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No. 2024AP1298

In the Wisconsin Court of Appeals

DISTRICT II

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

v.

WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, *as*
Administrator of WEC, DON MILLIS, ROBERT F.
SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK
THOMSEN AND CARRIE RIEPL, *as Commissioners of WEC*,
DEFENDANTS,
WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLANT.

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

**OPENING BRIEF OF INTERVENOR-DEFENDANT-
APPELLANT THE WISCONSIN STATE LEGISLATURE**

MISHA TSEYTLIN
Counsel of Record
State Bar No. 1102199
KEVIN M. LEROY
State Bar No. 1105053
EMILY A. O'BRIEN
State Bar No. 1115609
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, Illinois 60606
(608) 999-1240 (MT)
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Intervenor-Defendant-Appellant

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ISSUE PRESENTED

Whether the Circuit Court erroneously exercised its discretion in issuing temporary injunctive relief, including because the injunction will upset the State's status quo election procedures on the eve of the November 2024 General Election.

The Circuit Court answered "no."

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INTRODUCTION

The Circuit Court’s temporary injunction order mandates that the Wisconsin Elections Commission (“WEC” or the “Commission”) create a system under which non-party, local election clerks all over Wisconsin must learn and implement a new method of absentee-ballot distribution and marking for self-certified voters with print disabilities. The Circuit Court’s injunction improperly changes the status quo on the eve of the 2024 General Election by enjoining long-extant election laws. Accordingly, the Wisconsin State Legislature (the “Legislature”) respectfully requests that this Court either reverse the injunction before the end of August or grant the Legislature’s contemporaneously filed motion for a stay pending appeal by that time, given that is when at least some clerks will begin distributing absentee ballots to voters for the 2024 General Election.

ORAL ARGUMENT AND PUBLICATION

The Legislature does not request oral argument or publication to facilitate this Court’s “time-sensitive” review before “the November 2024 elections.” Order at 2, *Disability Rts. Wis. v. Wis. Elections Comm’n*, No.2024AP1298 (Ct. App. July 19, 2024).

STATEMENT OF THE CASE

A. Legal Background

To vote absentee, a voter in Wisconsin generally must request an absentee ballot from the municipal clerk, Wis. Stat. § 6.86, receive a physical copy of the absentee ballot and its accompanying envelope, *id.* § 6.87(2), mark her selections on the ballot, obtain a witness’s signature and certification on the

envelope, *id.*, and then return the ballot via mail or physical delivery to the municipal clerk by 8:00 p.m. on Election Day, *id.* § 6.87(6). Alternatively, an absentee voter may utilize in-person absentee-voting procedures to request and cast an absentee ballot at a clerk's office or another designated location before Election Day. *Id.* §§ 6.86(1), 6.855.

Recognizing that “military [and overseas] voters” face unique challenges, Wisconsin law authorizes electronic *delivery* of absentee ballots to these voters. *Luft v. Evers*, 963 F.3d 665, 677 (7th Cir. 2020); *see* Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), 6.87(3)(d). These absentee ballots must “be marked and returned” to the clerk's office “in the same manner as other absentee ballots.” Wis. Stat. §§ 6.22(5), 6.24(7); Wis. Elections Comm'n, Form EL-128u, *Uniform Instructions for Military & Overseas Absentee Voters (Email & Fax)* (Revised Aug. 2023) (hereinafter “Form EL-128u”);¹ *see* Wis. Elections Comm'n, *Military and Overseas Voting* 14 (Feb. 2022).²

Wisconsin law only allows the electronic delivery of absentee ballots to military and overseas voters, Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), 6.87(3)(d), which policy decision recognizes that this method of ballot delivery raises significant security and secrecy concerns, Susan Greenhalgh et al., *Email and Internet Voting: The*

¹ Available at https://elections.wi.gov/sites/default/files/documents/EL-128u%20%28US%20Letter%20Size%29%20Uniform%20Instructions%20UOCAVA_0.pdf (all websites last visited Aug. 5, 2024).

² Available at https://elections.wi.gov/sites/default/files/legacy/2022-02/UOCAVA%2520Manual%25202.2022_0.pdf.

Overlooked Threat to Election Security (Oct. 2018).³ The electronic delivery of ballots *via email*—as opposed to a specialized website or portal—creates additional security problems, given the well-documented prevalence of data breaches in email platforms in the United States. *See, e.g.*, FCC, Privacy and Data Protection Task Force (updated Mar. 5, 2024).⁴ These security and privacy problems are particularly acute in Wisconsin’s decentralized election system, where municipal clerks, many of whom only work part-time, administer elections, and at least some clerks use unsecured email addresses to conduct their official election duties. R.112 at 52:16–53:11; *see* Greenhalgh et al., *supra*.

Wisconsin law in place from 1999 to 2011 gave clerks discretion to email or fax an absentee ballot “if, in the judgment of the clerk, the time required to send the ballot through the mail may not be sufficient to enable return of the ballot.” 1999 Wis. Act 182, § 97 (creating Wis. Stat. § 6.87(3)(d)); Wis. Stat. § 6.87(3)(d) (2009–10). And for a brief time in 2011, a statutory enactment required clerks to send electronic absentee ballots to voters who requested them, *see* 2011 Wis. Act 23, §§ 58, 65, but no general or statewide elections were ever held under this rule, and it was soon amended by 2011 Wis. Act 75, § 50, to limit electronic distribution of absentee ballots to military and overseas voters.

Wisconsin has numerous voting provisions to accommodate voters with disabilities. On Election Day, disabled voters may

³ Available at <https://www.commoncause.org/wp-content/uploads/2018/10/ElectionSecurityReport.pdf>.

⁴ Available at <https://www.fcc.gov/privacy-and-data-protection-task-force>.

receive assistance from a person of their choosing to physically help them mark and/or cast their ballot. Wis. Stat. § 6.82. Polling places must provide accessible voting devices to ensure that these voters can vote without assistance. See 52 U.S.C. § 21081(a)(3)(A)–(B). Wisconsin also “funds specialized transportation assistance programs” to help voters with disabilities “get to the polls,” *Luft*, 963 F.3d at 672 (citing Wis. Stat. § 85.21), for which the State budgeted \$15,977,800 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).⁵ Voters with disabilities who elect to cast an absentee ballot can opt to “automatically” receive absentee ballots “for every election,” Wis. Stat. § 6.86(2)(a), and may submit a signed witness statement that “verifies” the voter’s name and address “in lieu of providing proof of identification,” *id.* § 6.87(4)(b)2.

Electors who are “unable to read, ha[ve] difficulty [] reading,” or are “unable to mark” their own absentee ballots may “select any individual . . . to assist them” at a location of the voter’s choice, provided the assistant is not “the elector’s employer” or union representative. *Id.* § 6.87(5). Any assistant who “intentionally fail[s] to cast a vote in accordance with the elector’s instructions,” or “reveal[s] the elector’s vote to any third person,” *id.* § 12.13(3)(j), commits a Class I felony, *id.* § 12.60(1)(a).

⁵ Available at <https://wisconsin.gov/Documents/doing-bus/local-gov/astnce-pgms/transit/8521-guide.pdf>.

WEC provides non-binding guidance to Wisconsin's over-3,000 local clerks and staff in 1,851 different municipalities on how to administer Wisconsin's absentee-voting scheme and comply with the relevant state and federal laws. *See* Wis. Stat. § 5.05(1); R.67, ¶ 38; *see* Wis. Elections Comm'n., *Election Administration Manual for Wisconsin Municipal Clerks* 76, 87 (Feb. 2024).⁶

B. Litigation Background

On April 16, 2024, Plaintiffs filed this lawsuit against WEC, its Administrator, and its individual members, alleging that Wisconsin's decades-old absentee-voting scheme, which permits voters with disabilities to use third-party assistance to cast absentee ballots, is unlawful under the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the Wisconsin Constitution, and the U.S. Constitution. R.9. On May 1, 2024, Plaintiffs moved for a temporary injunction, R.43, asking the Circuit Court to compel Defendants to "make available for the upcoming August 2024 primary and November 2024 general elections an option to request and receive an electronic absentee ballot that can be marked electronically using an at-home accessibility device," R.42 at 35. The Legislature moved to intervene, R.51, and both the Legislature and WEC opposed the temporary injunction motion, R.53, 68.

On July 17, 2024, Plaintiffs deposed WEC's Administrator. R.93. Plaintiffs questioned her on the time needed "to implement" a new voting system that would enable the State's clerks to email

⁶ Available at https://elections.wi.gov/sites/default/files/documents/EA%20Manual-February%202024_format%20update.pdf.

ballots to disabled voters. R.93 at 104–05. Citing the Administrator’s earlier-filed declaration, where she stated that it “would take approximately three months to implement” such a system, R.67, ¶ 38, Plaintiffs questioned why it would “require three months” to “mak[e] the same ballots” available to disabled voters that are already available “to military and overseas voters,” R.93 at 104–05. In response, the Administrator explained that the process of “mak[ing] sure the clerks have the information they need on a major change” takes considerable time, explaining WEC’s multi-step process of creating and implementing new guidance and noting difficulties in training Wisconsin’s many clerks. R.93 at 105–06.

On June 24, 2024, the Circuit Court heard argument on both Plaintiffs’ temporary injunction motion, R.43, and the Legislature’s intervention motion, R.51, 64. At the hearing, counsel for WEC explained that current law does not require the electronic delivery of *accessible* absentee ballots to even military and overseas voters, R.112 at 48:3–49:15, and emphasized that it would be the local clerks, and not WEC, who would be responsible for “mak[ing] sure these ballots could be tagged so that they could be readable by voters who have the technology at home to mark them” if the Circuit Court granted Plaintiffs’ motion, R.112 at 50:6–52:15. WEC’s counsel also noted the significant security concerns that would result from this change, noting that clerks “have discretion on how and when the ballot is transmitted and what security measures are taken” and “some [clerks] have gmail emails” rather than the standard “dot gov email.” R.112 at 52:16–

53:11. Counsel for the Legislature further highlighted the “special rule in election cases” that courts should not “change the rules of the game on the eve of an election,” as well as the “broader principle” that injunctive relief should not “disrupt the status quo.” R.112 at 123:10–125:6.

The following day, the Circuit Court issued orders on both motions, ruling in favor of Plaintiffs as to the temporary injunction, App.010–11, and in favor of the Legislature as to intervention, R.103. The Circuit Court’s initial temporary injunction order, which did not include any reasons for granting relief, (1) enjoined Wisconsin’s prohibition on the electronic distribution of ballots, including Wis. Stat. § 6.87(3)(a), as unenforceable as applied to print-disabled voters; (2) ordered WEC to facilitate the delivery of emailed, *accessible* ballots to self-certifying print-disabled electors for the November 2024 General Election; and (3) declared that to be accessible, a ballot must be capable of being read and marked by digital assistive technology such as a screen reader, App.010–11—a new mandate that has never been imposed on Wisconsin’s clerks, R.112 at 48:3–49:15.

On July 18, 2024, the Circuit Court issued a second order on the temporary injunction that purported to supplement its initial order with “additional explanation” for the Circuit Court’s reasoning without “chang[ing] the scope of the earlier injunction.” App.003. In this amended order, the Circuit Court recited the legal standard for preliminary injunctions and concluded that “plaintiffs satisfied each of these four criteria,” without engaging in any substantive analysis. App.007–08. The Circuit Court noted that

Plaintiffs are “likely to suffer irreparable harm because . . . absent this injunction, they may be denied the right to vote,” have “no other adequate remedy at law,” and “the statutes they seek to enjoin plainly appear to violate federal protections for the disabled under the” ADA and Rehabilitation Acts, while citing a few federal cases that addressed different statutory regimes in other states. App.007–08. The Circuit Court also explained that a temporary injunction was necessary to preserve the status quo, which it defined as the state of the law prior to the passage of 2011 Wis. Act 75, when “voters with disabilities could request and receive an electronic absentee ballot by email.” App.007–08.

The Legislature appealed the Circuit Court’s orders granting the temporary injunction, R.114; App.067–68, and moved the Circuit Court for a stay pending appeal, App.086–88. The Circuit Court heard argument on the stay motion on July 30, 2024. *See* App.065–66. At that hearing, WEC’s counsel explained that the Commission had not yet taken concrete steps to implement the temporary injunction order and would not begin that process until after the August primary election concluded. App.028–32. On August 1, 2024, the Circuit Court issued a decision denying the Legislature’s motion to stay. App.012–22.

STANDARD OF REVIEW

A circuit court may grant a temporary injunction if “(1) the movant is likely to suffer irreparable harm if an injunction is not issued, (2) the movant has no other adequate remedy at law, (3) an injunction is necessary to preserve the status quo, and (4) the movant has a reasonable probability of success on the merits.”

Gahl on behalf of Zingsheim v. Aurora Health Care, Inc., 2023 WI 35, ¶ 17, 989 N.W.2d 561 (citing *Serv. Emps. Int’l Union (SEIU), Loc. 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35). A circuit court’s “[g]rant[of] injunctive relief is a discretionary decision” that this Court “review[s] for an erroneous exercise of discretion.” *SEIU*, 2020 WI 67, ¶ 27. A circuit court abuses its discretion by making an error of law, such as failing to follow binding precedent. *See Bethke v. Auto-Owners Ins. Co.*, 2013 WI 16, ¶ 16, 345 Wis. 2d 533, 825 N.W.2d 482. A circuit court also “erroneously exercises its discretion in the context of a temporary injunction when it ‘fails to consider and make a record of the factors relevant to its determination.’” *Gahl*, 2023 WI 35, ¶ 23 (citation omitted).

ARGUMENT

I. The Circuit Court’s Order Disrupts The Status Quo On The Eve Of An Election

A. A temporary injunction may “be issued only when necessary to preserve the status quo.” *Werner v. A. L. Grootemaat & Sons, Inc.*, 89 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). This principle applies with particular strength where the injunction would disrupt the status quo on the eve of an election, when such relief may “result in confusion and disarray and [] undermine confidence in . . . election results.” *Hawkins v. Wis. Elections Comm’n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877; *see Common Cause v. Lawson*, 978 F.3d 1036, 1043 (7th Cir. 2020); *Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020).

B. Here, the relevant status quo is Wisconsin's current absentee-ballot regime, which permits voters with disabilities to cast absentee ballots with the assistance of an individual of their choosing who is subject to criminal penalties for failing to properly record the voter's selection or revealing the voter's selection to third parties, 1965 Wis. Act 666, § 1, 1985 Wis. Act 304; *see also* Wis. Stat. §§ 6.87(5), 12.13(3)(j), 12.60(1)(a), and which authorizes *only* voters in the military or those living overseas to receive absentee ballots electronically and contains no mandate that such ballots be screen-reader accessible, 2011 Wis. Act 75, § 50.

The temporary injunction order at issue disrupts this status quo by mandating a regime under which non-party election clerks and staff in 1,851 municipalities must learn and implement a new method of absentee-ballot distribution and marking for self-certified voters with print disabilities. While military voters and those living overseas may receive electronic absentee ballots under current law, Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e), Wisconsin clerks have *never* had to provide any voter with an electronic ballot that is screen-reader accessible, *see supra* p.11. Indeed, many non-party clerks do not have Adobe Acrobat Pro or a similar program capable of creating an accessible ballot, R.112 at 50:23–25, and it is unclear how that software would facilitate the ballot-marking process, how local clerks will pay for that software, *see* R.112 at 52:6–15; R.93 at 33:16–20; *see also* App.091 (noting that purchasing this software for each clerk would cost a total of \$444,000 per year), or how local clerks—many of whom work on a

part-time basis—would learn to implement the new system in such a short time period, *see* R.93 at 105:15–22.

The impending November 2024 General Election makes the Circuit Court’s disruption of the status quo plainly unlawful. *See Hawkins*, 2020 WI 75, ¶ 10; *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Non-party local clerks—not WEC—are responsible for administering Wisconsin’s elections. *See State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, ¶ 15, 396 Wis. 2d 391, 957 N.W.2d 208. Clerks will therefore be responsible for emailing ballots to voters who self-certify as having a print disability. *See* App.008–09. These clerks are already in the “crunch time frame” as they simultaneously prepare for the August Primary and the November General Election. R.112 at 51:12–52:15. Many such clerks will begin sending absentee ballots for the November Election at the end of this month, R.112 at 44:8–15, leaving very little time for WEC to prepare, distribute, and conduct trainings on guidance for how clerks might implement the Circuit Court’s injunction order, *see* R.112 at 49:16–22; R.67, ¶ 27. To lawfully perform their duties, these local clerks—none of whom are defendants in this lawsuit—must now learn and implement a new system of electronic absentee-ballot distribution and marking, figure out how to render these ballots accessible, train staff concerning those procedures, and determine to whom such ballots should be sent, all before they begin distributing absentee ballots. R.112 at 50:6–9, 50:23–25. There is neither sufficient time nor capacity for clerks to ensure that whatever new system they adopt takes account of the significant security risks associated with

electronic absentee-ballot distribution and marking, including because multiple part-time clerks utilize non-secure email systems like Gmail instead of government-issued email addresses. *See* R.112 at 52:16–53:11; *supra* p.10.

C. The Circuit Court erroneously exercised its discretion holding that “an injunction is necessary to preserve the status quo” by misidentifying the relevant status quo as the regime that existed prior to 2011 Wisconsin Act 75, and ordering relief that has never been the status quo in this State. App.007.

As an initial matter, the Circuit Court misunderstood the relevant “status quo.” *See* App.007–08. The term “status quo” refers to “[t]he *existing* state of affairs.” *Status Quo*, Oxford English Dictionary Online (2023) (emphasis added).⁷ The Circuit Court, by contrast, concluded that the relevant status quo is the state of affairs that existed more than a decade ago, when clerks were permitted to email electronic absentee ballots to voters that might—if the clerk had the necessary technology and tagged the ballot—be screen-reader accessible. App.007–08; *see* R.93 at 31:18–32:24. The Legislature eliminated that regime in 2011 Wisconsin Act 75, which expressly limits electronic distribution of absentee ballots to military and overseas voters. *See* 2011 Wis. Act 75, § 50. Although a federal court enjoined several provisions of that legislation for a time, including its restrictions on the electronic delivery of absentee ballots, the U.S. Court of Appeals for the Seventh Circuit reversed that injunction in June 2020.

⁷ Available at https://www.oed.com/dictionary/status-quo_n?tab=meaning_and_use#20925212 (subscription required).

Luft, 963 F.3d at 676–77. Since that time, the “existing state of affairs,” *Status Quo*, Oxford English Dictionary Online, *supra*, in Wisconsin has been that clerks are not allowed to email or fax ballots to voters who are not in the military or overseas, Wis. Stat. §§ 6.22(2)(e), 6.24(4)(e). That is the relevant status quo, not whatever state of affairs may have been in place prior to 2011 Wisconsin Act 75.

Nor has the relief that this Court ordered—requiring WEC to “facilitate the availability” of “accessible” electronic ballots for voters who “self-certify to having a print disability,” App.009—*ever* been the status quo in Wisconsin, even before 2011 Wisconsin Act 75. Before 2011, Wisconsin law gave clerks discretion to email or fax an absentee ballot “if, in the judgment of the clerk, the time required to send the ballot through the mail may not be sufficient to enable return of the ballot” in time. 1999 Wis. Act 182, § 97 (creating Wis. Stat. § 6.87(3)(d)). For a very brief period in 2011, the law required clerks to send electronic/fax absentee ballots to voters who requested them. *See* 2011 Wis. Act 23, §§ 58, 65 (effective date June 10, 2011). However, no general or statewide elections were held under that regime, and it was soon amended by 2011 Wis. Act 75, § 50 (effective date Dec. 2, 2011), to restrict electronic distribution of absentee ballots to military and overseas voters. To be clear, Wisconsin law has *never* required clerks to make any emailed ballots screen-reader accessible, nor is there evidence suggesting that all or even most of Wisconsin’s local clerks have the technology or training to do so. *See supra* p.11.

II. Plaintiffs Are Not Likely To Succeed On The Merits Of Their ADA And Rehabilitation Act Claims

A. Under the ADA, a State may not deny a “qualified individual with a disability” “the benefits of the services, programs, or activities of a public entity,” where the denial is “by reason of [the] disability.” 42 U.S.C. § 12132. Disability-discrimination claims under the Rehabilitation Act are analyzed under the same standard as ADA claims. *State v. Piddington*, 2001 WI 24, ¶ 44, 241 Wis. 2d 754, 623 N.W.2d 528. Under both statutes, a plaintiff must show that she is a “qualified individual with a disability,” was “denied the benefits of the services . . . of a public entity,” and “that the denial or discrimination was by reason of [a] disability.” *Ashby v. Warric Cnty. Sch. Corp.*, 908 F.3d 225, 230 (7th Cir. 2019) (citation omitted). A plaintiff makes that showing by demonstrating that a public entity failed to provide “reasonable accommodation[s]” that make its “services, programs, or activities” “meaningful[ly] access[ible].” *Alexander v. Choate*, 469 U.S. 287, 301 (1985). A reasonable accommodation need not “be perfect or the one most strongly preferred by the plaintiff.” *Wright v. N.Y. State Dep’t of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (alterations omitted; citation omitted).

B. Here, Plaintiffs are unlikely to succeed on the merits of their ADA and Rehabilitation Act claims because, *inter alia*, they have not been “excluded from participation in” or “denied the benefits of,” 42 U.S.C. § 12132, Wisconsin’s absentee-voting scheme. Under Wisconsin law, voters with print disabilities can readily vote absentee, including by casting a ballot with the assistance of a single individual of the voter’s choosing. Wis. Stat.

§ 6.87(5). That individual, in turn, is bound by law to faithfully record the voter's vote and prohibited from revealing that vote to third parties. *Id.* § 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.*, he or she “is guilty of a Class I felony,” *id.* § 12.60(1)(a). The State's third-party assistance provisions allow voters with disabilities to fully “participat[e] in” and receive “the benefits of,” 42 U.S.C. § 12132, absentee voting. Moreover, if voters with print disabilities do not want to avail themselves of third-party assistance, they may cast their vote in several alternative ways, including 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 id.* § 6.855.

Section 6.87(5)'s third-party assistance provision gives voters with disabilities “meaningful access” to absentee voting, and so can also be understood as a “reasonable accommodation,” *Alexander*, 469 U.S. at 301, under the ADA and Rehabilitation Act. That provision makes absentee voting accessible to voters with print disabilities by offering them the assistance of an individual of the voter's choosing, as well as ensuring the voter's assistant is subject to criminal penalties for mismarking or divulging the voters' selection. Wis. Stat. §§ 6.87(5), 12.13(3)(j), 12.60(1)(a). Providing those voters who cannot exercise the privilege of absentee voting independently the choice of an assistant is a most “reasonable,” *Alexander*, 469 U.S. at 301, accommodation and, thus, complies with federal law, *see also Nelson v. Miller*, 170 F.3d 641, 649, 654 (6th Cir. 1999) (secretary of state's refusal “to

implement a system by which blind voters could vote without third-party assistance of their choosing” did not violate the ADA or Rehabilitation Act).

C. The Circuit Court incorrectly concluded that Plaintiffs have a strong chance of success on their ADA and Rehabilitation Act claims. App.008.⁸ The Circuit Court’s reasoning on this point is, in fact, so sparse as to be unreviewable and thus an erroneous exercise of discretion. *See Gahl*, 2023 WI 35, ¶¶ 22–24. When ruling on an injunction motion, a court may not simply “ch[oose] between alternatives without giving the rationale or reason behind the choice.” *Id.* ¶ 22 (citation omitted). Rather, the court must “consider and make a record of the factors relevant to its determination” and render a “conclusion based on a logical rationale founded upon proper legal standards.” *Id.* ¶¶ 22–23 (citation omitted); *see id.* ¶ 22 (“[d]iscretion contemplates a process

⁸ The Circuit Court did not address Plaintiffs’ other claims in its amended temporary injunction order, holding only that “plaintiffs showed they have a reasonable probability of success because the statutes they seek to enjoin plainly appear to violate federal protections for the disabled under the [ADA] and the Rehabilitation Act.” App.008. Nevertheless, for completeness, Plaintiffs have no reasonable chance of succeeding on their other claims. Courts around the country have consistently rejected secret-ballot provision challenges to third-party assistance statutes. *See, e.g., Nelson*, 170 F.3d at 651; *Smith v. Dunn*, 381 F. Supp. 822, 823–24 (M.D. Tenn. 1974); *Am. Ass’n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1287 (M.D. Fla. 2002). That is because the term “secret” means “[k]ept from public knowledge . . . ; not allowed to be known, or only by selected persons.” *Secret*, Oxford English Dictionary Online (2023), https://www.oed.com/dictionary/secret_adj?tab=meaning_and_use#23661929. Thus, a ballot remains “secret” even if shared with “selected persons,” *id.*, such as an individual selected by the voter to assist in completing and casting a ballot, *see Wis. Stat. § 6.87(5)*. Additionally, the state election laws at issue in this case would easily survive both rational basis review and the *Anderson/Burdick* analysis for purposes of Plaintiffs’ state and federal equal protection claims. *See R.53* at 25–30.

of reasoning with a rational and explainable basis” (alteration in original and citation omitted)). The Circuit Court here did not offer a sufficiently “demonstrated rational process,” *id.* ¶ 18, for its conclusion that Plaintiffs are likely to succeed on their federal statutory claims, *see* App.008. It did not explain why Plaintiffs do not already have “meaningful access” to Wisconsin’s absentee-voting regime, or how the law currently does not already constitute a “reasonable accommodation.” *See supra* p.19. Instead, the Circuit Court merely cited to three federal, out-of-state decisions, App.008, none of which addressed a statute restricting the electronic delivery of absentee ballots, *see Disabled in Action v. Bd. of Elections*, 752 F.3d 189 (2d Cir. 2014) (designated polling places with physical barriers to access and lacking accessible voting machines violated the ADA); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020) (certain ballot-casting rules and a ban on curbside voting violated the ADA in light of the COVID-19 pandemic); *Cal. Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229 (N.D. Cal. 2013) (failure to provide accessible voting machines violated the ADA and Rehabilitation Act). The Circuit Court’s failure to articulate a sufficient “logical rationale” for its decision that Plaintiffs are likely to succeed on their federal statutory claims is “an erroneous exercise of discretion” requiring reversal. *Gahl*, 2023 WI 35, ¶¶ 21–22 (citation omitted).

III. Plaintiffs Will Not Suffer Irreparable Harm Absent Injunctive Relief

Plaintiffs failed to show that they will suffer irreparable harm without a temporary injunction, and the Circuit Court

erroneously exercised its decision in holding otherwise. *See SEIU*, 2020 WI 67, ¶ 93. Specifically, the Circuit Court concluded that Plaintiffs would suffer harm without a temporary injunction because “they may be denied the right to vote.” App.007. But Plaintiffs are not at any risk of being denied the right to vote, given that current law provides voters with print disabilities multiple ways to exercise the franchise, including by using third-party assistance to prepare and cast absentee ballots, *see Carey v. Wis. Elections Comm’n*, 624 F. Supp. 3d 1020, 1034 (W.D. Wis. 2022), as well as voting with or without assistance at a physical polling location, *see supra* pp.7–8.

IV. The Public Interest Disfavors Issuance Of A Temporary Injunction

A. The public interest counsels against the temporary injunctive relief granted below, *SEIU*, 2020 WI 67, ¶ 93, because the harm that Plaintiffs claim they will suffer absent relief is significantly outweighed by the “competing irreparable harm” the Legislature and the public will suffer if the temporary injunction is allowed to stand, *see* App.078; *Pure Milk Prods. Co-op v. Nat’l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

To begin, the injunction order harms 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* App.080, particularly those that are designed to protect the integrity of Wisconsin’s elections, *see Crawford v. Marion Cnty. Election Bd.*,

553 U.S. 181, 196 (2008) (controlling opinion of Stevens, J.); *Eu*, 489 U.S. at 231. The temporary injunction implicates that significant interest by declaring certain of Wisconsin’s carefully crafted absentee-ballot laws void under federal law. *See supra* pp.20–21 In granting Plaintiffs’ requested injunctive relief, the Circuit Court has thus undermined the State’s interest in the enforcement of its duly enacted statutes, *Bostelmann*, 2020 WI 80, ¶ 8, as well as in election integrity and security, *see Crawford*, 553 U.S. at 196 (controlling opinion of Stevens, J.); *Eu*, 489 U.S. at 231. In addition to the practical difficulties of implementing such a system in the narrow window before absentee ballots will be distributed, as well as the confusion such a change will cause for clerks and voters, the Circuit Court’s order will undermine the State’s interest in mitigating against the risks posed by electronic absentee-ballot distribution and marking. *See supra* pp.6–7, 15–16.

Plaintiffs’ purported benefits from a temporary injunction do not outweigh these substantial harms. The Legislature exercised its constitutional authority to enact absentee-voting laws, Wis. Const. art. III, § 2, that vastly expand ballot access to individuals with print disabilities. Recognizing that absentee balloting takes place “outside the traditional safeguards of the polling place,” Wis. Stat. § 6.84(1), the Legislature also enacted narrow, reasonable restrictions on absentee voters to “prevent the potential for fraud or abuse,” *id.*, including the reasonable policy choice to restrict electronic ballot distribution. There was no reason for the Circuit

Court to deviate from that regime on the eve of the November 2024 General Election.

B. The Circuit Court did not address whether “competing interests” outweighed Plaintiffs’ assertions of irreparable harm, *Pure Milk*, 90 Wis. 2d at 800, which itself constitutes an erroneous exercise of discretion, *see Gahl*, 2023 WI 35, ¶¶ 22–24. That is especially so here, where the Circuit Court misidentified the relevant status quo and imposed a new requirement for electronic absentee-ballot distribution and marking on the eve of an election. *See supra* pp.16–17. The Legislature set forth these reasons below and explained why, even if Plaintiffs were correct that they would suffer some irreparable harm absent a stay, the balance of the equities still tipped against temporary injunctive relief. R.53 at 31–33. The Circuit Court erred in failing to consider these equity arguments, providing an independent basis for reversal. *See Pure Milk*, 90 Wis. 2d at 800.

CONCLUSION

This Court should reverse the Circuit Court’s grant of injunctive relief to Plaintiffs.

Dated: August 6, 2024

Respectfully submitted,

Electronically signed by Misha Tseytlin

MISHA TSEYTLIN

Counsel of Record

State Bar No. 1102199

KEVIN M. LEROY

State Bar No. 1105053

EMILY A. O'BRIEN

State Bar No. 1115609

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe Street, Suite 3900

Chicago, Illinois 60606

(608) 999-1240 (MT)

(312) 759-1938 (KL)

(312) 759-5939 (EO)

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

kevin.leroy@troutman.com

emily.obrien@troutman.com

*Attorneys for Intervenor-Defendant-
Appellant*

CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief and this Court's July 19, 2024 Order. The length of this brief is 5,131 words.

Dated: August 6, 2024

*Electronically signed by Misha
Tseytlin*
MISHA TSEYTLIN

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