STATE OF WISCONSIN - COURT OF APPEALS
DISTRICT II
CASE NO. 2024AP001298

DISABILITY RIGHTS WISCONSIN, LEAGUE OF WOMEN VOTERS OF WISCONSIN, MICHAEL R. CHRISTOPHER, STACY L. ELLINGEN, TYLER D. ENGEL AND DONALD NATZKE,
Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, *as Administrator of WEC*, DON MILLIS, ROBERT SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK THOMSEN, and CARRIE RIEPL, *as Commissioners of WEC*,
Defendants,

WISCONSIN STATE LEGISLATURE,
Intervenor-Defendant-Appellant.

On Appeal From The Dane County Circuit Court,
The Honorable Everett Mitchell, Presiding,
Case No. 2024CV1141

BRIEF OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION

This is a case about ballot accessibility for voters with disabilities. Under Wisconsin's current absentee voting system, voters with print disabilities (*i.e.*, a disability that prevents an individual from independently reading or marking printed materials) must waive their right to vote privately and independently if they vote absentee because they must rely on a third party to ***mark*** their ***paper*** absentee ballots.

Plaintiffs-Respondents' request for a temporary injunction ("TI") below was straightforward: they sought an electronic absentee ballot delivery option and asked that the ballot be accessible such that it could be ***marked*** electronically. Although Plaintiffs-Respondents are seeking electronic delivery ***and return*** as the ***permanent*** relief in this case, they ***did not*** seek a TI requiring electronic ***return*** of ballots.

Wisconsin law previously provided all voters the opportunity to receive an electronic absentee ballot that could be printed and returned by mail. *See* 1999 Wis. Act 182, § 97; 2011 Wis. Act 23, §§ 58, 65. The enactment of 2011 Wisconsin Act 75 ("Act 75") changed that. *See* 2011 Wis. Act 75, § 50. Now, only military and overseas voters may receive an electronic absentee ballot. *See* Wis. Stat. § 6.87(3)(d). According to the Wisconsin Elections Commission ("WEC"), military and overseas electors may mark their ballot electronically. (R.67, ¶19; R.112 at 29:17-22)

The circuit court entered a TI requiring WEC to facilitate provision of electronically delivered accessible absentee ballots during the November general election to print-disabled voters. The TI does ***not*** require WEC to facilitate electronic ***return*** because that relief was not requested. The TI is an initial step to guarantee voters with print disabilities their rights under Wisconsin and federal law: equal opportunity to vote ***privately*** and ***independently***. As Plaintiffs-Respondents argued and the circuit court found, that is what the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12101, *et seq*.) and the Rehabilitation Act ("RA") (29 U.S.C. § 701, *et seq*) require (together, the ADA and the RA are the "ADA/RA").

The TI was merited as a matter of law and fact. Under the controlling standard of review, the circuit court did not err in entering the TI, and it must stand. *See Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, ¶18, 989 N.W.2d 561 (a TI is reviewed for an erroneous exercise of discretion and should be upheld if the court "examine[d] the relevant facts, applie[d] a proper standard of law, and, using a demonstrated rational process, reache[d] a conclusion that a reasonable judge could reach").

WEC, the only party with any obligations under the TI, did not appeal the TI. The Wisconsin State Legislature—whose party-status WEC is separately challenging[1]—did. By appealing the TI, the Legislature—which does not administer elections—injected uncertainty into how the general election will be administered. The Legislature has manufactured a controversy so that it may fight a battle it has no cognizable interest in waging. The TI does not harm the Legislature. Wisconsin's absentee voting laws remain valid except with respect to a small subset of electors whose rights would otherwise be denied. The TI does nothing to diminish the Legislature's power to write laws, nor does it create new ones by judicial fiat. It provides temporary relief based on properly considered TI standards and advances Wisconsin's interest in protecting its citizens with print disabilities.

This Court should affirm the circuit court's decision and leave the TI intact.

ORAL ARGUMENT AND PUBLICATION

This case requires the application of settled standards to an undisputed factual record. Publication is not warranted nor is oral argument.

[1] Whether the Legislature is a proper intervenor in this action in the first instance is at issue in *Disability Rights Wisconsin, et al., v. Wisconsin Elections Commission, et al.*, No. 2024AP1347 (Wis. Ct. App. filed Jul. 1, 2024).

ISSUE PRESENTED

Whether the circuit court having considered and applied all injunction factors, persuasive on-point authority, and the ample record before it, properly exercised its discretion in issuing temporary injunctive relief allowing print-disabled voters access to vote absentee privately and independently on equal terms as other Wisconsin voters.

The circuit court answered "yes."

STATEMENT OF THE CASE

A. Electronic Ballot Delivery Generally.

All qualified electors in Wisconsin are eligible to vote absentee. *See* Wis. Stat. § 6.87. To obtain an absentee ballot, any elector may "make written application to the[ir] municipal clerk." Wis. Stat. § 6.86(1)(a).

Wisconsin law previously provided that an absent elector could receive their absentee ballot electronically. *See* Wis. Stat. § 6.87(3)(d) (2009-2010). Until 2011, a municipal clerk could, upon request, "transmit a[n]…***electronic copy*** of the absent elector's ballot to that elector in lieu of mailing." *Id.* (emphasis added). In 2011, Act 75 amended Section 6.87(3)(d), striking out "absent elector" and replacing it with "military elector" or "overseas elector." *See* 2011 S.B. 116 (Dec. 1, 2011). That amendment "prohibit[ed] election officials from sending [electronic] absentee ballots via email [] to all but a few categories of voters" (*i.e.*, ***only*** military and overseas voters). *Luft v. Evers*, 963 F.3d 665, 676 (7th Cir. 2020).

Starting again in 2016, voters were able to request absentee ballots by electronic delivery under the injunction issued in *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 902 (W.D. Wis. 2016). That injunction was lifted in 2020 following the Seventh Circuit's ruling in *Luft*, 963 F.3d at 681.

Wisconsin continues to provide electronic absentee ballots to military and overseas voters in accordance with two federal programs: UOCAVA[2] and MOVE.[3] Some of those voters are able to mark their ballot electronically (R.67, ¶19; R.112 at 29:17-22), before they print it out and mail it back to the municipal clerk. Wisconsin law does not provide for electronic ballot return.

B. Absentee Voting For Print-Disabled Voters.

Plaintiffs Christopher, Ellingen, Engel, and Natzke (the "Individual Plaintiffs") are registered Wisconsin voters with print disabilities who cannot vote a paper ballot independently. Plaintiffs Natzke, Engel, and Christopher prefer to vote absentee because their disabilities make traveling to their polling places difficult. (*See, e.g.*, R.12, ¶10.) Plaintiff Ellingen ***must*** vote absentee. (R.11, ¶¶4-7)

To vote absentee, Plaintiff Ellingen generally must ask her caregivers to mark her absentee ballot for her. (*Id*. ¶¶8-9) But she fears asking her caregivers to do so because they might not agree with her political beliefs. (*Id*. ¶9) Since she relies on her caregivers for all her basic needs, she does not want to risk upsetting them. (*Id*.) Consequently, if her parents cannot travel to assist her, she cannot vote. (*Id*.) With the TI in place, voting would be "very easy" for her, and she could do so privately and independently. (*Id*. ¶10)

Wisconsin's prohibition against electronic ballot delivery also has disenfranchised Plaintiff Natzke. (R.14, ¶¶9-11) It is dangerous for him to travel to his physical polling place, and his wife, who is also blind, cannot assist him in marking a paper ballot. (*Id.* ¶¶6-7) Plaintiff Natzke could use audible technology (and headphones) to hear the ballot selections and mark an absentee ballot privately and independently. (*Id.* ¶13)

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[2] *The Uniformed and Overseas Citizens Absentee Voting Act*, Dep't of Justice: Civil Rights Division, https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act.

[3] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 525-89, 123 Stat. 2190, 2318-2335.

Plaintiffs-Respondents' situations are not unique. Many voters with disabilities with whom Plaintiffs-Respondents Disability Rights Wisconsin and League of Women Voters of Wisconsin work with face similar or more burdensome challenges, which their non-disabled peers do not face.

C. Procedural History.

Plaintiffs-Respondents brought this action in Dane County Circuit Court challenging Wisconsin's absentee voting system as applied to voters with print disabilities. Plaintiffs-Respondents alleged that the laws restricting electronic delivery and return of absentee ballots violate the ADA/RA and the Wisconsin and U.S. Constitutions. (*See* R.9.) On May 1, 2024, Plaintiffs-Respondents moved for a TI, asking the circuit court to compel Defendants to "make available for the upcoming August 2024 primary and November 2024 general elections an option to request and ***receive*** an electronic absentee ballot that can be marked electronically using an at-home accessibility device." (R.42 at 35) Plaintiffs ***did not*** request electronic ballot ***return***. The Legislature moved to intervene and opposed the TI motion, as did WEC. (R.51, 53, 68)

Administrator Wolfe confirmed in her deposition, taken before the TI hearing, that between 2016 and 2020 (while Section 6.87(3)(d) was enjoined by *One Wisconsin*) clerks emailed ballots to voters, and some ballots were ***accessible***. (R.93 at 31:11-24) She also agreed that, at worst, emailing ballots resulted in "a little more work before and on election day[,]" but that, by and large, election officials were not broadly opposed to emailing ballots and "it did not create significant logistical problems." (*Id.* at 37:10-38:3) Administrator Wolfe clarified that emailing accessible ballots would be a "less significant project" than modifying WEC's web platform, MyVote, to deliver electronic absentee ballots. (*Id.* at 125:11-16) Given this testimony, Plaintiffs-Respondents withdrew all relief sought in their TI motion for the August primary election and narrowed their request for relief in the November general election to email ballot ***delivery*** only, ***not return***. (R.112 at 7:14-19)

On June 25, 2024, the circuit court entered the TI with the ***narrowed*** relief Plaintiffs-Respondents sought. (R.104) On July 18, the circuit court reconsidered its decision, adding additional citations and reasoning. (R.139)

WEC did not appeal. It explained that "given the proximity to the election…WEC had no choice but to begin the complex process of determining how to comply with the [TI] without the back and forth and the potential uncertainty of an appeal." (R.156 at 6) As part of its petition for leave to appeal the Legislature's intervention, WEC expressed that the "confusion [of a reversal] will harm [WEC], municipal clerks, Wisconsin voters, and predictability in the elections process." (R.130 at 8)

The Legislature separately sought this Court's review, then moved the circuit court to stay the TI pending appeal. (R.157) After the circuit court declined to stay the TI, the Legislature moved this Court to stay the TI, which it did on August 19, 2024.

ARGUMENT

A TI is appropriate when: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *See Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. The factors are interrelated and "must be balanced together." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). Once a movant has established these four elements, it is within the court's discretion to grant a TI. *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶20. An issuing court may also consider the "public interest[.]" *See, e.g.*, *State v. Crute*, 2015 WI App 15, ¶39, 360 Wis. 2d 429, 860 N.W.2d 284.

A decision to grant a TI is reviewed for an erroneous exercise of discretion and must be upheld if the issuing court "examine[d] the relevant facts, applie[d] a

proper standard of law, and, using a demonstrated rational process, reache[d] a conclusion that a reasonable judge could reach." *Gahl*, 2023 WI 35, ¶18. The review of a TI is "limited" insofar as the reviewing court only evaluates "whether the circuit court erroneously exercised its discretion by issuing the subject temporary injunction." *Id.* ¶19. The circuit court considered an ample record on the merits of the TI. Its decision applied that record to the law[4] and concluded that Plaintiffs-Respondents met every factor. Its exercise of discretion should be upheld.

I. Plaintiffs-Respondents have a reasonable likelihood of success on the merits.

A. Plaintiffs-Respondents are likely to succeed on their ADA/RA claim.

As the circuit court held in its TI analysis, Plaintiffs-Respondents satisfied all elements of a claim under the ADA/RA. Plaintiffs-Respondents (1) have a qualified disability; (2) have been denied the benefits of the services, programs or activities of a public entity; and (3) the denial was because of their disability. (R.42 at 14-21)

The core of the Legislature's argument is that Plaintiffs-Respondents have meaningful access to absentee voting because Wisconsin law permits voting with assistance. (Br.20) That fundamentally misunderstands the ADA/RA. Plaintiffs-Respondents are entitled to vote absentee both ***privately*** and ***independently***—just like their non-disabled peers. That demand is coextensive with the ADA/RA's requirement that, "to be effective[,]" an accommodation "must be provided in accessible formats…in such a way as to protect the ***privacy*** and ***independence***" of the voter. 28 C.F.R. § 35.160(b)(2)(emphasis added); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013) (applying § 35.160(b)(2): "the covered entity must provide meaningful access to private and

[4] The circuit court went to so far as to directly acknowledge the standard set forth in *Gahl* and "put[] into writing those factors relevant to [its] decision." (R.139 at 3)

independent voting"). Because voting with assistance does not protect the ***privacy*** and ***independence*** of the voter, it violates the ADA. Accessible electronic absentee ballots that allow print-disabled voters to mark their ballots privately and independently using assistive devices such as screen-readers, headphones, or a computer mouse are an effective accommodation under the ADA.

Requiring Plaintiffs-Respondents to rely on assistance directly conflicts with the ADA's requirements that an accommodation "***shall not*** rely on an adult accompanying an individual with a disability to…facilitate communication" of the elector's voting preferences. 28 C.F.R. § 35.160(c)(2)(emphasis added). The TI aligns Wisconsin law with the ADA/RA. Being forced to use an assistant to vote absentee is not a reasonable accommodation because such a compromise would force voters with disabilities to bargain one right (to vote privately and independently) for another (to vote absentee).

The plain language of both federal and Wisconsin election laws show that disabled voters cannot be compelled to vote with assistance. The Voting Rights Act (52 U.S.C. § 10101, *et seq*.) provides that voters with disabilities "***may*** be given assistance." 52 U.S.C. § 10508. Wisconsin law provides that such voters "***may*** select any individual" to assist them. Wis. Stat. § 6.87(b)(5)(emphasis added). The word "may" is permissive. *See City of Wauwatosa v. Milwaukee Cnty*., 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963); *see also* 28 C.F.R. § 35.160(c)(2)(ii) (assistance permissible "where the individual with a disability specifically requests" assistance "and reliance…for such assistance is appropriate").

The Legislature's appeal to criminal penalties (Br.21) is misplaced. A disabled voter's right to a secret ballot is violated when they are forced to share their vote with an assistant, irrespective of an assistant's legal obligation to assist accurately or keep the voter's confidences. (*See infra* § I.B.1)

The Legislature does not meaningfully engage with these premises, instead citing outdated federal authority. (Br.21-22 (citing *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999).) But the Sixth Circuit's determination in *Nelson* that Michigan's

voting-with-assistance laws did not violate the ADA, *see* 170 F.3d at 653, preceded (by a decade) the amendment to the implementing regulations that require accommodations to ensure privacy and independence. *See* 75 FR 56253, Sept. 15, 2010 (amending 28 C.F.R. § 35.160(b)(2)). *Nelson*'s holding is therefore abrogated. Nevertheless, *Nelson* recognized that Michigan's secret ballot clause could "requir[e] the state legislature to modify its election law when the technology becomes available that would allow blind voters to exercise their voting rights without third-party assistance." 170 F.3d at 650. That technology is available today.

The Legislature also makes passing reference to "several alternative ways" a voter with print disabilities can cast their vote without assistance. (Br.21) This statement again demonstrates the Legislature's misunderstanding of the ADA/RA, which requires "granularity in analytic focus" on particular "activities" (here, at-home absentee voting) and not on the "broadly-defined public program" of voting. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503-04 (4th Cir. 2016); R.112 at 26:6-27:10; *see also Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 199 (2d Cir. 2014) ("[T]o assume the benefit is…merely the opportunity to vote at some time and in some way—would render meaningless the mandate that public entities may not 'afford [] persons with disabilities services that are not equal to that afforded others.'") (quoted source omitted). The Legislature's "holistic" analysis of substitutes here is belied by the relevant authority. (R.42 at 17-18 (collecting cases)) The only program at issue here is at-home absentee voting and the Legislature cites no cases establishing otherwise.

The Legislature is wrong that the circuit court's opinion was "so sparse as to be unreviewable." (Br.22) The circuit court cited three cases holding that similar election statutes violated the ADA and acknowledged "other persuasive decisions on this very topic" (R.139 at 6), which Plaintiffs-Respondents cited. (*See* R.42 at 16-22; R.89 at 14-15; R.120 at 8-9 (discussing *Lamone*, 813 F.3d at 507 ("requiring disabled individuals to rely on the assistance of others to vote absentee" denies meaningful access to absentee balloting under the ADA); *Taliaferro v. N.C. State*

Bd. Of Elections, 489 F. Supp. 3d 433, 437-38 (E.D.N.C. 2020) (same); *Johnson v. Callanen*, 2023 WL 4374998, at *11 (W.D. Tex. July 6, 2023) (same))). These cases address the very issue here—electronic ballot delivery and marking—and hold that failure to provide such relief violates the ADA.

Rather than address these cases head-on, the Legislature dismisses them as "out-of-state decisions" (Br.23) before relying on its own "out-of-state decision" and an inapposite U.S. Supreme Court opinion. The Legislature argues, "Providing those voters who cannot exercise the privilege of absentee voting independently the choice of an assistant is a most 'reasonable' accommodation[.]" (Br.21 (citing *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). However, *Alexander* ***is not*** about voting, it was about Tennessee's Medicaid program. 469 U.S. at 289. The only place that the word "reasonable" appears on the page that the Legislature cites is in a sentence reiterating that the ADA requires "reasonable accommodations." *Id.* at 301.

The Legislature fails to show that Section 6.87(5) provides meaningful access to private and independent absentee voting as the ADA/RA requires because it forces print-disabled voters to disclose their selections to an assistant to access the program. Non-disabled voters do not face the same imposition. Therefore, Plaintiffs-Respondents face discrimination and are likely to succeed on the merits.

B. Plaintiffs-Respondents are also likely to succeed on their remaining constitutional claims.

The Legislature relegates its entire position as to Plaintiffs-Respondents' remaining (constitutional) claims to a single footnote. (Br.22, n.3) Their arguments are inadequately developed and this Court should not consider them. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Even so, the Legislature's arguments fail.

1. Plaintiffs' Secret Ballot Claims.

Plaintiffs are likely to succeed on their secret ballot claims. The right to a secret (absentee) ballot is enshrined in the Wisconsin Constitution. *See* Wis. Const.

art. III, § 3. The secret ballot provision protects against the evils of intimidation and bribery. *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (approving regulation to ensure votes were cast ***privately*** and ***independently***).

The Legislature advances a flawed, atextual reading of "secret ballot" that belies the historical context of secret-ballot voting and decries common sense. The Legislature is wrong that if a vote is not "public," it is secret (Br.22, n.8), a contorted definition impacting only Plaintiffs-Respondents and other voters with print disabilities. To the contrary, "secret ballot" means that one's vote must be kept private, unless one chooses to share it. *Secret Ballot*, Am. Heritage Dictionary ("a method of voting in which each person writes their choice…so that ***no one else knows*** how they have voted"). This definition is incorporated into Wisconsin's election laws. *See, e.g.*, Wis. Stat. § 6.87(2) (non-disabled absent electors must vote "in such a manner that ***no one*** but [themselves]…***could know how [they] voted***") (emphasis added).

Moreover, none of the cases the Legislature cites address the issue here: whether ***compelling*** a person with a disability who votes absentee to use assistance violates the right to vote by secret ballot. Those cases have no persuasive application. (*See* R.89 at 8-9.)

2. Plaintiffs' Equal Protection Claims.

For voters like Plaintiff Ellingen, Wisconsin's prohibition on electronic ballot delivery forces the voter to choose between forfeiting their right to vote privately and independently or forfeiting their right to vote altogether. This prohibition constitutes a severe, disenfranchising burden on voters who cannot physically access the polls—a burden voters like Plaintiff Ellingen have faced before. (*See* R.42 at 28; R.11 at 3.) Coerced assistance does not lessen this burden, it exacerbates it.

The Legislature provides no reason why electronic ballot delivery and marking is feasible for military and overseas voters but impossible for voters with disabilities. *See* Wis. Stat. §§ 6.22(5), 6.24(7); *see also Luft*, 963 F.3d at 672. The

Legislature's conclusory assertion that its laws "would easily survive both rational basis review and the *Anderson/Burdick* analysis" (Br.22, n.8) is inadequately developed and not entitled to this Court's consideration. *See Pettit*, 171 Wis. 2d at 646.

Plaintiffs-Respondents' federal right to equal protection—coextensive with the right under Wisconsin law—is violated for the same reasons as under the Wisconsin Constitution, *see Metropolitan Associates v. City of Milwaukee*, 2011 WI 20, ¶22, 332 Wis. 2d 85, 796 N.W.2d 717—and they are likely to succeed on the merits of that claim.

II. The circuit court properly concluded that Plaintiffs-Respondents have no other adequate remedy at law.

The circuit court found "no other adequate remedy at law[.]" (R.139 at 5) The Legislature does not refute that finding (Br.2) therefore, any argument is abandoned and conceded. *See Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed on appeal are abandoned). The TI is an adequate remedy. Voters like Plaintiffs Natzke and Christopher, who are blind, would use an audible ballot and headphones to privately mark their ballot; they have not claimed they require assistance mailing back their ballots. (R.12-13) While voters like Plaintiffs Ellingen and Engel may require assistance returning their ballot, it has never been challenged that simple steps exist to conceal ballot markings and ensure secrecy, including printing the certificate sheet (Wis. Stat. § 6.87(3)(d)) so that marking are not revealed.

III. The circuit court properly concluded that Plaintiffs-Respondents face irreparable harm.

The circuit court correctly concluded that the Individual Plaintiffs and other print-disabled voters "are likely to suffer irreparable harm[.]" (R.139 at 5) The Legislature has not meaningfully engaged with that conclusion other than to dispute it. (*See* Br.24.) The harm Plaintiffs-Respondents seek to avoid is the abridgment of

their right to vote absentee both ***privately*** and ***independently***—without assistance. The Legislature fails to even acknowledge this harm.

Plaintiffs-Respondents submitted unrebutted proof that, absent the TI, they will suffer irreparable harm to their right to vote privately and independently and their right to reasonable accommodation and meaningful access to a program provided by the state. (*See* R.10-R.15.) That harm ***cannot be remedied retroactively***. As the circuit court recognized, injuries to one's right to vote are "plainly not reparable[.]" (R.139 at 5)

The Legislature bases its argument that Plaintiffs-Respondents will suffer no harm on the untenable premise that discrimination is acceptable if voters with disabilities retain ***some opportunity*** to vote. (Br.23-24) But discrimination in violation of the ADA presumptively establishes irreparable injury. *See, e.g.*, *Bartell v. Grifols Shared Servs NA, Inc.*, 618 F. Supp. 3d 275, 289-90 (M.D.N.C. 2022). Non-disabled electors can vote absentee or in-person at the polls both privately and independently; print-disabled voters (especially voters like Plaintiff Ellingen (R.112 at 14:3-7)) cannot. Whether a person with a disability can vote in some other fashion does not alleviate the substantial harm of discrimination under the ADA. *See Disabled in Action*, 752 F.3d at 198. Lack of opportunity is a quintessential and ***presumedly irreparable*** harm under the ADA/RA. *See Bartell*, 618 F. Supp. 3d at 289; *Norkunas v. HPT Cambridge, LLC*, 969 F. Supp. 2d 184, 192 (D. Mass. 2013) ("denying [] a choice…harms a disabled individual").

The Legislature suggests the circuit court's finding that Plaintiffs-Respondents were harmed was erroneous because it cited "federal cases that addressed different statutory regimes in other states." (Br.14) That is incorrect. Maryland, North Carolina, ***and*** Texas limited electronic absentee ballot access to military and overseas voters. *See Lamone*, 813 F.3d at 500; *Taliaferro*, 489 F. Supp. 3d at 436; *Johnson*, 2023 WL 4374998, at *2. ***All three states*** allow disabled electors to vote with assistance. *See* Md. Laws §§ 9-308 (absentee), 10-310 (in-person); N.C. Stat. §§ 163-231(a) (absentee), 163-166.8(2) (in-person); Tex. Elec.

Code §§ 64.031 (generally), 64.032(c) (in-person), 86.010 (absentee). ***All three states*** penalized disclosing how someone voted. *See* Md. Laws §§ 9-312, 16-201, 16-203; N.C. Stat. § 163-274(b)(1); Tex. Elec. Code § 86.010(f)-(g). ***And all three states*** provide in-person accessible voting. *See* Md. Laws § 9-503(c)(1); N.C. Stat. § 163-131; Tex. Elec. Code § 61.012.

Courts in all three states have concluded that electors with disabilities suffer irreparable harm if they are deprived of the opportunity to vote absentee ***privately*** and ***independently***. That the Legislature has provided no meaningful legal authority to conclude otherwise is both telling and dispositive. The only case they cite, *Carey v. Wis. Elections Comm'n*, found plaintiffs are harmed where they "risk losing their right to vote"—exactly the case here. 624 F. Supp. 3d 1020, 1034 (W.D. Wis. 2022).

The unrebutted evidence supports that the Individual Plaintiffs and voters like them will be harmed absent an injunction. (*See, e.g.*, R.10-R.15.) If the TI is reversed and voters like Plaintiff-Respondent Ellingen are not provided an accessible electronic absentee ballot, they will be ***forced*** to give up their right to vote by secret ballot and ask someone (with whom they may not wish to share their political preferences) for assistance or ***not vote at all***. (R.11, ¶¶5-11) The loss of the right to vote is a substantial harm and the circuit court did not abuse its discretion in finding so.

IV. The circuit court properly resolved consideration of the status quo.

The Legislature argues that Plaintiffs-Respondents should be denied relief because the TI disrupts the status quo. (Br.15-19) But mandatory injunctions have long been valid in Wisconsin. *See, e.g.*, *Gimbel Bros. v. Milwaukee Boston Store*, 161 Wis. 489, 154 N.W. 998 (1915). If the Legislature's status quo argument is correct, ***no court would ever be able to issue an injunction under the ADA/RA***. The ADA/RA preempts and requires affirmative modifications to the "status quo" whenever it and state laws are in conflict. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 163 & n.8 (2d Cir. 2013). The status quo cannot be preserved in such situations, and courts are under no obligation to allow continued enforcement

of preempted statutes. *See Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶115, 393 Wis. 2d 38, 946 N.W.2d 35.

The circuit court's order does not "misunderst[and] the relevant status quo[.]" (Br.18) The Legislature acknowledges that from 1999 until 2011, and from 2016 until 2020, clerks could email electronic ballots—even accessible electronic ballots. (*Id.*) The Legislature says that practice has long been abandoned, but concedes it remained intact until June 2020. (*Id*.) Moreover, military and overseas voters ***still can and do receive electronic absentee ballots***, including some that can be marked electronically. (*Id*.) The practice—as well as the systems and tools it depends on—persists.

The Legislature is also incorrect that the TI was entered on the "eve" of the November election. (*Id.* at 6-7, 13) The TI was issued in ***June,*** months before ballots for a November election are distributed. (R.93 at 98:10-23) While the Legislature has no definition for when the "eve" of the election occurs (R.156 at 35), the cases it cites indicate the "eve" remains far off. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶8, 393 Wis. 2d 629, 948 N.W.2d 629 ("clerks have already sent out…ballots"); *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1038 (7th Cir. 2020) (late October); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (early October).

V. The public interest favors the Temporary Injunction.

After concluding that Plaintiffs-Respondents "satisf[ied] all the criteria," the circuit court held that granting the TI was in the public interest. (R.139 at 8) The Legislature has not argued that the public is and will be harmed by the TI other than by conflating the public's interest with its own and raising unsubstantiated flags about confusion and security. (Br.24-25)

The Legislature has it backwards: WEC made clear that ***lifting*** the TI—not sustaining it—would result in "confusion [that would] harm [WEC], municipal clerks, Wisconsin voters, and predictability in the elections process." (R.130 at 8) There is no record evidence that the TI would sow confusion with clerks or voters.

Rather, the public is harmed by the uncertainty the Legislature created by appealing. Whether implementing the TI requires WEC to engage in a "complex process" is a harm only WEC can claim, but it has not done so. (R.156 at 6)

It is axiomatic that injunctions bolstering democratic principles, expanding the right to vote, and eliminating discrimination are in the public interest. The circuit court ***twice*** found that to be true. (*See* R.139 at 8; R.157 at 8-10.) So have other courts. *See Lamone*, 813 F.3d at 506-07; *Johnson*, 2023 WL 4374998, at *12; *Taliaferro*, 489 F. Supp. 3d at 438-40. The public's interest in a free and fair election supports preserving the TI. And the TI bolsters election integrity by ensuring that all Wisconsin voters may vote privately and independently.

Failing to marshal any authority or evidence to support its argument, the Legislature insinuates that email ballot ***delivery*** creates a security risk, proffering two new sources. These materials were not in the record below and the Court should not consider them. *See Vilas Cnty. v. Bowler*, 2019 WI App 43, ¶5 n.1, 388 Wis. 2d 395, 933 N.W.2d 120. Regardless, these new materials are inapposite. The Greenhalgh study (Br.8-9) only addresses "casting ballots online"—*i.e.*, electronic ballot ***return***. Moreover, it ***approves*** of voters receiving and marking ballots electronically then "print[ing] the ballot" and "returning [it] by postal mail"—***exactly*** the relief sought and granted here. The FCC website the Legislature cites neither discusses voting nor references email. (*Id.* at 9) Ultimately, the TI does not implement "new" systems. It requires clerks to use the same email systems and accounts ***they currently use*** to send electronic ballots to military and overseas voters. (R.112 at 7:24-8:3) The only change sought is that electronic ballots for voters with print disabilities be accessible.

To the extent the Legislature argues that the TI harms it in ways that constitute harm to the public, the purported harm is illusory, stemming from the false premise that the Legislature has "a sovereign interest in the enforcement of state statutes as written." (Br.24-25) But the Legislature plays no role in enforcing the law. *Evers v. Marklein*, 2024 WI 31, ¶23, 412 Wis. 2d 395, 8 N.W.3d 395.

The Legislature's theory of harm is antithetical to the principle of separation of powers because it encroaches on executive powers and the judicial branch. *See State v. Holmes*, 106 Wis. 2d 31, 68, 315 N.W.2d 703 (1982). The Legislature's theory suggests that only it is "harm[ed]" when laws are challenged and so, *per se*, its harm outweighs a right to relief. But this (a) ignores the executive's sole role in enforcement and (b) functionally wipes out a jurist's authority to say what the law is, to fashion injunctive relief, or find that a statute is unconstitutional or preempted.

Finally, whatever interest the Legislature could possibly have in enforcing its laws pales in comparison to the public's interest in enjoining laws that violate and are preempted by an individual's state and federal rights. *See, e.g.*, *Bank One v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) ("[The public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law[.]"). There is no record evidence that the public is affected by the TI. And it is well-settled that state interests are subordinate to rights created by federal disability laws. *See, e.g.*, *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782-83 (7th Cir. 2002); *Lamone*, 813 F.3d at 508; *Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1047 (N.D. Ia. 2011) ("[T]he national public interest in enforcement of the ADA 'trumps' the more local public interest[.]"); *Seaman v. Virginia*, 593 F. Supp. 3d 293, 328 (W.D. Va. 2022) (reasoning that "ensuring that the ADA's reasonable accommodation provisions are given effect notwithstanding contrary state law supports the public interests underlying the ADA itself").

Furthermore, the TI did not enjoin any statutes as facially unenforceable but rather enjoined the application of the provisions as to voters with print disabilities. Wisconsin law remains otherwise intact.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the circuit court granting Plaintiffs' motion for a temporary injunction.

Dated: August 30, 2024.

Respectfully submitted,

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules in Wisconsin Statutes section 809.19(8) (b), (bm), and (c) for a brief and in this Court's July 19, 2024 Order. The length of this brief is 5,406 words.

Dated: August 30, 2024.

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