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, MALEKEH K. HAKAMI, PATRICIA GINTER, CLAIRE WHELAN, WISCONSIN ALLIANCE FOR RETIRED AMERICANS and LEAGUE OF WOMEN VOTERS OF WISCONSIN,

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.

REVEREND GREG LEWIS, SOULS TO THE POLLS, VOCES DE LA FRONTERA, BLACK LEADERS ORGANIZING FOR COMMUNITIES, AMERICAN FEDERATION OF TEACHERS LOCAL, 212, AFL-CIO, SEIU WISCONSIN STATE COUNCIL, and LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Plaintiffs,

v. Case No. 20-cv-284-wmc

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

Defendants.

BRIEF IN SUPPORT OF MOTION BY PLAINTIFFS IN *LEWIS, ET AL. V. KNUDSON, ET AL.*, 20-CV-284, FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

For the reasons set forth below and pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 1920, and Fed. R. Civ. P. 54(d), the *Lewis* Plaintiffs request that this Court grant their motion for an award of attorneys' fees of $323,295 and expenses totaling $1,257.56. The *Lewis* Plaintiffs are prevailing parties in this matter, are entitled to the reasonable attorneys' fees and expenses they seek, and request that those fees and expenses be assessed against the defendants who are named in their official capacities.[1]

[1] The *Lewis* Plaintiffs are not seeking an award of fees from the Intervening Defendants: Republican National Committee, Republican Party of Wisconsin, and Wisconsin Legislature.

STATEMENT OF THE CASE

On March 26, 2020, the *Lewis* Plaintiffs filed in *Lewis v. Knudson*, No. 3:20-cv-284 (the "'284 case"), their Complaint for Declaratory and Injunctive Relief against the six Wisconsin Elections Commissioners and Administrator (collectively, the "WEC Defendants"). '284 case Dkt. 1. Two days later, on March 28, 2020, they filed a Motion for Temporary Restraining Order and Preliminary Injunction, asking the Court to enjoin for the April 7 election a number of Wisconsin statutory provisions governing elections. Included in their requests for injunctive relief was that the Court order that the statutory deadline for submission of absentee ballots be extended beyond the April 7 elections day. '284 case Dkt. 17:1–2. On March 28, the Court consolidated the *Lewis* case with *Democratic National Committee v. Bostelmann*, No. 3:20-cv-249 (W.D. Wis. *filed* Mar. 18, 2020) (the "'249 case"), and *Gear v. Knudson*, No. 3:20-cv-278 (W.D. Wis. *filed* Mar. 26, 2020) (the "'278 case") "'284 case Dkt. 26.[2]

The Wisconsin Legislature ("Legislature") moved to intervene on multiple occasions, *see* dkt. 20, 118, 137; moved to dismiss the *DNC* Plaintiffs' complaint and/or opposed preliminary injunctive relief; and moved for leave to file motions to dismiss the *Gear* and *Lewis* Plaintiffs' complaints, *see* dkt. 22, 23, 89, 142, 143, 148, 149. The Court did not rule or take action on the Legislature's motion for leave to file its motion to dismiss the *Lewis* complaint, and no parties responded to the complaint in *Lewis*. The Court denied the Legislature's Motion to Intervene, dkt. 85, and its Renewed Motion to

[2] All citations to the docket, unless otherwise identified, are to the '249 case. References to the Appeals Court docket will be cited as "R. __."

Intervene, dkt. 163 (although the Court later granted the Legislature's motion, as described below).

The Republican National Committee and Republican Party of Wisconsin (collectively, the "Republican Party") moved to intervene, dkt. 41, and opposed the *Lewis* Plaintiffs' motion for preliminary injunctive relief, dkt. 96, 138. The Court granted the Republican Party's Motion to Intervene, dkt. 85 at 1.

Following briefing and a half-day evidentiary hearing held on April 1, 2020, the Court on April 2, 2020 issued an Opinion and Order granting in part and denying in part the various Plaintiffs' requests for preliminary injunctions/temporary restraining orders. Dkt. 170 at 5. That Order provided the following preliminary relief:

> (1) enjoin[ed] the enforcement of the requirement under Wis. Stat. § 6.87(6) that absentee ballots must be received by 8:00 p.m. on election day to be counted and extend[ed] the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020; (2) enjoin[ed] the enforcement of the requirement under Wis. Stat. § 6.86(1)(b) that absentee ballot requests must be received by April 2, 2020, and extend[ed] the deadline for receipt of absentee ballot requests by mail, fax or email (and if deemed administratively feasible in the sole discretion of the [Wisconsin Elections Commission] Administrator, online) to 5:00 p.m. on April 3, 2020; and (3) enjoin[ed] the enforcement of Wis. Stat. § 6.87(2) as to absentee voters who have provided a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so, provided that the ballots are otherwise valid.

Dkt. 170 at 5; *see also* dkt. 170 at 52-53.

The Court also issued a corresponding Preliminary Injunction Order. Dkt. 171.

Following a request on April 3, 2020 for clarification from the WEC Defendants, , the Court entered an Order and an Amended Preliminary Injunction Order reiterating the relief provided the day before, further enjoining Defendants and election inspectors

"from releasing any unofficial results until April 13, 2020, at 4:00 p.m. or as soon thereafter as votes can be tabulated," and clarifying that Defendants and municipal clerks were enjoined "from enforcing Wis. Stat. § 6.87(2) as to any absentee voter who, prior to their ballot being tabulated, provides a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so." Dkt. 179 at 2; 180 at 2–3 (emphasis added).

The Legislature and Republican Party both filed Notices Of Appeal from the Court's original preliminary injunction Order, dkt. 172; dkt. 173, and the amended Order, dkt. 182; dkt. 185. The Legislature also filed a Notice of Appeal from denial of its motions to intervene. Dkt. 173.

On April 3, 2020, the Seventh Circuit Court of Appeals denied in part and granted in part the motions to stay portions of the district court's preliminary injunction, staying the portion that "enjoins the enforcement of Wis. Stat. § 6.87(2) for absentee voters who provide a written affirmation or other statement that they were unable to safely obtain a witness certification despite reasonable efforts to do so." R. 30:3. It denied a stay of that portion of this Court's order enjoining the enforcement of ballot receipt requirement under Wis. Stat. 6.87(6) and extending the deadline for receipt of absentee ballots to 4:00 p.m. on April 13. *Id*. The appeals court also concluded that the Legislature had standing to pursue an appeal and "the district court erred in refusing to permit the Legislature to intervene in the case below." R.30:4.

On an emergency application for stay to Associate United States Supreme Court Justice and Seventh Circuit Justice Brett M. Kavanaugh, the Supreme Court stayed the

district court's Order "to the extent it requires the State to count absentee ballots postmarked after April 7, 2020" and held: "in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8:00 p.m." The Supreme Court otherwise permitted the district court's injunction to stand. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (April 6, 2020) (per curiam).

On the same day, April 6, this Court granted the Legislature's Renewed Motions to Intervene, dkt. 186, deeming the appellate court's ruling "law of the case, meaning that the Wisconsin Legislature has effectively been an intervening defendant in all three cases since the time of that decision." Dkt .191. The Court did, however, note that "there is some question as to the scope of [the district] court's jurisdiction over [the Legislature's] motion pending return of the mandate." *Id.*

At the direction of the Seventh Circuit, all parties in the consolidated cases filed a Joint Status Report Regarding Mootness. R. 42. Addressing the issue of mootness, the *Lewis* Plaintiffs stated: "… because that injunctive relief that the Lewis plaintiffs requested already has accomplished what the Lewis plaintiffs sought – i.e., injunctive relief solely with respect to the Spring Election – the interlocutory appeal of the Lewis case is moot." R. 42 at 19. Neither the WEC Defendants nor the Republican Party disputed that statement. On May 14, 2020, the Seventh Circuit dismissed the consolidated appeals as moot. Dkt. 43.

Following remand to this Court, on May 21, the *Lewis* Plaintiffs moved to voluntarily dismiss their complaint in accordance with Fed. R. Civ. P. 41(a)(2) because it had become moot. Dkt. 205. Following briefing, on June 17, 2020, the Court issued an Order recognizing that the suit "is now plainly moot" and dismissed the case under Rule 41(a)(2) "without further comment on its prejudicial effect." '284 case dkt. 162.

ARGUMENT

The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988(b), provides: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." Congress enacted Section 1988 to encourage private litigation of civil rights claims. "When a plaintiff succeeds in remedying a civil rights violation . . . he serves 'as a "private attorney general," vindicating a policy that Congress considered of the highest priority.'" *Fox v. Vice*, 536 U.S. 826, 833 (2011) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam)).

Because such litigation advances important civil rights, a prevailing plaintiff "'should ordinarily recover an attorney's fee' from the defendant." *Id*. (citation omitted). Awarding attorney's fees to prevailing civil rights plaintiffs "at once reimburses a plaintiff for 'what it cos[t] [him] to vindicate [civil] rights,' and holds to account 'a violator of federal law.'" *Id*. (citations omitted).

Plaintiffs in this case achieved significant, beneficial success. They initially obtained a preliminary injunction granting critical relief they alone sought from the

Court, the most important of which was the order from the Court that absentee ballots be counted through April 13, 2020. The Court relied on the evidence submitted by the *Lewis* Plaintiffs with their Complaint in granting that relief. The declarations supplied by the *Lewis* plaintiffs was the evidence on which the Court relied when it made the finding that supported its preliminary injunction. The Seventh Circuit refused to stay that injunction, except as to the relief that this Court had granted with respect to relaxed requirements for witnessing of mail-in absentee ballots.

The Defendants further sought only a partial stay from the U.S. Supreme Court. On April 6, 2020, the Supreme Court added a postmark requirement, but otherwise let stand the preliminary injunction as modified by the Seventh Circuit. The next day, April 7, 2020, the election was held. The Wisconsin Elections Commission determined that this Court's "extension of the ballot return deadline to 4:00 PM on April 13, 2020 resulted in an additional 79,054 ballots being counted for this election." See *Wisconsin Election Commission April 7, 2020 Absentee Voting Report, May 15, 2020*, p. 7 and Table 8. The 79,054 absentee ballots returned during the period allowed by the preliminary injunction represented 6.68% of total ballots, including all in-person and absentee ballots cast in the election. *Id.*[3]

Had it not been for the evidence presented to this court by the *Lewis* Plaintiffs, and the injunctive relief the court granted, those 79,054 ballots would not have been

[3] https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/May%2020%2C%202020.Final_.pdf (last visited, July 1, 2020)

counted. To have obtained an injunction that kept that many voters from being disenfranchised was without doubt a success on a significant issue that benefited Wisconsin's voters.

I. The *Lewis* Plaintiffs are "prevailing parties" entitled to fees and costs.

A. A party is "prevailing" if it succeeded on a significant beneficial issue.

The Supreme Court has broadly defined "prevailing party" to include civil rights plaintiffs who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemore*, 581 F.2d 275, 278-79 (1st Cir. 1978)); *see also Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (affirming definition of "prevailing party" used in *Nadeau v. Helgemore*, 581 F.2d 275 and *Hensley v. Eckerhart*, 461 U.S. 424). It has consistently held that prevailing party status can be conferred in an interim fee award where a "a party has prevailed on the merits of at least some of [its] claims." *Buckhannon Bd. & Care Home v. W. Va. Dep't. of Health & Human Res.*, 532 U.S. 598, 605 (2001), *citing Texas State Teachers Assn. v. Garland Independent Sch. Dist.*, 489 U.S. 782, 792 (1989). Although *Buckhannon* jettisoned what was known as the "catalyst rule," the Court distinguished circumstances where defendants simply altered their conduct in the absence of a court order and held that prevailing party status hinged upon a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. That is precisely what occurred here.

B. The *Lewis* Plaintiffs explicitly and consistently requested an extension of the deadline for submission of absentee ballots.

Each and every submission to the Court by the *Lewis* Plaintiffs sought, *inter alia*, an extension of the deadline for voters to submit absentee ballots, the precise remedy ordered by the Court. Their Complaint directly addressed the problem imposed by the 8 p.m. election day deadline for return of voters' absentee ballots, statutorily mandated by Wisconsin Statutes Section 6.87, alleging the problems identified in various municipalities, and specifically alleging with respect to the City of Madison that:

> The circumstances described above makes the 8:00 p.m. election day deadline for receipt of absentee ballots completely unworkable. The combination of the volume of requests for absentee ballots, the ever-increasing backlog the City has, and the fact that it now takes about a week to send voters an absentee ballot means that a very large number of absentee ballots from lawful voters will not arrive until after election day. The Clerk estimates that the City will receive more than 1,000 absentee ballots after 8:00 p.m. on April 7. Under the current law, all of those voters will be disenfranchised -- their votes won't count.

'284 case dkt. 1 ¶ 140.

Their Complaint further alleged that an extension of the 8:00 p.m. election day deadline for receipt was essential to avoid disenfranchisement of voters:

> [A]s absentee balloting becomes the only safe way to vote, Wisconsin voters are at a high risk of not receiving their ballots with sufficient time to mail it into the municipal clerk's office so that it is received prior to the Election Day Receipt Deadline. This too will lead to disenfranchisement.

Id. ¶ 235.

The Complaint's Prayer for Relief specifically asked the Court to declare "the requirement that polling places receive absentee ballots by 8:00 p.m. on election day to be counted, [Wis. Stat.] § 6.87, [] unconstitutional in violation of the First and Fourteenth

Amendments;" "[e]njoin[ ] Defendants…from rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk's office by June 2, 2020" and order "[d]efendants to establish Tuesday, June 2, 2020 as the deadline by which municipal clerks must have counted all returned mailed absentee ballots." '284 case dkt. 1 at 65-67, "Prayer for Relief," ¶¶ B, H, L.

Indeed, the *Lewis* Plaintiffs sought a TRO specifically to enjoin the WEC Defendants from "enforcing the requirement that polling places receive absentee ballots by 8:00 p.m. on Election Day to be counted ("Election Day Receipt Deadline"), § 6.87." '284 case dkt. 17 at 2. In their supporting Brief for the TRO Motion, the *Lewis* Plaintiffs likewise requested that the "process for voter requests and submissions of mail-in absentee ballots be extended beyond April 7." '284 case dkt. 18 at 13. That request was not conditioned upon postponement of the in-person vote.

Finally, in their Statement of Record Facts in Support of Emergency Motion for Temporary Restraining Order, describing the sworn testimony (in the form of declarations) and other evidence submitted by them, the *Lewis* Plaintiffs identified the serious problems of backlogs, shortages of supplies, and the likelihood that absentee voters would not be able to return their ballots by April 7. With respect to the City of Madison, the testimony stated that:

> The circumstances described above makes the 8:00 p.m. election day deadline for receipt of absentee ballots completely unworkable. The combination of the volume of requests for absentee ballots, the ever-increasing backlog the City has, and the fact that it now takes about a week to send voters an absentee ballot means that a very large number of absentee ballots from lawful voters will not arrive until after election day. The Clerk estimates that the City will receive more than 1,000 absentee

> ballots after 8:00 p.m. on April 7. Under the current law, all of those voters will be disenfranchised -- their votes won't count.
>
> The City also is beginning to receive calls from voters who are currently overseas and unable to return their absentee ballot via mail because the country in which they are located is no longer offering mail service due to COVID-19. The City Clerk's Office contacted the Wisconsin Elections Commission about this issue and was informed that the only option for these voters is to return their ballot through the mail. The City has issued absentee ballots to over 500 voters who are currently overseas.
>
> In addition to the above issues, the unprecedented requests for absentee voting is hampered at times by shortages of mailing labels and envelopes.

'284 case dkt. 19 ¶¶ 110-112.

The *Lewis* Plaintiffs also presented sworn testimony identifying similar problems in Green Bay:

> To address absentee ballot envelope shortages, the Commission directs clerks to be prepared to print their own…. Such a suggestion, however, fails to take into account staffing shortages caused by COVID-19 as well as the fact that current clerks' staffs are already stretched too thinly while they attempt to process the overwhelming backlog created by unprecedented demand for absentee ballots. As of March 24, 2020, the City Clerk's Office was handling a backlog of over 4,000 absentee ballots with six staff members, including staff from outside of the department.
>
> The City Clerk's Office does not have the resources to adequately handle all of the requests for absentee ballots plus these new directives from the Commission. Notably, the Clerk's office is attempting to address the new directives in addition to its day-to-day duties, all of which have been assigned to other departments to the extent they can be at this time.

Id.¶¶ 116-117.

Any suggestion that the *Lewis* Plaintiffs were focused solely on a postponement of the in-person vote would be a blatant mischaracterization of the actual record in this litigation. The *Lewis* Plaintiffs consistently sought a broad range of relief, including an

extension of the April 7 absentee ballot return deadline, to ensure that thousands of eligible Wisconsin voters were not disenfranchised due to the COVID-19 pandemic.

C. The Court's order to extend the statutory deadline for receipt of absentee ballots was a significant beneficial issue on which the *Lewis* Plaintiffs prevailed, warranting prevailing party status.

The Court's Order to allow absentee ballots to be received by local clerks until 4 p.m. on April 13 was a significant remedial measure that enfranchised over 79,000 otherwise-qualified voters. That the Court declined to grant the other remedies sought by the *Lewis* Plaintiffs -- including postponement -- does not diminish the profound importance of the Court's remedial order.

Hensley, supra, establishes the principle that a party can acquire prevailing party status where it prevails on some, but not all, of its claims. Yet, in earlier briefing, the WEC contended that the *Lewis* Plaintiffs are not entitled to prevailing party status because they did not prevail on their "principal issue," dkt. 209 at 9, ignoring that, post-*Hensley,* the Supreme Court explicitly rejected a district court's use of such a "central issue" test to determine prevailing party status, holding that plaintiffs must only succeed on a "significant issue." *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782, 789 (1989) (quoting *Hensley* in holding that "the most critical factor is the degree of success obtained." 461 U.S. at 436). Moreover, the Supreme Court subsequently distinguished cases involving only nominal damages awards, or technical, or minimal victories for plaintiffs, where no fee award is typically appropriate from those that attained relief on a "significant issue." See *Farrar v. Hobby,* 506 U.S. 103 (1992) (where plaintiff sought $17 million award and received a nominal $1 award no fee

award was appropriate); see also, *Aponte v. City of Chicago,* 728 F.3d 724, 726-27 (7th Cir. 2013) (summarizing Seventh Circuit precedent applying *Garland* and *Farrar*).

Where plaintiffs receive meaningful relief, despite falling short of loftier objectives in their complaints, the Seventh Circuit "has rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought or that the fee award might, in fact, be more than the plaintiff's recovery." *Estate of Enoch v. Tienor,* 570 F.3d 821, 823 (2009) (plaintiff achieved more than nominal damages and was thereby entitled to fee award as prevailing party in connection with accepted offer of judgment for $635,000 despite procuring only a fraction of $10 million sought in complaint).

In this case, the Court's order to allow six additional days for absentee ballots to be received by local clerks enfranchised over 79,000 qualified voters by the WEC's own admission. That result was neither nominal, trifling, nor minimal relief. By any measure, the L*ewis* Plaintiffs procured a meaningful measure of success and thereby prevailed.

D. The Court's preliminary injunctive relief to extend the statutory absentee ballot return deadline was not mere recognition of an act of volition by the WEC; it was affirmative relief obtained by the *Lewis* Plaintiffs.

The extension of the absentee ballot return deadline was not a mere act of volition by the WEC. It occurred only due to the Court's order. The WEC's letter to the Court on the cusp of the April 1 TRO hearing indicating that it did not object to extension of the statutory deadline does not alter the *Lewis* Plaintiffs' status as a

prevailing party. Even if the WEC had offered to enter into a settlement or a consent decree – which it did not -- such conduct would still not adversely affect the *Lewis* Plaintiffs' entitlement to attorney fees. *Maheer v. Gagne,* 448 U.S. 122, 129 (1980) (fact that plaintiff obtained relief via settlement agreement had no impact on her being a prevailing party). The two other sets of intervening Defendants both opposed and appealed to both the Seventh Circuit and the Supreme Court this Court's April 2 Order, forcing the *Lewis* Plaintiffs to defend and preserve the remedial relief ordered by this Court.

Moreover, that only preliminary injunctive relief was ordered without a final judgment has no bearing on the prevailing party status of the *Lewis* Plaintiffs. The Seventh Circuit adheres to a clear majority view in the circuits in the wake of *Buckhannon* that prevailing party status may be conferred when, as in this case: (a) plaintiffs request and win preliminary injunctive relief from a district court on the merits of their clams, and not simply to equitably preserve the *status quo*; (b) the injunctive order altered the parties' legal relationship; and (c) the complaint sought the affirmative relief and became moot prior to the time the plaintiffs petitioned for fees. *See Young v. City of Chicago,* 202 F.3d 1000, 1000-01 (7th Cir. 2000) and *Dupuy v. Samuels,* 423 F.3d 714, 724-725 (7th Cir. 2005).

In *Young,* the plaintiffs requested and won a preliminary injunction granting them a permit to engage in assembly outside the 1996 Democratic Party convention. *Id.* Defendants' post-Convention appeal was dismissed as moot but the Seventh Circuit

which held that the plaintiffs were a prevailing party entitled to fees even though the district court never reached a final judgment on the merits of plaintiffs' claims. *Id.*

In *Dupuy* the court distinguished the circumstances where a preliminary injunction became moot because it had merely preserved the status quo until the court could reach a decision on the merits, versus cases such as *Young* – and in this case-- where the mere passage of time mooted the matter after the event which was enjoined had passed. The court in *Dupuy* also noted that the Seventh Circuit's view was consistent with how other circuits had addressed the issue in the wake of *Bukhannon*:

> Our circuit's law on the mootness issue is hardly an outlier among the federal circuit courts. We note that, in cases with circumstances similar to those in Young, several of our sister circuits have held that attorneys' fees may be awarded after a party has obtained a preliminary injunction and the case subsequently has become moot. See, e.g., Select Milk Producers, Inc. v. Johanns, 365 U.S. App. D.C. 183, 400 F.3d 939 (D.C. Cir. 2005); Watson v. County of Riverside, 300 F.3d 1092 (9th Cir. 2002); Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1558 (11th Cir. 1987).

Dupuy, 423 F.3d at 723, n. 4; *see also Consol. Paving Inc. v. City of Peoria,* No. 10-cv-1045, 2013 WL 916212 at *9 (C.D. Ill., Mar. 7, 2013) (surveying and summarizing the development of federal circuit positions including that of the Seventh Circuit, post-*Bukhannon,* on a party's prevailing party status in a moot case after procuring preliminary injunctive relief).

Since *Dupuy*¸ other circuits have adopted rules and general approaches affirming "prevailing party" fee awards in similar circumstances where plaintiffs won preliminary injunctive relief predicated upon a probability of success on the merits and the case became moot due to the passage of time and conclusion of

the event enjoined, or other circumstances beyond the control of the plaintiff. *See, e.g., Dearmore v. City of Garland,* 519 F.3d 517, 524 (5th Cir. 2008) (adopting test that plaintiff is a "prevailing party" if it wins preliminary injunction based upon likelihood of success and action becomes moot); *People Against Police Violence v. City of Pittsburgh,* 520 F.3d 226, 228-29 (3d Cir. 2008) (plaintiff "prevailed" where it achieved preliminary injunction and case became moot by virtue of "the results of the legal process"); *Kan. Judicial Watch v. Stout,* 653 F.3d 1230, 1234, 1238 (10th Cir. 2011) (plaintiff was a prevailing party by acquiring preliminary injunction).

In the *Lewis* Plaintiffs' Prayer for Relief in their Complaint, they explicitly requested that § 6.87, Wis. Stats. be enjoined and that the 8:00 P.M., April 7 deadline for the return of absentee ballots be extended. '284 case dkt. 1 at 65-67, "Prayer for Relief," ¶¶ B, H, L. The Court's April 2 Order granted the *Lewis* Plaintiffs' requests found in paragraphs B, H and L of their Prayer for Relief by enjoining Defendants from enforcing § 6.87 and requiring them to "extend the deadline for receipt of absentee ballots to 4:00 p.m. on April 13, 2020." Dkt. 170 at 5.

It cannot be disputed that the Order was a "judicially sanctioned change in the legal relationship of the parties," *Buckhannon,* 532 U.S. at 605, which resulted in the counting of 79,054 additional absentee ballots received by municipal clerks across the state between April 8 and April 13.

The Court's preliminary injunction was judicially sanctioned relief that altered the parties' legal relationship. It was a judicial determination to directly

address the merits of the *Lewis* Plaintiffs' claims and provide relief to what the Court recognized was a serious infringement upon Wisconsinites' right to vote. It was not a mere equitable remedy designed to preserve the *status quo.* The preliminary injunction was widespread, substantial, and meaningful in enfranchising scores of thousands of qualified Wisconsin electors who otherwise would not have been able to participate in this important election.[4]

The *Lewis* Plaintiffs sought no relief in their Complaint beyond Wisconsin's Spring General Election and Presidential Preference Primary. Accordingly, as the Court recognized with its order granting dismissal, their claims are now moot. The *Lewis* Plaintiffs are in the exact posture as the plaintiffs in *Young,* who similarly prevailed in procuring preliminary injunctive relief. In *Young,* plaintiffs sought to engage in protest activity at a specific event, only to have the case mooted by the passage of time and conclusion of the event which was the subject of the injunction. For the *Lewis* Plaintiffs, they likewise won injunctive relief applicable to an event that has now passed. In both cases, mootness arose post-injunction solely due to the temporal conclusion of the enjoined event, and dismissal was appropriate because further litigation to a final judgment on the merits served no purpose.

By all applicable measures, the *Lewis* plaintiffs "prevailed."

[4] Despite the United States Supreme Court qualifying the preliminary injunction by imposing a postmark requirement, it remained otherwise intact, resulting in profound relief.

II. The *Lewis* Plaintiffs are entitled to a fully compensatory award of reasonable attorneys' fees and costs.

That fee awards fully compensate successful plaintiffs so that the private attorney general function of the civil rights fee-shifting statute is achieved, is fundamental to the goals of the Civil Rights Attorneys' Fee Act, 42. U.S. C. § 1988. "[Its] purpose is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (citation omitted).

Effective access to the judicial process requires the services of competent counsel, which in turn requires that an attorney will recover a compensatory fee. "Congress intended for plaintiffs [to] receive a reasonable fee that is adequate to attract competent counsel, and that counsel for prevailing parties be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended." *Lightfoot v. Walker*, 826 F.2d 516, 520 (7th Cir. 1987) (internal quotations and citations omitted). Accordingly, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. Given that the *Lewis* Plaintiffs here have obtained excellent results, there is no question that the attorneys should receive the requested fees.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. A fee determined by this "lodestar method" is entitled to a "strong presumption" that it "represents the 'reasonable' fee." *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992) (citation omitted); *see also Perdue v. Kenny A.*, 559 U.S.

542, 552 (2010) ("[T]he lodestar method yields a fee that is presumptively sufficient to achieve this objective."). Indeed, this method provides the appropriate measure of fees even if the plaintiff is represented by counsel working for a legal services organization whose salary cost would produce a lower fee. *Blum v. Stenson*, 465 U.S. 886 (1984).

Although a district court has wide discretion in calculating an appropriate fee award, it may "not eyeball the fee request and cut it down by an arbitrary percentage because it seem[s] excessive to the court." *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1314 (7th Cir. 1996) (internal quotations and citations omitted). If a court reduces the hourly rate or number of hours, it must provide a clear explanation. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 518 (7th Cir. 1993).

The table below summarizes the *Lewis* Plaintiffs' lawyers' hours and hourly rates for purposes of calculating the lodestar amount.

	Hours	Rate	Total
Lester A. Pines, PB	63.0	$700	$44,100.00
Tamara B. Packard, PB	119.0	$500	$59,500.00
Aaron Dumas, PB	7.6	$350	$2,660.00
Beauregard Patterson, PB	9.4	$300	$2,820.00
Douglas M. Poland, RW	170.6	$500	$85,300.00
David P. Hollander, RW	90.5	$350	$31,675.00
Demetrio D. Johnson, RW	0.5	$180	$90.00
Richard Saks, HQ	194.3	$500	$97,150.00
TOTAL			**$323,295.00**

A. The time spent by the *Lewis* Plaintiffs' attorneys was reasonable.

There are two sets of Plaintiffs in this case who are separately represented: (1) SEIU Wisconsin State Council and (2) Revered Greg Lewis, Souls to the Polls, Voces de

la Frontera, Black Leaders Organizing for Communities ("BLOC"), American Federation of Teachers, Local 212, AFL-CIO, and League of Women Voters of Wisconsin ("LWVWI").

Douglas M. Poland of Rathje Woodward served as lead counsel for the case and, along with his associate David P. Hollander and co-counsel Richard Saks, represented Lewis, Souls to the Polls, Voces de la Frontera, BLOC, AFT Local 212, and LWVWI. Lester A. Pines and Tamara B. Packard of Pines Bach LLP, as well as other attorneys from Pines Bach, served as counsel for SEIU Wisconsin State Council.

As the attached declarations of Douglas M. Poland, Richard Saks, and Lester A. Pines show, the hours submitted by each of the *Lewis* Plaintiffs' lawyers were "reasonably expended," and the *Lewis* Plaintiffs' lawyers should be compensated for their time. *Lightfoot*, 826 F.2d at 520.

As an initial matter, the case presented complex voting rights questions in the context of a pandemic, raising unprecedented factual and legal issues. At the time they filed this case, it was far from certain that the *Lewis* Plaintiffs would prevail, in particular, because of the rapidly changing factual circumstances of the pandemic's impact on the election process combined with the *Purcell* principle which cautions against judicially imposed changes close to an election. Furthermore, Defendants vigorously contested the case at every stage of the proceeding. The novelty and importance of the issues presented by the raging pandemic, its interference with the recruitment of elections officials and the reluctance of voters to expose themselves to a

potentially deadly virus in order to cast a ballot, required careful and sometimes time-consuming fact-gathering, legal research and the assessment of potential arguments.

In addition, the case moved at lightning speed, both before this court and through the appellate courts, all the way to an election-eve ruling from the full U.S. Supreme Court, just weeks after the *Lewis* Complaint was filed. Prosecution of the *Lewis* Plaintiffs' claims involved intensive fact-gathering and presentation and great coordination among attorneys and between attorneys and their clients.

Each of the partners from the three law firms brought different strengths and experiences to bear, as trial attorneys, voting rights attorneys, and appellate attorneys. Specialized knowledge from each of those areas was essential to ensuring the success of the matter; providing insight into local practice and strategy; identifying appropriate witnesses and obtaining declarations from them, which were vital to the success of the case; and in performing essential tasks that attorneys from one law firm could not have done alone.

As the declarations of counsel illustrate, the *Lewis* Plaintiffs' lawyers litigated this case with the care and attention it deserved but also did so efficiently. Given the complexity of the case and the novelty of the issues presented, the expedited proceedings, and the fact that there were separately represented plaintiffs with different facts relating to the effect of the challenged laws on each of their interests, this case was staffed as leanly as possible throughout. Counsel coordinated their efforts and divided up tasks and delegated primary research and drafting to one law firm so as to not duplicate efforts. At the Court's invitation, the *Lewis* Plaintiffs chose to rely on their

witnesses' declarations as their direct testimony, in lieu of calling their witnesses to testify at the April 1, 2020 evidentiary hearing. And at the Court's instruction, the *Lewis* Plaintiffs' counsel coordinated with counsel for the plaintiffs in the other consolidated cases to streamline the parties' respective presentations to the Court at the April 1 hearing, and not to duplicate arguments on common issues.

Even with such efficiencies, it was appropriate to use multiple lawyers in this case because of the extraordinarily compressed timeframe. Counsel confined strategy and development discussions to three or four attorneys. As the Seventh Circuit has recognized, "[t]here is no hard-and-fast rule as to how many lawyers can be at a meeting or how many hours lawyers can spend discussing a project." *Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 661 (7th Cir. 2007). Using multiple lawyers in a case "is a common practice, primarily because it results in a more efficient distribution of work." *Id.* at 661.

Furthermore, as described in the declarations of the *Lewis* Plaintiffs' counsel, after gathering complete time records, counsel reviewed those records and eliminated excessive, redundant, and otherwise unnecessary time. And, the *Lewis* Plaintiffs are not seeking any reimbursement for the time expended by SEIU in-house counsel Claire Prestel, who participated in strategic discussions and reviewed and contributed to multiple filings.

B. The *Lewis* Plaintiffs' Attorneys' hourly rates are reasonable.

The hourly rates sought by the *Lewis* Plaintiffs' attorneys are reasonable. The "reasonable" rate is determined based on "prevailing market rates in the relevant

community. *Blum,* 465 U.S. at 895. The prevailing market rate is a rate that is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11. As the Seventh Circuit in *Jeffboat* noted, the "relevant community" may "refer[] to a community of practitioners," rather than to a geographical community, "particularly when . . . the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that area is a national market." *Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 490 (7th Cir. 2009); *see also Mathur v. Bd. of Trs. of S. Ill. Univ.*, 317 F.3d 738, 744 (7th Cir. 2003) ("[I]f an out-of-town attorney has a higher hourly rate than local practitioners, district courts should defer to the out-of-town attorney's rate when calculating the lodestar amount. . . . "); *Freeland v. Unum Life Ins. Co. of America*, No. 11-cv-053-WMC, 2014 WL 988761, at *2 (W.D. Wis. Mar. 13, 2014) ("[T]he fee applicant can meet the burden of producing satisfactory evidence by proof that the requested rates are in line with those prevailing in the community.")

The hourly rates sought for the lawyers who worked on this case vary, but all are reasonable, given the experience of each of their attorneys and the rates charged by civil rights lawyers of similar skill and experience in the Madison and Milwaukee communities, as supported by the declaration of Wisconsin civil rights attorney Jeff Scott Olson, Wisconsin commercial litigation attorney Beth Kushner, and Wisconsin Plaintiffs' counsel Walt Kelly. The experience of each *Lewis* attorney is detailed in the declarations of Lester A. Pines, Douglas M. Poland, and Richard Saks.

Finally, the hourly rates sought by the *Lewis* Plaintiffs' counsel are comparable to rates that the Wisconsin State Legislature has seen fit to pay its own outside counsel in litigation of similar complexity. *See* Patrick Marley, "Legal bills for taxpayers hit $2.3 million in court fight over Wisconsin's lame-duck laws," MILWAUKEE JOURNAL SENTINEL, November 26, 2019.[5]

III. Plaintiffs are entitled to costs and litigation expenses ordinarily billed to clients.

The *Lewis* Plaintiffs also seek a total of $1,257.56 in reasonable out-of-pocket expenses. Plaintiffs are entitled "the out-of-pocket expenses for which lawyers normally bill their clients." *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984).

IV. The award of fees is properly sought against the defendants who are sued in their official capacities.

Each of the Commissioners on the Wisconsin Elections Commission, and the Commission's top-ranking employee, its Administrator, were sued by the *Lewis* Plaintiffs in their official capacities under 42 U.S.C. § 1983. Seeking fees from the defendants sued in their official capacities is the proper procedure under 42 U.S.C. § 1988. The United States Supreme Court has held that:

> [O]fficial-capacity suits, . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, **for the real party in interest is the entity**.

[5] https://www.jsonline.com/story/news/politics/2019/11/26/legal-bills-2-3-million-court-fight-lame-duck-laws/4238365002/ (last visited July 2, 2020).

Kentucky v. Graham, 473 U.S. 159, 165–66, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985) (citations omitted) (emphasis added).

As it has consistently in the past, the 7th Circuit most recently applied that principle stating:

> As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.'

Bridges v. Dart, 950 F.3d 476, 478 n. 1 (7th Cir. 2020).

Moreover, the 7th Circuit has clearly stated an agency or government need not be a named party in order to be liable for attorney's fees when a plaintiff is a prevailing party in an official capacity action against a state agent.

> Under the Supreme Court's ruling in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), attorney's fees and costs assessed under 42 U.S.C. § 1988 (the Civil Rights Attorney's Fees Awards Act of 1976) in suits brought against public officials in their official capacity may be collected " 'either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (**whether or not the agency or government is a named party**).' "

Kolar v. Sangamon Cty. of State of Ill., 756 F.2d 564, 567 (7th Cir. 1985) (emphasis added).

CONCLUSION

For the foregoing reasons, the *Lewis* Plaintiffs request their motion be granted and that they be awarded attorneys' fees in the amount of $343,295 and expenses totaling $1,257.56 to be assessed against the WEC Defendants named in their official capacities.

Respectfully submitted this 2nd day of July 2020.

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