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

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

v. 20-cv-249-wmc

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

SYLVIA GEAR, et al.,

Plaintiffs,

v. 20-cv-278-wmc

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

CHRYSTAL EDWARDS, et al., Plaintiffs, v. ROBIN VOS, et al., Defendants, and REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF WISCONSIN, Intervening-Defendants.	20-cv-340-wmc
JILL SWENSON, et al., Plaintiffs, v. MARGE BOSTELMANN, et al., Defendants, and WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, AND REPUBLICAN PARTY OF WISCONSIN, Intervening-Defendants.	20-cv-459-wmc

PLAINTIFFS' OMNIBUS BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO THE INTERVENOR-DEFENDANTS' MOTION TO DISMISS.

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INTRODUCTION

The Wisconsin Legislature's core argument here is that it remains "easy to vote" in Wisconsin during the COVID-19 pandemic. That is an astonishing position to take as the pandemic continues to escalate and in light of Wisconsin's experience during the April election, during which tens of thousands of voters were disenfranchised and deterred from voting. Plaintiffs' claims are likely to succeed because, unlike the Intervenor-Defendants' arguments, they are grounded in the actual operation of Wisconsin's election system during the COVID-19 pandemic.

The Intervenor-Defendants in this case—speaking mainly through the Legislature's omnibus brief, which the Republican Party incorporates by reference—betray a stunning breeziness about recent history and brush aside what all the evidence suggests: that April was a sneak preview of what will happen in November, absent intervention from this Court. All of the epidemiological evidence proffered in this case establishes that the virus will continue to spread in Wisconsin, with infection rates in November likely to continue to grow from where they are today. *See infra* 88. The Intervenor-Defendants put forward no expert report questioning the public health consensus, and they do not even bother to rebut the expert analysis demonstrating how COVID-19 rates in April corresponded to the disenfranchisement of thousands of Wisconsin voters. *See infra* 64, 88.

In April, it was not one isolated aspect of the election system that buckled, but the interlocking components of that system as a whole, leaving huge numbers of Wisconsin voters without safe and effective access to the franchise. In-person voting was unsafe and untenable for many voters throughout the state due to poll worker shortages and the resulting polling place closures that followed, lack of personal protective equipment and sanitation supplies, and an absence of clear guidance on how to structure polling places during a pandemic. The deadly risk

associated with voting in person led to an unprecedented spike in absentee voting, which strained the MyVote and WisVote systems to the breaking point, spawned massive problems with ballot delivery, and placed huge numbers of voters at risk of returning their ballots too late to be counted despite having complied with the law. Absentee voting during the pandemic also put immunocompromised voters who tried to comply with the statutory witness signature requirement in an impossible position. These breakdowns in absentee voting sent many voters back to polling places to cast ballots, thus exacerbating the challenges associated with maintaining social distancing in a condensed number of polling places.

There are, however, at least two meaningful differences between the April and November elections. The first is the scale of the challenge. Based on historic participation rates, turnout may be twice as high in November as it was in April. That, coupled with the intensified scrutiny and potential for disputes inherent in a closely contested presidential race, will multiply the stresses to the system. The second difference offers some basis for optimism: in contrast to the extremely compressed litigation timeline in the lead-up to the April election, the Court now has an opportunity to craft relief that can appropriately address the risk to voters' rights on a timeline that can be effectively implemented across the state.

The Intervenor-Defendants nonetheless contend that the Court is powerless to make things better in November, based largely on an expansive reading of *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), which they contend simply forecloses the claims in this case. But their reliance on *Luft* fails for three primary reasons. *First*, the talismanic citation of the Seventh Circuit's observation that Wisconsin law makes it "easy to vote" *under normal conditions*, *id.* at 675, does not apply here. Plaintiffs do not contend that the state's election system, under normal circumstances, violates their rights. They do, however, assert that various elements of that

system will violate their rights when administered under the extraordinary conditions of the COVID-19 pandemic. *Second*, Intervenor-Defendants seriously distort *Luft*, insisting that it forecloses voting rights claims except where every potential pathway to voting is closed. That holding, inconsistent with longstanding Seventh Circuit and Supreme Court caselaw, is not to be found in *Luft*. To the contrary, *Luft* emphasized the importance of ensuring that voters can cast ballots with "reasonable efforts." *Third*, even if this unfounded reading of *Luft* were correct, Plaintiffs would succeed here. Instead of contending that one policy, or even one method of voting, places an undue burden on voting rights, Plaintiffs have identified system-wide, mutually-reinforcing breakdowns in the state's ability to operate a major election in the face of the COVID-19 crisis. This is precisely the kind of challenge that even the Legislature's extreme reading of *Luft* would permit. Intervenor-Defendants' numerous other legal defenses relating to the merits of Plaintiffs' claims or various putative justiciability concerns also fail, for reasons detailed below.

Finally, in response to the Court's query during the June 29, 2020 conference, this brief sets out in detail the legal and practical bases for maintaining these claims against the members of the Wisconsin Election Commission ("WEC"). The WEC occupies a unique role in the state's election infrastructure, charged by statute with "the responsibility for the administration" of Wisconsin election law (other than campaign finance laws). Wis. Stat. § 5.05(1). This responsibility entails broad authority to ensure that all actors in Wisconsin election administration comply with relevant election laws—including the Voting Rights Act, Americans with Disabilities Act, and U.S. Constitution. "Pursuant to its general authority, the commission may direct municipal clerks to implement a court order pertaining to the state's election procedures and federal law." *Frank v. Walker*, 196 F. Supp. 3d 893, 918 (E.D. Wis. 2016). This

broad responsibility is reflected in the WEC's longstanding practices, as well as the measures it has stated it will take in preparation for the November election. Moreover, beyond this broad general responsibility to administer Wisconsin's election laws, the Commission has specific statutory authority related to each of the forms of relief requested in this case, as detailed below.

The risks facing voters this November are profound, but the Wisconsin election system's failure is not inevitable. There are concrete measures that the WEC can take now, and statutes whose application can be enjoined for the November election, that will remedy these foreseeable harms. Intervenor-Defendants have failed to refute the bases for granting preliminary injunctive relief. This Court should therefore take action now to ensure that plaintiffs and all Wisconsin voters can participate in November without choosing between their safety and their right to vote.

STANDARDS OF REVIEW

To succeed on their motion for a preliminary injunction, Plaintiffs must establish "some likelihood of success on the merits," "no adequate remedy at law," and "irreparable harm if [the] preliminary injunction is denied." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012). "[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).

As the party moving to dismiss under Rule 12(b)(6), Intervenors have "the burden to prove that the complaint is legally insufficient." *Brost v. Capstan Corp.*, 19-CV-535-WMC, 2020 WL 2560965, at *2 (W.D. Wis. May 20, 2020) (citing *Yeksigian v. Nappi*, 900 F.2d 101, 104 (7th Cir. 1990)). To survive a motion to dismiss, Plaintiffs' complaint need only "allege sufficient facts that make the plaintiff[s'] claim plausible," that is, that there is "more than a sheer possibility" that the requested relief is warranted. *Sevugan v. Direct Energy Services, LLC*, 931 F.3d 610, 614 (7th Cir. 2019). At this stage, courts "accept as true all factual allegations in

the amended complaint and draw all permissible inferences in [Plaintiffs'] favor." *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015); *Bultasa Buddhist Temple of Chicago v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017) (applying the same standard to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)). "[D]ismissal is warranted ***only if*** no recourse could be granted under any set of facts consistent with the allegations." *Tzakis v. Wright Med. Tech., Inc.*, 19-CV-545-WMC, 2020 WL 955016, at *2 (W.D. Wis. Feb. 27, 2020) (emphasis added) (citation omitted).[1]

ARGUMENT

I. Plaintiffs Are Likely to Prevail on the Merits of Their Claims.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim Under Section 11(b) of the Voting Rights Act of 1965.

The Legislature does not deny that Wisconsin voters were forced to choose between their safety and their vote in the April election. Nor could it. The Chair of the Elections Commission has already conceded as much. *See* Jacobs Dep. 107:7-9, July 17, 2020, ECF No. 475 ("Jacobs Dep."); Statement of Add'l Proposed Facts in Supp. of Pls.' Mot. for a Prelim. Inj., July 31, 2020 ("SOAPF") ¶ 23 (admitting voters risked their lives to vote); Jacobs Dep. 100:12-20; SOAPF ¶ 24 (admitting "I have. . . seen the lines . . . that is an intimidating situation, there is no question about it."). Moreover, Dr. Fowler's unrebutted[2] expert report demonstrates the magnitude of the intimidation: tens of thousands of Wisconsinites were deterred and ultimately disenfranchised.

[1] Courts may consider documents referenced in the complaint without converting the motion into one for summary judgment. *See Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009).

[2] Defendants' only apparent response to Dr. Fowler's report in their nearly two hundred pages of briefing is the repeated assertion that it is "conjectural." *See* Joint Resp. of Intervenor-Defendants to Swenson Proposed Findings of Fact, ECF No. 451, at ¶ 138. But without an explanation of what exactly is wrong with Dr. Fowler's statistical methodology, the mere assertion his statistical analysis is supposedly conjectural is not enough to make it so.

See Statement of Proposed Facts in Supp. Of Pls.' Mot. for a Prelim. Inj., Case No. 20-cv-459-wmc (hereinafter "*Swenson*"), ECF No. 42 ("*Swenson* SOPF"), ¶ 138; Expert Report of Anthony Fowler, *Swenson* ECF No. 46 ("Fowler Report"), at 8-10.

Nor does the Legislature have a persuasive contention that the intimidation will subside by the November election. As Plaintiffs' expert Dr. Patrick Remington, a veteran epidemiologist and Director of the Preventative Medicine Residence Program at the University of Wisconsin-Madison explained, Wisconsin has seen an "acceleration of community transmission" of COVID-19 since June, increasing the risk of transmission at in-person voting locations. *See* Dep. of Patrick Remington, July 22, 2020, ECF No. 469 ("Remington Dep.") 35:11-13; SOAPF ¶ 8. Despite this, the Wisconsin Elections Commission has not consulted with medical experts or anyone else to assess the vulnerability of immunocompromised voters in the November election. *See* Dep. of Meagan Wolfe as 30(b)(6) Rep. of Wisconsin Elections Commission, July 3, 2020, ECF No. 247 ("WEC I Dep.") 32:2-6; SOAPF ¶ 84. Nor has the Elections Commission worked on any plans to offer altered witness requirement guidance for voters who are high-risk for COVID-19, or even for those who suffer from COVID-19 or COVID-related illnesses. Spindell Dep. 86:15-87:9, July 7, 2020, ECF No. 413 ("Spindell Dep."); Dep. of Meagan Wolfe as 30(b)(6) Rep. of Wisconsin Elections Commission, July 16, 2020, ECF No. 438 ("WEC II Dep.") 106:21-106:23; SOAPF ¶ 85.

Because the fact of past and future intimidation is inarguable (particularly for the immunocompromised), the Legislature focuses its opposition on arguing that Section 11(b) has a specific intent requirement and that the Commission should not be held legally responsible for fear of COVID. Wisc. Leg. and Leg. Defs.' Omnibus Br. in Opp. to Pls. Mot. for Prelim. Inj, and in Support of their Mots. to Dismiss, ECF No. 454 ("Leg. Br.") 94-96, 97-100. Both contentions

are wrong. Section 11(b) by its plain terms contains no specific intent requirement, and reading such a requirement into the statute would, among other things, improperly render Section 11(b)'s ban on voter intimidation a largely meaningless exercise given that Section 131(b) of the Civil Rights Act of 1957already banned intentional voter intimidation. And there is nothing wrong with holding defendants responsible for *their conduct* causing voter intimidation—administering an elections system in a manner that exposes voters to unnecessary risks and intimidation to cast a ballot. That is exactly what Section 11(b) was meant to preclude. The motion to dismiss should be denied, and a preliminary injunction should be granted.

1. *Section 11(b) does not contain an intent element.*

The Legislature's contention that Section 11(b) contains an intent element is contrary to the text of the statute, its surrounding context, and the statute's legislative history.

Plaintiffs start with the text. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (declining to adopt interpretation of statute "foreclose[d]" by the statutory text). The statute renders liable anyone who "shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). Here, the "plain language" of Section 11(b) "does not require a particular *mens rea*." *Arizona Democratic Party v. Arizona Republican Party*, No. 16-3752, 2016 WL 8669978, at *4 n.3 (D. Ariz. 2016). That is because the statute makes "no reference" to the Legislature's proposed "specific intent to intimidate" requirement. *LULAC-Richmond Regional Council 4614 v. Public Interest Legal Found*., No. 18-423, 2018 WL 3848404, at *3 (E.D. Va. 2018).

The Legislature counters that the statute does include an intent requirement because it proscribes intimidation "for voting or attempting to vote." Leg. Br. 98. Not so. "For voting" in the context here simply means "with respect to voting"—the statute prohibits intimidation with respect to voting or attempts to vote. That is what the word "for" means in this context. *See also,*

e.g., Random House Webster's Dictionary 257 (2d ed 1996) (offering "with respect to" as a definition of "for"). The Legislature does not say what it thinks "for voting" means—it simply asserts that the term creates a *mens rea* requirement. The only way to read that phrase to create an intent requirement is to interpret Section 11(b) as a retaliation provision, *i.e.*, that it only proscribes intimidating persons for *having* voted or tried to vote. But that obviously cannot be right: everyone agrees that the statute prohibits intimidation against people voting in the first place—*i.e.* "with respect to voting"—rather than retaliation after the fact "for having voted."

When Congress wanted to impose a *mens rea* requirement in the Voting Rights Act, moreover, it did so expressly, including in the very next section of that Act. Section 11(c) prohibits the provision of false information "*for the purpose of* establishing [ ] eligibility to register or vote," 52 U.S.C. § 10307(c) (emphasis added), and Congress would have used this readily available formulation if had intended an intent element in Section 11(b). *See also* 52 U.S.C. § 10307(a) (prohibiting persons acting under color of state law from "*willfully* fail[ing] or refus[ing]" to tabulate, count, or report lawful votes) (emphasis added).

The Legislature, meanwhile, has no answer for the fact that Section 131(b) of the Civil Rights Act of 1957 had *already* made intentional voter intimidation unlawful by using exactly the *mens rea* language that Section 11(b) lacks. *See* 52 U.S.C. § 10101(b) (formerly 42 U.S.C. § 1971(b)) (preventing intimidation "*for the purpose of* interfering with the right of such other person to vote" (emphasis added)); *see, e.g.*, *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967); *United States v. Beaty*, 288 F.2d 653, 655-56 (6th Cir. 1961); *United States v. Bd. of Edu. of Greene Cty., Miss.*, 332 F.2d 40, 46 (5th Cir. 1964). Reading Section 11(b) of the 1965 to parrot that already-existing prohibition would violate the principle that statutory enactments should not be interpreted to be "a largely meaningless exercise." *Rumsfeld v. Forum for Acad.*

and Inst. Rights, Inc., 547 U.S. 47, 58 (2006); *see also Babbitt v. Sweet Home Chapter of Cmtys.*, 515 U.S. 687, 701 (1995) (courts presume Congress intends to have "real and substantial effect" in subsequent statutory enactments) (citation omitted). The Legislature has no explanation for why Congress would have enacted a prohibition against intentional voter intimidation that already existed, or why it would have done so without using the readily available "for the purpose of" language that would have made its intent clear. *See LULAC*, 2018 WL 3848404, *4 ("The text of § 11(b), unlike § 131(b), plainly omits 'for the purpose of,' suggesting § 11(b)'s deliberately unqualified reach."). This Court should not read Section 11(b) as a meaningless enactment that served no purpose.

Legislative history confirms that the difference in language between Section 11(b) and Section 131(b) was intentional, and that the whole point of the former's enactment was to create a right against even unintentional acts that result in voter intimidation. The conference report on the Voting Rights Act indicates that Congress specifically intended to excise Section 131(b)'s specific intent requirement in Section 11(b). *See* Second Goodman Decl., Ex. 14 (H. Rpt. 89-439, at 30 (1965)) (explaining that under Section 11(b) "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C. 1971(b) [aka Section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown"); SOAPF ¶ 56.

The Legislature's cases to the contrary do not provide a persuasive justification for reading the *mens rea* requirement that Congress specifically intended to excise back into Section 11(b). Only three of the cases that the Legislature cites—*Parsons v. Alcorn*, 157 F. Supp. 3d 479 (E.D. Va. 2016); *Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985); *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006)—even examine the question of

Section 11(b)'s *mens rea* requirement at all. Two of those cases—*Willingham* and *Parsons*—simply cite *Olagues* for the proposition that Section 11(b) has a specific intent requirement. *See Willingham*, 593 F. Supp. 2d at 462; *Parsons*, 157 F. Supp. 3d at 498. And *Olagues* itself does not independently analyze whether Section 11(b) has an intent element; rather, *Olagues* cites for that proposition the Fifth Circuit's opinion in *United States v. McLeod*. *See Olagues*, 770 F.2d at 804. But *McLeod* was not a Section 11(b) case at all—it was a Section 131(b) case. *See McLeod*, 385 F.2d at 739-41. Obviously, then, *Olagues* carries no weight; it "is . . . unpersuasive" to cite a Section 131(b) case for the proposition that Section 11(b) has a *mens rea* requirement when (i) the provisions have crucially different language and (ii) the latter was enacted expressly to expand the former to non-intentional conduct. *LULAC*, 2018 WL 3848404, at *4.[3]

It is true, as the Legislature says, that the Voting Rights Act is not a "general mandate by which federal courts may correct election deficiencies of any sort." *Powell v. Power*, 436 F.2d 84, 87 (2d Cir. 1970). But the Voting Rights Act *does* require courts to correct election

[3] The language that the Legislature plucks out of *Fenton v. Dudley*—that Section 11(b) is a "sweeping prohibition of *official acts* of harassment," 761 F.3d 770, 777 (7th Cir. 2014) (emphasis added); Leg. Br. 107—was plainly never meant to be a comprehensive statement of Section 11(b)'s prohibitions for the simple reason that the plain text of the statute applies to unofficial actions as well. *See* 52 U.S.C. § 10307(b) ("No person, whether acting under color of law *or otherwise*, shall intimidate . . . ." (emphasis added)). *Bershatsky v. Levin* examines Section 11(b)'s definitions of "intimidate" and "coerce" (and not the mental state one needs to intimidate or coerce), and concludes that the Voting Rights Act probably should not be interpreted to render illegal something encouraged elsewhere as a core attribute of citizenship in the United States Code. *See* 99 F.3d 555, 557 (2d Cir. 1996). And the quoted language in *Democratic Nat'l Comm. v. Republican Nat'l Comm.* describes no statute, but rather the particular consent decree entered in that case. 671 F. Supp. 2d 575, 602 (D.N.J. 2009) (no "change in law that would make legal the activities *the Decree* is meant to prevent—attempts to prevent qualified voters from casting their ballots through intimidation . . ." (emphasis added)). Its sole relevance here is as a warning that the Republican National Committee's concerns about electoral integrity, *see* Intervenor-Defs. Consolidated Opp. to Pls. Mot. for Prelim. Inj., ECF No. 455 ("RNC Br."), at 3-4, have a nearly four-decade history of serving as a smokescreen in support of efforts to drive down turnout among voters of color, *see, e.g.*, 671 F. Supp. 2d at 580-84.

deficiencies expressly prohibited by the Act. Section 11(b) prohibits conduct that results in voter intimidation regardless of intent. And Plaintiffs' case challenges an electoral system that the Chair of the WEC *concedes* (1) intimidated voters in the last election by forcing them to pick between democracy and disease, and (2) may not produce a free and fair election in November. Dep. of Ann Jacobs, July 17, 2020, ECF No. 475 ("Jacobs Dep.") 100:12-20, 110:17, 99:8-17, 103:4-11; SOAPF ¶ 52. Such a system—in which the cost of electoral participation is risking one's life, Jacobs Dep. 107:99—is the kind of vote-deterring intimidation that the Section 11(b) was meant to prohibit. This Court must give effect to that provision and ensure that voters do not face the same sort of intimidation in November.

2. *Section 11(b) applies here because defendants are administering an elections system that intimidates voters and that fails to protect voters from intimidating threats.*

The Legislature next argues that Section 11(b) violations cannot "be premised on a mere failure . . . to mollify any exterior 'threat,'" Leg. Br. 99, particularly when that threat is supposedly prompted by a virus and not a person, Leg. Br. 96, 112. But that argument is irrelevant and, in any case, wrong.

The Legislature's argument rests on the flawed premise that the Section 11(b) violation here is simply the failure to protect against the virus.[4] What is intimidating voters is *defendants' conduct itself*. For example, as the Chair of the Election Commission admitted, a polling place without a sufficient number of poll workers, that is not properly sanitized, and that is populated by people who are not practicing social distancing or wearing masks is more intimidating to

[4] The Legislature's attempted distinction between human intimidation and non-human voter intimidation, *see* Leg. Br. 108, should be rejected because would quickly produce absurd results. If it were correct, a government could, for example, locate polling places in places transparently calculated to intimidate and deter voting—such as for example a morgue or a nuclear power plant—simply because the fear is not of human action.

voters than where safe practices are followed. *See* Jacobs Dep. 100:12-102:17; *see also id.* at 112:17-113:2 (noting importance that voters know in advance polling places are safe); WEC II Dep. 70:18-70:22 (admitting that WEC has not sought to determine whether voting conditions in April deterred participation among voters); SOAPF ¶ 53. Section 11(b) prohibits defendants from administering an elections system that exposes voters to an unnecessarily risky and intimidating in-person voting process coupled with an ineffective absentee voting procedure that frightens voters into believing that they need to vote in-person or not vote at all. *See* Br. in Supp. of Pls.' Mot. for a Prelim. Inj., *Swenson* ECF No. 41 ("*Swenson* PI Br.") 28-29 (explaining how defendants' administration of Wisconsin's electoral system during the pandemic deters electoral participation); Jacobs Dep. 108:7-109:8; SOAPF ¶ 54 (conceding that voter fear that absentee ballots will not be properly counted given past errors will lead some voters to feel as if they need to vote in-person instead of absentee).

The Legislature is in any event wrong that Section 11(b) does not reach failures to protect against harm. *See Swenson* PI Br. 26-27 (explaining how voter intimidation laws have been enforced against jurisdictions that failed to protect voters from known threats). The Legislature's main response is to cite factual differences between this case and the ones from the civil rights era that plaintiffs rely on, *see* Leg. Br. 99, but none of these distinctions rebuts the idea of an obligation to protect.

Take *United States v. Clark*. Yes, the Legislature is right that the *Clark* court did not enter an injunction against Selma in light of Selma's decision to appoint a new Director of Public Safety and attempt to "perform its duties and responsibilities under the law." 249 F. Supp. 720, 730 (S.D. Ala. 1965); Leg. Br. 99. But in denying injunctive relief, the *Clark* court did not decide that Selma's past failures to protect voters were somehow lawful. Just the opposite, in fact. The

Clark court made clear that an injunction loomed should the City fail to protect *all* citizens attempting to vote:

> [T]he replacement of old officials will not, in and of itself, justify the denial of injunctive relief . . . however, because of the circumstances of this case, particularly the apparent conscientious efforts on the part of the city officials . . . to deal with their racial matters within the framework of the law . . . no injunction will be issued at *this time*. . . . In proceeding in this manner, *this Court is assuming that the City of Selma . . . . will not fail to provide police protection to all persons attempting peaceably to exercise the right to vote* . . . . This Court will, *of course*, reserve jurisdiction of this matter . . . .

249 F. Supp. 720, 730 (emphasis added). If a failure to protect voters against an external threat did not constitute unlawful intimidation, then this discussion in *Clark* would be meaningless.

The Legislature's attempt to distinguish *Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), fares no better. Yes, the Klan engaged in horrific acts of intimidation in that case. *See* Leg. Br. 99-100. And yes, the holding of *Katzenbach* was about the defendant in that case—the Klan. *Id.* But the Legislature focus on the *Katzenbach*'s disposition wrongly elides *Katzenbach*'s commentary about its sister case, *Hicks*. *See* Second Goodman Decl., Ex. 15 (*Hicks v. Knight*, No. 15,727, 10 Race Rel. L. Rep. 1504 (E.D. La. 1965)).

In particular, the Klan in *Katzenbach* not only intimidated voters directly but *also* attempted to "intimidate public officials" sometimes "by threat of violence, sometimes by character assassination." 250 F. Supp. at 342. The result was that the Klan's actions "unquestionably intimidated public officials . . . and later hindered effective police action against Klan violence." *Id* at 340. The Klan's conduct rendered local voters "unable to obtain from police officials adequate protection from the Klan," so they sued and *won* an order enjoining the City from "failing to use all reasonable means to protect the . . . plaintiffs and others similarly situated from . . . intimidation." *Id.* at 342; *see also* Second Goodman Decl., Ex. 15 (*Hicks v.*

Knight, No. 15,727, 10 Race Rel. L. Rep. 1505 (E.D. La. 1965)) at 2 (injunction text).[5] This case is in the same posture—the government has the responsibility under Section 11(b) to protect voters against outside threats, whether they be the Klan or a deadly virus. If defendants fail to protect voters in the November election, they would still remain properly liable for that failure under Section 11(b).

B. Plaintiffs Are Likely to Prevail on the Merits of Their ADA Claims.

Plaintiffs challenge two aspects of Wisconsin's voting regime that, in the context of the COVID-19 pandemic, violate Title II of the ADA by denying Wisconsin voters with disabilities full and equal access to government programs or services: (i) Wisconsin's enforcement of the witness-verification requirement as applied to immunocompromised voters or voters currently infected with COVID-19; and (ii) Defendants' failure to provide an accessible online ballot to voters with vision and other disabilities that prevent them from reading or using a pen and paper ("print disabilities"). *See Swenson* PI Br. 30-36. The Legislature mounts an array of attacks on these modest ADA claims, but none is persuasive—indeed, each rests on fundamental legal error.

1. *The witness requirement*. The Legislature first contends that Plaintiffs have not carried their burden to show that substituting another anti-fraud tool for the witness-verification requirement for these voters is a reasonable modification "as opposed to a fundamental alteration

[5] *See also* Second Goodman Decl., Ex. 16, Hearing on the U.S. Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 189th Cong. 1300-1301 (1965) (*available at* https://bit.ly/2UZGsj6) (describing DOJ consent judgment in *United States v. Mathews* that enjoined defendants "from refusing reasonable police protection to any person in need thereof" when exercising the right to vote or encouraging others to exercise the right to vote). SOAPF ¶ 57.

of Wisconsin's absentee ballot-regime."[6] Leg. Br. 87. This argument seriously misunderstands the relevant burdens of proof and persuasion under Title II. Consistent with its sweeping anti-discrimination mandate, the ADA imposes only a minimal burden on Plaintiffs to show that the modification they seek "is reasonable on its face." *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002). This burden "is not a heavy one," *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (citation omitted), and requires only a "prima facie showing," *Oconomowoc*, 300 F.3d at 783; *see also Henrietta D.*, 331 F.3d at 280. The Legislature cannot seriously argue that Plaintiffs have failed to carry this burden.

Once a plaintiff makes this prima facie showing, it is the *defendant's* burden to demonstrate "unreasonableness or undue hardship in the particular circumstances." *Oconomowoc*, 300 F.3d at 783. It is thus the Legislature's burden to prove that replacing the witness-verification requirement with another anti-fraud tool "would fundamentally alter the nature" of voting by mail in Wisconsin. 28 C.F.R. § 35.130(7)(i) (showing must be made by "the public entity"); *see NFIB v. Lamone*, 813 F.3d 494, 508 (4th Cir. 2016); *Swenson* PI Br. 31.

The Legislature has not come close to making that showing, for two independent reasons. First, proving fundamental alteration requires more than attorney argument—it requires *evidence*, but the Legislature has marshaled none. As the Sixth Circuit has explained, "[i]t is not enough for a defendant to merely allege plaintiffs' proposed remedy undermines" its interests in preventing fraud. *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017). "In order to prevail on his affirmative defense, defendant has the burden of production and persuasion to prove that plaintiffs' proposed [modification] . . . would fundamentally alter [the State's] election system."

[6] The Legislature's brief confuses the standards under Title I of the ADA with those applicable under Title II. Title I of the ADA requires covered entities to make reasonable *accommodations*. Title II, by contrast, requires government entities to make reasonable *modifications*.

Id. The Legislature cites no record evidence demonstrating that allowing voters with disabilities who are reasonably unable to secure a witness to utilize another anti-fraud tool would somehow fundamentally alter the nature of voting by mail. In fact, the WEC and the RNC acknowledge that they have no evidence of voter fraud related to absentee ballots, and the Legislature is unable to provide any evidence of absentee voter fraud for voters invoking the "indefinitely confined" exemption. Second Goodman Decl., Ex. 30 (Objections and Responses of Defendants Dean Knudson, Julie M. Glancey, Robert F. Spindell, Jr., Mark L. Thomsen, Ann S. Jacobs, Marge Bostelmann and Meagan Wolfe to the Swenson Plaintiffs' First Set of Requests for Admissions (July 27, 2020)) ("WEC RFA Resp.") at No. 32; Second Goodman Decl., Ex. 31 (Republican Nat'l Comm. and Republican Party of Wis. Objections and Responses to Swenson Plaintiffs' Requests for Admission (July 20, 2020)) ("RNC RFA Resp.") at No. 2; SOAPF ¶ 76.

Second, the Legislature's fundamental alteration argument is unpersuasive, even on its own terms. Citing the Seventh Circuit's order staying relief this Court ordered in April, the Legislature reasons that Plaintiffs' requested relief must constitute a fundamental alteration because the State has a "substantial interest in combatting voter fraud." Leg. Br. 87 (quoting *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020)). Setting aside the fact that the Legislature mischaracterizes the Seventh Circuit's opinion,[7] the conclusion does not follow from the premise: the fact that the witness-verification requirement furthers the state's interest in combatting voter fraud does not mean that replacing

[7] The Seventh Circuit was "concerned with the overbreadth of the district court's order, which categorically eliminate[d] the witness requirement applicable to absentee ballots." *DNC*, 2020 WL 3619499, at *2. That concern is not present here because Plaintiffs seek relief on behalf of the small class of voters with disabilities who cannot secure a witness with reasonable effort.

the requirement with another anti-fraud tool for a limited class of voters would fundamentally alter the nature of voting by mail.

It does not. The fundamental nature of voting by mail is casting one's ballot remotely, which is not affected by the presence or absence of any particular anti-fraud tool. *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683-85 (2001) (holding under Title III that requiring the PGA Tour to allow a professional golfer to use a golf cart was not a fundamental alteration because "the use of carts is not itself inconsistent with the fundamental character of the game of golf," *i.e.*, "shotmaking"). That much is evident from the majority of states that currently offer vote-by-mail options without witness verification—no one could reasonably contend that voting by mail in those states is fundamentally different in nature than voting by mail in Wisconsin.[8]

The Legislature next contends that reasonable modifications to the witness-verification rule are not required because voters with disabilities do not have to vote by mail. Leg. Br. 88. This argument, too, fundamentally misunderstands the ADA. As explained below, the Legislature mischaracterizes the *Luft* analysis, but such analysis in any event has no relevance to the ADA. It is well-settled that the relevant government service or program under the ADA is narrow—here, it is voting by mail. *See, e.g.*, *Lamone*, 813 F.3d at 503-05 (rejecting argument "that even if absentee voting is not fully accessible, the full accessibility of Maryland's in-person

[8] The Legislature's argument is further undermined by the fact that some of the proposed "solutions" to the witness-verification requirement during COVID-19 that the Legislature touts are especially poor means of deterring fraud. For instance, the Legislature has made no showing that allowing witnesses without any specialized training or pre-existing knowledge of the voter (*e.g.*, a food delivery person), as WEC now suggests, *see* Goodman Decl., Ex. 31, Swenson ECF No. 43-31 (Wis. Elections Comm'n, Updated Absentee Witness Signature Requirement Guidance - COVID-19), is a better means of policing fraud than a certification under pain of perjury. Nor can the Legislature possibly explain how placing a ballot "outside [one's] door" for pick up by the witness, and then on the voter's "door step" after it is signed, is more secure than a voter self-certification.

polling places provides disabled voters with meaningful access to voting"); *Drenth v. Boockvar*, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020) (relevant government program was "ability to vote privately and independently without being physically present at a polling location"). It is thus irrelevant whether voters with disabilities could vote some other way. What matters is that they have been denied their rights to participate fully and equally in Wisconsin's vote-by-mail program. *Lamone*, 813 F.3d at 503-07; *Drenth*, 2020 WL 2745729, at *4-5; *cf. Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014) (assuming that the benefit is "merely the opportunity to vote at some time and in some way would render meaningless the mandate that public entities may not afford persons with disabilities services that are not equal to that afforded to others" (internal punctuation and citation omitted)).

Similarly misguided is the Legislature's suggestion that Plaintiffs were required to prove that the witness-verification rule "is likely to deny any disabled voters the right to vote." Leg. Br. 88-89. That is not the standard. An ADA plaintiff "need not . . . prove that they have been disenfranchised or otherwise completely prevented from enjoying a service, program, or activity to establish discrimination under . . . Title II." *Disabled in Action*, 752 F.3d at 198 (quotations omitted); *Lamone*, 813 F.3d at 503 ("Title II does not only prohibit 'exclusion from participation' in a public program[.]"). It is enough that individuals with disabilities be denied meaningful access to the public service—here, meaningful access to voting by mail. *Lacy v. Cook Cty.*, 897 F.3d 847, 854 (7th Cir. 2018); *see Lamone*, 813 F.3d at 506-07. Plaintiff Swenson was not alone in her difficulties securing a witness for April, *see DNC* Br. 20-21, and given that the pandemic is likely to be *worse* in November, not better, it is likely that thousands of Wisconsin voters will find themselves in the same situation. *See id*. at 20 (noting that "[o]ver

600,000 Wisconsinites live alone and even more live with an individual who is unqualified to be a witness").

Finally, the Legislature makes a half-hearted waiver argument, asserting that Plaintiffs failed to argue causation. Leg. Br. 89. But this element is plainly satisfied. If not for their immunodeficiencies, these Wisconsinites would safely be able to secure an in-person witness and vote by mail. *See, e.g.*, Swenson Decl. ¶¶ 11-15; *Swenson* PI Br. 36 n.164 (standard is "but for" causation).

2. *Accessible online ballots*. The Legislature does not dispute that voters with print disabilities are denied equal access to Wisconsin's vote-by-mail program because the WEC does not provide an accessible online ballot. The Legislature also does not dispute that these tools are reasonable, feasible, and would not fundamentally alter the nature of voting by mail. Instead, the Legislature offers two legal arguments that are clearly in error.

First, buried deep in its brief, the Legislature asserts that Plaintiffs lack standing. Leg. Br. 105-08. This contention is easily rejected. DRW has both associational and organizational standing.

Associational standing. Plaintiff DRW is Wisconsin's designated protection and advocacy agency for individuals with disabilities and is charged by statute to "pursue legal … remedies" for Wisconsinites with disabilities. *See* Supp. Decl. of Kit Kerschensteiner in Supp. of Pls.' Mot. for Prelim. Inj., July 31, 2020 ("Supp. DRW Decl.") ¶¶ 6-8; SOAPF ¶ 70.[9] "[C]ourts

[9] *See also DRW v. State of Wis. Dep't of Pub. Instruction*, 463 F.3d 719, 722-23 (7th Cir. 2006) (explaining that DRW is a P&A organization under Wisconsin statutes and pursuant to the Developmental Disabilities and Bill of Rights Act, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, and the Protection and Advocacy of Individual Rights Act, "known collectively as the … federal P&A statutes"); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Correction*, 642 F. Supp. 2d 872, 876 (S.D. Ind. 2009) [hereinafter *IPAS*] (noting

around the country have rejected similar [associational] standing challenges to protection and advocacy services," *IPAS*, 642 F. Supp. 2d at 877 (collecting cases), so long as they sufficiently detail how at least one of their constituents is adversely affected by the challenged policy, *see DRW v. Walworth Cty. Bd. of Supers.*, 522 F.3d 796 (7th Cir. 2008).[10] DRW has more than done so, illustrating how its constituents have been and will be denied equal access to Wisconsin's vote-by-mail program. *See* Decl. of Kit Kerschensteiner in Supp. of Pls.' Mot. for Prelim. Inj. ¶ 17, *Swenson* ECF No. 51 ("DRW PI Decl."); SOAPF ¶ 71 (blind voter required assistance from family member with different political views); *see also* Supp. DRW Decl. ¶ 16; SOAPF ¶ 71. The Legislature's "overly formalistic" argument that injuries to DRW's "constituents" are insufficient because they are not "direct member[s]" has been roundly rejected, *see, e.g.*, *Ore. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110-13 (9th Cir. 2003); *see also DRW*, 522 F.3d at 803 (acknowledging that disabled students who have suffered an injury can be "represented by DRW"), Supp. DRW Decl. ¶¶ 7 - 8, and any suggestion that DRW's constituents are not harmed because they can vote in person simply misunderstands the ADA.

As to the remaining two elements in the associational standing inquiry, not even the Legislature contests that the interests DRW seeks to protect are germane to DRW's statutory mission, and the Seventh Circuit (along with numerous other courts) has already recognized "that congress eliminated the third requirement"—viz., that the claims do not require the participation of individual members—"in enacting the Developmental Disabilities Act." *DRW*, 522 F.3d 796, 802; *see also, e.g.*, *Mink*, 322 F.3d at 1113 ("Congress abrogated the third prong of the *Hunt*

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that P&A organizations "are responsible for enforcing federal and state law on behalf of individuals with disabilities who otherwise would face perhaps insurmountable obstacles to seeing their rights enforced and their interests protected").

[10] Notably, however, DRW is not required to identify its constituents by name to establish standing. *Id*. at 802.

test" for "advocacy organizations" like DRW); *IPAS*, 642 F. Supp. 2d at 878 (same). Even if the third requirement did apply, however, it would be easily satisfied. Participation of DRW's constituents is unnecessary because the only facts that would hypothetically require individual participation are undisputed: the individuals DRW represents (i) have qualifying disabilities; and (ii) they all seek the same remedy—an accessible ballot—that the Legislature does not dispute is a reasonable and feasible modification, within the WEC's authority to implement.

Organizational standing. There is no need to consider organizational standing because DRW clearly has associational standing. But even if the Court proceeds further, there is no question that DRW has organizational standing, too. Indeed, the Legislature *does not even contest* DRW's organizational standing. *See Cook Cty. v. Wolf*, 962 F.3d 208, 219 (7th Cir. 2020); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 949-53 (7th Cir. 2019). DRW respectfully directs the Court to paragraphs 17 and 22-26 of Ms. Kerschensteiner's first declaration, *Swenson* ECF No. 51, and paragraphs 19-23 of her second declaration, filed July 31, 2020, which set out in detail how DRW has been forced to divert resources to aid voters with print disabilities.

Second, the Legislature again asserts that voting in person is a reasonable modification for voters with print disabilities, Leg. Br. 90, but as explained above, it categorically is not. *Supra* 18-22. The relevant government service here is voting by mail, and a "modification" that requires an individual with a disability to utilize a different service altogether (voting in person) is not a modification *to the service from which an individual has been denied meaningful access* (voting by mail) because it does not allow the individual to participate in *that* service. The Legislature's argument is thus discriminatory on its face. In the Legislature's view, individuals with disabilities should be satisfied with voting in person, while the general public is able to choose between voting in person and by mail. The ADA was enacted to prohibit just such

discriminatory treatment, as myriad courts have recognized, including *Lamone* and *Drenth* in the vote-by-mail context.

C. Plaintiffs Are Likely to Prevail on Their Claim That Defendants' Election Administration and Various Provisions of Wisconsin Election Law Unduly Burden Their Right to Vote Under *Anderson-Burdick*.

1. Luft *does not foreclose, and if anything reinforces, Plaintiffs'* Anderson-Burdick *claims.*

The Legislature devotes nearly twenty pages to the Seventh Circuit's decision in *Luft* and treats that case—which has absolutely nothing to do with COVID-19 or any other extraordinary shock to the state's election system—as somehow dispositive of the *Anderson-Burdick* analysis in Plaintiffs' challenge to the administration of Wisconsin elections during a deadly pandemic. Leg. Br. 2-3, 22-41. That is wrong for three reasons.

First, *Luft* addressed the operation of certain of Wisconsin's voting laws *prior to*, and unaffected by, COVID-19; the court posited that Wisconsin's ordinary electoral system "make[s] it easy to vote"—in normal circumstances. *Luft*, 963 F.3d at 665. That premise carries zero weight here. These circumstances are anything but normal. The November 2020 presidential election will happen in the midst of a global pandemic the likes of which the world has not seen in over a century. *Swenson* PI Br. 2-3, 20-22. COVID-19, by virtue of making in-person encounters potentially deadly and disease-spreading, has wholly disrupted ordinary voting processes and procedures. *Swenson* PI Br. 3-19. Plaintiffs' challenges do not concern the ordinary administration and operation of Wisconsin's generally functioning system, but its operation in extraordinary COVID-19 conditions—when it will be anything but "easy to vote," as every expert before this Court has opined.[11] *See, e.g.*, Remington Dep. 34:21-35:18; Decl. of

[11] Courts around the country have recognized COVID-19's destructive force on otherwise-functioning election apparatus—nationwide, election laws and administration that might function

Dr. Meagan Murray, July 8, 2020, ECF No. 370 ("Murray Decl.") ¶¶ 47, 66-81; SOAPF ¶¶ 12-13.

Plaintiffs' claims are thus in no sense "foreclose[d]" by *Luft*. Leg. Br. 25. And the Legislature's suggestion otherwise is indicative of its failure throughout its brief to confront the profound and cross-cutting ways in which COVID-19 will create unprecedented difficulties for Wisconsin's administration of the November 2020 election.

Second, Plaintiffs' suit—which challenges core components of an electoral system that is failing on multiple axes in light of a novel pandemic—is exactly the type of suit that would remain viable even under the Legislature's overly expansive reading of *Luft*.

According to the Legislature, *Luft*'s references to "the system as a whole" mean that for an *Anderson-Burdick* challenge to be successful, a plaintiff must show that a voter is "unable to use any available voting avenue"—i.e., that every part of the electoral system is failing. Leg. Br. 40. So long as Wisconsin's mail-in voting options are available, Plaintiffs cannot raise an *Anderson-Burdick* claim with respect to Wisconsin's in-person voting regime. Leg. Br. 27 ("Plaintiffs' criticisms of Wisconsin's in-person voting regime … are legally irrelevant under *Luft* because Wisconsinites can fully vindicate their right to vote with reasonable effort through

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properly in normal times are now breaking down. *See, e.g.*, *League of Women Voters of Virginia v. State Bd. of Elections*, 2020 WL 2158249, at *8, 10 (W.D. Va. May 5, 2020) (while in "ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote," the inquiry is different in an election that "takes place during the worst pandemic this state, country, and planet has seen in over a century"); *Thomas v. Andino*, 2020 WL 2617329, at *1 (D.S.C. May 25, 2020) (modifying voting requirements based on the "immediate and severe effects" of the Covid-19 pandemic); *Acosta v. Pablo Restrepo*, 2020 WL 3495777, at *11 (D.R.I. June 25, 2020) (modifying voting requirements based on the "extraordinary circumstances wrought by the ongoing COVID-19 pandemic"); *Idaho v. Little*, 2020 WL 3490216, at *1 (D. Idaho June 26, 2020) (finding plaintiffs had standing to challenge Idaho's election procedures based on the "unprecedented COVID-19 pandemic scenario").

absentee voting."). And vice versa: if Wisconsin permits in-person voting, Plaintiffs cannot raise an *Anderson-Burdick* claim with respect to Wisconsin's mail-in voting regime. Leg. Br. 31 ("Wisconsin's generous in-person voting options render Wisconsin's voting regime entirely constitutional under *Luft*'s requirement that a plaintiff must demonstrate that Wisconsin's election system "as a whole").

That extreme overreading of *Luft* is wrong, as explained below. But even if it were correct, Plaintiffs here would be entitled to prevail on their claims. The Legislature ignores that COVID-19 *will* disrupt Wisconsin's election system as a whole—and that's the thrust of this suit. It is not one component of the system that's failing under the weight of a pandemic it was not designed to handle; it's all of it, both mail-in voting and in-person voting. The Legislature's suggestion that each avenue is "independently adequate," Br. 27, 31, is wrong on its face; right now, *neither* avenue is independently adequate.

For instance, with respect to absentee voting, the Legislature argues that "Wisconsin has a generous, no-excuses-needed mail-in absentee voting regime." Leg. Br. 27. But the whole point of this challenge is that the normally "generous, no-excuses-needed" mail-in absentee regime *will not* function as it did prior to the onset of COVID-19. To take just one example, that regime currently allows voters to request ballots so close to the return deadline that it is virtually impossible for them to vote those ballots, in the midst of a natural catastrophe severely affecting municipal and postal resources. *See infra* 38-39.

On the in-person side of the equation, absent adequate safety precautions, voting in person is now a dangerous act—it is a gathering of people that, while in normal times would be celebrated, is now a grave risk to the health of the voter and her loved ones, or to strangers who happen to find themselves near a voter who is unknowingly infected. It is now dangerous to wait

in line too close to someone, to work as a poll worker at a voting precinct without adequate PPE and sanitization supplies, and to touch unsanitized pens or screens or other objects that the preceding voter touched. Absent steps by Defendants to ensure that in-person voting is safe, Wisconsin's in-person voting regime is simply not an independently adequate option. *See, e.g.,* Remington Dep. 34:21-35:3; Jacobs Dep. 100:12-103:11; SOAPF ¶ 51.

Even accepting the Legislature's extreme reading of *Luft*, then, Plaintiffs' suit thus challenges "the system as a whole." There are two basic options for voters: in-person or absentee. Both regimes will be substantially disrupted by COVID-19. And the systemic breakdowns exacerbate each other: the in-person voting risks compound the likelihood of a deluge of absentee-ballot requests, and resulting breakdowns in the mail-in voting process will result in voters resorting to in-person polling locations.[12] Absent judicial intervention, "the system as a whole" will likely suffer from widespread, arbitrary, and dangerous breakdowns in the November election that will ultimately disenfranchise thousands of Wisconsin voters. Indeed, it is the Legislature that refuses to consider whether Wisconsin's "election code as a whole impose[s] only reasonable burdens." *Luft*, 963 F.3d at 671. And it is the Legislature's analysis that contradicts *Luft* by looking at each of Wisconsin's challenged voting laws and practices "in isolation," without putting them in context—i.e., without accounting for the effect of these interlocking failures amid an ongoing pandemic. *See* Leg. Br. 27-48.

The sheer number of voters likely to be disenfranchised absent Plaintiff's requested relief eliminates any doubt. Take just the absentee-ballot receipt deadline: Chair Jacobs testified that

[12] Remarkably, the Legislature also criticizes Plaintiffs for bringing too *many* challenges. Leg. Br. 1. The Legislature's Goldilocks theory—where a plaintiff must show that every single voting method the State provides is inadequate, but may not challenge each of the components of the system that burdens the right to vote—finds no support in *Luft* or any other source of authority.

hundreds of thousands of duly qualified voters—an amount on par with the entire State of Wyoming, and many times the margin of victory in Wisconsin in the last several elections—will likely be disenfranchised in November absent judicial injunction of the ballot-receipt deadline. Jacobs Dep. 32-35; see also Fowler Report at 8-20; SOAPF ¶ 58. There can be no serious dispute that challenges to voting provisions that would cause disenfranchisement on that massive scale survive *Luft*. That is the definition of a "system as a whole" breaking down.

Third, the Legislature seriously misreads *Luft*, which does not set nearly so high a bar. *Luft* does not support the Legislature's theory, which narrows *Anderson-Burdick* to a sliver of challenges (perhaps pandemic-based challenges once a century) where plaintiffs can show (as they can here) that every aspect of the system is failing. Rather, the thrust of *Luft* is much more modest: courts can't consider "individual provisions" in a vacuum, because every election law "invariably impose[s] some burden on individual voters." *Luft*, 963 F.3d at 671. Accordingly, election laws must be considered in context, and considered against the backdrop of whether voters can vote with "reasonable effort." *Id.* at 670. So for instance, in *Luft*, the court ruled that a restriction on the number of hours per day for in-person early voting should not be assessed "in isolation" but rather in light of various other provisions that ordinarily make it easy to vote in Wisconsin. *Id.* at 671. But that does not mean that so long as there's *some* hypothetical way a voter *could* vote, no burden on voting can be unconstitutional. To the contrary, *Luft*—consistent with *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) ("*Frank II*")—emphasized the importance of ensuring that all voters can cast ballots with "reasonable effort." *Luft*, 963 F.3d at 678. And *Luft* further emphasized that the right to vote is "personal," and cannot be defeated by the fact that others will be able to reasonably cast their ballots. *Id.* at 669. Rather, the state must provide all voters with a true "path to cast a vote." *Id.* at 678.

And it certainly cannot be true, as the Legislature suggests, that so long as the in-person voting system functions, the vote-by-mail system can wholly fail; or vice versa. *Luft* didn't consider core breakdowns infecting an entire voting method, and *Luft* certainly never suggested that such challenges would be meritless. For good reason: Any such ruling would be irreconcilable with both Supreme Court and Seventh Circuit precedent. An unduly burdensome protocol—even if the state has provided alternatives—is still unconstitutional. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008) (evaluating burden of in-person photo requirement even though voters could avoid requirement by voting through absentee ballots); *Griffin v. Roupas*, 385 F.3d 1128, 1129 (7th Cir. 2004) (evaluating burden of absentee ballot requirements even though in-person system existed).

The Legislature's description of *Luft*'s sweep highlights how aggressively it reads that case, beyond anything the Seventh Circuit actually said. In the Legislature's view, this is the vanishingly small space in which an *Anderson-Burdick* claim may still exists: A hypothetical voter who "does not wish to vote in person, prudently request[s] an absentee ballot well in advance of November, ha[s] that ballot lost in delivery due to some error by the USPS, [is] unable to request a replacement ballot, and [is] so compromised that he cannot safely vote in person." Leg. Br. 40. Set aside the transparent *Purcell* trap that such a narrow reading would create, forcing voters to bring potentially fact-intensive claims to Court only at the very last moment, when all else has failed. *Cf. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020) (hereinafter "*RNC*"), Slip Op. at 2 ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."). A state imposes an unconstitutional burden on the right to vote long before a voter has encountered repeated, insurmountable obstacles at every turn. *Frank II*, 819 F.3d at 387

(holding that, if a voter cannot meet a voting requirement after "reasonable efforts," there must be a "safety net").

The Legislature makes much of the fact that states are not constitutionally required to provide mail-in voting. Leg. Br. 31-32. But the Legislature cites no authority that suggests Wisconsin can choose to provide mail-in voting, and then create a system that will necessarily fail. And any such suggestion is absurd. A state need not have mail-in voting, but once it decides to create such a regime, many of its citizens will understandably rely on that regime as a viable voting option. So if a state decides to have mail-in voting, that regime must function in a way that actually allows people to vote. The rule the Legislature appears to press—that there can be no oversight of mail-in voting because mail-in voting need not be offered in the first place—would lead to wide-scale voter confusion and certain disenfranchisement. Once a state provides an option such as mail-in voting, it must take measures to ensure that a voter who reasonably chooses that option can effectively vote. *See Price v. New York State Bd. of Elections*, 540 F.3d 101, 110-12 (2d Cir. 2008) (holding that New York unconstitutionally denied absentee ballots when it "relie[d] exclusively on its contrived argument that tabulating absentee ballots could cause delay in finalizing election results"). That is why courts routinely assess the burdens imposed by such laws under the *Anderson-Burdick* framework. *See, e.g.*, *Democratic Nat'l Comm. v. Bostelmann,* No. 20-CV-249-WMC, 2020 WL 1638374, at *17 (W.D. Wis. Apr. 2, 2020), ECF No. 170*; Mays v. LaRose*, 951 F.3d 775, 780 (6th Cir. 2020) (evaluating constitutionality of deadline to request absentee ballot); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016) (evaluating burden of reducing early in-person voting and same day registration).

The voting laws and practices Plaintiffs challenge are not simply "less-convenient feature[s]," as *Luft* characterized the laws it upheld. *Luft*, 963 F.3d at 675. This case isn't about minor or picayune details of the voting apparatus. Absent this Court's intervention, Wisconsin voters who attempt to vote in person will be required to choose between voting and risking their health or the health and lives of their loved ones in order to vote. *See infra* 30-36. And even if they choose to assume that risk in order to vote, sheer overcrowding at too-few polling locations may prevent them from actually casting a ballot. *See infra* 36-38. Meanwhile, voters who attempt to vote by mail will risk having their entirely valid ballots not counted. *See infra* 38-44, 44-46. *Luft* poses no barrier to these claims.

2. *Absent judicial intervention, several aspects of the upcoming election are likely to unconstitutionally burden the right to vote.*

Absent judicial intervention, four aspects of the upcoming November 2020 Election are likely to unconstitutionally burden Wisconsinites' right to vote: (i) Defendants are likely to fail to ensure safe and accessible in-person voting; (ii) Defendants are likely to fail to ensure an adequate number of poll workers to administer safe polling places; (iii) Wisconsin's statutory deadline for receipt of mail-in absentee ballots is again likely to disenfranchise thousands of voters; and (iv) Wisconsin's absentee-ballot witnessing requirement is likely to disenfranchise a discrete class of immunocompromised, high-risk, or infected individuals unable to safely secure a witness. Each of these challenged practices and laws severely burdens the right to vote, considered within the framework of the Wisconsin voting system as a whole. *See supra* 29-46. Absent intervention from this Court, each of these challenged practices is likely to disenfranchise or create serious health risks for many Wisconsin voters—and their cumulative effect will likely spell disaster for November, measured against any norms of a functioning electoral system.

The WEC Defendants have not taken a position on the merits of Plaintiffs' requested relief. And the Legislature has come nowhere near showing that the challenged burdens are narrowly tailored to a compelling state interest. To the contrary, the Legislature has constructed an almost exquisite Catch-22, arguing that any health risks associated with in-person voting are ameliorated by the availability of vote-by-mail procedures, while any failures of the vote-by-mail system are rendered irrelevant by the options available for voting in person. *Compare* Leg. Br. 27 ("Plaintiffs' criticisms of Wisconsin's in-person voting regime . . . are legally irrelevant under Luft because Wisconsinites can fully vindicate their right to vote with reasonable effort through absentee voting.") with *id.* at 31 ("For those voters who choose not to take advantage of Wisconsin's generous absentee voting regime . . . in-person voting in November . . . is a safe and entirely constitutional option.").

a. Failure to Ensure Safe In-Person Voting

The Legislature first suggests that Wisconsin need not take reasonable steps to ensure that its in-person voting system is safe at all, because voters can always mail-in their ballots. Leg. Br. 30. That position is untenable. The mail-in system is itself suffering from COVID-19-related breakdowns, and more fundamentally, Wisconsin cannot tell its voters they can vote in person, but then abdicate its duty to ensure that doing so is safe. Instructing voters that they can vote in person while allowing that voting avenue to pose life-threatening risks severely burdens the right to vote.

The Legislature's fallback position, accordingly, is that in-person voting in April was safe, and that in-person voting in November will likewise be safe and therefore constitutionally adequate. Leg. Br. 33-39. Both assertions fly in the face of all available evidence and expert guidance.

As Plaintiffs' opening brief laid out, in-person voting was *not* safe in the April election. During the April 7 election, many polling locations, including in parts of the state most acutely affected by COVID-19, lacked the social distancing protocols and safety equipment—such as PPE, masks and gloves, sanitization supplies and equipment—necessary to ensure safe voting. *Swenson* PI Br. 15-17; 38-39. Plaintiffs themselves experienced such unsafe voting environments, including crowded venues and unsanitary voting practices, in April. *Swenson* PI Br. 15-16; *see also DNC* PI Br. 11-15; SOAPF ¶ 31.[13] Both public-health and epidemiological experts in this consolidated litigation evaluated the April election and opined, based on their respective expertise, just how unsafe that election was. *Swenson* PI Br. 38-40; *Gear* PI Br. 9-10.

Discovery has only underscored that conclusion. The WEC's own communications reveal that it was unable to source masks and gloves due to inadequate supplies. SOAPF ¶ 26. Supplies were in such short demand poll workers had to rely on vodka as a sanitizer. SOAPF ¶ 27. Poll workers reported being fearful for their life. SOAPF ¶ 28. Two WEC commissioners noted that Wisconsin could not guarantee the safety of its voters in the April election. SOAPF ¶ 29. Voter after voter reported lack of social distancing and safety protocols. SOAPF ¶¶ 30-31. Chair Jacobs testified that some voters in the April election risked their lives to vote. Jacobs Dep. 107:7-9; SOAPF ¶ 23.

Rather than attempting to rely on some competing expert to suggest that, contrary to all available evidence, in-person voting in April was safe, the only argument the Legislature can

[13] *See also, e.g.*, Decl. of Marquisha Wortham, July 8, 2020, ECF No. 367 (conditions at voter's polling place were unsafe as a result of overcrowding and long lines; she left after 30 minutes without voting); Decl. of Christy Moore, July 8, 2020, ECF No. 330 (voter's polling place had crowded line; she waited in her car for an hour and a half to vote and then left); Decl. of Latoya Washington, July 8, 2020, ECF No. 363 (voter's polling place had crowded line; she waited for two hours to vote and then was told the polls were closing and she could not vote); SOAPF ¶ 31.

muster is to claim that some of the declarations submitted in the DNC case show that in-person voting "could be done safely and responsibly in" April. Leg. Br. 33. But no one disagrees that in-person voting *could* have been made safe; the problem is that it was not made safe as a general matter.

The Legislature further suggests that Plaintiffs have failed to show any COVID-19 spread in fact occurred during the April election. But that is a red herring. Plaintiffs have offered a substantial body of evidence showing an association between voting in April and COVID-19 transmission. COVID-19 is transmitted through contaminated respiratory droplets or "droplet nuclei" (aerosolized particles). Expert Report of Patrick Remington, M.D., *Swenson* ECF No. 44 ("Remington Report") at 8; SOAPF ¶ 1. This is "well-established" and "based on extensive research about respiratory viruses, coronaviruses, and the [] novel COVID-19 virus." Remington Dep. 116:5-11; SOAPF ¶ 2. Because of these characteristics, COVID-19 spreads in the exact type of environments in which in-person voting occurs—indoor environments where voters are necessarily brought into close contact with one another and the same surfaces and objects at the polling place. Remington Report at 9; SOAPF ¶ 3. The record reflects that where Wisconsinites did in fact vote in person on April 7, they reported long, crowded lines for hours, and polling places with lack of social distancing and use of PPE or masks. *See* Second Goodman Decl., Ex. 2 (Compilation of six emails from voters regarding April 7) (produced by WEC); SOAPF ¶ 2. The evidence further reflects that rates of COVID-19 increased in counties with higher rates of in-person voting, confirming what is known about the epidemiology of COVID-19 and the biology of transmission. Remington Report at 11 & n. 35; SOAPF ¶ 4. In addition, Dr. Murray reports "71 confirmed cases of Covid-19 among people who may have been infected during the election." Decl. of Dr. Meagan Murray ¶ 60, July 8, 2020, ECF No. 370 ("Murray Decl.");

SOAPF ¶ 5. The Legislature suggests that such evidence is insufficient because there is no conclusive proof that any one voter actually contracted COVID-19 during the April election. But such proof would require a nearly impossible "randomized placebo controlled double-blind trial, where you would . . . assign people to vote in person, and a controlled population to not to," and then "randomize the confounding factors in the exposed and the unexposed group." Remington Dep. 73:18-74:3; *see also* Murray Dep. 37:11-17; ("I wouldn't ever be able to say that someone was definitely infected at a particular time."). What the Swenson Plaintiffs have shown, however, is that the evidence shows a significant association between voting in-person in April and COVID-19 rates. Murray Dep. 55:22-56:3; SOAPF ¶ 78. The Legislature's efforts to refute the import of that conclusion are meritless.

The Legislature attempts to rely on two studies that it says show that voting in Wisconsin was a "low risk" activity on April 7. *See* Leg. Br. 36. But both studies, by Leung and Berry, respectively, are methodologically weak and unreliable.[14] By contrast, the study on which Plaintiffs' experts rely, by Chad Cotti and his colleagues, found a "statistically and economically significant association between in-person voting and the spread of COVID-19 two to three weeks after the election." Remington Report at 11 & n. 35. The Cotti study addresses the limitations in

[14] The Leung study is a post-test observational study without a control group which makes the assumption that the expected rates of COVID-19 transmission following the election would be constant and then finds a lack of increase in expected rates to be evidence that the April election did not cause any increase. But infection rates could have increased or decreased as a result of changes in other unmeasured factors. The Berry study examined the expected daily rates of COVID-19 transmission following the April election and concluded that the trends in Wisconsin were the same as in the rest of the United States during the two-week period following the election. But Wisconsin had much lower rates of COVID-19(44.3 per 100,000 on April 7) than did the US (120.8 per 100,000 on April 7). So, the entire United States, with a much larger rate of COVID-19 spread, was not a viable control group. Remington Report at n.34. Further, Dr. Berry and his colleagues did not measure other potential confounding factors for trends in the United States. Murray Report ¶ 63.

the Leung and Berry studies by comparing trends within the state of Wisconsin using county-level data and controlling for known and potential confounders, including measures of social distancing and county-specific demographics. Both Plaintiffs' experts in the field of epidemiology concluded that, given these important distinctions in methodology, the Cotti study is most rigorous and reliable. *See* Remington Report n. 34; Murray Report ¶ 63. In short, all available evidence and reliable expert analysis demonstrates that in-person voting was simply *not* safe in April. Murray Report ¶ 63.

The Legislature thus pivots to the wildly irresponsible suggestion that even if in-person voting was not safe in April, Plaintiffs must show that it will be "uniquely unsafe" in November. Leg. Br. 31, 33. But unsafe voting conditions represent a burden whether unique or not. And Plaintiffs have shown that COVID-19 is likely to be a problem in November, and that in-person voting is November—absent appropriate safety precautions—is thus likely to again be unsafe again. Plaintiffs' experts have testified that COVID-19 is continuing to spread throughout Wisconsin and will continue to be a major public health concern during the remaining months of 2020. Remington Report at 6-10; Br. in Supp. of Pls.' Mot. for TRO and Prelim. Inj. 12, Case No. 20-cv-278-wmc, ECF No. 17 ("*Gear* PI Br."); Murray Decl. ¶¶ 10, 66; SOAPF ¶ 10. Those conclusions are consistent with all available public health and epidemiological evidence. The Legislature's claim otherwise—unsupported by expert testimony—is simply reckless.[15]

[15] In its Supplemental Brief, the Legislature contends that Dr. Remington's acknowledgment that the exact course of the pandemic is unknown somehow means Plaintiffs are not entitled to relief, ECF No. 474-1 at 6. But Dr. Remington stated that "there's no doubt in my mind that we will have significant community transmission for the next four months, certainly through November," Remington Dep. 38:14–17; SOAPF ¶ 79, and Plaintiffs need not provide evidence of the precise number of cases in Wisconsin on November 3 to demonstrate that in-person voting will be unsafe without appropriate precautions.

The Legislature hangs its hat on a single model, from the Institute for Health Metrics and Evaluation (IHME), which indicates that infection rates in November will be lower than in April. Leg. Br. 34. But that model has not been updated since June and is thus of no predictive value for November. Dr. Remington cited that model in his June report when it was current but subsequently explained that it is now hopelessly out of date and wrong. Remington Dep. 47:12-20; Remington Dep. 49:12. Its projections are flatly inconsistent with the real-world numbers in Wisconsin today, where the infection rate is far higher than predicted (likely in part because the assumptions of widespread mask use in the model have not proven correct). For instance, that model predicts 308 daily infections in WI as of July 23, 2020, while the Wisconsin health department tracker shows more than 1,000. SOAPF ¶ 81. And the model predicted two and a half deaths for July 21, when Wisconsin recorded 13. SOAPF ¶ 82. As Dr. Remington testified, the projections in the model for November are likely "off by an order of magnitude of four to five"; "clearly, [the IHME] model vastly underestimated the number of deaths," and "clearly, this model has to be rerun." Remington Dep. 47:17-48:17; SOAPF ¶ 83.

The Legislature likewise repeatedly suggests that the only reason any difficulties occurred in April at all is because COVID-19 was new, and no one saw it coming. Leg. Br. 33. Although COVID-19 will have been around longer by November, Defendants still have not taken nearly the measures necessary to ensure safe in-person voting. *See infra* 70-78, 87-95. The passage of time since COVID-19's onset will not alleviate its likely effect if appropriately responsive measures have not been taken in the interim. Indeed, the WEC's inaction despite the passage of time is all the more reason for the Court to issue appropriate instructions to the WEC, which is currently deadlocked without the Court's intervention. WEC I 23:8-24:15.

b. Adequate poll workers and in-person voting opportunities.

Safe in-person voting during a highly contagious pandemic cannot take place absent an adequate number of poll workers to staff polling locations, and in the absence of adequate voting opportunities to spread out in-person voting so that crowds do not form, *see* Expert Report of Kevin J. Kennedy, *Swenson* ECF No. 45 ("Kennedy Report") ¶¶ 87-89.

To avoid the widespread closures that occurred in April, this Court should order the WEC to ensure an adequate number of available poll workers—a key cause of those closures. *Swenson* PI Br. 40-42. The Legislature does not deny that the widespread closure of polling locations that occurred in April burdened the rights of Wisconsin voters, instead calling such closures "ill-advised," "inexplicabl[e]," and "irresponsible." Leg. Br. 14, 16. It contends that Milwaukee, at least, will not experience them again, Leg. Supp. Br. 5, despite the fact that the Milwaukee Elections Commission has testified that it is concerned about poll worker shortages for the November election. *See* MEC Dep. 111:2-112:18; SOAPF ¶ 49.

The Legislature also suggests that the WEC lacks authority to solve this problem, Leg. Br. 102-03, but as explained below, *infra* 66-70, that is wrong. The WEC retains the statutory authority under Wisconsin law to engage in recruitment efforts and the duty to ensure compliance with state and federal election laws—including the VRA, ADA, and U.S. Constitution. That entails ensuring safe and effective in-person voting facilities for all voters throughout the State by recruiting poll workers to staff the polls. *See infra* 72-74. At the very least, the WEC can, by taking the steps Plaintiffs request, significantly mitigate the problem. *See* Goodman Decl., Ex. 33, *Swenson* ECF No. 43-33 (Wis. Elections Comm'n, Special Teleconference-Only Meeting, Polling Place Supply and Personnel Shortages (Mar. 31, 2020)) (hereinafter "March 31, 2020 WEC Meeting Notice") at 10 ("It has become clear that a shortage

of available election inspectors due to COVID-19 is one of the most limiting factors related to the number of polling locations to be used."); SOAPF ¶ 91.

This Court's intervention is likewise necessary to enjoin two statutes that prevent WEC from ensuring that there are adequate in-person voting opportunities. First, the county-residence requirement in Wis. Stat. § 7.30(2), prevents the WEC from creating a statewide pool of poll workers who could be deployed in response to shortages around the state. WEC II Dep. 89-90. Second, the requirement that municipalities designate by June 11, 2020 all locations that will provide in-person absentee voting for the November 3 election, Wis. Stat. § 6.855(1), limiting in-person absentee voting to a period of 14 days, tie municipalities' hands with respect to in-person absentee voting. Enjoining these provisions would facilitate a greater number of in-person polling locations operating smoothly, efficiently, and safely for the November election—thus alleviating the burden on the right to vote caused by unsafe, crowded polling locations.

The Legislature's articulated countervailing interests do not justify its opposition to this relief. Lifting restrictions on in-person absentee voting does nothing at all to displace "officials who are truly local [from] administer[ing] the polling places." Leg. Br. 69. After all, the whole point is that local officials should be able to provide more in-person voting options and respond to the changing pandemic as need be. And allowing jurisdictions to share poll workers would abate arbitrary shortages in the November election, Kennedy Report ¶¶ 67-69; *Swenson* SOPF ¶ 237; Milwaukee Elect. Comm'n 30(b)(6) Dep., July 23, 2020, ECF No. 470 ("MEC Dep.") 113:3-10; SOAPF ¶ 129. Still, no municipality would be forced to hire poll workers from outside the county—it would be up to local officials. *Swenson* PI Br. 41. Likewise, contrary to the Legislature's assertion, Leg. Br. 68-69, the record evidence shows that § 6.855(1), if enforced, will impose a burden on voters. COVID-19 infection rates have risen substantially

since June 11, SOAPF ¶ 129, making clear how difficult it is for clerks to project their November needs five months out. Cutting off designation of in-person absentee polling sites in June means that many of the sites that municipalities designate could be unworkable come the fall, yet municipalities will be prevented from adapting to COVID-19's course by designating replacement sites. That in turn will cause the overcrowding and dangerous conditions that characterized April in-person voting, severely burdening the right to vote. *Swenson* PI Br. 11, 23-24, 42-44. The State's interest in "orderly administration," Leg. Br. 68, would only be promoted by enjoining this provision.

c. Statutory Deadline for Receipt of Absentee Ballots

This Court's preliminary injunction extending the statutory deadline for receipt of absentee ballots by six days in April preserved the constitutional right to vote of nearly 80,000 people who cast valid ballots on or before election day—according to Defendants' own analysis. *Swenson* SOPF ¶ 67. That is because the relevant statutory provisions authorize voters to timely request an absentee ballot by mail up until five days (Thursday) before election day, Wis. Stat. § 6.86(1)(b), but require all ballots to arrive at the polling place by 8 PM on election day, Wis. Stat. § 6.87(6). But while Wisconsin law allows voters to request a ballot five days out, it is undisputed that the total time, from receipt of the request to receipt of a completed ballot, can be up to 14 days. WEC I Dep. 51:1-52:21; SOAPF ¶ 62. The tight turnaround envisioned by Wisconsin law means that if the system is flooded with absentee ballot requests, or if USPS is overwhelmed by the volume of ballots, many absentee ballots will be rejected even though the voter made a timely request and acted consistently with state law at every turn.[16] That is exactly

[16] *See* Jacobs Dep. 32:19-33:1 ("[B]y virtue of the fact that the law was changed so that ballots had to arrive by 8:00 p.m. of election day, that is a profound disconnect with the timing of being permitted to request absentee ballots."); SOAPF ¶ 33; Jacobs Dep. 34:18-35:6 ("The problem with

what happened in April: COVID-19 led to a huge number of requests for absentee ballots, which in turn strained electoral and USPS resources and capacity. *See* Kennedy Dep., July 24, 2020, ECF No. 471 ("Kennedy Dep.") 64:19-65:4; 113:16-114:17; Green Bay City Clerk 30(b)(6) Dep., July 28, 2020, ECF No. 480 ("Green Bay Dep.") 124:1-14, 162:8-17; *Swenson* PI Br. 42-43; SOAPF ¶ 34.[17] Absent judicial intervention, those validly cast votes would not have been counted.

These 80,000 votes amount to 6.68% of all absentee ballots cast and 5.1% of all votes. *Swenson* SOPF ¶ 67. A large swath of the Wisconsin voting population would thus have been disenfranchised absent judicial intervention—proof that this Court's *Anderson-Burdick* analysis in April, affirmed on appeal by both the Seventh Circuit and U.S. Supreme Court, was correct. Moreover, the salience of this number to public confidence in the legitimacy of the election cannot be overstated. The nearly 80,000 validly cast ballots that were counted as a result of this Court's order far exceeds the margin of victory in the 2016 Wisconsin presidential election, as well as many of the other recent elections.[18] These razor-thin margins only underscore the significance that disenfranchising tens of thousands of voters could have on ensuring a legitimate outcome in the election and public confidence in the result.

Yet the Legislature nevertheless objects to the Court similarly modifying the ballot-receipt deadline in November. Its objections are meritless.

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the receipt deadline is . . . it takes the ability of a voter to return their ballot and have it be counted out of the hands of the voter."); SOAPF ¶ 32.

[17] WEC Commissioner Spindell admitted that the 1.2 million mail-in votes in Wisconsin in April "completely overwhelmed our election system." Spindell Dep. 47:20-49:9. SOAPF ¶ 35.

[18] President Trump's margin of victory in 2016 was 22,748 votes. *See* Richard Cohn & Charlie Cook, *The Almanac of American Politics 2020*, at 1917 (2019); SOAPF ¶ 59. And that election was not an outlier: The Gore margin of victory in Wisconsin in 2000 was 5,708 votes; the Kerry margin of victory in Wisconsin in 2004 was 11,384 votes. SOAPF ¶ 60.

First, the Legislature suggests that because absentee voters *can* request and return their ballots earlier than the statutory deadline, or could return their ballots by methods other than the mail, relief is not warranted. Leg. Br. 27-30, 55-60. But voters should not have to disregard the timeframes and methods authorized by state law to have a chance that their ballot is counted; that is not what "reasonable effort," *Frank II*, 819 F.3d at 386, means. Indeed, a recent report by the Inspector General of the USPS found that voters requesting absentee ballots consistent with the operative statutory deadline—in other words, voters complying with state law—face a "high risk" that their ballots will go uncounted. *See* WEC II Dep. 115:12-116:12; SOPF ¶ 61. If following state law means put a voter at "high risk" of being disenfranchised, despite validly casting her ballot, the system severely burdens the right to vote. *See Democratic Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1324-25 (11th Cir. 2019) (finding that voting system severely burdened right to vote when voters were disenfranchised despite "follow[ing] the ostensible deadline for their ballots only to discover that their votes would not be counted and that they would have no recourse"). Indeed, this is the functional equivalent of misinforming people about which day they should vote.

Second, the Legislature suggests that the problems in April are not likely to recur in November, because the system will *in fact* be able to process the volume of absentee ballots likely requested. Leg. Br. 55-62. But all the available evidence is to the contrary. The pandemic is likely to be wreaking public-health havoc in November, just as in April. *Swenson* SOPF ¶¶ 6, 10, 224; Remington Report at 8-11; SOAPF ¶ 16. And given the nature of the November presidential election, there is likely to be an even higher volume of absentee ballot requests in November than in April. *Swenson* SOPF ¶¶ 228-235; Kennedy Report ¶ 147; SOAPF ¶ 15. In comparison to the nearly 1.2 million absentee ballots cast in April, the WEC has already sent

absentee ballot request forms to approximately 2.7 million voters for the November election and, as noted, WEC officials believe the number of absentee ballots cast easily could exceed 2 million. Jacobs Dep. 22:5-23:11, 151:9-152:12; Goodman Decl., Ex. 18, *Swenson* ECF No. 43-18 (Wis. Elections Comm'n, *April 7, 2020 Absentee Voting* Report (May 15, 2020)), at 12; SOAPF ¶ 18. Even if some voters send in their requests earlier, the unprecedented demand is likely to strain local resources. *Swenson* SOPF ¶¶ 231-236; Kennedy Report ¶¶ 104-106, 110, 125, 137; Remington Report at 11-12; Green Bay Dep. 124:1-14, 162:8-17; SOAPF ¶ 19.[19]

The Legislature provides little support for its argument to the contrary, which seems to rest on the assumption that election officials can manage a potential deluge of mail-in voting, despite the lack of any articulable game plan or real investment in building that capacity. Indeed, the Legislature's argument is inconsistent with Defendants' own representations: As Defendant Wolfe described, the WEC is already predicting that it will take two weeks for an absentee ballot to make its way through the mail from a clerk's office to a voter and back again for the November election—meaning that voters who request absentee ballots in the final two weeks before the election will not have sufficient time to mail their ballots back for arrival by election day. WEC I Dep. 51:1-52:21; SOAPF ¶ 62. And Chair Jacobs testified that "the volume of absentee balloting that we're looking at is definitely going to put a strain on the system," and that absent a continued injunction, "several *hundred thousand*" would-be absentee voters are at risk of not having their ballots counted in November. Jacobs Dep. 34:7-15; SOAPF ¶ 63.

[19] As the DNC explains, the 1.3 million absentee ballots issued in April 2020 election already amounted to five times the number of absentee ballots issued in the four April elections from 2016-2019. A conservative estimate of more than half a million additional ballots in November will only further tax an overtaxed system. *DNC* PI Br. 12.

Accordingly, all available evidence suggests that in November—as this Court found in April—"even the most diligent voter may be unable to return his or her ballot in time to be counted." *DNC*, 2020 WL 1638374, at *16; Remington Report at 11-12; Kennedy Report ¶¶ 15, 126-29, 147. WEC Chair Jacobs herself testified that the Court's order extending the receipt deadline for the April election enfranchised approximately 80,000 Wisconsinites. Jacobs Dep. 121:4-14; SOAPF ¶ 66, *see also* Kennedy Dep. 110:9-111:2; SOAPF ¶ 64.[20] And she encouraged the Court to enter another order suspending the receipt requirement, noting the "amazing and important" results of the April injunction. Jacobs Dep. 121:4-14; SOAPF ¶ 67. Chair Jacobs testified that changing the receipt requirement is "essential to allowing people to exercise their right to vote and particularly to vote absentee, which is the safest way to vote in the upcoming election." Jacobs Dep. 146:12-17; *see also* MEC Dep. 115:16-116:13; SOAPF ¶ 68.

Absent this Court's intervention, many thousands of voters are likely to be disenfranchised in November despite complying with Wisconsin law and validly casting their ballots. That is a core *Anderson-Burdick* injury.

On the other side of the ledger, the Legislature's stated interests in not extending the deadline are unpersuasive. The Legislature suggests that its primary interest is in promptly reporting the vote count. However, Ms. Wolfe conceded that in April, even with the extension to receive and count ballots by April 13, the state was able to certify its election results by its statutory deadline. WEC I Dep. 47:14-48:16; SOAPF ¶ 73. Defendant Wolfe did not recall any clerks missing their reporting deadlines. WEC I Dep. 48:8-16; SOAPF ¶ 74. And quickly

[20] "I think we know from experience that the post office doesn't keep very good track of ballots much less other important pieces of mail, and that if we're going to ensure that people are able to fully participate, particularly when there's a much greater reliance on mail in absentee ballots, that there has to be some accommodation for the failures of the post office and just the delivery issues." Kennedy Dep. 110:9-111:2.

announcing election results—at the expense of accuracy—is not a valid state interest. Rather, prioritizing speed over accuracy *harms* Wisconsin's "valid interest in protecting 'the integrity and reliability of the electoral process.'" *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008)); *see Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). Indeed, the Legislature itself notes the importance of the "integrity of its elections," and the State's interest in "accurately" reporting election-day winners. Leg. Br. 57. That is precisely what's at issue here: whether validly cast ballots will be counted. If the Legislature's concern is the public's faith in the election, then it should be extremely concerned that, in the WEC's own estimation, *hundreds of thousands of qualified voters* may be disenfranchised absent judicial remediation of the ballot-receipt deadline. Jacobs Dep. 34:7-15; SOAPF ¶ 58. The public can have no faith in an election where the votes of hundreds of thousands of citizens who followed the rules are not counted.

Likewise, while the efforts to canvass the election results after an extension are appreciated, Leg. Br. 57, these efforts do not outweigh the risk of disenfranchisement if the court does not modify the deadlines for the November election. *See, e.g., Price v. New York State Bd. of Elections*, 540 F.3d 101, 111-12 (2d Cir. 2008) (finding that state's concern that elections would "be unsettled for several days while the candidates await[ed] certification" carried "infinitesimal weight" that did not justify the burdens imposed on voters); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030-31 (N.D. Fla. Nov. 15, 2018) (finding that state's interest in "efficiently and quickly report[ing] election results . . . unconstitutionally burden[ed] the fundamental right of Florida citizens to vote and have their votes counted").

Indeed, the Legislature's concern about timely counting of ballots only supports Plaintiffs' request that the Court enjoin Wis. Stat. §§ 6.88, 7.51-.52, which artificially limits localities by preventing them from canvassing absentee ballots before election day, *see infra* 52-57, 65. Enjoining that statute would free municipalities to spread the burden of counting ballots over the entire election period, thereby eliminating the Legislature's concern about administrative burdens and delayed results *and* promoting public confidence in the election by allowing results to be reported sooner.

d. Absentee-Ballot Witnessing

In addition to violating Title II of the ADA, as discussed above, *see supra* 14-22, Wisconsin's witness certification requirement will likewise impose a serous burden on immunocompromised voters and voters currently infected with COVID-19. As the Seventh Circuit explained in *Frank v. Walker*, each citizen's "personal" constitutional right to vote "is not defeated by the fact that 99% of other people can secure the necessary credentials easily." 819 F.3d at 387. Although "the State's interest in the integrity and reliability of the electoral process is strong, every citizen's interest in individual treatment also is strong. That's the holding of *Frank II*." *Luft*, 963 F.3d at 680 (internal quotation marks omitted). Wisconsin must provide a safety net in one form or another that demonstrably provides eligible voters with a genuine "path to cast a vote." *Id.* at 678.

Here, Plaintiffs have shown that for a limited class of voters who are immunocompromised or at high risk from COVID-19, or who are actively infected with COVID-19, Wisconsin's requirement that would-be absentee voters locate and secure a witness to verify the ballot and sign the envelope, Wis. Stat. § 6.87(2), will impose a severe—indeed, insurmountable—obstacle to absentee voting in the upcoming November election. *See Swenson* PI Br. 44-45; *supra* 29. And Defendant Wolfe testified at her deposition that the WEC's

witnessing guidance suggestions are an "ongoing challenge," WEC II Dep. 107:9-108:7, confirming that WEC's proposed workarounds do not alleviate the burden posed by § 6.87(2). Indeed, remarkably, despite the Seventh Circuit's instruction that the WEC "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)," *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020), the WEC's June 25 status report is entirely silent on the issue of witnessing.

The Legislature, for its part, maintains that any burden imposed by the witness-certification requirement is necessarily justified by its interest in preventing voter fraud. But importantly, there was *no* evidence of attempted voter fraud in the April 7 election, and the Legislature has introduced no evidence that such fraud is a real risk in the November general election. *See* Defs. RFA Resp. No. 32 (admitting there is no evidence of absentee ballot fraud); RNC RFA Resp. No. 2 (failing to identify any evidence of absentee ballot fraud for those voting without a witness). [21] And whatever deference the state's interest in fraud merits even absent any substantiating facts, it is outweighed by the serious burden that the witness certification requirement imposes on immunocompromised and voters currently infected with COVID-19 during this pandemic. Moreover, as Plaintiffs explained in their opening brief and above, *see Swenson* PI Br. 45-46, *supra* 14-17, the state's anti-fraud rationale is seriously undermined by the fact that Defendants' proposed workarounds are especially poor means of deterring fraud. The State's anti-fraud goals would, in any event, be adequately served by a self-certification on penalty of perjury. *Swenson* PI Br. 44-45. And the Legislature nowhere acknowledges the State's

[21] Indeed, multiple members of the WEC testified that they had not heard of any incidents of attempted voter fraud in the April election. *See* Jacobs Dep. 37:9-20; Spindell Dep. 25:9 - 26:15; SOAPF ¶ 75.

interest in preventing the disenfranchisement that will occur if the WEC fails to take actions sufficient to ensure that voters are not intimidated from safely casting their votes in November. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) (noting "States' compelling interests in preventing *voter intimidation and* election fraud") (emphasis added).

At bottom, the Legislature's objection to a safety net for those for whom the witness-certification requirement poses a severe burden exposes its mystifying refusal to grapple with the nature and impact of the current pandemic.[22] A physical signature requirement is plainly a different beast during a pandemic that spreads from person to person and especially through contact. Yet the Legislature wraps itself in an anti-fraud rationale that has no evidentiary basis, refusing to accede to a limited alternative for those for whom this requirement is most dangerous.

3. *The Supreme Court has not ruled or suggested that an* Anderson-Burdick *challenge to election law and administration in light of COVID-19 will be rejected.*

In an apparent attempt to convince the Court that any relief it awards here will ultimately be rejected by the Supreme Court, the Legislature points to the fact that the Supreme Court stayed a portion of this Court's relief in the litigation involving the Wisconsin April election and likewise blocked, or allowed the Court of Appeals to block, relief in litigation arising from COVID-19-related voting issues in Texas and Alabama. *See* Leg. Br. 3 (citing *Republican Nat'l*

[22] The Legislature's representation of Jill Swenson's deposition testimony, *see* Leg. Proposed Supp. Br., ECF No. 474-1, is of a piece with this refusal. The Legislature questioned Ms. Swenson about her plans with respect to voting in the August 11 election, currently in process, *see* Dep. of Jill Swenson, July 21, 2020, ECF No. 468, 53:2-55:3, and then presented that testimony as if it applies directly to the November election. But Ms. Swenson also testified that "things are kind of up in the air right now given the increasing rates of Covid in Appleton," *id.* at 53:12-14. Moreover, the Legislature fails to acknowledge that Ms. Swenson would be subject to, in effect, a 48-hour waiting period to cast a ballot, because the "option[]" she could take advantage of would involve two 24-hour intervals between the time she fills out her ballot and the time she could return it.

Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020)); *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *application to vacate stay denied*, No. 19A1055 (June 26, 2020); *People First of Ala. v. Sec'y of State*, 2020 WL 3478093 (11th Cir. June 25, 2020) , *application to vacate stay granted*, *Merrill v. People First of Alabama*, No. 19A1063 (July 2, 2020)).

But the Legislature ignores that all three suits ran up against a common obstacle: *Purcell*. As the Supreme Court explained in the *RNC* case, the district court's order requiring the State to count absentee ballots postmarked after April 7, 2020 was stayed because it "chang[ed] the election rules so close to the election date," and "lower federal courts should ordinarily not alter the election rules on the eve of an election." 140 S. Ct. at 1207. In *Texas Democratic Party*—in which the Court issued no written decision—the consistent theme of Texas's briefing to the Court was *Purcell*. *See* Respondents' Opp. To Application to Vacate Fifth Circuit Stay Of Prelim. Inj., No. 19A1055, at 1 ("[T]his Court has 'repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.' . . . Now, having waited nearly a month since the injunction was initially stayed, petitioners claim crisis and ask this Court to grant them the extraordinary relief of vacating the Fifth Circuit's unanimous stay and issuing a writ of certiorari before judgment precisely *because* there are just a few weeks before a statewide primary election."). In the Alabama litigation, the election was already *underway* when the district court issued the injunction. *See* Emergency Application for Stay, No. 19A1063, at 1 ("Alabama is in the middle of a primary election runoff.").

By contrast, as explained below, *Purcell* has no bearing here, where Plaintiffs filed suit and moved expeditiously to allow this Court to provide relief well ahead of the November election. *See infra* 81-84. These stay decisions thus have no bearing here. Critically, the Supreme

Court has not addressed the merits of any COVID-19-related *Anderson-Burdick* claim. The Legislature's attempts to insinuate otherwise are meritless.

D. Plaintiffs Are Likely to Succeed on the Merits of Their Procedural Due Process Claim.

Plaintiffs ask this Court to ensure that Wisconsin voters have constitutionally guaranteed procedural rights against erroneous decisions to not to count an absentee ballot—or not to provide an absentee ballot upon request in the first place. Given the importance of the right to vote, the significant improvement that Plaintiffs' requested relief would produce with respect to the risk of erroneously discarded or denied absentee ballots, and the minimal burdens on the government, Plaintiffs are likely to prevail on this claim, which is not subsumed by the *Anderson-Burdick* analysis.

1. *Plaintiffs' procedural due process claim is independent of their* Anderson-Burdick *claims.*

Plaintiffs' procedural due process claim is fundamentally distinct from their *Anderson-Burdick* claim, and the former need not be subsumed under the latter. "The hallmarks of procedural due process are notice and an opportunity to be heard," when the State deprives a person of a protected liberty or property interest. *Pugel v. Bd. of Tr. of Univ. of Ill.*, 378 F.3d 659, 662-63 (7th Cir. 2004). In this case, Plaintiffs seek procedural protections to guard against erroneous decisions not to count their properly-cast absentee ballot—or to deny an absentee ballot on request in the first place. *See, e.g.*, *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990) ("[T]he right to vote is a 'liberty' interest which may not be confiscated without due process."). Unlike Plaintiffs' claim under the *Anderson-Burdick* framework, their procedural due process claim is not concerned directly with burdens that the law places on the "'individual's right to vote and . . . to associate with others for political ends" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780,

788 (1983)). It instead seeks to ensure that—when the state deprives a person of their vote by rejecting their absentee ballot at the canvass (or by failing to provide a ballot in the first place)—that individuals have adequate procedural protections to learn why their rights were taken, to contest the decision, and to protect against and cure errors.

Indeed, procedural due process claims have been recognized repeatedly by courts, particularly with respect to the processes that accompany the decision to challenge and discard absentee ballots upon canvassing. *See, e.g.*, *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214 (D.N.H. 2018) (procedural due process rights violated where "voters receive neither prior notice of, nor an opportunity to cure, [absentee ballot] rejection due to a signature mismatch."); *Zessar v. Helander*, 2006 WL 642646, at *5 (N.D. Ill. Mar. 13, 2006) ("lack of notice and an opportunity to rehabilitate . . . absentee ballot before the official election canvass date" violated procedural due process.); *Raetzel*, 762 F. Supp. at 1356 ("lack of notice and a hearing prior to . . . absentee votes being disqualified" violated procedural due process).[23]

Nonetheless, the Legislature and the WEC argue that procedural due process challenges to deprivations of the right to vote have simply been subsumed under the *Anderson-Burdick* framework. They rely primarily on a single line from *Acevedo v. Cook County Officers Electoral*

[23] There are many other contexts in which the Constitution simultaneously protects both the substantive right (as does the *Anderson-Burdick* framework) and procedural rights. To take one example, it is uncontroversial that the "substantive" component of the Due Process Clause limits the circumstances in which a person can be detained indefinitely without criminal charge, *see, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment"), while the "procedural" component of the Due Process Clause specifies the processes the state must afford a when it chooses to do so, *see, e.g. Addington v. Texas*, 441 U.S. 418, 431-32 (1979) (requiring state to establish by "clear and convincing evidence" that person is properly subject to civil commitment). Likewise here. *Anderson-Burdick* tests whether the state has unconstitutionally burdened the substantive right to vote, whereas procedural due process determines the process the state must afford when it deprives a person of their right by, for example, discarding a ballot.

Board, in which the Seventh Circuit wrote that "[i]n *Burdick v. Takushi*, the Court emphasized that [the *Anderson-Burdick*] test applies to *all* First and Fourteenth Amendment challenges to state election laws." 925 F.3d 944, 948 (7th Cir. 2019). But this statement cannot be read literally to mean that any election challenge arising under either the First or Fourteenth Amendment is governed by a single test, given that courts—including the Supreme Court and Seventh Circuit—plainly recognize a variety of distinct causes of action and legal frameworks under the Fourteenth Amendment in the voting rights context. For instance, racial discrimination challenges to voting laws are of course governed by the Fourteenth Amendment, but nobody believes that *Anderson-Burdick* governs them. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 642–44 (1993) (applying strict scrutiny to intentional racial discrimination in voting). In *Bush v. Gore*, 531 U.S. 98, 104–05 (2000), the Supreme Court rested its decision on Fourteenth Amendment rights, but it did not rely on *Anderson-Burdick* framework. In *Gill v. Whitford*, concerning Wisconsin's districting laws, nobody argued—and the Supreme Court certainly did not hold—that the challenge should be governed by *Anderson-Burdick* even though it was explicitly a case brought "under the First and Fourteenth Amendments." 138 S. Ct. 1916, 1923 (2018).

Defendants' ignore that when *Acevedo* refers to "First and Fourteenth Amendment" claims governed by the *Anderson-Burdick* test, it is necessarily referring only to a particular species of the many claims encompassed by those two Amendments. In particular, *Anderson-Burdick* applies to "claim[s] that a state law burdens the right to vote," *Burdick*, 504 U.S. at 438, or "impose[s] . . . burden on voters' rights to associate or to choose among candidates," *Anderson*, 460 U.S. at 788. But where a party argues that a state election law violates the Fourteenth Amendment in some *other* way—here, by violating its Due Process Clause for failing

to provide adequate procedural safeguards against erroneously discarded or denied ballots—the particular doctrinal test appropriate to that species of Fourteenth Amendment claim should apply.

The Legislature also attempts to draw an analogy to the Seventh Circuit's summary disposition of the Twenty-Sixth Amendment and "partisan fencing" arguments in *Luft*, where the court agreed that those claims were "just different ways of presenting contentions under *Anderson* and *Burdick*." *Luft*, 963 F.3d at 673; *see* Leg. Br. 72. Here, unlike in *Luft*, the procedural due process claims are not "different ways of presenting" contentions under *Anderson-Burdick* but challenge distinct aspects of the electoral process and seek different relief.[24]

If anything, the Legislature's reading of *Luft underscores* the need for different analyses. As explained *supra* 22-29, the Legislature (incorrectly) reads *Luft* to mean that so long as a voter *can* vote in some way, a state's election system "as a whole" is immune from challenge under *Anderson-Burdick*. But if that were true, procedural due process would be the *only* means for challenging components parts of that system that might be completely arbitrary—for example, a hypothetical law requiring clerks to lie about the deadline for voting. Wisconsin's absentee-ballot receipt deadline functions just like the lie described above. Voters are told they can vote

[24] For similar reasons this Court's prior suggestion that the DNC's procedural due process claims may be duplicative of its *Anderson-Burdick* claims has no bearing on the *Swenson* plaintiffs' claims here. *See* Leg. Br. 72-73 (citing ECF No. 217, at 15). Unlike the DNC, which has essentially asserted procedural due process as an alternative way to adjudicate the same claims and relief they press under *Anderson-Burdick*, *see* ECF No. 420, at 53–56, the *Swenson* Plaintiffs' procedural due process claims are analytically and factually distinct from their *Anderson-Burdick* claims. The *Swenson* Plaintiffs do not agree with the DNC that "[t]he *Anderson-Burdick* and due process analyses are like looking at the same object through different lenses" or that the Court should "use both an Anderson-Burdick and a due process analysis, if only to confirm that the two analyses both lead to the right result." *Id.* at 55-56. Instead, as argued here and below, the *Swenson* Plaintiffs press distinct procedural due process claims that focus on the procedures necessary to prevent erroneous deprivations of the fundamental liberty interest in having one's ballot properly counted.

by requesting a ballot five days before the election, but in reality it will take up to *fourteen* days to cast a ballot. If that scheme does not substantively burden an individual's right to vote, it surely is an arbitrary deprivation of a liberty interest that the state itself provides.

Because *Anderson-Burdick* has not devoured all other Fourteenth Amendment claims that happen to challenge state election laws, Plaintiffs' procedural due process claims here are properly governed by *Mathews v. Eldridge*, 424 U.S. 319 (1976), as are claims that the state is providing inadequate procedural guarantees in essentially every other context where the state abridges a fundamental right or other protected interest. *Mathews*, 424 U.S. 319 (cancellation of social security benefits); *Santosky v. Kramer*, 455 U.S. 745, 761 (1982) (termination of parental rights); *Illinois v. Batchelder*, 463 U.S. 1112, 1117 (1983) (suspension of drivers' licenses).

2. *The prohibition on canvassing absentee ballots before Election Day violates procedural due process.*

When the state rejects an absentee ballot, it deprives the person who cast it of their fundamental right to vote and their protected "liberty" or "property" interest in voting. The Constitution thus requires that the state provide constitutionally adequate procedures to protect these voters. Wisconsin does not.

To start, Wisconsin law currently prohibit absentee ballots from being counted before Election Day, Wis. Stat. §§ 6.88, 7.51-.52. This prohibition prevents municipalities from processing absentee ballots as they are received, preventing them from properly adjudicating challenges to ballots and providing voters notice and an opportunity to cure (or contest) any defects. The statute also increases the risk that votes will be improperly counted by forcing municipalities to canvass all absentee ballots in a compressed time period after the election—a limitation that was plainly not designed to accommodate the unprecedented deluge of absentee

ballots that municipalities will receive in November.[25] Under *Mathews*, whether an injunction against this statute is warranted depends on "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake." *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017).

The Legislature does not dispute the weight of the "private interest"—*i.e.*, the value of having one's vote counted properly. Nor does it make any attempt to argue that the requested relief would impair any governmental interest, perhaps because it would impose only minimal administrative burdens and would in fact serve the government's interest in ensuring that voters are not erroneously denied the opportunity to vote absentee. With respect to the risk of "erroneous deprivation," the only *Mathews* prong on which it does make an argument, the Legislature simply ignores that (i) the law deprives local election officials of time to detect defects in absentee ballots, in turn depriving voters of notice and a meaningful opportunity to cure, and (ii) given other deadlines by which ballots must be counted, it increases the risk of incorrect vote-counts.

[25] Plaintiffs do not ask this Court itself to issue an order requiring WEC to require municipalities to provide notice of defective ballots or an opportunity to cure in advance of Election Day. While Plaintiffs' opening brief laid out the minimal requirements of procedural due process in this regard, *see Swenson* PI Br. 53, Plaintiffs did not actually seek that relief from this Court, *see id.* at 65-66. The statutory framework already in place should give WEC and municipalities the necessary authority to provide notice and an opportunity to cure so long as the statutes that prohibit opening and counting absentee ballots before Election Day are waived. *See, e.g.*, Wis. Stat. § 6.86(5) (allowing clerk to replace a "spoiled or damaged ballot"); § 6.869 (requiring WEC to "prescribe uniform instructions . . . concerning the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot."); *accord* Leg. Br. 78 (describing "procedures for absentee voters to correct errors with their absentee ballots"). Plaintiffs thus ask this Court only to enjoin the statutory prohibitions on canvassing absentee ballots before Election Day.

In April, *tens of thousands* of ballots were rejected for insufficient certification or for other reasons. *See Swenson* PI Br. 51-52; SOAPF ¶ 40; *see also* SOAPF ¶¶ 38-39.

It is essentially uncontested that the number and proportion of absentee ballots in the November election will be far higher in November. Jacobs Dep. 21:8-10, 22:18-23:11; Spindell Dep. 129:10-16; SMEC Dep. 117:3-118:11; SOAPF ¶ 40. More than 1 million absentee ballots were cast in the April election. *See* Spindell Dep. 47:20-49:9; SOPF ¶¶ 35, 18. If the same proportion of voters in November cast absentee ballots, we are likely to see approximately double that number. SOPF ¶ 47.

But the prohibition on counting absentee ballots until Election Day prevents voters from getting notice of defects in their ballots before Election Day such that they might cure defects (or contest adverse determinations) before Election Day. *See Swenson* PI Br. 52-53. The deadline means that there will almost always be no notice of a defect—and never an opportunity to cure—an absentee ballot before Election Day. *Id.* And, of course, once Election Day has passed, it is too late for a voter to re-cast their ballot. Another district court in this Circuit invalidated Illinois' prohibition on counting ballots before Election Day on procedural due process grounds for exactly the same reason, even absent the vast increase in absentee balloting prompted by the COVID-19 pandemic. *See Zessar*, 2006 WL 642646; *see also Raetzel*, 762 F. Supp. 1354. Wisconsin law is worse, layering on additional barriers to providing notice and opportunity to cure, as explained in Plaintiffs' opening brief. *See Swenson* PI Br. 52.

The prohibition on early counting of these ballots also hinders an accurate count because the unprecedented task of counting so many absentee ballots will have to be completed on an impossibly short timeline. Wisconsin Law requires municipalities to count ballots and transmit results to the county clerk such that the county clerk can certify results no later than 11 days after

the election. Wis. Stat. § 7.70(1)(b). The WEC's statewide canvass of election results commences on December 1, 2020 and must end by December 11, 2020. Wis. Stat. § 7.70(3)(a), (c). In a presidential election year, there is little flexibility. The presidential electors must convene on December 14, 2020, to cast votes for the Presidency and Vice-Presidency, according to both state and federal law. Wis. Stat. §§ 7.70(5)(b), 7.75(1); 3 U.S.C. § 7. Given the significant possibility that absentee ballots will be challenged, counts contested, and judicial intervention sought, the prospect of counting more than two million absentee ballots on this timeline obviously heightens the risk that absentee votes will be erroneously discarded or counted. *See* Kennedy Dep. 119:2-122:1.

Common sense and record evidence show that these timelines increase the risk that those procedures will produce erroneous results. Wisconsin law prescribes detailed steps by which each absentee ballot must be opened, inspected, and counted. *See* Wis. Stat. §§ 6.88, 7.52. It also prescribes procedures to adjudicate challenges to the validity of any absentee ballot, § 6.93, including—in municipalities that have established a central board to canvass absentee ballots—the power to "call before it any person whose absentee ballot is challenged if the person is available to be called." Wis. Stat. § 7.52(5)(b). These procedures will have to be applied to literally millions of ballots in a hotly contested presidential election, on an artificially compressed timeframe. *See* Kennedy Dep. 120:6-122.[26]

Given Wisconsin's historical importance in presidential elections, the risk is grave that this prohibition could throw the election into doubt by leaving a significant number of voters' ballots improperly rejected or inadvertently uncounted, without enough time to properly

[26] "[B]y focusing on processing the ballots in the clerk's office, you're not relying on tired poll workers to identify the problem. You're in a position where it could be brought to the attention of the clerk."

adjudicate challenges, let alone cure defects. While the statutes envision that canvassing of absentee ballots will happen between the open and close of polls on Election Day, Wis. Stat. § 7.52, the evidence in the record suggests that it will be impossible to complete the count on that timeline, particularly in Milwaukee. MEC Dep. 117:3-21; *see also* Green Bay Dep. 124:1-14 ("My biggest worry right now is election night. . . . I don't know if we're going to get the results in an acceptable time . . . . In April, with all the absentees we had, we were given multiple days to get those in the tabulator. I haven't heard anything yet for November. So we'll have from 7:00 in the morning until we're done. I just can't even—I'm just—I'm really worried.") SOAPF ¶ 115. Indeed, the Town Administrator from Merrimac, who also serves as chair of the Republican Party of Sauk County, expressed fears to a WEC Commissioner that the massive influx of absentee ballots "will burden the system to the point we'll look like Florida 2000 counting ballots a month later." *See* SOAPF ¶ 69.

Against the enormous benefits that would flow from allowing an earlier canvass of absentee ballots, the Legislative Defendants assert an illusory and self-defeating government interest. They argue that "early canvassing of ballots" would "gravely affect the integrity of the election process" because it "risks disclosure of election results." Leg. Br. 78. The Legislature cites no evidence for this proposition, because there is none. In fact, the experience nationwide is that numerous states permit absentee ballots to be counted early, and Plaintiffs are aware of no reported instances where results leaked. *See* SOAPF ¶ 137. But the Court need not rely only out-of-state experience: during the 2020 election municipal and county clerks statewide did not report results until six days after Election Day, April 13, 2020, and suffered not a single reported leak even though some ballots were processed through optical scan machines or tallied on Election Day. *See id.* ¶ 138. There is no reason to believe that processing absentee ballots before

Election Day would cause problems. In truth, the clear and present risk is the *prohibition* on canvassing absentee ballots before Election Day, which should be invalidated especially because it will delay vote tabulation that could be dispositive of the presidential election.

3. *Defendants' procedures regarding requesting, processing, and rejecting requests for absentee ballots violate due process.*

Wisconsin voters have a statutory right to vote absentee if they wish, for any reason. Wis. Stat. §§ 6.20, 6.86. This, too, is a protected liberty or property interest. *See* Swenson PI Br. 46; *Zessar*, 2006 WL 642646, at *6; *Raetzel*, 762 F. Supp. at 1457. In order to provide notice and an opportunity to challenge or cure any denial of an absentee ballot, Plaintiffs contend that the following procedural protections are necessary: (1) increased bandwidth and server resources for WEC's computer systems that receive and process requests; (2) guidance and support from WEC such that municipalities must provide prompt notice if a request for a ballot is rejected along with an opportunity to correct; (3) effective notice to the public regarding the procedures governing the right to vote absentee; and (4) flexibility to designate in-person absentee voting locations.

These remedies are necessary in order to decrease the risk of an erroneous denial of the protected interest in voting absentee. Contrary to the Legislature's suggestion, *see* Leg. Br. 73-74, there is strong evidence that, absent such relief, voters will once again suffer significant delays and outright failures to receive an absentee ballot, similar to the experience in April. Kennedy Dep. 64:19-65:4, 66:13-16, 113:1-5, 120:20-121:4. The Legislature seeks to downplay this risk, contending that the April election did not produce an unusual number of unreturned or rejected ballots. *Id.* at 74. But this misses the point: thousands of people *did not receive* their absentee ballot at all. *Swenson* PI Br. 9–10. There is copious evidence in the record of individuals who simply did not get an absentee ballot. Goodman Decl., Ex. 18, *Swenson* ECF No. 43-18 (Wis. Election Comm'n, *April 7, 2020 Absentee Voting Report*, at 15-17, 20)

(reporting thousands of ballots not received); Declaration of Melody McCurtis in Supp. of Pls.' Mot. for Prelim. Inj., *Swenson* ECF No. 48 at ¶ 7; Declaration of Maria Nelson in Supp. of Pls.' Mot. for Prelim. Inj., *Swenson* ECF No. 49 at ¶¶ 7-9; SOAPF ¶ 37. And voter turnout overall was significantly depressed in areas with large numbers of first-time absentee voters. *See* Fowler Report, at 20. All of this underscores that difficulties navigating the absentee ballot request process—including the absence of timely notice and opportunities to correct a faulty request—deprived many people of their right to vote absentee.

With respect to the specific remedies sought here, first, the need for increased server and bandwidth resources for the MyVote and WisVote system remains crucial. WEC's description of its efforts to date fail to show that it has adequately prepared to handle the much larger number of voters in November. Kennedy Dep. at 63:11-67:22.

Second, directives requiring prompt, effective notice when an absentee ballot request is rejected or delayed are appropriate relief here. The Legislature contends that such protections will have no benefit, because of the longer lead times before November that permit voters to apply to obtain absentee ballots early. Leg. Br. 74–75. But this elides the fact that large numbers of voters are likely to register in the immediate lead-up to the election, as is their right under the law. Establishing the procedural safeguards of notice and opportunity-to-cure will help ensure they are not deprived of the ability to access the ballot. The Legislature also suggest that this claim fails because voters' failure to properly fill out an application effectively defeats their procedural due process rights. *See* Leg. Br. 75 (citing *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 608 (7th Cir. 2006)). But that ballot access case is inapposite. Where, as here, the statute gives voters an affirmative right to choose to vote absentee and gives voters an opportunity to cure any

defects, *see* Wis. Stat. § 7.15(1)(cm), voters plainly have a procedural due process right to notice that their application suffered from a defect and an opportunity to fix the problem.

Third, Plaintiffs ask this Court to waive the statutory requirement precluding municipalities from designating additional in-person absentee voting sites for November, which, remarkably, is now already passed. Wis. Stat. § 6.855(1). The fact that Wisconsin law already allowed municipalities to designate multiple in-person absentee sites misses the point: what is necessary is flexibility so that municipalities can increase or change their designations based on the realities of this rapidly evolving pandemic.

Finally, the Legislature argues against the need for public education and notice regarding the procedures they must follow by citing to the WEC's statutory mandates to provide guidance to *election officials*. Leg. Br. 76-77. But what is necessary is effective notice to the voting public, *Swenson* PI Br. 50–51, and WEC's efforts to date are insufficient. Kennedy Dep. 86:5–91:14; 113:1–115:7; SOAPF ¶ 105.

Because the right to vote absentee is vital in a pandemic, because the value of these additional procedural safeguards to protect that right are considerable, and because there are no countervailing government interests, plaintiffs are likely to succeed on the merits of their claim for relief with respect to requests for absentee ballots.

E. Plaintiffs Are Likely to Succeed on the Merits of Their Equal Protection claim.

The Legislature fails to engage seriously with Plaintiffs' equal protection claim. Rather than address Plaintiffs' core allegation—that absent Plaintiffs' requested relief Wisconsin voters will again face constitutionally impermissible disparities in their access to the franchise—the Legislature attempts to conjure nonexistent barriers to *any* equal protection claim challenging election administration. But those attempts fail. So too does the Legislature's attempt to avoid the mounting evidence in this case. Rather than make any effort to rebut Plaintiffs' expert

evidence laying bare the disproportionate harm visited on older voters, voters with disabilities, and minority communities in April, the Legislature blithely characterizes Defendants' administration of the April election as "*generally successful*." Leg. Br. 80. But as everyone other than Defendants seems to appreciate, April was not a success, *see Swenson* PI Br. 54-60, and unless this Court grants the relief requested, November won't be, either.[27]

The Legislature first contends that Plaintiffs' equal protection claim fails because "both the Supreme Court and lower courts have expressly limited [*Bush v. Gore*] to its own particular circumstances[.]" Leg. Br. 121, 79. But Plaintiffs' claim is premised on the longstanding equal protection principle that, "[h]aving once granted the right to vote on equal terms," a state cannot "by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05. That principle is not some novel or fact-bound holding limited to *Bush*; it is a "basic proposition[]" of longstanding equal protection law. *Id.* (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) & *Reynolds v. Sims*, 377 U.S. 533 (1964)).

Indeed, contrary to the Legislature's claim that lower courts have "limited" the principles described in *Bush*, virtually every court to consider the decision has recognized its continuing vitality. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476-77 (6th Cir.

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[27] Although some courts have considered equal protection claims under the *Anderson-Burdick* standard, the Supreme Court declined to apply that framework in *Bush v. Gore*. Instead, having deemed the franchise "fundamental," the Court asked only if a state's actions result in "arbitrary and disparate" treatment of voters. *Bush*, 531 U.S. at 104-05. That approach, appropriate here, is consistent with decisions before and after *Bush* addressing equal protection claims alleging arbitrary and disparate treatment. See *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (holding long wait times violated Equal Protection Clause without reference to *Anderson-Burdick*); *see also Lyman v. Baker*, 954 F.3d 351, 370–71 (1st Cir. 2020) (adjudicating equal protection claim without discussion of *Anderson-Burdick*); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (same); *League of Women Voters of U.S. v. Fields*, 352 F. Supp. 1053, 1055 (E.D. Ill. 1972) (same); *Ury v. Santee*, 303 F. Supp. 119, 125-27 (N.D. Ill. 1969) (same).

2008) (holding that *Bush* "reaffirmed" fundamental equal protection principles prohibiting defendants from "arbitrarily den[ying] its citizens the right to vote or burden[ing] the exercise of that right based on where they live"); *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011) ("We are … guided in our analysis by the important requirement that state actions in election processes must not result in 'arbitrary and disparate treatment' of votes" (quoting *Bush*, 531 U.S. at 104-05)); *Wexler v. Anderson*, 452 F.3d 1226, 1231 (11th Cir. 2006) (considering under *Bush* whether variations between counties in voting systems "accord arbitrary and disparate treatment to Florida voters, thereby depriving voters of their constitutional right[] to … equal protection"). Plaintiffs' claim here is the same: that enforcement of the challenged provisions, coupled with Defendants' failures to take the practical statewide measures within its authority described *supra*, will result in wide disparities in voting access based on arbitrary factors, such as where voters happen to live. There is accordingly no basis to dismiss Plaintiffs' equal protection claim based on *Bush*'s purported "limitations."

The Legislature next invents a prerequisite to bringing an equal protection challenge, contending that Plaintiffs must identify "specific election 'procedures'" that will cause arbitrary and disparate treatment in November. Leg. Br. 79 (quotation omitted). But the crux of the equal protection problem in *Bush* was "the *absence* of specific standards . . . designed to ensure uniform treatment" of voters. *Bush*, 531 U.S. at 106 (emphases added). That is what is at issue here, too—Defendants' ongoing failure to adopt policies, practices, and procedures ensuring that Wisconsin meets its "obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* at 105. For example, it is clear that "the failure of the Commission to give specific guidance" on the interpretation of postmarked ballots in the April election resulted in "1,850 different standards to assess postmarks," leading to the non-uniform treatment of voters

that the Court in *Bush* found to be an equal protection violation. Jacobs Dep. 117:16-118:2; *see also* SOAPF ¶ 41 (WEC staff member noting problems with varied interpretations of the witnessing requirement by saying, "I will follow up with the clerk in the morning, but we're incorrectly training a bunch of people…"). Nor was this merely a failure of omission: what advice the WEC *did* provide led to the arbitrary and disparate treatment of voters whose ballots were received after April 7. SOAPF ¶ 42 (citing documents containing contradictory WEC instructions). As this Court already has recognized, such allegations state a valid equal protection claim. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 3077047, at *7 (W.D. Wis. June 10, 2020), ECF No. 217 (DNC's allegation that Defendants issued conflicting guidance and failed to ensure adequate in-person registration, absentee voting, and election-day voting opportunities stated equal protection claim).[28]

Similarly unpersuasive is the Legislature's complaint that Plaintiffs' equal protection claim focuses too heavily on what went wrong in April, failing to identify any policies or practices that might "bear[] on the upcoming November Election." Leg. Br. 80-82. Belying that assertion, however, Plaintiffs have set forth in detail the practical steps Defendants must take to meet their constitutional obligations in November. *See* Remington Report at 8-9, 14-17; Kennedy Report ¶¶ 35-41; *see infra* 70-78. And should Defendants fail to implement that relief, the same equal protection violations that occurred in April will make an unwelcome comeback this fall: arbitrary lack of safe, accessible polling locations, differing availability of PPE and other

[28] *See also Brunner*, 548 F.3d at 474, 477-78 (plaintiff stated equal protection claim in suit for prospective relief alleging that Ohio "fail[ed] to prevent and correct the system-wide chaos that is alleged to have occurred in [the previous general election]"); *Ury*, 303 F. Supp. at 126 ("As a consequence of the failure of defendants to provide substantially equal voting facilities, plaintiffs and those similarly situated were discriminated against in the exercise of their franchise and were denied the right secured by the United States Constitution to equal protection of the laws.").

equipment necessary to guarantee safe in-person voting, uneven access to the MyVote system, and more. *See Swenson* PI Br. 56-59.

Contrary to the Legislature's suggestion otherwise, mounting evidence demonstrates that Defendants have not even taken the steps necessary to learn what went wrong in April, let alone to ensure similar equal protection violations will not recur in November. *See Swenson* PI Br. 22-24; *see* Jacobs Dep. 62:1-18 (expressing concern about problems from the April Election recurring in November, noting, "When we don't know what's gone wrong, we can't fix it. So one of my concerns is we don't know what went wrong with – either it was 1600 or 750 ballots [not received by voters in the Oshkosh area]"); SOAPF ¶ 77. And Defendants' current plans and policies are insufficient to guarantee voters will have equal access to safe and accessible voting options both in person and by mail. *See* WEC II Dep. 70 (discussing how the WEC is not taking any measures that are specifically designed to prevent racial disparities in future elections).

Symptomatic of the problem is the Legislature's description of the April election as "generally successful." Leg. Br. 80. That characterization reflects Defendants' continued failure to understand the wide-ranging failures in the WEC's approach to administering elections during the COVID-19 pandemic—failures that disproportionately and arbitrarily harmed minority communities, older voters, and voters with disabilities. *See* Spindell Dep. 153:7-11; SOAPF ¶ 43. And it puts the lie to the Legislature's contention that Plaintiffs have "no reasonable basis to contend [similar] problems will recur in November." Leg. Br. 81. Indeed, Defendants *entirely ignored* the findings in Dr. Fowler's expert report detailing the outsized and arbitrary impact of Defendants' failures on particular groups of voters, including those in zip codes with higher percentages of Black and Hispanic voters and those over 65. *See* Fowler Report at 8-16; *Swenson* PI Br. 17-19; SOAPF ¶ 45. Yet Defendants say nothing about these arbitrary disparities.

Defendants similarly take no notice of the ample evidence indicating that voters were not treated equally in April. *See* Spindell Dep. 153:7-11; SOAPF ¶ 44, (describing the disparate impact of the April Election by noting that "the Black community was not treated as they should have been.").

Finally, the Legislature once again attempts to take refuge in the assertion that Wisconsin's "decentralized" election system insulates it from any equal protection liability. Leg. Br. 81-82. But, as described below, Defendants have a unique state-wide role in ensuring the uniform, non-arbitrary treatment of Wisconsin voters during the COVID-19 pandemic as well as the authority to implement the specific relief Plaintiffs have requested, including the policies and practices necessary to meet their obligations under the Equal Protection Clause.

II. The WEC Is the Proper and Necessary Defendant to Remedy the Unique Threat to Voting Rights in November.

Plaintiffs listened carefully to the Court's instruction to demonstrate the WEC's authority to provide the specific relief Plaintiffs seek. In the pages that follow, Plaintiffs heed the Court's charge: they itemize in detail the relief they seek and show, based on Wisconsin statutes, settled case law, and WEC past and current practice, that WEC indeed is the proper defendant to provide every piece of relief sought.

The Legislature does not dispute that the WEC, as the sole agency with "the responsibility for the administration" of Wisconsin election law (other than campaign finance laws), Wis. Stat. § 5.05(1), is the proper defendant for all of Plaintiffs' request to enjoin Wisconsin statutes, *see, e.g.*, *Luft*, 963 F.3d 665; *Frank v. Walker*, 196 F. Supp. 3d at 918-19, as this Court has already found, *DNC*, 2020 WL 1638374. Thus, there is no dispute that the WEC is the proper defendant as to Plaintiffs' requests to enjoin:

- Wis. Stat. § 6.87(6) to ensure that voters who comply fully with Wisconsin law and timely mail absentee ballots by election day have their votes counted. In the April

election, the Court's injunction of this statutory provision protected the franchise of nearly *80,000* Wisconsin voters, SOAPF ¶ 133, and this injunction is needed to protect the franchise of "*several hundred thousand voters*," Jacobs Dep. 34:7-8, come November.

- Wis. Stat. § 6.87(2) for those voters who are immunocompromised or otherwise at high risk from COVID-19 and cannot safely secure a witness, and replace the witness-verification requirement with another anti-fraud tool like a self-certification on pain of perjury.

- Wis. Stat. § 7.30(2) to allow cross-county sharing of poll workers, which will alleviate shortages that are likely to recur. The WEC itself admits that the pool of poll workers available to local election officials would be larger if there was no county-residence requirement limiting the area in which an individual can serve as a poll worker. Defs. RFA Resp. No. 36.

- Wis. Stat. § 6.855(1) to allow localities the flexibility to re-designate polling places based on the realities of the pandemic as the November election approaches.

- Wis. Stat. §§ 6.88, 7.51-.52 to allow localities to count absentee ballots before election day, which will: (i) give localities time to provide voters with notice and opportunity to cure defects that will otherwise be disenfranchising; (ii) promote public confidence in the integrity of the election by making partial results available sooner (*i.e.*, immediately after polls close); (iii) alleviate massive and inevitable burdens on clerks who will be forced to count an unprecedented number of absentee ballots; and (iv) prevent error and uncertainty that will result from requiring all counts and challenges to be adjudicated in an artificially compressed period after Election Day.

The Legislature's objection is thus quite narrow. It challenges *only* the WEC's authority to: (i) assist localities in ensuring that in-person voting is safe by providing, for example, guidance on polling place layout and set-up; (ii) assist localities in staffing polling places; (iii) require access to drop boxes; (iv) develop statewide policies and procedures for absentee ballots; and (iv) educate the public. *See* Leg. Br. 101-02.

As set out in detail below, the members of the WEC are the natural—and indeed, necessary—defendants in a case seeking to remedy the statewide harms flowing from the systemic breakdown of election administration in the face of COVID-19. As this section explains in detail, the Legislature fails in its effort to distract from the role of the Commission and insists,

in effect, that every municipality is on its own to face the extraordinary demands of COVID-19 on the state's elections. That simply is not true.

A. The WEC is Responsible for the Administration of Wisconsin Elections and Is Therefore the Appropriate Defendant Here.

The Legislature devotes much of its brief to the argument that the WEC's authority is so anemic that it could not take the kinds of steps needed to ensure a safe and effective election, and its members are therefore not the proper defendants in this case. *See, e.g.*, Leg. Br. 1-2, 100-105.[29] There is no question that Wisconsin law invests certain day-to-day responsibilities for administering elections with the state's nearly 2,000 local election officials. But that uncontroversial proposition does not carry the weight that the Legislature wants it to.

Wisconsin law entrusts the WEC with the broad "*responsibility* for the administration" of Wisconsin law "relating to elections and election campaigns, other than laws relating to campaign finance." Wis. Stat. § 5.05(1) (emphasis added). This includes ensuring compliance with federal and state election law, including the Voting Rights Act, ADA, and U.S. Constitution. WEC II Dep. 17:21-19:4; SOAPF ¶ 109 The WEC Administrator, in turn, is the "chief election officer" of the state. Wis. Stat.§ 5.05(3g). The WEC has express statutory authority to "[p]romulgate rules . . . applicable to all jurisdictions for the purpose of interpreting or implementing laws regulating the conduct of elections or election campaigns . . . or ensuring their proper administration." Wis. Stat. § 5.05(1)(f). It is also required by statute, "following the publication of a decision by a state or federal court that is binding on the commission and [the]

[29] Significantly, while the WEC's "Memorandum in Response" to the consolidated motions for preliminary injunction details the structure of the state's election code, it pointedly "does not take a position on the specific relief requested in the Plaintiffs' respective motions," Mem. of WEC Defs. in Resp. to Pls. Mots. for Prelim. Inj., ECF No. 444 ("WEC Br."), at 3, and does not say that it is an improper defendant with respect to any of the relief sought.

state," to "issue updated guidance or formal advisory opinions," and to "commence the rule-making procedure to revise administrative rules promulgated by the commission." Wis. Stat. § 5.05(5t) (emphasis added). And it is tasked with responding to requests for advisory opinions concerning Wisconsin election laws, and when supported by a "specific case or common law authority," such formal and informal WEC advisory opinions can have "legal force and effect." Wis. Stat. § 5.05(6a)(a)1-2. *See also* Green Bay Dep. 87:16-87:18 (Green Bay deponent describing WEC's role in Green Bay's preparation for elections as "I follow what they tell us to do."); *id.* at 90:9-91:3 (describing binding instruction for WEC regarding election procedures); SOAPF ¶ 116.

In conjunction with these broad grants of authority, existing caselaw establishes the WEC as the appropriate defendant in litigation that requires broad statewide relief. Indeed, "[p]ursuant to its general authority, the commission may direct municipal clerks to implement a court order pertaining to the state's election procedures and federal law." *Frank*, 196 F. Supp. 3d at 918. In *Frank*, the court applied this principle to conclude the WEC "clearly" had the power to require municipal clerks to implement an affidavit option for voter identification. *Id*. at 918. This "clear[]" understanding of the WEC's authority applies with equal force in this case, not least because, as in *Frank*, it obviates the need for the "impractical" alternative of joining the nearly 2,000 local election officials in litigation requiring implementation of statewide remedies. *Id.*; *see also* DNC Br. 51-53.

The Legislature attempts to distinguish *Frank* by making the conclusory assertion that "whatever enforcement authority the Commission has on statewide rules like photo ID has no bearing whatsoever on those aspects of election administration unambiguously allotted only to local officials, such as those for staffing and equipping polling places, preparing and delivering

ballots, and the like." Leg. Br. 103. This assertion begs the question. The very issue the court in *Frank* addressed was whether the Commissioners had "authority under state law to require clerks to accept affidavits from voters in lieu of photo ID," in light of the administrative power enjoyed by clerks over elections. *Frank*, 196 F. Supp. 3d at 918. In any event, the Legislature's argument fails on its face: the claims plaintiffs assert here are violations of federal statutes and the U.S. Constitution, which are indisputably "statewide rules." Indeed, the *Frank* decision is among the cases consolidated on appeal in *Luft*, which does not discuss these issues and then affirmatively states that it "agree[s] with the district courts' handling of any issues that we have not mentioned." *Luft v. Evers*, 963 F.3d 665, 681 (7th Cir. 2020).

Although not expressly examining the scope of the WEC's authority, this Court's April 2 order requiring the WEC to count mail-in absentee votes received by 4 p.m. on Sunday, April 13—six days later than prescribed by statute—implicitly recognized the WEC's broad authority. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *17 (W.D. Wis. Apr. 2, 2020), ECF No. 170. By statute, the obligations to record absentee ballots that are validly cast fall on municipal clerks and local elections inspectors, not the WEC itself. Wis. Stat. § 6.86. Nonetheless, the Court ordered the WEC to extend the deadline by which mail-in absentee ballots must be counted. *Id*.[30]

[30] This understanding of the WEC's authority is consistent with the way courts have handled cases in other states where statewide remedies are necessary but the day-to-day administrative responsibility for elections is diffuse. For example, federal courts addressing voting restrictions in Florida have repeatedly rejected the argument that the Secretary of State is an improper defendant in a suit concerning statewide administration of elections, despite the fact that Florida's election system is also frequently described as "decentralized." *See e.g.* SOAPF ¶ 113. In *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1276, 1284 (N.D. Fla. 2018), order enforced, No. 1:18-CV-152-MW/GRJ, 2018 WL 7506109 (N.D. Fla. Nov. 5, 2018), the district court entered an injunction requiring the Secretary of State to provide written direction to county election supervisors, and found that the Secretary had that power as a result of the Secretary's status as

To be sure, localities also play an important in Wisconsin's election scheme—that is, after all, the nature of a partly decentralized system. But even where Wisconsin law delegates principal authority to local officials, the Legislature sensibly authorized the WEC to act as a backstop to ensure that, if local officials, for whatever reason, cannot ensure a safe and fair election, Wisconsin's voters are not left out in the cold. Mr. Kennedy repeatedly testified to this careful balance. *See, e.g.,* Kennedy Dep. 33:9-18, 35:5-36:3, 37:4-14.

For example, Wisconsin statutes authorize the WEC to "provide financial assistance to eligible counties and municipalities for election administration costs." Wis. Stat.§ 5.05(11). To that end, the WEC has directed its staff "to spend federal CARES Act grant money to distribute sanitation supplies to all 72 counties in Wisconsin." WEC Br. 27; *see* Leg. Br. 16. The WEC also is plainly authorized to provide supplies to local election officials. Indeed, it has done just that, "find[ing], procur[ing] and distribut[ing] sanitation supplies and personal protective equipment to polling places throughout Wisconsin" in advance of the April 7 election. WEC Br. 5; *see id*. at 7 (WEC "distributed 1.2 million absentee ballot envelopes to municipal clerks"). As necessary, WEC even has the authority to hire an individual to "perform[] duties which are [ordinarily] the responsibility of a county or municipality." *Id*. at 22 (citing Wis. Stat. § 7.03(2)).

"chief election officer," Fla. Stat. § 97.012, general administrative authority, Fla. Stat. § 15.13, and power to investigate local election officials violations of law, Fla. Stat. § 97.012(14). *Compare* Wis. Stat. § 5.05(3g) (WEC administrator is "chief election officer"); Wis. Stat. § 5.05(1) (WEC has "responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections"); and Wis. Stat.§ 5.05(2m)(a) (WEC may "investigate violations of laws administered by the commission"). *Fla. Democratic Party v. Detzner*, No. 4:16-CV-607-MW/CAS, 2016 WL 6090943, at *5 (N.D. Fla. Oct. 16, 2016). Surprisingly, the Intervenor-Defendants argue that a subsequent Eleventh Circuit decision on signature matching that directly cites this decision is inapposite here because it found the Secretary to have "the authority to relieve the burden on Plaintiffs' right to vote." Leg. Br. 105 (citing *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (citing *Fla. Democratic Party v. Detzner*, 2016 WL 6090943, at *5). That authority, however, is derived from a statutory scheme that parallels Wisconsin's in significant ways.

Moreover, in a number of instances during the pandemic, WEC has undertaken actions that by statute are ordinarily assigned to localities, indicating that State and local authority under Wisconsin's election scheme is *not* mutually exclusive. For example, the WEC has directed clerks not to send special voting deputies (SVDs) into care facilities for the August or November elections, as it did in April, SOAPF ¶ 110, despite the fact that Wis. Stat. § 6.875 explicitly gives municipal clerks responsibility for dispatching SVDs and gives the WEC responsibility only for prescribing the form of the SVD's oath, Wis. Stat. § 6.875(5). And the mailing that the WEC will send to registered voters will include the WEC's address as one to which the enclosed absentee ballot request forms can be returned. SOAPF ¶ 111, although statute provides only that "an absent elector may make written application *to the municipal clerk of that municipality* for an official ballot by" several methods, including mail, Wis. Stat. § 6.86(1)(a).

Plaintiffs do not ask this Court to "wrest" authority away from local officials and grant it to the WEC. Leg. Br. 102. Instead, they ask this Court to order the WEC to take specific steps *within its powers* to assist localities throughout Wisconsin in ensuring the November election satisfies minimum constitutional and statutory standards. That is the WEC's responsibility, on behalf of the state of Wisconsin.

B. The WEC's Specific Statutory Authorities Support Each of Plaintiffs' Claims for Relief.

For all the reasons just stated, it is clear that the WEC is the proper defendant here. In addition to its broad general authority, each item of relief sought by Plaintiffs is further supported by specific statutory authorities of the WEC.[31] Plaintiffs simply ask the Court to order

[31] Contrary to the Legislature's assertions, Plaintiffs do not seek relief requiring a specific number of polling locations or poll workers, nor do Plaintiffs seek an order allowing the WEC to overrule a municipality's determination of the location for a particular polling site. *See* Leg. Br. 100-102. Additionally, Plaintiffs no longer seek relief with respect to accessible voting machines

relief that is consistent with the WEC's broad administration and enforcement powers, state statutory authorities, and past practices. Each specific item of relief, as well as additional authority supporting the WEC's ability to implement that relief, is set out below.

a. *Take all appropriate actions to ensure that in-person voting, whether exercised by casting an absentee ballot or by casting a ballot on election day, can be safely conducted.*

- Order the WEC to establish requirements for social distancing and appropriate sanitization practices at all in-person absentee and election day registration and voting locations, as well as creating appropriate corresponding signage. *See* Expert Report of Patrick Remington, *Swenson* ECF No. 44 ("Remington Report"), at 14-17; Kennedy Report ¶¶ 66-78.

- Order the WEC to provide adequate staff time to support municipalities in implementing these measures.

- Order the WEC to provide counties and municipalities with necessary safety supplies and PPE or assist them in procuring such supplies.

- Order the WEC to develop training specific to conducting elections during the current public health crisis, as the WEC represented in its June 25 status report.

In addition to its general authority to administer Wisconsin elections, two specific provisions empower the WEC to implement Plaintiffs' measures to ensure safe in-person voting activities. First, the WEC possesses the authority to direct the posting of information at polling places, which can include social distancing guidance and the requirement of signs, tapes, markers, and other visual cues. Wis. Stat. § 5.35(6). WEC also has clear authority to issue statewide guidance on the layout and set up of polling places, WEC Br. 27 (noting "over 20 public health guidance documents for clerks, poll workers and the public"), and municipalities have already testified that they will follow this guidance. *See* MEC Dep. 92-94, Kennedy Dep.

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for in-person absentee voting, PI Brief 65 ¶ 2, voters in care facilities, *id.* at 66, ¶ 4, and coordination with the United States Postal Service, *id.* at 66 ¶ 8.

73:16-74:8.[32] WEC staff can assist municipalities in following this guidance. Wis. Stat. § 7.08(11). *See also* Green Bay Dep. 110:21-111:11 (testifying that WEC should have done more to guide municipalities on how to set up polling locations during pandemic and noting "we take direction from them on everything else."); *id*. at 117:1-118:17; SOAPF ¶ 119. Additionally, the WEC shall "[a]llocate and assign sufficient members of its staff to coordinate their activities with local election officials." Wis. Stat. § 7.08(11).

The WEC is authorized to financially assist counties and municipalities with procuring additional supplies, including disposable writing utensils, personal protective equipment, sanitizing equipment, and others. *See* Wis. Stat. § 5.05(11). During the April election, the WEC went a step further and actually procured and directly provided municipalities with PPE, pens, and sanitizing equipment. *See* SOAPF ¶ 112; WEC I Dep. 74:13-15 ("We don't have any sort of statutory responsibility to [provide supplies], but certainly felt like the right thing to do").

b. *Take all appropriate actions to ensure an adequate number of poll workers to administer safe polling places.*

- Order the WEC to directly assist in poll worker recruitment at the state level, by: (1) developing and implementing procedures for proactively recruiting poll workers; (2) facilitating the assignment of recruited poll workers to jurisdictions where they are needed and (3) creating a pool of reserve poll workers who can be trained ahead of time to serve in the event of an unplanned, critical lack of poll workers on election day, as the WEC discussed for April. *See also* Kennedy Report at ¶¶ 67-69.

In addition to its general responsibility to administer Wisconsin's election laws, the WEC has the statutory authority to financially assist with recruitment efforts, *see* Wis. Stat. § 5.05(11),

[32] The guidance should also direct localities, where practicable to make available open-air registration and voting opportunities, as well special walk-in hours registration hours, including opportunities exclusively designed for voters 65 years of age or older, voters with disabilities, and immunocompromised voters or voters who are otherwise at high risk from COVID-19, and to use arena venues for polling locations, whenever practicable. *See* Kennedy Report ¶¶ 41, 53-59, 71-75.

coordinate with and assist local officials, including by allocating and assigning members of its staff to coordinate activities with local officials as it did in April, Wis. Stat. § 7.08 (11); WEC Br. 7, employ staff to complete work that is the responsibility of the county or municipality, Wis. Stat. § 7.03(2), and collect information concerning "election administration," Wis. Stat. § 5.05(14)(a); Wis. Stat. § 7.10(10); Wis. Stat. § 7.15(13). The WEC acknowledges that it has tools available to recruit poll workers, and that it is feasible for it to assist local officials with recruitment efforts. *See, e.g.,* Second Goodman Decl., Ex. 30 (WEC RFA Resp.) at Nos. 14-15; WEC Defs.' Add'l Prop. Findings of Fact ¶ 26, July 20, 2020, ECF No. 445 ¶¶ 26-27; WEC II Dep. 84:24-86:15 (admitting that the WEC has tools available to it to attempt to impact the number of poll workers on election day); SOAPF ¶ 118. Municipalities "would be able to open more polling places for the November election" if the WEC helped with recruitment. MEC Dep. 113:11-18.

c. *Ensure that voters who are blind and others with disabilities have an accessible means of receiving, marking, and submitting absentee ballots privately and independently.*

   - Order the WEC to make available accessible ballots that voters with disabilities can complete privately and independently. *See* Kennedy Report ¶¶ 90-94.

This relief would enable voters with print disabilities to print out and mail in their ballot. There is no question WEC has this authority; WEC has already tested an option for doing so, *see* DRW Second Decl. ¶ 27. WEC also makes ballots available online through MyVote to military and overseas voters, SOAPF ¶ 120, showing again that WEC does have the authority to make ballots available to those who need them online.

Creating these ballots falls within WEC's current responsibilities, which include establishing the form of all ballots and ballot containers. Wis. Stat. § 7.08 (1) (a); *id.* § 7.08 (1) (b); Wis. Stat. § 5.51(8). And as noted above, the WEC plays a distinctive role in assisting voters

with disabilities, *see* Wis. Stat. § 5.25(4)(a), including by promulgating rules for the administration of the statutory requirements for voting machines, electronic voting systems, and any other voting apparatus which may be used in elections, Wis. Stat. § 7.08(1)(d). *See also* Wis. Stat. § 5.905(2) (noting the WEC's role establishing software components of an electronic voting system).

d. *Take all appropriate actions to ensure that all voters who request and are qualified to receive an absentee ballot in fact receive such absentee ballot, and that any voter whose request for an absentee ballot is rejected or not processed for any reason be notified and given the opportunity to cure any defect in a timely manner.*

- Order the WEC to issue a directive reiterating local election officials' statutory responsibility to mail absentee ballots within one business day of receiving the request, Wis. Stat. § 7.15(1)(cm), and requiring that they seek assistance from the WEC if they are failing to meet that responsibility.

- Order the WEC to proactively use the WisVote database to monitor the status of absentee ballot applications and mailings, including implementing the new "pending absentee" feature in WisVote, which allows clerks to approve or deny requests and communicate the result and its status to voters without manual data entry. *See* Goodman Decl., Ex. 18, Swenson ECF No. 43-18 (April 7 Absentee Voting Report) ("April 7 Absentee Voting Report"), at 34.

- Order the WEC to deploy its staff and resources to allow local election officials to comply with their statutory responsibility, when it finds that local officials are unable to keep up with the volume of absentee ballot requests or failing to identify defective requests, as was the case during the April election. *See* Kennedy Report ¶¶ 105-107.

The WEC is authorized to coordinate its activities with local election officials, including by allocating staff for this purpose, Wis. Stat. § 7.08(11), and hiring staff to complete work that is the responsibility of the county or municipality, Wis. Stat. § 7.03(2). In addition to its role operating and maintaining WisVote and MyVote, Wis. Stat. § 6.30(5); WEC II Dep. 96:20-22, the WEC can monitor and assist local clerks as they respond to a large volume of absentee ballot requests. *See* WEC Status Report at 3-4 ("WEC staff would also be available to follow-up with absentee voters that submitted an incomplete application, including a lack of photo ID if

required."); SOAPF ¶ 122. For example, the WEC has already intervened and involved its staff in the coordination of, and response to, absentee ballot requests, *see id.*, even though the receipt and distribution of absentee ballots requests is statutorily tasked to municipalities. *See* Wis. Stat. § 6.30(1) ("Any eligible elector may register by mail on a form prescribed by the commission and provided by each municipality . . . The clerk shall mail a registration form to any elector upon written or oral request."); *see also* Wis. Stat. §§ 7.10(1), 7.15(1)(c), 6.86.

- Order the WEC to mandate the use of WisVote mailing labels that incorporate intelligent barcodes so that every ballot can be tracked throughout the mail process.

The WEC can mandate the use of intelligent barcode mailing labels pursuant to its broad authority to require "information from county and municipal clerks relating to election administration, performance of electronic voting systems and voting machines, and use of paper ballots in elections." Wis. Stat. § 5.05(14)(a); Wis. Stat. § 7.10 (10) ("[e]ach county clerk shall provide to the commission any information requested under s. 5.05 (14)") (emphasis added); Wis. Stat. § 7.15(13) (same for municipal clerks). The WEC may invoke this authority to compel county and municipal clerks to provide it with the underlying tracking information and data that an intelligent barcode system would collect and display that information to voters and officials through the MyVote and WisVote systems, which the WEC operates. The WEC's authority to mandate the use of intelligent barcode is further supplemented by its plenary power over the absentee ballot application forms and certificates, Wis. Stat. § 6.86(2m)(a); Wis. Stat. §§ 7.08(1)(b)-(c); Wis. Stat. § 6.24(d).

- Order the WEC to establish clear, uniform procedures to ensure that voters whose absentee ballot requests are defective receive individual, prompt, and effective notice of the reasons their request was rejected and information about how to cure the defect, and that voters whose ballots are not timely processed similarly be provided with notice. *See also* Kennedy Report ¶ 110.

The WEC has the authority to "prescribe uniform instructions for municipalities to provide to absentee electors." Wis. Stat. § 6.869; *see also* Wis. Stat. § 6.24 ("The commission shall prescribe the instructions for marking and returning ballots and the municipal clerk shall enclose such instructions with each ballot."). This includes "information concerning the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot." Wis. Stat. § 6.869.

e. *Take all appropriate actions to upgrade electronic voter registration systems so they can process the anticipated elevated number of online registrations and absentee ballot requests.*

- Order the WEC to implement technological upgrades, including: (1) upgrade the WisVote voter registration database in anticipation of substantial increases in voter registration and absentee ballot requests for the November election; (2) increase memory capacity for MyVote—in particular for uploaded photo ID documents that required for online registration; and (3) add sufficient bandwidth and server capacity to support increased demand on the website, including a late surge in online absentee ballot requests. *See* Kennedy Report ¶¶ 42-48.

The WEC has straightforward authority to implement this requested relief. Second Goodman Decl., Ex. 30 (WEC RFA Resp.) at Nos. 9-10 (WEC admits that it is both feasible and that it has the authority to upgrade the memory, bandwidth, and server capacity of its electronic voter registration systems, including, but not limited to, WisVote and MyVote); *see also* Green Bay Dep. 105:11-107:20 & Teske Ex. 16 (Green Bay deponent describing city's dependence on WEC to ensure that registration system works properly); SOAPF ¶ 125.

f. *Ensure that secure drop boxes for in-person return of absentee ballots are available to every voter and increase in-person absentee voting opportunities that are safe and accessible, including, for instance, drive-through voting.*

- Order the WEC to mandate at least one secure drop box in every municipality at which voters can safely return their absentee ballots on or before election day without having to mail their ballots or go to the polling place. *See* Kennedy Report ¶¶ 138-140.

- Order the WEC to provide staff time to assist municipalities with identifying suitable locations for in-person absentee voting, drop-boxes, and drive-through locations. *See* Kennedy Report ¶¶ 84-86.

- Order WEC to issue guidance on the use and placement of drop boxes.

The WEC is the proper party to implement this relief given its broad-ranging powers to establish standards for ballot containers and to collect information. Kennedy Dep. 115:21-116:3 ("[T]here's a lot of resources that are available in the election communicate [sic] on drop box implementation that the WEC can direct towards municipalities to provide this safe alternative for voters."); The WEC has the authority to "[p]rescribe the necessary standard sample forms and *ballot containers* . . . for all elections the results of which are reportable to the commission," as well as "all other materials as it deems necessary to conduct the elections." Wis. Stat. § 7.08 (1)(b) (emphasis added). The WEC also has the authority to collect information concerning "election administration," Wis. Stat. § 5.05(14)(a); Wis. Stat. § 7.10 (10); Wis. Stat. § 7.15(13). The WEC provided guidance to local election officials that they could establish new drop boxes before the April election. Second Goodman Decl., Ex. 22 (Wis. Elections Comm'n, *FAQs: Absentee Ballot Return Options: USPS Coordination and Drop Boxes* (Mar. 31, 2020)); *see also* Green Bay Dep. 158:4-22 (expressing frustration that the WEC has not provided sufficient guidance on the appropriate type of drop box); SOAPF ¶ 97.[33]

g. *Engage in a public education campaign to apprise the public on: how to request, vote, and return absentee ballots; the locations and times for in-person absentee voting; all early voting opportunities in each community; the provisions being made for safe in-person voting; and any changes in election day polling locations.*

[33] In the alternative, and at the very least, the Court should require the WEC to issue guidance to clerks detailing the (1) the desirability of drop boxes; (2) guidelines for municipalities to follow for determining the number and location of ballot drop boxes, equipment and supplies needed, and staffing and security requirements; and (3) the relationship between the expansion of well-publicized early in-person voting hours and the reduction in the risk of exposure to COVID-19. *See* Kennedy Report ¶¶ 41, 89.

- Order the WEC to initiate a comprehensive statewide voter education program in advance of the November election that (1) provides information on: how to request, vote, and return absentee ballots; the locations and times for in-person absentee and election day voting; and the provisions being made for safe in-person voting; (2) involves multiple media channels, including MyVote, radio, television, print, social media, and an online presence, and (3) is designed to reach all voters—including those with disabilities, without ready access to the internet, or those who are unable to effectively to navigate the MyVote Wisconsin website. *See* Kennedy Report ¶¶ 157-164.

- Order the WEC to coordinate this voter education campaign with municipal and county clerks, community groups, political parties, and presidential and congressional campaigns. *See id.* ¶ 160.

Wisconsin law tasks the WEC with engaging in public education initiatives, and it compels municipal and county clerks to assist in these efforts. *See* Wis. Stat. § 5.05(12); Wis. Stat. § 7.10(7); Wis. Stat. § 7.15(9). Additionally, the WEC is tasked with maintaining a toll-free telephone line for electors to get information about the general election, access information regarding their registration status, current polling place locations, and report voter rights violations or fraud. Wis. Stat. § 5.05(13). As with educational campaigns, municipal and county clerks are required to assist the WEC in maintaining this telephone service. Wis. Stat. § 7.10(8); § 7.15(10).

III. Plaintiffs' Claims Are Justiciable.

A. Plaintiffs' Claims Are Ripe and Present No *Purcell* Problem.

The Intervening Defendants argue both that Plaintiffs' motion is not ripe, because the risks of COVID-19 are still too speculative, Leg. Br. 109, but also that the motion comes too late, "given the short time frame" before the election, RNC Br. 4-6. They argue, in effect, that Plaintiffs' claims are simultaneously not yet ripe and already overripe. These contradictory arguments, if accepted, would preclude federal courts from ever enforcing the constitutional and statutory rights of voters during a pandemic. That cannot be the law. Perhaps that is why the Intervening Defendants chose to make them in separate briefs. In truth, however, this

incoherence simply underscores the conclusion that the time is right for this Court to promptly adjudicate Plaintiffs' claims.

1. *Plaintiffs' claims are ripe.*

It is not too early for this Court to issue an injunction to protect the right to vote during the pandemic. The ripeness doctrine's "underlying objective is to avoid premature adjudication and judicial entanglement in abstract disagreements." *Church of Our Lord & Savior Jesus Christ v. City of Markham, Ill.*, 913 F.3d 670, 676 (7th Cir. 2019). Ripeness is "peculiarly a question of timing," *id.* (quotation omitted), and "depends on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration,'" *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983)). In election cases, courts are particularly wary of withholding relief on ripeness grounds precisely in order to avoid a situation where "[c]hallengers to election procedures [are] left without a remedy . . . because the election is too far underway or actually consummated prior to judgment." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 301 n.12 (1979).

The Legislature argues that adjudication now would be premature because it requires "[s]peculation about the course of COVID." Leg. Br. 110. But every expert in this case agrees that COVID will have a significant effect on the administration of the November election. Remington Dep. 34:21-35:3; Murray Decl. ¶¶ 47, 66-81; SOAPF ¶ 13. Both of the Commissioners who sat for depositions also expect COVID-19 to affect the November election, as do the election administrators for Milwaukee and Green Bay. Jacobs Dep. 151:3-8; Spindell Dep. 22:6-23:1; MEC Dep. 67:20-69:21, 95:22-96:1, 99:3-7, 100:23-101:8; Green Bay Dep. 86:21-87:15; 123:4-124:14; 124:18-125:1; 126:12-127:21; 158:4-159:3; SOAPF ¶ 14. The WEC

has also acknowledged this likelihood by taking some measures to prepare to run the November election amid the continuing pandemic. *See* WEC Status Report; SOAPF ¶ 15.

The Legislature cites no evidence to the contrary. Instead it suggests, falsely, that the Swenson plaintiffs "admitted" that the effect of COVID-19 in November is speculative. To the contrary, Plaintiffs' expert has provided undisputed testimony that the pandemic will "almost certainly be a significant risk of contracting and transmitting COVID-19" during the November election. Remington Dep. 34:21-35:3; SOAPF ¶ 6.[34] The Legislature also argues Plaintiffs' claims are not ripe because the WEC has taken steps since April to address the pandemic. Leg. Br. 109-10. But this only demonstrates that the effects of COVID-19 are entirely foreseeable, not speculative. If the WEC understands that the risk of COVID-19 in November justifies some action now, it is hard to understand why this Court should come to the opposite conclusion. Unsurprisingly, the WEC does not argue that this motion is unripe.

The Legislature's ripeness argument impermissibly conflates the merits with the threshold issue of timing. The fact that WEC has taken various steps to address COVID-19 does not mean this motion is speculative; instead, it means that those steps must be assessed against the constitutional and statutory rights that Plaintiffs assert. Plaintiffs have shown that the WEC has not done enough and that its actions and plans are insufficient to safeguard Wisconsin

[34] The Legislature cites to an objection that Plaintiffs lodged to a discovery request on vagueness grounds, but that is not a concession that COVID-19's effect on the coming election is too speculative to adjudicate. *See* Leg. Br. 110. The Legislature also claims Plaintiffs "rely upon" an IHME model that predicted lower COVID-19 rates in November than April, *id.* (citing *Swenson* SOPF ¶ 216), but Plaintiffs do not endorse that model's predictions and their expert has explained that the IHME model is now obviously wrong because it has not been updated to reflect recent data and consequently is currently underestimating COVID-19 rates by a factor of 4 to 5. Remington Dep. 35:19-36:10, 47:7-51:10.

citizens' voting rights. *See infra* 87-95. This dispute cannot be dismissed as "unripe" simply because the Legislature believes the steps WEC has taken are sufficient.

There is a live, concrete dispute among the parties now. The fact that COVID-19 will profoundly affect the November election is accepted by all except, perhaps, the Wisconsin Legislature and the Republican National Committee. Plaintiffs' claims are ripe, just as the Court held the DNC plaintiffs' claims were in its June 10, 2020 opinion. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 3077047, at *2-*4 (W.D. Wis. June 10, 2020), ECF No. 217.

2. *Purcell does not prevent an injunction here.*

Nor is it somehow too late for this Court to issue an injunction. The RNC/RPW asks the Court to stay its hand because the election has drawn too near.[35] RNC Br. 4-6. But that is wrong, both because there is sufficient time before the election and because the relief sought here would assist rather than disrupt the fair and orderly administration of the November election.

In *Purcell v. Gonzalez*, the Supreme Court cautioned lower courts to be mindful of the "risk" that an injunction close to election day could "result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. 1, 7 (2006). The Supreme Court relied on that reasoning in granting a stay of part of this Court's April order—issued five days before the April election—to the extent that it permitted absentee ballots to be returned after Election Day. The Court reasoned that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

[35] The RNC makes no effort to reconcile its argument with the contradictory position of the Legislature, even though RNC "incorporate[d] by reference" the Legislature's arguments. RNC Br. 1.

Plaintiffs here do not seek relief on the election's eve, but months in advance. This Court has been attentive to the need to move quickly, scheduling discovery and the preliminary injunction hearing to occur on a highly compressed schedule. *See* Scheduling Order of June 29, 2020. This case has moved as expeditiously as possible and, as the recent experience in these consolidated cases shows, appeals can move very rapidly too. Moreover, the relief Plaintiffs seek here does not create "voter confusion" and will produce no "incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. To the contrary, Plaintiffs are seeking relief that will make it *safer* for people to vote in person if they choose, and *easier and more certain* for people to vote absentee. For instance, a ruling permitting use of out-of-county poll workers—and the concomitant ability to operate more polling places—does not risk any voter confusion. Similarly, permitting absentee ballots to be counted before election day or requiring the WEC to take specific measures to make polling places safe and accessible do not create any risk of confusion whatsoever.[36]

The Supreme Court cases cited by the RNC to suggest that it is already too late do not support that proposition; all issued stays without any accompanying reasons. There is no basis to

[36] To the extent that the RNC contends that relief is untimely because it would impose a burden on election administrators, see RNC Br. 5, it is noteworthy that the WEC itself does not make this argument. WEC I Dep. 17:20-21:5 (noting that the WEC was able to implement the Court's ordered changes in a matter of days and, while not necessarily always the most comfortable way to operate, the WEC can "can work very, very quickly"). SOAPF ¶ 114. And administrators from Green Bay and Milwaukee indicated that some of the relief sought here against the WEC would in fact help them prepare for November. MEC Dep. 90:8-91:18 (health and safety measures), 111:9-113:18 (recruiting poll workers), 113:3-10 (out-of-county poll workers), 117:22-119:9, (counting ballots before election day), and 119:10-121:18 (upgrades to MyVote and WisVote); and Green Bay Dep. 60:14-19 (supplies), 104:4-104:12, 104:22-105:4, 110:5-18 (upgrades to WisVote & MyVote), 131:22-132:9 (recruiting poll workers), 143:21-144:22 (out-of-county poll workers), 148:11-22 (clearer guidance on public health best practices), 154:1-8 (PPE and sanitizing supplies), 158:4-159:3 (clearer guidance on drop box security), 162:8-163:6 (extended time to accept mail-in ballots). SOAPF ¶ 115.

assume that they were based on *Purcell* concerns, rather than disagreement on the merits or other considerations. *See Perry v. Perez*, 565 U.S. 1090 (2011), *subsequent op. vacating and remanding,* 565 U.S. 388 (2012); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014). The remaining case is non-precedential and held that the district court had erred on the merits; its comments about *Purcell* were plainly and self-consciously dicta. *See Thompson v. Dewine*, 959 F.3d 804, 812–13 (6th Cir. 2020) (granting stay pending appeal and then proceeding to make several additional "point[s]").

In contrast to this grab-bag of non-precedents, the Supreme Court has made clear that courts do not need to stay their hands whenever an election draws near. In *RNC v. DNC* the Court itself ordered a change to Wisconsin's absentee ballot deadline on the *evening before the election*, permitting voters to postmark their ballots by Election Day rather than shoulder the risk of unpredictably slow mail delivery. 140 S. Ct. at 1208; *id.* at 1209 (Ginsburg, J. dissenting) (describing the Court's postmark deadline as a "novel requirement"). Plaintiffs seek precisely that remedy here, among other relief. It cannot possibly be too late for this Court to order now what the Supreme Court granted on the literal eve of the April election. To the contrary, *RNC v. DNC* demonstrates that there is no *Purcell* bar to measures that ensure lawfully cast ballots are properly counted or that ordinary means of voting are accessible despite the pandemic. Because those are precisely the kinds of relief Plaintiffs seek, and because there is plenty of time to adjudicate expedited appeals if necessary, the so-called *Purcell* principle has no purchase here.

Cf. RNC, 140 S. Ct. at 1208 (staying part of this court's order only because, in its view, it would "fundamentally alter the nature of the election").[37]

B. *Burford* Abstention Does Not Apply.

Ignoring the Court's previous rulings, the Legislature renews the now twice-rejected argument that the *Burford* abstention doctrine bars Plaintiffs' claims. *See* Leg. Br. 111-12; *Democratic Nat'l Comm. v. Bostelmann*, 20-cv-249-WMC, 2020 WL 1320819, at *7 (W.D. Wis. Mar. 20, 2020), ECF No. 21 ("*Burford* abstention is not an appropriate reason to duck this court's obligation to protect voters' rights"); *Democratic Nat'l Comm. v. Bostelmann*, 20-cv-249-WMC, 2020 WL 3077047, at *7-8 (W.D. Wis. June 10, 2020), ECF No. 217 (Court was "not persuaded" that *Burford* abstention was appropriate the first time it was urged and "is [not] persuaded" the second time, either). The Court was right the first two times: *Burford* abstention does not apply here.

A "federal court's obligation to hear and decide cases within its jurisdiction is 'virtually unflagging.'" *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Col. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976)). *Burford* abstention "represents an extraordinary and narrow exception" to that duty. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996)

Under *Burford*, federal courts have discretion to decline jurisdiction in "two narrow situations." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011). "First, a federal court may choose to abstain when it is faced 'with difficult questions of state law.'" *Id.* "Second,

[37] The Supreme Court's decision also explicitly noted that it was not "expressing an opinion on . . . whether other reforms or modifications in election procedures in light of COVID–19 are appropriate." *RNC*, 140 S. Ct. at 1208.

… when concurrent federal jurisdiction would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Adkins*, 644 F.3d at 504 (quoting *New Orleans Pub. Serv., Inc.* ("*NOPSI*") *v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)).

Defendants cannot rely on the first type of *Burford* abstention—the presence of difficult state law questions—because "[P]laintiffs here bring exclusively federal law claims." *DNC*, 2020 WL 3077047, at *7 n.7. Defendants thus rely exclusively on the second type of *Burford* abstention, arguing that this Court's intervention would disrupt Wisconsin's effort to "establish a coherent policy" with respect to administering the November general election, which is a "matter of substantial concern." Leg. Br. 111 (quoting *NOPSI*, 491 U.S. at 361).

However, reliance on the second basis of *Burford* abstention—disruption of state efforts to establish a coherent policy—is legally foreclosed. "[F]or th[e] second basis of *Burford* abstention to apply," *Adkins*, 644 F.3d at 504, "two essential elements" must be satisfied: (1) "the state must offer some forum in which claims may be litigated," and (2) "that forum must be special—*it must stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims*," *Prop. & Cas. Ins. Ltd. v. C. Nat. Ins. Co. of Omaha*, 936 F.2d 319, 323 (7th Cir. 1991) (emphasis added). "In other words, judicial review by state courts *with specialized expertise* is a *prerequisite* to *Burford* abstention." *Adkins*, 644 F.3d at 504 (second emphasis added). Defendants make no attempt to satisfy these elements. As this Court already has recognized, Defendants cannot rely on ordinary Wisconsin state courts to adjudicate Plaintiffs' claims, because that would "ignore[] that [state] courts are not specialized tribunals with a special relationship with voting rights issues." *DNC*, 2020 WL 3077047, at *7; *see Int'l College of Surgeons v. City of Chi.*, 153 F.3d 356, 365 (7th Cir. 1998) (rejecting claim that

Burford required dismissal because, "unlike the situation in *Burford*, the administrative scheme at issue in th[e] case does not recognize any specialized expertise in the Circuit Court of Cook County"). Because Defendants are "unable to point to the type of specialized forum" required to decline jurisdiction, "the second of the *Burford* abstention rationales does not apply to this case," *id.*, and *Burford* does not bar Plaintiffs' claims.[38]

IV. Plaintiffs Are Entitled to a Preliminary Injunction.

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their statutory and constitutional claims. Plaintiffs are entitled to a preliminary injunction because the other equitable factors likewise tilt heavily in their favor.

A. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction.

In arguing that the equities preclude injunctive relief, *see* Leg. Br. 112-13, the Legislature altogether ignores that "[t]he threatened loss of constitutional rights"—and especially "the fundamental right to vote"—"constitutes irreparable harm." *DNC*, 2020 WL 1638374, at *11; *see also Swenson* PI Br. 63-64. As Plaintiffs demonstrated extensively above, absent judicial intervention, countless Wisconsinites will have their right to vote threatened, and many will actually be disenfranchised, as they were in April. Many individuals with disabilities, moreover, will be denied the right to participate in our democracy on par with individuals without disabilities, directly contrary to the core purpose of the ADA—i.e., "[e]nsuring that disabled

[38] Moreover, as this Court recently emphasized, "numerous decisions [have held] that *Burford* abstention is inappropriate in federal constitutional challenges to state election laws." *DNC*, 2020 WL 3077047, at *7; *see, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1173 (11th Cir. 2000) (declining to dismiss under *Burford* in case "target[ing] certain discrete [election] practices set forth in a particular state statute"); *Duncan v. Poythress*, 657 F.2d 691, 699 (5th Cir. 1981) (observing that "[t]he delay inherent in abstention is least tolerable where" a case concerns "the fundamental right to vote"); *Stein v. Thomas*, 672 Fed. App'x 565, 570 (6th Cir. 2016) (*Burford* abstention not warranted in case "evaluating whether state election procedures violate First and Fourteenth Amendment election rights").

individuals are afforded an opportunity to participate in voting that is equal to that afforded others" so that these "individuals are never relegated to a position of political powerlessness." *Lamone*, 813 F.3d at 507.

The Legislature offers two throwaway arguments in response. First, it argues that Plaintiffs will not suffer irreparable harm because of "the Commission's recent efforts" to address voting during the pandemic. Leg. Br. 113. As the Legislature itself recognizes, this is simply a recycled version of its (erroneous) ripeness argument. Regardless, while Plaintiffs are certainly mindful and appreciative of WEC's efforts, the WEC has not done enough—and in the case of statutes, *cannot* do enough, absent judicial intervention—to protect the voting rights of Wisconsin's citizens. The Legislature's second argument confuses the injury here. Unlike in *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, 2020 WL 2145350 (W.D. Mo. May 5, 2020), where the claimed injury was "potentially contracting COVID-19," *id*. at *9-10, the injury here is an irreparable loss of the right to vote in the November 3 election and the stigma and inequity that comes with disparate treatment of voters with disabilities. And any suggestion that voting will be easier in November because the virus is under control is inconsistent with reality.

B. The WEC's Efforts to Date Will Not Prevent Irreparable Harm to Plaintiffs.

Plaintiffs have amply established that administering the November 3 election will present an unprecedented challenge for the WEC. The WEC itself has noted that turnout in presidential elections has lately surpassed 3 million votes, and that Wisconsin could see more than 1.8 million requests for absentee ballots by mail, a volume which would create "terrific challenges." April 7 Absentee Voting Report, at 12-13; SOAPF ¶ 46. It has projected that more than twice as many total ballots will be cast in November as were cast in April. April 7 Absentee Voting Report, at 13; SOAPF ¶ 47. There will almost certainly be a significant risk of contracting and

transmitting COVID-19 in Wisconsin around that date. Remington Dep. 34:21-35:3; SOAPF ¶ 6. Since Plaintiffs' opening brief was filed, the daily infection rate in Wisconsin has climbed to 1,170 cases a day. Remington Dep. 35:11-18; SOAPF ¶ 7. A statistical analysis of the April election found "that approximately 38,000 people statewide (more than 1 percent of registered voters) did not vote who otherwise would have done so in the absence of COVID-19." Fowler Report at 9. In areas of the state where COVID-19 infection rates were higher, at least 8.4 percent of voters were deterred from voting. Fowler Report at 10. Based on this analysis and the continuing increase in infection rates, there is almost certain to be a significant risk of contracting and transmitting COVID-19 during the November 3, 2020 election. *See* Remington Report at 34:21-35:3; SOAPF ¶ 6.

Given these extraordinary circumstances, the WEC must take every action within its authority to ensure that the widespread disenfranchisement that plagued the April election does not recur. Mr. Kennedy explains that the number of local election officials in Wisconsin highlights the need for clear and strong leadership from the WEC. Kennedy Dep. 30:7-31:4. Defendant Wolfe—speaking on behalf of the Commission—appears to agree, describing the WEC's role as providing the "framework" for local officials to follow and implement. WEC II Dep. 151:21-25. But remarkably, the WEC has not, to date, even taken a position on the question of *whether* the risk of COVID-19 transmission should factor into its planning for the November election. WEC I Dep. 23:8-24:15; SOAPF ¶ 86; *see* Defs. RFA Resp. No. 20 (WEC "does not have knowledge or information" to admit whether there is a significant risk to human health associated with in-person voting during the COVID-19 pandemic). And, on at least some aspects of relief sought by Plaintiff, the Commission's "deadlock" is unlikely to change "absent instruction from a court or the Legislature." Jacobs Dep. 120:2-19; SOAPF ¶ 107.

The WEC has likewise made clear that it simply cannot or will not address many of the breakdowns Plaintiffs have identified:

- *Statutory Requirements*: The WEC acknowledges that it has no authority to modify statutory deadlines or requirements. WEC Status Report at 15. The WEC thus cannot address any of Plaintiffs' claims seeking such relief. And its Chair has testified that an absence of "political will" will prevent the Legislature from taking the steps necessary to ensure a safe election in November. Jacobs Dep. 99:8-100:4.

- *Absentee Ballot Receipt*: The Status Report does not mention that nearly 80,000 validly cast ballots did not arrive by election day in April and offers no plan to deal with a likely recurrence of this catastrophic breakdown in November. The WEC does not suggest any plan to request a legislative or executive solution.[39]

- *Certification Requirement*: The Status Report is silent on the question of workarounds to the witness-certification requirement. The WEC does not suggest actually workable ways for voters to overcome the documented difficulties with the requirement, nor does it evaluate the success (or failure) of the methods it originally suggested. *See supra* 6, 14-19, 44-46.

And while the WEC has taken some limited steps or announced plans to address certain other issues, its current plans are insufficient to cure the known defects and ensure that each Wisconsin voter has the opportunity to cast a safe and effective ballot.

1. *In-Person Voting*

The WEC has thus far failed to take adequate action to correct the problems with unsafe in-person voting opportunities that plagued the April election. Remarkably, it has not updated or created any new health guidelines or safety standards since the April election. *See* WEC Status Report at 4. And when asked if the WEC had issued any health guidance for the November election, Defendant Wolfe, speaking on behalf of the Commission, said that it would be a "fool's

[39] Green Bay's deponent also testified that her "biggest worry" is the election night challenges inherent in counting the surge of absentee ballots without a high speed tabulator, and noted that "[i]n April, with all the absentees we had, we were given multiple days to get those in the tabulator." Green Bay Dep. 124:1-124:11; *see also id.* 162:10-163:6.

errand" to do so at this stage. WEC II Dep. 52:13-17; SOAPF ¶ 88. Although the WEC directed the use of $500,000 of CARES Act grant money to secure and distribute sanitation supplies, *see* WEC Status Report at 4, it has not taken any steps to ensure that polling places implement adequate safety measures, including regarding layout, distancing, PPE, and sanitization practices, or special voting opportunities for at-risk populations. *See* WEC II Dep. 50:4-51:24; SOAPF ¶ 89. Because Wisconsin elections cannot be uniformly safe without leadership from the WEC to mitigate health risks associated with in-person voting activities, the Court should grant Plaintiffs' requested relief. *See* Kennedy Dep. 71:4-12; SOAPF ¶ 108. Indeed, local officials have confirmed that they need and will follow WEC guidance.

Likewise, the WEC has yet to take the comprehensive action necessary—and within its authority—to address poll worker shortages for November, which are likely to be exacerbated by increased voter participation during the presidential general election. SOAPF ¶ 48; *Swenson* SOPF ¶ 237. According to the WEC, to address November poll worker shortages it plans to "urge counties and municipalities to solicit election inspectors," compile training protocols, provide materials to local election officials to help them recruit workers, and promote the need for poll workers through a widget on MyVote, as well as earned and social media. *See* WEC Status Report at 11-12; *see also* WEC I Dep. 77:1-8 (surveying municipalities to identify poll workers shortages); SOAPF ¶ 90. It has pointedly not announced that it plans to create "a pool of reserve poll workers who can be trained ahead of time to serve in the event of an unplanned, critical lack of poll workers on election day," March 31, 2020 WEC Meeting Notice 12-13; SOAPF ¶ 90, as it discussed doing for April. *See, e.g.*, Green Bay Dep. 141:20-142:7 (stating that Green Bay is not aware of WEC doing anything actively to reach out to voters and encourage them to be poll workers.); SOAPF ¶ 95. And the National Guard is not a sufficient

backstop: the WEC has told municipalities "not to plan on them." Green Bay Dep. 136:16-137:22; SOAPF ¶ 94. Indeed, when Green Bay recently requested National Guard assistance at the polls for the August election, the WEC informed the city's clerk it could not receive the level of support requested, and that the WEC "[does not] know if they'll be trained." *Id.* at 70:17-71:13; SOAPF ¶ 93. Moreover, the WEC's current efforts are proving to be deficient now in the lead up to the August primary election, which will have far fewer participants—by orders of magnitude—than the November general election. *See* SOAPF ¶ 92 ("The City of Sun Prairie will be consolidating from eight polling places down to one polling place for the Tuesday, Aug. 11 Fall Partisan Primary because of Election Official shortages resulting from COVID-19.").

Accordingly, the approach that the WEC has outlined to address poll worker shortages for November is inadequate—particularly given the number of municipalities that may once again have to close numerous polling locations for lack of poll workers. *See* MEC Dep. 111:2-112:18 (explaining that Milwaukee Elections Commission is concerned about poll worker shortages in November and that assistance from the WEC would allow the city to maintain as many polling locations as it intends to offer); Kennedy Dep. 30:19-31:4 (noting that the number of local officials highlights the need for a leadership role from the WEC); Green Bay Dep. 123:6-19 (noting that lack of poll workers is the biggest concern for November); SOAPF ¶ 50. In order to ensure that municipalities have the staff they need to maintain an adequate number of polling locations, the Court should require that the WEC immediately initiate the coordinated approach to poll worker recruitment that Plaintiffs outline above, *see supra* 72.

2. *Absentee Voting*

During the April election, tens of thousands of voters were disenfranchised due to failures throughout the absentee voting process. The WEC is currently failing to address some critical systemic problems that persist, including: measures to ensure that voters receive their ballots and have the opportunity to correct issues with their ballot request forms; upgrades to WisVote and MyVote; and methods to allow voters with print disabilities to vote using an absentee ballot. *See also* Kennedy Dep. 66:13-16 ("[T]here were problems with [sending absentee ballots in] April; that there undoubtedly [will] be problems with November because the volume will increase.") *See* Kennedy Dep. 66:13-16; SOAPF ¶ 65.

Receiving Absentee Ballots: Thus far, the WEC has failed to take appropriate action to ensure that voters will receive their absentee ballots and have the opportunity to correct issues with their ballot request forms. The WEC has established an intelligent barcode system, *see* WEC Status Report at 6, and it identifies deploying intelligent barcodes as one of the critical steps it has taken to prevent the kind of absentee ballot delivery problems that afflicted the April election. *See* WEC I Dep. 98:22-99:17; *see also id.* at 93:9-11 ("[W]ithout intelligent mail barcodes, there, we don't have any data to know if the voter did eventually receive their ballot"); SOAPF ¶ 99. However, the WEC does not know how many municipalities will use intelligent bar codes. WEC I Dep. 58:8-18; SOAPF ¶ 98. And, as Mr. Kennedy testified, the Commission has not begun educating voters about intelligent barcodes or how to use them to track ballots. Kennedy Dep. 93:9-94:4; SOAPF ¶ 100. Relatedly, the WEC has discussed the "pending absentee" feature in WisVote for over two months, *see* April 7, 2020 Absentee Voting Report at 34, but has yet to implement the feature, *see* WEC Status Report at 9-10; SOAPF ¶ 101. And finally, the WEC does not appear to have taken any action to establish clear, uniform procedures to ensure that voters whose absentee ballot requests are defective receive notice and instructions

on how to correct deficiencies. Without a judicial order—particularly regarding the need to use intelligent barcodes—voters will once again face a multitude of problems requesting and timely receiving absentee ballots.

Drop Boxes. While the WEC has made CARES Act subgrant money available for the purchase of "additional absentee ballot drop boxes," it has not issued any guidance or directive regarding drop boxes and/or drive-through voting in anticipation of the November election. *See* WEC Status Report at 5; Green Bay Dep. 158:4-158:22; WEC II Dep. 51:21-51:24; SOAPF ¶ 97. The Court should order the WEC to enact Plaintiffs' proposed relief—namely, mandating at least one drop box per municipality, procuring such drop boxes for localities, and promulgating uniform, statewide standards for their placement and use, *see supra* 76-77 & n.33—so that voters have a safe and convenient means to ensure timely receipt of their ballots and without risking their safety. *See* Kennedy Report ¶¶ 81, 85, 138-40.

WisVote and MyVote. The WEC has not affirmatively stated that these systems are being upgraded to handle increased traffic associated with a general election and prevent outages, which have dogged the MyVote website since at least February 2020. *See* Goodman Decl., Ex. 21, *Swenson* ECF No. 21; Kennedy Report ¶¶ 44-46; SOAPF ¶ 102. Plaintiffs' expert Kevin Kennedy reviewed the WEC Status Report and concluded that the WEC has simply not provided enough information to evaluate the sufficiency of their actions, including whether whatever they are doing "scales up" to meet November demand, which will be twice as high as in April. *See* Kennedy Dep. 64:13 -65:4; SOAPF ¶ 106. When asked about upgrades to server capacity on MyVote, Megan Wolfe testified that WEC staff are doing "load testing" and looking at "server structure," but did not clarify whether explicit steps were being taken to ensure that both MyVote and WisVote are being upgraded to handle surges in traffic. WEC II Dep. 101:17-102:11;

SOAPF ¶ 103. Accordingly, the Court should require the WEC to take the necessary steps to prepare for the inevitable demand for absentee ballots. *See supra* 74-45.

Accessible Absentee Ballot: Finally, the WEC has not committed to establishing a procedure to allow voters with print disabilities to have an accessible means of receiving, marking, and submitting absentee ballots privately and independently.

3. *Voter Education*

Up to this point, the WEC has not taken proper action to provide voters with information about their voting options and the steps the WEC is taking to allow for safe voting opportunities. *See, e.g.*, Kennedy Dep. 113:1-5 ("I don't think voters have enough information about the absentee voting process . . . ."). In its June 25 Status Report, the WEC briefly states that it is working with an advertising agency to produce videos, web content, social media content, and other outreach documents and tools to educate voters. *See* WEC Status Report at 12. And the WEC has admitted that it is feasible, and that it has the authority, to create a public education campaign that provides information on: how to request, vote, and return absentee ballots; the locations and times for in-person absentee and election day voting; and the provisions being made for safe in-person voting. Defs. RFA Resp. Nos. 19-20; SOAPF ¶126. But Defendant Wolfe's testimony was not clear as to whether the WEC had established a budget, set a start date, identified the campaign's communications channels, or designed a coordination plan to engage outside nonprofits and political campaigns. *See* WEC II Dep. 57:3-65:25; SOAPF ¶ 104. The lack of clarity on the WEC's voter education campaign is all the more concerning because Plaintiffs' expert, Mr. Kennedy, explained that *all* of the recommendations in his report on how to improve Wisconsin elections are conditioned on proper communication with the public about the measures the WEC is taking to ensure voting is safe and the various opportunities that voters have to access the ballot. Kennedy Dep. 74:9-15. With the election only four months away, it is

essential that the Court direct the WEC to create a clear and comprehensive voter education campaign that explains safety measures and voting opportunities, and includes outreach to voters with disabilities, without ready access to the internet, or voters who are unable to effectively navigate MyVote.

As described in detail in Section II above, the WEC has the authority to do far more. At this point, judicial intervention compelling the WEC to use its authority to protect voting rights is warranted.

C. The Public Interest Favors an Injunction.

The Legislature's argument that the public interest favors denying injunctive relief amounts to an argument that a state's interest in enforcing its election laws is always supreme. *See* Leg. Br. 113-14. That is incorrect, as this Court held in April. *DNC*, 2020 WL 1638374, particularly because those laws were not written (and have not been revised) to deal with the exigencies of a pandemic. In any event, the injunctive relief here is narrowly tailored to further the public's interest in "permitting as many qualified voters to vote as possible," *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012), while protecting the State's interest in election integrity and predictability. Thus, for example, Plaintiffs seek relief far in advance of the November election so that the public has advance notice of any changes. Plaintiffs seek to make in-person voting safe, which will benefit voters *and* State officials alike. Plaintiffs seek minimal extensions to various deadlines to allow the State's election system to accommodate the new reality of voting during a pandemic—*i.e.*, mass voting by mail—and safeguard the public's faith in the legitimacy of the election. And Plaintiffs proposed modest changes for voters with disabilities will make Wisconsin's system more equitable while either preserving the State's

interest in preventing fraud (self-certification under penalty of perjury) or imposing no meaningful burden on the State at all (ADA-compliant ballots).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enter the attached proposed order. The Court should further deny the Legislature's motion to dismiss.

Respectfully submitted,

/s/ *Rachel E. Goodman*
Rachel E. Goodman
The Protect Democracy Project
115 Broadway, 5th Fl.
New York, NY 10006
(202) 997-0599
rachel.goodman@protectdemocracy.org

Sara Chimene-Weiss
The Protect Democracy Project
530 E McDowell Rd., Suite 107-222
Phoenix, AZ 85004
(202) 934-4237
sara.chimene-weiss@protectdemocracy.org

Laurence M. Schwartztol
The Protect Democracy Project
15 Main St., Suite 312
Watertown, MA 02472
(202) 856-9191
larry.schwartztol@protectdemocracy.org

Farbod Kaycee Faraji*
Rachel F. Homer
Cameron Kistler
THE PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Ave. NW, Suite # 163
Washington, D.C. 20006
(202) 579-4582
farbod.faraji@protectdemocracy.org
rachel.homer@protectdemocracy.org
cameron.kistler@protectdemocracy.org
*Admitted to practice in California, not D.C.; practice consistent with D.C. App. R. 49(c)(3).

Douglas M. Poland
State Bar No. 1055189
Rathje Woodward LLC
10 E Doty Street, Suite 507
Madison, WI 53703
(608) 960-7430
dpoland@rathjewoodward.com

Anton Metlitsky
Leah Godesky
Yaira Dubin
O'Melveny & Meyers LLP
7 Times Square
New York, NY 10036
(212) 326-2000
ametlitsky@omm.com
lgodesky@omm.com
ydubin@omm.com

Molly M. Lens
O'Melveny & Meyers LLP
1999 Avenue of the Stars, Suite 800
Los Angeles, CA 90067
(310) 553-6700
mlens@omm.com

Jason Zarrow
O'Melveny & Meyers LLP
400 S. Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-6000
jzarrow@omm.com

Jonathan Manes
Roderick & Solange MacArthur Justice Center
160 E Grand Ave, Sixth Floor
Chicago, IL 60611
(312) 503-0012
jonathan.manes@law.northwestern.edu

Jeffrey A. Mandell
State Bar No. 1100406
Stafford Rosenbaum LLP
222 West Washington Avenue
P.O. Box 1784
Madison, WI 53701-1784
(608) 256-0226
jmandell@staffordlaw.com

Counsel for Plaintiffs

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