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

DEMOCRATIC NATIONAL COMMITTEE
and DEMOCRATIC PARTY OF WISCONSIN,

Plaintiffs,

v. Case No. 20-cv-249-wmc

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE
and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants.

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

Plaintiffs,

v. Case No. 20-cv-278-wmc

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

Defendants.

CHRYSTAL EDWARDS, TERRON EDWARDS, JOHN JACOBSON, CATHERINE COOPER, KILEIGH HANNAH,

KRISTOPHER ROWE, KATIE ROWE, CHARLES DENNERT, JEAN ACKERMAN, WILLIAM LASKE, JAN GRAVELINE, TODD GRAVELINE, ANGELA WEST, DOUGLAS WEST, and all others similarly situated,

Plaintiffs,

v. Case No. 20-cv-340-wmc

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

Defendants.

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

Plaintiffs,

v. Case No. 20-cv-459-wmc

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

Defendants.

GEAR v. BOSTELMANN, 20-cv-278, PLAINTIFFS' COMBINED REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION AND BRIEF IN OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO DISMISS

INTRODUCTION & SUMMARY

From the Covid-19 pandemic itself to the foreseeable, crushing burden of preparing and delivering an estimated two million mail-in absentee ballots, Intervenor-Defendants have a standard, Panglossian response—wait and see. But adopting a wait-and-see approach will leave voters disenfranchised. In the run-up to the April 7 election, there was not time to institute fail-safe options for absentee ballot delivery failures and delays, train municipal clerks to offer them, and educate voters to request them. The full scope of the problems associated with conducting an election during a pandemic was also unknown at the time. The lack of alternative, back-up ballot delivery methods for regular absentee voters living through this public health emergency needlessly deprived at least thousands of Wisconsin voters of their right to vote. Absent injunctive relief, the same will happen again in November when turnout and the demand for mail-in absentee ballots will double. Fortunately, there are readily available remedies to prevent a repeat of April through systems already in place that the Wisconsin Elections Commission ("WEC" or "the Commission") just needs to adapt or reinstate.

If state lawmakers and executive officials need not wait until electoral fraud actually occurs to create and enforce requirements they believe will prevent such crimes, *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 (2008) (holding that a state has an interest in preventing voter fraud even when there is "no evidence of any such fraud actually occurring"), then, by the same token, voters need not wait until they suffer grievous injury to their right to vote, health, or bodily integrity before securing preliminary injunctive relief. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (granting a motion for preliminary injunction because "Florida's signature-match scheme subjects vote-by-mail and provisional electors to *the risk of disenfranchisement* . . .") (emphasis added). To hold otherwise, as Intervenor-Defendants advocate, would eviscerate the *Anderson-Burdick* framework, privileging credible risks to the state's legitimate interest in protecting election integrity while dismissing credible risks to voters' rights to participate in their democracy. More generally, such disparate treatment of the competing interests would run counter to the Supreme Court's precedent which emphasizes that preliminary injunctive relief is warranted "to prevent a substantial risk of serious injury from ripening into actual harm." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994); *see also Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of a threatened injury to obtain preventive relief.") (citation and quotation omitted).

Well-settled precedent on the factors for issuance of a preliminary injunction holds that such relief is warranted when the plaintiffs establish that "irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis added). Certainty is not required to overcome a ripeness objection or to secure preliminary injunctive relief protecting voters' rights but, as the record demonstrates, there is a very strong likelihood that the absentee ballot delivery failures observed in the April 7 election will recur in November. Intervenor-Defendants imagine that the ripeness doctrine is more stringent and unforgiving than the likely irreparable injury factor in *Winter*, but that is not the law. *See, e.g.*, *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 734 F. Supp. 853, 861 (S.D. Ind. 1990) ("The doctrine of ripeness addresses only a court's jurisdictional authority to hear a case. The decision to grant a preliminary injunction involves myriad additional factors, including the timing of the threatened conduct and the immediacy and irreparability of the harm likely to result."). As will be shown below, Plaintiffs clear both hurdles.

In their opposition briefs, none of the Defendants or Intervenor-Defendants seriously dispute or introduce evidence in opposition to the feasibility, benefits, or security of extending alternative mail-in absentee ballot delivery methods to regular domestic civilian voters. The perpetually-deadlocked Defendants neither endorse nor oppose the relief sought in the *Gear* action, and the Intervenor-Defendants argue (1) that the harm is speculative, *i.e.* that disenfranchisement due to ballot delivery failures is not concrete and imminent, and (2) that the law forecloses the relief sought in this case. They are mistaken on both counts.

First, in state after state this year, from Wisconsin to Pennsylvania to Indiana to Maryland to Ohio to New York, election officials and the U.S. Postal Service have collectively failed to timely deliver mail-in absentee ballots to voters in primary elections with significantly lower turnout than a typical presidential election. This is not speculative; this is the consistent reality of voting during the Covid-19 pandemic. Second, Plaintiffs in this action and the other consolidated cases have adduced evidence that foretells another surge in demand for mail-in voting and another shortfall in capacity to meet that demand. Some of Defendants' reforms will hopefully streamline the processing and preparation of ballots, forestall technical glitches, and allow voters and election officials alike to better track ballots. But these measures and procedures are newly-implemented and untested, and municipal clerks will now face double the requests for mail-in absentee ballots in the November election. Additionally, just 24 days ago, the U.S. Postal Service's Office of the Inspector General finally issued a report ("the USPS OIG report"), attempting to explain the widespread shortcomings and shortfalls in service during the April election and to make recommendations for improvement.[1] These reforms are only just beginning less than 90 days out from the start of voting in Wisconsin, and there is no evidence in the record that they will cure the problems observed in April, which left voters, particularly Covid-19-vulnerable voters, without

[1] *See* dkt. 503, Sherman Reply Decl., Ex. 1, https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf.

any recourse. Indeed, the USPS OIG report notes inherent structural defects in the interaction between certain election laws and the practical demands of the postal service—*glaring* defects that the Legislature could but has declined to address. Additionally, former Deputy Postmaster General Ronald Stroman states in his declaration that his "experience with voting by mail and my extensive work with election officials leads me to conclude that Wisconsin's Spring Election is a predictor of what may occur in Wisconsin's November General Election, absent necessary changes . . ." *See* dkt. 484, Declaration of Ronald Stroman ("Stroman Decl.") ¶ 8.

Even if the Court were to conclude that the injury *as to the individual Plaintiffs* in this action is speculative or unlikely to occur, Plaintiffs League of Women Voters of Wisconsin ("LWVWI" or "the League") and Wisconsin Alliance for Retired Americans ("Wisconsin Alliance") (collectively, "the Organizational Plaintiffs") will necessarily be forced to help and educate voters who are facing disenfranchisement due to ballot delivery failures and will necessarily suffer a constitutional injury due to the state's failure to offer fail-safe alternative delivery methods to regular absentee voters, such as online access and downloading via the MyVote portal or email delivery. This diversion of resources, staff time, and money from core mission activities would not occur but for the unconstitutional failure to offer domestic civilian absentee voters electronic transmission options to receive their mail-in absentee ballots and, therefore, confers standing on LWVWI and Wisconsin Alliance. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Second, *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), a case decided on a pre-pandemic record, in no way forecloses this action. "Courts weigh these burdens against the state's interests by looking at the whole electoral system," *id*. at 671-72, but if no part of the election code addresses a particular burden or outright denial of the right to vote, as here, then unrelated provisions such as no-excuse absentee voting and Election Day registration logically provide no defense against an *Anderson-Burdick* claim. When voters inevitably face disenfranchisement due to the confluence of absentee ballot delivery failure or delay and a Covid-19 risk factor that makes voting in person unduly dangerous, then there is no part of the Wisconsin election code that "offsets" or cures this constitutional violation, as Defendants contend. *See* dkt. 454 at 25-26; *see also id*. at 128 ("Even a burdensome individual election law passes constitutional muster if other provisions in the State's election code allow voters to exercise their franchise by other means, with reasonable efforts.").[2] Assuming the mail-in absentee ballot request deadline has not passed, such a voter's only recourse is to request a *replacement* mail-in absentee ballot, once again by mail delivery, and to hope that it arrives faster than the first ballot they requested. Of course, many voters will continue to wait for their initially-requested mail-in ballot's arrival until after the deadline to request a ballot has passed or when it is far too late to guarantee that a ballot can arrive timely in the mail. Because there is no part of the Wisconsin election code that can remedy this problem, *Luft*'s instruction to analyze the election code holistically offers the Intervenor-Defendants no aid. Plaintiffs' counsel have reviewed the Wisconsin election code as a whole and find that the entire scheme fails to safeguard the right to vote in the context of this pandemic, necessitating this Court's intervention and fail-safe options.

Nevertheless, the Intervenor-Defendants disingenuously argue that the individual Plaintiffs in *Gear* can, at a later date, simply seek narrow, as-applied relief if their ballots do not arrive in the mail. Due to *Purcell*, at that late stage, it would be much less likely for the Courts to order an extension of the requested fail-safe ballot delivery methods to voters who have a higher risk of complications or death from Covid-19. Intervenor-Defendants well know this and would argue

[2] All docket references are to the 20-cv-249 docket, unless otherwise expressly noted.

against such cases or motions, if they were brought weeks or days before the election—as they did in April, *see* dkt. 96 at 9-10. Additionally, with respect to online access via the MyVote portal, it would be impossible to upgrade the WisVote and MyVote systems at that point, though it is feasible right now.

The relief that the *Gear* Plaintiffs seek is feasible, narrow, secure, and beneficial to voters and municipal clerks alike. As to Plaintiffs' requested upgrade to WisVote and MyVote, WEC's Training and Technology Director has testified: "absolutely, it is possible." *See* dkt. 489, Transcript of Deposition of Robert Kehoe ("Kehoe Tr.") at 72:7-8. Plaintiffs have requested that this Court order Defendants to provide alternative ways to receive a ***replacement*** mail-in absentee ballot, if and only if: (1) the voter timely requests a mail-in absentee ballot, and (2) the voter's ballot does not arrive in the mail. Further, as Plaintiffs themselves have suggested, this Court could require that the voter's mail-in absentee ballot request be made a certain number of days in advance of exercising one of the fail-safe options, *e.g.* online access and downloading at myvote.wi.gov (hereinafter "MyVote" or "the MyVote portal"), and could also restrict the time period in which a voter could exercise one of these fail-safe options. The Intervenor-Defendants' argument that ballot delivery failures in the November election will be "extremely rare," *see* dkt. 454 at 31, and that affected voters can seek as-applied relief later, is self-defeating. Effectively, this ***is*** that as-applied relief; it is simply being sought months in advance of the election, not at the last minute. If, contrary to the overwhelming weight of the evidence, Intervenor-Defendants correctly predict that absentee ballot delivery failures and delays will be "extremely rare," then only a very few regular domestic civilian voters will qualify to use this alternative form of ballot delivery, currently reserved by statute for military and overseas voters. Wis. Stat. § 6.87(3)(d).[3]

Confronted with a deadlocked state election authority that cannot adequately protect the right to vote—and vote safely during this pandemic—and a legislature that has expended far more effort and taxpayer dollars in resisting the common-sense, last-resort solutions the *Gear* Plaintiffs have advanced instead of legislating to guarantee voter access during the deadliest pandemic in one hundred years, it falls to this Court to intervene and safeguard the rights of voters in the November election.

ARGUMENT

I. Standing

a. The *Gear* Plaintiffs are threatened with a non-speculative, concrete, and imminent injury in the November election.

1. The Covid-19 pandemic

Intervenor-Defendants make only three arguments in opposition to the epidemiological evidence. First, they argue that a single study that Dr. Murray cites, the Cotti paper (dkt. 370, Murray Decl. ¶ 63), which attempts to demonstrate an association between in-person voting and higher incidence of Covid-19 cases in the wake of the April 7 election, is methodologically flawed. *See* dkt. 454 at 37. Dr. Murray's opinions on the risk to in-person voters posed by Covid-19 do not hinge on whether or not this *single* study that Intervenor-Defendants cherry-pick from the plethora upon which Dr. Murray relies was able to conclusively establish a causal link between in-person voting and increased Covid-19 transmission. *See* dkt. 440, Transcript of Deposition of Dr. Murray

[3] Section 6.87(3)(d) appears to only restrict email or fax delivery, but it is not worth debating whether the statute restricts online access and downloading via the MyVote portal as well; this Court can enjoin the provision in any event, as needed to afford the relief the *Gear* Plaintiffs have requested.

("Murray Tr.") at 117:21-118:3. During her deposition, Dr. Murray offered explanations for why she believed the study was reliable and based on a reasonable, sound methodology, while acknowledging some of its potential limitations. *Id*. at 31:1-97:6. Nevertheless, the wealth of epidemiological and medical studies upon which Dr. Murray's declaration is based have gone unchallenged and uncontroverted by Intervenor-Defendants. Intervenor-Defendants could have retained an expert in infectious disease transmission dynamics and epidemiology to rebut Dr. Murray's conclusions but, understandably, they came up empty-handed. And they could have moved *in limine* to exclude Dr. Murray's opinions as inadmissible under Federal Rule of Evidence 702 and *Daubert*. But they did not, choosing instead to argue to the Court the weight of the scientific evidence Plaintiffs offer through Dr. Murray, rather than its admissibility.

Second, the Intervenor-Defendants argue that in-person voting can be made safe, a view borne from their rosy view of the pandemic and their willful blindness to Covid-19's extremely serious clinical manifestations, some of which include long-lasting health complications, and persistent transmission in Wisconsin. This evidence is severely undermined by the gathering scientific consensus on aerosolized transmission, *see infra*, and by evidence in the record of unsafe conditions at polling places. *See, e.g.* dkt. 386, Keresty Decl. ¶¶ 3- 7.

The Covid-19 pandemic poses an extremely serious danger to in-person voters, particularly those most vulnerable to complications and death from the pandemic.[4] The threat of airborne transmission of SARS-CoV-2, the virus that causes Covid-19, in indoor settings where people congregate, like a polling place, is real, substantial, and not meaningfully mitigated by any of the available protective measures. *See* dkt. 370, Murray Decl. ¶¶ 6-20, 32-44. Forcing voters to take

[4] *See* dkt. 503, Sherman Reply Decl., Ex. 5, CDC, Coronavirus Disease 2019 (COVID-19), *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last updated July 30, 2020).

this risk is per se a severe burden on the right to vote. Due to the pre-symptomatic and asymptomatic transmission of SARS-CoV-2, voters will cast their ballots in person at the polls not knowing that they are Covid-19-positive and further shed and transmit viral particles in large respiratory droplets and aerosolized droplet nuclei that can stay suspended in the air for much longer. *Id.* ¶¶ 8-9, 32-42.

During her deposition, Dr. Murray testified that there are three separate routes of SARS-CoV-2/Covid-19 transmission: (1) respiratory droplet; (2) aerosols or microdroplets; and (3) fomite transmission from contaminated surfaces. *See* dkt. 440, Murray Tr. at 120:22-125:8. Respiratory droplet transmission happens "when a person speaks or coughs or sneezes or sings" and "they put into the environment droplets that consist of a mixture of mucous, saliva, and then that's what viral particles are -- and there's viral particles on those droplets." *Id*. at 121:7-121:22. If the droplets are "large they fall out of the environment because of gravity, and that happens at a one to two meter distance." *Id*. at 121:22-122:2. If the droplets are smaller, however, then they function as aerosols, or desiccated "droplet nuclei" that can stay suspended in the air and "move[ ] with the turbulence and the air flow within a room." *Id*. at 122:15-123:11. Dr. Murray explained that aerosolized transmission poses "a somewhat more dangerous issue because it can go further than the two meters" and "can move throughout the room in ways that are not necessarily expected because it has to do with where furniture is and where air turbulence moves around in rooms." *Id*. at 123:11-17. Because these aerosolized droplets are so tiny, neither cloth masks nor even surgical masks can prevent transmission of SARS-CoV-2. *Id*. at 124:2-6, 133:1-6. For this reason, aerosolized transmission is the hardest to control via interventions like sanitization or social distancing. *Id*. at 125:9-126:3. Effective countermeasures are much more limited, such as "improving ventilation in a very rigorous way by having either negative pressure rooms or something like UV germicidal radiation," *id*. at 126:3-7, and there is no evidence in the record that either of these measures will be used in Wisconsin polling places. Finally, in her deposition testimony and in her Reply Declaration, Dr. Murray has referenced the Open Letter to the World Health Organization published on July 6, 2020, entitled "It is Time to Address Airborne Transmission of COVID-19," which was signed by 239 scientists, noting that the authors

> argue very convincingly that the WHO's early sort of statements suggested that there was no aerosol, or that we didn't need to worry about aerosol transmission and that by not focusing on the possibility of aerosol transmission, that we were giving people a false sense of security that masks and hand-washing would be adequate to protect people. So they're really raising both the examples of -- specific examples of aerosol-based transmission that they know of and some of the engineering data that shows . . . how far particles actually go when people cough and sneeze, and the fact that SARS-CoV-2 can be on these particles to make that case that we should be really focusing a little more on aerosol-based transmission, and they have something like 240 scientists who signed on to this document.

Dkt. 440, Murray Tr. at 126:15-127:22; dkt. 490, Reply Declaration of Dr. Megan Murray ("Murray Reply. Decl.") ¶¶ 1-3; dkt. 490, Murray Reply Decl., Ex. 1 (Dr. Murray Deposition Exhibit 4). In her Reply Declaration, Dr. Murray writes that, "There is a gathering consensus in the epidemiological community that aerosolized transmission of Covid-19 is occurring, making the pandemic that much harder to control." *See* dkt. 490, Murray Reply Decl. ¶ 2.

In light of the evidence and studies Dr. Murray cites, she concludes that "[t]here is a substantial risk that an infection with Covid-19 acquired during voting at a poll place in Wisconsin in the fall of 2020 could result in symptomatic disease, hospitalization or death." Dkt. 370, Murray Decl. ¶ 11. That is because "[t]o the extent that polling places are crowded, require people to wait in lines, involve interacting with polling staff or other voters at a close distance, move people through the process slowly, are poorly ventilated and/or involve people touching objects like pens, paper, or surfaces within the voting booth, they constitute a risk to voters." *Id*. ¶ 47. As Dr. Murray put it during her deposition,

> [T]he risks are related to people gathering in an indoor, or in some cases outdoor space, and it will depend on how crowded those spaces are, how many people at the time have infectious – are infected with the virus, how many are symptomatically infected, because those people could stay home, how many are asymptomatically or presymptomatically infected, those people won't know they're sick, so they could be -- could come without actually, you know, knowing whether they did or not. So there's a risk when you bring any group of people together in a single place that there's going to be transmission.

See dkt. 440, Murray Tr. at 118:8-22.

COVID-19 cases continue to rise in Wisconsin, with less than 90 days left before the start of early voting. There are currently more than 4.5 million confirmed cases in the United States, and there have been 152,431 deaths nationwide.[5] As of this filing, the Wisconsin Department of Health Services had confirmed 52,108 positive cases of coronavirus in Wisconsin, with over 1,000 new cases from the prior day, 4,590 hospitalizations, and 919 deaths.[6] In response to the climbing cases and deaths, just yesterday, Governor Tony Evers declared a Public Health Emergency and issued an Emergency Order requiring individuals to wear face coverings when indoors and not in a private residence, effective at 12:01 a.m. on Saturday, August 1, 2020, through September 28, 2020. Dkt. 503, Sherman Reply Decl., Ex. 3, Executive Order #82; *id.*, Ex. 4, Emergency Order #1. According to the U.S. Centers for Disease Control and Prevention, ("CDC"), individuals are at higher risk of severe complications and death from Covid-19 if they are 65 years old or older or have underlying health conditions and diseases, including but not limited to cancer, chronic kidney disease, COPD (chronic obstructive pulmonary disease), immunocompromised state (weakened immune system) from solid organ transplant, obesity (body mass index [BMI] of 30 or higher),

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[5] Dkt. 503, Sherman Reply Decl., Ex. 1, Mitch Smith et al, *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last accessed July 31, 2020).

[6] Dkt. 503, Sherman Reply Decl., Ex. 2, Wisconsin Department of Health Services, *COVID-19: Wisconsin Summary Data*, https://www.dhs.wisconsin.gov/covid-19/data.htm (last accessed July 31, 2020).

serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies, sickle cell disease, and Type 2 diabetes mellitus.[7] A number of these are fairly common diseases and/or conditions in Wisconsin: 32 percent of residents are obese, and 8 percent have diabetes mellitus. *See* dkt. 370, Murray Decl. ¶ 79. For all the foregoing reasons, it is not safe for vulnerable people of a certain age and/or who have certain underlying comorbidities to venture to polling places to vote. *Id*. ¶ 47.

The efficacy of intervention measures such as sanitizing surfaces, the use of masks and hand sanitizer, and maintaining a 6-foot distance from others is wildly variable and, even in the best of circumstances with maximum compliance, cannot eliminate the risk of Covid-19 transmission in polling places. *Id*. ¶¶ 48-56. And these measures are not effective against aerosolized transmission: "[A]irborne (or aerosol) transmission is less amenable to easily-implemented infection control measures than is transmission through large respiratory droplets, and this therefore makes polling booths and other closed spaces more dangerous than they might be otherwise." *Id*. ¶ 36. In her Reply Declaration, Dr. Murray writes that

> Given the possibility of aerosol-based spread, precautions against Covid-19 should include those designed to reduce airborne spread. This point is made emphatically in the Letter to the WHO, see Ex. 1 (Murray Deposition Exhibit 4), from aerobiologists Lidia Morowska and Don Milton that was published in the journal, Clinical Infectious Diseases, and signed by 239 scientists. In it, the authors state: "It is understood that there is not as yet universal acceptance of airborne transmission of SARS-CoV2; but in our collective assessment there is more than enough supporting evidence so that the precautionary principle should apply. In order to control the pandemic, pending the availability of a vaccine, all routes of transmission must be interrupted." Here, "the precautionary principle" refers to the assertion "that the burden of proof for potentially harmful actions by industry or government rests on the assurance of safety and that when there are threats of serious damage, scientific uncertainty must be resolved in favor of prevention." See Exhibit 2 (Murray Deposition Exhibit 6), Goldstein, "The Precautionary Principle Also Applies to Public Health Actions," American Journal of Public Health | September 2001, Vol 91, No.

[7] Dkt. 503, Sherman Reply Decl., Ex. 5, CDC, Coronavirus Disease 2019 (COVID-19), *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last updated July 30, 2020).

> 9, at 1. In this context, the precautionary principle prescribes that measures be put into place to reduce the possibility of infection through the aerosol route. Such measures would include use of N95 respirators that filter out small droplet nuclei and ensuring adequate ventilation within rooms such as polling places.

But many public buildings where polling places are located are generally insufficiently ventilated to prevent aerosolized transmission, Murray Tr. at 140:5-141:10, and N95 masks that can block aerosols are "in short supply" and not broadly accessible to and worn by the general population. *Id*. at 129:9-130:6. Accordingly, if more vulnerable voters cannot vote safely absentee by mail, they cannot vote at all, and it is per se unreasonable for the state to require them to do so.[8]

Third and finally, the Intervenor-Defendants argue that it is speculative that the pandemic will continue to pose a threat to in-person voters in less than 90 days when early voting begins in Wisconsin, but offer no expert testimony or other evidence to indicate the situation will be improved in October and November. Dr. Murray does not believe the prevalence of Covid-19, vaccine development and administration, herd immunity, and pharmaceutical development are likely to change sufficiently over the next 90 days to minimize or significantly alter the persistent risk to voters from voting in person. *See* dkt. 440, Murray Tr. at 163:11-173:16; dkt. 370, Murray Decl. ¶¶ 82-86. Defendants' arguments to the contrary are unsubstantiated.

2. Absentee ballot preparation and delivery failures

As in the April 7 election, Wisconsin election officials and the U.S. Postal Service remain unprepared to meet the unprecedented demand for 1.8 to 2 million mail-in absentee ballots. Three sets of evidence demonstrate this unfortunate reality: (1) municipal clerks' insufficient capacity to handle 2 million-plus ballot requests from data entry to preparation for mailing; (2) the U.S. Postal

[8] This Court theoretically restrict its remedy to voters who have one of the CDC's risk factors, but it is not appropriate for Defendants to be policing which voters have what diseases and health conditions.

Service's widespread and continuing delivery failures and delays during this public health emergency; and (3) the evidence of a nationwide pattern of election officials and USPS being overwhelmed by and unable to meet the demand for mail-in absentee ballots.

First, municipal clerks and the WEC remain unprepared for the deluge of mail-in absentee ballots. WEC creates the infrastructure and implements the laws for absentee ballot preparation and delivery, but municipal clerks must do (most of) the work, and two of the municipal clerks who have submitted declarations in these consolidated proceedings do not believe they have been given the resources they need to process two times as many mail-in absentee ballots as they saw requested for the April 7 election. Madison City Clerk Ms. Witzel-Behl states that her office "has not been given the resources and money necessary to meet the anticipated demand for mail-in absentee ballots in November" and that "with other departments going back to work, [her] staff now only has a few dozen League of Women Voters volunteers available to help." *See* dkt. 382, Declaration of Maribeth Witzehl-Behl Decl. ("Witzel-Behl Decl.") ¶ 6. With respect to IMBs, she states that "better tracking of ballots with anticipated delivery dates listed on myvote.wi.gov can only do so much to alleviate the burden on [her] staff. Although we anticipate that the intelligent bar codes may reduce the number of telephone inquiries we receive, this will not make it easier to process a massive volume of absentee ballot requests—according to the WEC, an estimated 1.8 million statewide." *Id.*; dkt. 384, Declaration of Debra Salas ("Salas Decl.") ¶ 8 (same).

Municipal clerks' office staff of course cannot devote all of their time to mail-in absentee ballots, without damaging other critical election functions. As Administrator Wolfe states in her declaration, clerks must somehow manage "the unprecedented demand for absentee ballots, in addition to their other duties including administering in-person absentee voting, preparing polling places and recruiting and training new election inspectors." *See* dkt. 446, Wolfe Decl. ¶ 28. The hardships of large municipalities' clerks are significant, but so too are the hardships of the "[h]undreds of municipal clerks [who] work alone and part-time." *Id*. The crushing burden of processing so many absentee ballot requests forced clerks to make difficult trade-offs. For instance, in Kenosha, "[d]ue to the volume of absentee ballot requests and the Covid-19 precautions we were taking, in-person absentee voting was limited to the two weeks before the election by appointment only during a limited number of hours from 7:00 a.m. to 9:00 a.m. Monday through Friday." *See* dkt. 384, Salas Decl. ¶ 4. No municipal clerk in Wisconsin has ever encountered presidential election turnout with over 50-60 percent of the electorate voting by mail. In the April 7 election, they were already stretched beyond their maximum capacity, and it still was not sufficient to timely meet the demand. For example, notwithstanding all of the Madison City Clerk's office's and their volunteers' efforts, Madison still "received thousands of calls and emails from voters in Madison informing us that they had never received their requested absentee ballot in the mail" and still "sent thousands of replacement ballots to such voters in the weeks before the election." Dkt. 382, Witzel-Behl Decl. ¶ 4. Hundreds of voters contacted Racine city clerk's office complaining that their ballots had not arrived. Dkt. 383, Coolidge Decl. ¶ 4.

Additionally, hundreds of thousands of voters will likely submit their request *on or after* the 47th day before the election. Wis. Stat. § 7.15(1)(cm). That total could climb over 1 million. A spike in Covid-19 transmission could also suddenly deter more voters from voting in person, triggering a spike in mail-in absentee ballot requests. *See* 20-cv-459, dkt. 44, Declaration of Dr. Patrick Remington ("Remington Decl.") at 12-13. Many of these requests are submitted in the final weeks and days before the deadline, when municipal clerks' offices will be busy conducting in-person absentee voting and making other preparations for Election Day. The Commission notes in its report that: "Statewide, the volume of absentee requests received remained high in the week prior to April 7. Clerks received over 60,000 requests on the Friday before Election Day alone. Even if all these requests were mailed on Saturday, it is unknown how long those ballots took to reach voters."[9] With significant USPS delays, it is highly likely that a substantial portion did not arrive in time for voters to cast them, forcing voters to either gamble with their health at the polls or lose their right to vote. Furthermore, 80,593 requests for mail-in absentee ballots were submitted on March 31, 2020, 66,482 on April 1, 79,921 on April 2, and 62,172 on April 3, which, by this Court's order, was the last day to request a *mail-in* absentee ballot.[10] *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020). A total of 289,168 requests were received on *just those four days alone*. A proportionate surge in the final week of November's much higher-turnout election might well strain the system of ballot preparation and delivery beyond the breaking point.

To be sure, WEC has been working to prevent a relapse of April 7 and, on June 25, 2020, the WEC Defendants submitted a status report outlining the various measures and projects aimed at improving these systems in advance of the August and November elections. *See* dkt. 227. Unfortunately, beyond the subgrants to Wisconsin's 1,850 municipal clerks for additional staffing, *id*. at 5, not many of these items can have a significant impact on mail-in absentee ballot preparation and delivery delays. Data entry will be somewhat reduced for clerks as WEC staff and contractors take on some of that burden, dkt. 227, at 3-4. The WEC's efforts to modify the state's voter information database, WisVote, "to identify which method of processing absentee ballot requests, ballot records, and absentee address labels is best in managing high volumes of requests,

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[9] *See* dkt. 423, Sherman Decl., Ex. 1, Wisconsin Elections Commission, April 7, 2020 Absentee Voting Report ("Post-Election Absentee Voting Report"), at 17 (May 15, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf.

[10] *Id*.

and [to] train exclusively on this method," *id*. a 9, are ongoing, but the WEC has not set forth evidence that this project has been completed, let alone successful. The proposed WisVote modification "to implement additional tracing procedures and audit tools in WisVote to enable early detection of issues that could occur during the high volume of absentee ballot request processing," is designed to prevent a reprise of the disastrous computer glitch observed in Milwaukee. *Id*. at 9-10; dkt. 423, Sherman Decl., Ex. 1, Wisconsin Elections Commission April 7, 2020 Absentee Voting Report, at 18-20. But as to the intelligent mail barcodes ("IMBs") that Intervenor-Defendants cite frequently, Defendants expressly note that it will *not* have a meaningful impact on the burden of processing and mailing so many ballots: "Use of IMBs will not change the preparation of absentee ballots in any significant way, but they will allow for more precise population of tracking information in WisVote/MyVoteWI." *Id*. at 6.

Second, the U.S. Postal Service is not prepared to timely deliver over two million mail-in absentee ballots this fall. Former Deputy Postmaster General Ronald Stroman states in his declaration that his "experience with voting by mail and my extensive work with election officials leads me to conclude that Wisconsin's Spring Election is a predictor of what may occur in Wisconsin's November General Election, absent necessary changes . . ." *See* dkt. 484, Stroman Decl. ¶ 8. Mr. Stroman goes on to argue that "[t]he USPS has an Election Mail target of 96 percent on-time delivery. While this is a high target for some types of mail, even if this target is achieved, 4 percent of mailed ballots—which could represent at least tens of thousands of ballots in the November election—will be at high risk of untimely delivery." *Id*. ¶ 12. Mr. Stroman concludes that Wisconsin law, which permits a voter to request a ballot as late as five days before an election but requires it be returned by 8:00 p.m. on Election Day, induces voters to rely to their detriment on the false assurance that they can receive and cast a ballot by mail in such a short time-frame.

Id. ¶¶ 13-15. While this "entrapment" argument is of less immediate relevance to the *Gear* Plaintiffs' proposed remedy, Mr. Stroman's testimony, as a recent high-ranking official in USPS with nearly a decade of experience, *id*. ¶ 2, is compelling evidence that the embattled USPS is woefully underprepared for November:

> [T]he high probability of broad disenfranchisement resulting from the state's Ballot Receipt Deadline is increased by the significant challenges the USPS is facing. For example, in various cities during the COVID-19 pandemic, the USPS has had significant challenges with employee availability. As employees tested positive for COVID-19, in some locations, large numbers of employees were out on leave. This led to a slowing of mail delivery because with limited staffing, the Postal Service began prioritizing the delivery of packages to ensure the timely delivery of life-saving pharmaceuticals and personal protective equipment. With health-care experts predicting a possible second wave of COVID-19 in the fall, along with the seasonal flu, employee availability could be a significant issue.
>
> The USPS also has experienced a dramatic decline in mail volume over the last decade. In addition, since the middle of March of this year, the Postal Service has seen about a 25 percent decline in mail volume over the same period as last year, as a result of the COVID-19 pandemic. In responding to this decline, it appears the USPS has chosen to cut costs by ending employee overtime, and requiring all trucks to leave plants on time, regardless of whether all mail is loaded onto the trucks. This new policy will likely delay mail delivery. If the policy is still in effect in October and November, it could delay the delivery of mail-in ballots.

Id. ¶¶ 16-17; *see also* dkt. 503, Sherman Reply Decl., Ex. 6, U.S. Postal Service Mandatory Stand-up Talk (July 10, 2020).

The USPS OIG Report on the April 7 election absentee ballot delivery failures and delays is consistent with Mr. Stroman's account. *See* dkt. 503, Sherman Reply Decl., Ex. 1. It reviews and tries to offer explanations as to what went wrong in April and then draws some conclusions and makes some recommendations. The bottom-line conclusion in this report is not reassuring at all:

> *The Postal Service generally followed its procedures for processing and delivering ballots for the Wisconsin spring election and presidential preference primary of April 7, 2020.* However, we identified opportunities to improve communication and coordination between the Postal Service and election offices and strengthen adherence to procedures.

> We also identified potential nationwide issues integrating election office's vote by mail processes with the Postal Service processes which could impact future elections. Specifically, for ballots processed in the Milwaukee area, we found issues related to the timeliness of ballots being mailed to voters, correcting misdelivery of ballots, an inability to track ballots, and inconsistent postmarking of ballots. Nationally, we noted potential concerns with the deadlines set by the states to request absentee ballots, ballots postmarks, ballots mailed without mail tracking technology, and the ratio of Political and Election Mail coordinators to election offices in certain locations.

Id. at 3-4 (emphasis added). The USPS OIG report concludes that USPS by and large followed its procedures, and that they need to focus on communication and coordination. This summary does not state unequivocally that the task of processing mail-in absentee ballots in the November general election can be accomplished; nor does it forcefully argue that absent increased resources and staff, they will be unable to meet the demand for absentee ballot delivery and return. Instead, it indicts state election laws and notes "nationwide issues integrating election office's vote by mail processes with the Postal Service processes which could impact future elections." *Id*. at 3. The Wisconsin-specific recommendations, three in total, just call for better communication and coordination with WEC and municipal clerks' offices and use of the political mail log for ballot mail. *Id*. at 5-6. Moreover, these reforms are only just beginning less than 90 days out from the start of voting in Wisconsin, and there is no evidence in the record that they will cure the problems seen in Wisconsin. The USPS OIG report concludes by noting inherent structural tensions between late absentee ballot request deadlines and the logistical difficulties USPS is facing. *Id*. at 6-7. Finally, it is also worth noting that, as of July 20, the WEC had still received no response to its inquiries with the USPS: "Following the April 7 Election, WEC staff sent a letter to local, state, regional and national USPS representatives regarding ballots not received and outgoing ballots returned to municipalities, to which there has not been a response." *See* dkt. 446, Wolfe Decl. ¶ 28. This is does not bode well for the new plan to improve communication between WEC and USPS.

Further, Wisconsin has already had a history of problems with USPS mail delivery. The seven lowest-performing mail processing centers examined in the wake of the 2018 election cycle, including facilities in Florida, Ohio and Wisconsin, delivered an average of 84.2% of election mail on time. *See* dkt. 503, Sherman Reply Decl., Ex. 8, U.S. Postal Service Office of the Inspector General, *Service Performance of Election and Political Mail During the 2018 Midterm and Special Elections*, Report Number 19XG010NO000-R20 (Nov. 4, 2019), https://www.uspsoig.gov/sites/default/files/document-library-files/2019/19XG010NO000.pdf. This is part of a nationwide trend. The U.S. Post Office has recently struggled to meet its own goals for on-time delivery of first-class mail. Last year, the USPS delivered only 80.88 percent of its three-to-five-day single-piece first-class mailings on time, missing its goal by 14.37 percentage points. Dkt. 503, Sherman Reply Decl., Ex. 9, Postal Regulatory Comm'n, *Analysis of the Postal Service's FY 2019 Annual Performance Report and FY 2020 Performance Plan* (Jun. 1, 2020), https://www.prc.gov/docs/113/113321/FY%202019%20Report%20FY%202020%20Plan.pdf. Even USPS's own website states that "the Postal Service cannot guarantee a specific delivery date or alter standards to comport with individual state election laws." Dkt. 503, Sherman Reply Decl., Ex. 10, *U.S. Postal Service Provides Recommendations for Successful 2020 Election Mail Season*, United States Postal Service (May 29, 2020), https://about.usps.com/newsroom/national-releases/2020/0529-usps-provides-recommendations-for-successful-2020-election-mail-season.htm.

Third, as further evidence of these systemic delivery problems, it must be noted that in state after state this year, from Wisconsin to Pennsylvania to Indiana to Maryland to Ohio to New York, election officials and the U.S. Postal Service have collectively failed to timely deliver mail-in absentee ballots to voters in *lower-turnout* primary elections. In Pennsylvania, the day before the June 2 primary election, Delaware County announced that, "As of June 1, the County has sent out approximately 80,000 absentee or mail-in ballots. The County has made arrangements with the United State Postal Service to send 6,000 ballots today. Those applications will be delivered to homes by tomorrow. There are approximately 400 ballots that will not be mailed due to the timing and staffing constraints. Residents who do not receive their mail in ballot can vote provisionally at their polling location." Dkt. 503, Sherman Reply Decl., Ex. 11, June 1 Update on the Primary Election in Delaware County, Delaware County, Pa. (June 1, 2020), https://www.delcopa.gov/publicrelations/releases/2020/primaryupdate_june1.html. In Indiana, the Marion County Clerk informed the Secretary of State that they had "experienced significant delays with the U.S. Postal Service in mailing ballots" and there had "been instances in which a ballot [was] received by the voter two weeks after" it was mailed. Dkt. 503, Sherman Reply Decl., Ex. 12, Letter from Marion County Clerk Myla Eldridge to Indiana Secretary of State Connie Lawson (May 28, 2020), https://fox59.com/wp-content/uploads/sites/21/2020/05/5.28.20.-Clerk-Eldridge-Second-Letter-to-Secretary-Lawson.pdf. "There was a delay in the post office delivery of many ballots to Frederick County voters from the Maryland State Board of Elections." Dkt. 503, Sherman Reply Decl., Ex. 13, *Frederick County Ballots Mailed for June 2, 2020 Presidential Primary Election Ballot*, Frederick County Board of Elections (May 13, 2020), https://www.frederickcountymd.gov/DocumentCenter/View/326089/Ballot-Mailing---Wrong-Date-on-Ballot---5-13-2020. "In Ohio, more than 37,000 absentee ballots were mailed out on the Saturday before the Tuesday primary, a time frame that the USPS reported a 'high likelihood' that ballots would not arrive on time." Dkt. 503, Sherman Reply Decl., Ex. 14, Jennifer Friedmann, Mohit Mookim, Michelle Ly, Cristopher Maximos, and VinhHuy Le, "The 2020 Ohio Primary." *Healthyelections.org* (June 16, 2020). https://healthyelections.org/sites/default/files/2020-

07/Ohio%20Primary%20Memo(2).pdf. "And more than 29,000 residents of New York City who requested a ballot [had] yet to receive a ballot or envelope from the city's Board of Elections with three days left before primary elections on Tuesday." Dkt. 503, Sherman Reply Decl., Ex. 15, Nick Corasaniti & Stephanie Saul, *Vote-by-Mail Ballot Requests Overwhelm New York City Elections Agency*, N.Y. Times (June 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/nyc-vote-by-mail.html.

Fourth and finally, even if the Court were to conclude that the anticipated injury *as to the individual Plaintiffs* in this action is speculative or unlikely to occur, Plaintiffs League of Women Voters of Wisconsin ("LWVWI" or "the League") and Wisconsin Alliance for Retired Americans ("Wisconsin Alliance") (collectively, "the Organizational Plaintiffs") will necessarily be forced to help and educate voters who are facing disenfranchisement due to ballot delivery failures and will necessarily suffer a constitutional injury due to the state's failure to offer fail-safe alternative delivery methods such as online access and downloading via the MyVote portal or email delivery. This diversion of resources, staff time, and money from core mission activities would not occur but for the unconstitutional failure to offer domestic civilian absentee voters electronic transmission options to receive their mail-in absentee ballots, and therefore confers standing on LWVWI and Wisconsin Alliance. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding an organization suffers an injury in fact when defendant's actions impede the organization's efforts to carry out its mission requiring it to "devote significant resources to identify and counteract" legal violations).

3. Witnessing

Given the many ballots rejected in the April 7 election for lack of a witness, and the fact that the Organizational Plaintiffs have already diverted and will further divert resources as a result of the requirement, their harm is concrete, imminent and not speculative. LWVWI and Wisconsin Alliance have standing to challenge the witness requirement because they have already expended resources, time, and money educating and helping voters that would not need help but for the unconstitutional enforcement of the witness requirement and will continue to do so through the November general election. *See* dkt. 380, Cronmiller Decl. ¶¶ 9, 11-12; dkt. 381, Mitchell Decl. ¶¶ 11-14. *Havens Realty*, 455 U.S. at 379; *see also Common Cause Indiana,* 937 F.3d at 952 (agreeing with sister circuits which "upheld the standing of voter-advocacy organizations that challenged election laws . . . [and] demonstrated the necessary injury in fact in the form of the unwanted demands on their resources.").

b. The *Gear* Plaintiffs' claims are ripe.

In assessing the ripeness of a plaintiff's claims, courts must evaluate "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs v. Gardner*, 387 U.S. 136 (1967)); *Texas v. United States*, 523 U.S. 296, 301 (1998). "[L]egal questions are 'quintessentially fit' for judicial decision." *E.F. Transit v. Cook*, 878 F.3d 606, 610 (7th Cir. 2018) (quoting *Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cty.*, 325 F.3d 879 (7th Cir. 2003)). In its June 10 Order, this Court set forth the *Abbott Labs* ripeness test and added that:

> A claim is not fit for judicial review if "the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts." *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992). In evaluating a claim of hardship, courts consider whether "irremediably adverse consequences" would flow from requiring a later challenge. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967).

Democratic Nat'l Comm. v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 3077047, at *3 (W.D. Wis. June 10, 2020).

Here, as this Court held just last month in the consolidated *DNC v. Bostelmann* case, the Plaintiffs' claims and requests for relief are ripe for adjudication as the restriction on the requested alternative fail-safe ballot delivery methods to military and overseas voters and the witness certification requirement are nearly certain to be enforced in the November general election and fit for judicial review at this time. *Id*. ("[T]he court concludes 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.").

The Intervenor-Defendants argue that no harm will come to Plaintiffs if the Court determines their claims are not ripe for adjudication now, and that they can bring an as-applied challenge at a later date if their ballots do not arrive in the mail. *See* dkt. 454 at 52-53. But as the Court already has signaled in voicing its concerns about *Purcell* and the timing of granting relief too close to Election Day, Plaintiffs would face "irremediably adverse consequences" if forced to bring these claims as later as-applied challenges. *Toilet Goods Ass'n*, 387 U.S. at 164. Facing the *Purcell* headwinds legally and the extreme practical difficulties of reprogramming MyVote and WisVote and training municipal clerks on new procedures just days before a high-turnout election, Plaintiffs would not stand much of a chance of persuading this or any Court to order the proposed fail-safe options at that late date, and the Intervenor-Defendants know this. This Court explained this in its June 10 Order:

> As was amply demonstrated in the fire drill leading up to the April election, the longer this court delays, the less likely constitutional relief to voters is going to be effective and the more likely that relief may cause voter confusion and burden election officials charged with its administration. Further, any delay may ultimately preclude relief under the *Purcell* doctrine, which cautions against court intervention in imminent elections. As plaintiffs point out, the Legislature appears to propose a rule in which it would either be "too soon" or "too late" to enforce voting rights.

Democratic Nat'l Comm. v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 3077047, at *4 (W.D. Wis. June 10, 2020) (citations omitted). This Court also noted that "[i]n similar cases, other courts have found challenges to election laws to be ripe even in the face of various factual uncertainties", explaining:

> In *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), the Fourth Circuit held that a challenge to Virginia's open primary law was ripe, even though it was uncertain whether a candidate would run in the primary and be subjected to the challenged provision. *Id*. at 319. The court reasoned that "[w]aiting until at least two candidates file for office likely would provide insufficient time to decide the case without disrupting the pending election," causing the court to ultimately conclude that "[t]he case is fit for judicial review despite this uncertainty." *Id*. at 319-20. Similarly, in *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the Eleventh Circuit concluded that plaintiffs' challenge to a Florida voter registration law was ripe even though it had not yet been enforced. *Id*. at 1164. According to that court, potential voters would face hardship if they had to wait until after their applications had been rejected to challenge the statute, as "there may not be enough time to reach a decision on the merits before the actual election." *Id*. The court further observed that state election officials would likewise be burdened if the court were to enjoin enforcement of the challenged statute weeks or days before the election. *Id*.

Id.

Nothing has changed about the ripeness doctrine since then. Now—with the benefit of months, not mere days, before an election—there is a real possibility of affording adequate and timely relief to voters who will face disenfranchisement from the twin effects the pandemic is having on safe voter access to a ballot and the operation of election administration and the postal service. Defendants argued in the spring that the consolidated Plaintiffs' claims were unripe; they have argued the same this summer; and they will continue to argue unripeness through the fall until such time as they would argue *Purcell*—in their view, Plaintiffs are always either too late or too early. This argument has been repeatedly rejected and cannot be credited now.

Intervenor-Defendants imagine that the ripeness doctrine is more stringent and unforgiving than the likely irreparable injury factor in *Winter*, but the law is otherwise. *See, e.g.*, *Gov't*

Suppliers Consolidating Servs., Inc. v. Bayh, 734 F. Supp. 853, 861 (S.D. Ind. 1990) ("Although there exists a ripe controversy with respect to each of the three statutory provisions under attack, this is not to say that the timing is appropriate for a preliminary injunction decision on each of the provisions. The doctrine of ripeness addresses only a court's jurisdictional authority to hear a case. The decision to grant a preliminary injunction involves myriad additional factors, including the timing of the threatened conduct and the immediacy and irreparability of the harm likely to result."). Ripeness is a more lenient standard than the *Winter* factor of likelihood of irreparable harm for issuance of a preliminary injunction. And even with respect to the *Winter* factors, Intervenor-Defendants seem to misunderstand the test, which calls for a *likelihood* of irreparable harm, not certainty: "The *Gear* Plaintiffs similarly admit that they believe it only 'likely' that 'Wisconsin election officials will remain unable to satisfy . . . demand for mail-in absentee ballots in the fall.'" *See* dkt. 454 at 122.

c. The *Gear* Plaintiffs' injuries are directly traceable to and redressable by Defendants.

First, there can be no reasonable dispute that for the limited and targeted declaratory and injunctive relief the *Gear* Plaintiffs seek in their First Amended Complaint against certain specific Wisconsin statutes with statewide application, Wis. Stat. § 6.87(3)(d) and Wis. Stat. § 6.87(4)(b)1., the WEC Defendants are the proper parties. The Intervenor-Defendants nonetheless appear to argue that because municipal clerks are doing the work of preparing and mailing out absentee ballots, they must be sued to enjoin state laws governing that process. *See* dkt. 454 at 103 ("Even assuming Judge Adelman's vacated decision could be persuasive authority on points not discussed by the Seventh Circuit in Luft, whatever enforcement authority the Commission has on *statewide rules like photo ID* has no bearing whatsoever on those aspects of election administration unambiguously allotted *only to local officials*, such as those for staffing and equipping polling places, preparing and delivering ballots, and the like, see, e.g., Wis. Stat. §§ 5.25(2), 7.15(1)(a), (b), (c), (cm), (k).") (emphasis added). As shown below, this is incorrect for the simple reason that WEC administers Wisconsin election laws and creates, deploys, oversees, and trains municipal clerks on how to use the infrastructure necessary to prepare and mail absentee ballots.

An injury can be traced to a defendant when they contribute – even modestly – to a plaintiff's injury. See *Bennett v. Spear*, 520 U.S. 154, 171 (1997); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.) (holding that Article III "requires no more than de facto causality"); *Banks v. Secretary of Ind. Family and Soc. Serv. Admin*., 997 F.2d 231, 239 (7th Cir. 1993) (noting that standing can exist even the causal connection between the defendant's action and the plaintiff's injury is "weak"). Moreover, even state inaction can be constitutionally cognizable if it produces a "coercive or determinative effect" on the behavior of third parties. *Bennett*, 520 U.S. at 169; *see also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005). Here, that bar is clearly met. WEC enforces Wisconsin election laws that govern how municipal clerks process and deliver absentee ballots and creates the infrastructure in the MyVote database to do so; the latter take their direction, training, and supervision on Wisconsin laws and policies from the former. *See, e.g.*, dkt. 444 at 16 ("The WEC is required to conduct regular information and training meetings for county and municipal clerks, as well as other election officials. Wis. Stat. § 5.05 (7)."); *id*. at 8 (describing WEC's directives to and communications with municipal clerks). Additionally, WEC indisputably manages, upgrades, and trains clerks on how to use WisVote and MyVote, the statewide voter information database and its public interface, respectively, *see, e.g.*, *id*. at 6-7 (describing WEC's upgrades to WisVote and MyVote), and if Plaintiffs' requested relief were granted, it is those systems that would need to be modified. Municipal clerks use but are not the architects of those systems. Indeed, the

Intervenors themselves concede that WEC plays an instrumental role in whether or not ballot delivery is successful. Dkt 454 at 41 ("[T]he Commission . . . ha[s] already taken significant steps to ensure timely absentee-ballot delivery.").

As such, the Intervenor-Defendants' assertion that Plaintiffs "admit that '[m]unicipal clerks prepare absentee ballots for delivery to voters that request them,' that municipal clerks and the USPS are responsible for delivery and return of mailed ballots, Dkt. 213-1 ¶¶ 71, 74, as is clear under Wisconsin law, see, e.g., Wis. Stat. § 7.15(1)(a), (b), (c), (cm), (k)," dkt. 454 at 135, is of no legal significance. For statewide laws, systems, and procedures, the WEC Commissioners and Defendant are the proper defendants. Even the WEC Defendants do not argue to the contrary, contending only, as Plaintiffs of course agree, that an order from this Court is required before WEC could make the changes the *Gear* Plaintiffs have requested and train municipal clerks on them. *See* dkt. 444 at 32. Accordingly, the constitutional violations alleged are directly traceable to the Defendants and redressable by an injunction that runs against them enjoining these particular statutory requirements in part, and mandating that Defendants utilize alternatives to both the restricted ballot delivery methods for regular absentee voters and alternatives to the witness requirement.

Second, Intervenor-Defendants Republican National Committee and Republican Party of Wisconsin argue that there is no state action that can be challenged here, just a virus wreaking havoc. This is plainly untrue, as Wisconsin's state legislators have made a choice not to offer alternatives to regular domestic civilian voters in Wisconsin to cast a ballot, should their absentee ballot not arrive on time. Importantly, if this Court granted Plaintiffs their requested relief, it would also by no means be the first time that a federal court has found an unconstitutional burden on the right to vote under the First and Fourteenth Amendments to the U.S. Constitution in the context of a natural disaster. When Hurricane Matthew struck Florida just weeks before the November 2016 general election, a federal court ordered an extension of the voter registration deadline by a week "to afford a full opportunity to register for those who may have been affected by Hurricane Matthew's destruction." *Fla. Democratic Party v. Scott*, No. 4:16-CV-626-MW/CAS, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016). The first claim in Plaintiffs' Complaint was an *Anderson-Burdick* claim. *See* dkt. 160-1.

Similarly, in *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1344–45 (S.D. Ga. 2016), the plaintiffs argued:

> Plaintiffs contend that the mandatory evacuations imposed due to hurricane Matthew prevented potential voters in Chatham County from registering for the upcoming election on November 8, 2016. The registration deadline in Georgia is October 11, 2016. However, the Chatham County Board of Elections office was closed from October 6 to October 12, 2016. Moreover, post office closures and the suspension of mail service during this period also potentially prevented individuals from submitting their registration applications. Finally, many individuals were potentially unable to register, either in person or electronically, due to evacuation or recovery efforts. Given all these events, Plaintiffs argue that Defendants' failure to extend the voter registration deadline violates the 1st and 14th Amendments of the United States Constitution . . .

Id. at 1344–45. Their first claim was an *Anderson-Burdick* claim. *See* dkt. 160-2. The Court granted Plaintiffs' request for relief pursuant to their *Anderson-Burdick* claim and extended the voter registration deadline for a week. *Id*. at 1345–46. While the Court acknowledged that the extension "would present some administrative difficulty," it nevertheless ultimately concluded that

> those administrative hurdles pale in comparison to the physical, emotional, and financial strain Chatham County residents faced in the aftermath of Hurricane Matthew. Extending a small degree of common courtesy by allowing impacted individuals a few extra days to register to vote seems like a rather small consolation on behalf of their government.

Id. The same reasoning holds true here where public health authorities have urged Plaintiffs to stay at home, with very limited exceptions, and avoid all unnecessary interactions or gatherings with people not in their households. Whether it is a mandatory evacuation or a mandatory quarantine, federal courts have found an undue burden on the right to vote under the First and Fourteenth Amendments where, as here, a natural disaster not of the state's making interacts with a *preexisting* state law or policy to create a severe burden on the right to vote. And again, for the purposes of Article III standing, the defendant need not be the sole cause of plaintiff's injury. *Norton*, 422 F.3d at 500. So long as the government's regulatory choice constitutes a but-for cause of the constitutional deprivation, Plaintiffs' injury is traceable to it.

II. Merits

a. The *Gear* Plaintiffs are likely to prevail on the merits of their *Anderson-Burdick* claims and will suffer irreparable harm, absent a preliminary injunction.

1. *Luft* does not foreclose or even weaken the *Anderson-Burdick* claims the *Gear* Plaintiffs have asserted.

Luft v. Evers, 963 F.3d 665 (7th Cir. 2020), a case decided on a pre-pandemic record, in no way forecloses this action. "Courts weigh these burdens against the state's interests by looking at the whole electoral system," *id*. at 671-72, but if no part of the election code addresses a particular burden or outright denial of the right to vote, as here, then unrelated provisions such as no-excuse absentee voting and Election Day voter registration provide no defense against an *Anderson-Burdick* claim. When voters inevitably face disenfranchisement due to the confluence of absentee ballot delivery failure or delay and a Covid-19 risk factor that makes voting in person unduly dangerous, then there is no part of the Wisconsin election code that "offsets" or cures this constitutional violation, as Defendants contend. *See* dkt. 454 at 25-26; *see also id*. at 128 ('Even a burdensome individual election law passes constitutional muster if other provisions in the State's election code allow voters to exercise their franchise by other means, with reasonable efforts."). Assuming the mail-in absentee ballot request deadline has not passed, that voter's only recourse is to request a *replacement* mail-in absentee ballot, again by mail delivery, and to hope that it arrives faster than the first ballot they requested. Of course, many voters will reasonably continue to wait for their initially-requested mail-in ballot's arrival until after the deadline to request a ballot has passed and/or when it is far too late in the game to guarantee that a ballot can arrive timely in the mail. They will also reasonably conclude that they cannot safely vote in person due to Covid-19 and its transmission via aerosolized viral particles. *See infra* at 8-13. Because there is no part of the Wisconsin election code that can remedy this problem, *Luft*'s instruction to analyze the election code holistically offers the Intervenor-Defendants no aid. In any event, Plaintiffs' counsel have reviewed the Wisconsin election code holistically and find that the entire scheme fails to safeguard the right to vote in the context of this pandemic, necessitating this Court's intervention and fail-safe options.

The Intervenor-Defendants fail to mention or address two of Plaintiffs' three requested fail-safe options: permitting regular absentee voters to access and download their mail-in absentee ballots online at myvote.wi.gov or to cast a Federal Write-in Absentee Ballot ("FWAB"). Perhaps this omission is inadvertent, or perhaps, in mentioning only email delivery,[11] they are trying to persuade the Court that *Luft*'s reinstatement of the state law restriction on ballot delivery by email and fax to anyone but military and overseas voters forecloses all of these options which involve electronic transmission of a mail-in absentee ballot. If it is the latter, nothing could be further from the truth. The claim in the *One Wisconsin Institute* case attacking Wis. Stat. § 6.87(3)(d)'s restriction of email and fax delivery to military and absentee voters was based purely on the disparate treatment, not the burdens imposed upon voters trying to vote safely during a pandemic, as in this case. *Luft*, 963 F.3d at 676 ("The district court determined that 2011 Wis. Act 75, which

[11] The Intervenor-Defendants also mention fax delivery, but Plaintiffs have not sought to extend fax delivery to regular absentee voters.

prohibits election officials from sending absentee ballots via email or fax to all but a few categories of voters, Wis. Stat. § 6.87(3), violates the Constitution. 198 F. Supp. 3d at 948. We reverse this aspect of the decision. The district court identified some voters who might be inconvenienced by this rule—road warriors who may be out of state, or leisure travelers who don't plan ahead."). The district court's opinion in *One Wisconsin Institute, Inc. v. Thomsen* makes this even clearer: "Act 75, passed in 2011, prevents municipal clerks from faxing or emailing absentee ballots, except to military or overseas electors. Plaintiffs contend that this provision unjustifiably burdens voters who are traveling but who do not qualify as overseas electors." *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019), *and aff'd in part, vacated in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). The *Gear* case is focused on the burdens facing all voters trying to cast their ballots safely during the pandemic, but particularly those who due to underlying comorbidities and age are more vulnerable to Covid-19. This is not a challenge based on the disparate availability of email delivery but rather based on the unique challenges of voting during this pandemic and the evidence of what has happened to election administration and mail delivery of ballots during this pandemic. This evidence was of course not before the Court when it decided *One Wisconsin Institute*.

2. The *Gear* Plaintiffs' proposed remedy for mail-in absentee ballot delivery failures is narrow, beneficial to voters and municipal clerks alike, feasible, and secure.

Because the particular remedies the *Gear* Plaintiffs have proposed are directly relevant to the *Anderson-Burdick* analysis balancing the voters' burdens against and any purported state interest, Plaintiffs discuss the relief first and then the constitutional inquiry second. The claim cannot be considered in the abstract, as Defendants prefer. As the *Gear* Plaintiffs must consider the whole Wisconsin election code, so too the Intervenor-Defendants must consider the *whole claim and the whole proposed remedy*. *See Crawford*, 553 U.S. at 199-200 (considering whether the burden on some voters is "sufficient to establish petitioners' *right to the relief they seek*" and concluding otherwise) (emphasis added); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 596 (6th Cir. 2012) (considering and rejecting state's argument that a district court's "limited remedy" will facilitate fraud). Intervenor-Defendants' argument to the contrary, dkt. 454 at 64-65, which seeks to separate cause of action from the prayer for relief, is contradicted by the Supreme Court's decision in *Crawford*, and unsupported by any other case, including *Luft*, as demonstrated by their failure to cite anything after the crucial phrase "not the proposed remedy from a challenger to the law." *See* dkt. 454 at 64.

The *Gear* Plaintiffs have endeavored to propose a remedy that will benefit both voters and municipal clerks' offices alike. The fail-safe options, all of which involve alternative ballot delivery methods that rely on electronic transmission of a ballot, would cure the constitutional violation by giving voters safe, easy, and fast ways to access a ***replacement*** mail-in absentee ballot, while minimizing any additional burden on clerks' staff to process and send replacement ballots by mail. Fail-safe measures are vital, familiar tools in guaranteeing the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193 (2008) (citing the Help America Vote Act, 42 U.S.C. § 1543, which provided fail-safe provisional ballots for those voters whose names do not appear on rolls, did not meet identification requirements, or whose eligibility was challenged); *see also Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001) (citing National Voter Registration Act, 52 U.S.C. § 20501, which provides several fail-safe provisions, including for those who need to update their registration or address on election day in federal election).

i. The proposed relief is narrow.

As Plaintiffs stated in their opening brief, this is a last resort, not a first resort. In addition to limiting the relief to regular absentee voters who have previously requested but not received a mail-in absentee ballot by mail delivery, Plaintiffs have further proposed that extending MyVote access to a mail-in ballot to regular voters can be (1) limited to a single week, for instance the last seven days of the election up to and including Election Day, and (2) limited to just those voters who have requested a ballot a certain number of days (perhaps in the range of 7 to 10 days, given the USPS's anticipated delivery times) in advance of their exercise of these fail-safe delivery methods. These restrictions on the proposed remedy would generally restrict the pool of regular absentee voters who could exercise these fail-safe options and specifically restrict the voters eligible for these back-up options to those who had diligently requested their mail-in absentee ballot more than a few days in advance of Election Day.

ii. The proposed relief is mutually beneficial.

Not only will this relief benefit voters facing disenfranchisement due to delivery failures, but several municipal clerks from large municipalities have endorsed this particular form of relief for the additional benefits it would afford clerks who will inevitably have to process a substantial volume of replacement ballot requests and mail those ballots out. Current and former clerks from Madison, Racine, and Kenosha have all endorsed extending online access and downloading through the MyVote portal to regular absentee voters. Dkt. 382, Declaration of Maribeth Witzel-Behl ("Witzel-Behl Decl.") ¶ 15; Dkt. 383, Declaration of Tara Coolidge ("Coolidge Decl.") ¶¶ 8-12; Dkt. 384, Declaration of Debra Salas ("Salas Decl.") ¶¶ 11-13, 17-18. As opposed to mail delivery—or even email delivery—of a replacement mail-in ballot, this back-up option would only require the municipal clerk's staff to cancel the prior request for a mail-delivered ballot. Dkt. 423, Sherman Decl., Ex. 2, Wolfe Tr. at 143:22-144:17; *see also* Dkt. 382, Witzel-Behl Decl. ¶ 12; Dkt.

383, Coolidge Decl. ¶ 11; Dkt. 384, Salas Decl. ¶ 14; dkt. 423, Sherman Decl., Ex. 2, Wolfe Tr. at 137:5-12 (noting that municipal clerks "do nothing" and "it's all a voter initiated process"); dkt. 489, Kehoe Tr. at 23:8-16 (same). Furthermore, as Robert Kehoe, the WEC's Training and Technology Director testified at his deposition, their photo ID would have been previously verified by the clerk's office with the initial request for a ballot by mail delivery. *Id*. at 7:18-9:6; *see also* dkt. 384, Salas Decl. ¶ 14.

iii. The proposed relief is feasible.

Though WEC Training and Technology Director Robert Kehoe noted in his deposition that there are some open questions to resolve, he largely believed it was feasible to upgrade WisVote and MyVote so that a limited number of regular absentee voters who need a fail-safe method to secure a replacement ballot can download that ballot at the MyVote portal, just like military and permanent overseas voters do. The code or programming logic already exists for: the full range of absentee ballot delivery methods that military and overseas voters enjoy, including the MyVote download option, dkt. 489, Kehoe Tr. at 20:7-21:1; the functionality of the online access and downloading of mail-in absentee ballots through the MyVote portal, at least for military and overseas voters, *id*. at 23:17-22; determining when photo ID is required or already on file for regular absentee voters, *id*. at 18:20-19:2; and both voter-initiated and clerk-initiated cancellation of prior absentee ballot requests, so the voter can request a replacement with a different delivery method, *id*. at 43:1-4, 50:6-12. Mr. Kehoe testified as follows:

> Q. Okay, the issues we identified above seem to indicate that the Commission has the ability to at least quickly implement some features with the logic Plaintiffs are asking for, correct?
>
> A. Yes.
>
> Q. And that you would not be starting from scratch and extending this capability for online access and downloading to all regular absentee voters, correct?

A. That's correct. We would certainly be able to use some of the existing processes.

Id. at 45:17-46:7. Additionally, Mr. Kehoe explained that for this proposed upgrade extending the MyVote portal ballot download's functionality, "the technical processes are not terribly elaborate" and "[f]rom a technical and development standpoint, [it] wouldn't be terribly difficult." *Id*. at 49:22-50:1; 53:4-6. In terms of WEC's bandwidth, the IT staff has already completed complex upgrades to WisVote "over a matter of weeks." *See* dkt. 489, Kehoe Tr. at 39:3-40:11; *id*. at 40:12-42:22; *id*. at 44:14-18. Even subsequent "testing to include load testing," *id*. at 68:13, which simulates user access and tests the traffic WisVote and MyVote can withstand, *id*. at 64:2-67:8, would only take "a week," *id*. at 67:9-17. The WEC's IT staff could accomplish this project in an estimated "couple hundred hours of work," which would be divided amongst 3 to 4 staff members. *Id*. at 71:18-21. Ultimately, while noting some questions for resolution and trade-offs over the course of his deposition, Mr. Kehoe's bottom-line conclusion on Plaintiffs' proposed extension of the MyVote access and downloading function to regular voters seeking a *replacement* absentee ballot was: "But is it possible, absolutely, it is possible." *Id*. 72:7-8.

Furthermore, Intervenor-Defendants' objections to this proposed remedy as unduly burdensome are directly contradicted by the people in the best position to know: municipal clerks from large municipalities who processed enormous volumes of mail-in absentee ballots in the April election. Municipal clerks (two current, one former) from three of Wisconsin's largest municipalities, Kenosha, Madison, and Racine, have all endorsed this proposed relief, citing the *reduction* in their and their staffs' administrative burdens in processing *replacement* ballot requests in the final weeks of the election. Dkt. 382, Witzel-Behl Decl. ¶ 10; dkt. 383, Coolidge Decl. ¶ 8; dkt. 384, Salas Decl. ¶ 12. They acknowledge the increased burden of duplicating or re-making absentee ballots on the back end during canvassing, but each believes that this is far outweighed by the benefits to voters and the reduced administrative burden on the front end. Dkt. 382, Witzel-Behl Decl. ¶ 14; Dkt. 383, Coolidge Decl. ¶ 10, Dkt. 384, Salas Decl. ¶ 16. And Racine City Clerk Tara Coolidge urges a cut-off before Election Day, so that her office has "advance notice of how many downloaded absentee ballots have been requested and are to be expected for each polling location," in which case she "do[es] not foresee any difficulties in staffing polling places to adequately process such ballots once they are cast." Dkt. 383, Coolidge Decl. ¶ 9. Accordingly, any administrative burden on the back end when these ballots are received is far outweighed by the reduced burden on the front end when clerks will struggle to mail out replacement ballots while conducting in-person absentee voting and preparing for Election Day, and by the voters' interest in casting a ballot safely. These fail-safe measures will also alleviate the strain on early voting and Election Day polling sites, which also benefits election administrators and voters alike. Dkt. 382, Witzel-Behl Decl. ¶ 14; dkt. 383, Coolidge Decl. ¶ 10; dkt. 384, Salas Decl. ¶ 17. The Intervenor-Defendants have presented zero declarations from municipal clerks taking a different view of the relief the *Gear* Plaintiffs seek.

iv. The proposed relief is secure

WEC Training and Technology Director Mr. Kehoe has testified that to authenticate regular absentee voters, it is "certainly a possibility" that they could use a second round of photo ID verification. Dkt. 489, Kehoe Tr. at 34:20-35:8. He also noted that he did not have concerns "about the concept" of extending online access to mail-in ballots to regular voters. *Id*. at 74:1-2. Because no Defendant or Intervenor-Defendant challenges this, Plaintiffs will simply refer the Court back to Matt Bernhard's declaration, *see* dkt. 371, and the discussion in Plaintiffs' opening brief in support of their motion for preliminary injunction. *See* dkt. 421 at 39-41. Plaintiffs will just note Mr. Bernhard's bottom-line conclusion:

> To summarize, because the pool of voters who will be eligible to receive their ballots through MyVote will be limited, said pool of voters will have already had their identities verified by their clerk, the window of time in which voters can access MyVote to request a replacement ballot is short, because fraud is known to be practically non-existent, and because Wisconsin has significant defense-in-depth measures to prevent fraud and other attacks, extending the usage of the MyVote portal to domestic civilian voters who do not receive their mail-in ballot in time to cast it in the November election does not pose a risk to the integrity of that election.

See dkt. 371, Bernhard Decl. ¶ 25. Additionally, all absentee ballot certificate envelopes bear a unique identifying number and bar code, and clerks will cancel the previously-requested absentee ballot, so there is a safeguard that prevents the voter from casting more than one ballot. Dkt. 423, Sherman Decl., Ex. 2, Wolfe Tr. at 149:15-151:7; 169:20-170:6; dkt. 384, Salas Decl. ¶¶ 11, 13.

Intervenor-Defendants of course oppose this relief, but beyond their legal arguments, they fail to even wrestle with the proposed remedy, including Plaintiffs' proposed limitations on who can exercise these fail-safe options and when. This kneejerk opposition is not based on any evidence or facts. They have not argued or marshalled any evidence to suggest that this proposed remedy is administratively infeasible or would harm the integrity of the November election in any way.

The sole exception is that the Intervenor-Defendants note that municipal clerks would have to duplicate replacement ballots delivered to voters by these alternative, electronic means of transmission so that the voter's choices can be scanned and tabulated, and that means additional work on the back end. But their arguments are self-defeating. The Intervenor-Defendants claim that absentee ballot preparation and delivery failures will be "extremely rare," dkt. 454 at 43. If that proves true—and all evidence points to the contrary—then it will be a very small addition to the regular workload of canvassing the ballots once the polls close and overwhelmingly worth the additional burden on the back end, in order to ensure voters, particularly those most vulnerable to

Covid-19, can cast a ballot in the November election. Intervenor-Defendants cannot have it both ways; it cannot be both “rare” and a monumental additional burden.

3. The *Gear* Plaintiffs are entitled to a preliminary injunction on their *Anderson-Burdick* claims.

i. Absentee Ballot Preparation and Delivery Failures

As a threshold matter, Plaintiffs will address the Intervenor-Defendants’ spurious argument that there is no constitutional right to vote absentee by mail. *See* dkt. 454 at 31-32. For this proposition, they cite *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), and the Fifth Circuit’s recent—and inapposite—stay order issued in *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). First, no Supreme Court or Seventh Circuit decision has ever endorsed the idea that the 1969 decision in *McDonald* fully supersedes *all* of the later-in-time jurisprudence that developed the *Anderson-Burdick* framework over the last 50 years, when a restriction on absentee voting is implicated. The district court in *Thomas v. Andino* persuasively rejected this argument, noting that where “‘other means of exercising the right’ to vote are not easily available,” restrictions on absentee voting do impede voting rights and must be analyzed under *Anderson-Burdick*. No. 3:20-cv-01552-JMC, --- F.Supp.3d ---- , 2020 WL at 2617329, at *17 n.20 (D.S.C. May 25, 2020). The court notes that:

> In-person voting, while still technically an available option, forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease. . . . [D]uring this pandemic, absentee voting is the safest tool through which voters can use to effectuate their fundamental right to vote. To the extent that access to that tool is unduly burdened, then no matter the label, “denial of the absentee ballot is effectively an absolute denial of the franchise [and fundamental right to vote].” *O'Brien*, 414 U.S. at 533, 94 S.Ct. 740 (Justice Marshall concurring). As such, in these circumstances, absentee voting impacts voters’ fundamental right to vote.

Id.

Moreover, the *Texas Democratic Party* stay order is readily distinguishable from the instant case because that case solely concerned a challenge to a single, age-based excuse for absentee voting, not a set of claims alleging that certain voting laws interact with the Covid-19 pandemic to severely burden voters' rights. Effectively, the Fifth Circuit was confronted with a broad discrimination challenge on behalf of all 18-to-64-year-old voters. *Texas Democratic Party*, 961 F.3d at 395, 402. Plaintiffs' claims here, by contrast, do not sound in discrimination. Though the Legislative Defendants would prefer a more abstract, pre-pandemic review, the challenged laws must all be analyzed against the epidemiological evidence of Covid-19's transmission dynamics and reviewed under *Anderson-Burdick*'s burdens-interests balancing test.

Having established that restrictions on mail-in absentee voting can violate voters' right to be free of undue burdens on their right to vote, Plaintiffs turn to the Intervenor-Defendants' arguments that the *Gear* Plaintiffs have not established an undue burden on their right to vote. If state lawmakers and executive officials need not wait until electoral fraud actually occurs to create and enforce requirements they believe will prevent such crimes, *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 (2008) (holding that a state has an interest in preventing voter fraud even when there is "no evidence of any such fraud actually occurring . . ."), then, by the same token, voters need not wait until they suffer grievous injury to their right to vote, health, or bodily integrity before securing injunctive relief. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (granting a motion for preliminary injunction because "Florida's signature-match scheme subjects vote-by-mail and provisional electors to *the risk of disenfranchisement* . . .") (emphasis added). To hold otherwise, as Intervenor-Defendants advocate, would eviscerate the *Anderson-Burdick* framework, privileging credible risks to the state's legitimate interest in protecting election integrity while dismissing credible risks to voters' rights to participate in their democracy. More generally, such disparate treatment of the competing interests would run counter to the Supreme Court's precedent which emphasizes that preliminary injunctive relief is warranted "to prevent a substantial risk of serious injury from ripening into actual harm." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994); *see also Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of a threatened injury to obtain preventive relief.") (citation and quotation omitted).

Because the Intervenor-Defendants have conflated some of their responses to the claims in these consolidated cases, they do not spend time analyzing the *Gear* Plaintiffs' *Anderson-Burdick* claims on their own terms. For instance, they do not clearly identify what state interest is advanced by failing to afford the relief Plaintiffs seek for voters who cannot vote safely at the polls and whose mail-in absentee ballot does not arrive timely in the mail. Where voters cannot safely vote in person due to the Covid-19 pandemic, the failure to prepare and deliver mail-in absentee ballots timely or at all constitutes a complete denial of a voter's right to cast a ballot. Denial of the right to vote is the most severe and total burden on the right to vote possible, so the state must identify a compelling interest. *Luft*, 963 F.3d at 672. Neither the WEC Defendants nor the Wisconsin Legislature have articulated what compelling interest supports refusing to offer alternative and fail-safe ballot delivery methods to voters whose ballots do not arrive timely in the mail. The relief requested is important here, because Plaintiffs have already suggested restricting the exercise of this last resort to only those voters who diligently requested their ballots some amount of time in advance, and to a specific time window, say just one week.

Accordingly, it is wholly inadequate for the Intervenor-Defendants to consider Section 6.87(3)(d)'s restriction of electronic transmission of ballots to military and overseas voters in the abstract, without considering the specific relief proposed and identifying the state interest or justification for rejecting it. The *Gear* Plaintiffs' claims cannot be divorced and analyzed separately from the proposed relief, because Plaintiffs are not seeking full invalidation of the challenged laws but limited alternatives to them. *See supra* at 32-33. Accordingly, the only legitimate state interests that can be asserted here must be directed to Plaintiffs' proposed fail-safe options. Under the dire circumstances of the Covid-19 pandemic, which are lightly mentioned in the Intervenor-Defendants' briefs, there is no "compelling," "important," or "legitimate" interest, *Burdick*, 504 U.S. at 434, that can justify this disenfranchisement and the refusal to implement these common-sense work-arounds. Given the proposed relief is narrow, feasible, beneficial to voters and clerks alike, and secure, *see supra* at 33-39, the effect the pandemic is having on the operation of election administration and mail delivery systems, as documented by the record in these consolidated cases, and the lack of any compelling state interest, it is unreasonable *not* to provide these fail-safes to voters, particularly those most vulnerable to Covid-19.

Plaintiffs cannot necessarily alleviate the burden by requesting their ballot immediately. *See* dkt. 454 at 29-30, 63. Despite Intervenor-Defendants' rosy assertions to the contrary, even requesting an absentee ballot by mail delivery weeks in advance of an election does not guarantee that the voter will receive it timely or ever. *See* dkt. 396, Braun Decl. ¶ 4 (requested mail-in ballot "well in advance" of the election); dkt. 387, Wood Decl. ¶ 4 (requested ballot on March 16); dkt. 389, Krejci Decl. ¶¶ 2,6 (requested ballot "within days of entering quarantine" in mid-March); dkt. 390, Harrell Decl. ¶ 5 (requested ballot in mid-March); dkt. 388, Ackerbauer Decl. ¶ 6 (same); dkt. 375, Bahr Olsan Decl. ¶ 6 (same); dkt. 391, Newby Decl. ¶ 6 (same); dkt. 376, Sheila Jozwik Decl. ¶ 4 (requested ballot on March 17); dkt. 377, Gregg Jozwik Decl. ¶ 4 (same); dkt. 374, Gary Fergot Decl. ¶ 5 (requested ballot on two weeks before election); dkt. 373, Diane Fergot Decl. ¶ 5 (same); dkt. 392, Lohrenz Decl. ¶ 5 (requested ballot on March 22); dkt. 394, Thompson Decl. ¶ 7 (requested ballot "at least three days before" the deadline). Some of these voters, despite their timely request, received their ballots too late to cast and deliver or postmark them by April 7th, dkt. 388, Ackerbauer Decl. ¶ 11, dkt. 394, Thompson Decl. ¶¶ 5, 7, while others never received them at all, even weeks or months later. Dkt. 372, Kohlbeck Decl. ¶ 9; dkt. 373, Diane Fergot Decl. ¶ 7; dkt. 374, Gary Fergot Decl. ¶ 7; dkt. 375, Bahr Olsan Decl. ¶ 6; dkt. 376, Sheila Jozwik Decl. ¶ 7; dkt. 377, Gregg Jozwik Decl. ¶ 7; dkt. 390, Harrell Decl. ¶ 5; dkt. 389, Krejci Decl. ¶ 7; dkt. 392, Lohrenz Decl. ¶ 5; dkt. 391, Newby Decl. ¶ 5; dkt. 387, Wood Decl. ¶ 6.

Whether or not, outside the context of the pandemic, Wisconsin could reasonably conclude under *Luft* that military and overseas voters face special problems in the voting process is not at issue, nor is the example of overseas voters used to identify a disparate treatment issue resolved by a rational basis analysis. Instead, here, the special circumstances of the confluence of the pandemic with a high-turnout election means that Plaintiffs' voting rights are denied, and the comparison to military and overseas voters merely demonstrates the feasibility of relief. While voting in Wisconsin outside the context of a pandemic may or may not be "easy," here, in this context, without relief it may be impossible. To remedy this disenfranchisement, the Court should afford relief to voters who otherwise cannot safely vote during the pandemic if they do not receive their duly requested mail ballot and there is no failsafe in place.

Lastly Republican National Committee and Republic Party of Wisconsin argue the Court cannot focus only on the inconvenience or disruption to certain *individual* voters. *See* dkt. 155 at 4 ("'Some [voters'] potential inconvenience does not permit a court to override the state's judgment that other interests predominate.'" (quoting *Luft*, 963 F.3d at 677)). They argue that the Court cannot focus only on the inconvenience or disruption to certain *individual* voters. But the ballot delivery failures encountered in the April 7 election were not isolated incidents, but were a systemic failure that disenfranchised at least thousands of voters. They add that states like Wisconsin must make legislative determinations for their population as a whole and could not possibly anticipate every potential effect on each and every voter. *Id*. But the combined effects of the pandemic on elections and the postal service are not felt by just a few random voters, but rather by thousands, if not tens of thousands come October and November. Six of the eight individual Plaintiffs have already been disenfranchised once this year and seek to prevent a recurrence.

Plaintiffs' are likely to suffer irreparable harm absente injunctive relief and likely to succeed on the merits of their *Anderson-Burdick* claim over absentee ballot preparation and delivery failures.

ii. **The Witness Requirement**

Contrary to Defendants' and Intervenor-Defendants' arguments, *Luft* does not foreclose Plaintiffs' request for a "reasonable efforts certification" in lieu of a witness signature. The witness requirement for mail-in absentee ballots has become unduly burdensome *specifically in the context of the Covid-19 pandemic* because its burdens, in this context, far outweigh its efficacy in advancing the state's interests. *See Thomas*, 2020 WL 2617329, at *19, *21. Eligible Wisconsin voters who live alone or who do not have an adult U.S. citizen in their household, and particularly those who are at higher risk from Covid-19, will struggle to safely satisfy the witness requirement through reasonable efforts. The unreasonable lengths to which self-isolating voters would have to go to satisfy the witness requirement during the pandemic are not justified by the minimal value to the State of the witness signature. *Luft*'s ruling on a facial voter ID challenge outside the pandemic context has no bearing on the fact-specific weighing of burdens in the current circumstances under *Anderson-Burdick.* Here, when there are reasonable alternatives such as this Court's own preliminary injunction providing a certification alternative or the Seventh Circuit's panel suggestion of remote witnessing with the recording of a witness name, without a physical signature from that witness, there is no justification for the witness signature requirement as it currently stands during the pandemic. Defendants point to no evidence in the record contrary to Plaintiffs' showing that the requirement holds only minimal benefits for law enforcement. *See* Tutor Decl. ¶¶ 6-9.

Other arguments raised by Intervenor-Defendants warrant further scrutiny. First, they propose ways that voters can satisfy the witness requirement, such as "using a family or household member and mail-delivery persons or medical professionals, having a witness observe over Skype or FaceTime, and signing after sanitizing and social distancing." Dkt. 454 at 54–55. The first recommended method overlooks voters who do not live with another U.S. citizen, and ignores the fact that few voters are likely to pay a copay and congregate in their doctors' offices for the purpose of getting their ballot witnessed—or that medical professionals would even assent to them doing so during a pandemic. Having a delivery person witness the ballot would seem to undercut the alleged anti-fraud purpose of the witness requirement, unless the delivery person is familiar with the voter and can say with certainty that the person completing the ballot is the person to whom the ballot was issued. Furthermore, applications like FaceTime and Skype require voters to have access to a computer with an Internet connection or a smartphone, but according to a study by Pew Research Center, 27 percent of Americans aged 65 or older, 18 percent of people making less than $30,000 a year, 15 percent of Black Americans, 14 percent of Hispanic Americans, and 15 percent of rural residents report not using the Internet.[12] These statistics demonstrate the burden that enforcing the witness requirement during the pandemic will place on certain populations, some of

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[12] Dkt. 503, Sherman Reply Decl., Ex. 16, Monica Anderson et al., *10% of Americans don't use the internet. Who are they?*, PEW RES. CTR. (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/.

which have been particularly hard hit by Covid-19. *See* dkt. 370, Murray Decl. ¶¶ 27-30. And the final suggestion—using sanitizing measures and social distancing—ignores information put out by the Wisconsin Department of Health Services, finding that novel coronavirus can survive on paper for up to five days,[13] and that using sanitizing products on one's ballot may spoil it.

Second, Intervenor-Defendants treat the state's interest in preventing voter fraud as absolute, without balancing the burden on voters during the Covid-19 pandemic, as required under the *Anderson-Burdick* standard. Dkt. 454 at 55. In so doing, they mischaracterize the evidence offered by LWVWI's executive director, Debra Cronmiller, in her declaration. Intervenor-Defendants state that her declaration "demonstrates the ease of compliance with the witness-signature requirement," *id.* at 56, when in fact Ms. Cronmiller's declaration said the exact opposite, explaining: "While League volunteers offering such assistance will attempt to assist using appropriate social distancing, I would expect that some voters will not be able to accept such help because of self-quarantine and other compromising situations. In addition, we do not have enough volunteers across the state to assist all of the thousands of voters who live alone in Wisconsin." Cronmiller Decl. ¶ 6. She also said that, for the first time in its century-long history, LWVWI had to divert resources to educate and assist voters in meeting the witness requirement, *id.* ¶ 9, thereby belying Intervenor-Defendants' arguments as to the alleged ease in satisfying the requirement during the pandemic. Tellingly, the Intervenor-Defendants offer no explanation for how the witness requirement protects against voter fraud, or why a witness signature is required and why adopting the Seventh Circuit's proposed alternative of remote witnessing would not serve the exact same purpose, at no risk to the voter. They do not discuss how, if at all, clerks ensure that witness

[13] Dkt. 503, Sherman Reply Decl., Ex. 17, *COVID-19: Avoid Illness*, WIS. DEPT. OF HEALTH SERVS., https://www.dhs.wisconsin.gov/covid-19/protect.htm (last visited July 31, 2020).

signatures belong to the person purporting to sign the voter's ballot, or how the signatures are otherwise used to detect fraud. *Crawford* may not require states to find the actual presence of voter fraud to justify imposing anti-fraud measures, but at a bare minimum, they should be required to justify the requirements and methods chosen. The Intervenor-Defendants have completely failed to do so here.

b. Unconstitutional Conditions Claim

The Intervenor-Defendants' only response to this claim is that the Plaintiffs' discussion of it is "lengthy" and "a legally irrelevant distraction." Dkt. 454 at 59. These are not substantive responses, and Intervenor-Defendants fail to develop them further. Plaintiffs will rest on their opening brief in support of this part of their preliminary injunction motion.

c. Title II of the Americans with Disabilities Act

Plaintiffs will not reiterate the standard for assessing ADA Title II claims but will instead address Intervenor-Defendants' proposed defenses to their ADA claim. Notably, they do not contest that Plaintiffs Kohlbeck, Whelan, Fergot, and LWVWI's similarly-situated members have disabilities within the meaning of the ADA. First, Intervenor-Defendants argue that having a replacement ballot sent by email or fax would be an unreasonable accommodation because clerks would have to reconstruct ballots printed by voters on official ballots before counting them and because WEC would have to modify the MyVote and WisVote systems to make this option available to clerks and voters. *See* dkt. 454 at 91-92. As noted previously, the only municipal clerks who have submitted declarations in this case do not agree that this will be unduly burdensome; they think the benefit to voters justifies the inconvenience on the back end. Plaintiffs seek online access to mail-in ballots, email delivery, and the Federal Write-in Absentee Ballots ("FWABs") as a *back-up* for the subset of timely-requested absentee ballots that do not reach voters, not as the original form of delivery for all ballots requested by voters with disabilities. Additionally, clerks will save a comparable amount of labor by not having to print and mail these replacement ballots to voters in the days before the election, when demand is at its peak. In determining whether an accommodation is reasonable, "it is necessary that the court take into consideration all of the costs to both parties." *Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006). The modest administrative burdens this form of relief would impose on elections officials are dwarfed by the grave cost of disenfranchisement faced by at-risk voters, absent such relief. The record also shows that the software change on WEC's part would be less burdensome than Defendants suggest.

Intervenor-Defendants also point to other ways to vote should an at-risk voter's ballot fail to arrive by mail, such as "curbside voting; in-person absentee voting; as a hospitalized elector; or simply in-person at the polls, following all safety precautions" suffice as reasonable accommodations, obviating the need for additional relief. Dkt. 454 at 92. This suggestion wholly ignores—and fails to respond to—the thrust of the *Gear* Plaintiffs' injury—that they cannot vote in person because it would force them to risk contracting Covid-19 and, by extension, risk severe illness or even death. Moreover, the record reveals the difficulties of maintaining safety during curbside and in-person voting. *See* Keresty Decl. ¶¶ 3, 7 (noting that poll workers were unable to maintain 6 feet of distance from voters during curbside voting and polling places were too crowded to allow for proper social distancing). In-person absentee voting still requires voters to expose themselves to other potential carriers of Covid-19. And while the WEC has expanded the definition of "hospitalized" elector to include those quarantining due to Covid-19, that definition is limited to "people who were exposed to a contagious disease," excluding people who are isolating to avoid exposure in the first instance. Dkt. 503, Sherman Reply Decl., Ex. 18, Meagan Wolfe, *Hospitalized Electors and Public Health Guidance*, WIS. ELEC. COMM'N (March 29, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Hospitalized%20Electors.pdf. Even if the hospitalized elector procedure were made available to voters in preventative quarantine, allowing them to receive and return an absentee ballot by agent would still require the same exposure that the challenged witness requirement would entail for isolating voters who live alone, not to mention defeat the entire purpose of the quarantine.

Lastly on this point, and confusingly, Intervenor-Defendants claim:

> [T]he *Gear* Plaintiffs have not argued that their receipt of mailed absentee ballots is likely to prohibit them from voting, *see* Dkt. 421 at 65–66, thus they have waived this essential element of their claim, Stadfield, 689 F.3d at 712. Given their lack of developed argument, the *Gear* Plaintiffs have failed to present *any evidence* that any voter will likely be unable to vote if required to obtain an absentee ballot through the mail, rather than via fax or email.

Dkt. 454 at 104 (emphasis in original). Once again, they misstate the *Gear* Plaintiffs' claims because they cannot refute them directly. The *Gear* Plaintiffs have not argued that they will be unable to vote if required to receive an absentee ballot by mail—indeed, the ideal situation would be for the individual Plaintiffs to receive their first requested ballot by mail, without having to request a new one by mail, fax, or email from their clerk. Instead, they have argued that their injury lies in not receiving their requested ballots by mail because their health conditions make it too dangerous for them to vote in person during the pandemic. This injury was realized for six of the individual *Gear* Plaintiffs in the April 7 election, and the WEC's own assessments offer little hope that the failures causing them to never receive their ballots will be cured or even mitigated before November. The evidence in the record supports the strong likelihood that this injury will recur.

Next, Intervenor-Defendants again mischaracterize the nature of the *Gear* Plaintiffs' ADA claims by arguing that any failure to receive a requested absentee ballot by mail would not be due to Plaintiffs' disabilities. This argument deliberately misses the point. Should these voters fail to receive their requested ballots by mail, and absent electronic transmission of replacement ballots, they will be disenfranchised because vote by mail remains their only viable means of voting *due to their disabilities*. Stated another way, their health conditions put them at increased risk of severe illness or death from Covid-19 and accordingly prevent them from voting in person. But for their disabilities, they would be able to cast their ballots using any one of the methods highlighted by Intervenor-Defendants. It is therefore the failure to provide an alternative means of absentee ballot delivery that would disenfranchise them as a direct consequence of their disabilities.

As to the witness requirement, Intervenor-Defendants contend that they need not suspend the witness requirement for voters with disabilities because doing so would "fundamentally alter Wisconsin's electoral system by undercutting the State's 'substantial interest in combatting voter fraud.'" *See* dkt. 454 at 118 (internal citations omitted). But a public entity is only relieved of the obligation to provide a reasonable accommodation when it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. 35.130(b)(7), which Intervenor-Defendants' bare assertion, unsupported by any evidence, fails to accomplish. They do not describe how, if at all, modifying the witness requirement to permit remote witnessing or a certification alternative for Covid-19-vulnerable voters who live alone would fundamentally alter Wisconsin's election system, or why other anti-fraud requirements imposed by Wisconsin law are inadequate to meet the State's interest in election integrity. As such, they have not met their burden under the ADA framework, and this defense cannot prevail.

It also bears mentioning that while the case Intervenor-Defendants cite in support of this failed defense does not purport to define a "fundamental alteration" within the meaning of Title II, *see* dkt. 454 at 118 (citing *Tennessee v. Lane*, 541 U.S. 509, 532 (2004)), other cases have held that this defense applies when the proposed modification fundamentally alters the protected service, program, or activity for *participants*, not for the public entity providing it. *See Olmstead* *v. L. C. by Zimring*, 527 U.S. 581, 604 (1999) ("Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979) (holding that exempting a deaf prospective nursing student from clinical requirements would fundamentally alter the nursing program because she "would not receive even a rough equivalent of the training a nursing program normally gives"). For voters with disabilities, the nature of the protected activity—voting—is fundamentally preserved rather than fundamentally altered by the suspension of the witness requirement as to at-risk voters. Were it sufficient for a state entity to assert an abstract state interest in preserving a particular requirement in order to avoid providing a reasonable accommodation, the entire function and efficacy of the ADA would collapse and litigants with disabilities would almost always fail to succeed on their claims.

III.*Burford* Abstention and *Purcell*

Intervenor-Defendants ask this Court to reject, stay or dismiss this case, citing the *Burford* abstention doctrine. Dkt. 454 at 123-24. At its core, in the rare case where it is applied, *Burford* abstention seeks to avoid competing interpretations of unsettled questions of state law by federal and state courts, where those interpretations would interrupt complex regulatory schemes. "*Burford* abstention is rarely, if ever, appropriate when 'the state law to be applied appears to be settled.'" *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 364 (7th Cir. 1998) (quoting *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976)). *Burford* abstention "may be appropriate when concurrent federal jurisdiction would 'be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 504 (7th Cir. 2011) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989)). Under the second set of circumstances in which courts may invoke *Burford*, "the mere existence of a statewide regulatory regime is not sufficient. The state must 'offer some forum in which claims may be litigated,' and this forum must 'stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims.' In other words, judicial review by state courts *with specialized expertise* is a prerequisite to *Burford* abstention." *Id.* (quoting *Property & Cas. Ins. Ltd. v. Cen. Nat'l Ins. Co. of Omaha*, 936 F.2d 319 (7th Cir. 1991) (emphasis in original) (internal citation omitted) (finding that district court abused its discretion in abstaining under *Burford* where Indiana law permitted courts of general jurisdiction to hear claims brought under state environmental law); *see also Int'l Coll. of Surgeons*, 153 F.3d at 364 (finding abstention under *Burford* inappropriate where Illinois law granted any county court of general jurisdiction the authority to review local landmark commission decisions). Accordingly, *Burford* abstention is not appropriate here. The *Gear* Plaintiffs have asserted federal constitutional and federal law violations, and a federal forum is therefore appropriate. That Wisconsin state courts could exercise jurisdiction over these federal claims is of no moment, because *Burford* applies when state law has created a specialized forum in which to hear claims arising under state law. Further, the *Gear* Plaintiffs claims manifestly do not seek to "undercut or completely remove Wisconsin's election-integrity laws." Dkt. 454 at 123. The Commission has not said that Section 6.87(3)(d) is intended to further election integrity. Further, proposing alternative ballot delivery methods and alternatives to a physical witness signature requirement are efforts to balance voters' rights with election integrity, not to eviscerate the latter.

After joining a brief that argues the *Gear* Plaintiffs' claims are unripe, the Republican National Committee and Republican Party of Wisconsin argue that *Purcell v. Gonzalez*, 549 U.S. 1 (2006) instructs this Court to stay its hand this close to an election. Dkt. 455 at 4-6. As has become routine in this litigation, Intervenor-Defendants argue that Plaintiffs—who include voters who have already been disenfranchised once during this pandemic—are paradoxically both too early and too late to seek a modification of voting rules and procedures to prevent losing their right to vote once again. However, their argument is completely divorced from the animating concerns in the Supreme Court's original decision in *Purcell*, which directed federal courts to weigh "considerations specific to election cases"—namely the risks of voter confusion, increased administrative burdens, and suppressed turnout—amongst the normal equitable factors for issuance of an injunction. 549 U.S. at 4-5. It did not create a per se rule mandating that courts reject any request for injunctive relief as to voting rules brought within a certain timeframe before an election.

First, *Purcell* does not apply in the same way when voters' rights would be vindicated and voter confusion would be *reduced* by the injunctive relief sought. It "demands 'careful consideration' of any legal challenge that involves 'the possibility that qualified voters might be turned away from the polls.'" *U.S. Student Ass'n Fdn. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008) (quoting *Purcell*, 549 U.S. at 4). Accordingly, circuit courts have upheld injunctions issued shortly before an election where the challenged law or rule would have the effect of disenfranchising voters. *See League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (issuing injunction related to voter registration form less than two weeks before relevant registration deadlines); *Obama for America v. Husted*, 697 F.3d 423, 436–37 (6th Cir. 2012) (affirming entry of preliminary injunction approximately one month prior to early voting days at issue); *Land*, 546 F.3d at 387 (denying six days before Election Day defendants' motion to stay district court's order granting preliminary injunction, issued twenty-two days before Election Day). *Purcell*'s express language was deeply concerned with the risk of suppressing turnout, 549 U.S. at 4-5 (citing the "consequent incentive to remain away from the polls"), but the requested injunction here will *facilitate and increase* voter turnout.

Second, Intervenor-Defendants have no basis to claim that these proposed changes come too soon before an election. WEC is issuing new guidance, developing new policies, and updating WisVote and MyVote continuously, trying to prepare for the August and November elections. Additionally, in the run-up to the April 7 election, WEC issued over 50 communications and guidance documents to clerks to keep pace with the unprecedented and rapidly-evolving pandemic, and made changes to WisVote and MyVote up to Election Day. *See* dkt. 446, Wolfe Decl. ¶ 23. WEC was doing what it needed to do, but for this reason, the Intervenor-Defendants' *Purcell* argument is dead on arrival. If such extensive and ever-evolving administrative responses to the Covid-19 pandemic by the WEC are manageable and not likely to unduly confuse voters, and Intervenor-Defendants have praised these efforts throughout their briefs, then the same should hold true of any relief this Court orders. If these ameliorative administrative efforts were not too late, then neither is ameliorative litigation.

Third, the purported risk of voter confusion cannot be invoked as support for rules that disenfranchise and burden voters during a pandemic—any confusion over a rule that facilitates voters' participation hurts *voters*, not the Defendants or Intervenor-Defendants.

Fourth, the Supreme Court has soundly rejected arguments that increased administrative burdens override First Amendment rights. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986). The same principle should apply with even greater force in a case that concerns voters' rights to cast their ballots in the face of a deadly pandemic. While some of the requested relief will shift the administrative burdens on municipal clerks and those canvassing ballots, the net result will be less burdensome on the front end prior to Election Day, and far more votes will be cast and counted than if no injunctive relief issued.

CONCLUSION

For the foregoing reasons, the *Gear* Plaintiffs respectfully request that this Court grant their motion for a preliminary injunction and deny the Intervenor-Defendants' motion to dismiss this action.

DATE: July 31, 2020

Respectfully submitted,

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**Admitted to the U.S. District Court for the Western District of Wisconsin*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 31, 2020, I caused the foregoing document to be served to all counsel of record via the Court's CM/ECF System.

/s/ Jon Sherman