UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

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
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
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
JILL SWENSON, et al., Plaintiffs, v. MARGE BOSTELMANN, et al.,	Civil Action No. 3:20-cv-459-wmc

and

REPUBLICAN NATIONAL COMMITTEE, et al.,

Intervening Defendants.

EDWARDS PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Time is not helping the Legislative Defendants'[1] efforts to minimize the threat posed by COVID-19. The thrust of their defense on the facts is that it's purely speculative whether the pandemic will even pose a public health threat come November, and even if it does, Wisconsin is fully equipped for safe in-person voting and has a fully functional absentee ballot process for those who do not wish to vote in person. Thus, the pandemic does not require any adaptations at all.

Defendants' contentions are at best irresponsible and at worst outright dangerous. More important, they are daily belied by more facts demonstrating that COVID-19 is persistent, spreading, and ever more dangerous. On July 8, 2020, the day that plaintiffs filed their motions for preliminary injunction, the PGA of America announced that the 2020 Ryder Cup, which was to have been contested at Whistling Straits in Sheboygan County September 22-27, 2020, was postponed to 2021 "based on guidance from the Centers for Disease Control and Prevention, and in conjunction with the state of Wisconsin and Sheboygan County, with the health and well-being of all as the top priority."[2]

More recently, the events of ordinary life continue to be cancelled or postponed; we

[1] We focus on the Legislative Defendants (including Intervenor Republican National Committee) because of Defendant WEC's assertion in its brief that it "does not take a position on the specific relief requested" by plaintiffs. (WEC Br. 3.)

[2] https://www.rydercup.com/updated-event-information.

highlight just a few of those here. On Monday of this week, the Wisconsin Intercollegiate Athletic Conference – the conference that includes UW-Oshkosh, UW-Eau Claire, UW-La Crosse, UW-Platteville and other UW System schools – announced that the fall seasons for football, women's soccer, women's volleyball, and men's and women's cross-country are canceled for the 2020-21 academic year.[3] On Thursday, July 30, 2020, based on "a surge of new COVID-19 cases" here, the City of Chicago added Wisconsin to a list of 22 states from which travelers entering Chicago must quarantine upon their arrival for 14 days.[4]

Also on Thursday, July 30, Governor Tony Evers issued Emergency Order #1, mandating that people indoors wear masks in nearly all situations.[5] In shamefully typical Wisconsin fashion, several local law enforcement officials immediately announced that their offices would not enforce the Order.[6] And in equally shamefully typical fashion, Defendant and Wisconsin Senate Majority Leader Scott Fitzgerald announced today that "Republicans in the State Senate stand ready to convene the body to end the Governor's order, which includes the mask mandate."[7]

After all this, perhaps the most remarkable cancellation occurred this morning. Major League Baseball is a multi-billion-dollar industry that is devoting extensive resources to prevent players and team personnel from exposure to COVID-19.[8] It has literally billions of dollars at

[3] https://wiacsports.com/news/2020/7/27/general-wiac-fall-statement-on-covid-19.aspx.

[4] https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html.

[5] https://evers.wi.gov/Documents/COVID19/EmO01-FaceCoverings.pdf.

[6] https://www.channel3000.com/sheriffs-office-in-northern-wisconsin-refusing-to-enforce-mask-mandate/ (sheriffs of Grant, Dodge, Lafayette and Washburn Counties); https://urbanmilwaukee.com/pressrelease/statement-from-waukesha-county-executive-paul-farrow-after-governor-evers-issues-mask-mandate/ (criticism by Paul Farrow, Waukesha County Executive); https://www.wisn.com/article/some-sheriffs-around-state-say-they-wont-enforce-mask-mandate/33475941 (sheriffs of Racine and Washington Counties).

[7] https://twitter.com/sbauerAP/status/1289235396514263040.

[8] https://www.si.com/extra-mustard/2020/06/24/mlb-return-coronavirus-health-protocols.

stake in completing its abbreviated regular season and crowning a World Series winner.[9] People hoped that the outbreak that hit the Florida Marlins last weekend and forced them out of action through early August would prove to be an isolated incident.[10]

Unfortunately, it was not. Early this morning, the Milwaukee Brewers' fan-less home opener against the St. Louis Cardinals, set to begin at 1:10 p.m., was postponed because several Cardinals players tested positive for COVID-19.[11] Late in the afternoon of Friday July 31, MLB Commissioner Rob Manfred met with representatives of the Major League Baseball Players Association and warned that he could shut down the entire season as soon as Monday if players do not take more effective steps to eliminate positive tests.[12] If Major League Baseball, with resources literally orders of magnitude greater than those available to the WEC and 1,800 cash-strapped Wisconsin municipalities, cannot crush the coronavirus, how can we hope to conduct early voting, absentee balloting, and the in-person November Election without life-threatening outbreaks – especially under the "business as usual" rules that Defendants insist are sufficient?

The only way Defendants can win this case is if this Court accepts their position that it involves nothing more than the application of ordinary legal rules to ordinary times. Unlike sporting events, the November Election cannot be cancelled or delayed. But Wisconsin's political process is failing the plaintiffs. Every time a Wisconsin politician or administrator decrees a measure to protect public health, some officials declare they will refuse to enforce it, while litigants

[9] Total MLB revenues in 2019 were almost $11 billion, much of which is generated by the playoffs and World Series television rights. https://www.forbes.com/sites/maurybrown/2019/12/21/mlb-sees-record-107-billion-in-revenues-for-2019/#4bc108535d78.

[10] https://www.cbssports.com/mlb/news/marlins-covid-19-outbreak-another-player-tests-positive-friday-20-total-reported-cases-among-team/.

[11] https://www.espn.com/mlb/story/_/id/29570869/source-mlb-calls-cardinals-brewers-game-due-coronavirus.

[12] https://www.espn.com/mlb/story/_/id/29572885/sources-mlb-commissioner-warns-shutdown-players-do-better-job-managing-coronavirus.

run to court to block the measures and the Legislature either prepares to join in the blocking or refuses to adopt any remedies. This Court's broad equitable powers are plaintiffs' only hope to be freed from the untenable, illegal Hobson's choice of either risking their lives by exercising their right to vote in person, or risking their franchise by participating in the November election through an absentee ballot system that will not be able to function as designed.

DISPOSITIVE FACTS

Of course, Major League Baseball, the Wisconsin Intercollegiate Athletic Conference, and the Ryder Cup have it comparatively easy: they can cancel or postpone events. Likewise, Chicago and other cities can impose quarantine orders and let time reduce the risk that travelers from viral hot spots will cause a flareup of contamination. Not so Wisconsin and its sister states regarding the November Election. Under 3 U.S.C. § 1, they must hold the Presidential election "on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." That date will not change, even with COVID-19 raging. With the date carved in stone, the only way to ensure safe and effective voting is for the political branches to adopt, or the courts to decree, special measures designed to blunt the effects of the virus.

Or, if you are the Legislative Defendants, you can assert that the problem isn't all that bad in the first place, and in any event there is no proof that the pandemic will still be with us in November. They cite no persuasive authority for their contention, because there isn't any. Not only do each new day's cancellations, new case reports, and death statistics disprove the Legislative Defendants' position, but it is simply inconsistent with the nature of infectious diseases: they smolder – or explode – until they have burned their way through a population.

Plaintiffs' experts Patrick Remington, M.D. and Megan Murray, M.D. explained this phenomenon at their depositions. Dr. Remington testified that

> given, in particular, what we know about the biology of COVID, how extremely communicable it is, its ability to go from person to person prior to symptom development, 40 percent or more of individuals infected are asymptomatic, most individuals who become symptomatic are contagious prior to symptoms. So I think for all of these reasons: The nature of the organism, the patterns of transmission globally, nationally, and within Wisconsin; and then, finally, I think despite having close to 50,000 cases, with 5 and a half million, or 5.8 million people in the state, we have a tremendous reserve, tremendous number of people who remain susceptible. And the evidence is that as long as you have susceptible populations and community transmission, that we will continue to see epidemics. . . . And the risk will be – of contracting and transmitting COVID-19 will be significant into November.

(Dkt. # 269, P. Remington M.D. Dep. Trans. at 36-37.)

For her part, Dr. Murray also testified that the trajectory of an epidemic doesn't decline unless some intervention or change to cause it:

> So the things that alter the number of infectious people at any particular moment, the trajectory of an epidemic, are that you've either seen a change in the number of people who contact each other over time, then the transmissibility of an organism over time, and that's where weather kind of, you know, was I think, a question. That seems to be less the question now, or that a vaccine is altering the risk of transmission. But we don't – you know, of course anything is possible, the world might end, but from a reasonable perspective we're not going to see a decline unless something happens to make that decline.

(Dkt. # 282, M. Murray M.D. Dep. Trans. at 116-117.)

As the Edwards Plaintiffs point out in their replies to the Defendants' responses to the Proposed Findings of Fact, neither the Legislative Defendants nor WEC mounts a significant challenge to our factual contentions.[13] The principal alleged dispute rests on the Legislative Defendants' attempt to deny that in-person voting is a threat to public health and safety. Yet they have failed to show that in-person voting in the middle of a deadly pandemic is safe, and they have not presented any evidence to contradict the overwhelming reality of epidemiological science that COVID-19 is certain to remain a threat through the November Election. The Legislative

[13] As to the Legislative Defendants, this is principally because many paragraphs are deemed admitted by virtue of Defendants' failure to follow this Court's rules setting forth the requirements for a contested fact.

Defendants do not have evidence showing any reason to believe that the pandemic will have eased by November.

ARGUMENT

I. FEDERAL COURTS HAVE POWER TO IMPOSE EXTRAORDINARY REMEDIES BASED ON EXTRAORDINARY FACTS.

It's no surprise that the linchpin of the Legislative Defendants' legal arguments is the Seventh Circuit's very recent decision in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), which generally confers wholesale approval on almost all of the Legislature's recent changes to Wisconsin statutes governing the voting process. They cite it at least 100 times in their brief. And if this were an ordinary voting rights case, we would be concerned about *Luft*. It could foreclose a Constitutional or statutory challenge to many of the election statutes at issue in this case.

But we are not bringing a frontal Constitutional assault on the statutes upheld in *Luft*, nor on the Legislature's power to pass such changes. The relief we seek is limited to the November Election only. Our case is simply not an effort to relitigate *Luft*, or any of the other recent Supreme Court or Seventh Circuit decisions that affirm state legislatures' power to restrict the right to vote.

Instead, our argument is fundamentally different: we contend that based on the literally unprecedented impact that the COVID-19 pandemic is certain to have on all aspects of the November Election, **in that factual context and in that context alone** certain provisions of Wisconsin's election statutes must be temporarily suspended because suspending their operation is the only means of preserving the fundamental right to vote while COVID-19 rages through the population.

What defendants ignore, and what we urge this Court to conclude, is that federal courts have sweeping powers to impose drastic remedies in order to do justice in extraordinary situations. We used the example of prison reform litigation in our initial brief, citing the Supreme Court's

decision in *Brown v. Plata*, 563 U.S. 493 (2011), in which the Court upheld the truly extraordinary remedy of requiring California to release prisoners before their sentences were over in order to remedy longstanding unconstitutional conditions of confinement. More recently, in *Braggs v. Dunn*, 383 F. Supp.3d 1218 (M.D. Ala. 2019), in the wake of 15 prisoner suicides in 15 months, the District Court granted a permanent injunction implementing a suicide-prevention program in the Alabama prison system. Extraordinary situations compel extraordinary remedies.

Education is the quintessential local activity. Yet federal courts have consistently taken over school districts that engaged in persistent racial discrimination in order to bring to life the Constitutional guarantee barring segregated schools. Probably the most extreme case is the Supreme Court's decision in *Missouri v. Jenkins*, 495 U.S. 33 (1990), holding that although federal courts lacked the power to directly impose a tax increase to fund school desegregation in a foot-dragging district, they "could have authorized or required the [school district] to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented [the district] from exercising this power." *Id*. at 51. Faced with an extraordinary record of recalcitrance, the Supreme Court approved what might have seemed an intrusion into ordinary school district functions, but that was a remedy neatly tailored to the extraordinary facts.

Much more common – yet still intrusive – are the many decisions in which federal courts uphold continued judicial supervision over school districts that once operated "dual" systems that favored white students over black or Hispanic students as those districts worked their way into compliance with equal protection of the laws. *E.g., Stout by Stout v. Jefferson County Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018)(reversing order allowing partial "secession" of newly formed school district because of evidence showing that district was formed to exclude black children); *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011) (ordering continued judicial supervision

of district that had failed to implement desegregation obligations in good faith); *Banks v. St. James Parish Sch. Bd.*, 2017 WL 2554472 (E.D. La., Jan. 30, 2017) (approving detailed consent order specifying many aspect of school operations necessary to achieve elimination of vestiges of segregation). In education, extraordinary facts empower federal courts to impose extraordinary remedies.

Last, and most important, federal courts have long imposed drastic, intrusive remedies – including invalidation of election results and ordering special elections – in order to preserve the fundamental right to vote. *E.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (when legislators fail to carry out reapportionment as required by Equal Protection Clause, "it becomes the 'unwelcome obligation' . . . of the federal court to do so and impose a reapportionment plan pending later legislative action"); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (federal courts may order judicially supervised elections under federal law); Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966); *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss. 1985)(shortening office term of unconstitutionally elected officials and ordering special election to replace them); *Ketchum v. City Council of City of Chicago*, 630 F. Supp. 551, 565 (N.D. Ill. 1985) ("Federal courts have often ordered special elections to remedy violations of voting rights"); *Donohoe v. Bd. of Elections*, 435 F. Supp. 957, 968 (S.D.N.Y. 1976)("[F]ederal courts in the past have not hesitated to take jurisdiction over constitutional challenges to the validity of local elections and, where necessary, order new elections); *Cousins v. City Council of City of Chicago*, 361 F. Supp. 530 (N.D. Ill. 1973); *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969); *Perkins v. Matthews*, 336 F. Supp. 6 (S.D. Miss. 1971). Extraordinary deprivations of fundamental rights justify extraordinary remedies.

This Court plainly has the power to temporarily suspend the application of Wisconsin's ordinary voting rules in order to preserve the fundamental right to vote in what is literally a once-

in-a-lifetime public health emergency.

II. PLAINTIFFS WILL PREVAIL ON THEIR CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT.

The Legislative Defendants contend that the Edwards Plaintiffs' claims under the Americans with Disabilities Act fail because they do not specify the accommodations that Plaintiffs are seeking. (Leg. Def. Br. 93-94.) Their real complaint is that they don't like how Plaintiffs organized their brief. Although the substantive ADA section indeed does not mention Plaintiffs' desired accommodations, Defendants ignore the ten-page section of Plaintiffs' brief (Edwards Pl. Br. 44-53) that first reviews Plaintiffs' individual situations, including some of their disabilities (*id*., 44-45), and then discusses the accommodations that Plaintiffs seek in great detail, again with reference to disabilities (*id*., 46-53). In fact, each change requested by the Edwards Plaintiffs is designed to limit exposure to COVID-19. Plaintiffs require accommodations to limit their exposure to COVID-19, because they are at an increased risk of severe illness or death from COVID-19. Therefore, **every** proposed change is a reasonable accommodation that will allow Plaintiffs to vote safely.

Specifically, the Edwards Plaintiffs seek to enjoin voter identification laws to the extent they adversely impact persons with disabilities, and argue that statements under penalty of perjury, rather than witnesses or identification that may be impossible for persons with disabilities to obtain, are sufficient to satisfy the state's legitimate needs. (*Id*. 47-48.) They contend that the witness requirement of Wis. Stat. § 6.87(2) improperly impairs the voting rights of immunocompromised persons, those with limited mobility, and those who are diagnosed with COVID-19 (all conditions suffered by one or more plaintiffs). (*Id*., 49-50.) Plaintiffs further contend that the time limit on early in-person voting (*id*., 51-52), the unduly early deadline for designating early in-person voting locations (*id*., 52), and the requirement that poll workers must

reside in the county where they will serve (*id*., 53) all impose undue burdens on the right to vote, and seek the accommodation of suspending those requirements for the November Election alone.

Nothing more was required. The Edwards Plaintiffs' ADA claims are valid and they will prevail on the merits.

III. THE REMEDIES PLAINTIFFS SEEK ARE TEMPORARY, REASONABLE, FEASIBLE, AND NOT BURDENSOME.

The WEC Defendants emphasize that the Commission can act only if at least four commissioners agree; they further contend that this statutory requirement limits the relief this Court can order. (WEC Br. 16.) We submit that the majority-vote requirement is a bug, not a feature. As this Court noted in its June 10, 2020 decision denying defense motions to dismiss the DNC's complaint, the Commission has a "recent history of strict adherence to the Wisconsin statutory requirements and deadlocking over any creative efforts to vindicate voter rights even if the statutes arguably allow them[.]" *Democratic Nat'l Committee v. Bostelmann*, 2020 WL 3077047 at *8 (W.D. Wis., June 10, 2020). Against this background, the Court rightly concluded that it "would be remiss in abstaining from exercising its role in protecting the federal constitutional rights of Wisconsin voters, if necessary." *Id*. The same result should obtain here.

Defendants contend that with so much time between now and the election, even the most reluctant in-person voter has more than enough time to meet the requirements for requesting an absentee ballot, fill it out, and return it in plenty of time for it to be timely counted. (Leg. Def. Br. 61.) We recognize that the WEC has advanced voters' interests by mailing absentee ballot requests to all registered voters in Wisconsin.[14] But the added convenience provided by this mailing does nothing to address the significant problems on the "back end" of the absentee voting process – that is, the potential delays in the Post Office for delivering and returning absentee ballots, and the

[14] The Edwards Plaintiffs hereby withdraw their requested relief that the Court order WEC to have an absentee ballot mailed to every registered voter in the state.

daunting challenge that municipalities will have in counting all absentee ballots and then completing their canvasses within the unmodified statutory time frame. Evidence to be presented at the hearing will show that delays in the Post Office are virtually certain, and the unprecedented volume of absentee voting is likely to tax the resources of municipalities beyond their capacities. Suspending application of Wis. Stat. § 6.87(3), which prohibits clerks from faxing or emailing absentee ballots to most voters, will permit voters who timely request absentee ballots but who do not receive them through the mail to obtain them electronically. Likewise, extending the statutory deadlines for receipt and tabulation of absentee ballots beyond the date of the in-person November Election will help relieve the pressure on municipalities. Similarly, suspending Wis. Stat. §§ 6.88 – 7.51-.52 in order to allow municipalities to begin reviewing absentee ballots before Election Day will enable absentee voters who have made easily curable mistakes to fix them and have their votes counted.

Taken as a whole, the common theme of the remedies that the Edwards Plaintiffs seek is breathing space for the fundamental right to vote during an unprecedented public health crisis. Our remedies will relieve pressure on voters so they will not have to choose between exercising their right to vote and preserving their life and health (and the lives and health of their loved ones). Our remedies allow breathing space so the probable delays in delivery on both ends of the absentee voting process will not impair the right to vote. Allowing more time for receipt and counting of absentee ballots allows breathing space for the likely otherwise overwhelming volume of absentee ballots so municipal officials can process them in an orderly way.

Business as usual allows for none of these benefits and ensures a constitutional deprivation that cuts to the core of what we are about.

Similarly, the in-person absentee voting and election day remedies sought by the Edwards Plaintiffs will allow breathing space in a literal sense for those who do vote in person. Suspending

Wis. Stat. § 6.86(1)(b) to allow additional time for in-person absentee voting will allow municipalities to spread out such voting consistent with Centers for Disease Control Protocols, and enjoining enforcement of Wis. Stat. § 6.855(1) (pertaining to early designation of in-person absentee voting sites) and Wis. Stat. § 7.30(2) (requiring poll workers to be qualified electors of the county in which they are serving) will allow local elections officials flexibility to respond to local conditions as they arise. The Court only needs to look at the impact COVID-19 had on the ability to have a sufficient number of polls to appreciate why this reasonable modification for a single election could prove so vital.

Finally, the temporary suspension of the election statutes requested by the Edwards Plaintiffs will not impose a significant burden on the State of Wisconsin or on any of the Defendants. First and most important, the Edwards Plaintiffs do not seek to declare any of the statutes unconstitutional. The ordinary rules will spring back into place after COVID-19 passes. Second, several of the statutory limits we seek to suspend, such as the limited hours for in-person early voting, are enactments of recent vintage. If Wisconsin regularly conducted elections under the rules we seek in the past, there is literally no harm in temporarily restoring the previous regime to facilitate voting in a grave public health crisis.

CONCLUSION

For the reasons stated in this brief and in their initial brief in support of their motion for preliminary injunction, the Edwards Plaintiffs respectfully request that the Court grant the relief requested in their motion for preliminary injunction, with the exception of the request that absentee ballots be mailed to all registered Wisconsin voters, which is withdrawn.

Dated this 31st day of July, 2020.

LAFFEY, LEITNER & GOODE LLC
Attorneys for Plaintiffs

By: s/ *Joseph S. Goode*
Joseph S. Goode
Mark M. Leitner
John J. Laffey
Sarah E. Thomas Pagels
Jessica L. Farley
325 E. Chicago Street, Suite 200
Milwaukee, WI 53202
(414) 312-7003
(414) 755-7089 (facsimile)
jgoode@llgmke.com
mleitner@llgmke.com
jlaffey@llgmke.com
stpagels@llgmke.com
jfarley@llgmke.com

URBAN & TAYLOR, S.C.
Jay A. Urban
Urban Taylor Law Building
4701 N. Port Washington Road
Milwaukee, WI 53212
(414) 906-1700
(414) 704-7207 (facsimile)
jurban@wisconsinjury.com

HALLING & CAYO, S.C.
Stacie H. Rosenzweig
320 East Buffalo Street, Suite 700
Milwaukee, WI 53202
(414) 238-0197
(414) 271-3841 (facsimile)
shr@hallingcayo.com

SALAWDEH LAW OFFICE, LLC
Rebecca L. Salawdeh
7119 W. North Avenue
Wauwatosa, WI 53213
(414) 455-0117
(414) 918-4517
rebecca@salawdehlaw.com