballot witness signatures would have prevented absentee ballot fraud.”). Additionally, Mr. Tutor notes that a witness signature is easily forged so as to evade detection. *Id.* ¶ 6 (“I never detected a forgery just by reviewing the face of the absentee ballot envelope.”).

Even if the state identifies a legitimate state interest, the voting regulation cannot be unreasonable or irrational. The state’s own guidance on the witness requirement makes plain how unreasonable the requirement is during a pandemic.<sup>67</sup> They want elderly people with multiple Covid-19 risk factors who live alone to ask a neighbor or postal worker or Meals on Wheels volunteer to observe them voting through a window or glass door and then pass the ballot under a closed door or through a crack in an open window to be marked, signed, and returned after handwashing or sanitizing.<sup>68</sup> This is, on its face, an unreasonable proposition, and the state’s confusing guidance on the subject is requiring civic engagement organizations like the Organizational Plaintiffs LWVWI and Wisconsin Alliance to assist voters who live alone. This rigmarole and diversion of civic engagement organizations’ resources, money, and time could only

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<sup>67</sup> Sherman Decl., Ex. 28, Wisconsin Elections Commission, Absentee Witness Signature Requirement Guidance (Mar. 29, 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Absentee%20Witness%20Guidance.pdf>.

<sup>68</sup> This procedure of course is not possible for individuals living in an apartment above the ground floor.

be justified by a requirement that held unmistakable benefits for law enforcement, but as a former chief election fraud inspector has stated in his declaration, there is no such clear benefit. Tutor Decl. ¶ 9. Instead of requiring a physical signature on the ballot, this Court could order, at the Seventh Circuit’s suggestion, remote witnessing and compel voters to record the name and address of the witness on the ballot’s certificate envelope. This would satisfy the state’s attenuated interest, while greatly alleviating the burden on groups like LWVWI and Wisconsin Alliance to physically travel to a voter’s home in order to assist them. It would also be far easier to educate the public on remote witnessing than on how to stay safe while witnessing a ballot in person.

Further, Wisconsin law establishes other, less burdensome means that sufficiently safeguard election integrity. For example, it prohibits “[f]alsely mak[ing] any statement for the purpose of obtaining or voting an absentee ballot under ss. 6.85 to 6.87.” Wis. Stat. § 12.60(3)(i). Violators face a \$1,000 fine and up to 6 months in prison. *Id.* § 12.60(1)(b). Additionally, Form EL-121, one of the ways by which voters may request an absentee ballot, states that “[a]bsentee ballots may not be forwarded”<sup>69</sup> or sent to a P.O. Box,<sup>70</sup> thereby reducing the risk of someone other than the voter obtaining and casting the ballot. It also requires applicants to provide their name as it appears on their voter registration and their birthdate,<sup>71</sup> which are used to verify the voter’s identity. Voters must also sign the following statement: “I certify that I am a qualified elector, a U.S. Citizen, at least 18 years old, having resided at the above residential address for at least 10 consecutive days immediately preceding this election, not currently serving a sentence including probation or parole for a felony conviction, and not otherwise disqualified from voting.”<sup>72</sup>

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<sup>69</sup> Sherman Decl., Ex. 20, Form EL-121, *Wisconsin Application for Absentee Ballot*, WIS. ELECTIONS COMM’N 1 (Oct. 2018), *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-07/EL-121%20Application%20for%20Absentee%20Ballot%20%282018-10%29.pdf>.

<sup>70</sup> *Id.* at 2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1.



While states need not wait for an election problem to arise before addressing it through legislation, voting regulations cannot be upheld if they are patently ineffective at advancing the state's proffered interest. *Cf. Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 606 (4th Cir. 2016) ("In conducting the *Anderson-Burdick* analysis, the Court found that Indiana had a valid interest in adopting standards that aligned with federal election statutes, including HAVA, where Congress had indicated a belief that 'photo identification is one *effective* method of establishing a voter's qualification to vote.'" (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193 (2008)) (emphasis added).

Therefore, under these circumstances of this pandemic, Section 6.87(4)(b)1. now creates an undue burden on LWVWI and Wisconsin Alliance in violation of the First and Fourteenth Amendments to the U.S. Constitution as construed in *Anderson* and *Burdick*.

**iv. Remedies for voters who cannot safely comply with the witness requirement through reasonable efforts**

Due to the witness requirement's relative inefficacy and the persistent pandemic conditions, Section 6.87(4)(b)1. cries out for modification. This Court can order relief short of invalidation that would satisfy the state's anti-fraud interest, while minimizing absentee voters' exposure to the risk of infection.

On April 1, 2020, this Court presided over a hearing on Plaintiffs' motion for a preliminary injunction. Ruling in Plaintiffs' favor, the Court blocked the witness requirement in part: "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." 20-cv-249, dkt. 171.

Defendant-Intervenors Republican Party of Wisconsin and Republican National Committee appealed the preliminary injunction and moved for and obtained a stay of the above-

excerpted part of the preliminary injunction. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). The Seventh Circuit’s motions panel concluded “that the district court did not give adequate consideration to the state’s interests in suspending this requirement.” *Id.* at \*3. But notably, in seeking to strike a balance between the voters’ burdens and the state’s anti-fraud interest, the Court suggested that witnesses could observe voters casting their ballots remotely without actually physically signing the ballot:

So, too, do we have every reason to believe the Commission, in keeping with the forward-leaning action it has taken thus far to accommodate voters’ interests while also striving to ensure their safety, will continue to consider yet other ways for voters to satisfy the statutory signature requirement (if possible, for example, by maintaining the statutory presence requirement but not requiring the witness’s physical signature).

*Id.* at \*4. While this was a mere suggestion in dicta, the Organizational Plaintiffs LWVWI and Wisconsin Alliance now seek this as a remedy in addition to or in the alternative to this Court’s own reasonable efforts certification. The Seventh Circuit panel never ruled on the merits and has dismissed the appeals, so both forms of relief remain viable. While the Seventh Circuit panel clearly believed the witness requirement rationally advanced Wisconsin’s anti-fraud interest, there was limited evidence in the record at the time to evaluate the efficacy of witnessing in preventing, detecting, and prosecuting fraud. But there is record evidence now that demonstrates that the witness requirement’s weak benefits for law enforcement are outweighed by the burdens to civic engagement organizations like LWVWI and Wisconsin Alliance on the other side of the scales. For that reason, Plaintiffs respectfully request that this Court order either or both of the following alternatives: (a) a reasonable efforts certification, and/or (b) remote witnessing.

#### **b. Unconstitutional Conditions Doctrine**

Plaintiffs are also likely to prevail on their alternative constitutional claim under the unconstitutional conditions doctrine. The failure to provide fail-safe options to absentee voters

who do not receive their ballots in the mail and the witness requirement are also unconstitutional because they require voters to forfeit their fundamental right to bodily integrity as a condition of exercising their right to vote. Such state coercion violates the unconstitutional conditions doctrine.

Here, a condition is imposed on the exercise of the right to vote, which is protected by the First Amendment as a means of political association and political expression. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Norman v. Reed*, 502 U.S. 279, 288–90 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787–89, 806 (1983); *Kusper v. Pontikes*, 414 U.S. 51, 56–58 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). Similarly, courts recognize a constitutional right to bodily integrity. *See Washington v. Glucksberg*, 521 U.S. 702, 777–78 (1997); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (quoting *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992)) (“It is settled now . . . that the Constitution places limits on a State's right to interfere with a person’s . . . bodily integrity.”).

Under the unconstitutional conditions doctrine, the government may not require an individual to forfeit one constitutional right in order to exercise another. *Simmons v. United States*, 390 U.S. 377 (1968) presented a classic violation of this doctrine, where a criminal defendant was effectively forced to incriminate himself in establishing his standing to move to suppress evidence on Fourth Amendment grounds. The Supreme Court noted that the defendant “was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination.” *Id.* at 394. The Supreme Court found “it intolerable that one constitutional right should have to be surrendered in order to assert another.” *Id.* at 394. The doctrine has also been invoked to prohibit the imposition of conditions on First Amendment-protected activities that require the forfeiture of other rights. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (New York law unconstitutionally required political party leaders to provide unimmunized testimony before a grand jury, forcing

leaders to choose between First Amendment right of association and Fifth Amendment right against self-incrimination); *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) (“This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right—freedom from unreasonable searches and seizures—not merely to receive a discretionary benefit but to exercise two other fundamental rights—freedom of speech and assembly.”).

Most directly relevant to this case, the Supreme Court has invalidated voting requirements or conditions that require the forfeiture of another fundamental right. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court held that a one-year durational residency requirement for voter registration placed an unconstitutional condition on the fundamental right to interstate travel. *Id.* at 346, 353. The Court explained that “such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote.” *Id.* at 342. Notably, when First Amendment-protected rights such as the right to vote are at stake, it is irrelevant whether the government intended to coerce the voter into forfeiting a constitutional right. *See Bourgeois*, 387 F.3d at 1324–25 (“[T]he very purpose of the unconstitutional conditions doctrine is to prevent the Government from subtly pressuring citizens, *whether purposely or inadvertently*, into surrendering their rights.” (emphasis added)).

Courts evaluate these claims by looking to the constitutional standard for the right that Plaintiffs are being coerced into surrendering. “[W]hen a condition on a government benefit burdens a constitutional right, it generally triggers the same scrutiny as a direct penalty would.” *McCabe v. Sharrett*, 12 F.3d 1558, 1562 (11th Cir. 1994). In *Dunn*, for instance, the durational residency requirement for voter registration was subjected to strict scrutiny because fundamental voting and interstate travel rights were implicated: “In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification

(recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.” 405 U.S. at 335; *see also Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969), *rev’d in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 670 (1974) (invalidating Connecticut’s one-year durational residential residency requirement for welfare eligibility as impermissible penalty on individuals who exercised their right to interstate travel) (“Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.”).

“[I]ndividuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest.” *Guertin v. State*, 912 F.3d 907, 919 (6th Cir. 2019) (quoting *Planned Parenthood Sw. Ohio Reg. v. DeWine*, 696 F.3d 490 (6th Cir. 2012)). Government actions that threaten the right to bodily integrity must be narrowly tailored to achieve a compelling state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998). In the Flint water crisis case, *Guertin*, the Court articulated the following standard: “Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value . . . is a classic example of invading the core of the bodily integrity protection.” 912 F.3d at 921–22; *cf. id.* at 921 (“[A] government actor violates individuals’ right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit.”). In this case, absent relief from this Court, the challenged Wisconsin laws would force voters in certain circumstances to vote in person at risk to their bodily integrity, health and life.

Because Wisconsin law bars regular absentee voters from online access and downloading or email delivery options for absentee voting even if their ballots do not arrive by mail, Wis. Stat.

§ 6.87(3)(d), bars regular voters from casting a FWAB, and requires at-risk absentee voters who live alone to satisfy a witness requirement during this pandemic, Defendants place unconstitutional conditions on the right to vote that coerce Plaintiffs into forfeiting their right to bodily integrity.

The Organizational Plaintiffs will not re-state the facts as to their witness requirement challenge. Suffice it to say that the witness requirement does not sufficiently advance the state's interest in preventing vote by mail fraud to justify the unreasonable diversion of resources it has forced upon and will continue to force upon LWVWI and Wisconsin Alliance. These organizations will always seek to educate and help voters, but they are expending time, money, and resources helping voters safely comply with a requirement that is of extremely limited value to Defendants' anti-fraud interests. What is more, because the majority of their members are above the age of 65, the witness requirement impermissibly conditions their members' right to vote on forfeiture of their right to bodily integrity. Cronmiller Decl. ¶ 7.

As to Plaintiffs' challenges to restrictions on alternative absentee ballot delivery methods, Plaintiff Kohlbeck cannot vote in person because she is undergoing cancer treatment and in an at-risk age group, Kohlbeck Decl. ¶ 3; Plaintiff Diane Fergot cannot vote in person because she has hypertension and a history of blood clots, Diane Fergot Decl. ¶ 4; and Plaintiffs Gary Fergot, Bahr Olsan, and Sheila Jozwik cannot vote in person because they are each above the age of 65, Gary Fergot Decl. ¶ 1; Bahr Olsan Decl. ¶ 1, Sheila Jozwik Decl. ¶ 1. Therefore, since April, they have relied on vote by mail to cast their ballots, and each were disenfranchised in the Spring Election after their ballots failed to arrive, and their only remaining option was to vote in person at risk to their bodily integrity, health, and life. Faced with a choice between exercising their right to vote or their right to bodily integrity, they sacrificed the former to defend the latter. *Cf. Dunn*, 405 U.S. at 334 (durational residence laws impermissibly penalized people who had recently exercised their right to interstate travel); *Shapiro*, 394 U.S. at 634 (law establishing waiting period for new state

residents before they qualified for welfare benefits impermissibly penalized people who had exercised their right to interstate travel). Because these Plaintiffs never received an explanation for why their ballots never arrived and have received no assurances that these issues have been resolved going forward, they risk confronting the same impermissible choice in November.

At age 70, Plaintiff Gregg Jozwik is also at risk of severe illness or death from Covid-19. After not receiving his ballot, he too faced the choice between his right to vote and his right to bodily integrity. He chose his right to vote, which required him to vote in person and forego his right to bodily integrity. Gregg Jozwik Decl. ¶ 8. He estimated that about half of the voters at his polling place were not wearing masks, Gregg Jozwik Decl. ¶ 8; nor does Wisconsin law impose a requirement that voters wear masks or employ any other preventative measures in public. Therefore, due to election officials' failure to make a ballot electronically available to him or to let him vote by FWAB, they impermissibly conditioned his right to vote on forfeiture of his right to bodily integrity. *Cf. Dunn*, 405 U.S. at 334; *Shapiro*, 394 U.S. at 634. Mr. Jozwik risks the same injury again in November, as he has received no explanation for why he never received his Spring Election absentee ballot, nor any assurances that those issues have been resolved.

For these reasons, Plaintiffs are likely to succeed on the merits of their unconstitutional conditions claim as well.

### **c. Title II of Americans with Disabilities Act**

Plaintiffs Kohlbeck, Diane Fergot, Whelan, and LWVWI are also likely to succeed on the merits of their Title II of the Americans with Disabilities Act ("ADA") claim. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "[W]ith respect to an individual," the law defines "disability" as: "(A) a physical or mental impairment that substantially

limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Id.* § 12102(1)(A)–(C). The term “major life activity” encompasses “the operation of a major bodily function, including but not limited to, *functions of the immune system*, normal cell growth, digestive, bowel, bladder, neurological, brain, *respiratory, circulatory*, endocrine, and reproductive functions.” *Id.* § 12102(2)(B) (emphasis added). “The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” *Id.* § 12102(4)(A). Furthermore, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.” *Id.* § 12102(4)(E)(i).

Public entities must make “reasonable modifications” to rules, policies, or practices, remove barriers, or provide aid so that they are accessible to individuals with disabilities. *Id.* § 12131(2). To accommodate a disability in the context of a public service would be to make some change enabling a person with a disability to “participat[e] in or [enjoy the] benefits of services, programs, or activities of a public entity.” *Id.* § 12132 ; *Lacy v. Cook Cty.*, 897 F.3d 847, 853 (7th Cir. 2018) (“The obligation to make ‘reasonable modifications’ parallels the obligations to make ‘reasonable accommodations’ in the context of Title I”); *Washington v. Indiana High Sch. Ass’n*, 181 F.3d 840, 848 (7th Cir. 1999) (“Congress clearly intended the failure-to-accommodate method of proving discrimination to apply to Title II”). An accommodation is reasonable if “it is both efficacious and proportional to the costs to implement it.” *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002).

Here, Plaintiffs Kohlbeck, Whelan, and Diane Fergot each have health conditions that limit major life activities, thereby placing them under the ADA’s protections and requiring Wisconsin



election officials to make reasonable modifications so that they can participate in the November general election. These conditions also put them at increased risk of severe illness from Covid-19.

Plaintiff Kohlbeck was diagnosed with cancer earlier this year. According to the CDC, cancer compromises Plaintiff Kohlbeck's immune system, which in turn places her at increased risk from Covid-19.<sup>73</sup> The ADA specifically identifies "functions of the immune system" as a major bodily function. 42 U.S.C. § 12102(2)(B).

Plaintiff Whelan lives with asthma, which interferes with the major bodily function of breathing. The CDC has also identified asthma as a condition that can put someone at increased risk from Covid-19.<sup>74</sup> The ADA specifically identifies respiratory function as a major bodily function. *Id.*

Plaintiff Diane Fergot lives with hypertension and has a history of blood clots. Hypertension is a disease impacting the circulatory system that can result in damage to the heart, brain, and other major organs.<sup>75</sup> It also places her at increased risk from Covid-19.<sup>76</sup> The ADA specifically identifies circulatory function as a major bodily function. *Id.*

Wisconsin election officials can reasonably accommodate Plaintiff Kohlbeck, Whelan, and Fergot's disabilities by guaranteeing them the ability to receive a ballot through MyVote or email delivery, or to cast a FWAB should they fail to receive their absentee ballot by mail. In this way, they would be able to avoid the risk of infection at a polling place and still vote in the general

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<sup>73</sup> Sherman Decl., Ex. 29, *If You Are Immunocompromised, Protect Yourself From COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/immunocompromised.html> (last updated May 14, 2020).

<sup>74</sup> Sherman Decl., Ex. 30, *Coronavirus Disease 2019 (COVID-19): People of Any Age with Underlying Medical Conditions*, CDC, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html) (last updated Jun. 25, 2020).

<sup>75</sup> Sherman Decl., Ex. 31, *High Blood Pressure Symptoms and Causes*, CDC, <https://www.cdc.gov/bloodpressure/about.htm> (last updated May 19, 2020).

<sup>76</sup> Sherman Decl., Ex. 6, CDC, *People of Any Age with Underlying Medical Conditions*.

election. This accommodation would be “efficacious and proportional to the costs to implement it” because municipal clerks already electronically transmit ballots to military and overseas voters, and electronic transmission spares clerks’ offices the time, effort, and expense of printing and mailing an absentee ballot. *Oconomowoc Residential Programs*, 300 F.3d at 784.

Plaintiff LWVWI has standing to seek fail-safe alternatives for ballot delivery failures on behalf of its members, who include Claire Whelan, and many of whom are at risk because they are above the age of 65. Cronmiller Decl. ¶ 7. It also has standing in its own right to seek this accommodation and waiver of the witness requirement, as Covid-19 has forced it to divert resources to conduct additional voter education on vote by mail. *Id.* ¶ 6. In the 2020 Spring Election, LWVWI conducted voter education and fielded calls from municipal clerks and voters in response to ballot delivery failures, and plans to do so again for the August and November elections. *Id.* ¶ 10-11, 13. With respect to the witness requirement, for the 2020 Spring Election, it “fielded calls, texts, emails, and social media messages from voters who were struggling to comply with the witness requirement, and LWVWI members offered to help voters by serving as Plaintiffs’ witnesses.” *Id.* ¶ 9. Two local chapters “worked with Meals on Wheels and educated its delivery people on how to serve as witnesses for people who live alone. LWVWI-Dane County also worked with the Dane County Voter ID Coalition to mobilize their Voter ID helpline to identify voters in need of a witness and to provide assistance as needed.” *Id.* Until then, LWVWI had never needed to expend resources on voter education and assistance specific to the witness requirement—an injury directly attributable to the State’s refusal to waive the requirement during the duration of the pandemic. *Id.* ¶ 9. LWVWI and its local chapters plan to make these efforts again for the November Election, though LWVWI anticipates that they will be unable to help all voters who will require assistance fulfilling the witness requirement. *Id.* ¶¶ 6, 11, 12.

For these reasons, Plaintiffs are likely to succeed on the merits of their ADA claim. Accordingly, the Court should grant their requested relief.

**3. Absent relief from this Court, Plaintiffs are certain to suffer irreparable harm because there is no way to regain one's right to vote after an election is held.**

The Seventh Circuit has stated that “[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.” *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978); *see also Ezell v. City of Chicago*, 651 F.3d 684, 697-700 (7th Cir. 2011) (finding irreparable harm when plaintiffs’ Second Amendment rights were likely violated). “When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury.” *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citations omitted) (affirming preliminary injunction against law which imposed shorter in-person early voting period for nonmilitary Ohio voters than for military voters).

In virtually all circumstances implicating the exercise of voting rights, courts have found that the harm is irreparable because a violation of constitutional rights that implicate a voter’s ability to cast a ballot cannot be redressed after the election. *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1155 (S.D. Ind. 2018), *aff’d*, 937 F.3d 944 (7th Cir. 2019) (“A violation of the right to vote is presumptively an irreparable harm.”) (citing *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 1440–41 (2014); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Elrod v. Burns*, 427 U.S. 347, 373-74 & n.29 (1976) (plurality opinion); *Ezell*, 651 F.3d at 699)) (additional citations omitted); *Dillard v. Crenshaw*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) (“Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.”).

Absent relief from this Court, Plaintiffs are certain to suffer irreparable harm because there is no way to regain one’s right to vote after an election is held. Plaintiffs will suffer loss of their right to vote if alternatives to mail delivery are not ordered by this Court. Plaintiffs Kohlbeck,

Diane Fergot, Gary Fergot, Bahr Olsan, and Sheila Jozwik, are all at elevated risk of suffering severe complications and even dying from Covid-19. They cannot safely vote in person and if, once again, no absentee ballot arrives in the mail and they have no recourse, such as online access and downloading or email delivery, they will lose their right to vote. Similarly, all of those Plaintiffs and Gregg Jozwik will either lose his right to vote without a fail-safe alternative or be unconstitutionally compelled to make a choice between their right to bodily integrity and their right to vote.

Once the election is held and the results are certified, the injury to these voters' constitutional rights will of course be irreparable. There is no adequate remedy at law, no damages, that can make a disenfranchised voter whole. In addition, the LWVWI and the Wisconsin Alliance will both be irreparably harmed because their members will be disenfranchised, and because both organizations will have expended resources, time, money, and effort to try to assist voters with voting absentee under these circumstances, including by helping them navigate absentee ballot delivery failures and safe compliance with the witness requirement.

#### **4. The balance of hardships militates strongly in favor of an injunction.**

The element involving the balance of harms comes down to a requirement that injunctive relief “must do more good than harm.” *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). The balancing requires the court “to choose the course of action that minimizes the cost of being mistaken” and “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 of Manitou Council*, 549 F.3d at 1100. The balancing of harms also impacts the threshold requirement of the plaintiff's likelihood of success: “[h]ow strong a claim on the merits [must be] depends on the balance of harms: the more net harm

an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Hoosier Energy*, 582 F.3d at 725. This "sliding scale" approach means that the "more likely it is that [the plaintiff] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts*, 549 F.3d at 1100.

If the court does not grant a preliminary injunction in this case, thousands of Wisconsinites isolated by the current Covid-19 crisis will be unable to cast a ballot that counts. There is little likelihood that extending online access and downloading and email delivery to all regular absentee voters or offering alternatives to the witness requirement will cause more harm to Wisconsin voters or the public than the disenfranchisement that would otherwise result from the court's failure to issue the requested injunction.

Additionally, there will be no increased administrative burden or costs for Defendants from relaxing the witnessing requirement by permitting remote witnessing without a signature. If anything, the administrative burden will likely be reduced. As to ordering alternative ballot delivery methods, the requested injunction will require some amount of work by Defendants to update the MyVote portal and WisVote, and to inform municipal clerks. First, WEC is already in updating MyVote and WisVote right now. Sherman Decl., Ex. 2, Wolfe Tr. at 159:4-13. And second, the U.S. Supreme Court has explicitly stated that constitutional rights do not bend to administrative convenience and financial considerations. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986) (striking down Connecticut's closed primary law on First Amendment associational rights grounds) ("Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major party primary. Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two

existing major parties from competition solely on the ground that two major parties are all the public can afford.”).

**5. Ordering these alternatives for voters who do not receive their ballot in the mail or who are struggling to safely comply with the witness requirement would also advance the public’s interest in maximizing eligible Wisconsin voters’ participation and preventing the denial of voting rights.**

The balancing of harms also looks at the effect on nonparties and the public interest. The Seventh Circuit has stated that remedying a “continuing constitutional violation . . . certainly would serve the public interest.” *Preston*, 589 F.2d at 303 n.3; *see also Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004) (“Surely, upholding constitutional rights serves the public interest.”) (quoting *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003)). Issuing a preliminary injunction to prevent the disenfranchisement of countless mail-in absentee voters would serve the public interest by vindicating constitutional rights and ensuring that the integrity and legitimacy of Wisconsin elections is not undermined or destroyed by the unconstitutional failure to afford voters who are at higher risk from Covid-19 alternatives to receive their absentee ballot and alternatives to the witness requirement. The public has a strong interest in the safeguarding of these individuals’ fundamental voting rights.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

Dated: July 8, 2020

Respectfully submitted,

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