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

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DEMOCRATIC NATIONAL COMMITTEE, et al.,
Plaintiffs,

v.

MARGE BOSTELMANN, et al.,
Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,
Intervening Defendants.

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

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SYLVIA GEAR, et al.,
Plaintiffs,

v.

MARGE BOSTELMANN, et al.,
Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,
Intervening Defendants.

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

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CHRYSTAL EDWARDS, et al.,
Plaintiffs,

v.

ROBIN VOS, et al.,
Defendants.

and

REPUBLICAN NATIONAL COMMITTEE, et al.,
Intervening Defendants.

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

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JILL SWENSON, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants

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

**REPLY BRIEF OF PLAINTIFFS DEMOCRATIC NATIONAL COMMITTEE AND DEMOCRATIC PARTY OF WISCONSIN IN SUPPORT OF MOTION FOR RENEWED PRELIMINARY INJUNCTION**

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|---|---|
| DMV | The Wisconsin Division of Motor Vehicles of the Wisconsin Department of Transportation |
| DNC | The full legal and juridical name of plaintiff DNC is DNC Services Corp./Democratic National Committee, but its d/b/a and trade names "Democratic National Committee (DNC)" are familiar and non-confusing, and used throughout this brief and accompanying submissions. |
| DNCFOF | DNC/DPW's accompanying proposed findings of fact |
| DPW | Democratic Party of Wisconsin |
| *Frank I* | *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) |
| *Frank II* | *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) |
| *Frank III* | *Frank v. Walker*, 835 F.3d 649 (7th Cir. 2016) (en banc) |
| IDPP | The Wisconsin Identification Petition Process, which is administered by the DMV. The IDPP administers Wisconsin's chosen "safety net" to the voter ID law. |
| RNC | Republican National Committee |
| *RNC v. DNC* | *Republican Nat'l Comm v. Democratic Nat'l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part 5-4*, 140 S. Ct. 1205 (Apr. 6, 2020) (per curiam). |
| RPW | Republican Party of Wisconsin |
| SDNCFOF | Supplemental DNC/DPW's proposed findings of fact |
| USPS | U.S. Postal Service |
| WEC | Wisconsin Elections Commission |

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief replies to the July 20 briefs filed by the "WEC defendants" (ECF No. 444), the RNC and RPW (ECF No. 455), and the Wisconsin Legislature (ECF No. 454) in opposition to the DNC and DPW's July 8 motion for a renewed preliminary injunction (ECF Nos. 252 (motion), 420 (brief)). The first two defense briefs require relatively little reply. The "WEC defendants take no position with respect to the injunctive relief the plaintiffs seek in regard to the statutes," but emphasize they are "not allowed to afford any aspect of such relief, including guidance or rule-making, absent legislative action or a judicial order addressing the statutes." ECF No. 444 at 32. The WEC defendants acknowledge that, if this Court grants renewed injunctive relief with respect to these statutes, they "will be responsible for issuing appropriate guidance to implement that decision," consistent with their duty to "administer[] and enforce[e] those statutes." Id. at 16 (citing Wis. Stat. § 5.05(5t)).

The RNC and RPW have only filed a six-page opposition, which largely "incorporate[s] by reference" the "comprehensive[]" arguments in the Wisconsin Legislature's brief. ECF No. 455 at 1. They add several brief "points," including that this Court has no jurisdiction to do *anything* here because there is no "state action"—the "difficulties" encountered by plaintiffs are caused by the pandemic, not "by the State." *Id.* "Wisconsin," they reason, "is not responsible for COVID-19 or private citizens' responses to it." *Id.* The RNC and RPW do not mention that this Court forcefully rejected the identical "state action" defense in its April 2 Opinion and Order: "Wisconsin cannot enforce laws that, even due to circumstances out of its control, impose unconstitutional burdens on voters." ECF No. 170 at 29 n.14.[1] The RNC-RPW also rely on the

[1] *Clarified & amended*, ECF Nos. 179-80 (Apr. 3, 2020), *stayed in part on other grounds sub nom. DNC v. RNC*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct.

argument that "[p]laintiffs cannot even demonstrate that a single voter was infected during April's in-person election"—as if a "no-one-died" defense could ever be appropriate in a voting rights case.[2] And they argue it is too late under *Purcell* for this Court to take any action because the general election is now fewer than 100 days away (ECF No. 455 at 4-6), even though the Legislature simultaneously argues that, because the election is still nearly 100 days away, plaintiffs' claims are "speculative" and "unripe" (ECF No. 454 at 108-10)—another example of the "too soon"/"too late" defense rejected by this Court in its June 10 ripeness decision. *See* ECF 217 at 9.

That leaves the Legislature's 125-page brief, which will be the focus of most of this reply brief. This brief follows the same order of argument as the DNC-DPW's opening brief, demonstrating first that this Court should again extend the election-day ballot receipt deadline and the online registration deadline (and extend the by-mail registration deadline as well). *See* Part I. The reply next addresses the challenged witness-certification, voter ID, and proof-of-residence provisions, demonstrating that this Court should grant partial, as-applied injunctive relief to provide the constitutionally required "safety net" for those who cannot meet these requirements through reasonable efforts. *See* Parts II-III. Remaining sections of the reply will address the

1205 (Apr. 6, 2020).

[2] Seventy-one in-person voters and poll workers tested positive for COVID-19 statewide following the election, though given the nature of the virus it could not be determined whether they contracted it before the election, at the polls, or thereafter. DNCFOF ¶ 6. Different studies using different methodologies have reached differing conclusions. *Id*. ¶ 115-16. And due to the continuing lack of widespread testing, the significant spread by symptomless carriers, and the State's decision at the end of April to stop attempting to determine whether or how many people had contracted the virus as a result of their participation in the election, we likely will never know the full extent of infection that followed. On the other hand, there is strong evidence that the pandemic suppressed voter turnout in the April primary and will likely have an even greater deterrent effect on turnout in November, especially among groups like senior citizens, voters of color, and economically depressed voters. *See generally* Burden Decl. at 6-7 (ECF No. 418); Fowler Rpt. at 13-16 (Dkt. 3:20-cv-459, ECF No. 46).

polling place issues, DNC-DPW's due process and equal protection claims, and the other requirements for preliminary injunctive relief. *See* Parts IV-VII-A. The reply closes by refuting several defenses the Legislature has recycled from previous unsuccessful motions, including standing, ripeness, and *Burford* abstention. *See* Part VII-B.

Before turning to their specific claims and requested relief, the DNC and DPW address several overarching flaws in the Legislature's brief.

**The present reality**. Throughout its brief the Legislature describes a world that does not exist, in which the pandemic is now on the wane, "Wisconsin has largely reopened," the U.S. Postal Service ("USPS") will "ensure" that its "isolated issues" with mail service in Wisconsin's April 7 election "do not recur in November," and it will be "easy" for everyone to vote either in person or by absentee ballot in the general election. Leg. Br. at 5, 29, 55. That is not remotely the reality in which this Court must decide the plaintiffs' motions. As discussed below, the pandemic is getting worse, not better, in part because the intervening defendants and their allies forced Wisconsin to reopen too early. Many problems encountered in April have not been resolved and will only get worse with the expected surge of absentee voting in October and November; the Office of the Inspector General of the USPS has issued a dire warning about mail delays in Wisconsin and elsewhere in the upcoming November election;[3] and there is a growing chorus of alarm about the risks of widespread disenfranchisement in November.

**The "prudent voter."** The Legislature (as well as the RNC-RPW) refuse even to acknowledge that many Wisconsin citizens were unable to vote in April because of the challenged

[3] *See* USPS Office of Inspector General's Management Alert: Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area (Report Number 20-235-R20, July 7, 2020) ("IG Report"), https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf; *see also* Suppl. Umberger Decl. Ex. 30.

provisions and face similar risks in the November election. In fact, the intervening defendants appear to contend there are *no* such voters—or at least none who have been identified to date. Leg. Br. at 40-41; RNC Br. at 4. We repeatedly are told that those who encounter such difficulties have only themselves to blame—they will have "procrastinated" too long, "voluntarily fail[ed] to act" sooner; "fail[ed] to take timely steps," and failed to behave in a "prudent" manner. Leg. Br. at 53-56. The Legislature repeatedly admonishes that voting is "easy," even during this pandemic, and that voters will encounter no difficulties so long as they are "prudent." *Id.* at 34, 40, 60-61. To the extent there is any remaining "hypothetical voter" who has behaved "prudently" but *still* has problems, the Legislature adds (apparently in jest), "[t]hat hypothetical voter would be exceedingly unfortunate" and "extremely unlucky." *Id.* at 40.

That is an appalling way for the Wisconsin Legislature—the peoples' elected representatives—to characterize the genuine problems their constituents faced in April and now face again in the general election. The multiple plaintiffs' groups in these consolidated cases have collectively presented extensive record evidence of tens of thousands of voters who were either unable to cast a ballot that was ultimately counted or would have suffered that fate had this Court not acted when it did. There are, indeed, many "unlucky" and "unfortunate" fellow citizens who face genuine problems in voting during this pandemic. *Id.* To dismiss them all as "hypothetical voters" who probably did not try hard enough is offensive.

***Luft* and other recent appellate decisions.** It would be an understatement to say the Legislature relies heavily on the Seventh Circuit's June 29 decision in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), literally citing to that decision *over one hundred times* in its brief. *Luft*, the Legislature insists, is "controlling" and "dispositive," and "devastates Plaintiffs' core theories." Leg. Br. at 2, 25, 30, 63. But the Legislature almost entirely ignores the detailed analysis in our

opening brief showing that *Luft* not only is *consistent* with our "core theories," but in several important respects strongly *reinforces* those theories. ECF No. 420 at 5-6, 8-9, 27-28, 34-44, 47-48. To be sure, the Legislature at one point (at 26) dismisses the DNC and DPW's reliance on *Luft* as "remarkabl[e]," but it generally either ignores or mischaracterizes our key points about *Luft*, including:

- *Luft* is a ringing re-endorsement of the Wisconsin federal district courts' continuing jurisdiction and responsibility to hold the State of Wisconsin to its voting-rights promises, including in ensuring that its promised "safety nets" are "reliably implemented" *and* sufficiently explained and publicized to potential voters. 963 F.3d at 679; *see also Frank v. Walker*, 835 F.3d 649, 652 (7th Cir. 2016) (en banc) (per curiam) ("*Frank III*") (directing Judge Peterson to "conscientiously" monitor the State's compliance with voter ID injunctive relief "between now [August 2016] and the November 2016 election"); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 964-65 (W.D. Wis. 2016), *aff'd in part, vacated in part, rev'd in part*, 963 F.3d 665 (7th Cir. 2020).

- *Luft* relies heavily on the Seventh Circuit's unanimous *en banc* decision in *Frank III*, which was decided several months before the last presidential election (in August 2016). Yet the Legislature cites only once to *Frank III* in passing (at 46) for an innocuous proposition, entirely ignoring our detailed discussion of how *Frank III* applies in this presidential election year. *See* DNC-DPW Br. at 42-45.

- *Luft* reaffirmed that if citizens' voting rights are in danger of being "*severely restricted*" on a widespread scale, "looking at the whole electoral system," the State must have "compelling interests" for its restrictions and ensure they are "narrowly tailored" to help alleviate these widespread, systemic burdens on voting. 963 F.3d at 671-72 (emphasis added). Such an analysis confirms this Court should again extend the election-day receipt deadline and the online and by-mail voter registration deadline in order to alleviate these "severe" systemic problems.

- *Luft* also strongly reaffirmed the emphasis in *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (*Frank II*) and *Frank III* on the "personal" nature of the right to vote and the "individual" entitlement to accommodation by the State. *Luft* and these earlier decisions emphasize that "voting rights are personal"; that this "personal" right "is not defeated by the fact that 99% of other people can [meet challenged requirements] easily"; that "[e]very citizen" has a "strong" right to receive "individual treatment"; that the State must "ensur[e] that every eligible voter" can vote with no more than "reasonable effort"; that the State cannot make it "unreasonably difficult" for *anyone* to vote; and that voters facing "high hurdles" *must* be provided with a genuine, functioning "safety net" so they can vote. *Luft*, 963 F.3d at 677-80; *Frank III*, 835 F.3d at 651; *Frank II*, 819 F.3d at 386; *see also Luft*, 963 F.3d at 669 ("the state *must*

> accommodate voters who cannot [comply with voting requirements] with reasonable effort") (emphasis added). It is remarkable that, in a 125-page brief that cites *Luft* well over 100 times as a "controlling" decision, the Legislature *never once* uses the key phrases "safety net," "voting rights are personal," "individual treatment," "entitled to an accommodation," "high hurdles," or "unreasonably difficult"—not once. The *Luft* that it describes is a caricature of the decision's emphasis on "*[e]very citizen's interest in individual treatment*." 963 F.3d at 680.[4]

The Legislature takes similar liberties with other recent appellate decisions. In fact, it claims that "*every* case" in the federal system that has reached appeal has "rejected any court-ordered changes" in election procedures due to COVID-19. Leg. Br. at 3 (emphasis in original). That is not so. Begin with the Supreme Court's decision in *RNC v. DNC*, 140 S. Ct. 1205 (2020). While that decision stayed part of this Court's injunctive relief, it left intact this Court's six-day extension of the ballot-receipt deadline and approvingly relied on that extension in rejecting further relief. *Id.* at 1206, 1208. And the Court of Appeals scorecard is mixed: some decisions have rejected requests for temporary modifications in election procedures in response to the pandemic; some have accepted such requests; some have stayed district court orders granting such relief and some have denied such stays.[5]

**As-applied relief**. The Legislature also badly mischaracterizes the nature of relief the DNC and DPW are seeking, claiming they have not asked for *any* "as-applied relief." Leg. Br. at 26; *see also id.* at 24, 27, 40. To the contrary, this entire case is an as-applied action—the DNC and DPW do not seek to enjoin the challenged provisions in all circumstances and all elections,

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[4] To be fair, although the Legislature never once uses Judge Easterbrook's key "safety net" phrase, *Frank II*, 819 F.3d at 387, it occasionally refers to the possible availability of a "failsafe" or "bypass." Leg. Br. at 25, 40, 43, 45, 47, 49, 116-17. To the extent the Legislature means these as synonyms for "safety net," we prefer and will use the Seventh Circuit's own terminology.

[5] *See* the Sixth and Seventh Circuit decisions discussed on pages 26-27 of this brief, together with the Ninth Circuit's rejection of a motion to stay district court injunctive relief against certain petition signature requirements during the pandemic. *See People Not Politicians Or. v. Clarno*, 2020 WL 3960440, 6:20-cv-1053-MC (D. Or. July 13, 2020), *stay denied*, Order, No. 20-35630 (9th Cir. July 23, 2020), ECF No. 14.

but only as applied in the context and for the duration of the current global COVID-19 pandemic. *See* Second Amend. Compl. ¶¶ 8-9; *see also id*. at 38-39, ECF No. 198-1. Moreover, although the as-applied relief extending the challenged deadlines would apply to "all voters generally," Leg. Br. at 24, the DNC and DPW only seek partial relief from the witness-certification, voter ID, and proof-of-residence provisions for the minority of voters who cannot meet these requirements with "reasonable effort" under the standards of *Frank II*, *Frank III*, and *Luft*. *See* Second Amend. Compl. ¶¶ 59, 64, 68. In other words, the DNC and DPW accept the general applicability of these provisions, even in the midst of the pandemic, but seek as-applied relief for the subset of voters who, at least for the duration of the pandemic, need the "safety net" promised in *Frank II* and subsequent decisions.

The Legislature's response is to question whether any such voters even exist and to assure that any such "hypothetical" voters will be able to seek "individual," as-applied relief if they actually encounter problems voting in November. Leg. Br. at 40. The Legislature insists that such an as-applied "failsafe" is available, but it nowhere explains what that "failsafe" might possibly be. The Legislature reasons as follows:

> *Luft*'s treatment of *Frank II* merely reaffirms that the rare, individual voter who objectively demonstrates that he or she cannot comply with a voting provision with reasonable effort is entitled to, at most, **individual, as-applied relief** as to that provision. … **The *DNC* Plaintiffs have not pursued this narrow, as-applied relief on behalf of any identifiable voter, and nothing in the evidence that they have presented even indicates that such a voter exists**. …
>
> If an extremely rare series of events transpires to make those paths reasonably unavailable to a specific voter in November, **that voter may seek targeted, as-applied relief under *Frank II* at that time**. …
>
> In all events, **the as-applied failsafe that the Seventh Circuit discussed in *Frank II* and *Luft* remains available for individual voters** challenging a specific provision of Wisconsin law that, even after considering Wisconsin's election system "as a whole," … actually prevents the voter from casting a ballot after expending "reasonable effort" …. If that parade of unlikely hypotheticals were to

> afflict a specific, extremely unlucky voter, **that voter can then seek—at the very most—narrow, as-applied relief under *Frank II*, limited to that voter, for this election.**"

Leg. Br. at 26-27 (citations omitted, emphasis added). Note that the Legislature never explains what "as-applied failsafe" supposedly "remains available for individual voters" to use "at th[e] time" of the election, if needed. What is that "failsafe"? Is the Legislature referring to some kind of undisclosed petition process for such voters, similar to the IDPP? An emergency lawsuit in Circuit Court "limited to that voter"? *Id.* at 40. A petition for leave to file an original action in the Wisconsin Supreme Court, or a petition to the Legislature? What about other voters who face similar problems? How could any voters possibly obtain effective relief if they had to wait until the election to sue, and then only individually?

The answer, of course, is that there is no such additional "as-applied failsafe" for the witness-certification, voter ID, or proof-of-residence provisions that "remains available for individual voters" who encounter "high hurdles" in attempting to meet these requirements. *Id.* at 40. That is the whole point of the DNC and DPW's as-applied claims targeted at these requirements. We accept the general applicability of these statutory provisions and seek relief under the standards of *Frank II*, *Frank III*, and *Luft* only for those who cannot through reasonable efforts do what the other so-called 99% can do without much effort. Those voters are constitutionally entitled to a genuine "safety net" that is "*reliably implemented*," ensures "*individual treatment*" and fulfillment of the "personal" right to vote, and is subject to federal judicial oversight and enforcement. *Frank II*, 819 F.3d at 386; *Luft*, 963 F.3d at 679-80 (emphasis added). The Legislature's "as-applied failsafe" that supposedly "remains available to individual voters," to the extent it exists at all, meets none of these requirements.

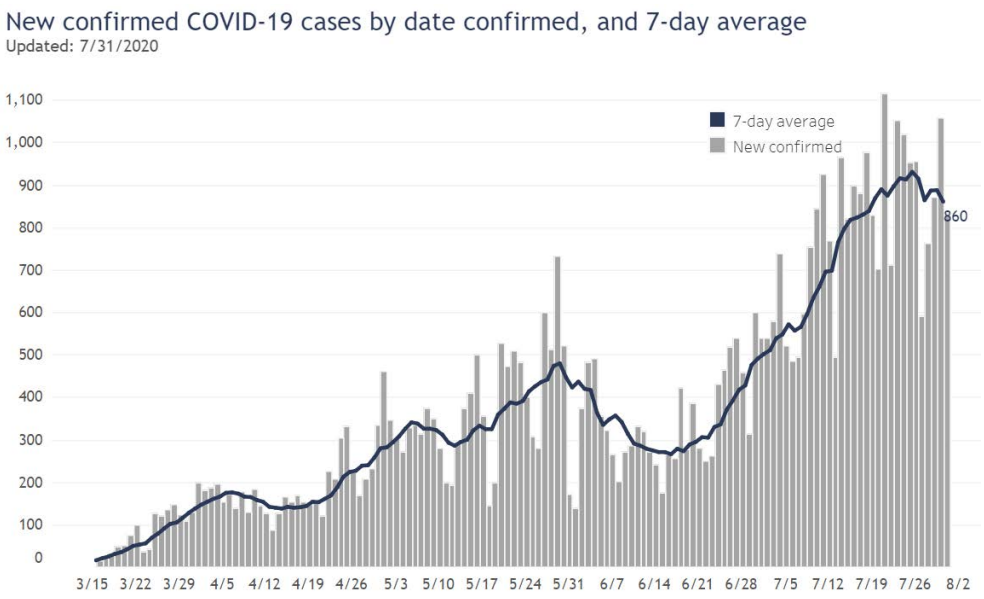
## REPLY STATEMENT OF FACTS

This section addresses several of the intervening defendants' most important (and

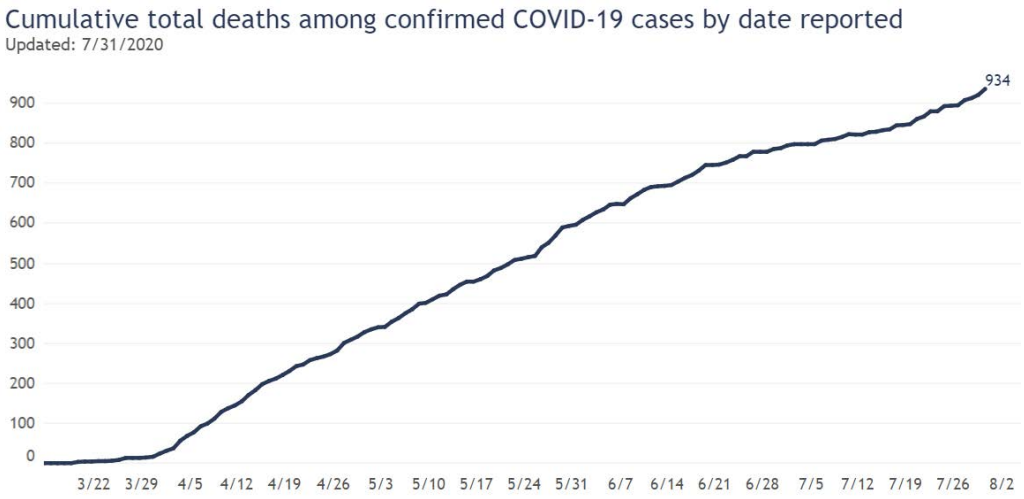
egregious) misstatements of fact, as well as several relevant developments since our opening submissions were filed on July 8.

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

The Legislature insists that the worst of the pandemic is over, that "Wisconsin has largely reopened," and that "the COVID-19 situation in Wisconsin will be much *better* in November than it was in April." Leg. Br. at 39, 55 (emphasis added). A simple look at the trend lines for positive cases and total cumulative deaths in Wisconsin repudiates these rosy claims:[6]




[6] Both charts reprinted here can be found at https://www.dhs.wisconsin.gov/covid-19/data.htm (Suppl. Umberger Decl. Ex. 10).




Though it is true that "Wisconsin has largely reopened," that premature, judicially compelled reopening has led to a resurgence in positive cases throughout the State. Cases are now skyrocketing again, the death and hospitalization tolls are steadily increasing (934 Wisconsinites have died of COVID-19 thus far; 4,637 have required hospitalization), and Wisconsin counties continue to roll back their reopening plans in response to the spike in new cases. *See* DNCFOF ¶ 47; SDNCFOF ¶ 1. Governor Evers declared a new Public Health Emergency on July 30, also issuing an Executive Order that day requiring individuals to wear face coverings when indoors other than in a private residence. *Id.* ¶ 2. The Office of the Governor explained:

> Wisconsin is seeing new and significant community spread and increase in cases of COVID-19 which requires that we declare a new public health emergency and require face coverings. Wisconsin has experienced a drastic rise in COVID-19 cases throughout the entire state, with 61 of 72 counties (84 percent) representing 96 percent of the state's population experiencing high COVID-19 activity. All regions of Wisconsin have high COVID-19 activity levels. This is a dramatic increase from where Wisconsin was in June, when only 19 of 72 counties (26%) were experiencing high COVID-19 activity.

As of the filing of this reply brief (July 31), nearly 4.59 million Americans already have tested positive for the COVID-19 virus, and over 155,000 Americans have been killed by it (conservatively estimated), with the numbers growing by the day. *Id.* ¶ 3. Even the President now acknowledges the pandemic "will probably, unfortunately, get worse before it gets better," and

"that's the way it is." *Id.* ¶ 4. (He should tell his lawyers.) There are growing warnings that the pandemic's toll will escalate in the coming months, potentially to catastrophic proportions. *Id.* ¶ 5.[7]

There is every reason to believe that Wisconsin's November 3 election—particularly since there may be at least double the number of absentee ballots as in April—is going to pose even greater challenges than those seen in the April 7 election. The plans outlined in the WEC's June 25 report to the Court do not resolve these issues, and, as the WEC conceded, it is not aware of any steps the USPS has taken to prevent a repeat of the problems seen in April. DNCFOF ¶ 110, 132, 143-44. County clerks will continue to be overtaxed; issues posed by first-time absentee voters will continue; and the problems of delays and mishandling of absentee ballots by the USPS have not been fixed. *Id.* ¶ 87. The WEC itself concedes that its own forecasted demand for absentee ballots will "present terrific challenges for Wisconsin election officials at all levels." *Id.* ¶ 88. As a result, without this Court's intervention, the widespread disenfranchisement of voters that was averted in April will occur in November on a much larger and more consequential scale.

[7] By comparison, the Great Influenza of 1918-20 is widely regarded as having "kill[ed] more people than any other outbreak of disease in human history" (between 50-100 million people worldwide). John M. Barry, *The Great Influenza: The Epic Story of the Deadliest Plague in History*, at 4 (2004). It was "the greatest massacre of the twentieth century"—"the greatest tidal wave of death since the Black Death, perhaps in the whole of human history." Laura Spinney, *Pale Rider: The Spanish Flu of 1918 and How It Changed the World*, at 4 (2017); *see also* Catherine Arnold, *Pandemic 1918: Eyewitness Accounts From the Greatest Medical Holocaust in Modern History*, at 9 (2018) ("whatever the final tally, there is no doubt that the 1918 influenza outbreak was one of the deadliest natural disasters in human history"). That pandemic a century ago is estimated to have killed about 675,000 Americans. Barry, *Deadliest Plague* at 450. The American death toll in this pandemic surpassed 150,000 in late July and continues to rise steadily, and we are only five months into the crisis with over seven weeks of summer left before entering the deadly autumn flu season. SDNCFOF ¶ 3. Note that, in 1918, the "full horror" of the deadliest second wave did not reach its U.S. peak until October and November 1918, with deaths continuing through much of 1919 and finally trailing off in early 2020. Alfred W. Crosby, *American's Forgotten Pandemic: The Influenza of 1918*, at 108 (2003); Spinney, *Pale Rider*, at 4.

**B. The State's failure to prepare for the November election.**

The same detachment from reality that characterizes the Legislature's depiction of the state of the pandemic is seen in its repeated representations that the State has taken all the necessary steps to prepare for the November election and that it will go off without a hitch—that it will be "easy" for everyone to vote either in person or by absentee ballot in the general election. Leg. Br. at 55. The truth of the matter, however, is that although the Legislature and the WEC had front-row seats for the April election and saw first-hand all that can go wrong in an election conducted during a pandemic, little has been done to prevent a recurrence of the many problems that occurred and the unprecedented scale of disenfranchisement that Wisconsinites suffered. Knowing that thousands were unable to vote at all and that nearly 80,000 had their votes counted only because of this Court's intervention, the State has failed to take the actions necessary to head off another electoral disaster that threatens a level of disenfranchisement that Wisconsin—indeed, the country—has never seen before.

The consequences of the State's inaction are nowhere more obvious and problematic than with the election-day ballot receipt deadline. The WEC's own report on the April election establishes that because of the systemic inability of election officials and the USPS to handle the deluge of absentee ballots that voters cast, approximately 8% of them (81,713 out of more than 1.1 million total absentee ballots) arrived at election offices after election day. ECF No. 412-7, Ex. 57 at 7. WEC officials have testified that for the November election, the number of absentee ballots will increase dramatically and easily could reach 2 million—more than double the volume in April. ECF No. 475 at 33:18-34:8 (Chair Jacobs estimating "two million plus voters likely voting absentee" and "several hundred thousand voters" whose ballots arrive after election day); *see also* ECF No. 413 at 28:1-6 (Commissioner Spindell explaining that "certainly the number of absentee ballots that we will receive back [in November] will be greater than they were" in April).

The experience of the April election, with 8% of absentee ballots arriving after election day, clearly frames the scope of the problem presented by the likelihood of 2 million absentee ballots in the November election, as the Chair of the WEC, Commissioner Jacobs, recognized in her recent deposition testimony:

> Q. If the ballot receipt deadline is not extended for the November election, do you have a sense of what volume of ballots would be discounted and thrown away?
>
> A. We know that, I think it was 1.2 million absentee ballots were requested and 964 thousand were returned. Of those, we know that 79 thousand would not have been counted. So if you figure that's what, 8 to 10 percent of ballots cast by mail, you're looking at two million plus voters likely voting absentee, *that's several hundred thousand voters if you just do the math*.
>
> Q. And so to be clear, *it's several hundred thousand voters who are at risk of not having their ballots counted* because of the confluence of the time it takes for mail and the election day receipt deadline, is that correct?
>
> A. *That's correct*, and I want to make one point about the absentee ballot received deadline. The biggest problem with that is it takes the ability of a voter to return their ballot and have it be counted out of the hands of the voter. So the advance of a postmark is it says to the voter, if you do X by a certain date, your ballot will be counted. Get it in the mail by a certain date, your ballot will be counted. So the voter has a duty and if they follow that duty, their ballot gets counted. The problem with the receipt deadline is it says to the voter, put your ballot in the mail and cross your fingers and wish that it might get there on time, which is something you have no control over. So unless you have a voter who can drive and drop it off or someone who can drive and drop it off for them, although there's now threats that's going to be litigated, who knows? The voter can't control the receipt of their own ballot, and that's a problem, and I think it's legally a problem because it doesn't allow the voter to control whether or not their ballot is counted. And I have a problem with that based on a receipt deadline. …
>
> So I think again, going back to my previous statement, the problem with the way Wisconsin has set this up is the voter doesn't have control over that process. If we say to the voter, get it in the mail stream by this date, then the vagaries of the Post Office become less urgent. Because chances are pretty good if they get an extra week to get it in, it will get there. And we know that actually based on some of the returns, even—there were very few late, late arriving ballots. There were very few that came in after the 13th. It was really a fairly small amount, especially if you look at the percentages. So that's the problem I see. We can take all of that out of the equation if we say to the voter, once you put it into that process, you've done your part, your ballot will be counted, and then we can address the Post Office in a separate way.

ECF No. 475 at 33:18-35:20; 63:13-64:12 (emphases added). While it is of course not possible to know the precise number of ballots that will arrive after election day, Chair Jacobs' forecast of massive disenfranchisement is supported not just by Wisconsin's April election, but also by the very recent experiences of other states that also have absentee ballot receipt deadlines. Nearly 6% of the mail-in ballots for Virginia's June primary were rejected for arriving too late. SDNCFOF ¶ 14. Pennsylvania rejected over 15,600 mail-in ballots for the same reason that month. *Id.* ¶ 15. Because of the widespread publicity surrounding the disenfranchising effects of ballot receipt deadlines in these elections and in Wisconsin's spring election, many in our country are waking up to the fact that these deadlines pose a dire threat to the integrity and outcomes of the November election. Suppl. Umberger Decl. Exs. 32 and 9.

But, not so in Wisconsin. The Legislature has not taken any steps since April 7 to ameliorate the effects of the State's election day receipt deadline, and the WEC has no plans to request the Legislature to take any action. The State's refusal to address the problem is epitomized by WEC Commissioner Robert Spindell, who despite admitting that the problems of "ballots not sent to voters on time" and "ballots not returned on time" would "only multiple and create more chaos" in November, testified in baffling fashion that "everybody will be much better off" if the election-day receipt deadline is strictly enforced and ballots arriving after 8:00 p.m. on election day are not counted. ECF No. 413 at 67:17-68:20. The WEC's Election Administrator, Meagan Wolfe, thus confirms that she is unaware of any plans the WEC has to address, or even discuss, the election-day receipt deadline before the November election. ECF No. 247 at 62:20-63:3.

The Legislature attempts in its brief to justify this stunning inaction by representing that the Court's extension of the receipt deadline for the April 7 election caused myriad problems for election officials that must be avoided in November. But the Legislature does so only by twice

quoting the deposition testimony of Ms. Wolfe out of context. *See* Leg. Br. at 57, 60. While Ms. Wolfe did testify that the extension of the deadline resulted in "an extremely tight turnaround" for election officials in meeting their post-election canvassing deadlines, she also said she does not "recall anyone not meeting their deadline." ECF No. 247 at 48:8-16. The Legislature makes no mention of this acknowledgment nor of Ms. Wolfe's testimony that the deadline extension allowed local election officials more time to count ballots and tabulate results and that election clerks told her that the volume of absentee ballots "was large enough that it warranted having multiple days to be able to count." *Id*. at 16. Nor does the Legislature acknowledge the testimony of Chair Jacobs, who confirmed that election officials were able to meet canvassing and other post-election deadlines in the spring election and that they will be able to do so again in November if the Court again extends the receipt deadline:

> Q. Chair Jacobs, with respect to the six to eight [day] extension for the deadline of the spring election, do you know, were election officials able to meet their post election canvassing responsibilities and deadlines notwithstanding that extension?
>
> A. Yes.
>
> Q. Do you expect that they would be able to meet those responsibilities and deadlines if there were an extension for November?
>
> A. Yes.
>
> Q. And why do you believe that?
>
> A. Well, because one of the things we allowed was the tallying of the ballots to begin after election day, after the close of the physical polls on election day, which allowed the municipalities to get their ballots tallied as they went through to that final day, and so everything was ready to go through I think it was April 13th, they're done, they're ready to go. There is no reason that couldn't be the same going into November.

ECF No. 475 at 35:21-36:22. In other words, an unskewed look at the results of this Court's extension of the deadline shows that nearly 80,000 votes were saved, election officials met their deadlines, clerks on the front lines benefited from the additional time to count ballots, the overall

integrity of the election—and voters' confidence in it—was vastly enhanced, and election officials are prepared to manage another extension of the deadline for the November election. And all of this was accomplished without a single known or suspected incident of voter fraud *anywhere* in the State. *See* DNCFOF ¶¶ 194-95.

The State's lack of regard for the lessons learned from the April 7 election is also seen in its refusal to take any action to extend the October 14 deadline for voters to register on-line or by mail for the November election. As described, this Court's 12-day extension of the online registration deadline prior to the spring election enabled an additional **57,187** voters to register without having to go to local election offices or the polls. Election officials acknowledge this modest extension caused few additional administrative tasks or other problems, SDNCFOF ¶ 25, and that the by-mail registration deadline could be similarly extended for the November 3 election without difficulty so long as mailed registrations are received by the Friday before the election (October 30)—the same day that in-person registration closes. *Id.* ¶ 24.[8] *As applied in this pandemic*, it makes no rational sense to require by-mail and online registrations by October 14 while allowing in-person registrations to continue until October 30, particularly given the continuing need to engage in social distancing and avoid crowded indoor spaces. And, yet, neither the Legislature nor the WEC has taken any action to extend the deadlines and apparently has no plans to do so.

The same pattern of inaction can be seen when it comes to both the witness certification requirement for absentee ballots and the standard governing whether infection from the COVID

[8] This Court's expressed concern about moving the deadline for by-mail registrations to the Friday before the election—that envelopes mailed then would arrive too close to (if not after) the election—could be readily resolved by making October 30 a *receipt* deadline for all by-mail and on-line registration requests, rather than following a "postmark" rule that would allow this late-arriving problem to occur.

virus or particular susceptibility to it triggers the "indefinitely confined" exception to the voter ID requirement for requesting an absentee ballot. In the April elections, election officials rejected more than 14,000 absentee ballots for insufficient witness certifications. DNCFOF ¶ 156. The inability of thousands of voters to obtain a witness certification during the pandemic is hardly surprising. Indeed, in addressing this issue, the Seventh Circuit recognized the importance of alternative methods for satisfying the witness and signature requirements "in light of the extraordinary challenges presented by the COVID-19 crisis." *DNC v. RNC*, Nos. 20-1538 & 20-1546, slip op. at 4 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (Apr. 6, 2020). In that context, the Seventh Circuit emphasized that it had "every reason to believe" the WEC "will continue to consider yet other ways for voters to satisfy the statutory signature requirement" and that it is "best to leave these decisions and more particular prescriptions to the Commission." *Id*.

Since the Seventh Circuit wrote those words, the spread of the pandemic in Wisconsin has increased exponentially, the "extraordinary challenges" presented by the pandemic continue to mount, and the need for safe alternatives to the witness requirement is greater than ever. And, yet, despite the Seventh Circuit's trust that the WEC would act, it has done nothing to develop any alternatives. Commissioner Spindell explained that he sees no need to change the existing law, even to make allowance for people infected with COVID-19:

> Q. And so it is your view as a commissioner, that if someone has COVID, that they should interact with a witness and they're required to interact with a witness to have their absentee ballot signed?
>
> A. Yes. Until the law is changed. I don't see a reason for changing the law, I guess that would be my answer.

ECF No. 249 at 82:22-83:7. Accordingly, the WEC has no current plan even to discuss alternatives for satisfying the witness signature requirement, much less develop the types of "more particular prescriptions" the Seventh Circuit expected would be forthcoming. *Id*. at 89:6-9.

Finally, with the Wisconsin Department of Health Services having just announced that more than 52,000 Wisconsinites have been diagnosed with COVID-19, the WEC has no plans to clarify whether the "indefinitely confined" exception to the photo ID requirement for requesting an absentee ballot applies to people infected by the coronavirus or people particularly vulnerable to it. ECF No. 247 at 44:15-21. As the Court will recall, the WEC's guidance on this term provides that the determination "of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence." ECF No. 170 at 16-17 (citation omitted). This "guidance" is beyond vague; there are no criteria, other than the reference to travel, for voters to apply to determine if their "current circumstances" qualify them for the exception. For those who have been infected by the coronavirus or exposed to it, or who are at high risk if they are infected, there is no assurance they qualify for the exception. And, for many of those people, obtaining a copy of a photo ID requires leaving their homes to find a printer or scanner. Some will choose not to vote over taking that risk.

**C. The continuing USPS service problems.**

According to the Legislature, any problems with USPS absentee-ballot mail service in the April election are being investigated and corrected. The USPS "has already studied the errors that *DNC* Plaintiffs complain of," and "will take measures to ensure that these *isolated issues* do not recur in November." Leg. Br. at 29 (emphasis added). The Legislature adds that USPS "has engaged in substantial efforts to identify and correct *possible* errors," and has "provided concrete solutions to problems that arose in April." *Id.* at 74, 76 (emphasis added); *see also id.* at 4, 60.

Far from having been "corrected," the problems involving USPS absentee-ballot mail service are getting worse, not better. Since early April there repeatedly have been serious delays in mailed deliveries of absentee ballots, both to voters and back to election officials. Our opening

brief addressed such postal delays in connection with elections in South Carolina, Georgia, New York, Pennsylvania, and Ohio. *See* DNC-DPW Br. at 32-33; DNCFOF ¶¶ 133-38; Burden Rep. (ECF No. 418) at 11-12. Since that brief was filed on July 8, there have been further reports of postal delays in the recent Texas and Louisiana elections and expressions of alarm from local, state, and federal officials about mail service in the numerous upcoming August primaries. *See* SDNCFOF ¶ 6. The Legislature responds that these postal difficulties in other States "have no bearing on the operation of *Wisconsin's* election laws." Leg. Br. at 61 (emphasis added). But these widespread difficulties with USPS absentee-ballot mail service throughout the Nation show that the postal delivery breakdown in Wisconsin was *not* an isolated one-time fluke, but a widespread and recurring systemic issue that will only grow worse with the much greater turnout in November.

Moreover, the July 7 *IG Report* (*see* full cite in footnote 3) expressly warns there is "a *high risk*" in Wisconsin's upcoming elections that timely requested ballots once again will "**not be[] delivered, completed by voters, and returned to the election offices in time.**" Suppl. Umberger Decl. Ex. 30 at 7 (emphasis added); *see id*. at 12-13 ("[USPS] Management agrees that ballots requested less than seven days before an election are at **high risk** of not being completed and returned to election offices in time to be counted. … We endeavor to deliver ballots entered close to the election date as soon as possible. However, **we cannot guarantee a specific delivery date** or alter standards to comport with individual state election law.") (emphasis added). The *Report* further warns that the State of Wisconsin has more "election offices" (1,929 separate offices) than any other State in the Nation, which makes it more "challenging" for the USPS and state and local election officials to "effectively communicate" with each other and more likely that local election officials will not follow "proper mailing processes." *Id.* at 7-8 & Figure 2.

On top of this sobering new evidence, the new Postmaster General, Louis DeJoy, "established major operational changes [on July 13] that could slow down mail delivery" even further, thereby "imperil[ing] access to mailed and absentee ballots" to an even greater degree in the November general election. Suppl. Umberger Decl., Ex. 28; SDNCFOF ¶ 7. This includes new restrictions on the ability of USPS employees to work overtime and instructions for mail trucks to leave loading stations at particular prescribed times even when waiting a few minutes would allow the trucks to carry a fuller load and to avoid leaving mail overnight. SDNCFOF ¶ 8. There also are growing reports of USPS employees requiring local election clerks to sign acknowledgments that mailed absentee ballots may not be delivered and returned through the mail before election day. *Id.* ¶ 9.

Coupled with the anticipated surge of absentee ballots going through the mail in late October and early November, these developments threaten an even greater breakdown in timely mail service than occurred in the April election, when this Court's six-day extension of the ballot-receipt deadline saved the votes of nearly 80,000 Wisconsin voters whose valid and timely cast ballots would otherwise have been rejected. *See* ECF No. 420 at 2; ECF No. 419 ¶ 198.

These concerns about timely mail service are underscored in the accompanying declaration of Ronald A. Stroman, the former Deputy Postmaster General, who resigned from the USPS effective June 1, 2020, after nine years as its second highest-ranking official. *See* ECF No. 484. Mr. Stroman was involved with the USPS's investigation into the problems with the delivery and receipt of absentee ballots in Wisconsin's April 7 election; he is fully familiar with the election day receipt deadline and with the USPS's mail delivery timelines in the State. Based on this knowledge, and as a preeminent expert in mail delivery and the USPS's operations, Mr. Stroman's opinion is that, without an extension of Wisconsin's election day receipt deadline, "**it**

**is highly likely that in the November General Election, the absentee ballots of at least tens of thousands of voters will arrive at election offices after Election Day and will not be counted**." SDNCFOF ¶ 10.

Mr. Stroman's conclusion that the election day receipt deadline poses substantial, imminent harm for Wisconsin voters and the November election is driven by multiple factors. First, he points out an irreconcilable conflict between USPS's delivery service standards and Wisconsin's voting regime that inevitably will lead to the disenfranchisement of large numbers of Wisconsin voters, particularly given the predicted surge in absentee voting. Specifically, the USPS has service standards for the two types of mail used for election-related materials: First Class Mail and Marketing Mail. The delivery service standard for First Class Mail is two to five days, while the standard for Marketing Mail is three to ten days. Meanwhile, Wisconsin law allows voters to request absentee ballots up to five days before election day, Wis. Stat. § 6.86(1)(b), and local election officials have an obligation to mail an absentee ballot to a voter within one business day after receiving such a request. Wis. Stat. § 7.15 (1) (cm). As Mr. Stroman explains, given the USPS service standards, it is nearly impossible for a voter who lawfully requests an absentee ballot within one week of an election to receive the ballot in the mail, complete it, and have that ballot delivered by a mail carrier to an election office by election day. SDNCFOF ¶ 11. The significance of this reality of the mail service is demonstrated by the large volume of absentee ballots that Wisconsin election officials mail to voters in the last week before an election; in the April election, officials mailed 246,139 absentee ballots to voters in the six days before the election. *Id.* ¶ 12. Mr. Stroman's analysis shows that among this group, the votes of those who chose to mail their ballots back—probably tens of thousands of voters, at least—were almost certainly not received until after April 7. Those who request ballots in the

last week before November election, as they are lawfully permitted to do, will suffer the same fate.

Second, Mr. Stroman explains that the USPS has an election mail service target of 96% on-time delivery. In the best of circumstances, this means that at least 4% of absentee ballots are delivered *after* the maximum 10-day delivery standard for Marketing Mail and *after* the maximum 5-day delivery standard for First Class mail. This additional reality of mail service means that if approximately two million Wisconsinites vote absentee in the November election, as is predicted, tens of thousands of voters will not even receive their ballots until somewhere between approximately six days (for election offices that use First Class mail) to more than 10 days (for election offices that use Marketing Mail) after election officials mail them. *Id.* ¶ 13.

Third, Mr. Stroman's prediction of massive disenfranchisement resulting from the election day receipt deadline also rests on his knowledge of the significant challenges the USPS is facing, due in part to the effects of the pandemic. For example, the USPS has had significant challenges with employee availability, as many employees have tested positive for COVID-19. The resulting staffing shortages have led to slow-downs in mail delivery, which will increase if the number of COVID-19 cases in Wisconsin continues to rise or if there is a second wave of the disease in the fall. In addition, the USPS has experienced a dramatic decline in mail volume over the last decade and, in particular, since the start of the pandemic. The USPS apparently has responded to this decline by taking the measures described above, including cutting costs, ending employee overtime, and requiring all trucks to leave plants on time, regardless of whether all mail is loaded onto the trucks, all of which will result in further mail delivery delays. *Id.* ¶ 16.

Finally, Mr. Stroman confirms what the WEC itself has said—that the use of intelligent mail bar codes for absentee ballot envelopes easily facilitates relying on a postmark deadline

instead of a receipt deadline. The use of these bar codes will allow election officials to determine when a ballot entered the mail stream and function as the equivalent of a postmark, thereby eliminating the problem of ballot envelopes that lack postmarks or legible postmarks. *Id.* ¶ 17.

## ARGUMENT IN REPLY

### I. This Court should extend the injunctive relief granted for the April 7 election to the November 3 general election.

Although the Legislature grudgingly admits (at 57) they were "bearable," this Court's extensions of the election-day receipt and online registration deadlines in March and April were in fact a spectacular voting-rights and election-administration success. The extensions saved the votes of **79,054** Wisconsin citizens who cast valid, timely absentee ballots but would have been disenfranchised by the election-day receipt deadline, but for this Court's intervention, as well as enabling an additional **57,187** Wisconsin voters to register online, safe and secure from the pandemic. State election administrators acknowledge these extensions were manageable and implemented with relatively modest administrative burdens, and emphasize that the extensions helped *alleviate* numerous problems. And *no one* has pointed to any evidence that these extensions led to any voter fraud or other systemic problems. On top of that, turnout will be vastly larger in November, local election officials will probably be overwhelmed by the additional volume, and the USPS at best will continue to face widespread challenges in providing timely election-mail service. And the pandemic will still be with us on November 3.

There is, in short, *nothing* on the *Anderson-Burdick* scales to outbalance the many positive effects of this Court's deadline extensions, including avoiding widespread disenfranchisements, helping to maintain at least some degree of public confidence that a ballot cast will be a ballot counted, and protecting public health in this time of global pandemic. "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a

voting booth. The right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted).

*Luft* does not change the analysis in the least. Deadlines are extended if there are *systemic* crises that threaten to undermine the electoral process. *Luft* reminds us that "[c]ourts weigh [any individual] burdens against the state's interests by *looking at the whole electoral system*," and that when an analysis of that "whole" system, taken together, shows that citizens' voting rights are in danger of being "*severely restricted*" on a widespread basis, the State *must* have "compelling interests" for continuing to enforce its restrictions and ensure they are "narrowly tailored." 963 F.3d at 671-72. As April 7 already has shown, the challenged deadlines "severely restrict" voting activity on a broad scale, and they serve no "*compelling interests*," especially in the midst of the COVID-19 pandemic. *Id.* The Court should grant the same relief it previously granted, as modified on appeal. It also should include by-mail registration in its extension of the online registration deadline, which Wisconsin election officials have testified can be done without significant additional costs so long as mailed-in registrations are *received* by October 30 (the Friday before the election). *See* SDNCFOF ¶ 24.

**A. This Court should again extend the election-day ballot-receipt deadline.**

The *Anderson-Burdick* balancing analysis is compellingly one-sided. This Court's six-day extension of the ballot-receipt deadline saved the votes of nearly 80,000 citizens without causing any significant problems for Wisconsin election officials, without causing any canvassing or reporting deadlines to be missed, and without leading to any known or suspected incidents of voter fraud. *See* DNCFOF ¶¶ 194-95. And that extension operated to *promote*, not *undermine*, the "integrity" of the April 7 election and voter confidence in its results. *See, e.g., id.* ¶ 195. Nothing would undermine public confidence in the integrity of the election system more than the rejection of tens if not hundreds of thousands of ballots that were timely cast but late arriving.

And that is precisely the scenario we are facing in November, given the anticipated surge of voter turnout, continuing problems with timely USPS election-mail service, the expected record number of first-time absentee voters, and the deadly trend of the pandemic. For all the reasons discussed above, we know the COVID-19 pandemic is unlikely to ebb before the election, that USPS service is unlikely to improve appreciably, and that absentee voting will be at record levels. In these circumstances, the case for a comparable extension of the November 3 ballot -receipt deadline by up to ten days is compelling.

The Legislature disagrees with these assessments. It contends this Court should not extend the election-day receipt deadline for several reasons even if that results in the rejection of tens, if not hundreds of thousands of otherwise-valid ballots that are postmarked on or before November 3 but arrive in the following days.

**Efficient and orderly administration.** The Legislature argues the election-day receipt deadline is necessary to provide "adequate time to canvass the election results, so as to accurately and timely report election-day winners." Leg. Br. at 57. It claims the deadline is necessary to "ensure the 'orderly administration' and 'efficient[ ]' operation of [Wisconsin's] elections.'" *Id.* at 53 (citations omitted). Yet as demonstrated above, state and local elections officials not only were able to accommodate the six-day extension, but in many instances benefitted from it. Wisconsin's chief elections officials have testified they believe they can accommodate a similar extension in November without missing any certification deadlines. SDNCFOF ¶ 18. Wisconsin law gives counties until November 10 to begin their canvasses, and until November 17 to complete them. The State itself need not complete its canvass until December 1. Wis. Stat. § 7.70(3)(a). Accordingly, there would be ample time to extend the ballot-receipt deadline by up to ten days so that late-arriving absentee ballots may be counted so long as postmarked by November 3. The

experience of the April 7 election proves that such an extension can be successfully carried out with a minimum of administrative inconvenience while avoiding the disenfranchisement of tens if not hundreds of thousands of voters. The WEC acknowledged in its Rule 30(b)(6) deposition that the administrative burdens caused by this Court's prior deadline extensions were modest and manageable. DNCFOF ¶¶ 194-95. There is no reason to expect a difference now.

**State action**. The RNC and RPW once again argue that no election deadlines can be extended because there has been no "state action" here. RNC Br. at 1-2. They reason that "Wisconsin is not responsible for COVID-19 or private citizens' responses to it," and that any current "difficulties" with absentee voting "are not burdens imposed '*by the State*,'" but instead by the pandemic itself. *Id.* at 1 (emphasis in original). This is the identical argument the RNC and RPW made last time around, and it was squarely "dismissed" by this Court in its April 2 Opinion and Order:

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

ECF No. 170 at 29 n.14. This reasoning was correct then and remains correct today. *See also Miller v. Thurston*, No. 20-2095, 2020 WL 4218245, at *6 (8th Cir. July 23, 2020) ("by blaming the pandemic, Arkansas has not changed the fact that enforcing its in-person signature requirement under current circumstances burdens the plaintiffs' ability to engage in core political speech"); *Esshaki v. Whitmer*, No. 20-1336, 2020 WL 2185553, at *1 (6th Cir. May 5, 2020) (upholding district court's determination that ballot-access signature deadline, in the context of the pandemic, was "not narrowly tailored *to the present circumstances*," and thus could not be enforced "unless

the State provides some reasonable accommodations to aggrieved candidates"); *Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 3421662, at **3-4 (7th Cir. June 21, 2020) (denying motion to stay preliminary injunction that moved statutory petition filing deadline from June 22 to August 7, 2020 because of the pandemic, where Illinois State Board of Elections initially had agreed to the terms of the preliminary injunction but then tried to back out on the grounds the extension would "harm" and "impede" the proper administration of the election); *Obama for Am. v. Husted*, 697 F.3d 423, 441 (6th Cir. 2012) (White, J., concurring) ("*Anderson/Burdick* balancing ... should not be divorced from reality, and [ ] both the burden and the legitimate regulatory interest should be evaluated in context."); *Goldstein v. Sec'y of Commonwealth*, 142 N.E.3d 560, 570 (Mass. 2020) ("requirements that in ordinary times impose only modest burdens on [the electoral process] may significantly interfere with the fundamental right [to participate in the electoral process] in a time of pandemic").[9]

***RNC v. DNC.*** The intervening defendants rely heavily on *RNC v. DNC* where it suits them, but downplay the significance that the Supreme Court endorsed the six-day extension of the ballot-receipt deadline. The Legislature insists this was only because the intervening defendants elected not to challenge that part of this Court's relief, focusing instead on their bogus argument that this

[9] As this Court previously has recognized, *see* ECF No. 37 at 11, decisions involving the impacts of extreme-weather events on voting provide further support for judicial extensions of registration and voting deadlines in extreme circumstances. *See, e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (ordering Secretary to direct Supervisors to accept voter registration applications after statutory deadline because Hurricane Matthew prevented voters from registering prior to deadline); *Ga. Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (similar); Amended Order, *Obama for Am. v. Cuyahoga Cty. Bd. of Elections*, 1:08-cv-562-PAG, ECF No. 6 (N.D. Ohio Mar. 4, 2008) (extending voting deadline after heavy rain, flooding, and precincts ran out of ballots); *In re Gen. Election 1985*, 109 Pa. Commw. 604 (1987) (extending deadline to complete election after "extreme weather conditions that caused extensive flooding, loss of electricity, heat, and water"). Being in the midst of the worst global pandemic in over a century would seem to qualify as an extreme circumstance.

Court had "unilaterally" and "on its own ordered yet an *additional* extension, which would allow voters to mail their ballots after election day." *RNC v. DNC*, 140 S. Ct. at 1208 (emphasis added). This of course was a fabrication, as Justice Ginsburg and many legal scholars and national commentators have pointed out. *See id.* at 1209-10 (Ginsberg, J., dissenting) (emphasizing that, contrary to the majority's assertion that this Court granted relief that "plaintiffs themselves did not even ask for," "plaintiffs specifically requested that remedy at the preliminary-injunction hearing in view of the ever-increasing demand for absentee ballots").[10]

The five Justices in the majority may have been misled by the intervening defendants' mischaracterizations, but the point is that the Justices affirmatively relied on the six-day ballot-receipt extension in rejecting this Court's supposed "additional extension." The majority approvingly relied on "the fact that the deadline for receiving ballots was already extended to accommodate Wisconsin voters . . . *to ensure [they] can cast their ballots and have their votes count*." *Id.* at 1208 (emphasis added). The Court expressed no concerns about "afford[ing] Wisconsin voters several extra days in which to mail their absentee ballots," so long as those ballots were "postmarked by election day." *Id.* at 1206. Intervening defendants glaringly overlook

[10] *See also, e.g.*, Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 Election L.J. (forthcoming 2020) (Suppl. Umberger Decl. Ex. 32) ("odd" that Supreme Court majority emphasized "three times" that the DNC and DPW had not requested this Court's relief, when of course plaintiffs had requested this relief); Linda Greenhouse, *The Supreme Court Fails Us*, N.Y. Times (Apr. 9, 2020), https://www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html (Suppl. Umberger Decl. Ex.33) ("[A]nyone reading only the Supreme Court's majority opinion would come away thinking that the order was the act of a rogue judge, cramming an extreme remedy for a nonexistent problem down the throat of a resistant public. … [T]he justices in Monday's majority were for some strange reason obsessed with the notion that the Democratic plaintiffs had not asked the judge for the precise remedy he ordered; the opinion mentions this on each of its four pages. But as the plaintiffs told the justices in their brief, and as Justice Ginsburg concluded from reading the transcript of the District Court hearing, that wasn't true. The plaintiffs 'specifically requested that remedy at the preliminary-injunction hearing in view of the ever-increasing demand for absentee ballots,' she wrote.").

the Supreme Court's material reliance on the ballot-receipt extension in arguing there is no appellate authority for such an extension. *See* Leg. Br. at 3.

**Voters' fault**. As with every brief they have submitted thus far, one of intervening defendants' repeated arguments is that any failure by voters to register before the online and by-mail cutoff on October 14 or to mail their ballots in sufficient time to be received by the November 3 absentee-ballot receipt deadline will be their own fault. Intervening defendants argue that, unless a particular voter can *prove* it will be *impossible* to comply with the challenged deadlines, they have no legitimate claim. Intervening defendants cite decisions that, in the course of upholding challenged election-law deadlines, have observed that the plaintiff voters *could* comply with those deadlines but chose not to. Leg. Br. at 53-54, 56; RNC Br. at 3; *see especially Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Marston v. Lewis*, 410 U.S. 679 (1973).

But the intervening defendants badly misread these and similar decisions. They hold that, even where a voter arguably can comply with a given deadline, the State *still* must demonstrate that the "particular deadline" is sufficiently "justified" and "necessary" under the circumstances to promote "a particularized legitimate purpose." *Rosario*, 410 U.S. at 760-62; *Marston*, 410 U.S. at 681. In *Rosario*, the purpose was to prevent "large-scale [political party] raiding," a well-documented practice in which the members of one party voted in another party's primary "so as to influence or determine the results of the other party's primary"—a practice that was deemed to undermine "the integrity of the electoral process." 410 U.S. 760-61. Moreover, the Court took care to determine that a shorter deadline "'would not have the same deterrent effect'" on this practice. *Id.* at 761-62 (citation omitted). *Marston* upheld a voter registration deadline 50 days prior to the election, but only after ensuring that the State of Arizona had "demonstrated" this particular cut-off was "necessary to permit preparation of accurate voter lists," given certain

"realities" that were "complicating factors" in the registration process (recall that this was nearly 50 years ago, long before the Internet or the widespread use of computers). 410 U.S. at 681.

A challenged deadline cannot stand in the absence of such a "particularized" demonstration. *Rosario*, 410 U.S. at 762. One Supreme Court decision applying *Rosario* has emphasized that a deadline cannot be enforced if "the asserted state interest can be attained by 'less drastic means,' which do not unnecessarily burden the exercise of constitutionally protected activity." *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973). Another decision distinguishing *Rosario* has emphasized that a State may not "impose[] a restriction on the franchise having no perceptible purpose or effect in preserving the integrity of the electoral process." *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975).

Thus, voters' alleged ability to meet a given deadline is merely the first question, not the entire analysis. The State still must demonstrate the "particular deadline" is "necessary" under the circumstances to "preserv[e] the integrity of the electoral process." *Id.*; *Rosario*, 410 U.S. at 761. Far from being "necessary" to the Wisconsin election system's "integrity," the record establishes that rigid enforcement of the election-day receipt deadline as applied in the context of the 2020 pandemic would *undermine*, not "preserve," electoral integrity and voter confidence.

**Potential national "limbo."** The Legislature also argues that, while the six-day extension of the ballot-receipt deadline in April may have been "bearable" (saving the votes of 80,000 citizens is just "bearable"?), a similar extension in November "would be *intolerable*." Leg. Br. at 57 (emphasis added). The Legislature's entire reasoning for why this would be "intolerable" is as follows (*id.*, emphasis added):

> Extending this deadline for the November Election would be far more harmful to the State's and the Nation's interests than the extension that this Court ordered in April, given that the November Election includes the Presidential race. **As this Court previously recognized, an order extending the absentee ballot receipt**

> **deadline must be paired with an order prohibiting the release of any election results until the new, court-imposed deadline, in order to ensure election integrity and public confidence in the results**. See Dkt. 179. Imposing this gap in November would delay the public announcement and completion of Wisconsin's election results, including as to the Presidential race, for more than a week, **potentially leaving the State and the Nation in needless limbo, given Wisconsin's swing-state status**.

This reasoning is ridiculous. This Court amended its April 2 preliminary injunction order to bar release of voting tallies prior to April 13 because, under its order, voters would still be casting ballots during that period and might be influenced by the early returns. That was the sole reason for barring release of returns prior to April 13. The Supreme Court agreed that any running disclosure of election tallies while absentee voting was still underway "would gravely affect the integrity of the election process," but thought it "highly questionable" whether this Court's order "suppress[ing] disclosure of the election results . . . would work." 140 S. Ct. at 1207. (This Court's order did, in fact, "work"). Once the Supreme Court had imposed its election-day postmark requirement, the justification for the non-disclosure portion of this Court's relief evaporated. Perhaps because all parties were exhausted by that point in the run-up to April 7, no one asked this Court to lift this part of its injunctive relief after the Supreme Court ruled on the afternoon of April 6.

The Legislature is therefore far off base in claiming this Court has "recognized" that an extension of the ballot-receipt deadline "**must be paired**" with a corresponding ban on releasing election results, even when *all* votes must be cast by election day given the Supreme Court's postmark rule. This Court has never "recognized" such a "pair[ing]," and there is no need for one. The Legislature's rhetoric that, if this Court extends the ballot-extension deadline again, it might "leave[e] the State and the Nation in needless limbo, given Wisconsin's swing-state status," is spurious. *Fourteen* other States (including some with "swing-state status") and the District of

Columbia follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election so long as they are timely postmarked. SDNCFOF ¶ 19.[11] The outcome could well be in "limbo" in several of these other jurisdictions while timely cast ballots are received and tabulated in the days following the November 3 election. This likely scenario has been extensively discussed; it is a national phenomenon and not peculiar to Wisconsin. *Id.* ¶ 22.

Our point is not that this Court should extend the election-day receipt deadline simply because many other States have chosen to do so, but that the consequences of counting timely cast but late-arriving absentee ballots are manageable and not at all unusual. A modest extension of Wisconsin-s election-day receipt deadline would be unlikely to create a national crisis—especially where that extension avoids the potential disenfranchisements of hundreds of thousands of eligible voters.

That leads to two final points in reply to the Legislature's insistence that the election-day receipt deadline must not be deferred again.

*First*, the DNC and DPW demonstrated in their opening brief that it is unfair to make voters cast their absentee ballots several *weeks* before an election in order to ensure those ballots will be counted given that, as a simple practical reality, many people do not even decide who they will

[11] These include Alaska (10 days following election); California (3 days following election); the District of Columbia (7 days); Illinois (14 days); Iowa (6 days if postmarked by the day before the election); Kansas (3 days); Maryland (no deadline for receipt so long as postmarked by election day); New Jersey (48 hours following closure of polls); New York (7 days following election if postmarked by the day before the election); North Carolina (3 days); Ohio (10 days if postmarked by the day before the election); Texas (1 day); Utah (7-14 days if postmarked by the day before the election); Vermont (3 days); and West Virginia (5 days). SDNCFOF ¶ 20. Unless otherwise noted above, all these States require that absentee ballots be postmarked by election day in order to be counted when received in the days following the election. *See generally* Nat'l Conference of State Legislatures, VOPP: *Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, (June 15, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx; SDNCFOF ¶ 21.

vote for until late in the campaign (which one would expect from undecided swing voters); the all-important presidential debates continue until late October; and recent presidential campaign history abounds with examples of legendary late-October "surprises" that changed, or very nearly changed, the election results by causing late-deciders to break one way or the other. DNC Br. at 32-33; Burden Rep.at 12-13.[12] The Legislature repeatedly insists these practical political realities are "*constitutionally irrelevant*" and "of *no constitutional import*." Leg. Br. at 54 n.10, 60 (emphasis added). Says who? *Anderson-Burdick* analysis is all about the "flexible" balancing of the real-world "interests" involved and the practical benefits and burdens of a challenged provision. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Telling voters that, to be "prudent," they must vote absentee two or three weeks before the election imposes real-world costs that most certainly are "relevant" and of "import" to the *Anderson-Burden* analysis.

*Second*, for all its talk of system "integrity" and "voter confidence," the Legislature fails to acknowledge that nothing would destroy confidence in the integrity of our voting system more than throwing out tens if not hundreds of thousands of valid ballots that were timely cast in good faith but did not arrive until after election day. *That* is what would be "intolerable," to borrow the

[12] Professor Burden's report discusses one example of an "October surprise"—the unexpected announcement by FBI Director James Comey on October 28, 2016 that the FBI was reviewing new evidence in its investigation of former Secretary of State Hillary Clinton's email. *See* Burden Rep. at 12-13. Other examples of "October surprises" over the past half-century or so have included President Lyndon Johnson's October 31, 1968 announcement of a complete bombing halt over North Vietnam; National Security Advisor Henry Kissinger's October 26, 1972 announcement that "peace is at hand" in Vietnam; President Jimmy Carter's announcement on November 2, 1980, that he had been unable to negotiate an end to the Iran hostage crisis; the October 30, 1992 indictment of former Secretary of Defense Caspar Weinberger as part of the Iran-Contra proceedings; Governor George Bush's November 2, 2000 acknowledgment of his 1976 DUI charge; the October 29, 2004 broadcast by Al-Jazeera of a videotaped message from Osama bin Laden denouncing President George Bush; and the October 29, 2012 landfall of Hurricane Sandy near Atlantic City, New Jersey, and the next several days of destructive weather in the Northeast. *See* SDNCFOF ¶ 23.

Legislature's word. Leg. Br. at 57.

### B. This Court should again extend the online registration deadline, and should include by-mail registration in that extension.

The Legislature's arguments against any extension of the October 14 deadline for registering by mail or online are, if anything, even weaker than its arguments against extension of the November 3 election-day receipt deadline. This Court's 12-day extension of the online registration deadline prior to the April 7 election enabled an additional **57,187** voters to register without having to go to local election offices or the polls during a time of dangerous community spread. Wisconsin's election administrators acknowledge that this modest extension caused relatively few additional administrative burdens. SDNCFOF ¶ 25. They also acknowledge that the by-mail registration deadline could be similarly extended for the November 3 election without difficulty so long as mailed registrations are received by the Friday before the election (October 30)—the same day that in-person registration closes. *Id.* ¶ 24.[13] Thus, in-person, by-mail, and online registration would all be treated the same, which makes particular sense in the current public-health emergency. *As applied in this pandemic*, it makes no rational sense to require by-mail and online registrations by October 14 while allowing in-person registrations to continue until October 30, particularly given the continuing need to engage in social distancing and avoid crowded indoor spaces.

The Legislature again lectures that deadlines help promote the "orderly administration" and "efficient operation" of Wisconsin elections, and that voters who fail to meet deadlines are not being "prudent" and have only themselves to blame. Leg. Br. at 53. But as discussed above, this

[13] This Court's expressed concern about moving the deadline for by-mail registrations to the Friday before the election—that envelopes mailed then would arrive too close to (if not after) the election—could be readily resolved by making October 30 a *receipt* deadline for all by-mail and on-line registration requests, rather than following a "postmark" rule that would allow this late-arriving problem to occur.

entirely ignores the point of the decisions cited by the Legislature: even where a voter arguably *could* meet a challenged deadline, that "particular deadline" must still be sufficiently "justified" and "necessary" under the circumstances to promote "a particularized legitimate purpose" without "unnecessarily burden[ing]" the right to vote. *Supra* at 28-29; *see also Rosario*, 410 U.S. 760-62; *Kusper*, 414 U.S. at 61. In a variant of its blame-the-voter defense, the Legislature argues "[t]he Court's justification for extending registration deadlines on March 20 for the April 7 election is no longer applicable," because now there is sufficient time for each "prudent" unregistered voter to plan ahead to avoid having to register in person and, in any event, the conditions of March 20 no longer apply; "Wisconsin has largely reopened." Leg. Br. at 54-55.

It is true we are no longer in late March; now July is turning to August and the pandemic has grown much worse, with the worst yet to come. As for the Legislature's plea for "prudence," we can readily agree that voters who are not yet registered to vote should do so as soon as possible. Both political parties, of course, are busy encouraging voters to do just that. It is in DNC and DPW's best interests that as many as their supporters register as early as possible.

But it is a long-standing political reality that many voters do not register until shortly before or on election day, and many who are new to absentee voting may not realize they cannot register and vote at the same time by mail, as they have done before when voting in person. And though we can agree with the Legislature that people should not "procrastinate" (Leg. Br. at 54), the question is how should procrastinators and anyone else who miss the online and by-mail registration deadline be treated. Contrary to the Legislature, the result is not a forfeiture but an analysis of whether that "particular deadline," as applied in the context of this pandemic, remains sufficiently "justified" and "necessary" under the circumstances to promote "a particularized legitimate purpose" without "unnecessarily burden[ing]" the right to vote. *Rosario*, 410 U.S. 760-

62; *Kusper*, 414 U.S. at 61.

As applied in our present context, no valid, reasonable state interests are served by the disparity and discrimination between in-person registration, on the one hand, and by-mail and electronic registration on the other. If election officials can accommodate registrations as late as election day when done in person, there is no sufficient reason why they cannot accommodate by-mail and electronic registrations much closer to the election than "the 3rd Wednesday preceding" it. *Id.* ¶ 191.

## II. This Court should again grant limited injunctive relief against Wisconsin's witness-certification requirement, modified to resolve the Seventh Circuit's concerns.

The DNC and DPW continue to believe this Court granted the right relief on the witness-certification issue last time around, for all of the right reasons, and that the Court can meet the concerns expressed in the Seventh Circuit's April 3 stay order through fairly modest (but nevertheless very important) adjustments to this Court's earlier relief. Our opening brief demonstrated in detail that this modified approach not only is consistent with the *Frank* decisions and *Luft v. Evers*, but compelled by the logic of those decisions. DNC Br. at 5-6, 8, 34-44. The need for such relief was demonstrated by the rejection of over **14,000** absentee ballots in the April election for "insufficient certification." *See* WEC Br. at 11 (ECF No. 444); SDNCFOF ¶ 26. And there are strong reasons to believe that many of the **135,417** unreturned ballots—over 10% of all ballots sent out—were not returned because the voters who had requested these ballots (many of them inexperienced with absentee voting) were simply unable to navigate the witness requirements in the midst of the pandemic and resulting isolation from others. DNCFOF ¶ 157.

The Legislature purports to find our reliance on *Luft* "[r]emarkabl[e]" (Leg. Br. at 26), but what is "remarkable" is how much of the detailed analysis of *Luft* in our opening brief the Legislature simply ignores, including *Luft's* reliance on the unanimous *en banc* decision in *Frank*

*III*, the only *en banc* authority in this Circuit on the constitutionally required "safety net" and thus of particular significance. *Luft*, 963 F.3d at 669, 679-80; *Frank III*, 835 F.3d at 649; DNC Br. at 34-44. The Legislature also claims (at 43-44) our proposed relief would "flout" the Seventh Circuit's April 3 stay order in *RNC v. DNC* as well as the Supreme Court's July 2 stay order in the Alabama *People First* litigation. Neither stay order is inconsistent with, let alone "flouted" by, our proposed relief. We will address the alleged conflict with *Luft* first, and then turn to the recent stay orders.

**A. Plaintiffs' requested relief is fully consistent with *Luft.***

The Legislature has caricatured the *Luft* decision, insisting it bars *any* relief from the witness-certification requirement even though the decision strongly reaffirms the focus in *Frank II* and *Frank III* on "*[e]very citizen's interest in individual treatment*." 963 F.3d at 680. Because of this "personal" constitutional right, the State must "*ensur[e]* that every eligible voter" can vote with no more than "reasonable effort," which means "the state *must* accommodate voters who cannot [comply with voting requirements] with reasonable effort" by providing them with a "safety net." *Id.* at 669-70. And the "constitutional question" for a federal court is whether the promised safety net is "*reliably implemented*." *Id.* (emphasis added). Any such voter is constitutionally "*entitled to an accommodation* that will permit him or her to cast a ballot." *Id.* at 678-79; *see also Frank III*, 835 F.3d at 651; *Frank II*, 819 F.3d at 386. It is striking that, while citing *Luft* over 100 times, the Legislature never *once* quotes the decision's key phrases like "safety net," "voting rights are personal," "individual treatment," "entitled to an accommodation," or "reliably implemented."

Instead, the Legislature simply denies there are *any* such voters who require the constitutionally guaranteed "safety net" from the witness-certification requirement. This Court recognized there are such voters among us, and the massive evidentiary record documents the "high hurdles" faced by these fellow citizens. ECF No. 170 at 46; DNCFOF ¶¶ 111-16. The

Legislature insists that, so long as voters are "prudent," they all should be able to obtain witness certifications with only "reasonable effort." Leg. Br. at 40-44.[14] Perhaps recognizing the extremity of its position—*no one* needs a "safety net" from this requirement?—the Legislature goes on to assure that, if there *are* such "hypothetical" voters out there, "the as-applied failsafe that the Seventh Circuit discussed in *Frank II* and *Luft* remains available for individual voters," so that if a "*specific* voter" has problems in November, "*that* voter may seek targeted, as-applied relief under *Frank II* at *that* time." Leg. Br. at 27, 40 (emphasis added). But any such "narrow, as-applied relief under *Frank II*" will have to be "limited to that voter, for this election." *Id.* at 40.

The Legislature does not identify what "as-applied failsafe" supposedly "remains available." What "failsafe" is the Legislature talking about? How does it work, and who does the voter contact? Is the Legislature referring to individual lawsuits brought on election day to require that specific absentee ballots be counted? Does the Legislature have an administrative process in mind? And how is this Court supposed to answer "[t]he constitutional question under *Frank II*" of whether this supposed "as-applied failsafe" will be "*reliably implemented*," *Luft*, 963 F.3d at 679 (emphasis added), if the Legislature will not even identify what "as-applied failsafe" that "remains available" it is talking about?

There is no such "failsafe," and this Court correctly concluded in its April 2 Opinion and

[14] Intervenors argue that certain witnesses, including two of the individuals who filed declarations in support of DNC-DPW's motion, can satisfy the witness-signature requirement "consistent with their current level of social interaction." Wisconsin Legislature and Legislative Defendants' Proposed Supplemental Brief in Opposition to Plaintiffs' Motions for Preliminary Injunction (ECF No. 474-1) at 2-4. Intervenors' argument is based on the depositions of *two* out of the **116** voters who submitted sworn declarations in support of DNC and DPW's motion. Moreover, as aptly pointed out Mr. Nunley when asked how going to the grocery store is any different from voting, even immunocompromised individuals must take some risks to obtain necessities, such as groceries. Nunley Dep. at 65:14-66:17 ("I shop for the groceries because I have to."). Voters should not "have to" take additional, unnecessary risks to exercise their constitutional right to vote.

Order that there *must* be some kind of safety net under *Frank II* for the minority of voters who cannot meet the certification requirements with "reasonable efforts." ECF No. 170 at 44-47. Though its eleventh-hour effort was flawed in some respects and came too close to the election for *Purcell* purposes, this Court now has the time to engineer a proper safety net that follows guiding Supreme Court and Seventh Circuit principles.

The Legislature takes numerous potshots at the DNC-DPW's proposed safety net—a court-ordered, WEC-issued and publicized form for claiming an exemption from the witness-certification requirement, based on objective standards and signed under penalty of perjury—without bothering to offer an alternative proposal of its own. It claims the DNC-DPW's proposal "is, at bottom, not meaningfully different from" the voter ID declaration Judge Adelman adopted in 2016 in the *Frank v. Walker* litigation, which the Seventh Circuit "emphatically" rejected both in a 2016 stay of Judge Adelman's order and in *Luft*'s June 2020 rejection of that order on the merits. Leg. Br. at 45. As discussed in detail in our opening brief, however, the DNC-DPW's proposed declaration differs in several important ways from Judge Adelman's approach.

**"Indiana's affidavit option."** In discussing the constitutionally required "safety net," *Frank II* pointed favorably to Indiana's affidavit option that was integral to Justice Stevens's controlling opinion in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 (2008); *see Frank II*, 819 F.3d at 387. The Legislature contends our discussion of *Crawford* and the "affidavit option" is "self-defeating" because *Luft* "rejected it as a permissible remedy, emphatically." Leg. Br. at 45. But *Luft* obviously could not "reject" a Supreme Court decision; instead, it held that Wisconsin was entitled to adopt its own version of a "safety net" so long as it was "reliably implemented" and demonstrably *worked.* 963 F.3d at 679. "One federal judge's preference for using affidavits does not prevent a state legislature from implementing a different approach." *Id.*

Here, of course, the Legislature has not purported to "*implement[] a different approach*"; it has offered no alternative safety net at all. In the absence of a legislatively created "different approach" to the constitutionally required safety net, an affidavit/declaration option is entirely appropriate.

**Lack of objective standards.** The Seventh Circuit criticized Judge Adelman's proposed affidavit as lacking any objective standards or requirements; "the district court has not attempted to distinguish genuine difficulties …, or any other variety of substantial obstacle to voting, from any given voter's unwillingness to make the effort that the Supreme Court has held that a state can require." *Frank v. Walker*, Nos. 16-3003 & 16-3052, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016). A voter could claim an exemption for any reason or no reason at all, "including a belief that spending a single minute to obtain a qualifying photo ID is not reasonable." *Id.* "The injunction allowed a voter to make his or her choice about how much effort was too much—some people might deem even one trip to a governmental bureau excessive." *Luft*, 963 F.3d at 678. Here, on the other hand, DNC and DPW have proposed that the statement asserting an individual exemption from the witness-certification requirement must present "an objectively reasonable explanation for why the voter needs the exemption." DNC Br. at 43.

**Inability to follow up with the declarant.** Judge Adelman's injunction also provided "that state officials are forbidden to dispute or question any reason the registered voter gives." *Frank v. Walker*, 2016 WL 4224616, at *1. This was a non-starter for the Seventh Circuit, which emphasized that an applicant could not "declin[e] to cooperate with a request for information that is either readily available or obtainable with reasonable effort," and could be rejected for a "failure to comply with reasonable requests for information that is material to voting eligibility." *Luft*, 963 F.3d at 680. DNC-DPW's proposed declaration respects this important principle; a voter *must* cooperate with any reasonable inquiries by local election officials.

**"Sovereign prerogative."** The Legislature claims that any analogies to the ID Petition Process ("IDPP") are "deeply misleading," since "Wisconsin created that petition process itself, as its sovereign prerogative, and *Luft* holds only that a district court can monitor this process to ensure that it is available even as to the rare individual, such as Mr. Randle, described in that decision—not that the Court can simply order such a procedure itself." Leg. Br. at 45. But Wisconsin created the IDPP because it was *constitutionally* obligated to provide a "safety net" under federal law, and chose to attempt to satisfy that obligation through the IDPP. If this were simply a matter of state "sovereign prerogative," a federal district court would have no jurisdiction to "monitor" such a state-law process to ensure it was compliant with state law.

**Required information.** The Legislature also argues that an IDPP applicant must "fill out two forms" with requested information, not simply the single form proposed by DNC and DPW. Leg. Br. at 46. And the IDPP applicant is asked to provide more information than we propose be asked of voters seeking a "safety net" exemption from the witness-certification requirement, and must "show up at a DMV." *Id.* (citation omitted). Applicants seeking a "safety net" because they must isolate themselves from contact with others during the pandemic obviously cannot be expected to "show up at a DMV" or other government office building; that would defeat the purpose of the request. And if the Legislature believes our proposed voter declaration signed under penalty of perjury does not provide enough information for local election officials to follow up on, the Legislature is free to propose additional inquiries for the Court's consideration. The point is that, under *Frank II*, *Frank III*, and *Luft*, the State *must* provide "individual treatment" and "accommodate" voters who require a "safety net," even though 99% of the voting public needs no such help. That is the essential truth this Court recognized in its April 2 Opinion and Order, a truth

the Legislature wholly ignores.[15]

### B. Plaintiffs' requested relief would not "flout" Seventh Circuit or Supreme Court stay orders.

The Legislature also claims our arguments not only fail under *Luft*, but "flout" the Seventh Circuit's April 3 stay order in this case as well as the Supreme Court's recent stay of an Alabama federal district court injunction in *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049 (July 2, 2020), *staying People First of Ala. v. Merrill*, Civil Action No. 2:20-cv-619-AKK, 2020 WL 3207824 (N.D. Ala. June 15, 2020). The Legislature is wrong about both stay orders.

Our opening brief demonstrated in detail why the *RNC v. DNC* stay order does not foreclose our requested relief. *See* DNC Br. at 34-35, 42-43. The stay was based on the Seventh Circuit's conclusions that (a) "the district court did not give adequate consideration to the state's interests in suspending this requirement"; (b) the *Purcell* principle counseled against relief given that the election was then only days away; and (c) the perceived "overbreadth of the district court's order . . . categorically eliminates the witness requirement applicable to absentee ballots." Order, *DNC v. RNC*, Nos. 20-1538 & 20-1546, at *3. The panel suggested the WEC's "alternative suggestions" for fulfilling the witness requirement *might* be sufficient, especially given the extra time that voters had to obtain a witness signature because of this Court's extension of the ballot-receipt deadline. *Id.* The Seventh Circuit also urged this Court to let the WEC try to fix the problems first, before further judicial action. *Id.* The stay did not purport to preclude further judicial relief.

[15] The Legislature also argues (at 67) that the IDPP public education campaign ordered by Judge Peterson in *One Wisconsin* and endorsed by the *en banc* Seventh Circuit in *Frank III* was not *constitutionally* required, but instead "was a *remedy* for an underlying constitutional violation that the district court there had found" (emphasis added). That misreads both Judge Peterson's reasoning as well as the emphasis in *Frank III* on the importance of public education by the State: a safety net cannot be a constitutionally adequate alternative unless "the State adequately informs the general public" about it. 835 F.3d at 651-52. Thus, whatever safety net this Court orders, the Court must ensure the State "adequately informs the general public" about what that safety net is, where they can find it, and how they can use it. *Id.*

WEC's proposed alternatives proved woefully inadequate, with over 14,000 ballots rejected for "insufficient certification" and many more never even returned because the process was simply too complicated for the voters who had requested them. WEC Br. at 11 (ECF No. 444); SDNCFOF ¶ 26; DNCFOF ¶ 156. Moreover, the WEC has not further evaluated the witness-certification issue, or revised its guidance on this issue in any respect, or even addressed this critical issue in its June 25 Status Report (ECF No. 227) despite the Seventh Circuit's urgings that it give the issue further attention. on remand. SDNCFOF ¶ 27. Since the Court has sufficient time under *Purcell* to fashion a safety net that complies with *RNC v. DNC* and *Luft*, before absentee voting even begins, the Seventh Circuit's concerns about changing the witness-certification procedures while absentee voting already was underway do not apply here.

As for the Seventh Circuit's concerns about the informality of this Court's statement, which did not have to be signed under penalty of perjury and required no "magic words" of any kind, ECF No. 170 at 46, those concerns can be accommodated by providing objective standards for claiming an exemption, requiring the claim to be signed under penalty of perjury, and requiring the claimant to cooperate with any follow-up inquiries from local election officials. Far from "flouting" the Seventh Circuit's concerns in *RNC v. DNC*, the DNC-DPW's proposals have sought to address and honor those concerns. Again, if intervening defendants have a better idea for a genuine, reliable, and effective safety net for those who cannot satisfy the witness-certification requirement with reasonable effort they are welcome to propose it, but there must be an "adequate" safety net that is "*reliably implemented.*" *Luft*, 963 F.3d at 679 (emphasis in original).

The Legislature also claims that any as-applied relief with respect to the witness-certification requirement would "flout" the Supreme Court's July 2 decision to stay an Alabama federal district court's injunction against the enforcement of Alabama's certification requirement.

Leg. Br. at 43-44 (citing *Merrill v. People First of Alabama*). The Legislature characterizes the Supreme Court's stay order as a decision on the merits, asserting it demonstrates that any injunction by this Court dealing with Wisconsin's witness-certification requirement "*is sure to be stayed by the … Supreme Court once again.*" *Id.* at 46 (emphasis added). That grossly exaggerates the meaning and significance of the Supreme Court's order, which gave no reasons for the stay and in any event is now moot since Alabama's July 14 primary has passed and the State has dismissed its appeal (without seeking to vacate the district court's opinion). SDNCFOF ¶ 30. Although Alabama certainly raised the merits in its Supreme Court stay papers, its lead argument rested squarely on *Purcell* and had nothing to do with the merits: The district court had issued its injunction modifying the witness-certification requirement on June 15, only 29 days before the July 14 election, at a point when "voters were *already* voting absentee and had been since March." Suppl. Umberger Decl. Ex. 12 at 16; *see id.* at 3 (arguing that changes in absentee-voting rules "*while absentee voting is already taking place* seriously threatens the integrity of the election"); *id.* at 19 (arguing that stay was warranted because district court "ha[d] not only altered rules on the eve of an election, but fundamentally changed voting requirements after voting has already begun").

The timing here is entirely different. Absentee voting for the general election does not begin in Wisconsin until ballots are sent out beginning September 17.[16] Thus, any partial, as-applied injunctive relief this Court might grant with respect to the witness-certification requirement can be crafted and implemented prior to the start of absentee voting. Though the Legislature and RNC-RPW ask this Court to read more into the *People First* stay, that would be

[16] Absentee ballots are sent out 47 days before the election for existing applications. *See* https://elections.wi.gov/clerks/guidance-absentee; *see also* Wis. Stat. § 7.15(1)(cm).

entirely speculative. Meantime, the intervening defendants entirely ignore the numerous cases cited on pages 45-46, note 16 of our opening brief that have modified certification and similar proof requirements because of the pandemic. These cases all remain good authority for narrowly focused, as-applied modifications of witness requirements during the pandemic.[17]

## III. This Court should partially enjoin the ID and proof-of-residency requirements as applied to those who attest under penalty of perjury that they cannot meet those requirements after reasonable efforts.

The DNC and DPW understand the Court's admonition that we should not spend time seeking to "overturn" decisions that have upheld the general applicability of Wisconsin's voter ID and proof-of-residency laws. ECF No. 217 at 13. We shall not do so. Instead, consistent with *Frank II*, *Frank III*, and *Luft*, we ask the Court to ensure there is a genuine and "reliably implemented" "safety net" available for the minority of eligible voters who face "high hurdles" in complying with otherwise-reasonable requirements that 99% of voters can comply with. *Frank II*, 819 F.3d at 387. We ask the Court to consider two points with respect to this requested as-applied

[17] We also call the Court's attention to the Supreme Court's newly issued stay in *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (July 30, 2020). In that case, Reclaim Idaho waited "more than a month *after* the deadline for submitting signatures" on petitions for ballot initiatives had expired before suing for "additional time to gather digital signatures through an online process of solicitation and submission never before used by the State." *Id.* at *1 (Roberts, C.J., concurring in stay) (emphasis added). The District Court granted that request, ordering the "develop[ment] and implement[ation of] a new online system *over the course of nine days*." *Id.* (emphasis added). County clerks were required to "learn, under extraordinary time pressures, how to verify digital signatures through an entirely new system mandated by the District Court." *Id.* at *2. These were the circumstances in which the Supreme Court stayed the Idaho federal district court's injunction pending appeal to the Ninth Circuit. Four Justices emphasized that Reclaim Idaho had "delayed unnecessarily" in filing suit. *Id.* (Roberts, C.J., concurring in stay). Moreover, the case was about ballot access for initiative petitions and was "*not a case about the right to vote*." *Id.* (emphasis added).

The circumstances here are entirely different: this case *is* about the right to vote; no deadlines have passed or are close to passing; the DNC-DPW have not delayed in filing suit; and they are not trying to impose a new technology on local officials with little notice. And, like the *People First* stay order, the *Little* order does not purport to resolve the merits.

relief.

*First*, there is no principled basis for saying that some identification and proof requirements are constitutionally required to have a "safety net," while allowing similar requirements to be enforced rigidly with an iron fist and no exceptions allowed, notwithstanding every voter's "personal" constitutional right to "individual treatment" and "accommodation that will permit him or her to cast a ballot." *Luft*, 963 F,3d at 678 (quotations and citations omitted). For all the reasons discussed above in Part II, voters who believe in good faith they cannot satisfy the photo ID or proof-of-residency requirements challenged here should be allowed to seek an exemption subject to the same conditions discussed above—a signature under penalty of perjury claiming entitlement to a well-defined exemption, specific standards, suitable contact information, and required cooperation with local election officials. No more may constitutionally be required, especially in a time of pandemic.

*Second*, this Court previously denied injunctive relief on the photo ID requirement (without prejudice) because it was "satisfied that the current proof of ID requirement, as being applied under the ["indefinitely confined" exception], does not impose an undue burden on the right to vote." ECF No. 170 at 49. The "indefinitely confined" issue is important; the WEC estimates that about **195,000** voters claimed to be "indefinitely confined" in the April 7 election, nearly 2-1/2 times the number who claimed that status the prior year. SDNCFOF ¶ 31. As demonstrated in our opening brief, "indefinitely confined" is *not* a self-defining term, and in the absence of explicit, prominent instructions on the absentee ballot request form, many voters will likely continue to misunderstand this confusing term. DNC Br. at 46-49.

The Legislature argues these concerns about the vagueness of the "indefinitely confined" standard are "obviously meritless," because "[t]he law presumes that citizens know and apprise

themselves of applicable legal rules." Leg. Br. at 83; *see also id.* at 52 ("all citizens are presumed to know the law"). The only decision the Legislature cites for these bromides does not go nearly so far; rather, it says that a "statute or regulation is adequate notice in and of itself **as long as it is clear**." *Cochran v. Ill. State Toll Highway Auth.*, 828 F.3d 597, 600 (7th Cir. 2016) (emphasis added). Thus, "regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit." *Id.* (internal quotation marks and citation omitted). Rather than dismissing complaints about vague standards on the grounds that "all citizens are presumed to know the law," Leg. Br. at 52, courts "insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (citations omitted); *see Gresham v. Peterson*, 225 F.3d 899, 937 (7th Cir. 2000) (due process "forbids the enforcement of a law that contains 'terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application"). The undefined "indefinitely confined" standard is precisely the sort of vague rule that invites application "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109.

The record shows that many voters have misunderstood their entitlement to claim this status; those who even know about it have been given vague and conflicting guidance on what it means to be "indefinitely confined." *See* DNCFOF ¶¶ 170-71; Burden Rep. at 12-13. The "indefinitely confined" option gets only passing fine-print the mention in WEC's planned instructions to voters who request an absentee ballot for the November election. *Id.* ¶ 167. Those instructions do not tell voters that designation of indefinitely confined status is for each individual voter to make based on how they feel about their own current circumstances. Nor do those instructions tell voters that a claim of indefinitely confined status does not require permanent or

total inability to travel outside of their residence. *Id.* ¶ 168. The instructions to voters do warn, however, that they may be fined $1,000 or imprisoned up to six months for falsely making an assertion in connection with the indefinitely confined option. *Id.* ¶ 169. And the WEC has no plans to modify its guidance on indefinitely confined status to clarify that being in a COVID-19 high-risk category is a qualifying condition. *Id.* ¶ 173. To the contrary, that is a sharply disputed issue and the subject of widely conflicting advice to voters, an illustration of the uneven, confusing, and inadequate use of this option, the supposed "safety net" for the ID requirement in this time of pandemic. *See* DNCFOF ¶¶ 165-73.

In the absence of explicit, prominent instructions on the absentee ballot request form, on the WEC's website and in other informational materials, voters are likely to misunderstand the scope of their entitlement to claim this status and, if they are otherwise unable to copy or upload an acceptable photo ID, may forego attempting to obtain an absentee ballot.

## IV. This Court should order defendants to take further steps to ensure all Wisconsin voters have access to safe and secure in-person voting opportunities.

To reduce duplication, the DNC and DPW deferred in their opening brief to the comprehensive demonstration by the *Swenson* plaintiffs and their expert, Keven Kennedy, of the many measures the WEC can and should take to ensure safe and secure in-person voting opportunities, both through early voting and on election day. The DNC and DPW again defer to, and incorporate by reference, the *Swenson* plaintiffs' arguments on these matters in their reply brief. This includes the *Swenson* plaintiffs' reply to the defense arguments that these claims should be directed at local election officials rather than the state agency charged with "responsibility" for the "administration" of Wisconsin's election laws. Wis. Stat. § 5.05(1). The WEC has the authority to set statewide rules "regulating the conduct of elections … or ensuring their proper administration." *Id.* § 5.05(1)(f); *see also* ECF No. 420 at 50-53. That is precisely what the DNC

and DPW seek, and they need not sue thousands of local election officials to ensure that the Commissioners exercise *their* responsibilities regarding the proper "conduct" and "administration" of the November 3 general election.

## V. The challenged provisions violate federal due process guarantees.

The Legislature argues the DNC and DPW only "half-heartedly contend" they have a distinct due process claim; that "the *DNC* Plaintiffs *agree* their procedural due process claim is duplicative of the *Anderson/Burdick* framework"; and that DNC and DPW concede a due process analysis is "*not necessary*." Leg. Br. at 72 (citing *Luft*, emphases added). None of that is true. Our opening brief advised that we had found no election law case in which a court rejected an *Anderson-Burdick* claim while allowing a due process claim (or vice versa), but also cited numerous decisions that have elected to use due process analysis under the *Mathews v. Eldridge* framework rather than following an *Anderson-Burdick* analysis. *See* DNC Br. at 55 & n. 19.[18] We explained why it sometimes makes more sense to view a voting rights issue through a due process lens rather than an *Anderson-Burdick* lens, as the cited decisions did in cases involving, *e.g.*, adequacy of notice, whether post-deprivation notice and opportunity to cure are required, and the like. *Id.* at 55. The Legislature fails even to acknowledge any of these cited decisions, much less attempt to refute our reliance on them.[19]

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[18] *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (enjoining law requiring rejection of ballots due to signature mismatch without giving voters opportunity to cure); *Fla. Democratic Party v. Detzner*, 4:16cv607-MW/CAS, 2016 WL 6090943, at *9 (N.D. Fla. Oct. 16, 2016) (same); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *9 (N.D. Ill. Mar. 13, 2006) ("Once rejected, the ballot cannot be rehabilitated and cast after a post-deprivation hearing."); *see also id*. ("It is apparent that the risk of erroneous deprivation of the protected interest in absentee voting is not enormous, but the probable value of an additional procedure is likewise great in that it serves to protect the fundamental right to vote.").

[19] For additional relevant decisions, *see Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) ("Having created an absentee voter regime through which qualified voters can exercise

**Sufficiency of vague terms like "indefinitely confined."** Voters' procedural due process rights are violated when they are required to comply with "a law that contains 'terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Gresham*, 225 F.3d at 907 (citations omitted). The Legislature dismisses these concerns about vagueness with the argument that "all citizens are presumed to know the law." Leg. Br. at 52; *see also id.* at 83 ("The law presumes that citizens know and apprise themselves of applicable legal rules."). But the only authority it cites contains the crucial caveat that a "statute or regulation is adequate notice in and of itself **as long as it is clear**." *Cochran*, 828 F.3d at 600 (emphasis added). Thus, as discussed in greater detail in Part II *supra*, "regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit." *Cochran*, 828 F.3d at 600 (internal quotation marks and citation omitted); *see Gresham*, 225 F.3d at 937 (due process "forbids the enforcement of a law that contains 'terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application"). The undefined "indefinitely confined" standard is precisely the sort of vague rule that invites application "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109.

**Deadline for mailing ballots.** Unlike the deadline to vote in-person, which is clear—to participate, you must join the line by 8 p.m.—there is no clear instruction given to voters on how

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their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate due process protection."); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) (invalidating Arizona's practice of not notifying absentee voters of ballots' rejection and recognizing that absentee voting "is deserving of due process" even though "voting absentee is a privilege and a convenience for those unable to vote in person," and holding that "[s]uch due process is not provided when the election procedures do not give some form of post-deprivation notice to the affected individual so that any defect in eligibility can be cured ….").

to ensure their votes will be counted if they vote absentee. The time needed to send back a ballot is a moving target, changing depending on the postal service and guesswork of local elections officials. This is a constitutionally indefensible way to run an election—particularly when absentee ballots are how a record-breaking number of Wisconsin voters are likely to cast their ballots just over three months from now.

For procedural due process claims, "it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). This Court should ask: are voters receiving adequate notice of election procedures? Are elections officials providing specific guidance—such as a precise date—for voters to return their absentee ballots to ensure timely delivery? The answer is "no."

What's more, the DNC and DPW have shown that the "probable value" of "additional or substitute procedural safeguards," *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is enormous—a far cry from the intervenor defendants' belittlement of these safeguards. *See* ECF No. 454 at 84. The *precise "value"* of extending the deadline is one this Court is familiar with; the additional procedural safeguards this Court ordered in April resulted in nearly 80,000 Wisconsin voters vindicating their liberty interest in the franchise. And a similar extension when even more voters will be casting their ballots may well be necessary to vindicate *hundreds of thousands* of voters' protected liberty interests in the franchise. *See* ECF No. 475 at 34:10-35:20 (explanation by WEC Chair Jacobs of how absentee ballots cast by "several hundred thousand voters" are at risk of not being counted if they arrive after election day). Just as the injury caused by a lost vote is "irreparable," the value of a rescued vote is priceless.

**Opportunity to cure ballot errors.** Wisconsin law permits—but does not *require*—municipal clerks to return to voters ballots with incomplete certificates or no certificates

"whenever time permits" the voters "to correct the defect and return the ballot[s]" by 8 p.m. on Election Day. Wis. Stat. § 6.87(9). As a result, municipal clerks received guidance from the WEC stating, for example, "[i]f you receive an absentee back with the certificate not correctly completed, you *can* contact the voter." SDNCFOF ¶ 28. (emphasis added).

This procedure is constitutionally inadequate in several ways. *First*, the municipal clerk "may" return a defective ballot to the voter. Wis. Stat. § 6.87(9). She does not have to. The WEC advised that a "[clerk] should make their best effort to contact the voter to advise them of their options" to cure deficiencies, but did not require them to. ECF No. 412-34, Ex. 84 at 4. During a time period when clerks will be sending out, receiving, and processing record numbers of absentee ballots, it is unlikely that reaching out to voters to cure their ballots' deficiencies will be near at the top of their to-do lists, particularly when there is no requirement that they do so. And reaching out for cure opportunities can also be impossible. At least one clerk could only reach voters who provided phone numbers to the clerk's office: "We acted like detectives trying to find and get a hold of these people." Suppl. Umberger Decl. Ex. 1.

*Second*, even if the clerk decided to embark on a cure process, she must mail the ballot to the voter and the voter must return the correct ballot *all before the 8:00 p.m. deadline on election night*. This forecloses any hope of curing ballot errors for any voter who cast their ballot within the final week before election day, if not earlier. In other words, the vindication of voting rights depends not just on the mail functioning properly, but on the sole discretion of a municipal clerk. During the spring election, voters whose absentee ballots were received after April 7 had no opportunity to cure witness-related deficiencies. SDNCFOF ¶ 29. These grave problems culminated in the rejection of more than 14,000 ballots for witness certification deficiencies. WEC Br. at 11.

While these are examples of constitutionally infirm examples of *pre*-deprivation processes, Wisconsin provides no *post*-deprivation process. Voters simply do not know their absentee ballots have been rejected for one of dozens of reasons: a lack of witness signature, the witness was not a U.S. citizen, the witness failed to write his address, the ballot arrived after 8:00 p.m. on election day, to name a few. As one federal court has observed, when a voter is not notified that his absentee ballot has been rejected, "due process is not provided . . . so that any defect in eligibility can be cured and the individual is not continually and repeatedly denied so fundamental a right." *Raetzel*, 762 F. Supp. at 1358. Without any post-deprivation process, including any notice requirement, Wisconsin voters risk making the same mistakes in election after election.

## VI. The challenged provisions violate equal protection guarantees.

The Legislature continues to argue that *Bush v. Gore*, 531 U.S. 98 (2000), was, in effect, a judicial one-night stand, a decision better left undiscussed and forgotten whose equal protection holdings supposedly mean nothing thereafter. Leg. Br. at 79-84. They argue that "other courts have concluded that the *Bush* opinion is not applicable" to other election law cases, citing only a single decision. *Id.*at 79, citing *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008) (internal punctuation omitted). But *Lemons* "concluded" no such thing. It reserved judgment on whether *Bush v. Gore* applied in that case and instead "concluded" that, "[e]ven were *Bush* applicable," the challenged "standard" for verifying referendum signatures "would be sufficiently uniform and specific to ensure equal treatment of voters." *Id*. at 1106. The Legislature also disregards the many decisions cited in our opening brief demonstrating that "[c]ourts repeatedly have relied on the equal protection principles enunciated in *Bush v. Gore* in a variety of election law circumstances." DNC-DPW Br. at 56-57 (numerous citations omitted). Additional authorities refuting the Legislature's false claim that *Bush v. Gore* has not been applied outside its specific

context are included in the footnote below.[20]

The Legislature also seizes on the word "procedures" in *Bush v. Gore*, argues that the decision is limited to arbitrary and disparate "procedures," and spends several pages purporting to show that the various matters challenged by the DNC and DPW under an equal protection analysis—*e.g.*, disparate application of the "postmarked by election day" requirement, disparate definitions of "indefinitely confined," disparate guidance on other absentee-voting requirements, and the like—are not actually "election *procedures*," but something else. "[D]isparate treatment regarding voter registration and requests for absentee ballots"? Leg. Br. at 80. Not a "specific election *procedure[]*," and thus not subject to equal protection guarantees. *Id.* (emphasis added). The "indefinitely confined" exemption? That's a "standard," not a "procedure." *Id.* at 83. And the "postmark" deadline? That's a judicially imposed "requirement," and involves no "election procedures." *Id.* at 84.

With respect, these supposed distinctions between "procedures," on the one hand, and "standards" and "requirements," on the other, are an invention, the result of nothing more than

[20] *See, e.g.*, *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 242 (6th Cir. 2011) (affirming district court determination that "the intrajurisdiction unequal treatment undertaken by the Hamilton County Board" in its disparate treatment of provisional ballots violated equal protection); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008) (allegations of disproportionate allocation of voting machines among counties stated equal protection claim; "[v]oting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others"); *Stewart v. Blackwell*, 444 F.3d 843, 876-77 (6th Cir. 2006) (allegations of disproportionate use of unreliable voting equipment among counties stated equal protection violation), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007) (case mooted after Ohio agreed to stop using the unreliable equipment); *Black v. McGuffage*, 209 F. Supp. 2d 889, 892, 899 (N.D. Ill. 2002) (allegations that votes in some counties were statistically less likely to be counted than votes in other counties because of disparate "systems" used among them stated equal protection claim); *Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones*, 213 F. Supp. 2d 1106, 1109 (C.D. Cal. 2001) (allegations that some counties adopted more reliable voting procedures than others stated equal protection claim for "unreasonable and discriminatory" treatment).

selective quotation from *Bush v. Gore* itself. To be sure, *Bush* emphasizes the equal protection entitlement to "minimum *procedures* necessary to protect the fundamental right of each voter." 531 U.S. at 109. Among other things, this requires "uniform *rules"* and "specific *standards*" to ensure fair and equal "*treatment*" of voters. *Id.* at 106-07 (emphasis added). Whether characterized as "procedures," "rules," or "standards," the underlying constitutional rule is that the State of Wisconsin may not "value one person's vote over that of another." *Id.* at 104-05. And as demonstrated in our opening brief, there is no "emergency exception" from this equal protection guarantee. *Id.* at 108-09.

**Confusing "indefinite confinement" exemption**. A further example of "arbitrary and disparate treatment [of] voters," *Bush*, 531 U.S. at 104-05, is the interpretation adopted by the WEC and the Wisconsin Supreme Court of Wis. Stat. §§ 6.86(2)(a) and 6.87(4)(b)(2), which exempt voters who are "indefinitely confined because of age, physical illness or infirmity" from many of the absentee voting restrictions and conditions. As discussed above, in response to conflicting advice from county and local election officials about what it takes to be "indefinitely confined" by the pandemic within the meaning of these statutes, the Wisconsin Supreme Court, in an original action, adopted the WEC's guidance that the "[d]esignation of indefinitely confined status is *for each individual voter to make based upon their current circumstances*. It does not require permanent or total inability to travel outside of the residence." *Jefferson v. Dane Cty.*, No. 2020AP557-OA, at *2 (Wis. 2020) (emphasis added). This "guidance" in no way provides "uniform" rather than "arbitrary and disparate treatment to voters." *Bush*, 531 U.S. at 106-07. If using a standard that "might vary . . . from county to county" or "within a single county" violates equal protection, *id.* at 106, so much more the case where the interpretation and application of the standard varies from voter to voter. The record amply demonstrates the confusing and "piecemeal

way" in which this exemption was administered. Wisconsin Election Protection, *2020 Spring Election Report* at 9-10 (Ex. 59); DNCFOF ¶¶ 165-73, 207-09, 214.

**Standardless "postmark" requirement**. Another example of disparate and non-uniform treatment in the April election involved the interpretation and administration of the U.S. Supreme Court's requirement that an absentee ballot be "postmarked by election day" in order to be counted. *RNC*, 140 S. Ct. at 1208. Wisconsin elections officials and the Postal Service do not follow uniform standards and procedures in postmarking absentee ballots. As a result, many absentee ballots were returned to local election officials by the Postal Service with either no postmarks at all, postmarks without dates, or illegible postmarks. The six Commissioners of the WEC, on a 3-3 tie vote, largely failed to agree on how election officials should address these issues, leaving local election officials throughout Wisconsin to make these decisions on a discretionary an *ad hoc* basis without any uniform standards ensuring consistent treatment throughout the State. DNCFOF ¶ 215.[21]

**Disparate standards on notice and opportunity to cure faulty ballots**. As explained above, *see supra* at 51-53, Wisconsin's municipal clerks are only permitted—but not required—to reach out to voters "with an improperly completed certificate or with no certificate," and only "whenever time permits" the voter to correct the issue and return it by 8:00 p.m. on election day. Wis. Stat. § 6.87(9). The result is a patchwork landscape of notices and voters' opportunities to

[21] The WEC is promoting the use of "intelligent bar codes" as a way to reduce if not eliminate the many uncertainties of the postmark rule. This is a promising development. As Ms. Wolfe testified, however, the decision whether to use these codes will be left entirely to the discretion of local election officials. ECF No. 247 (Wolfe Dep.) at 56:2-57:5. In addition, while most election offices have the equipment required to scan bar codes, some in rural areas do not. *Id.* at 59:22-60:9. Thus, this partial, optional switch to bar codes will not only fail to resolve the equal protection problems in those jurisdictions that do not adopt them, it will exacerbate the lack of uniformity among Wisconsin election jurisdictions.

cure their ballots; whether one's vote counts depends entirely on where they live and whether the municipal clerk in that specific locality has decided to exercise her discretion in contacting the voter or has the ability to do so. For example, when one absentee voter failed to include their date of birth on an absentee ballot, the WEC advised the municipal clerk to fill in the date herself and then advised "[i]f you have an email or phone number for this voter, I would also contact them and remind them to fill in their DOB . . . before they mail it back to you." Suppl. Umberger Decl. Ex. 27. Of course, these communications depend entirely on whether the clerk decides to contact the voter, and the clerk's discretion in this respect is essentially unchecked. Many clerks do not bother to contact voters at all. No wonder so many voters "expressed surprised that their ballots were not counted" when members of the press reached out to some of them. Suppl. Umberger Decl. Ex 1.

## VII. Plaintiffs meet all other requirements for their requested preliminary injunction relief.

### A. Plaintiffs satisfy all other preliminary injunctive criteria.

The DNC and DPW demonstrated in their opening brief that all additional requirements for injunctive relief are readily met here: they, their members, and their constituents face irreparable injury for which they have no adequate legal remedies; the balance of equities favors granting the requested relief; and the relief is strongly in the public interest. DNC Br. at 59-62. This Court concluded in March and then again in April that plaintiffs satisfied all these requirements for injunctive relief, and it should so conclude again for all the reasons discussed in its previous decisions. *See* ECF No. 37 at 18-20; ECF No. 170 at 24-28; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (emphasizing citizens' "strong interest in exercising the 'fundamental political right' to vote") (citation omitted). The other plaintiffs' groups also amply discuss the various requirements for preliminary injunctive relief, and there is no need for further analyses of the issue.

The DNC and DPW will, however, respond to the one argument directed at them on the issue of irreparable injury. The Legislature charges that "the *DNC* Plaintiffs," in asking this Court to retain jurisdiction and require periodic reports on compliance with its injunction, are "essentially" asking this Court to take Wisconsin's election system "*into a federal receivership*," which "would gravely harm the State's interests." Leg. Br. at 114 (emphasis added). That of course is not true. Federal district courts routinely retain jurisdiction after granting injunctive relief to ensure proper compliance, and they routinely require enjoined parties to "report back on [their] progress." *Id.* That's exactly what the Seventh Circuit, sitting *en banc*, unanimously instructed Judge Peterson to do during the run-up to the last Presidential election. *See Frank III*, 835 F.3d at 652 ("The Western District has the authority to monitor compliance with its injunction, and we trust that it will do so conscientiously between now and the November 2016 election."). That hardly amounts to a "federal receivership," let alone "grave[] harm [to] the State's interests." Leg. Br. at 114.

### B. As this Court repeatedly has ruled, it has Article III jurisdiction and should not abstain in favor of state remedies.

The Legislature again raises two Article III jurisdictional defenses—standing and ripeness—along with its now-familiar *Burford* abstention argument. *See id.* at 100-05, 108-12. This Court has rejected all these arguments before and should again.

**Standing**. The Legislature claims the DNC and DPW lack "standing" because they are suing the wrong parties. It argues that plaintiffs are "attack[ing] the actions and responsibilities of local election officials that they have declined to name as defendants, as well as the alleged actions of non-party USPS." Leg. Br. at 100-01. And it even argues that "[a]ll" of DNC and DPW's requests for relief "are properly directed at local officials and, in some cases, the USPS, not the Commission." *Id.* at 101.

This Court already has held that the DNC and DPW have Article III standing to assert their members' rights as well as their own organizational interests. *See* ECF No. 37 at 6-7. DNC-DPW submitted updated evidence on July 8 demonstrating they continue to suffer both kinds of Article III injuries as the direct and proximate result of the state action in this litigation. *See* DNC Br. at 27 n.11; DNCFOF ¶¶ 16-22, 48 n.14. The Commissioners obviously are the proper defendants to sue for statewide declaratory and injunctive relief barring the enforcement of the challenged provisions in this case—Wis. Stats. §§ 6.28(1), 6.34, 6.86, 6.87, and 6.87(2). The Commissioners are the officials charged by law with "the *responsibility* for the *administration* of" these challenged provisions, and they have a variety of rulemaking, oversight, planning, guidance, and other tools for the "administration" of these provisions. Wis. Stat. § 5.05(1) (emphasis added); *see* DNC Br. at 50-53; ECF No. 85 at 7. There would be no basis for suing local election officials, let alone the USPS, for declaratory and injunctive relief against the enforcement of state statutes that the WEC is responsible for administering. Indeed, the WEC defendants have acknowledged that, if this Court enters renewed injunctive relief against any of the challenged provisions, "the WEC will be responsible for issuing appropriate guidance to implement that decision." ECF No. 378 at 16.[22]

The only challenge brought by the DNC and DPW involving overlapping state and local authority concerns the safety and security of polling places. That challenge is addressed in Part IV *supra* and in the *Swenson* plaintiffs' briefing. As shown there, despite the significant role delegated to local election officials, the WEC retains ample statutory authority and the *duty* to set and enforce standards and procedures to maximize the safety and security of in-person voting

[22] The Legislature also appears to concede that the Commissioners (in their official capacities) are proper defendants to sue for an injunction against "statewide rules like voter ID," as opposed to "those aspects of election administration unambiguously allotted only to local officials." Leg. Br. at 103. Nearly all of the DNC and DPW's claims focus on "statewide rules" that the WEC is responsible for administering.

locations.

**Ripeness**. This Court observed in its June 10 Opinion and Order that "the Legislature appears to propose a rule in which it would either be 'too soon' or 'too late' to enforce voting rights"—that is, a voting rights claim is either not yet ripe or it comes "too late" and thus is barred under the *Purcell* principle. ECF No. 217 at 9. To avoid that contradiction, the Legislature this time focuses just on ripeness and leaves *Purcell* to the RNC and RPW.

The Legislature once again contends that the DNC and DPW's claims are not "ripe" because the November 3 election is still over three months away, any decision *now* would require "[s]peculation about the course of COVID-19 in November," and we cannot predict "how Wisconsin's election administration will respond to the virus." Leg. Br. at 108-10. The Legislature insists "[t]his is textbook unripeness." *Id.* at 110. But the Legislature does not even acknowledge that this Court already has rejected these identical ripeness arguments, let alone attempt to engage the Court's decision on its own terms and show why the Court should rule differently now. *See* ECF 217 at 7-8 (holding that "plaintiffs' claims state an actual and concrete conflict premised on the near-certain enforcement of the challenged provisions in the context of the present and ongoing COVID-19 health care crisis," and that plaintiffs "are likely to suffer adverse consequences if the court were to require a later challenge"). Nor does the Legislature bother citing, let alone distinguishing, the principal decisions this Court discussed in its ripeness analysis. *Id.* at 9-10 (discussing *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), and *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008)). It's as if this Court had never ruled on the issue.

Meanwhile, the RNC and RPW don't mention ripeness and instead invoke *Purcell* in arguing it is too late to grant any of plaintiffs' requested relief because "any injunction in this case

would issue less than three months before the election." ECF No. 455 at 5. Thus, the Legislature claims an election in three months is too far from now to grant any relief, while RNC-RPW claim the same election is too close to grant any relief. Once again, in the world of the intervening defendants it always is either "too soon" or "too late" when it comes to the enforcement of voting rights protected under the U.S. Constitution.

***Burford* abstention**. The Legislature once again invokes its threadbare *Burford* abstention defense, arguing this Court should "*allow* [!!] all Plaintiffs to take their claims to the Wisconsin courts" rather than continue to litigate those federal claims in federal court. Leg. Br. at 112 (emphasis added). This defense has repeatedly been briefed and rejected by this Court, and the Legislature offers nothing new this time around. *See* ECF No. 37 at 17 n.12; ECF No. 217 at 16-18. Remarkably, the Legislature does not even *acknowledge* the Court's previous decisions rejecting *Burford* abstention, attempt to show how the Court erred in its prior analyses, or try to distinguish the Seventh Circuit authority cited by the Court. For example, this Court has emphasized that *Burford* abstention is appropriate only where the state offers a "specialized tribunal[] with a special relationship with [the] issues" in dispute. ECF No. 217 at 18; *see Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) ("judicial review by state courts *with specialized expertise* is a prerequisite to *Burford* abstention"); *Prop. & Cas. Ins. Ltd. v. Cent. Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 323 (7th Cir. 1991) (*Burford* abstention appropriate only where the state forum "stand[s] in a special relationship of technical oversight or concentrated review to the evaluation of th[e] claims" in issue). The Legislature does not even mention the "specialized tribunal" issue, and it misleadingly cites *Adkins* for the proposition that "Wisconsin's state election laws count as such a 'state regulatory regime'" that deserve *Burford* deference from federal courts. Leg. Br. at 111 (citing *Adkins* ). *Adkins* said no such thing. It had nothing to do with election

laws, but involved the interplay of federal and state environmental laws, and the Seventh Circuit *rejected Burford* abstention because the State of Indiana in that case did *not* provide for "concentrated" review in "specialized courts"—the "essential condition of *Burford* abstention." 644 F.3d at 504-05. Neither does the State of Wisconsin, and that should be the end of any further discussion of *Burford* in this case.[23]

Moreover, the Seventh Circuit's *Frank III* and *Luft* decisions are ringing re-endorsements of the federal district courts' jurisdiction and responsibility to ensure that state election agencies comply with federal voting rights. *See Frank III*, 835 F.3d at 651-52 (en banc) ("The Western District has the authority to monitor compliance with its injunction, and we trust that it will do so conscientiously between now and the November 2016 election."); *Luft*¸ 963 F.3d at 679-81 (discussing district court's responsibility to ensure the State's promised voter ID reforms are "reliably implemented," and remanding for further proceedings). There is no room for *Burford* abstention in the enforcement of federal voting rights.

## CONCLUSION

For the reasons set forth above and in the DNC-DPW's opening brief and other submissions; in the submissions of the *Gear*, *Edwards*, and *Swenson* plaintiffs; and in the evidence and argument to be presented in the upcoming preliminary injunction hearing, this Court should grant the DNC and DPW's motion for a renewed preliminary injunction containing the terms set

[23] Rather than addressing this Court's *Burford* reasoning and the key Seventh Circuit decisions that support it, the Legislature instead quotes out of context (at 112) from the wholly inapposite *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674 (7th Cir. 2010). That case applied *Younger*, not *Burford* abstention, and involved an effort to obtain federal injunctive relief targeted at "pending state eviction actions" in Illinois state court. *Id.* at 678. The Seventh Circuit rejected this effort "to have a federal court tell state courts how to manage and when to decide a category of cases pending in the state courts," because federal courts may not "step in and tell the state courts how to manage their dockets." *Id.* at 679-80. This of course has nothing to do with our case; there are no pending state proceedings and no basis to abstain.

forth in the Prayers for Relief at the end of their motion (ECF No. 252) and opening brief (ECF No. 420 at 62-64).

Respectfully submitted,

/s/ *John Devaney*
Marc E. Elias
John Devaney
Bruce V. Spiva
Amanda R. Callais
Zachary J. Newkirk
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
jdevaney@perkinscoie.com
bspiva@perkinscoie.com
acallais@perkinscoie.com
znewkirk@perkinscoie.com

Charles G. Curtis, Jr.
Michelle M. Umberger
Sopen B. Shah
Brandon M. Lewis
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, Wisconsin 53703-3095
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
CCurtis@perkinscoie.com
MUmberger@perkinscoie.com
SShah@perkinscoie.com
BLewis@perkinscoie.com

*Counsel for Plaintiffs in Case No. 20-cv-249-wmc*