

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

CITY OF GREEN BAY, and KRIS TESKE, in
her official capacity as City of Green Bay City
Clerk,

Plaintiffs,

Civil Action No. 20-cv-479

v.

MARGE BOSTELMANN, JULIE M.
GLANCEY, ANN S. JACOBS, DEAN
KNUDSON, ROBERT F. SPINDELL, JR., and
MARK L. THOMSEN, in their official capacities
as Wisconsin Elections Commissioners,
ANDREA PALM, in her official capacity as
Secretary-Designee of the Wisconsin
Department of Health Services, and
TONY EVERS, in his official capacity as
Governor of the State of Wisconsin,

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs City of Green Bay (“City”) and Kris Teske, in her official capacity as City of Green Bay City Clerk (“Clerk Teske”), bring this emergency motion for a temporary restraining order and preliminary injunction to address the proper procedures for the April 7, 2020 election given the current state of affairs. The State of Wisconsin, along with the rest of the world, is in the midst of a public health crisis as a result of the rapid spread of COVID-19 through its communities. At the same time, the state is preparing for a spring election that is scheduled to occur a mere two weeks from now. Defendants, Wisconsin Governor Tony Evers (“Governor Evers”) and the individual commissioners of the Wisconsin Elections Commission (collectively, “the Commission”), have insisted that municipalities must continue exposing their employees to members of the public for the purpose of in-person voter registration and in-person absentee

voting, despite mandates from state officials and health care practitioners to socially distance and to prevent contact with others as much as possible. The Commission's refusal to permit municipalities to cease such processes given the current circumstances, and inaction with respect to changing the date or method of administration of the April 7, 2020 election endangers not only the public health, but also the legitimacy of that same election process.

Plaintiffs therefore seek immediate injunctive relief from this Court in order to protect the health and safety of its employees and members of the public while also ensuring a free and fair election process. Specifically, Plaintiffs respectfully move this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order and preliminary injunction restraining Defendants from violating Plaintiffs' equal protection rights and ordering Defendants: (1) to cancel the April 7, 2020 in-person election; (2) to permit Plaintiffs to conduct said election by mailing ballots to all registered voters; (3) to extend the deadline for registering to vote electronically or by mail to May 1, 2020; (4) to cancel in-person registration and in-person absentee voting; and (5) to establish Tuesday, June 2, 2020 as the deadline by which municipal clerks must have counted all returned mailed ballots. Such relief is necessary to protect both the public health and the sanctity of the upcoming election.

STATEMENT OF FACTS

Unfortunately, the timing of the April 7, 2020 election could not be worse; the COVID-19 pandemic is ramping up in the United States with no expectation that the number of cases will begin to diminish before the election. While efforts are in place across the country, state, county, and city to "flatten the curve," it is abundantly clear that the outbreak in Wisconsin is just beginning. (Decl. Vanessa R. Chavez Supp. Mot. Temporary Restraining Order and Preliminary

Injunction (“Chavez Decl.”), Ex. 1 (quoting Dr. Howard Markel, M.S., Ph.D.: “An outbreak anywhere can go everywhere.”); *Id.* at Ex. 2.)

In Wisconsin, the number of confirmed cases more than quadrupled from 106 cases in 14 counties on March 18, 2020, to 416 cases in 30 counties on March 23, 2020. *Id.* Brown County, Wisconsin is identified as having community spread of COVID-19. *Id.* The statewide outbreak has caused state officials to take extreme measures such as closing schools indefinitely, and directing all persons to stay at home. (*Id.*; *see also* Chavez Decl. at Exs. 3, 4, 5, 6, and 7.)

Yet woefully missing from this list are any measures to address the April 7, 2020 election. The only relief to date on this issue comes from the Opinion and Order entered on March 20, 2020 by the Honorable William Conley, U.S. District Court Judge for the Western District of Wisconsin, extending the deadline for electronic voter registration to March 30, 2020. (Chavez Decl. at Ex. 8.) However, that decision does not go far enough; it is impossible to hold the April 7, 2020 election in compliance with Wisconsin law under the current circumstances created by the COVID-19 outbreak.

Municipal clerks throughout the State of Wisconsin have expressed concerns about safe procedures for administering the election on April 7, 2020. In response, the Commission has issued several communications concerning the clerks’ responsibilities relative to the administration of the election. In a memorandum prepared for the Commission’s March 18, 2020 telephonic meeting, titled “Update Regarding COVID-19 Election Planning,” the Commission forthrightly identified several concerns about the April 7, 2020 election as a result of the COVID-19 pandemic, such as shortages of absentee ballot envelopes, polling locations, poll workers, and even hand sanitizer and cleaning products. (*See generally* Chavez Decl. at Ex. 9.) Notably, the proffered solutions for

the problems identified in the memo are impractical and insufficient—and in some cases no solutions are offered at all.

A. Absentee Ballots

Wisconsin’s absentee voting process allows all registered voters to request an absentee ballot by mail, in person at the municipal clerk’s office, by signing a statement and requesting to receive an absentee ballot, via an agent, by delivery to a special voting deputy, or by e-mail or fax. WIS. STAT. § 6.86(1)(a). All voters are required to present a copy of their proof of identification with their absentee application. *Id.* at § 6.86(1)(ac). Once a voter has received and completed his or her ballot, he or she must return it so that “it is delivered to the polling place no later than 8 p.m. on election day.” *Id.* at § 6.87(6). Absentee ballots mailed but not physically received by that time are not counted. *Id.* Under normal circumstances, the process of mailing absentee ballots to voters and receiving them back in the mail can take up to two weeks. This time period is likely to be even longer under the current circumstances.

Notably, there are statewide absentee ballot envelope shortages due to the increase in absentee ballot requests. To address absentee ballot envelope shortages, the WEC directs clerks to be prepared to print their own.¹ (Chavez Decl. Ex. 9 at 3.) Such a suggestion, however, fails to take into account staffing shortages caused by COVID-19 as well as the fact that current clerks’ staffs are already stretched too thinly while they attempt to process the overwhelming backlog created by unprecedented demand for absentee ballots. As of Friday, March 20, 2020, the Green Bay City Clerk’s Office was handling a backlog of over 4,000 absentee ballots with six staff members, including staff from outside of their department. The Green Bay City Clerk’s Office

¹ A subsequent memo from the Commission indicated that it has placed an order for additional envelopes and that it “is expected to begin to receive a large portion of the envelopes on March 25, 2020.” (Chavez Decl. at Ex. 10.) However, the memo lacks specificity as to precisely when and how many envelopes municipalities can expect to receive. *Id.*

does not have the resources to adequately and timely handle all of the requests for absentee ballots, plus these new directives from the Commission, while ensuring the usual election functions are met.

B. Sanitizing Products

The in-person voting process on Election Day consists of multiple opportunities for direct person-to-person contact. Polls open on Election Day at 7:00am and close at 8:00pm. Two identical lists of the registered voters in each ward, known as “poll books,” are provided to each ward. A minimum of two poll workers are assigned to each ward table and are responsible for checking photo IDs, locating names and addresses in the poll book, assigning sequential voter numbers, and issuing ballots. (*See Chavez Decl. Ex. 11 at 12.*) There must always be two poll workers at each ward table whenever a voter is being issued a ballot for the purpose of cross-checking each other’s work and avoiding errors. *Id.* at 23. Poll workers work closely together the entire Election Day to ensure the integrity of the election by confirming the information recorded on each voter list is accurate and identical. *See id.* at 12. State law requires that each eligible voter state his or her full name and address when appearing at a ward table to vote. *Id.* at 13 (citing WIS. STAT. § 6.79(2)(a)). Voters must then provide a photo ID. *Id.* Notably, verification of name, address, and photo ID is completed by two poll workers at the voting location. *See generally id.*

After the information is validated, the voter is required to sign the poll book used by the poll workers, and poll workers frequently have to assist the voter in finding their name. *Id.* at 14. A ballot must then be initialed by two poll workers and is then issued to the voter, along with a voter number. *Id.* at 15. After the voter completes the ballot, the voter number is returned to the poll workers when the voter feeds their ballot into the voting machine. *Id.* Further assistance is provided by poll workers to voters who require additional help in voting, such as through the

express vote machine. *See generally id.* Same-day registration is also available to the public on Election Day. *Id.* at 22. If a person fills out their ballot incorrectly, the ballot is considered spoiled and returned to the poll workers for issuance of a new ballot. *Id.* In addition to poll workers and voters, election observers and the media have a right to be present during voting hours at all polling locations. *Id.* at 73. Notably, observers may examine the poll books, but they must remain under the control of the poll workers at all times. *Id.* at 74.

In response to the critical shortage of hand sanitizer and other sanitation wipes for polling places, the WEC merely acknowledges that “there appears to be no hand sanitizer or sanitation wipes available through local, state or federal channels,” and that while federal security funds may be used to procure sanitation supplies, “those resources do not seem to be available at this time.” (Chavez Decl. Ex. 9 at 3.) The City as a whole has also been unable to acquire additional sanitizing products. As a result, the City has moved many of its operations to remote access to decrease the number of employees and members of the public who are required to be present in its facilities. Increasing the number of people present in facilities under its control, even if just for the election, is ill-advised given the shortages of sanitizing supplies and the current state of affairs.

The Commission issued another memo about sanitizing products on March 22, 2020, with suggestions for alternative options for locations without sufficient supplies; however, the possible alternatives identified therein would require municipalities to employ measures that may only be partially effective. (Chavez Decl. at Ex. 12.) The City has determined that the alternative suggestions offered in that memo are not adequate substitutes to compensate for its lack of sanitizing products, which are necessary to ensure the cleanliness of polling places and limit potential exposure to COVID-19.

Throughout the entirety of the voting process, there are multiple instances in which voters and poll workers alike are closer to one another than the recommended six feet of separation for proper social distancing—and that does not even take into account the predicted lack of ability to maintain social distancing between voters in line at their polling places. There is no way to protect poll workers or voters if basic sanitizing wipes are unavailable for the 13-hour Election Day, particularly since the voting process requires people to make direct contact and operate in close proximity to each other. There are no directives allowing poll workers to take precautions should a person showing symptoms of illness show up to vote. Even more problematically, persons with mild and even no symptoms can spread the disease. Anyone who shows up to a polling location on Election Day does so at their own peril—voters and poll workers alike. Unsurprisingly, the City is now facing a mass shortage of poll workers as a result.

C. Staffing Shortages

With respect to shortages of poll workers and election inspectors, the memo suggests that clerks should create backup lists of election inspectors in case poll workers are not able or do not show up to work during the election. (Chavez Decl. Ex. 9 at 4.) It suggests recruiting from “high school students, college students, teachers, other municipal, county, and government employees and to private employers in the community.” *Id.* “Clerks are also advised to develop backup plans if they personally are unable to serve in the days leading up to and on Election Day. Clerks should be in the position to deputize other members of their staff or other individuals within their local municipal government that could step in and run the election should it become necessary in an emergency. Clerks should be mindful that additional training of these individuals will be needed.” *Id.*

The City has 278 poll workers. Problematically, 72% of these poll workers are age 65 years or older, and a whopping 90% are age 60 years or older. No data is available for other COVID-19 risk factors for poll workers such as underlying medical conditions, and no consideration has been given to availability of child care for younger workers or potential exposure for high-risk family members. In Green Bay, only 54 of the City's 278 poll workers have agreed to work the April 7, 2020 election. Only 11 of those 54 are Chief Inspectors. A chief inspector must be present at each polling location. This staggering deficit cannot be addressed by creating a backup list of election inspectors as the WEC recommends. Finding poll workers has been an on-going challenge for the City for many years, leading to already creative solutions to meet poll worker needs under normal circumstances. Accordingly, the City would be unlikely to be able to create sufficient backup lists of poll workers this close to an election under normal circumstances—but these are by no means normal circumstances.

Furthermore, the Commission's guidance to recruit additional poll workers is contrary to the advice of both the CDC and Wisconsin Department of Health Services, which, although identifying older adults as having a higher risk of developing more serious complications from COVID-19 and recommending that they stay home as much as possible during times of spread, also cautions that "[y]ounger people, and particularly those who are 18 to 30 years old, aren't immune to COVID-19. Anyone can contract COVID-19. So it's important for everyone, including young and healthy people, to practice social distancing." (Chavez Decl. at Ex. 13, 2.) Because all segments of the population are at risk of contracting COVID-19, the City is highly unlikely to be able to find sufficient poll workers from any potential pool; nor should it be required to ask its citizens to put themselves in harm's way so that it may fulfill its election-related obligations.

The Commission's recommendations for replacing Clerk's Office staff or even an alternate individual who could step into the Clerk's place to run the election if Clerk Teske is unable to do so is likewise problematic. Even assuming the City Clerk is able to identify someone who can proceed in Clerk Teske's place, the WEC is asking the City to operate an election under unprecedented conditions, with unprecedented staffing shortages, with new and untrained staff and poll workers, and potentially headed by someone whose primary job function is not to run elections, and is therefore less familiar with the election process. This is a downright reckless request.

D. Polling Locations

Many of the City's polling locations are located on private property such as churches, and as a result, access to these locations is uncertain. More importantly, even assuming all of the City's polling locations would remain available, the City would be unable to staff them all, given current staffing deficits. Accordingly, some polling places will have to be moved, which will almost certainly result in issues with getting voters to the correct polling locations. The confusion to the voters will be extreme and potentially inequitable as the City tries to co-locate wards in a centralized fashion, with certain voters having to drive further than others, making multiple stops to find their correct polling location.

STANDARD OF REVIEW

In determining whether a temporary restraining order or a preliminary injunction is appropriate the Court considers four factors in a two-step analysis. *See Van Hollen*, 963 F. Supp. 2d at 865 (*citing Winnig v. Sellen*, 731 F. Supp. 2d 855, 857 (W.D. Wis. 2011)). Specifically, a plaintiff must show "(1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law exist; and (3) he has a reasonable

likelihood of success on the merits.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)). Then, if this showing is successfully made, “the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant’s interests.” *Id.* (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016)).

Both a temporary restraining order and a preliminary injunction are designed to protect against irreparable injury and to preserve the court’s power to render a meaningful decision after a trial on the merits. *See Am. Can Co. v. Mansukhani*, 742 F.2d 314, 323 (7th Cir. 1984). A temporary restraining order, however, may be issued “before the adverse party can be heard in opposition,” and has strict durational limits. Fed. R. Civ. P. 65(b). *See also Geneva Assurance Syndicate, Inc. v. Med. Emergency Servs. Assocs.*, 964 F.2d 599, 600 (7th Cir. 1992) (“The essence of a temporary restraining order is its brevity, its *ex parte* character, and (related to the second element) its informality.”). Moreover, the federal rules only expressly require a party making such a request to provide “specific facts in an affidavit or a verified complaint.” Fed. R. Civ. P. 65(b)(1)(A). In election cases, a factor that the court must consider in balancing the equities is the confusion that can result from last-minute orders affecting elections, which can undermine confidence in our electoral processes. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

ARGUMENT

A temporary restraining order and/or a preliminary injunction are appropriate in this matter. The City will suffer irreparable harm absent preliminary injunctive relief during the pendency of this action, there are inadequate remedies at law, and the City has a reasonable likelihood of success on the merits. *See Whitaker By Whitaker*, 858 F.3d at 1044. Furthermore, the balance of

harm favors the City, and the risk of harm to the public also weighs in favor of the City. *See id.* The City is therefore entitled to the injunctive relief in the form of a temporary restraining order and preliminary injunction restraining Defendants from violating Plaintiffs' equal protection rights and ordering Defendants: (1) to cancel the April 7, 2020 in-person election; (2) to permit Plaintiffs to conduct said election by mailing ballots to all registered voters; (3) to extend the deadline for registering to vote electronically or by mail to May 1, 2020; (4) to cancel in-person registration and absentee voting; and (5) to establish Tuesday, June 2, 2020 as the deadline by which municipal clerks must have counted all returned mailed ballots.

I. 3-Factor Analysis for Injunctive Relief

A. Equal Protection Violations

Plaintiffs' first cause of action—and first request for injunctive relief—stems from Defendants' violations of Plaintiffs' equal protection rights under the Fourteenth Amendment. The Amendment forbids a state from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV § 1. By requiring them to conduct in-person voter registration and absentee voting without sufficient staff or cleaning supplies, and with a significant risk of exposure to a serious communicable disease, when the remainder of the State has been ordered to stay home except for essential functions, Defendants are denying Clerk Teske and her staff the equal protection of the public health orders that have been put in place.

Currently, all of Wisconsin is subject to a ban on gatherings of ten or more people. (Chavez Decl. at Ex. 7.) Additionally, schools, salons, bars, restaurants, and shopping malls, have been closed, and all individuals in the state are ordered to stay home unless they are performing essential functions, as defined in the order. *Id.* All individuals have also been ordered to preserve social distancing by maintaining six feet of space between them. *Id.* Notwithstanding these orders, the

Commission has informed Clerk Teske that she and her staff have to continue to conduct in-person voter registration and absentee balloting, and that they and any poll workers or staff will have to conduct the in-person election on April 7, 2020—all of which requires those individuals to be much closer to voters than the six feet of distance all Wisconsinites have been ordered to maintain between themselves. For their parts, Governor Evers and Secretary Palm have failed to take any steps to postpone or otherwise alter the procedures for the April 7, 2020 election despite their orders to stay home and limit close contact with others.

Accordingly, the Defendants are denying Clerk Teske and all of her staff and poll workers the equal protection of the law under the Governor's emergency declaration and the Department of Health Services's emergency orders. By being forced to conduct in-person voter registration and absentee voting, and if forced to conduct in-person voting on Election Day as well, Clerk Teske and the others responsible for administering the election will be forced to undertake actions that are unsafe and potentially detrimental to their own health and the health of their families, friends, and the community. Moreover, those who conduct elections will be the only individuals forced to engage in such unsafe activities, while the rest of the public maintains the ability to protect themselves through proper social distancing practices. Plaintiffs acknowledge that Defendants have an interest in ensuring that the upcoming election occurs in a timely manner; however, there is no compelling governmental interest—nor even a rational basis—for treating elections operations, and the people charged with conducting them, any differently than the rest of the population of the State of Wisconsin. Numerous other states have recognized this, moving their April elections to June 2, 2020.² Accordingly, Plaintiffs have a reasonable probability of success

² *E.g.*, Texas, Louisiana, Connecticut, Maryland, Pennsylvania.

on the merits on their equal protection claim, and therefore satisfy that element of the temporary restraining order/preliminary injunction legal analysis.

To prevail on their motion, Plaintiffs must also demonstrate that absent injunctive relief, they will suffer irreparable harm. *Whitaker By Whitaker*, 858 F.3d at 1044-45. Courts consider harm irreparable if it “cannot be prevented or fully rectified by the final judgment after trial.” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1089 (7th Cir. 2008). Notably, courts have held that irreparable harm can be shown by demonstrating a likelihood of success on the merits as to a constitutional claim. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). As described in this section, Plaintiffs have a likelihood of success on the merits with respect to their equal protection claim, and therefore also face irreparable harm absent injunctive relief. Furthermore, because the trial is scheduled for a mere two weeks from today and, at the same time, the spreads of COVID-19 continues at an exponential rate, in the absence of injunctive relief, Plaintiffs’ harm cannot be fully rectified by a final judgment after trial. *Whitaker By Whitaker*, 858 F.3d 1045.

Finally, no adequate remedies at law exist to make Plaintiffs whole for the harm they have suffered and will continue to suffer. Defendants have stated on several occasions they will not postpone the election, and continue to require strict adherence to Wisconsin’s election laws despite the COVID-19 crisis. Additionally, despite having declared a public emergency twelve days ago and having issued many subsequent orders concerning public health and safety, Governor Evers and Secretary Palm have not yet made any attempts to eliminate the risks posed by COVID-19 by postponing the election or otherwise ordering changes in its administration. There is no remedy at law, in the absence of injunctive relief, for redressing the harm that will be caused by continuing

to conduct in-person registration and absentee voting, and from conducting in-person elections on April 7, 2019.

Plaintiff has therefore satisfied each of the three elements of the first step in the analysis for injunctive relief, and is entitled to an order restraining Defendants from violating Plaintiffs' Fourteenth Amendment equal protection rights by mandating that Clerk Teske and her staff continue to conduct in-person voter registration and absentee voting.

B. Cancelling In-Person Voting on April 7, 2020 and Allowing Mailed Ballots

Plaintiffs are also entitled to injunctive relief ordering Defendants to cancel in-person voting on April 7, 2020, and instead permit Plaintiffs to conduct the election by mailing ballots to all registered voters in order to minimize person-to-person contact and ensure the health and safety of Clerk Teske and her staff, as well as the general public.

1. Irreparable Harm

Plaintiffs are in a no-win situation. The City has an obligation to comply with the requirements of state law and the directives of the Commission, or risk potential legal action.³ Similarly, the City risks liability from the electorate if its elections are not conducted according to state law and in a manner that maintains the integrity of the election process.⁴ Without injunctive relief, Plaintiffs face significant irreparable harm. Readyng an election scheduled to occur in a

³ The Commission has made it clear that a municipality faces potential liability if it fails to abide by state election laws and Commission directives. (*See, e.g.*, Chavez Decl. Ex. 14 at 2 (“Eliminating [in-person absentee voting] processes without proper justification or authority risks a complaint being filed with the WEC, or an order being issued by the WEC, or litigation being initiated against the municipality.”); *Id.* at 3 (“Wis. Stat. § 5.06 allows a resident to file a complaint with the Commission alleging that the municipality is not complying with election laws or has abused its discretion in implementing its laws.”); *Id.* (“The Commission may order an election official to conform their conduct to the law . . . [and] may ask the Department of Justice to initiate court action to convert the Commission’s order into an enforceable court order.”).)

⁴ This has already proven true: following the closure of City Hall for public business, which action was taken in order to protect City employees and the public from exposure to COVID-19, and while preparations were being made to ensure safe access to in-person registration, the City received a letter from the League of Women Voters of Wisconsin threatening legal action for any actions construed by it as denying electors the right to vote. (Chavez Decl. at Ex. 15.)

matter of two weeks, with only 54 of 278 poll workers confirmed, staff shortages, extreme backlogs of absentee ballot requests, no sanitizing products in the middle of a pandemic, and no additional methods or funding to carry out these directives, is impossible. These challenges are insurmountable, even when ignoring the threat to the public health that in-person voting creates. Plaintiffs *will* fall short of their obligations, despite all of the City's efforts. By forcing Plaintiffs to conduct an election, all the while knowing that the integrity of the election will be compromised under the current circumstances, the Commission is simultaneously subjecting Plaintiffs to potential liability for disobeying its directives *and* for conducting a flawed and possibly illegitimate election. In either circumstance, Plaintiffs will be irreparably harmed absent injunctive relief, as judgment in their favor after trial will be insufficient to compensate for their injuries.

Moreover, holding the election on April 7, 2020 as directed also jeopardizes the health and safety of the entire Green Bay community. Poll workers, most of whom are over the age of 60, are at a heightened risk of contracting COVID-19. Health care professionals are cautioning against younger people placing themselves in a position to contract the disease as well. The current directives from the Commission completely ignore all of that information and place poll workers and City election officials at risk. Relatedly, notwithstanding the drastic orders and recommendations issued by government officials and health care providers alike, the Commission has continued to insist that municipal clerks must hold the in-person election on April 7, 2020 without sufficient modifications, which necessarily requires that there be fewer than six feet between the voters and poll workers. (*See, e.g.*, Chavez Decl. at Ex. 14, 9.) Wis. Elections Comm'n, *COVID Planning – In-Person Absentee Voting Hours* (March 18, 2020).

Defendants' refusal to modify the upcoming election, scheduled for April 7, 2020, puts Plaintiffs in a position to be facing almost certain liability related to its administration of said

election. Perhaps more significantly, Defendants' position also places not just Plaintiffs, staff, and poll workers, but indeed the entire public at significant risk of continuing the spread of COVID-19 because of the up-close contact required under current election laws. Eligible voters who are either not yet registered or who did not have time to request an absentee ballot electronically or by mail will be forced to choose between exercising their most basic right to vote, or protecting themselves from a dangerous and highly contagious disease. The City, the Clerk's Office, the poll workers, and the community will all be significantly and irreparably harmed in multiple ways unless social distancing is maintained. The only way to avoid that harm is to issue grant Plaintiffs' motion for injunctive relief and order Defendants to cancel in-person voting on April 7, 2020, and instead permit Plaintiffs to conduct the election by mailed ballot.

2. Adequate Remedy at Law

A party seeking injunctive relief must also demonstrate that they have no adequate remedy at law if the injunction is not issued. *Promatek Indus., Inc. v. Equitrac Corp.*, 300 F.3d 808, 813 (7th Cir. 2002). The movant is not required to show that a remedy would be wholly ineffectual, but rather that any other remedy would be "seriously deficient as compared to the harm suffered." *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003). Here, there are no remedies available to Plaintiffs that would compensate for the harms they are currently suffering and will continue to suffer if the injunction is not issued.

Across the state, in accordance with the executive branch's public health orders, people from all segments of the population are staying home. Indeed, just today the Department of Health Services issued a "Safer at Home" order at Governor Evers's direction, which prohibits people from leaving their homes unless they do so to perform essential functions. (*See generally* Chavez Decl. Ex. 7.) At the same time, however, the Commission has stated that it will not vary from

established election procedures sufficiently enough to protect election administrators and the public from the spread of COVID-19—that is, the Commission has repeatedly declined to issue any directives to cease in-person voter registration or absentee voting, despite the ever-increasing potential for exposure, or to cancel in-person voting on April 7, 2020. Furthermore, the Governor’s “Safer at Home” order, although defining in detail which workers and functions are “essential,” fails to mention voting or elections altogether, thus creating confusion as to Clerk Teske’s responsibility to her office, her staff, the City, and the voters. Plaintiffs cannot seek an alternative remedy through appeals to the Commission because of the Commission’s refusal to alter its stances on these issues.

Additionally, Plaintiffs do not have an avenue by which they could force the state legislature to change the laws for the April 7, 2020 election given the state of emergency that currently exists. Finally, monetary damages, to the extent they may be available, would fall far short of compensating Plaintiffs for the harm suffered by Defendants’ actions. For all of these reasons, Plaintiffs have satisfied the second element of the injunctive relief analysis: that there is no other adequate remedy at law.

3. Likelihood of Success on the Merits

Plaintiffs also meet the third requirement for injunctive relief: that they have a reasonable probability of success on the merits. A moving party must only meet the low threshold of demonstrating that its “chances to succeed are better than negligible.” *Whitaker By Whitaker*, 858 F.3d at 1046 (internal quotations and citations omitted). In addition to their likelihood to succeed on the merits of its equal protection claim, discussed *supra*, Plaintiffs are also likely to succeed on their other causes of action, particularly with respect to the Commission’s authority to postpone the election and modify the method of its administration.

The Commission has asserted that it “does not have the authority to change these statutory deadlines [for voter registration] or cancel or postpone the election,” and that any such change “may require court intervention, an act of the Legislature, or an order of the Governor.” (Chavez Decl. at Ex. 9.) Notwithstanding that position, however, the Commission has also, on its own authority, has ordered that “Municipalities shall not use the Special Voting Deputy process [established by Wis. Stat. § 6.875] to serve residents in care facilities for these two elections and instead shall transmit absentee ballots to those voters by mail.” (Chavez Decl. Ex. 16 at 1.)

Wisconsin Statutes section 6.875 provides for absentee voting in certain residential care facilities and retirement homes through the use of special voting deputies, who are tasked with visiting the facilities to supervise the in-person absentee voting procedure. On March 12, 2020, Governor Evers had issued Executive Order #72 (Chavez Decl. at Ex. 17), declaring a public health emergency and designating the Department of Health Services as the lead agency to respond to said emergency, but the Department had not issued any specific guidance relevant to COVID-19 and long-term care facilities and assisted living facilities.⁵ (Chavez Decl. Ex. 19 at 1.) Accordingly, at the time that the Commission ordered that municipalities “shall not” use Special Voting Deputies (Chavez Decl. at Ex. 16), it was acting upon its own authority, and not pursuant to any “require[d] court intervention, an act of the Legislature, or an order of the Governor.” (Chavez Decl. at Ex. 9.) Although Wisconsin Statutes section 6.875 sets out specific procedures by which in-person absentee voting is to occur in residential care facilities and retirement homes, the Commission determined that it was within its authority to eliminate in-person absentee voting as

⁵ On March 13, 2020, the Department did issue a memo containing recommendations for preventing COVID-19 in long-term care facilities and assisted living facilities. (Chavez Decl. at Ex. 18.) However, at the time of the Commission’s decision to suspend the use of Special Voting Deputies, that memo had not yet been publicly issued. Furthermore, that memo contained *recommendations* for limitations on access to such facilities, rather than explicit orders.

an option for residents of such facilities based on information from the Department of Health Services concerning vulnerable populations and exposure to COVID-19. (Chavez Decl. Ex. 16 at 1.)

Despite having established precedent for changing election laws when situations dictate it is appropriate to do so,⁶ when asked to modify in-person absentee voting procedures for all other voters in light of COVID-19, the Commission has declined, instead reminding clerks that “directives to limit the number of people gathering in one location do not translate into the elimination of in-person absentee voting.” *March 18, 2020 WEC In-Person Absentee Voting*.

The Commission did not hesitate to suspend the customary operation of municipal clerks under Wisconsin Statutes section 6.875 as a result of information from the Department of Health Services that elderly populations are at increased risk of serious complications from COVID-19. However, it has balked at taking similar precautions to protect the entire voting population—which includes at-risk groups such as the elderly and those with serious underlying medical conditions—as well as the population of poll workers, many of whom are at an increased risk because of their age. Based on its own precedent of suspending Wisconsin’s elections laws when the situations dictate that it is appropriate to do so, the Commission cannot now make any rational argument for declaring to do so in the face of an almost unprecedented public health crisis, particularly when all of the evidence demonstrates that requiring in-person voting is not only likely to spread COVID-19 to more individuals, but is also likely to put the legitimacy of the entire election in order if

⁶ The Commission’s decision to abandon strict adherence to Wisconsin elections law is not unprecedented. Earlier this year, on February 12, 2020, the Commission determined that although technically required by Wisconsin elections law, municipal clerks would not be required to send two separate primary ballots—both of which would provide an opportunity for the elector to cast a vote in the presidential preference primary—to all registered absentee voters, as doing so would create confusion and chaos. (Chavez Decl. at Ex. 20.)

Plaintiffs—and similarly situated clerks throughout the state—are forced to conduct an election despite deficiencies like staffing shortages and insufficient resources such as cleaning supplies.

For all of these reasons, Plaintiffs have demonstrated that they have a likelihood of success on the merits—certainly a “better than negligible” chance to succeed, *Whitaker By Whitaker*, 858 F.3d at 1046—on its claims for relief against the Defendants, including a declaratory judgment that the Commission has the authority and the duty to suspend the application of Wisconsin’s election laws given the extraordinary circumstances. Accordingly, Plaintiffs have satisfied all three of the elements of the first step in the analysis for determining whether Plaintiffs are entitled to injunctive relief.

II. Balance of Harms

The final step of the analysis as to whether a moving party is entitled to injunctive relief involves a balancing of the parties’ respective harms. Specifically, “the court must engage in a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs movant’s interests.” *Whitaker By Whitaker*, 858 F.3d at 1044 (citing *Jones*, 842 F.3d at 1058). Here, not only do Plaintiffs’ harms substantially outweigh Defendants’, the public’s harms outweigh Defendants’ potential harms as well.

Plaintiffs acknowledge that Defendants have an interest in ensuring that the upcoming election occurs, and occurs in a timely manner, according to a proper procedure. Thus, Defendants will suffer some harm if they are ordered to postpone the election and establish new procedures for an all-mail election that is to occur as soon as possible. Plaintiffs are not indifferent to the burdens the requested relief will place on Defendants.

However, looking at the big picture, the harms to be suffered by Plaintiffs *and* by the public far exceed those that Defendants will suffer. As described in detail *supra*, there are significant barriers to conducting a fair and legitimate election amidst the current pandemic, particularly with respect to shortages of individuals to work at the polls on Election Day. Similarly, Plaintiffs' current lack of sanitizing supplies would put both voters and poll workers at an unacceptable risk of exposure to COVID-19. The City is concerned that it may not be able to adequately ensure the cleanliness and safety of its polling places, and that as a result in-person voting—either absentee or on Election Day—may actually contribute to the spread of COVID-19 throughout the community. Clerk Teske's, her staff, and poll workers will have to ignore state-mandated orders concerning the distance between individuals in order to properly administer the election process on April 7, 2020. The risk of harm to those individuals, and to the public as a whole, is too large to justify an in-person election when other methods of administration are available.

Last-minute orders affecting elections can undermine confidence in the elections process, and this Court must consider that factor when conducting this balancing analysis. *Purcell*, 549 U.S. at 4. This factor weighs in Plaintiffs' favor. Given the difficulties Clerk Teske is experiencing with respect to administering the election, particularly as it concerns staffing issues for polling places, the Commission would have to issue numerous additional orders to develop new procedures that would ensure a fair election. Additionally, Wisconsinites have already seen an abundance of orders in recent days, which have certainly caused confusion. The executive branch's orders altogether fail to mention elections or voting at all, while simultaneously mandating that people practice social distancing and stay at home. These orders are cause confusion among voters and poll workers alike, who have called the Clerk's office inquiring about the election in light of the current crisis. If the Commission were to issue additional orders to attempt to make the voting

process work despite the COVID-19 pandemic, the totality of all of the orders would undoubtedly create sufficient confusion to undermine confidence in our election process.

Finally, there is also a real threat of harm to the public if the election is allowed to proceed: specifically, holding the election amidst the uncertainty and fear surrounding the COVID-19 pandemic, as well as the executive branch's orders to socially distance and stay at home except for essential reasons, would significantly undermine the public's faith in the electoral process, as well as the legitimacy of this election. Plaintiffs are concerned that publicity related to shortages of hand sanitizer, sanitizing wipes, and similar cleaning products, coupled with fears related to community spread, will discourage unprecedented numbers of voters from exercising their right to vote, in favor of abiding by public health directives—a choice they should never be forced to make. Requiring in-person appearance at an in-person absentee voting location or at a polling place on Election Day forces electors to make a burdensome and unacceptable choice between protecting their health and the health of their friends, families, and communities, and exercising their most fundamental right as Americans: participating in democratic elections.

The balance of harms commands that the Commission come up with solutions to prevent harm to all those involved in the election process. Rigid application of state laws will cause more harm to Plaintiffs, the public, *and* Defendants, particularly since the Commission itself has a vested interest in ensuring the elections are successful.

Plaintiffs have concluded that the only way to balance the competing interests, protect the public, ensure the validity of the upcoming election, and avoid potential liability for actual or perceived disenfranchisement is to distribute mailed ballots to all registered voters within the City. Taking such a step is the most effective way in which the City could protect the public from potential exposure to COVID-19, while simultaneously ensuring that no eligible voters are

disenfranchised on account of being afraid or unable to go to the polls. Additionally, this proposed alternate remedy will mitigate the harm caused to Defendants by changing the election procedure. For all of these reasons, the balance of harm favors Plaintiffs, and the public, and Plaintiffs therefore request the injunctive relief described herein.

CONCLUSION

The unified message the entire world is spreading to reduce the transmission of COVID-19 is to practice social distancing. The only reasonable message from the State of Wisconsin should also be to socially distance. Not to socially distance unless you want to vote. Not to socially distance unless you are young. Not to socially distance unless you care about democracy. It needs to be to socially distance. Full stop. Readying an election scheduled in a matter of two weeks with only 54 of 278 confirmed poll workers, with staff shortages, extreme backlogs of absentee ballot requests, and no additional methods or funding to carry out these directives is not only impractical, it is wholly irresponsible given that the integrity of the election will be jeopardized and knowing that older Americans are at higher risk of mortality from COVID-19 during times of community spread, but also knowing that older Americans are the backbone of the election administration process.

Importantly, Plaintiffs request this extraordinary remedy for the April 7, 2020 election only, given the unprecedented emergency caused by COVID-19 and the unanimous opinion of those in the health care community that the pandemic will not be over before Election Day, but will in fact continue to get worse up to and even after that time. Furthermore, the City does not wish to cause any chaos, confusion, or uncertainty by disrupting the procedure for the April 7, 2020 election. No, chaos, confusion, and uncertainty reign in all aspects of life, thanks to COVID-

19. Rather, Plaintiffs requests these changes in order to preserve the democratic process to the fullest extent possible while protecting the health and safety of our entire community.

Dated this 24th day of March, 2020.

Respectfully submitted,

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