STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 4

DISABILITY RIGHTS WISCONSIN, et al.,

Plaintiffs,

v. Case No. 24-CV-1141

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR EMERGENCY DECLARATORY RELIEF AND TEMPORARY INJUNCTION

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INTRODUCTION

Four Wisconsin voters who are unable to read or mark a ballot due to their disabilities, along with two advocacy groups, seek declaratory relief from the application of Wis. Stat. § 6.87, which, according to Plaintiffs, denies them the ability to receive, mark, and return their absentee ballots electronically. (Doc. 9 ¶¶ 1, 17–18.) Plaintiffs have sued the Wisconsin Elections Commission, its commissioners, and administrator (collectively, "the Commission"), contending that "Wisconsin must provide an option for voters with disabilities to receive, mark, and return their absentee ballot electronically" under Title II of the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act, as well as under the state and federal Constitutions. (Doc. ¶¶ 1, 152–205.)

In the motion before the Court, Plaintiffs seek emergency declaratory relief and a temporary injunction, ordering the Commission "to make available for the August 2024 primary election and November 2024 general election an option to request and receive an electronic absentee ballot that can be marked electronically using an at-home accessibility device." (Doc. 43:2.) Plaintiffs contend that this "partial remedy" is an "easy and necessary first step" that "can be implemented quickly." (Doc. 42:3 (emphasis omitted).) That is not the case.

The relief Plaintiffs seek would disturb the status quo and change election rules on the eve of the election. It would alter existing absentee voting

procedures such that a new class of voters—individuals who are unable to read or mark a ballot due to disability—would be able to receive and mark their ballots electronically, something that is not permitted under current law. And Plaintiffs seeks this change when the election is essentially ongoing—the August primary is just weeks away and absentee voting for that election begins in a matter of days. Changing the rules now would disrupt the election and is not what a preliminary injunction is for.

The timing of Plaintiffs' requested relief alone dooms their motion. But even if it didn't, there are several additional problems with their motion.

Plaintiffs are unlikely to succeed on the merits of their claims. Their ADA and Rehabilitation Act claims are unlikely to succeed because they seek relief that goes far beyond the reasonable accommodations already provided for casting a ballot and would impose undue administrative burdens and fundamentally alter the existing absentee voting scheme. Plaintiffs' equal protection claims under the state and federal constitutions fail because the lack of electronic balloting for voters with print disabilities does not severely burden the right to vote and is rational, in any event. And Plaintiffs' "secret ballot" claim under Wis. Const. art. III, § 3 is unlikely to succeed because that provision does not require absolute privacy; it simply requires a non-public vote.

Beyond their unlikelihood of success on the merits, Plaintiffs also will not suffer irreparable harm without an injunction—they will still be able to cast a ballot in the upcoming elections—and there are public interest concerns with changing election rules this close to an election. The Court should deny Plaintiffs' motion.

RELEVANT FACTS

While the Commission is responsible for overseeing elections law and administration, Wisconsin elections are conducted on the local level by nearly 2000 county and municipal clerks. Local clerks are responsible for in-person and absentee voting, both of which are available and accessible to all Wisconsin voters. (Wolfe Decl. ¶ 21.)

I. In-person and absentee voting is available and accessible.

Municipal clerks are responsible for in-person voting at the polls on election day. All polling places must be equipped with at least one accessible voting machine that permits individuals with disabilities to vote privately and independently. (*Id.* ¶¶ 4, 5.) Relevant here, the accessible voting machines approved for use in Wisconsin all have an audio ballot-marking option for voters with visual impairments. (*Id.* ¶¶ 5, 6.)

Voters who are unable or unwilling to vote at the polls may vote absentee. *See* Wis. Stat. § 6.84(1). Any qualified, registered voter can vote absentee in Wisconsin. *See* Wis. Stat. § 6.85(1); (Wolfe Decl. ¶ 9). Voters can

request an absentee ballot by email using the MyVote website or by asking their municipal clerk in writing, by email, or in person using a form application or a statement containing all the information required on the form. *See* Wis. Stat. § 6.86(1); (Wolfe Decl. ¶ 10).

When a voter requests an absentee ballot, the municipal clerk must mail the ballot to the voter within one business day of the request. *See* Wis. Stat. § 7.15(1)(cm); (Wolfe Decl. ¶ 11). Once the absentee voter receives her ballot, she must complete her ballot in the presence of a witness and seal the ballot in the envelope provided by the clerk. The voter and witness must sign the certificates printed on the envelope. *See* Wis. Stat. § 6.87(4); (Wolfe Decl. ¶ 12).

If the absentee voter is unable to mark her ballot due to disability, she may select someone to assist in marking the ballot, other than the voter's employer, agent of that employer, or officer or agent of the voter's union. *See* Wis. Stat. § 6.87(5); (Wolfe Decl. ¶ 13). The envelope must then "be mailed by the elector, or delivered in person, to the municipal clerk." *See* Wis. Stat. § 6.87(4)(b)1. Voters who need assistance with mailing or delivering their absentee ballot to the municipal clerk because of a disability may also receive assistance. (Wolfe Decl. ¶ 14.)

II. Wisconsin law does not allow clerks to send absentee ballots electronically to anyone other than military and overseas voters.

Wisconsin law does not allow clerks to send absentee ballots electronically to anyone other than military and overseas voters. *See* Wis. Stat. §§ 6.22(2)(e), 6.87(3)(a); (Wolfe Decl. ¶¶ 15, 25). Military and overseas voters can submit a request to receive a ballot electronically by email on the MyVote website or by submitting an email directly to their municipal clerk. (Wolfe Decl. ¶ 17.) The clerk then must scan and electronically transmit (by fax or email) each side of the ballot and the face of the absentee-ballot-certificate envelope, along with instructions. (*Id.* ¶ 18.)

Military and overseas voters who receive their ballot electronically must print, complete, and mail their ballot to their municipal clerk. *See* Wis. Stat. § 6.87(3)(d). They can mark their electronic ballot before printing it if they have the appropriate software, but this software is not considered a ballot-marking device, meaning the vote is not electronically recorded. (Wolfe Decl. ¶ 19.) No voter, including military and overseas voters, can return a voted ballot to the municipal clerk electronically. *See* Wis. Stat. § 6.87(3)(d); (Wolfe Decl. ¶¶ 19, 20).

III. Expanding electronic balloting to additional voters would be virtually impossible to implement ahead of the upcoming elections and could put election security and uniformity at risk.

Expanding electronic balloting beyond military and overseas voters would be virtually impossible to implement ahead of the upcoming elections in August and November 2024. (Wolfe Decl. ¶ 26.)

Technical changes to election systems carry many risks and are not made lightly. The time required to complete any one project is influenced by the software-development process, the Wisconsin Department of Administration's IT infrastructure policies, and the limited staff available to perform the work. (*Id.* ¶¶ 27, 30, 33, 35.) The typical development cycle for even the most minor change generally requires two to three months of work under ideal conditions, while major changes typically require eight to twelve months to complete. (*Id.* ¶ 27.)

Election-system technical changes are implemented through a six-step software-development process, involving planning, analysis, design, testing, implementation, and maintenance. (*Id.* ¶ 30.) The first two steps require staff to assess the situation and estimate the time required for development. These initial steps require stakeholders to identify requirements, understand the business needs, and identify necessary workflows that will interface with other components within the statewide voter-registration and elections-administration system. (*Id.* ¶ 31.) While all

aspects of the software-development process influence completion time, the testing step is particularly variable because a project must pass the testing milestones before advancing to deployment. (*Id.* ¶ 32.)

The time required to implement technical changes is also influenced by factors outside of the Commission's control. Election-related technical systems are hosted, maintained, and secured in the Wisconsin Department of Administration, Division of Enterprise Technology (DET) facilities and interface with other state infrastructure. (*Id.* ¶ 33.) All changes to election systems require the support and assistance of DET and must adhere to the DET Change Management Policy, which prohibits changes to IT infrastructure around all legal holidays and 30 days ahead of all scheduled elections. (*Id.* ¶¶ 33, 34.) Because of these change-freeze periods, most elections software-development occurs in odd-numbered years, when there are no fall elections. (*Id.* ¶ 34.) Software-development is further limited by the Commission's small software-development team, which is primarily dedicated to *maintaining* existing systems to ensure availability to Wisconsin voters and local clerk staff. (*Id.* ¶ 35.)

If the Commission were ordered to make electronic ballots available to disabled voters through the MyVote website, the Commission would have to shepherd this change through each of the six steps of the software-development process. Among other things, the Commission staff would need to test

prototypes with common screen readers and other assistive tools to ensure compatibility. The Commission would also have to decide whether and how to verify that a voter who claims a disability is, in fact, disabled. (*Id.* ¶ 36.) This process would take a minimum of three months to complete and would be further delayed by the change-freeze periods 30 days prior to the upcoming primary and general elections. (*Id.* ¶¶ 34, 36, 37.) Compressing this process could result in serious security concerns because skipping or rushing steps increases the likelihood that the system will have vulnerabilities that could frustrate voters and compromise the upcoming elections. (*Id.* ¶ 40.)

Even if the injunction did not involve the MyVote website and simply required clerks to scan and email ballots to disabled voters, such a change would also take approximately three months to implement because the Commission would have to develop, approve, and provide training to over 2,000 local clerks, plus their staff. (*Id.* ¶ 38.) Each of these clerks would need time to engage and understand the Commission's training materials. Clerks typically have dozens of major responsibilities outside elections and have only limited time to devote to elections matters. Hundreds of them are part-time, and many work only a few hours each week. As a result, the Commission normally provides training opportunities well ahead of any change—ideally a year or more. (*Id.*)

There are security concerns with expanding electronic absentee ballots through clerks sending emails to disabled voters. Not all clerks have government-issued email addresses. That means that their email address is not recognizable as an official government email, which can make it difficult for voters to verify that an email purporting to contain an official ballot is genuine. Email inboxes can also be hacked and addresses mimicked in ways that their physical analogues cannot. (*Id.* ¶ 41.) Expanding electronic ballots through clerks sending emails to disabled voters also threatens uniformity and fair administration of elections because local election officials would have discretion in determining who is eligible for the ballot, the type of ballot sent, how and when it is transmitted, and the security measures taken. (*Id.* ¶ 42.) These security and uniformity concerns are part of why the Commission provides significant and sustained trainings to clerks well ahead of changes to election processes. (*Id.* ¶ 43.)

TEMPORARY INJUNCTION LEGAL STANDARD

Wisconsin Stat. § 813.02, titled "Temporary injunction; when granted," provides courts the authority to issue temporary restraining orders and injunctions. Section 813.02(1)(a) is directly relevant and states:

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act

> to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis. Stat. § 813.02(1)(a).

A court may issue a temporary injunction only if four criteria are met: "(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." *Serv. Emps. Int'l Union , Loc. 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154).

"[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction." *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

ARGUMENT

Plaintiffs cannot meet their burden of proving that they are entitled to an emergency declaration and temporary injunction. First, Plaintiffs are requesting relief that would disturb the status quo, not preserve it, and change election rules on the eve of the election. That alone prevents the Court from granting their motion. Second, even if a last-minute change in the rules were

warranted, Plaintiffs cannot show a reasonable probability of success on the merits of their claims because the accommodation they seek is not reasonable, especially on this tight timeframe, and their right to vote is not at stake, even if their preferred method of absentee voting is unavailable. The Court should deny Plaintiffs' motion.

I. Plaintiffs are requesting relief that would disturb the status quo and change election rules on the eve of the election.

First, Plaintiffs are requesting relief that would disturb the status quo, not preserve it. *See SEIU*, 393 Wis. 2d 38, ¶ 93. And Plaintiffs seek this change on the eve of the election—just days before clerks must begin sending absentee ballots for the August primary, which would disrupt an essentially ongoing election and cause confusion to voters and clerks alike.

A. Plaintiffs' requested relief would disturb the status quo, not preserve it.

"[I]njunctions are not to be issued lightly, but only where necessary to preserve the status quo of the parties and where there is irreparable injury." *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974) (footnote omitted). "The purpose of 'a temporary injunction is to *maintain the status quo*, not to change the position of the parties or *compel the doing of acts which constitute all or part of the*

ultimate relief sought.'" *Sch. Dist. of Slinger v. WIAA*, 210 Wis. 2d 365, 364, 563 N.W.2d 585 (Ct. App. 1997) (quoting *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964)). A temporary injunction should neither give new rights nor alter the positions of the parties. *See Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377 (1964).

Plaintiffs are asking this Court to enter a temporary injunction requiring the Commission to do something new: make an electronic absentee ballot that can be marked electronically available for certain disabled voters who cannot currently request and receive an electronic ballot under Wisconsin law. (Doc. 43:2.) Plaintiffs argue that this is "necessary to restore the status quo" as it stood prior to 2011 Wis. Act 75, when *all* absentee voters could request and receive an electronic absentee ballot that could be marked electronically. (Doc. 42:32.) While that was the law prior to 2011, it is not the law now and has not been so for many years. Under current Wisconsin law, only military and overseas voters can request and receive an electronic absentee ballot. *See* Wis. Stat. § 6.87(3)(d). *That* is the status quo.

The relief Plaintiffs seek—electronic absentee balloting for a new class of voters—is the opposite of what a temporary injunction is supposed to do, and it would constitute part of the ultimate relief in the case. *Pure Milk Prods. Coop.*, 64 Wis. 2d at 251; *WIAA*, 210 Wis. 2d at 364. Whether Plaintiffs are asking the Commission to implement an entirely new system or to simply

extend an existing system to a new class of voters, Plaintiffs are asking for new rights; they are not asking to preserve existing rights. Plaintiffs' requested relief would upset the status quo, and their motion should be denied.

B. Plaintiffs' requested relief would change election rules shortly before the election, causing disruption and confusion.

Plaintiffs' request to change the status quo, rather than preserve it, is reason alone to deny their motion. But the fact that this is an elections case, and Plaintiffs seek to change election rules on the eve of the election, makes Plaintiffs' requested relief impossible.

Wisconsin precedent dictates that the rules of election administration should not be changed in the midst of an ongoing election. *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877. The U.S. Supreme Court concurs with this reasoning. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("As an election draws closer," "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.").

In *Hawkins*, the supreme court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." 393 Wis. 2d 629, ¶ 5. In that case, the petitioners filed an original action and asked for preliminary relief (adding their names to new ballots for President and Vice President) after absentee ballots had already

been sent out by municipal clerks. *Id.* ¶¶ 2–6, 8, n.2. The supreme court denied the petition and motion, explaining that granting the requested relief would disturb an essentially ongoing election by causing confusion to voters and other candidates. *Id.* ¶¶ 6–10.

Notably, in one of the federal cases cited by Plaintiffs—*American Council of Blind of Indiana v. Indiana Election Commission*, No. 1:20-CV-03118, 2022 WL 702257, *6 (S.D. Ind. Mar. 9, 2022)—the district court declined to enter an injunction requiring electronic absentee balloting, concluding that "the requested relief is too disruptive, and too close in time to the election," when the "primary election [wa]s less than eight weeks away, with other forms of absentee voting scheduled to begin in less than two weeks."

Here, the proximity to the election is nearly identical to the timeframe deemed "too close in time to the election" in *American Council of Blind*. *Id.* Municipal clerks are poised to send out absentee ballots to voters with an active request on file for the partisan primary on June 27, 2024. (Wolfe Decl. ¶ 23.) This includes indefinitely confined voters with automatic ballot requests on file, like Plaintiff Engel. *See* Wis. Stat. §§ 6.87(3), 7.15(1)(cm). And thereafter, when any voter requests an absentee ballot, clerks must mail the ballot to the voter within one business day of the request. *See* Wis. Stat. § 7.15(1)(cm); (Wolfe Decl. ¶ 11). Despite the proximity of the election, Plaintiffs did not file their complaint until mid-April 2024 and waited until

May 2024 to file their temporary injunction motion. (Doc. 9; 43.) This delay is particularly unwarranted because the electronic balloting prohibition that Plaintiffs challenge has been in effect since 2011. *See* 2011 Wis. Act 75.

Plaintiffs' requested temporary injunction would change Wisconsin election law just weeks before election day and days before absentee ballots—which are at issue in this case—must be sent out. If this Court were to issue a declaration and injunction on or after the June 24, 2024, hearing, election disruption and voter and clerk confusion would be almost certain.

Expanding electronic absentee balloting to a new class of voters is not simply a flip of a switch. If this Court ordered the Commission make such a change via the MyVote website, the Commission would have to go through the six-step software-development process, which would take a minimum of three months to complete and would be further delayed by the IT change-freeze periods around legal holidays and 30-days prior to the elections. (Wolfe Decl. ¶¶ 34, 36, 37.) Even if the injunction did not involve the MyVote website and simply required clerks to scan and email ballots to disabled voters, such a change would also take approximately three months to implement because the Commission would have to develop, approve, and provide training to nearly 2,000 local clerks. (*Id.* ¶ 38.)

Either way, the requested declaration and injunction would conflict with longstanding law on who can receive an electronic absentee ballot. Given that

Wisconsin elections are run in a decentralized manner through local clerks around the state, it would be challenging to ensure that such a last-minute change to the law is applied equally throughout the state. While the Commission can communicate any court-ordered changes to the clerks, it is the clerks who administer the elections at the ground level. (*Id.* ¶¶ 21, 22, 24.) There is no guarantee that nearly 2,000 clerks will uniformly be able to adapt quickly to these changes, particularly when they are busy preparing for the upcoming election. (*Id.* ¶¶ 24, 38.) For example, even if this Court ordered the Commission to make electronic absentee ballots available to certain disabled voters, clerks, who receive requests for absentee ballots and send those ballots to eligible voters, may still deny a request for an electronic absentee ballot if they fail to change their procedures immediately after any Commission guidance to do so. Similarly, clerks who are busy preparing for the election may not realize they must send electronic absentee ballots to a new group of voters, or they may not have sufficient staff to handle a new task added shortly before the election. And municipalities may not all treat requests for electronic absentee ballots in the same manner. (*Id.* ¶ 42.) There is no guarantee that an injunction could be implemented in a uniform manner statewide.

Communicating these changes to voters would also be difficult, and voters may be confused as to who qualifies to receive an electronic absentee ballot and how they mark and return the ballot. The public information

currently available on the Commission's and clerks' websites references current law, as one would expect. While some voters will hear about a court order, many will not. This has potential to disenfranchise some voters. For example, an indefinitely confined voter who is sent a paper ballot for the partisan primary on June 27, 2024, may, after learning about the injunction in this case, request an electronic ballot, but the local clerk and voter may be confused about whether that voter qualifies for an electronic ballot, whether the clerk can send a second ballot to that voter, and which ballot the voter should complete. An injunction changing the electronic absentee balloting rules at the last minute risks clerk and voter confusion and could have serious consequences.

The supreme court in *Hawkins* refused to change the rules of an election after absentee ballots had gone out for the November 2020 general election. This Court should do the same and refuse to change the rules just days before absentee ballots go out for the August 2024 primary. Plaintiffs' motion should be denied based on the *Hawkins* precedent.

II. Plaintiffs are not likely to succeed on the merits of their claims.

Second, Plaintiffs do not have a reasonable probability of success on the merits. *See SEIU*, 393 Wis. 2d 38, ¶ 93.

"A request for a temporary injunction is not a claim in and of itself, but a vehicle to prevent harm while litigation is pending on the

underlying claim(s)." *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶ 30, 403 Wis. 2d 539, 977 N.W.2d 756, *aff'd*, 2023 WI 35, ___ Wis. 2d ___, 989 N.W.2d 561. Thus, "[a] complaint stating at least one viable legal claim is required as an underlying basis for an injunction." *Gahl on behalf of Zingsheim*, 403 Wis. 2d 539, ¶ 30. "In other words, there must be a viable or protectable legal claim (or right) upon which [the plaintiff] would have a reasonable probability of success." *Id.* "(I)f it appears . . . that the plaintiff is not entitled to the permanent injunction which his complaint demands, the court ought not to give him the same relief temporarily." *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 521, 259 N.W.2d 310 (1977) (citation omitted).

There are several reasons why Plaintiffs' case will not succeed.

A. Plaintiffs are unlikely to succeed on their ADA and Rehabilitation Act claims.

Title II of the ADA, which applies to public entities, 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. Similarly, section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded

from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by the Act. 29 U.S.C. § 794(a). Title II was modeled after section 504, and "the elements of claims under the two provisions are nearly identical" such that courts generally "apply precedent under one statute to cases involving the other." *Lacy v. Cook Cnty.*, 897 F.3d 847, 852 n.1 (7th Cir. 2018) (citation omitted).

To prove discrimination under Title II or section 504, a plaintiff must show that: (1) he is a qualified individual with a disability; (2) he was denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such an entity; and (3) the denial or discrimination was by reason of her disability. *Id.* at 853 (citations omitted).

A plaintiff qualifies under the first factor when he is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). A plaintiff may establish the second factor—that he was excluded from participating in a service, program, or activity—by demonstrating that the defendant refused to provide a reasonable accommodation. *See Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006). A reasonable accommodation must provide "meaningful access" to the public activity, *Alexander v. Choate*, 469 U.S. 287, 301 (1985), such that it is "readily

accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a). An accommodation is unreasonable, however, "if it imposes significant financial or administrative costs, or it fundamentally alters the nature of the program or service." *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018); *see* 28 C.F.R. §§ 35.150(a)(3), 35.130(b)(7)(i). A plaintiff may establish the third factor by showing that "'but for' his disability, he would have been able to access the services or benefits desired." *Wis. Cmty. Servs., Inc.*, 465 F.3d at 752.

The Commission does not dispute, for the purposes of this motion, that Plaintiffs are qualified individuals with disabilities or that Defendants are public entities covered by the ADA and the Rehabilitation Act. And while the ADA applies to voting, *see* 42 U.S.C. § 12101(a)(3), voting—including absentee voting—is "readily accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a).

Wisconsin's election system provides multiple opportunities for voters with disabilities to cast a ballot. If they choose to vote absentee, Wis. Stat. § 6.84(1), they can select someone to assist them in marking and returning their absentee ballot. *See* Wis. Stat. § 6.87(5); *Carey v. WEC*, 624 F. Supp. 3d 1020, 1032–33 (W.D. Wis. 2022). The assistant is subject to felony penalties if he "intentionally fail[s] to cast a vote in accordance with the elector's instructions or reveal[s] the elector's vote to any

3rd person." Wis. Stat. §§ 12.13(3)(j), 12.60(1)(a). If the voter chooses not to cast an absentee ballot with assistance, he can instead vote on election day at his polling place, which must be equipped with at least one accessible voting machine that permits individuals with disabilities to vote privately and independently. (Wolfe Decl. ¶¶ 4–6.) These accommodations are reasonable and provide disabled voters with "meaningful access," *see Alexander*, 469 U.S. at 301, and full "participation in," 42 U.S.C. § 12131(2), voting in Wisconsin, including absentee voting.

Plaintiffs seek injunctive relief that goes far beyond the reasonable accommodation already provided for casting a ballot. For the purposes of this motion, they seek a temporary injunction, ordering the Commission "to make available for the August 2024 primary election and November 2024 general election an option to request and receive an electronic absentee ballot that can be marked electronically using an at-home accessibility device." (Doc. 43:2.) This, according to Plaintiffs, is an "easy and necessary first step" that "can be implemented quickly." (Doc. 42:3 (emphasis omitted).) That is not the case.

Even this "partial remedy," (Doc. 42:3), would impose "undue . . . administrative burdens" and would "fundamentally alter" the nature of Wisconsin's absentee voting scheme. 28 C.F.R. §§ 35.150(a)(3), 35.130(b)(7)(i). While the Commission currently maintains a system for sending ballots electronically to military and overseas voters, the change Plaintiffs request

would involve expanding that system to a *new class of voters* and would require the ability to not only send but also *mark* ballots electronically, which is not part of the current system. (Wolfe Decl. ¶ 18.) The Commission would have to design and implement a new system following the six-step software-development process. (*Id.* ¶¶ 30, 36.) The Commission would also have to decide whether and how to verify that a voter who claims to have a disability is, in fact, disabled, and staff would need to test prototypes with common screen readers and other assistive tools to ensure compatibility. (*Id.* ¶ 36.)

Even if the injunction did not involve the MyVote website and simply required clerks to scan and email ballots to disabled voters, such a change would involve undue administrative burdens because the Commission would have to develop, approve, and provide training on the new process to nearly 2,000 local clerks. (*Id.* ¶ 38.) Even with extensive training, such a change would risk security and uniformity because local election officials would have discretion in determining who is eligible for the ballot, what type of ballot is sent, how and when it is transmitted, and what security measures are taken. (*Id.* ¶¶ 41–42.)

The relief Plaintiffs seek would fundamentally alter Wisconsin's existing absentee voting scheme, causing administrative burdens, election disruption,

and voter and clerk confusion. Plaintiffs are unlikely to succeed on their ADA and Rehabilitation Act claims.

B. Plaintiffs are unlikely to succeed on their equal protection claims under the applicable balancing tests.

Plaintiffs claim that their inability to obtain an electronic ballot unduly burdens their right to vote under the equal protection guarantees of article 1, section 1 of the Wisconsin Constitution and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs agree that "claims brought under the Wisconsin Constitution's equal protection guarantees are analyzed in parallel with federal equal protection claims" (Doc. 42:29), using the *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262, tests.

Courts vary the degree of constitutional scrutiny depending on the severity of any burden the challenged law may impose on the overall opportunity to vote. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (referencing *Anderson* and *Burdick*); *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40 (same).

Plaintiffs claim that the prohibition on electronic voting is constitutional only if it passes strict scrutiny review, and that the law cannot meet that standard. (Doc. 42:28–30.) That is not the governing test. Under either

Anderson/Burdick or *Milwaukee Branch of NAACP*, laws—like the absentee voting law at issue here—that do not severely burden voting are analyzed under rational basis review, and they must be assessed in the context of all opportunities to vote.

1. The *Anderson/Burdick* standard results in rational basis review for challenges to absentee voting regulations.

Under what is commonly called the *Anderson/Burdick* test, a court weighs "the character and magnitude of the asserted injury" against "the precise interests" the state is seeking to serve. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. 780). A regulation deserves strict scrutiny only when it places "severe burdens on plaintiffs' rights." *Timmons*, 520 U.S. at 358. When the burden is not severe, the review is "less exacting" and a "State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788).

In analyzing laws regulating absentee ballots, courts have recognized that the *Anderson/Burdick* test results in rational basis review. In *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 804–05 (1969), the U.S. Supreme Court held that, as long as voters' opportunity to vote in person is not reduced, constitutional challenges to rules for absentee ballots are considered under rational basis review. The U.S. Court of Appeals for the Seventh Circuit

has concluded that harmonizing *McDonald* and *Anderson/Burdick* results in rational basis review: "all election laws affecting the right to vote are subject to the *Anderson/Burdick* test, but election laws that do not curtail the right to vote need only pass rational-basis scrutiny." *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020). *Tully* concluded that absentee ballot requirements fall in the latter category because voters generally can still vote in person. *Id.*; *see also Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) ("As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.").

Rational basis review for absentee ballots is consistent with the more general principle that rules for voting be assessed in the context of the whole electoral system. *Luft v. Evers*, 963 F.3d 665, 671–72 (7th Cir. 2020). Thus, whether a limit on absentee voting unconstitutionally affects voters must be assessed in the context of other opportunities to cast a ballot, including in person.

2. Wisconsin courts have followed the equivalent of the *Anderson/Burdick* standard.

While the Wisconsin Supreme Court has not considered a challenge to rules for absentee ballots under the state constitution, Wisconsin courts reviewing challenges to in-person voting statutes generally follow the federal

courts' lead. The supreme court's most recent review of a state constitutional challenge to a voting statute created the equivalent of an *Anderson/Burdick* test.

In *Milwaukee Branch of NAACP*, the supreme court considered a challenge to Wisconsin's voter ID law under the state constitution. The court held that a voter regulation is subject to strict scrutiny if it creates a severe burden on the right to vote, but that it is otherwise presumed valid, and reviewed under rational basis. *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40 (referencing *Anderson* and *Burdick*).

The court first assessed whether the time, inconvenience, and cost imposed by the voter ID law on in-person voting were severe. *Id.* ¶¶ 40–71. It concluded they were not, reasoning that the state could not charge a fee for ID cards and the time and inconvenience to get a card were "in many respects no more of an imposition than is casting an in-person ballot on election day." *Id.* ¶¶ 71, 77.

The court then turned to a rational basis review of the law. *Id.* ¶¶ 71, 80. It concluded that "[i]t should be beyond question that the State has a significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public's confidence in elections." *Id.* ¶ 73. It further reasoned that because voter ID did not severely burden the

exercise of the franchise, the state needed only a legitimate state interest and the measures were a reasonable means of serving that interest. *Id.* ¶¶ 75–76.

3. The prohibition on electronic ballots is constitutional.

Plaintiffs claim that Wis. Stat. § 6.87(3)(a) and (4)(b)1. are unconstitutional because they deny voters with disabilities the ability to receive and mark absentee ballots electronically. Plaintiffs are unlikely to succeed on this claim. While the Commission agrees that electronic balloting facilitates absentee voting for military and overseas voters, the lack of electronic balloting for others is not a constitutional violation under *Anderson/Burdick* and *Milwaukee Branch of NAACP*.

a. The lack of electronic balloting for voters with print disabilities does not severely burden the right to vote.

Under *Anderson/Burdick* and *Milwaukee Branch of NAACP*, not extending electronic balloting to print disabled voters does not severely burden voting. "[T]he fundamental right to vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner." *Tully*, 977 F.3d at 613.

In *Luft*, for example, the Seventh Circuit considered a constitutional challenge to the statute at issue here. 963 F.3d at 676. The court rejected the claim as "not a plausible application" of *Anderson/Burdick* and concluded that the statute prohibiting election officials from sending electronic absentee

ballots to most voters was constitutional. *Id.* The court emphasized that "all parts of the electoral code must be considered," and Wisconsin voters have many ways to vote. *Id.* at 676–77. While the court did not specifically consider disabled voters, its reasoning still applies: voters are not constitutionally entitled to their preferred method of voting so long as they have other options for casting a ballot. *See id.*

Here, Plaintiffs have multiple options for casting a ballot. If they choose to vote absentee, Wis. Stat. § 6.84(1), they can select someone to assist them in marking and returning their absentee ballot. *See* Wis. Stat. § 6.87(5); *Carey v. WEC*, 624 F. Supp. 3d 1020, 1032–33 (W.D. Wis. 2022). Or they can instead vote on election day at their polling place, which must be equipped with at least one accessible voting machine. (Wolfe Decl. ¶¶ 4–6.) Plaintiffs, apart from Plaintiff Ellingen, do not allege that they are unable to access the polls on election day. And voters like Ellingen, who "must vote by absentee ballot," (Doc. 42:27), can do so with assistance as provided by state and federal law. *See* Wis. Stat. § 6.87(5); 52 U.S.C. § 10508. None of these options curtail Plaintiffs' right to cast a ballot.

Plaintiffs can cast a ballot and have it counted. The law prohibiting electronic absentee ballots does not curtail that more general right. *See Tully*, 977 F.3d at 611 ("[U]nless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake."). Because the right to vote is not at stake,

the law is presumed valid and need only pass rational-basis scrutiny. *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40; *Tully*, 977 F.3d at 616.

b. Limiting electronic balloting to military and overseas voters could rationally relate to legitimate state interests.

Given that the burden caused by lack of electronic absentee balloting is not severe, the question is whether the law prohibiting clerks from sending electronic ballots to most voters could further legitimate state interests. *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 789); *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶¶ 22, 40.

Wisconsin law permits clerks to send electronic absentee ballots to military and overseas voters, but not to other voters, including those with print disabilities. Plaintiffs complain about this legislative line-drawing. But state legislatures have significant discretion in drawing lines between groups. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "Defining the class of persons subject to a regulatory requirement . . . . requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . [and this] is a matter for legislative, rather than judicial, consideration." *Id.* at 315–16. This presents a high bar for plaintiffs seeking to expand the scope of the law: because "the legislature must

be allowed leeway to approach a perceived problem incrementally," such "scope-of-coverage" challenges are "virtually unreviewable." *Id.* at 316.

Here, the Legislature's decision to limit electronic absentee balloting to military and overseas voters was an appropriate exercise of legislative line-drawing that could rationally relate to two legitimate state interests.

First, it could relate to the state's interest in promoting election security. Wisconsin has "a significant and compelling interest in protecting the integrity and reliability of the electoral process, as well as promoting the public's confidence in elections." *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶ 73 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008)). The security concerns with expanding electronic absentee balloting through the MyVote website—especially if done before the upcoming elections—include having to rush the software development and testing processes, which increases the likelihood that the program would have vulnerabilities that could frustrate voters and compromise the upcoming elections. (Wolfe Decl. ¶ 40.) Expanding electronic absentee balloting through clerks sending emails to disabled voters also presents security concerns because not all clerks have government-issued email addresses, making it difficult for voters to verify that an email purporting to contain an official ballot is genuine, and email inboxes can be hacked and addresses mimicked in ways that their physical analogues cannot. (*Id.* ¶ 41.)

Second, the Legislature's decision to limit electronic absentee balloting to military and overseas voters could relate to the state's interest in promoting uniformity, which in turn promotes the fair administration of elections. Courts recognize that states have a legitimate interest in the fair and orderly administration of elections. *See Crawford*, 553 U.S. at 196. Expanding electronic absentee balloting through clerks sending emails to disabled voters would undermine uniformity and fair administration of elections because local election officials would have discretion in determining who is eligible for the ballot, what type of ballot is sent, how and when it is transmitted, and what security measures are taken. (Wolfe Decl. ¶ 42.) This would result in significant variation among jurisdictions.

Here, as in *Luft*, the prohibition on sending electronic absentee ballots to most voters, including those with print disabilities, is not a severe burden, and there are rational reasons why the state would have such a law. Plaintiffs are unlikely to succeed on their equal protection claims under the state or federal Constitutions.

C. Plaintiffs are not likely to succeed on their claims under the "secret ballot" provision of the Wisconsin Constitution.

Plaintiffs claim that the lack of electronic balloting for disabled voters violates their rights under Wis. Const. art. III, § 3, which provides: "All votes shall be by secret ballot." They contend that because current law does not allow

for the provision of electronic absentee ballots to voters with disabilities, "certain voters must accept assistance—and forfeit their right to vote by secret ballot—to vote as absentee voters" in Wisconsin. (Doc. 9 ¶ 188.) The plain meaning of the Constitutional provision does not support Plaintiffs' argument.

In construing a provision of the constitution, courts abide by basic interpretive principles. The Constitution means what its framers and people approving of it have intended it to mean, and that intent is to be determined in light of the circumstances in which they were placed at the time. *See Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 16, 278 Wis. 2d 216, 692 N.W.2d 623. To achieve that goal, courts examine three primary sources: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *See id.*

The plain text of the "secret ballot" provision forecloses Plaintiffs' argument. The word "secret" means "something kept from the knowledge of others or shared only confidentially with a few." *Secret*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/secret (last visited June 10, 2024); *see State ex rel. Kalal v. Cir. Ct. v. Dane Cnty.*, 2004 WI 58, ¶ 53, 271 Wis. 2d 633, 681 N.W.2d 110 (dictionary is a proper source for plain meaning). And the word "secret" must be read, not in isolation, but in the context of the words around it. *See id.* ¶ 46. A "secret ballot" is a term of art,

meaning a vote that is not disclosed publicly, as opposed to a voice vote or roll call vote that discloses each person's vote to all. In contrast to a secret ballot, a voice vote or show of hands is "not a private affair, but an open, public decision, witnessed by all and improperly influenced by some." *Burson v. Freeman*, 504 U.S. 191, 200 (1992); *see also* Wis. Stat. § 19.88 (prohibiting a "secret ballot . . . to determine any election or other decision of a governmental body," unless otherwise provided by statute, and requiring instead "roll call votes" that "shall be recorded, preserved and open to public inspection").

The plain meaning of the term "secret ballot" is a far cry from how Plaintiffs interpret it. It does not mean absolute privacy where an elector's vote is not revealed to anyone under any circumstances. It simply means a "secret ballot" as opposed to a public vote where each person's vote is open and disclosed to all. Wisconsin Stat. § 6.87(5)—which provides certain disabled voters with a means to vote absentee using an assistant of their choosing—is, therefore, entirely consistent with the "secret ballot" provision of the Wisconsin Constitution. By using an assistant, the elector's vote is "shared only confidentially" with one person, *see Secret*, Merriam-Webster Dictionary, who is subject to criminal prosecution for revealing the elector's vote to others, *see* Wis. Stat. §§ 12.13(3)(j), 12.60(1)(a). The voter is not required to vote in an open setting or otherwise disclose his vote publicly; he simply votes a "secret ballot" with assistance.

This interpretation is consistent with the way secret ballot provisions are understood in other states. "All 50 states [use] . . . the secret ballot method of voting." *Madison Tchrs., Inc. v. Scott*, 2018 WI 11, ¶ 22, 379 Wis. 2d 439, 906 N.W.2d 436 (citing *Burson*, 504 U.S. at 206). Many of those states allow disabled voters to use an assistant when voting absentee, just as the Voting Rights Act allows, *see* 52 U.S.C. § 10508. Courts have repeatedly concluded that voting assistance laws do not run afoul of secret ballot provisions. *See, e.g.*, *Nelson v. Miller*, 170 F.3d 641, 651 (6th Cir. 1999) (Michigan statute allowing blind voters to vote with assistance does not violate secret ballot requirement); *Smith v. Dunn*, 381 F. Supp. 822, 823–24 (M.D. Tenn. 1974) (Tennessee law allowing voters with disabilities to mark their ballot with the help of a chosen assistant in the presence of an election judge or official does not "violate[] [voters'] right to vote by secret ballot [or] den[y] them equal protection of Tennessee law"); *Am. Ass'n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1287 (M.D. Fla. 2002) (Florida's third-party assistance law is consistent with Florida's secret ballot provision); *see also Peterson v. City of San Diego*, 34 Cal. 3d 225, 230 (1983) ("We are satisfied that the secrecy provision of our Constitution was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting.").

Plaintiffs don't dispute this. They agree that voting with an assistant is lawful. Instead, they argue that "[t]he constitutional defect here is the lack of choice." (Doc. 42:27 n.25; *see also* Doc. 42:25.) Plaintiffs contend that "[c]urrent Wisconsin law . . . coerces [them] into using assistance to vote absentee, violating their constitutional right to a secret ballot." (Doc. 42:25.) But they don't explain why that is or provide any legal support for their argument. And the fact that Plaintiffs acknowledge that *sometimes* assistance with absentee voting—when it is uncoerced, according to Plaintiffs—does not violate the "secret ballot" provision demonstrates that the provision does not require absolute privacy.

Plaintiffs are unlikely to succeed on their "secret ballot" provision challenge.

III. Plaintiffs have failed to meet their burden of showing that they will suffer irreparable harm without a temporary injunction.

Plaintiffs have not shown that they will suffer irreparable harm without a temporary injunction. *See SEIU*, 393 Wis. 2d 38, ¶ 93.

Generally, "[i]rreparable harm is that which is not adequately compensable in damages." *Allen v. Wis. Pub. Serv. Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 694 N.W.2d 420. "[B]ut at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without

it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile." *Werner*, 80 Wis. 2d at 520.

Plaintiffs cannot demonstrate irreparable harm for the same reasons their claims are unlikely to succeed on the merits. Plaintiffs argue that they face irreparable harm if their motion for temporary injunction is denied because they "will be compelled to forfeit their rights to vote privately and independently at the upcoming elections, diminishing their ability to cast their votes freely." (Doc. 42:31.) As shown above, Plaintiffs will not be forced to forfeit their right to vote. Without an injunction requiring electronic absentee balloting, Plaintiffs can still cast their ballots in the same way they have for years—either from home with assistance or at the polls on election day. Rushing to implement an electronic absentee balloting scheme for a new, unspecified class of voters has even greater potential for the irreparable harm of disenfranchisement due to clerk and voter confusion.

IV. There are public interest concerns with changing the absentee voting process so close to the election.

As Plaintiffs note, the Court is not required to assess the public interest in determining whether to grant injunctive relief, but even if it were, the public interest weighs in favor of denying relief. Plaintiffs again point to the merits and argue that "[i]ssuing an injunction that ensures that Plaintiffs and their members can vote privately and independently will serve the public

interest." (Doc. 42:34.) Even if this Court agrees, this is an elections case with special public interest concerns. Even when an injunction is intended to eliminate some allegedly unlawful barrier to voting, the Court must consider the effect on the election itself. *See Purcell*, 549 U.S. at 4.

If this Court finds that an emergency declaration and temporary injunction are warranted, it still needs to weigh that remedy against the concerns about the proper functioning of the elections system as a whole, including voter confusion, statewide application of any injunction, and the risk of mistakes when the law is changed so close to an election. Any relief must be tailored to alleviate burdens without causing unnecessary disruption to the elections system this close to the upcoming elections. *That* public interest concern is paramount and weighs in favor of denying Plaintiffs' motion.

V. In the alternative, if the Court determines that Plaintiffs are entitled to preliminary relief, it should issue a narrowly tailored preliminary declaration as to the individual Plaintiffs.

Even if preliminary relief were clearly warranted, the appropriate relief would be a narrowly tailored preliminary declaration as to the individual Plaintiffs only. Such an order would be limited to a declaration, based on the undisputed record facts, that the individual Plaintiffs are voters who due to disability are unable to mark their ballots, and that their municipal clerks may, upon request, transmit to the individual Plaintiffs an electronic absentee ballot that can be marked electronically using an at-home accessibility device,

which each individual Plaintiffs claims to have, for the upcoming August 2024 primary and November 2021 general elections. No additional preliminary declaratory or injunctive relief would be warranted.

CONCLUSION

The Court should deny Plaintiffs' motion for emergency declaratory relief and temporary injunction.

Dated this 10th day of June 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Brief in Opposition to Motion for Emergency Declaratory Relief and Temporary Injunction with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of June 2024.

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