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CIRCUIT COURT
DANE COUNTY, WI
2024CV001141

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

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

Case No. 24-CV-1141

Plaintiffs,

Case Code: 30701
Declaratory Judgment

v.

WISCONSIN ELECTIONS COMMISSION, et al.

Defendants.

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR EMERGENCY
DECLARATORY RELIEF AND TEMPORARY INJUNCTION**

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INTRODUCTION

Plaintiffs are qualified Wisconsin electors who, because of disabilities, are unable to independently read, mark, and return their absentee ballots and some, because of their disabilities, *must* vote absentee to reliably vote at all. But Wisconsin's statutory scheme governing absentee voting treats voters with disabilities unequally to voters without disabilities. Unlike other voters who can read, mark, and return their absentee ballots on their own, Plaintiffs and other similar voters must use the assistance of another person to mark their absentee ballots. That act requires them to disclose to that person how their ballot is marked and deprives them of their right to a secret ballot, as guaranteed by Article III, Section 3 of the Wisconsin Constitution. Wisconsin's disparate treatment of Plaintiffs deprives them of equal protection of the laws under the Wisconsin and United States Constitutions, is an undue burden on their right to vote under the Wisconsin and United States Constitutions, and violates the federal Americans with Disabilities Act (ADA) and Rehabilitation Act.

There is an easy and necessary *first* step as a partial remedy for these violations that Plaintiffs ask this Court to order now: Wisconsin can provide to Plaintiffs the electronic delivery of absentee ballots the State once provided to them and that it now provides to military and overseas voters. This remedy can be implemented quickly so that it is in place for the August 13, 2024 presidential primaries; further remedies will be the subject of subsequent motions. For now, as demonstrated below and in the accompanying filings, Plaintiffs meet the standards required for the Court to issue emergency declaratory and temporary injunctive relief under Wis. Stat. § 813.02.

BACKGROUND

A. The Right to a Secret Ballot

The right to a secret ballot is enshrined in the Wisconsin Constitution: "All votes shall be by secret ballot." Wis. Const. art. III, § 3. The requirement that votes be cast by secret ballot

extends to absentee voting. Under current Wisconsin law, absent voters must, in the presence of a witness who is an adult U.S. citizen, mark the physical ballot, fold the ballot, and deposit it into the ballot envelope. Wis. Stat. § 6.87(4)(b)(1). Absent voters must also certify they marked and cast their ballot in secret. Each voter must attest that they “exhibited the enclosed ballot unmarked to the witness, that I then in [their] presence and in the presence of no other person marked the ballot and enclosed and sealed the same ... in such a manner that no one but myself ... could know how I voted.” Wis. Stat. § 6.87(2). The only exception to the requirement that absentee votes be made privately and independently is that an absent voter’s choices may be revealed to “any person rendering assistance” but only if that voter “requested assistance.” *Id.* indeed, absent electors who are “unable to mark his or her ballot” due to disability, have an uncoerced option to have an individual of their choice “to assist in marking the ballot.” Wis. Stat. § 6.87(5).

B. Legal Standards Relating to Electronic Absentee Ballots

The absentee voting program in Wisconsin is widely popular. In 2022, nearly 426,000 absentee ballots were cast, a 150% increase over prior years.¹ The reason for the growth in popularity is unsurprising: any voter in Wisconsin may request and receive an absentee ballot for any election. Commonly called no-excuse absentee balloting, any qualified voter “who for any reason is unable or unwilling to appear at the polling place” can vote by absentee ballot. Wis. Stat. § 6.85(1). To obtain an absentee ballot, any absent voter may “make written application to the municipal clerk ... for an official ballot” “[b]y mail,” “[i]n person at the office of the municipal clerk,” or “[b]y electronic mail,” among other options. Wis. Stat. § 6.86(1)(a). While the absentee ballot program has expanded in popularity in recent years, it has also been subject to restrictive

¹ See U.S. Election Admin. Comm’n, *Election Administration and Voting Survey 2022 Comprehensive Report* 34 (June 2023); U.S. Election Admin. Comm’n, *Election Administration and Voting Survey 2018 Comprehensive Report* 30 (June 2019).

legislation. Wisconsin law previously provided that any absent elector could also receive their absentee ballot electronically. *See* Wis. Stat. § 6.87(3)(d) (2009-2010). Until 2011, “[a] municipal clerk” was required to, upon valid request, “transmit a[n] ... electronic copy of the **absent elector’s** ballot to that elector in lieu of mailing.” *Id.* (emphasis added) The ability for any absent elector to receive an electronic absentee ballot ended in 2011. *See* 2011 Wisconsin Act 75 (“Act 75”). Act 75 amended Section 6.87(3)(d), striking out “absent elector” and replacing it with “a military elector” or an “overseas elector,” as defined elsewhere in the Election Code. *See* 2011 S.B. 116 (Dec. 1, 2011). The new statute “prohibit[ed] election officials from sending [electronic] absentee ballots via email [] to all but a few categories of voters,” i.e., **only** military members and permanent overseas voters. *Luft v. Evers*, 963 F.3d 665, 676 (7th Cir. 2020).²

Wisconsin provides such ballots to military and overseas voters in accordance with two federal programs: UOCAVA³ and MOVE.⁴ UOCAVA, short for the Uniformed and Overseas Citizens Absentee Voting Act, requires states and territories to provide easier absentee-voting processes for members of the United States Uniformed Services and merchant marine, their family members, and United States citizens residing outside the United States.⁵ MOVE, short for Military

² In 2016, Wisconsin voters challenged the federal constitutionality of this prohibition in a readily distinguishable case. *See One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 902 (W.D. Wis. 2016), *aff’d in part, vacated in part, rev’d in part sub nom, Luft*, 963 F.3d 665. In these cases, plaintiffs did not challenge the manner in which this prohibition impacted voters with disabilities, and instead argued that the prohibition unconstitutionally burdened “students or researchers who are abroad” and “domestic travelers.” 198 F. Supp. 3d at 946-47. While the district court agreed, *id.* at 948, the Seventh Circuit later reversed. *See generally Luft*, 963 F.3d 665. The Seventh Circuit trivialized the “inconvenience[]” experienced by “road warriors who may be out of state, or leisure travelers who don’t plan ahead.” *Id.* at 676-77. In reversing the district court, the Seventh Circuit rationalized its conclusion on the fact that “travelers have many ways to vote in Wisconsin” and that “potential inconvenience” did not “override the state’s judgment that other interests predominate.” *Id.*

³ *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>.

⁴ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 525-89, 123 Stat. 2190, 2318-2335.

⁵ Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for Federal Office, 52 U.S.C. §§ 20301-20311.

and Overseas Voter Empowerment Act, establishes procedures for states to send electronic absentee ballots to eligible military and overseas voters.⁶ To comply with UOCAVA and MOVE, states must enable the electronic delivery of blank absentee ballots to eligible voters.⁷ Wisconsin has adopted both UOCAVA and MOVE. Wis. Stat. §§ 6.22; 6.24; 6.25; 6.34; 6.87.⁸ Absentee military and overseas voters can obtain their ballots via email or can download their ballot on MyVote.com.⁹ Wisconsin does not provide for the electronic return of absentee ballots.

C. The Impact of Wisconsin's Prohibition on Electronic Absentee Ballots on Voters With Disabilities

The prohibition on electronically delivering and returning an absentee ballot (“the Electronic Absentee Ballot Prohibition”) has a recognized disenfranchising effect on many Wisconsin voters with disabilities because it denies them the right to vote privately and independently by absentee ballot. This unconstitutional defect in Wisconsin’s absentee ballot system is well-known yet remains unaddressed.

1. Generally

WEC has acknowledged that, under current law, “[v]oters with blindness or low vision still do not have an accessible absentee ballot or certificate envelope that can be marked independently.”¹⁰ WEC presented at the National Federation of the Blind of Wisconsin’s

⁶ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 525-89, 123 Stat. 2190, 2318-2335.

⁷ *Supra*, n.3.

⁸ In 2010, the Department of Justice initiated an action against Wisconsin for violations of UOCAVA. The district court entered a consent decree requiring Wisconsin to take steps to ensure compliance with UOCAVA. *United States v. Wisconsin*, No. 3:18-cv-00471 (W.D. Wis. June 20, 2018), <https://www.justice.gov/crt/case-document/file/1075226/dl>.

⁹ *Military & Overseas Voters*, MyVote Wisconsin, <https://myvote.wi.gov/en-us/Military-Overseas-Voters>.

¹⁰ Wis. Elections Comm’n, *Barriers Faced by Elderly Voters and Voters with Disabilities* 6 (June 2023), https://docs.legis.wisconsin.gov/misc/mandatedreports/2023/wisconsin_elections_commission/barriers_faced_by_elderly_voters_and_voters_with_disabilities_s_5_25_4_received_6_29_2023.pdf (hereinafter “Voting Barriers Report”).

Conference in 2022 and 2023 and was told that the main concern of the group was “the loss of screen reader friendly absentee ballots.” *Id.* WEC also knows that the result of this unconstitutional defect is that, currently, “[v]oters with blindness or low vision still do not have an accessible absentee ballot or certificate envelope that can be marked independently.”¹¹ That also means that there is no option for voters with such disabilities to privately mark their ballots. Although Defendants are aware of the impact of current law, the statutory text ties their hands from remedying these ills.

These ills are felt with particular acuity in Wisconsin. Approximately 21 percent of Wisconsinites with disabilities have disabilities that impact their mobility or perception, and as of 2016, more than 100,000 Wisconsinites live with visual disabilities, with an estimated two percent of all Wisconsin adults being blind or having “serious difficulty seeing, even when wearing glasses.”¹² Hundreds of thousands of voters in Wisconsin, many of whom, like Plaintiffs, by virtue of disability are uniquely reliant on the availability of more options to reliably vote, including through absentee balloting, may be forced to give up their right to vote absentee privately and independently due to the Electronic Absentee Ballot Prohibition.

2. *The Individual Plaintiffs*

Plaintiffs Michael Christopher, Stacy Ellingen, Tyler Engel, and Donald “Don” Natzke (the “Individual Plaintiffs”) are United States citizens, residents of the State of Wisconsin, and are duly qualified and registered as electors in local, state, and federal elections in Wisconsin. (Dkt. 12, Declaration of Michael R. Christopher (“Christopher Decl.”) ¶¶1-3; Dkt. 11, Declaration of Stacy

¹¹ *Id.* (emphasis added).

¹² *Disability & Health U.S. State Profile Data for Wisconsin (Adults 18+ years of age)*, Centers for Disease Control and Prevention (May 12, 2023), <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/wisconsin.html>; *Blindness Statistics*, National Federation of the Blind (Jan. 2019), <https://nfb.org/resources/blindness-statistics>.

Ellingen (“Ellingen Decl.”) ¶1-3; Dkt. 13, Declaration of Tyler Engel (“Engel Decl.”) ¶¶1-3; Dkt. 14, Declaration of Donald Natzke (“Natzke Decl.”) ¶¶1-3) Plaintiffs Christopher, Engel, and Natzke all strongly prefer to vote absentee since voting in-person is difficult and often inaccessible due to their disabilities. Plaintiff Ellingen *must* vote absentee as she is unable to reliably and safely access her polling place. As described below, each Plaintiff has a disability that makes it impossible for them to vote a paper absentee ballot privately and independently. So, each must choose between revealing their vote to an assistant, including one who they may not trust to accurately mark their vote, or forgoing voting by absentee ballot altogether.

Plaintiff Don Natzke has been completely blind since he was 12 years old. (Natzke Decl. ¶4) Because of his disability, he is unable to read and mark a paper ballot and requires assistance to vote. (*Id.* ¶5) His wife is also blind and cannot assist him. So, although Plaintiff Natzke would strongly prefer to vote absentee, he must go to the polls. (*Id.* ¶¶6-7) On at least one occasion, Plaintiff Natzke was physically unable to reach the polls. (*Id.* ¶¶9-11) In April 2020, he recently had surgery and could not travel to the polls. (*Id.* ¶9) Additionally, he was considered a high-risk individual and cautioned not to vote in person due to the COVID-19 pandemic. (*Id.*) Plaintiff Natzke requested and received an absentee ballot but was unable to fill it out due to his print disability and the fact that he had nobody at home to assist him. (*Id.* ¶¶10-11) Due to the Electronic Absentee Ballot Prohibition, he was completely disenfranchised. (*Id.* ¶11) If given access to an electronic ballot, Plaintiff Natzke would use his at-home accessibility devices to read and mark his absentee ballot privately and independently. (*Id.* ¶¶12-14) However, in order to vote absentee under the current law, he would be forced to give up his constitutional right to a secret ballot.

Plaintiff Michael Christopher is legally blind. (Christopher Decl. ¶5) He was diagnosed at the age of 19 with a benign brain tumor. (*Id.* ¶4) Surgery to remove the tumor left him blind in his right eye. (*Id.*) He subsequently suffered a traumatic injury to his left eye and has been legally blind ever since. (*Id.* ¶5) His brain injury also affects his balance, so he prefers to vote absentee due to the difficulty in accessing his physical polling place; but because of his disability, he cannot privately and independently read or mark a paper absentee ballot. (*Id.* ¶¶6-7) To vote a paper absentee ballot, Plaintiff Christopher must rely on an assistant to read the ballot and mark his selection, which means Plaintiff Christopher must tell the person assisting him who he is voting for and rely on them to mark his ballot without any means to independently verify its accuracy. (*Id.* ¶8) If he were allowed to vote via electronic ballot, he would use his at-home accessibility devices to read and mark the absentee ballot privately and independently. He cannot use his accessibility devices to read or mark Wisconsin's paper absentee ballot. (*Id.* ¶¶12-13) In order to vote absentee under the current law, he would be forced to give up his constitutional right to a secret ballot.

Plaintiff Stacy Ellingen has cerebral palsy, which affects every part of her body.¹³ (Ellingen Decl. ¶4) She lives alone and relies on assistance from caregivers for all her basic needs. (*Id.*) Because there is a caregiver shortage, Plaintiff Ellingen struggles to hire enough caregiver support and often can have a caregiver come for only a short period of time. (*Id.* ¶¶7-9) Due to her physical disabilities, she cannot physically access the polls because she cannot drive. (*Id.* ¶6) She also generally has no one to drive her, nor can she safely and independently use accessible public transportation, which is infrequent and unpredictable in the area where she lives. She also cannot

¹³ Athetoid cerebral palsy is the "second most common type of cerebral palsy" and is "usually more severe than other types of cerebral palsy." *Athetoid Cerebral Palsy*, Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/25198-athetoid-cerebral-palsy>. It is a "movement condition that causes involuntary and uncontrollable muscle movements." *Id.*

independently use a car service to go to her polling location. (*Id.*) Due to the caregiver shortage,¹⁴ Plaintiff Ellingen cannot use the care time available to her to have a caregiver drive her to the polls. (*Id.* ¶9) She therefore votes absentee. Because of her cerebral palsy, Plaintiff Ellingen does not possess the fine motor skills to mark a paper absentee ballot independently, so she must rely on an assistant to fill out her ballot for her. (*Id.* ¶8) Plaintiff Ellingen fears telling her caregivers of her voting preference because she often does not know her caregiver well (in light of the caregiver shortage), and because she needs them for daily assistance and cannot risk making a caregiver upset or uncomfortable if they disagree with her political views. (*Id.*) Additionally, since her parents live an hour away, she cannot readily rely on them for assistance. (*Id.* at ¶9) On the occasions that Plaintiff Ellingen could not see her parents within the necessary time frame for absentee voting, she has been completely disenfranchised. (*Id.*) If she were allowed to vote via electronic ballot, she could use her at-home accessibility devices to read and mark her absentee ballot completely privately and independently. (*Id.* ¶10) She cannot use her devices on Wisconsin's paper absentee ballot. (*Id.*) Unless Plaintiff Ellingen gives up her constitutional right to a secret ballot, she cannot vote, and will be disenfranchised.

Plaintiff Tyler Engel has spinal muscular atrophy, which affects his ability to control his body's movement.¹⁵ (Engel Decl. ¶4) Due to his disability, Plaintiff Engel is an indefinitely

¹⁴ *Addressing the Shortage of Direct Care Workers: Insights from Seven States*, The Commonwealth Fund (Mar. 19, 2024), <https://www.commonwealthfund.org/publications/issue-briefs/2024/mar/addressing-shortage-direct-care-workers-insights-seven-states#:~:text=Longstanding%20shortages%20in%20the%20direct,retention%20rates%2C%20and%20recruitment%20challenges>; Michelle Diamant, *Feds Take Steps to Shore Up Disability Caregiver Workforce*, DisabilityScoop (Feb. 29, 2024), <https://www.disabilityscoop.com/2024/02/29/feds-take-steps-to-shore-up-disability-caregiver-workforce/30765>.

¹⁵ "Spinal muscular atrophy (SMA) is a genetic (inherited) neuromuscular disease that causes muscles to become weak and waste away. People with SMA lose a specific type of nerve cell in the spinal cord (called motor neurons) that control muscle movement. Without these motor neurons, muscles don't receive nerve signals that make muscles move.... [and] certain muscles become smaller and weaker due to lack of use." *Spinal Muscular Atrophy*, Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/14505-spinal-muscular-atrophy-sma>.

confined voter under Wisconsin law, meaning he votes by absentee ballot out of necessity. Wis. Stat. § 6.86(2)(a); Engel Decl. ¶6. But also due to his disability, he does not have sufficient strength in his arms to mark his ballot independently. (Engel Decl. ¶5) Instead, he requires assistance to mark his ballot and to place it in the mailbox. (*Id.*) Plaintiff Engel has sufficient strength to use his laptop independently. But for the Electronic Absentee Ballot Prohibition, Plaintiff Engel would be able to vote absentee privately and independently, like all other Wisconsin voters without disabilities can. (*Id.* ¶8)

3. *The Organizational Plaintiffs*

Organizational plaintiff Disability Rights Wisconsin (DRW) represents voters who suffer a similar burden on their right to vote as the Individual Plaintiffs.¹⁶ DRW is a statewide, nonpartisan nonprofit with a mission to “empower all persons with disabilities to exercise and enjoy the full extent of their rights and to pursue the greatest possible quality of life,” including through their constitutional right to vote. (Dkt. 10, Declaration of Kristin Kerschensteiner (“Kerschensteiner Decl.”) ¶3) DRW has members who, like the Individual Plaintiffs, are disabled and cannot vote a paper absentee ballot privately and independently. (*Id.* ¶15) DRW also has members who, like Plaintiff Ellingen, cannot access their in-person voting location. For these voters, the ban on electronic absentee ballots means that they must “forfeit their constitutional right to a secret ballot, or not vote at all.” (*Id.* ¶16) Many of DRW’s members with disabilities have accessibility devices in their homes that would allow them to fill out an electronic ballot privately and independently. (*Id.* ¶17) But the current ban on electronic absentee ballots means that these voters must choose between voting absentee and their constitutional right to a secret ballot.

¹⁶ As Wisconsin’s protection and advocacy organization for people in Wisconsin, DRW does not have members, but has a federal mandate to “ensure full participation in the electoral processes for individuals with disabilities,” including all aspects of registering to vote, casting a vote, and accessing polling places,” 52 U.S.C. § 21061. For brevity, those that DRW represents are referred to throughout as “members.”

Organizational plaintiff League of Women Voters of Wisconsin (LWVWI or “the League”) has members who suffer a similar burden on their right to vote. The League is a nonpartisan nonprofit formed immediately after the enactment of the Nineteenth Amendment granting women’s suffrage. (Dkt. 15, Declaration of Debra Cronmiller (“Cronmiller Decl.”) ¶2) The League’s mission is to “empower voters and defend democracy.” (*Id.* ¶3) The League has members who, like the individual plaintiffs, are disabled and cannot vote an absentee ballot independently. (*Id.* ¶8) Many of these voters have accessibility devices in their homes that would allow them to fill out an electronic ballot independently and privately. (*Id.* ¶10) But the current ban on electronic absentee ballots means that these voters must choose between voting absentee and their constitutional right to a secret ballot. The League also has members who cannot access their in-person voting location. For these voters, the ban on electronic absentee ballots means that they must choose between their right to vote and their right to a secret ballot. (*Id.* ¶9)

The Individual Plaintiffs Ellingen, Christopher, and Engel plan to vote absentee for the August 2024 primary and November 2024 general elections in Wisconsin and Plaintiff Natzke would vote absentee if he were physically able. DRW represents electors who plan to vote absentee and the League has members who plan to do the same. Without relief, these individuals will be forced to abandon their right to vote a secret ballot if they wish to access the franchise through absentee voting.

ARGUMENT

Plaintiffs bring their claims under the United States Constitution, the Wisconsin Constitution, and two separate substantive federal statutory schemes, the Americans with Disabilities Act and the Rehabilitation Act. Plaintiffs are entitled to temporary mandatory injunctive relief on all their claims. Specifically, at this stage, Plaintiffs seek only a partial remedy

for these violations: the same electronic delivery of absentee ballots the State once provided to them and that it now provides to overseas and military voters.

A. Legal Standard For Issuing a Temporary Injunction.

Wisconsin law permits Plaintiffs to seek temporary injunctive relief. Wis. Stat. § 813.02. To prevail and obtain a temporary injunction, a movant must show: “(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.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. The factors underlying the issuance of a temporary injunction are interrelated and “must be balanced together.” *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), holding modified by *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. Once a movant has established these four elements, it is within the court’s discretion to grant a temporary injunction. *Milwaukee Deputy Sheriffs’ Ass’n*, 2016 WI App 56, ¶20; *Gimbel Bros. v. Milwaukee Boston Store*, 161 Wis. 489, 154 N.W. 998, 1000 (1915) (requiring that the “present or threatened injury must be real, and not trifling, transient [sic], or temporary”).

B. Plaintiffs Have A Reasonable Probability Of Prevailing On the Merits of All Of Their Claims.

Plaintiffs need only show that they are likely to succeed on one of their claims for the Court to grant their proposed relief. *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶30, 402 Wis. 2d 539, 977 N.W.2d 756. Nonetheless, they have a reasonable probability of succeeding on all, as shown below.

1. ADA and Rehabilitation Act Claims (Claims 1 & 2)

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act of 1973 also prohibits discrimination against people with disabilities by any program or activity that received federal financial assistance. 29 U.S.C. § 794(a).

Claims brought under both Title II of the ADA and Section 504 of the Rehabilitation Act are “nearly identical,” and are analyzed and assessed together. *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999); *Lacy v. Cook Cnty., Illinois*, 897 F.3d 847, 852 n.1 (7th Cir. 2018); see also *State v. Piddington*, 2001 WI 24, ¶44, 241 Wis. 2d 754, 623 N.W.2d 528 (“The rights and responsibilities established by the ADA and the Rehabilitation Act are nearly identical.”).

To prevail under either statutory scheme, Plaintiffs must show: (i) they are qualified individuals with disabilities; (ii) they have been denied the benefits of the services, programs, or activities of a public entity, or otherwise subjected to discrimination by that entity; and (iii) the denial or discrimination was because of (or in context of a Section 504 claims, “solely” because of) their disability. See, e.g., *Ashby v. Warrick Cnty. Sch. Corp.*, 908 F.3d 225, 230 (7th Cir. 2018); *Jaros v. Ill. Dep’t of Corr.*, 684 F.3d 667, 671-72 (7th Cir. 2012).

Public entities must “make reasonable modifications” to avoid “discriminat[ion] on the basis of disability” so long as the measures do not “fundamentally alter” the nature of the entity’s programs. 28 C.F.R. § 35.130(b)(7).

a) *Plaintiffs are qualified individuals with disabilities.*

Individual Plaintiffs are qualified individuals with disabilities under the ADA and Rehabilitation Act; DRW and the League also represent Wisconsin voters who are qualified individuals with disabilities. A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies or practices ... or the provision of auxiliary aids and services, meets the essential eligibility requirements for ... participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2); *see also* 29 U.S.C. § 794. Both the ADA and the Rehabilitation Act define a “disability” as “a physical or mental impairment that substantially limits one or more major life activities of such individual,” including, in pertinent part, “caring for oneself, performing manual tasks, ... walking, standing, lifting, bending, ... reading” and more or affects “a major bodily function” including “neurological” and “brain” functions. 42 U.S.C. §§ 12102(1)(A), (2)(A)-(B); 29 U.S.C. § 705(20)(B) (adopting ADA definition at 42 U.S.C. § 12102). Individual Plaintiffs all have disabilities that meet this definition. (Christopher Decl. ¶¶4-7 (blindness and mobility); Ellingen Decl. ¶4 (cerebral palsy); Engel Decl. ¶¶4-5 (spinal muscular atrophy); Natzke Decl. ¶4 (blindness)) So too do DRW and the League’s members have disabilities that meet this definition. (Kerschensteiner Decl. ¶¶3, 6-7, 15; Cronmiller Decl. ¶¶8-10)

Wisconsin’s no-excuse absentee ballot program makes each Individual Plaintiff and the Organizational Plaintiffs’ members eligible to vote by absentee ballot in Wisconsin. (Christopher Decl. ¶8; Ellingen Decl. ¶7; Engel Decl. ¶6; Natzke Decl. ¶8; Kerschensteiner Decl. ¶16; Cronmiller Decl. ¶9) Each has voted absentee in past elections and forfeited their right to vote a secret ballot, and in some cases, like Plaintiff Natzke and Plaintiff Ellingen, were disenfranchised. (Christopher Decl. ¶9; Ellingen Decl. ¶¶8-9; Engel Decl. ¶7; Natzke Decl. ¶¶10-11; Kerschensteiner Decl. ¶16; Cronmiller Decl. ¶9) Each would vote absentee in future elections.

(Christopher Decl. ¶14; Ellingen Decl. ¶11; Engel Decl. ¶10; Natzke Decl. ¶15; Kerschensteiner Decl. ¶17; Cronmiller Decl. ¶10) Plaintiffs' access to Wisconsin's absentee ballot program cannot be restricted. 42 U.S.C. § 12131(2); *see also* 29 U.S.C. § 794.

- b) *Plaintiffs have been denied the benefits of Wisconsin's absentee balloting franchise, a service offered by a qualifying public entity.*

As a threshold matter, all Defendants are covered entities under both the ADA and Section 504 of the Rehabilitation Act. Title II of the ADA defines a covered entity as any "public entity," including "(A) any State or local government; [or] (B) any department, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). The Rehabilitation Act covers any entity, program, or activity that received federal financial assistance. 29 U.S.C. § 794(a).

WEC and its six Commissioners, Defendants Millis, Spindell, Bostelmann, Jacobs, Thomsen, and Riepl, comprise a governmental entity established by the laws of the State of Wisconsin and have "the responsibility for the administration of ... laws relating to elections and election campaigns," as well as their enforcement. Wis. Stat. §§ 5.05(1), (2m), (2w), 5.025 ("commission" means the elections commission"); *see also State ex rel. Zignego v. Wis. Elections Comm'n*, 2020 WI App 17, ¶3, 391 Wis. 2d 441, 941 N.W.2d 284, *aff'd as modified*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208 (describing "The Commission" as a "governmental entit[y] established by the Wisconsin legislature"). Defendant Wolfe is WEC's Administrator, a position created under the laws of the State of Wisconsin, and she serves in that capacity as the "chief election officer" of Wisconsin and is tasked with performing "such duties as the commission assigns" her. Wis. Stat. §§ 5.05(3d), (3g); *see also Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016) (finding no dispute that elections agencies and related individuals, sued in their official capacities, were "public entities" under the ADA). WEC and its Administrator

receive federal funds from the Election Assistance Commission, a federal agency, making them subject to the Rehabilitation Act.¹⁷

Under both the ADA and the Rehabilitation Act, Defendants must provide Plaintiffs with access to the absentee ballot program on terms *equal to* that of voters without disabilities. Plaintiffs are entitled, under the ADA and Rehabilitation Act, to vote absentee in the same manner as voters without disabilities: *privately* and *independently*. Voters without disabilities have the advantage of being able to cast their absentee ballot in secret. On the other hand, voters with disabilities that prevent the reading, marking, and return of a paper ballot, like Plaintiffs, must rely on an assistant, tell that assistant their voting preferences, and hope that their assistant is trustworthy and will accurately mark the ballot on their behalf. By forcing Plaintiffs to forfeit their constitutional right to vote a secret ballot and coercing Plaintiffs into using an assistant in order to cast their absentee ballot, Wisconsin law denies these qualified voters full and equal access to Wisconsin's no-excuse absentee ballot program. Defendants' administration of Wisconsin's absentee ballot program violates the ADA and the Rehabilitation Act.

The program subject to the Court's analysis here is *only* WEC's provision of absentee balloting. The absentee ballot program is a "program, service, or activity" and is distinct from in-person voting on election day, and in-person absentee ballot voting (colloquially known as "early in-person voting.") (*see* Wis. Stat. § 6.86(b)). It does not matter whether in-person voting on election day or other voting programs can be offered as substitutes; the Court should "view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny for compliance with the ADA and the Rehabilitation Act." *Lamone*, 813 F.3d at 504; *see also Disabled*

¹⁷ *See generally* State of Wisconsin Elections Commission Budget Request, <https://doa.wi.gov/budget/SBO/2023-25%20510%20ELEC%20COMM%20ExASExecutive%20Budget.pdf>; *see also* Voting Barriers Report at 5 (noting that WEC "was awarded a yearly HAVA grant for accessibility programming at roughly \$200,000 for several years").

in Action v. Bd. of Elections in City of New York, 752 F.3d 189, 199 (2d Cir. 2014) (same); *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (assuming without deciding that absentee voting was the program, service, or activity to be analyzed); *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at *5 (M.D. Pa. May 27, 2020) (same); *Taliaferro v. N.C. State Bd. of Elections*, 489 F. Supp. 3d 433, 437-38 (E.D.N.C. 2020) (same). The relevant program to analyze for violations of the ADA and Rehabilitation Act is only the absentee ballot program as administered by Defendants.

Even if in-person polling places might have accessible voting machines that could offer Plaintiffs the opportunity to vote privately and independently (which is far from clear¹⁸), that does not affect Defendants' obligation to offer absentee balloting on equal terms to both Wisconsin voters with disabilities and those without. Courts assessing similar circumstances have made clear that "the relevant benefit is the opportunity to fully participate in [the state's] voting program" because "to assume the benefit is anything less—such as 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.'" *Disabled in Action*, 752 F.3d at 199 (cleaned up). Once Wisconsin provides voters a choice between "in-person and absentee voting," the "ADA's broad remedial purpose ... mandates that *both options* be accessible to voters with disabilities." *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1158 (N.D. Ala. 2020)(emphasis added). Whether any of the Plaintiffs *could* vote in-person on election day is irrelevant to their claims that the absentee ballot program is offered to them on unequal terms.

¹⁸ Defendants reported that nearly 40% of samples polling places had non-compliant, high-severity findings relating to the functioning, set-up, privacy, or accessibility of accessible voting equipment. *See, e.g.*, Voting Barriers Report at 12-14.

- c) *Plaintiffs cannot vote absentee privately and independently solely because of their disabilities.*

Plaintiffs also satisfy the third element of their ADA and Rehabilitation Act claims because Defendants' enforcement of the Electronic Absentee Ballot Prohibition discriminates against the Individual Plaintiffs and the Organizational Plaintiffs' members *solely* because of their disabilities. Each is denied meaningful access to the absentee ballot program because they cannot vote their absentee ballots privately and independently because their disabilities make it impossible to vote a paper ballot without assistance. *See Lamone*, 813 F.3d at 507 ("effectively requiring disabled individuals to rely on the assistance of others to vote absentee" denies such voters meaningful access to the state's absentee voting program); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013) ("[U]nder the terms of the ADA or the Rehabilitation Act, the covered entity must provide meaningful access to private and independent voting."); *Lacy*, 897 F.3d at 854 (it is sufficient that plaintiffs be denied "meaningful[] access[]" to the public benefit). And Wisconsin voters like Plaintiff Ellingen are denied more than mere "meaningful access" to participation in the absentee ballot program. Plaintiff Ellingen's disability, combined with the substantial barriers to voting in-person,¹⁹ mean that Plaintiff Ellingen must vote by absentee ballot to reliably access her right to vote. (Ellingen Decl. ¶¶4-7) Because of her cerebral palsy, she cannot independently mark a paper ballot in the current form authorized under Wisconsin law. (*Id.* ¶8) Plaintiff Ellingen is thus forced to either share her vote with an assistant, or not vote at all. (*Id.* ¶9)

Under the ADA and the Rehabilitation Act, Defendants may not "[d]eny a qualified individual with a disability"—which the individual Plaintiffs are, *see supra* pp. 7–11—"the opportunity to participate in or benefit from the aid, benefit, or service," or "[o]therwise limit a qualified individual ... in the enjoyment of any right, privilege, advantage, or opportunity enjoyed

by others receiving the aid, benefit, or service.” 28 C.F.R. §§ 35.130(b)(1)(i), (vii). Nor may they “[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded [to] others,” or provide “an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result ... as that provided to others.” *Id.* §§ 35.130(b)(1)(ii)-(iii). Where the service or benefit being provided is given on unequal terms or in a fashion that limits a qualified individual’s enjoyment of a right, Defendants are required to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” *Id.* § 35.130(b)(7)(i); *see also* 28 C.F.R. § 41.53 (imposing duty to ensure persons with disabilities have equal access to public programs); *Washington*, 181 F.3d at 847; *Johnson v. Callanen*, No. 22-CV-00409-XR, 2023 WL 4374998, at *6 (W.D. Tex. Jul. 6, 2023) (“[B]oth the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals.”).

As explained above, the only program or service at issue here is Plaintiffs’ ability to participate on equal terms in absentee balloting. While any registered Wisconsin voter can opt to vote absentee without excuse, Plaintiffs Christopher, Engel, and Natzke strongly prefer voting absentee due to barriers that prevent them from reliably accessing in-person voting. (Christopher Decl. ¶10; Engel Decl. ¶6; Natzke Decl. ¶¶8-11, 13) And Plaintiff Ellingen does so out of necessity. (Ellingen Decl. ¶¶4-7) Voters without disabilities who vote absentee enjoy the guarantee of being able to vote a secret ballot at home privately and independently. They do not have to share their voting preferences with anyone. Plaintiffs are treated differently because of their disabilities.

¹⁹ In their mandated report on barriers to access for disabled and elderly voters, Defendants found thousands of non-compliant findings at the polling places sampled, 44% of which constituted “high severity” barriers, defined as “a barrier that, in and of itself, would be likely to prevent a voter with a disability from entering a polling place and casting a ballot privately and independently.” *See* Voting Barriers Report at 8, 10.

Because Plaintiffs have disabilities that make it impossible for them to read, mark, and return a paper ballot independently, they are forced to give up their privacy and share their vote with an assistant. Denying Plaintiffs a reasonable modification that would allow them to vote absentee on the same terms as voters without disabilities violates the ADA and the Rehabilitation Act.

d) Electronic balloting is a reasonable modification.

An electronic absentee ballot that can be marked electronically is a reasonable modification of absentee voting procedures that would allow Plaintiffs and similarly situated voters with disabilities to access the absentee ballot program on equal terms with all other voters. The only legal limitation on this relief is that it must not “fundamentally” alter the service provided. 28 C.F.R. § 35.130(b)(1)(7)(i). The temporary relief Plaintiffs seek here does not do so. Before the passage of Act 75, all absent electors could request and receive an electronic absentee ballot. *See* Wis. Stat. § 6.87(3)(d) (2009-10). And Wisconsin military and overseas voters still *do* receive electronic ballots. *See* Wis. Stat. § 6.87(3)(d) (current version). Because Wisconsin did and still does (for some voters) deliver electronic absentee ballots, expanding that option to voters with disabilities, like Plaintiffs, could not be said to fundamentally alter the nature of the program or service. *See Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003) (rejecting district court’s fundamental-alteration analysis because it was not “clear why the preservation of a program as it has existed for years ... would ‘fundamentally alter the nature’ of the program.”)(quoted source omitted); *Johnson*, 2023 WL 4374998, at *11 (finding that expanded access to the same or similar web-based application used for military and overseas voters was a reasonable accommodation under the ADA and Rehabilitation Act for print-disabled voters that did not alter the nature of the program).

Allowing for electronic ballot marking also does not fundamentally alter the absentee balloting regime, and there is no reasonable basis to conclude otherwise. Military voters and

overseas voters already receive a copy of their ballot via email or as a download through MyVote.²⁰ To the extent that this format is not already readable and markable through at-home accessibility devices, WEC could not reasonably argue that the modifications needed to render such ballots accessible by electronic means is burdensome or that it alters the program. Several states already use ballots under UOCAVA and MOVE that can be electronically marked,²¹ and each of Wisconsin's in-person accessible voting machines allow disabled persons to mark their choices electronically by touch screen or keypad.²² The at-home accessibility devices that Plaintiffs and other similarly situated voters would use to mark their ballots privately and independently are not meaningfully different. (See Christopher Decl. ¶13; Ellingen Decl. ¶10; Engel Decl. ¶8; Natzke Decl. ¶¶12-13.) The Court should conclude that delivery of an electronic ballot that can be marked electronically is a reasonable modification that, though still insufficient and short of the relief Plaintiffs seek, would help remedy the discrimination on the basis of disability that Plaintiffs currently face.

2. Wisconsin Constitutional Claims (Claims 3 & 4)

a) Plaintiffs' right to vote a secret ballot

Plaintiffs also have a strong probability of succeeding on their claims that the Electronic Absentee Ballot Prohibition in Wis. Stat. §§ 6.86, 6.87 violates the Wisconsin Constitution's guarantee of a secret ballot.

²⁰ *Supra*, n.9.

²¹ *Electronic Ballot Return*, National Conference of State Legislatures, <https://www.ncsl.org/elections-and-campaigns/electronic-ballot-return-internet-voting>.

²² See Wis. Elections Comm'n, *Accessible Voting Equipment*, <https://elections.wi.gov/accessible-voting-equipment>.

The guarantee of a right to vote secretly—i.e., *privately* and *independently*—was established through a legislatively referred constitutional amendment in 1986²³ that asked whether the then-current article III should be “repealed and recreated so as to ... remove the existing detailed provisions as to who may or may not vote ... and ... [t]o substitute, instead, a new article that[, *inter alia*]: (a) Preserves the right of a secret ballot.” See 1987-88 Wisconsin Blue Book, Elections in Wisconsin, at 868. The change was immensely popular. The amendment passed with 82% voting for the new constitutional provisions. *Id.* at 870. The right to a secret ballot is a fundamental aspect of Wisconsin’s voting system and is a constitutional right; one that cannot be denied.

The right to a secret ballot for all voters is not unique to Wisconsin. Wisconsin, like all other states, recognizes that the right to a secret ballot enhances democracy by ensuring that elections are held freely and without encumbrance. “All 50 states have employed the secret ballot method of voting to limit voter intimidation during elections.” *Madison Teachers, Inc. v. Scott*, 2018 WI 11, ¶22, 379 Wis. 2d 439, 906 N.W.2d 436. Indeed, “[a]lthough the US Constitution does not specifically guarantee that a person has a right to a secret ballot, such a right has been recognized as one of the fundamental civil liberties of our democracy.” *Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981). The secret ballot “safeguards the purity of our election process by eliminating the fear of scorn and ridicule, as well as lessening the evils of violence, intimidation, bribery and other corrupt practices which can be incumbent in non-secret elections.” *Id.*; see also *Luft*, 963 F.3d at 677 (recognizing state interest “to protect the secrecy of the ballot”).

²³ The right to a secret ballot precedes its express addition to the state constitution in 1986. For example, in 1868, the Wisconsin Supreme Court addressed the question: “Does the privilege of the secret ballot, conceding it to exist, extend to a person who voted illegally?” *State ex rel. Doerflinger v. Hilmantel*, 23 Wis. 422, 425 (1868). Without citing a statute or constitutional provision, the Court assumed that right existed.

Under previous voting systems, bribery and intimidation of vulnerable voters was rampant. In Colonial times, officials were elected *viva voce* (by voice vote or show of hands), “an open, public decision, witnessed by all and improperly influenced by some.” *Burson v. Freeman*, 504 U.S. 191, 200 (1992). The repeal of the *viva voce* system led to a process by which voters could submit their own handwritten ballots “marked [] in the privacy of their homes,” but discerning the votes of such ballots was “complex and cumbersome.” *Id.* The demise of the handwritten ballot led “political parties [to begin] produc[ing] their own ballots for voters.” *Id.* Such ballots were “printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance,” signaling to anyone which party (and thus which candidates) an elector intended to vote for. *Id.* The evils of the *viva voce* system thus “reinfected” the election process, as partisans could bribe voters to use their party tickets and engage in “[s]ham battles” “to keep away elderly and timid voters of the opposition.” *Id.* at 200-01

The ills of these systems led all states, including Wisconsin, to adopt standardized, official ballots encompassing all political parties and candidates. *Id.* at 203-05. The vestiges of the earlier move to a secret ballot are apparent in modern Wisconsin election law. For example:

- All ballots in partisan elections must be uniform. Wis. Stat. § 5.51.
- All polling places must “permit all individuals with disabilities to vote without the need for assistance and with the same degree of privacy that is accorded to nondisabled electors.” *Id.* § 5.25(4).
- All absent electors must certify that their ballot was voted “in such a manner that no one but [themselves] ... could know how [they] voted.” *Id.* §§ 6.87(2), (4)(b)(1) (“The absent elector ... shall mark the ballot in a manner that will not disclose how the elector’s vote is cast.”).
- All new voting equipment, devices, or ballots must “enable[] an elector to vote in secrecy and to select the party for which an elector will vote in secrecy at a partisan primary election” and “permits an elector to privately verify the votes selected by the elector before casting his or her ballot.” *Id.* §§ 5.91(1), (15).

The only exception to the requirement that votes be cast privately and independently is that voters with disabilities *may* have a person of their choosing assist them in marking and returning their ballot. But at the polling place and at home, that option is a right to *uncoerced* assistance. At the polling place, if “assistance is *requested*,” a voter “*may* have assistance” and “*may* select any individual to assist in casting his or her vote.” *Id.* § 6.82 (emphasis added). Likewise, an absent elector who declares that they have a disability “*may* select any individual ... to assist in marking the ballot,” and that assistant is sworn to keep the vote secret. *Id.* §§ 6.87(2), (b). Nothing in Wisconsin’s election statutes can be read to require any voter to use assistance if they do not wish to do so. The right to a secret ballot must be preserved.

Current Wisconsin law does not preserve the right to cast a secret ballot for absentee voters with disabilities that prevent them from reading, marking, and returning a paper ballot independently. For example, each Individual Plaintiff *must* use an assistant to mark a paper absentee ballot as they either cannot read a paper ballot, and thus cannot accurately mark their selections, (*see* Christopher Decl. ¶¶4-9; Natzke Decl. ¶¶4-6), or they lack the fine motor skills to mark their choices using a pen (*see* Ellingen Decl. ¶¶8-9; Engel Decl. ¶¶4-6). Current Wisconsin law thus coerces each Individual Plaintiff into using assistance to vote absentee, violating their constitutional right to a secret ballot. Plaintiff Ellingen fears that revealing her partisan preferences to her caretaker may result in making her caregiver uncomfortable and losing the care she requires; or worse, that they may take advantage of her and not fill out her ballot accurately. (Ellingen Decl. ¶¶9, 11) Ellingen thus must confront the dilemma of whether to ask a caretaker, whom she may not know well, to mark her selections for her, or risk not voting at all. (*Id.* ¶9) The Organizational Plaintiffs’ members face similar coercion under Wisconsin law. (*See* Kerschensteiner Decl. ¶16; Cronmiller Decl. ¶9)

The circumstances that each Individual Plaintiff and the Organizational Plaintiffs' members face violate the Wisconsin Constitution's guarantee of a right to vote a secret absentee ballot. Plaintiffs have shown a reasonable likelihood of succeeding on the merits of their claims under article III, § 3 of the Wisconsin Constitution.

b) Plaintiffs' right to equal protection of the law

Article I, Section 1 of the Wisconsin Constitution guarantees equal treatment for all Wisconsinites. It provides that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.” Wisconsin’s guarantee of equal protection under the laws is at least coextensive with federal protections under the Fourteenth Amendment, if not more expansive in the protections it provides. *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶22, 332 Wis. 2d 85, 796 N.W. 2d 717 (courts “apply the same interpretation to the equal protection provisions of the Wisconsin and the United States Constitutions.”).

To determine whether a voting restriction like the Electronic Absentee Ballot Prohibition violates the Wisconsin Constitution’s guarantee of equal protection, courts first assess “how the right is burdened” and then consider whether that “burden on the right to vote is severe.” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶26, 40, 357 Wis. 2d 469, 851 N.W.2d 262. Where the burden is severe, Wisconsin courts “apply strict scrutiny to the statute, and conclude that it is constitutional only if it is narrowly drawn to satisfy a compelling state interest.” *Id.* ¶22. Otherwise, courts “apply a rational basis level of judicial scrutiny in determining whether the statute is constitutional.” *Id.*

Here, it is obvious that the right is burdened. As discussed above, all Wisconsinites have a right to vote a secret ballot that is guaranteed by the Wisconsin Constitution. The right to vote a secret ballot ensures that votes are made freely and without intimidation or interference.

See Johnson, 2023 WL 4374998, at *11. The right to a secret ballot “takes on such significance because it safeguards the purity of our election process by eliminating the fear of scorn and ridicule, as well as lessening the evils of violence, intimidation, bribery and other corrupt practices which can be incumbent in non-secret elections.” *Mills*, 664 F.2d at 608.

The Electronic Absentee Ballot Prohibition not only burdens the right to a secret ballot, it eliminates it entirely for voters like Plaintiff Ellingen. She is unable to reliably access her physical polling location where she might utilize an on-site accessibility device. Defendants recognize that there currently exists no “options for a voter [with a disability] to fill out a[n] absentee ballot *independently*.”²⁴ Defendants concede that the current absentee ballot program forces voters like Plaintiff Ellingen to choose between revealing their voting preferences or being completely disenfranchised because they cannot access other forms of voting. Voters like Plaintiff Ellingen, and DRW and LWVWI members who are unable to travel to in-person polling places, must vote by absentee ballot. (Ellingen Decl. ¶6-7; Kerschensteiner Decl. ¶16; Cronmiller Decl. ¶9) Due to their disabilities, voters like Plaintiff Ellingen *must* use assistance to vote absentee and *must* share their preferred candidates with an assistant of their choice, even if she does not wish to share her preferences.²⁵ Indeed, for voters like Plaintiff Ellingen, this is not merely a question of the severity of the burden—the Electronic Absentee Ballot Prohibition functions as a complete bar to her right

²⁴ Voting Barriers Report at 6.

²⁵ This is not to say that the proper reliance on an assistant is or should be unlawful. The constitutional defect here is the lack of choice. Of course, many voters with disabilities may prefer to use an assistant and that protects that choice. See 52 U.S.C. § 10508 (Guaranteeing “assistance by a person of the voter’s choice” to “any voter who requires assistance to vote by reason of blindness [or] disability”); see also Wis. Stat. § 6.82(2). But that exception to the right to a secret ballot is recognized as imperfect and cannot be coercive. See *Am. Council of the Blind of Ind. v. Ind. Elections Comm’n*, No. 1:20-cv-03118, 2022 WL 702257, at *8 (S.D. Ind. Mar. 9, 2022) (recognizing that assistance does not “result in a private and independent vote for people with disabilities” and is only effective if in the form of “assistance of a trusted and chosen individual”). Voters must have an option to vote privately and independently in the absentee process where they are unable to vote in person. Otherwise, they face complete disenfranchisement.

to vote a secret ballot privately and independently. And far from speculation, this bar has left her completely disenfranchised in the past. (Ellingen Decl. ¶9)

Under strict scrutiny, the Electronic Absentee Ballot Prohibition fails to pass constitutional muster. As discussed above, *supra*, pp. 3–4, the public interest is served by ensuring that the right to vote a secret ballot is preserved for all voters who seek to vote privately and independently. Defendants cannot present *any* interest (let alone one that passes strict scrutiny) that justifies the burdens the Electronic Absentee Ballot Prohibition inflicts on voters with disabilities who cannot access the physical polls. *Walker*, 2014 WI 98, ¶22.

And even if they could find any compelling interest (they cannot), their position is weakened by two critical aspects of Wisconsin law. *First*, before Act 75's enactment, Wisconsin provided electronic ballot delivery to any absentee voter who requested one, and for some voters, it still does. See Wis. Stat. § 6.87(3)(d) (2009-2010). Critically, the temporary relief requested here is aligned with the stated interest in "protect[ing] the secrecy of the ballot." *Luft*, 963 F.3d at 677. In fact, the same rationale that supported the Seventh Circuit's conclusion in *Luft* that "members of the military face special problems" is entirely consistent with why an electronic absentee ballot must be extended to voters like Plaintiff Ellingen: "they cannot travel freely and may be unable to ... use [the state's] regular voting methods." *Id.* Defendants cannot overcome the fact that they have already "justif[ied] willingness on the state's part to accept the burdens" (and whatever they are, they are minimal) that an electronic absentee ballot delivery poses vis a vis its accommodation of military and overseas voters. *Id.*

Second, Defendants readily admit that the Electronic Absentee Ballot Prohibition is currently depriving voters with print disabilities of their right to vote privately and independently. In the face of this history, it would be impossible for Wisconsin to show alone that its blanket ban

on electric absentee ballots for everyone, including those with disabilities, is “narrowly drawn to satisfy” a compelling state interest. *Id.* Any interest that Defendants could conjure up could hardly pass a rational basis test.

3. U.S. Constitutional Claims (Claim 5).

Plaintiffs Ellingen, DRW, and LWVWI also have a strong probability of success on the merits for their claims brought under the First and Fourteenth Amendments to the United States Constitution, for the same reasons that the Electronic Absentee Ballot Prohibition fails under the Wisconsin Constitution. Indeed, claims brought under the Wisconsin Constitution’s equal protection guarantees are analyzed in parallel with federal equal protection claims. *See, e.g., Walker*, 2014 WI 98, ¶26; *see also Metro. Assocs.*, 2011 WI 29, ¶22 (same). Like under Wisconsin jurisprudence, election laws that restrict the franchise are subject to the framework set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under *Anderson/Burdick*, courts must weigh the “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The inquiry is fact-specific and, rather than being applied in mechanical fashion, courts apply a “flexible standard.” *Id.* Laws that severely restrict the right to vote “must be narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 280 (1992). In essence, the same test employed under the Wisconsin Constitution applies in the Federal setting.

For the same the reasons discussed in connection with the Wisconsin Constitution, *supra*, pp. 22–28, the Electronic Absentee Ballot Prohibition violates the United States Constitution’s

First and Fourteenth Amendments. The Electronic Absentee Ballot Prohibition severely burdens Plaintiff Ellingen's right to vote a secret ballot and forces her to choose between revealing her voting preferences or not voting at all. (Ellingen Decl. ¶9) There is no compelling interest that the State can identify that justifies that burden. Accordingly, Plaintiffs have established a reasonable probability of success on their claims under the First and Fourteenth Amendments of the U.S. Constitution.

C. An Injunction is Necessary to Avoid Irreparable Harm.

The Electronic Absentee Ballot Prohibition infringes on the Individual Plaintiffs and the Organizational Plaintiffs and their members' constitutional rights to vote a secret ballot and, absent a temporary injunction, will cause Plaintiffs and numerous similarly situated voters to suffer irreparable harm at the August 2024 primary and November 2024 general elections in Wisconsin. Courts routinely find that the threatened loss or impairment of the constitutional and fundamental right to vote constitutes irreparable harm. See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury.") (collecting cases); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable injury."); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) ("[F]or some kinds of constitutional violations, irreparable harm is presumed"); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"); *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1034 (W.D. Wis. 2022) (restrictions affecting voters with disabilities' "right to vote ... qualifies as an irreparable harm").²⁶

²⁶ The infringement of a constitutional right is sufficient to show irreparable harm. See *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶ 93, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting).

And states like Wisconsin that guarantee a right to vote a secret ballot have also concluded that laws that “require[] [plaintiffs] to sacrifice their right to a private and independent vote” constitutes irreparable harm because, once forced to give up that right to secrecy, “there is no way to vindicate that interest once the election has concluded.” *Am. Council of the Blind of Ind. v. Ind. Elections Comm’n*, No. 1:20-cv-03118, 2022 WL 702257, at *9 (S.D. Ind. Mar. 9, 2022); *see also Taliaferro*, 489 F. Supp. 3d at 438 (finding that “Plaintiffs have demonstrated irreparable harm” based on the “denial of [plaintiffs] right to cast a private ballot” during elections). Indeed, “[a]ccess to a secret ballot to protect the right to vote freely is integral to Plaintiffs’ right to vote” under Wisconsin law. The effect of the Electronic Absentee Ballot Prohibition is permanent and irreversible. Plaintiffs, their members, and other individuals with disabilities who seek to access the absentee ballot as other voters will be compelled to forfeit their rights to vote privately and independently at the upcoming elections, diminishing their ability to cast their votes freely. That right, once given up, can never be restored. Permitting electronic delivery and marking is an easy, obvious measure that aligns with these constitutional interests.

D. Plaintiffs Have No Other Adequate Remedy At Law.

The only sufficient remedy for Plaintiffs and Wisconsin voters with print disabilities that prevent them from reading, using, or marking a paper ballot is access to an electronic ballot. No other adequate remedy will suffice. If Plaintiffs are denied injunctive relief and the ability to cast their ballot privately and independently, they will have lost that right forever. And voters, like Plaintiff Ellingen, who cannot share their voting preferences for fear of repercussions from caretakers, face complete disenfranchisement. To vote absentee as other voters, each will unequivocally be forced to give up their right to vote a secret ballot during the upcoming elections, or to not vote at all. That infringement cannot be unwound. Once an election comes and goes, “there can be no do-over and no redress.” *League of Women Voters of N.C.*, 769 F.3d at 247; *see*

also *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1153-54 (S.D. Ind. 2018), *aff'd*, 937 F.3d 944 (7th Cir. 2019) (finding no “adequate remedy at law” when an individual’s right to vote is violated, because “an individual cannot vote after an election has passed”).

Monetary damages cannot compensate Plaintiffs: the right to keep ones vote private is priceless. See *Common Cause Ind.*, 327 F. Supp. 3d at 1154; *Democratic Nat’l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020), *stay granted in part and denied in part*, Nos. 20-1538 & 20-1546, Nos. 20-1539 & 20-1545, 2020 WL 3619499 (7th Cir. April 3, 2020), *stay granted in part sub. nom. Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. 423 (2020) (“[I]nfringement on a citizens’ [sic] constitutional right to vote cannot be redressed by money damages, and therefore traditional legal remedies [are] inadequate.”); *People First of Ala.*, 491 F. Supp. 3d at 1180 (“Because no monetary sum could compensate for this injury [abridgment of the right to vote], legal remedies are inadequate.”).

E. The Requested Relief is Necessary to Restore The Status Quo.

Plaintiffs requested, limited relief of an electronic absentee ballot that can be marked electronically is necessary to restore the status quo: a Wisconsin in which voters with disabilities can more readily vote absentee privately and independently. The requested temporary injunction and declaration is insufficient but necessary to ensure that Plaintiffs can access a ballot that allows them to vote privately and independently. As Defendants have recognized, before Act 75’s passage, voters with disabilities could request and receive an electronic absentee ballot by email that “allowed a voter to use a screen reader to mark their ballot.”²⁷ And while pre-Act 75 electronic absentee ballots were still required to be printed and returned by mail or in person, this limited

²⁷ Voting Barriers Report at 6.

mandatory injunction seeks only to restore the status quo that “allowed voters to independently fill out their absentee ballot.”²⁸

Whether the mandatory injunction should issue to restore the status quo requires balance the “equitable principles of fairness and justice,” i.e., a balancing of the harms to Defendants and to Plaintiffs. As discussed above, *supra*, pp. 30–31, the loss or impairment of the right to vote privately and independently is a substantial and irreparable harm. There is, on the other hand, no cognizable harm to Defendants. Defendants already have in place all the fundamental aspects of an electronic absentee ballot system, as they already provide such ballots to military and overseas voters. Wis. Stat. § 6.87(3)(d). And Defendants provided ballot delivery to all voters prior to the 2011 change in the law. All that must be done for the purpose of this motion is to extend the same to voters with disabilities. See *Johnson*, 2023 WL 4374998, at *8 (finding that providing PDF ballots could be made available easily). And Defendants may “certify” any ballot or voting device provided that “[i]t enable[d] an elector to vote in secrecy.” Wis Stat. § 5.91(1). There is no additional burden if those ballots that are voted electronically need to be recreated by election authorities to be tabulated as that is already done for ballots that cannot automatically be read by tabulating equipment. Wis. Stat. § 5.87(1) All of the equities weigh in Plaintiffs’ favor. The requested temporary injunction provide access to a vote private and independent vote. Requiring Defendants to make available an electronic absentee ballot that can be marked electronically is necessary to restore the status quo in Wisconsin.

²⁸ *Id.*

F. The Court Should Exercise Its Discretion to Grant Plaintiffs' Motion In Service of The Public Interest.

While this Court is not required to assess the public interest in determining whether to grant injunctive relief, it may do so. *See, e.g., State v. Crute*, 2015 WI App 15, ¶39, 360 Wis. 2d 429, 860 N.W.2d 284. Issuing an injunction that ensures that Plaintiffs and their members can vote privately and independently will serve the public interest. *See Village of Hobart v. Brown Cnty.*, 2007 WI App 250, ¶24, 305 Wis. 2d 263, 742 N.W.2d 907 (public interest is an equitable consideration in whether to grant an injunction); *see also Forest Cnty. v. Goode*, 219 Wis. 2d 654, 684, 579 N.W.2d 715 (1998) (same).

The right to vote and to vote by secret ballot is enshrined in the Wisconsin Constitution. Wis. Const. art. III, §§ 1, 3. Courts have found that the public interest is fulfilled through injunctions that allow plaintiffs to vote privately and independently. For example, Courts have granted injunctions that expanded online UOCAVA portal to print disabled voters because it as fulfills the public interest. *See Taliaferro*, 489 F. Supp. 3d at 439. And others have found that “a preliminary injunction protecting Plaintiffs’ right to vote independently and privately would be in the public interest.” *Drenth*, 2020 WL 2745729, at *5; *Nat’l Fed. ’n of the Blind, Inc. v. Lamone*, No. RDB-14-1631, 2014 WL 4388342, at *15 (D. Md. Sept. 4, 2014), *aff’d*, 813 F.3d 494 (finding in the public interest “an injunction [that] would assure that people with disabilities can vote privately and independently by absentee ballot”). Further, “this injunction ‘would serve the public interest by achieving the ADA’s broad mandate to eliminate discrimination against disabled individuals.’” *Johnson*, 2023 WL 4374998, at *12 (quoted source omitted); *Am. Council of Blind of Ind.*, 2022 WL 702257, at *10 (“[T]he Court finds that the public interest would be served by prohibiting discrimination in voting.”). This Court too should recognize the “importance of ensuring every qualified voter may vote privately and independently,” *Gary v. Va. Dep’t of*

Elections, No. 1:20-CV-860, 2020 WL 6589326, at *2 (E.D. Va. Aug. 28, 2020), and exercise its discretion and issue the requested temporary injunction.

Wisconsin law also favors resolution of this case in a way that best gives effect to the will of the voters. *See* Wis. Stat. § 5.01(1). In all, granting Plaintiffs' motion will serve the public interest in the vindication of constitutional, state, and federal rights and the lawful administration of elections.

CONCLUSION

For the foregoing reasons, Plaintiffs Disability Rights Wisconsin, League of Women Voters of Wisconsin, and Individual Plaintiffs respectfully request that the Court grant their motion for a temporary injunction and order 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.

RETRIEVED FROM DEMOCRACY DOCKET.COM

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