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## INTRODUCTION

Plaintiffs' temporary injunction motion asks this Court to order the Wisconsin Elections Commission ("WEC") to design and implement immediately a new system of "electronic balloting." See Dkt.42 ("Mot.") at 21. This Court should reject this request to disrupt the status quo on the eve of an approaching election. Those status quo considerations are a sufficient basis for denying Plaintiffs' temporary injunction request, leaving inquiry into the merits of Plaintiffs' claims for orderly development and litigation thereafter. But even if this Court wishes to look at the merits of Plaintiffs' arguments in this preliminary posture, those arguments have no likelihood of success given that Wisconsin's assisted-absentee-ballot provisions are an imminently reasonable and lawful means of accommodating voters with disabilities, which have survived similar challenges in other States. Finally, the equities disfavor the disruptive, eleventh hour relief that Plaintiffs seek, including because Wisconsin already accommodates individuals with disabilities under current law.

## STATEMENT<sup>1</sup>

### A. Legal Background

#### 1. Wisconsin Law Helps Individuals With Disabilities Vote In-Person And Absentee

Article III of the Wisconsin Constitution provides for the right to vote, and states that "[a]ll votes shall be by secret ballot." Wis. Const. art. III, §§ 1, 3. Article

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<sup>1</sup> To avoid duplicative briefing, the Statement section of this brief is identical to the Statement section in the Legislature's Memorandum In Support Of Its Motion To Intervene.

III also empowers the Legislature to enact laws governing various aspects of the voting process, including “absentee voting.” *Id.* § 2. Pursuant to its constitutional authority, the Legislature has enacted “lots of rules that making voting easier” than in “many other states.” *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). Most relevant here among these “rules,” *id.*, the Legislature has “extend[ed] the privilege of voting by absentee ballot to [all] otherwise qualified electors who, for any reason, are unable or unwilling to appear at the polls.” *Id.* (citing Wis. Stat. § 6.85).

Because voting by absentee ballot is a “privilege” and not a right under Wisconsin law, Wis. Stat. § 6.84; *see Luft*, 963 F.3d at 672, “[s]tate law requires citizens who wish to vote absentee to comply with various procedural requirements,” *Liebert v. Millis*, No.23-CV-672, 2024 WL 2078216, at \*2 (W.D. Wis. May 9, 2024). Subject to certain exceptions discussed below, an absentee voter must request an absentee ballot from the municipal clerk, Wis. Stat. § 6.86; receive a physical copy of the absentee ballot and the accompanying absentee ballot envelope from the clerk, *id.* § 6.87(2); mark his or her selections on the ballot and obtain the signature and certification of a witness on the absentee-ballot envelope, *id.*; and return the ballot to the municipal clerk by 8:00 p.m. on Election Day either by mail or physical delivery, *id.* § 6.87(6). An absentee voter can also take advantage of in-person absentee-voting procedures to simultaneously request and cast an absentee ballot at a clerk’s office or an alternatively designated location for such voting in a designated period before Election Day. *Id.* §§ 6.86(1), 6.855.

Recognizing that “military [and overseas] voters” often “face special problems” in accessing “regular voting methods,” such voters may request that their absentee ballots be delivered electronically. *Luft*, 963 F.3d at 677; *see* Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), 6.87(3)(d). But these voters must nevertheless “mark[] and return[]” such ballots “in the same manner as other absentee ballots,” Wis. Stat. §§ 6.22(5), 6.24(7); *see also id.* § 6.87(3)(d) (“[M]ilitary or overseas elector[s]” must “make and subscribe to the [absentee-voter] certification,” “enclose the absentee ballot in a separate envelope contained within a larger envelope, that shall include the completed certificate,” “affix sufficient postage,” and “mail the absentee ballot to the municipal clerk.”). As detailed in the WEC Uniform Instructions for Military and Overseas Absentee Voters, after a military or overseas absentee voter receives her emailed or faxed ballot from the clerk, she must print out both the ballot and the absentee certificate, mark the printed ballot in the presence of a witness, fold the ballot and place it in an envelope, fill out the required sections of the absentee ballot certificate, glue or tape the absentee ballot certificate to the envelope, put that envelope inside a larger envelope, and then send that larger envelope back to the clerk. WEC, Form EL-128u, *Uniform Instructions for Military & Overseas Absentee Voters (Email & Fax)* (hereinafter “Form EL-128u”);<sup>2</sup> *see* WEC, *Military and Overseas Voting* 14 (Feb. 2022) (hereinafter “WEC Military and Overseas Voting”) (“The elector should be

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<sup>2</sup> Available at [https://elections.wi.gov/sites/default/files/documents/EL-128u%20%28US%20Letter%20Size%29%20Uniform%20Instructions%20UOCAVA\\_0.pdf](https://elections.wi.gov/sites/default/files/documents/EL-128u%20%28US%20Letter%20Size%29%20Uniform%20Instructions%20UOCAVA_0.pdf) (all websites last visited May 24, 2024).

instructed to print the ballot, vote the ballot in the presence of a witness, fold the ballot and seal it inside a regular, non-window envelope, complete and sign the absentee certificate.”)<sup>3</sup> Wisconsin law does not permit such voters to return absentee ballots electronically. *See* Wis. Stat. §§ 6.22(5); 6.24(7).

Wisconsin law also endeavors to make voting easier for voters with disabilities. On Election Day, voters with disabilities may vote at their polling place with the assistance of a person of the voter’s choosing, which assistant may physically help the individual cast the ballot. *Id.* § 6.82. Polling places must also provide accessible voting devices upon which voters with disabilities can vote privately and independently. *See* 52 U.S.C. § 21081(a)(3)(A)–(B). To make in-person voting more accessible for voters with disabilities, Wisconsin “funds specialized transportation assistance programs” to help such voters “get to the polls,” *Luft*, 963 F.3d at 672 (citing Wis. Stat. § 85.21)—programs the State budgeted \$15,977,800 to provide in 2024 alone, *see* Wis. Dep’t of Trans., *2024 Application Guidelines: Specialized Transportation Assistance 85.21 Program for Counties (Wis. Stat. 85.21)*, (Dec. 15, 2023).<sup>4</sup> As for absentee voting, voters with disabilities may elect to “automatically” receive absentee ballots “for every election,” Wis. Stat. § 6.86(2)(a), and may submit

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<sup>3</sup> Available at [https://elections.wi.gov/sites/default/files/legacy/2022-02/UOCAVA%2520Manual%25202.2022\\_0.pdf](https://elections.wi.gov/sites/default/files/legacy/2022-02/UOCAVA%2520Manual%25202.2022_0.pdf).

<sup>4</sup> Available at <https://wisconsindot.gov/Documents/doing-bus/local-gov/astnce-pgms/transit/8521-guide.pdf>.

a signed witness statement that “verifies” the voter’s name and address “in lieu of [the voter] providing proof of identification,” *id.* § 6.87(4)(b)2.

Electors who are “unable to read, ha[ve] difficulty in reading, writing or understanding English or due to disability [are] unable to mark” their own absentee ballots may “select any individual, except the elector’s employer or an agent of that employer or an officer or agent of a labor organization which represents the elector, to assist in marking the ballot.” Wis. Stat. § 6.87(5). The person assisting the disabled elector then certifies his or her name on the back of the ballot, *id.*, and may assist the voter either in the privacy of the voter’s home or at an in-person absentee ballot location (commonly known as “early voting”), *id.* § 6.855. The certification ensures that the assistant truthfully and accurately helped complete the absentee ballot on the voter’s behalf, and if an assistant “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,” *id.* § 12.13(3)(j), it is a Class I felony, *id.* § 12.60(1)(a).

## **2. Wisconsin Law Limits The Availability Of Electronic Absentee Ballots Because Such Ballots Are Not Secure**

Electronic absentee balloting—meaning the process of receiving, marking, and returning marked absentee ballots for counting through electronic means—is a relatively new technology. Numerous federal agencies, including the Cybersecurity and Infrastructure Security Agency (“CISA”), the Election Assistance Commission (“EAC”), the National Institute of Standards and Technology (“NIST”), and the Federal Bureau of Investigation (“FBI”), have expressly recognized this fact, and

accordingly “recommend paper ballot return as electronic ballot return technologies are high-risk even with controls in place.” CISA, *Risk Management For Electronic Ballot Delivery, Marking, And Return* 1 (Feb. 2024);<sup>5</sup> see also EPI Ctr., Am. Ass’n for the Advancement of Sci. (Apr. 2021) (“Experts agree that ballots should not be transmitted over the internet.”).<sup>6</sup> Less than two years ago, a working group from the University of California, Berkeley, Center for Security in Politics aptly stated the concern: “Implementing widespread adoption of secure and accessible internet ballot return requires technologies that do not currently exist and others that have not been fully tested.” R. Michael Alvarez, et al., Ctr. for Sec. in Pol., Univ. of Cal., Berkeley, *Working Group Statement on Developing Standards for Internet Ballot Return* 2, (Dec. 2022).<sup>7</sup> That same study identified six specific risks presented by electronic absentee voting, including the risk of “[p]ervasive client-side malware,” “[r]educed confidence through international malfeasance,” “[t]argeted denial of service attacks,” “lack of deployed digital credentials among potential voters,” “[a]bsence of a directly voter-verifiable ballot of record,” and “[i]ncreased threat of wholesale attacks.” *Id.* at 6–10.

OmniBallot Online—the electronic voting tool Plaintiffs suggest for Wisconsin, Dkt.9 (“Compl.”) ¶¶ 149–50—is not immune from these security concerns. One study

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<sup>5</sup> Available at [https://www.cisa.gov/sites/default/files/2024-02/Final\\_%20Risk\\_Management\\_for\\_Electronic-Ballot\\_05082020\\_508c.pdf](https://www.cisa.gov/sites/default/files/2024-02/Final_%20Risk_Management_for_Electronic-Ballot_05082020_508c.pdf).

<sup>6</sup> Available at [https://www.aaas.org/sites/default/files/2021-04/EPI-Center\\_FactSheet\\_Online-Voting.pdf?adobe\\_mc=MCORGID%3D242B6472541199F70A4C98A6%2540AdobeOrg%7CTS%3D1715564537](https://www.aaas.org/sites/default/files/2021-04/EPI-Center_FactSheet_Online-Voting.pdf?adobe_mc=MCORGID%3D242B6472541199F70A4C98A6%2540AdobeOrg%7CTS%3D1715564537).

<sup>7</sup> Available at <https://csp.berkeley.edu/wp-content/uploads/2022/12/Working-Group-Statement-on-Internet-Ballot-Return.pdf>.



found that OmniBallot “is vulnerable to vote manipulation by malware,” Michael A. Specter & J. Alex Halderman, Internet Pol’y Rsch. Inst., Mass. Inst. of Tech., *Security Analysis of the Democracy Live Online Voting System* 1 (June 7, 2020),<sup>8</sup> leading Delaware to abruptly cease using OmniBallot during COVID-19, see Kathryn McGrath, Am. Ass’n for the Advancement of Sci., *Scientific experts discuss vulnerabilities of Delaware’s online voting system with the State Election Commissioner* (July 17, 2020).<sup>9</sup> OmniBallot, again, poses a specific threat to voter privacy, because the tool collects “sensitive personally identifiable information—including the voter’s identity, ballot selections, and browser fingerprints.” *Id.* Thus, “using OmniBallot for electronic ballot return represents a severe risk to election security.” Specter & Halderman, *supra*, at 1.

Reflecting these concerns, only a small minority of States—thirteen, by Plaintiffs’ count—permit people with disabilities to return absentee ballots electronically. See Compl. ¶¶ 130, 135–48.

## **B. Procedural Background**

On April 16, 2024—over 57 years after the Legislature enacted Wis. Stat. § 6.87, outlining the modern absentee voting procedure, see 1965 Wis. Act 666—Plaintiffs filed this lawsuit alleging that Wisconsin’s absentee voting laws, which allow voters with disabilities to use third-party assistance to cast absentee ballots,

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<sup>8</sup> Available at <https://internetpolicy.mit.edu/wp-content/uploads/2020/06/OmniBallot-1.pdf>.

<sup>9</sup> Available at <https://www.aaas.org/news/scientific-experts-delaware-internet-voting>.

leave voters with certain disabilities unable to vote an absentee ballot privately and independently. Compl. ¶¶ 1, 8. Plaintiffs bring claims under the Americans with Disabilities Act (“ADA”) and Rehabilitation Act, asserting that Wisconsin’s prohibitions on the electronic transmission and return of absentee ballots, Wis. Stat. §§ 6.87(3)(a), (4)(b)1, discriminates against people with disabilities in violation of Title II of the ADA and Section 504 of the Rehabilitation Act, Compl. ¶¶ 168, 182. Plaintiffs bring additional claims under the Wisconsin Constitution’s “right to vote by secret ballot,” Compl. ¶ 185, Wisconsin’s equal protection guarantee, Compl. ¶¶ 196–98, and the First and Fourteenth Amendments of the U.S. Constitution, Compl. ¶¶ 200, 205.

On May 1, 2024, Plaintiffs filed the instant motion, seeking a temporary injunction ordering 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.” Mot.35. This Court has scheduled a hearing on Plaintiffs’ temporary-injunction motion for June 24, 2024.

### **LEGAL STANDARD**

Temporary injunctive relief is only available to plaintiffs that demonstrate (1) that they are “likely to suffer irreparable harm if a temporary injunction is not issued,” (2) the absence of an adequate remedy at law; (3) that a “temporary injunction is necessary to preserve the status quo,” and (4) a “reasonable probability

of success on the merits.” *See Serv. Emps. Int’l Union, Local 1 v. Vos (“SEIU”)*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35; *Pure Milk Prods. Co-op v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977); *see also* Wis. Stat. § 813.02(1)(a). As noted, a temporary injunction may “be issued only when necessary to preserve the status quo,” *Werner*, 80 Wis. 2d at 520, and this principle is dispositive on the eve of elections, when courts must avoid issuing rulings that “result in confusion and disarray and [ ] undermine confidence in . . . election results.” *Hawkins v. WEC*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877.

## ARGUMENT

### I. Plaintiffs Are Not Entitled To Temporary Injunctive Relief

Plaintiffs cannot meet their burden of showing that they are entitled to temporary injunctive relief that would alter Wisconsin’s absentee voting procedures on the eve of absentee ballot distribution. Their eleventh-hour injunction request would disrupt the status quo mere days before Wisconsin’s clerks will begin distributing absentee ballots and should be denied on that basis alone. *See SEIU*, 2020 WI 67, ¶ 93; *see also Hawkins*, 2020 WI 75, ¶ 10. Plaintiffs also fail to demonstrate a reasonable likelihood of success on the merits of their claims, nor have they shown that they will suffer irreparable harm absent relief. *See id.* Finally, the balance of the equities weighs firmly in favor of denying injunctive relief. *See id.*

**A. This Court Should Reject Plaintiffs' Effort To Disrupt The State's Status Quo Election Procedures On The Eve Of An Election, Denying Relief On That Basis Alone**

1. A temporary injunction may “be issued only when necessary to preserve the status quo,” *Werner*, 80 Wis. 2d at 520, and should not “give [parties] new rights” or “alter” their “positions,” *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377 (1964). That is especially so in cases challenging election laws, when injunctive relief issued on the eve of an election can “result in confusion and disarray and [ ] undermine confidence in . . . election results.” *Hawkins*, 2020 WI 75, ¶ 10; see also *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424–26 (2020) (per curiam) (courts “should ordinarily not alter the election rules on the eve of an election”). On this basis, courts have repeatedly declined to issue relief that would change election rules and procedures on the eve of upcoming elections. *Hawkins*, 2020 WI 75, ¶ 10 (denying petition to commence original action where court “would be unable to provide meaningful relief without completely upsetting the election”); *Common Cause v. Lawson*, 978 F.3d 1036, 1043 (7th Cir. 2020) (staying an injunction affecting polling hours issued five weeks before the election); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020) (staying injunction issued four weeks before election extending deadline for requesting and delivering absentee ballots).

Two recent Wisconsin circuit court decisions demonstrate this principle in action. In *Rise v. WEC*, No.2022CV2446 (Dane Cnty. Cir. Ct.) (“*Rise*”), the Dane County Circuit Court denied a temporary injunction motion where such relief would

have upset the status quo definition of “address” for purposes of Wisconsin’s absentee-ballot witness certification a month before the 2022 general election, *see* Order Denying Temp. Inj., *Rise*, No.2022CV2446, Dkt.79 (Dane Cnty. Cir. Ct. Oct. 7, 2022) (attached hereto as Exhibit 6 to the Affidavit of Kevin M. LeRoy (“LeRoy Aff.”), filed contemporaneously with the Legislature’s Notice of Motion And Motion To Intervene). Similarly, in *League of Women Voters of Wisconsin v. WEC*, No.2022CV2472 (Dane Cnty. Cir. Ct. 2022) (“LWV”), the court rejected a temporary injunction request that would have required it to define the term “missing” for purposes of determining whether an absentee-ballot witness has provided an “address,” because issuing such a temporary injunction would have “upend[ed] the status quo” and “caus[ed] confusion” with the election “all but two weeks away,” Tr. of Oral Arg. at 13, *LWV*, No.2022CV2472, Dkt.72 (Dane Cnty. Cir. Ct. Oct. 26, 2022) (attached hereto as Exhibit 7 to the LeRoy Aff.). Notably, the courts in each of these cases denied injunctive relief despite eventually ruling in favor of the respective plaintiffs on the merits of their claims, which were adjudicated after the respective elections had concluded. *See* Decl. Judg. and Perm. Inj. Order, *Rise*, No.2022CV2446, Dkt.238 (Dane Cnty. Cir. Ct. Jan. 30, 2024) (attached hereto as Exhibit 8 to the LeRoy Aff.); Dec. and Order on Summ. Judg., *LWV*, No.22CV2472, Dkt.157 (Dane Cnty. Cir. Ct. Jan. 2, 2024) (attached hereto as Exhibit 9 to the LeRoy Aff.). The Legislature is currently appealing those decisions. *See Rise v. WEC*, No. 2024AP000165 (Wis. Ct. App.); *League of Women Voters v. WEC*, No. 2024AP166 (Wis. Ct. App).

2. Here, considerations of the status quo foreclose any temporary injunctive relief. *See Werner*, 80 Wis. 2d at 520. Since 1966, Wisconsin law has permitted voters with disabilities to cast absentee ballots with assistance, 1965 Wis. Act. 666, § 1, and since 1986 has permitted the voter to select an assistant of her choosing, which assistant is subject to criminal penalties for failing to properly record the voter's selection or revealing the voter's selection to third parties, 1985 Wis. Act 304; *see also* Wis. Stat. §§ 6.87(5); 12.13(3)(j); 12.60(1)(a). Since 2011, Wisconsin law has also limited the electronic distribution of absentee ballots only to voters in the military or those living overseas, 2011 Wis. Act 75, § 50, and Wisconsin does not provide for any voters to complete their absentee ballots electronically, *see* Wis. Stat. § 6.22(5); *id.* § 6.24(7); *see also* Form EL-128u, *supra*; WEC Military and Overseas Voting, *supra* at 14. That is the status quo here.

Plaintiffs' temporary injunction request would, if granted, disrupt this established status quo by requiring the State to design and implement a new system allowing voters with disabilities to receive and mark absentee ballots electronically. *See* Wis. Stat. § 6.22(5); *id.* § 6.24(7). While two narrow groups of voters—those in the military and those living overseas—are currently authorized to *receive* electronic absentee ballots, Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), no voters are authorized to *mark* electronic absentee ballots, *see* Wis. Stat. § 6.87 (detailing absentee voting procedure); *see* Form EL-128u, *supra*; WEC Military and Overseas Voting, *supra* at 14. Thus, Plaintiffs seek an entirely “new” privilege, *see Shearer*, 25 Wis. 2d at 668, under

Wisconsin law that would undermine the way Wisconsin has carried out its absentee ballot regime for years. Moreover, Plaintiffs' request, if granted, would force the State to adopt and implement "electronic balloting," Mot.21, technologies that are relatively new, untested, and the use of which multiple federal agencies have warned against, citing significant security and election-integrity risks. *See supra* pp.5–7. At a minimum, the overhaul of Wisconsin's absentee balloting system through the adoption of such technology is something the Legislature has the sovereign right to decide whether to adopt, after careful study.

Disrupting the status quo is clearly impermissible here, given the State's upcoming election deadlines. *See Hawkins*, 2020 WI 75, ¶ 10; *Purcell*, 549 U.S. at 4–5. Municipal clerks will begin distributing absentee ballots for the 2024 partisan primary election no later than June 27, 2024, Wis. Stat. § 7.15(1)(cm); WEC Calendar of Election Events,<sup>10</sup> and absentee voters may begin marking and returning absentee ballots upon receipt. All absentee ballots must be voted, returned to the clerks, and delivered to a central count location on August 13, 2024—the date of the partisan primary election. Wis. Stat. § 6.87(6); WEC Calendar of Election Events, *supra*. As for the 2024 General Election, clerks must begin distributing absentee ballots no later than October 22, 2024, and absentee ballots must be returned for counting by Election Day—November 5, 2024. WEC Calendar of Election Events, *supra*. Given these

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<sup>10</sup> Available at <https://elections.wi.gov/sites/default/files/documents/Wisconsin%20Elections%20Commission%202024%20Calendar%20of%20Election%20Events%20%28Rvsd%20Feb19.2024%29.pdf>.

imminent ballot deadlines, this Court should deny Plaintiffs' temporary injunction request.

c. Plaintiffs' suggestion that their "requested, limited relief of an electronic ballot that can be marked electronically" would somehow "restore the status quo," Mot.32, is flat wrong. Wisconsin adopted its modern absentee ballot regime in 1966, *see* 1965 Wis. Act 666, and most recently revised its absentee ballot laws in 2011, *see* 2011 Wis. Act 75. Those laws are clear: Wisconsin does not permit any voters to electronically mark and return absentee ballots, *see* Wis. Stat. § 6.22(5); *id.* § 6.24(7); *see also* Form EL-128u, *supra*; WEC Military and Overseas Voting, *supra* at 14, and an order requiring the State to depart from its well-established absentee ballot procedures and adopt a new and statutorily unauthorized system of absentee voting would obviously disrupt the status quo.

#### **B. Plaintiffs Have No Likelihood Of Success On The Merits**

While this Court may reject Plaintiffs' unjustified temporary injunction request just on the basis of considerations of the status quo on the eve of an election, *see supra* Part I.A, they also have not shown any reasonable probability of success on their claims, *see SEIU*, 2020 WI 67, ¶ 93. None of Plaintiffs' five claims—brought under Title II of the ADA, Section 504 of the Rehabilitation Act, the Wisconsin Constitution, and the U.S. Constitution—are likely to succeed on the merits.



## 1. Plaintiffs Are Unlikely To Prevail On Their ADA And Rehabilitation Act Claims

a. To prevail on an ADA claim against a public entity, a plaintiff must establish three elements. First, that he was a “qualified individual with a disability.” *Ashby v. Warric Cnty. Sch. Corp.*, 908 F.3d 225, 230 (7th Cir. 2018) (citation omitted). Second, that he was “denied the benefits of the services, programs, or activities of a public entity or otherwise subjected to discrimination by such an entity.” *Id.* (citation omitted). And third, “that the denial or discrimination was by reason of [the] disability.” *Id.* (citation omitted). With respect to the first element, a qualified individual is “an individual with a disability who, with or without reasonable modifications to rules, . . . meets the essential eligibility requirements for the . . . participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2). As for the second element, while the statute does not define “services, programs, or activities,” that phrase has been understood to encompass voting. See 42 U.S.C. § 12101(a)(3). A plaintiff can demonstrate that she was “denied the benefits of” or excluded from participating in a “service[ ], program[ ], or activit[y],” *Ashby*, 908 F.3d at 230, by demonstrating that the defendant refused to provide a reasonable accommodation that would make the program “readily accessible to and usable by” the plaintiff. 28 C.F.R. §§ 35.150(a), 35.130(b)(7); see also *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006). The final element is satisfied where a plaintiff “show[s] 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 (citation omitted); *A.H. v. Ill. High Sch. Ass’n*, 881 F.3d 587, 593–94 (7th Cir. 2018).

A “reasonable accommodation” is one that provides “meaningful access” to public services, *Alexander v. Choate*, 469 U.S. 287, 301 (1985), and a public entity need not make any modification that would “fundamentally alter the nature of the service, program, or activity,” 28 C.F.R. § 35.130(b)(7). The provided accommodation “need not be perfect or the one most strongly preferred by the plaintiff”—it need only “be effective.” *Wright v. N.Y. State Dep’t of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (alterations omitted; citation omitted).

b. Here, among other defects in their ADA and Rehabilitation Act claims that the Legislature will explore at the merits stage, Plaintiffs will most clearly be unable to show that they have been “excluded from participation in,” or “denied the benefits of,” 42 U.S.C. § 12132, Wisconsin’s absentee-voting regime. Wisconsin law already fully affords voters with disabilities the opportunity to partake in the privilege of absentee voting. Recognizing that such voters may have difficulty casting an absentee ballot without additional help, Wisconsin law permits voters with disabilities to cast a ballot with the assistance of a single individual of the voter’s choosing, who is bound by law to faithfully record the voter’s vote and prohibited from revealing that vote to third parties. Wis. Stat. §§ 6.87(5), 12.13(3)(j). If an assistant “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,” *id.* § 12.13(3)(j), the assistant “is guilty

of a Class I felony,” *id.* § 12.60(1)(a). These exceptions to the normal absentee ballot process allow voters with disabilities to fully “participat[e] in” and receive “the benefits of,” 42 U.S.C. § 12132, Wisconsin’s absentee-voting scheme. And to the extent a voter with a disability does not want to avail him or herself of assistance, he or she may cast a vote in a number of alternative ways, such as in-person voting on accessible devices on Election Day, *see* Wis. Stat. §§ 5.25(3)(a); 5.40(5), or in-person absentee voting, *see* Wis. Stat. § 6.855.

Because Section 6.87(5) provides voters with disabilities “meaningful access” to the absentee voting regime, it can also be understood as a “reasonable accommodation,” *Alexander*, 469 U.S. at 301, that satisfies the ADA and Rehabilitation Act. Section 6.87(5) makes absentee voting accessible to voters with disabilities that prevent them from marking and returning an absentee ballot alone by offering them the assistance of an individual of their choosing and subjecting that individual to criminal penalties for mismarking or divulging the voters’ selection. Wis. Stat. §§ 6.87(5), 12.13(3)(j), 12.60(1)(a). Offering the choice of an assistant to those voters who cannot exercise the privilege of absentee voting on their own is a most “reasonable,” *Alexander*, 469 U.S. at 301, accommodation.

Plaintiffs are independently unlikely to succeed on the merits of their ADA and Rehabilitation Act claims because the remedy they ultimately seek in this lawsuit—an order permitting them to use electronic means to cast absentee ballots—would “fundamentally alter,” 28 C.F.R. § 35.130(b)(7), the Legislature’s carefully designed

absentee balloting regime. Wisconsin's limited electronic ballot provisions are consistent with the State's policy of "carefully regulat[ing]" the "privilege of voting by absentee ballot" to "prevent the potential for fraud or abuse," which is even more heightened in the electronic voting context. See Wis. Stat. § 6.84(1); see *supra* pp.5–7. Electronic absentee balloting presents a significant risk of election manipulation and compromising voters' confidentiality and personal identifying information. See, e.g., Alvarez, et al., *supra*; see also CISA, *Risk Management For Electronic Ballot Delivery, Marking, And Return*, *supra*. Notably, only a small minority of States—thirteen, according to Plaintiffs, see Compl. ¶¶ 130, 135–48—currently authorize voters with disabilities to return absentee ballots electronically. Plaintiffs' proposed accommodation—that the State adopt an entirely new system of electronic voting that cannot guarantee the secure casting of an absentee ballot—would undermine the State's carefully crafted absentee voting regime, and thus it is not a reasonable accommodation under the ADA or the Rehabilitation Act.

c. Plaintiffs' arguments as to their ADA and Rehabilitation Act claims fail.

*First*, Plaintiffs argue that they have been denied "full and equal access to Wisconsin's no-excuse absentee ballot program," Mot.17, but that is incorrect. As explained, Section 6.87(5) provides voters with disabilities with a reasonable accommodation that allows them to fully participate in Wisconsin's generous absentee voting regime. Although Plaintiffs contend that Section 6.87(5) deprives them of their ability to vote "privately and independently," Mot.17 (emphasis

omitted), it already permits voters to mark their ballots privately, with the assistance of a single individual of their choosing who is subject to criminal penalties for intentionally mismarking the ballot or disclosing the voter's selections. Wis. Stat. § 6.87(5); *id.* § 12.13(3)(j); *id.* § 12.60(1)(a). And, notably, Plaintiffs' temporary injunction request does not seek the ability to return electronic absentee ballots—although the Complaint does seek that relief—meaning that even if a temporary injunction is issued here, Plaintiffs will still not be able to vote without assistance in any event. *See* Mot.19 (arguing that “meaningful access” to absentee voting is the ability to vote “without assistance”).

*Second*, Plaintiffs' assertion that “[a]n electronic absentee ballot that can be marked electronically is a reasonable modification,” Mot.21, is both legally irrelevant and false. As an initial matter, neither the ADA nor the Rehabilitation Act require an entity to adopt a “perfect” accommodation or even “the one most strongly preferred by the plaintiff.” *Wright*, 831 F.3d at 72 (citation omitted). All that these statutes require is an accommodation that provides “meaningful access,” *Alexander*, 469 U.S. at 301, to the public program. Plaintiffs here already benefit from a “reasonable accommodation”—Section 6.87(5)'s voting-with-assistance scheme—that grants them “meaningful access,” *Alexander*, 469 U.S. at 301, to the absentee voting regime. That Plaintiffs would prefer through this temporary injunction request to receive and mark their ballots electronically rather than avail themselves of Section 6.87(5)'s accommodation is not the legal standard. And, in any event, Plaintiffs' requested

accommodation is not “reasonable” in light of the well-documented risks associated with electronic balloting, *see supra* pp.5–7, which most States do not have, *see* Compl. ¶¶ 130, 135–48; *supra* pp.5–7.

*Finally*, Plaintiffs’ requested relief is not “reasonable.” *See* Mot.21–22. For one thing, Plaintiffs claim that electronic absentee ballot delivery would not “fundamentally alter” the absentee voting regime because military and overseas voters already receive their ballots in that manner, Mot.21, but merely *receiving* an electronic absentee ballot would not accommodate Plaintiffs’ disabilities, as Plaintiffs themselves recognize, *see* Mot.35 (requesting “an electronic absentee ballot that can be marked electronically using an at-home accessibility device”). Even military and overseas voters, who are eligible to *receive* absentee ballots electronically, must print the ballot and absentee certificate, physically mark the ballot in the presence of a witness, fold and place the ballot in an envelope, affix the absentee ballot certificate to the envelope, place the ballot and certificate in a larger envelope, and return the ballot to the municipal clerk by mail. *See* Form EL-128u, *supra*; WEC, *Military and Overseas Voting*, *supra* at 14. Plaintiffs, in contrast, are seeking electronic ballot marking, which military and overseas voters cannot do. Wis. Stat. §§ 6.22(5), 6.24(7); *see* Form EL-128u, *supra*; WEC, *Military and Overseas Voting*, *supra* at 14. Further, even with Plaintiffs’ requested relief, many voters with disabilities similar to those of the Individual Plaintiffs here would be unable to vote absentee without third-party

assistance, meaning that Plaintiffs' request for electronic ballot delivery would not remedy their concerns about the use of such assistance.

## **2. Plaintiffs Are Unlikely To Succeed On The Merits Of Their Secret Ballot Claim**

a. When determining the meaning of a constitutional provision, a reviewing court considers three sources. *See State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460. First—and most significantly—the court must analyze “the ‘plain meaning of the words [of the Constitution] in the context used.’” *Id.* (citation omitted); *see also Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 21, 407 Wis. 2d 87, 990 N.W.2d 122. Second, the court must examine “the ‘historical analysis of the constitutional debates’ relative to the constitutional provision under review; the prevailing practices [ ] when the provision was adopted; and the earliest legislative interpretations of the provision as manifested in the first laws passed that bear on the provision.” *Id.* (citations omitted). Third, the court “seek[s] to ascertain what the people understood the purpose of the amendment to be.” *Id.* (citation omitted).

b. Plaintiffs here contend that they “have no actual means to vote by secret ballot when voting absentee,” and that Wisconsin’s failure to offer Plaintiffs a means of voting absentee by “secret ballot” violates Article III, Section 3 of the Wisconsin Constitution (the “Secret Ballot Provision”). Compl. ¶ 185. Thus, the relevant question for purposes of Plaintiffs’ Article III claim is whether Section 6.87(5)—which provides voters with disabilities a means of voting absentee with an assistant of their

choosing—is consistent with the Secret Ballot Provision. Nothing about Section 6.87(5) violates the Secret Ballot Provision.

Section 6.87(5) falls squarely within the Secret Ballot Provision's plain text. *See Williams*, 2012 WI 59, ¶ 15. Article III, Section 3 provides that “all votes shall be by secret ballot.” Wis. Const. art. III, § 3. The term “secret” means “[k]ept from public knowledge, or from the knowledge of persons specified; not allowed to be known, or only by selected persons.” *Secret*, Oxford English Dictionary; *see Secret*, Am. Heritage Dictionary (defining a “secret” as “[s]omething that is kept out of the knowledge or sight of others or is knowing only to oneself or a few”); *see also Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 53, 271 Wis. 2d 633, 668, 681 N.W.2d 110, 126 (dictionary is a proper source for plain meaning). So, as a matter of plain text, a ballot may remain “secret” even if it is shared with “selected persons,” such as an individual selected by a voter with disabilities to aid that voter in casting his or her absentee ballot, Wis. Stat. § 6.87(5), so long as it is not divulged to the “public,” *Secret*, Oxford English Dictionary. Section 6.87(5)—which allows a voter to rely on an assistant, who is then subject to criminal prosecution for revealing the voter's vote to third parties, Wis. Stat. § 12.13(3)(j); *id.* § 12.60(1)(a)—is thus perfectly consistent with the Secret Ballot Provision's plain terms.

History and the experience of other jurisdictions support this interpretation. *See Williams*, 2012 WI 59, ¶ 15. All 50 States protect ballot secrecy, *see Burson v. Freeman*, 504 U.S. 191, 206 (1992), either constitutionally or at least by statute. All



50 States also permit absentee voting, and many of them, like Wisconsin, permit voters with disabilities to use an assistant to help them cast their absentee ballots. See, e.g., Fla. Stat. § 101.051; Ga. Code § 21-2-385(b); La. Rev. Stat. § 18:1310; Mass. Gen. Laws ch. 54, § 98; Mich. Comp. Laws § 168.751; Nev. Rev. Stat. § 293.269919; 25 Pa. Stat. § 3146.6a; Tenn. Code § 2-7-116. Voting-with-assistance laws like Section 6.87(5) have repeatedly withstood secret-ballot-provision challenges, providing further support that Wisconsin's accommodation for voters with disabilities does not violate the Secret Ballot Provision here. See *Nelson v. Miller*, 170 F.3d 641, 651 (6th Cir. 1999) (Michigan statute authorizing blind voters to vote with assistance does not violate constitutional requirement that legislature craft voting laws "to preserve the secrecy of the ballot"); *Smith v. Dunn*, 381 F. Supp. 822, 823–24 (M.D. Tenn. 1974) (Tennessee law allowing voters with disabilities to have "his ballot marked by" a person of the voter's selection 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, 666 P.2d 975 (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.").

c. Plaintiffs' contrary argument misreads the Secret Ballot Provision. Mot.23. They cite no authority suggesting that the Secret Ballot Provision renders Section 6.87(5) unconstitutional, nor do they conduct any analysis of the constitutional text. See Mot.23. Section 6.87(5)—like similar accommodations in other states, *see e.g.*, Fla. Stat. Ann. § 101.051; Mich. Comp. Laws § 168.751; Tenn. Code § 2-7-116—is fully compatible with ballot secrecy. Indeed, Section 6.87(5) offers an alternative method of casting an absentee ballot to an individual that would otherwise have trouble doing so, and a ballot cast in this manner remains “secret” even if it is shared with “selected persons,” like an assistant, Wis. Stat. § 6.87(5), so long as it is not divulged to the “public.” *Secret*, Oxford English Dictionary; *see also Nelson*, 170 F.3d at 651; *Smith*, 381 F. Supp. at 823; *Am. Ass'n of People with Disabilities*, 227 F. Supp. 2d at 1287.

Plaintiffs' unsupported contention that “[t]he only exception to the requirement that votes be cast privately and independently is that voters may have a person of their choosing to assist them,” Mot.25, is wrong. Assisted absentee voting is not an “exception” to the secret ballot requirement; rather, it is consistent with that requirement, as explained above. *See supra* pp.20–22. And Plaintiffs' suggestion that assistance is permissible only if it is “uncoerced,” Mot.25, undermines their argument, because it demonstrates that even Plaintiffs recognize there are certain situations where the Secret Ballot Provision does not *mandate* the absolute privacy Plaintiffs seek, so long as the marked ballot is made available only to a person “selected” by the voter. *Secret*, Oxford English Dictionary; *see Secret*, Am. Heritage

Dictionary (defining a “secret” as “[s]omething that is kept out of the knowledge or sight of others or is knowing only to oneself or a few”).

### **3. Plaintiffs’ Are Unlikely To Succeed On The Merits Of Their State Equal Protection Claim**

a. To overcome the “strong presumption” of constitutionality, *Martinez v. Dep’t of Indus., Labor & Human Rels.*, 165 Wis. 2d 687, 695, 478 N.W.2d 582 (1992), a plaintiff challenging an election statute on constitutional grounds must first articulate “how the right [to vote] is burdened” by the challenged law, with specific reference to the “character and magnitude of the asserted injury,” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 39, as weighed against the State’s interest purportedly justifying the rule, *id.* ¶ 29. If the burden is “severe,” strict scrutiny applies, and the court determines whether the law is “narrowly drawn to advance a state interest of compelling importance.” *Id.* ¶ 22. If the burden is not severe, the law is subject only to rational basis review, under which a law must be upheld so long as the defendant can show “a legitimate state interest and that [the challenged law] is a reasonable means of serving that interest.” *Id.* ¶ 75.

b. Here, Plaintiffs’ equal protection claim under the Wisconsin Constitution fails because Wisconsin’s laws making absentee voting more accessible to voters with disabilities do not burden such individuals’ right to vote. As an initial matter, absentee voting is a “privilege,” not a “right,” under Wisconsin law. Wis. Stat. § 6.84(1); see Wis. Const. art. III, § 2. And in any event, Wisconsin law makes the franchise accessible to voters with disabilities in a number of ways, including, as most

relevant here, by permitting such voters to cast absentee ballots with the assistance of an individual of their choosing who is subject to criminal penalties for mismarking or divulging the voter's selection. Wis. Stat. § 6.87(5); *id.* § 12.13(j)(3); *id.* § 12.60(1)(a). The law thus seeks to make it *easier* for voters with disabilities to exercise the right to vote, and therefore by definition does not “burden” the right to vote in any way—let alone “severely.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted).<sup>11</sup>

Because Wisconsin's electronic absentee ballot rules do not severely burden anyone's right to vote, they are subject to—and clearly satisfy—rational basis review. *Walker*, 2014 WI 98 ¶ 75. Wisconsin has a “significant and compelling interest in protecting the integrity and reliability of the electoral process,” Wis. Stat. § 6.84(1); *Walker*, 2014 WI 98, ¶ 73. Section 6.87(5), which allows voters with disabilities to cast an absentee ballot with the assistance of an individual of their choice, which assistant is subject to criminal penalties for intentionally failing to faithfully carry out his or her duties, Wis. Stat. §§ 12.13(3)(j), 12.60(a)(1), is a reasonable way of making voting in general, and absentee voting specifically, more accessible to voters

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<sup>11</sup> While Plaintiff Ellingen alleges that she is physically incapable of accessing the polls, Compl. ¶¶ 50, 197, this allegation does not support Plaintiffs' contention that Wisconsin's general prohibition on voters receiving and returning electronic ballots burdens the right to vote, where Wisconsin law takes steps to ensure that assisted absentee voting both is available to voters with disabilities and can be performed privately and independently. And even if Plaintiff Ellingen's allegations did support her constitutional claim here, it would only authorize as-applied relief to such citizens. *See SEIU*, 2020 WI 67, ¶¶ 37–42.

with disabilities, analogous to that adopted by multiple other States. Thus, Section 6.87(5) represents a reasonable way of serving the State's compelling interest in the electoral process while protecting the voting rights of the individuals with disabilities.

c. Plaintiffs claim that the Legislature's failure to provide electronic balloting "burdens their right to a secret ballot," Mot.27, but as explained above, Plaintiffs misunderstand what the "right to a secret ballot" entails. *Supra* pp.20–22. And because Plaintiffs cannot establish that the limitation on electronic voting "severe[ly] burdens," *Walker*, 2014 WI 98, ¶ 39, their constitutional right to vote, Wisconsin's voting laws for the disabled need only survive rational basis review to be upheld. But here, Plaintiffs assume that strict scrutiny applies and merely state, *without any explanation*, that "[a]ny interest . . . could hardly pass a rational basis test." Mot.29. Plaintiffs' failure to articulate a position with respect to rational basis operates as a concession that the law is constitutional under that test.

Plaintiffs claim that there are no compelling interests justifying not authorizing electronic balloting, Mot.28, but that is wrong. The State has a compelling interest in limiting the risk of "fraud or abuse," Wis. Stat. § 6.84(1), inherent in the absentee voting regime—particularly so when it comes to electronic balloting. *See supra* pp.5–7. Indeed, it is "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," *Walker*,

2014 WI 98, ¶ 73, which interest this statutory limitation is designed to promote, Wis. Stat. § 6.84(1).

Plaintiffs' suggestion that any state interest is diminished by the fact that Wisconsin for a limited time permitted all voters to receive absentee ballots electronically and still permits members of the military and people living overseas to do so, Mot.28, is unavailing. Wisconsin's current law and procedures governing electronic absentee ballots do not provide for electronic ballot marking for military and overseas voters, which is what Plaintiffs ask for in the instant motion. Wis. Stat. §§ 6.22(5), 6.24(7); see Form EL-128u, *supra*; WEC, Military and Overseas Voting, *supra*, at 14. Further, while Plaintiffs note the availability of electronic ballot delivery to these groups, what Plaintiffs ultimately seek in this lawsuit—as the Complaint makes clear, Compl. at 58–59 (prayer for relief)—is the unprecedented expansion of Wisconsin's absentee voting laws to permit electronic absentee *balloting*, in general. Because electronic ballot delivery alone would not remedy Plaintiffs' concerns in any way, their focus on the current, limited availability of electronic ballot delivery to those in the military and overseas is irrelevant. And in any event, in 2011, the Legislature made a policy judgment, based on its experience with widespread electronic balloting, to limit the distribution of electronic ballots to these two overseas groups that may be physically incapable of accessing the polls. See 2011 Wis. Act 75, § 50 (amending Wis. Stat. § 6.87(3)(d)). Here, with the exception of Plaintiff Ellingen, the Individual Plaintiffs do not claim to be actually “unable” to “travel freely” or to

“use . . . regular voting methods,” and there is no “right to vote in any [particular] manner.” *Id.* And, of course, the Legislature is free to change its policy positions at its discretion and pass legislation to that effect, *see Flynn v. DOA*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998) (“[i]t is for the Legislature to make policy choices”), which it did in 2011 when it limited electronic absentee ballot distribution to groups required to have such access under federal law, *see* 2011 Wis. Act 75, § 50; 52 U.S.C. § 20302 (requiring States to establish procedures allowing military and overseas voters to receive blank absentee ballots electronically).

#### **4. Plaintiffs Are Unlikely To Succeed On The Merits Of Their Federal Constitutional Claims**

Plaintiffs cannot prevail on the merits of their federal constitutional claims because they fail to address the federal constitutional standard and thus waive their arguments. *See League of Women Voters v. Madison Cmty. Found.*, 2005 WI App 239, ¶ 19, 288 Wis. 2d 128, 707 N.W.2d 285 (holding that a party’s failure to “present developed arguments” to the court waives the party’s argument); *Assocs. Fin. Servs. Co. of Wis. v. Brown*, 2002 WI App 300, ¶ 4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (declining to address conclusory and undeveloped arguments); *Clean Wis., Inc. v. Pub. Serv. Comm’n of Wis.*, 2005 WI 93, ¶ 180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 (“We will not address undeveloped arguments.”). Plaintiffs do set forth a distinct legal standard for federal constitutional claims under *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992)—but then bypass the *Anderson/Burdick* analysis entirely to declare a favorable conclusion, perfunctorily

noting that the Plaintiffs are successful “for the same reasons that the Electronic Absentee Ballot Prohibition fails under the Wisconsin Constitution.” Mot.28–29. The Court must “decline to address” these “[in]adequately briefed” and “conclusory and undeveloped” contentions. *Brown*, 2002 WI App. 300, ¶ 4 n.3. To the extent that Plaintiffs duplicate their state constitutional arguments, those arguments fail for the reasons discussed above. *Supra* pp.24–27.

**C. Plaintiffs Have Not Shown That They Will Suffer Irreparable Harm Absent Relief**

Plaintiffs also fail to show that they will suffer irreparable harm unless the Court grants them a temporary injunction. *See SEIU*, 2020 WI 67, ¶ 93. Plaintiffs’ lead harm argument is that their “constitutional and fundamental right to vote” will be impaired absent injunctive relief, Mot.30, but absentee voting is a privilege in Wisconsin, and not a constitutional right, *see* Wis. Stat. § 6.84(1); *Teigen v. WEC*, 2022 WI 64, ¶ 52 n.25, 403 Wis. 2d 607, 976 N.W.2d 519. Any burdens associated with absentee voting thus do not burden the fundamental right to vote. *See, e.g., Teigen*, 2022 WI 64, ¶ 52 n.25. In all events, Plaintiffs are not at “risk” of “losing” the privilege of voting absentee, where current law entitles them to the assistance necessary to prepare and cast their absentee ballots. *See Carey v. WEC*, 624 F. Supp. 3d 1020, 1034 (W.D. Wis. 2022).

While Plaintiffs suggest that they will be irreparably harmed because Section 6.87(5)’s voting-with-assistance mechanism requires voters to forgo their right to a secret ballot, Mot.31, they are wrong for all the reasons discussed above, *supra* pp.20–



24, and this alleged harm would not entitle them to the injunctive remedy they seek here in any event. Wisconsin law authorizes voters with disabilities to select a single individual of their choosing to assist the voter in marking his or her absentee ballot and subjects that chosen assistant to criminal penalties—including felony charges—if the assistant intentionally fails to dutifully mark the voter’s selection or reveals it to a third party. *See* Wis. Stat. §§ 6.87(5), 12.13(3)(j), 12.60(1)(a). And even if voters with disabilities were able to receive and mark their ballots electronically, many such voters *would still require assistance* to complete the absentee voting process, including printing the ballot, putting the ballot in the appropriate envelope, and returning it to the municipal clerk, Wis. Stat. § 6.87, which is why Plaintiffs’ Complaint seeks an order authorizing electronic ballot *return*, Compl. at 58–59 (prayer for relief), in addition to electronic ballot delivery and marking privileges. In other words, Plaintiffs’ requested temporary injunction would not remedy their claimed harm, providing an additional basis to deny their motion.

**D. The Balance Of The Equities Strongly Favors Denial Of Any Temporary Injunctive Relief**

The balance of the equities counsels against temporary injunctive relief here, *SEIU*, 2020 WI 67, ¶ 93, because any harm that Plaintiffs claim to suffer absent relief is outweighed by the “competing irreparable harm” the Legislature and the public will suffer if a temporary injunction is issued. *See Serv. Emps. Int’l Union (SEIU), Local 1 v. Vos*, No. 2019-AP-622, slip op. at 6 (Wis. June 11, 2019); *Pure Milk*, 90 Wis. 2d at 800.

Granting Plaintiffs' request for a temporary injunction would harm the People and the Legislature's sovereign interest in the enforcement of state statutes as written, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶¶ 8, 13, 394 Wis. 2d 33, 949 N.W.2d 423; *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); see *League of Women Voters of Wis. v. Evers*, No. 2019-AP-559, slip op. at 8 (Wis. Apr. 30, 2019), particularly those that are designed to protect the integrity of the elections in Wisconsin, *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 196 (2008); *Eu*, 489 U.S. at 231. This lawsuit implicates that significant interest because it calls on the Court to interpret, apply, and—if Plaintiffs are successful—declare certain of Wisconsin's carefully crafted absentee ballot laws unconstitutional or void under federal law. See *supra* Part I.C. An order granting Plaintiffs' request for a temporary injunction would undermine the State's interest in election integrity and security, see *Crawford*, 553 U.S. at 196; *Eu*, 489 U.S. at 231, by compelling the State to develop and implement a new system for delivering and marking absentee ballots on the eve of an election, see *Hawkins*, 2020 WI 75, ¶ 10; *supra* pp.10–14. In addition to the practical difficulties of implementing such a system in the narrow window before absentee ballots must be distributed, such an order would fundamentally undermine the State's interest in mitigating against the significant risks posed by electronic absentee ballot marking. See *supra* pp.5–7. The harm a preliminary injunction would cause the Legislature—and Wisconsin's voters—thus outweighs any

harm that Plaintiffs may suffer, especially since, as explained above, Plaintiffs' claimed remedy does not resolve the problems they allege exist.

Plaintiffs' purported benefits from a temporary injunction would not outweigh the significant harm to the Legislature and the People of Wisconsin from the temporary relief that Plaintiffs seek. As above, the Legislature exercised its constitutional authority to craft absentee voting laws, Wis. Const. art. III, § 2, that vastly expand ballot access to individuals who may have trouble—for whatever reason—accessing the polls. But recognizing that absentee balloting takes place “outside the traditional safeguards of the polling place,” Wis. Stat. § 6.84(1), the Legislature enacted narrow, reasonable restrictions on absentee voters to “prevent the potential for fraud and abuse,” *id.* Among those rules was the imminently reasonable policy choice to require *all* absentee voters to physically mark and return absentee ballots, while also permitting voters who may have trouble doing so to mark and return their ballots with the assistance of an individual of their choosing and subjecting that assistant to criminal penalties for failing to follow the voter's instructions or revealing his or her vote to any third party. See Wis. Stat. §§ 6.87(5), 12.13(3)(j), 12.60(1)(a). Wisconsin's history of absentee balloting—including the existence of these reasonable limitations—is long, 2011 Wis. Act 75, and Plaintiffs offer no reason to deviate from it now, particularly because the temporary relief they seek in this Motion is, in their own words, “insufficient,” Mot.22, to address their concerns.

## CONCLUSION

This Court should deny Plaintiff's Motion For Emergency Declaratory Relief  
And Temporary Injunction.

Dated: May 24, 2024

Respectfully submitted,

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