STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

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

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, in her official capacity as Administrator of the Wisconsin Elections Commission; DON MILLIS, ROBERT SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK THOMSEN, and CARRIE RIEPL, in their official capacities as Commissioners of the Wisconsin Elections Commission,

Defendants.

Case No. 2024CV1141

AMICUS BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION

INTEREST OF AMICI

The Republican National Committee (RNC) is a national committee under 52 U.S.C. §30101. It manages the Republican Party's business, coordinates election strategy, and supports Republican candidates nationwide. As a major political party running candidates throughout the State, the RNC has strong interests in the rules governing

the upcoming election. The RNC also has extensive expertise in election law, election administration, and voting rights. It has filed dozens of amicus briefs in election-related cases across the country, including briefs in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, and *Priorities USA v. Wisconsin Elections Commission*, 2024AP000164, which is currently before the Wisconsin Supreme Court.

SUMMARY OF ARGUMENT

Plaintiffs' case rests on three premises: (1) the Court can swap out some of Wisconsin's new election laws with its old ones; (2) federal disabilities law *requires* this Court to rewind the law; and (3) they have a right to vote absentee. All three are wrong.

First, by trying to change the law, Plaintiffs effectively concede that they are not entitled to a temporary injunction. Under Wis. Stat. §813.02(1)(a) Courts may issue temporary injunctions; however, injunctions should not be issued lightly, and only to "preserve the status quo." *Pure Milk Prod. Co op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564, 569 (1974). But the whole point of Plaintiffs' case is to *change* the status quo: They want the Court to replace Wisconsin's current laws—the so-called "state-law status quo"—with rules that were repealed decades ago. *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Ct.*, 769 F.3d 447, 553-54 (6th Cir. 2014). Such a move would upend the status quo, short-circuiting the laws that Wisconsin's voters have followed for more than a decade. *Id.* A temporary injunction is not appropriate in cases like this. *Pure Milk Prod.*, 64 Wis. 2d at 251.

Second, Plaintiffs' ADA and Rehabilitation Act arguments fail for a similar reason: Their proposed accommodations are simply too big. Although Wisconsin must provide "reasonable accommodations" to disabled voters, (Pl. Br.20), it does not have to "fundamentally alter" its absentee voting "program" when it does so, 28 C.F.R. §35.130(b)(7)(i). Swapping the State's current election laws for its old ones—and thus allowing millions of new voters to cast their ballots electronically—is just the type of "fundamental alteration" that the ADA and Rehabilitation Act let states avoid. *See Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 156 (2d Cir. 2013).

Third, Plaintiffs' constitutional claims misunderstand the law. In Wisconsin, "there is no constitutional right to an absentee ballot." *Teigen*, 403 Wis. 2d 607, ¶53 (cleaned up). Nor is there a federal right to vote absentee. *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020). So Wisconsin is not "den[ying]" Plaintiffs their constitutional right to vote "by absentee ballot," Br.6, because that right "does not exist" in the first place, *Teigen*, 403 Wis. 2d 607, ¶53.

The Court should thus deny Plaintiffs' motion for a temporary injunction.

ARGUMENT

I. Enjoining Wisconsin's absentee-voting laws would upend the status quo.

Since Wisconsin's founding, the State has recognized that temporary injunctions are "extraordinary remed[ies]," *Pettibone v. La Crosse & M.R. Co.*, 14 Wis. 443, 447 (1861), that are meant only "to maintain the status quo," *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377, 381 (1964). For good reason. A "temporary injunction" is traditionally

"a preventive remedy." *Pure Milk Prod.*, 64 Wis. 2d at 251 (cleaned up). That type of relief is supposed to "preven[t]" the status quo from changing—not change the status quo itself. *Id.*; *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157, 160 (1954).

Consistent with that principle, Wisconsin has long followed a common rule: A court may issue a temporary injunction "only when [it is] necessary to preserve the status quo." *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313-14 (1977) (collecting cases). Satisfying that standard—which is a high bar to begin with, *see e.g.*, *Pure Milk Prod. Co op.*, 64 Wis. 2d at 251—becomes all the more difficult "on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424-26 (2020) (*per curiam*). Indeed, in that case, courts must be especially careful not to "upset[]" the status quo, because any last-minute changes could sow "confusion and disarray," "undermine confidence" in Wisconsin's elections, and harm the State's "voters [and] candidates." *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶10, 393 Wis. 2d 629, 948 N.W.2d 877. Time and again, Wisconsin's circuit courts have followed those rules. *E.g.*, *Rise v. Wis. Elections Comm'n*, No. 2022CV2446, Dkt. 79 (Dane Cnty. Cir. Ct. Oct. 7, 2022) (denying a temporary injunction because it would alter the status quo); *League of Women Voters of Wis. v. Wis. Elections Comm'n*, No. 2022CV2472, Dkt. 72 (Dane Cnty. Cir. Ct. 2022) (same).

Indulging Plaintiffs' claims—and thus upending the status quo—would permit precisely what those cases prohibited. For more than a decade, Wisconsin has allowed

only military and overseas voters to get their absentee ballots online. 2011 Wis. Act 75, §50; *accord Luft v. Evers*, 963 F.3d 665, 666-70 (7th Cir. 2020) (discussing the law). And the State has *never* allowed anyone to cast their ballots online. Wis. Stat. §§6.22(5), 6.24(7). But Plaintiffs want to scrap those rules. (Pl. Br.31 33; Compl.58 59.) That change would short-circuit the democratic process, toppling the status quo that Wisconsin's representatives and the State's voters agreed to decades ago. *Platt*, 769 F.3d at 553-54.

In response, Plaintiffs admit that their case would change the law, but they say that swapping the new rules for the old ones would actually "restore the status quo." (Pl. Br.32-33.) Not true. When courts talk about "the status quo," they are referring to "the state of affairs that existed 'on the eve of the'" lawsuit. *Doe #1 by Doe #2 v. Mukwonago Area Sch. Dist.*, 681 F. Supp. 3d 886, 898 (E.D. Wis. 2023) (quoting *Int'l Bhd. of Teamsters Airline Div. v. Frontier Airlines, Inc.*, 628 F.3d 402, 405 (7th Cir. 2010)). That definition makes sense. After all, the "status quo" is just whatever "preceded the pending controversy." *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958). In other words, it is just "[t]he situation that currently exists." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quoting status quo, BLACK'S LAW DICTIONARY (11th ed. 2019)). Currently, that "situation" is simple: Wisconsin is enforcing its laws. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004). So the

State's "existing regulations" laws are "the status quo"—not the extinct ones. *Id.*; *accord Rocky Mountain Gun Owners v. Polis*, 2023 WL 8446495, at *7 (D. Colo. Nov. 13, 2023).

In fact, "the state[] law" *is always* the "status quo." *Platt*, 769 F.3d at 553-54; *accord Ashcroft*, 542 U.S. at 666. Indeed, that is the point of law: It establishes the rules and thus "set[s] … the legal status quo." *Golden v. Mitchell*, 2007 WI App 110, ¶30, 300 Wis. 2d 580, 730 N.W.2d 461. So, whenever a court "preliminarily enjoin[s]" a law, it "necessarily disrupt[s] the state-law status quo." *Platt*, 769 F.3d at 553-54.

Here, that rule leads to a simple conclusion. Plaintiffs want the Court to "[p]reliminarily … enjoin" the law. (Compl.59 ¶¶4-5.) But that request would upend the status quo, *Platt*, 769 F.3d at 553-54, causing the Plaintiffs' motion for a temporary injunction to "fail," *Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶¶62-63, 403 Wis. 2d 539, 977 N.W.2d 756, *aff'd sub nom. Gahl v. Aurora Health Care, Inc.*, 2023 WI 35, 989 N.W.2d 561.

II. Enjoining Wisconsin's absentee-voting laws would "fundamentally alter" the State's absentee-voting procedures.

Plaintiffs' requested relief also dooms their ADA and Rehabilitation Act claims: Those requests would change the law, and thus "fundamentally alter" the State's absentee-voting scheme. 28 C.F.R. §35.130(b)(7)(i). The ADA and Rehabilitation Act generally require states to "make reasonable modifications" to accommodate disabled voters. *Vaughn v. Walthall*, 968 F.3d 814, 819 (7th Cir. 2020). But that mandate comes with a big caveat. *Id.* States don't have to revise their rules when any change "would

fundamentally alter the nature of the service." *Id.* (quoting 28 C.F.R. §35.130(b)(7)(i)). Here, text, precedent, and practice all point to the same conclusion: Plaintiffs' proposed changes are "fundamental[]." 28 C.F.R. §35.130(b)(7)(i).

Start with the text. As mentioned, Wisconsin does not have to change its absentee-voting rules if those changes "would fundamentally alter" its absentee-balloting "program." *Id.* Traditionally, an accommodation "fundamentally alter[s]" a "program," *id.*, when it affects "an essential component" of that program or causes some other "major change," FUNDAMENTAL, AM. HERITAGE DICTIONARY (5th ed. 2011); FUNDAMENTAL, MERRIAM WEBSTER ENGLISH DICTIONARY (11th ed. 2003). If Plaintiffs' proposed accommodation affects "an essential or necessary part" of Wisconsin's absentee-ballot program, then that accommodation would "fundamentally alter" that program. AM. HERITAGE DICTIONARY, *supra*; *accord* 28 C.F.R. §35.130(b)(7)(i).

Plaintiffs' proposed accommodations would alter the State's absentee voting program in just that way. Recognizing that "ballots should not be transmitted over the internet,"[1] Wisconsin has always "carefully regulated" its "absentee ballot" procedures to "prevent the potential for fraud or abuse." Wis. Stat. §6.84(1). Applying that rule to electronic voting—a particularly "high-risk" endeavor[2]—Wisconsin chose to pass Act 75, which broadly prohibits electronic balloting, but carves out a modest exception for

[1] EPI Ctr., *Experts Agree That Ballots Should Not Be Transmitted Over the Internet* (Apr. 2021), tinyurl.com/y6krf5se.
[2] CISA, *Risk Management For Electronic Ballot Delivery, Marking, And Return* 1 (Feb. 2024), tinyurl.com/3ky4vcv9.

two types of voters: "military [and] overseas elector[s]." Wis. Stat. §6.87(3)(d). Plaintiffs' temporary injunction would scrap that careful scheme, loosening the law's narrow exceptions and thus allowing an entirely new group of voters to receive electronic ballots. (Pl. Br.32 33; Compl.58 59.) That's not all. Granting Plaintiffs' request would also force Wisconsin to accept electronically cast ballots, (Pl. Br.35)—something the state has *never* done before. Those changes are "fundamental."

Precedent proves the point. The Supreme Court has long observed that an accommodation "fundamentally alter[s]" a program if that change would force administrators to "waive[] an essential rule." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). That teaching applies with special force to "eligibility [and] qualifying requirements"—the type of requirements that Plaintiffs challenge here. *See A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 595 (7th Cir. 2018). Indeed, waiving those requirements almost always "constitute[s] a fundamental alteration in the nature of the program." *Mary Jo*, 707 F.3d at 156 (cleaned up); *accord Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir.1994) (same); *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012) (similar).

College sports, for example, would be very different—or, in the words of the ADA, they would be "fundamentally alter[ed]," 28 C.F.R. §35.130(b)(7)(i)—if any athlete, college aged or not, was "[e]ligible to play," *see Pottgen*, 40 F.3d at 929 31. Professional sports would also be very different if everyone—"amateur and professional" alike—was eligible to compete against each other. *Cf. PGA Tour, Inc.*, 532 U.S. at 683-

85. And absentee voting would indeed be very different if military and overseas voters—along with the "1,055,434 adults in Wisconsin [who] have a disability"[3]—were suddenly eligible to vote online. Plaintiffs' ADA and Rehabilitation Act claims thus fail.

III. Wisconsin's absentee-ballot laws do not implicate the right to vote.

Plaintiffs' constitutional claims also fail. According to Plaintiffs, Wisconsin's absentee-balloting rules are unconstitutional because those rules "den[y] them the right to vote privately and independently *by absentee ballot*." (Pl. Br.6 (emphasis added).) But there is no constitutional right "to cast an absentee ballot"—private or not. *Tully*, 977 F.3d at 611. So, Wisconsin's absentee-ballot rules do not "implicate the right to vote," much less violate it. *Ga. Proj. v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020); *accord Teigen*, 403 Wis. 2d 607, ¶53 (same for the Wisconsin constitution).

A. The federal Constitution does not protect absentee voting.

For most of the nation's history, states let everyone vote only one way: in person on election day. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 670 (2021). Based on that history, it is no wonder that the "right to vote" only protects *that* type of voting—*i.e.*, "cast[ing] a ballot" in person on election day. *Tully*, 977 F.3d at 613. Absentee voting falls far outside that procedure. So it makes sense that "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020). And because there is no "fundamental right to vote" absentee, there is also no right "to cast an

[3] CDC, *Disability Impacts Wisconsin* (archived June 4, 2024), https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/wisconsin.html.

absentee ballot" by mail, email, or in any other "manner" that some voters might "prefer." *Tully*, 977 F.3d at 611; *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 232 (5th Cir. 2020) ("no right" to vote absentee); *Raffensperger*, 976 F.3d at 1281 (same).

McDonald reinforces that conclusion. In that case, Illinois allowed some voters to cast absentee ballots, but prohibited others—like the incarcerated—from doing the same. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 803-04 (1969). When a group of inmates challenged the law, the Supreme Court upheld it, reasoning that "the right to vote" was simply not "at stake." *Id.* at 807. And that was so, the Court said, because there is no "right to receive absentee ballots." *Id.*; *Raffensperger*, 976 F.3d at 1288 (Lagoa, J., concurring) (*McDonald* "held that the right to vote *absentee* is not a fundamental interest."). So Illinois' absentee-voting rules did not violate the Constitution because the State never "precluded [anyone] from voting." *McDonald*, 394 U.S. at 808 n.6.

The same rule applies to Wisconsin. Therefore, Plaintiffs' federal constitutional claims—the ones that say they have a right to vote "by absentee ballot," (Pl. Br.6)—must fail.

B. The Wisconsin constitution does not protect absentee voting.

Plaintiffs' state constitutional claims fail, too. Indeed, when some of the *same* plaintiffs claimed two years ago that voters had a right to vote absentee, the Wisconsin Supreme Court roundly rejected their claim, stressing that "there is no constitutional right to an absentee ballot." *Teigen*, 403 Wis. 2d 607, ¶53 (cleaned up). And that wasn't the first time Wisconsin courts have rejected such a claim. *E.g.*, *Lee v. Paulson*, 2001 WI

App 19, ¶7, 241 Wis. 2d 38, 623 N.W.2d 577; *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶16, 394 Wis. 2d 602, 951 N.W.2d 556.

Considering Wisconsin's history, those conclusions make sense. For decades, Wisconsin has drawn a sharp line between absentee voting, on the one hand, and in person voting, on the other. *Lee*, 241 Wis. 2d 38, ¶7. While courts have long observed that "voting is a constitutional right," they have also explained that "voting by absentee ballot" is not. *Id.*; *Teigen*, 403 Wis. 2d 607, ¶53. Instead, absentee voting is merely "a privilege," *Jefferson*, 394 Wis. 2d 602, ¶16, so the state legislature is free to "carefully regulate[]" it, *Teigen*, 403 Wis. 2d 607, ¶53, 71 72.

That is exactly what the State Legislature did here. Wisconsin's rules don't affect Plaintiffs' "constitutional right[s]," much less violate them. *Id.* (quoting *Mays,* 951 F.3d at 792). So Plaintiffs are not entitled to a temporary injunction.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for a temporary in junction.

Dated this 10th day of June, 2024.

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*Application for admission *pro hac vice* forthcoming

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