
In the Supreme Court of the United States

JILL SWENSON, ET AL.,

Applicants,

v.

THE WISCONSIN STATE LEGISLATURE, ET AL.,

Respondents.

*On Emergency Application to Vacate the Seventh Circuit Court Stay of
District Court Order Entering Preliminary Injunction*

To the Honorable Brett M. Kavanaugh, Associate Justice
of the United States Supreme Court and Circuit Justice for the Seventh Circuit

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF,
MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER,
AMICUS CURIAE BRIEF OF TONY EVERS, GOVERNOR OF WISCONSIN
IN SUPPORT OF EMERGENCY APPLICATIONS TO VACATE STAY**

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*On Emergency Application to Vacate the Circuit Court Stay of
District Court Order Entering Preliminary Injunction*

To the Honorable Brett M. Kavanaugh, Associate Justice
of the United States Supreme Court and Circuit Justice for the Seventh Circuit

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF
EMERGENCY APPLICATION TO VACATE STAY**

Movant Tony Evers, the Governor of the State of Wisconsin (“the Governor” or “Governor Evers”), respectfully seeks leave of Court to file the accompanying brief as *amicus curiae* in support of Plaintiffs-Applicants’ Emergency Applications to vacate the stay imposed by the Seventh Circuit Court of Appeals. The Governor has a special interest in protecting Wisconsin residents’ right to vote, the efficient operation of elections, and sound public health policy, especially in the face of an unprecedented onslaught of a lethal virus. Applicants and Respondent have consented to the Governor’s participation as *amicus* in this matter.

The Governor respectfully represents that the COVID-19 pandemic is currently raging in Wisconsin. To an even greater extent than it did at the time of

Wisconsin's primary election on April 7, 2020, the pandemic has created a dangerous choice for Wisconsin's voters: risk exposure to the virus and the possibility of infection, illness, and death, or minimize that risk by voting absentee. Because of the current, continuing severe upsurge in COVID-19 cases in Wisconsin, which the Governor's proposed *amicus* brief describes, it is likely that an increasing number of Wisconsin's voters will choose in the remaining weeks before the election to protect themselves and vote absentee.

The preliminary injunction issued by the Western District of Wisconsin in *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, *et al* (W.D. Wis. Sept. 21, 2020) is a limited measure that protects the voting rights of every Wisconsin citizen amid a public health emergency and supports state and local efforts to contain the spread of COVID-19. Conversely, the Seventh Circuit's *per curiam* decision to stay the injunction has imposed a great risk to the public health of Wisconsin voters, as well as their potential disenfranchisement.

Interest of Amicus Curiae

Governor Evers is empowered under Wisconsin law to protect the voting rights and public health of Wisconsin's citizens. As the leader of the executive branch of Wisconsin government he has detailed information that he desires to share with the Court about the State's efforts to date to control COVID-19, and the State's ability to implement the district court's injunction. Governor Evers is well positioned to communicate with this Court regarding the current state of the pandemic and the need for the stay of the injunction to be lifted. Especially in light

of the absence of state legislative action on these urgent matters, Governor Evers, on behalf of the State of Wisconsin, should be heard by this Court.

The Governor represents and oversees the executive branch of Wisconsin's government. Wisconsin's Constitution vests "the executive power. . . in the governor," who must "take care that the laws be faithfully executed." Wis. Const. art. V, §§ 1, 4. Wisconsin's Constitution makes the Governor the superior of all other state executive officers. *See Serv. Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 60, 393 Wis. 2d 38, 75, 946 N.W.2d 35, 53-54 ("*SEIU*"). Consequently, it is Governor Evers' duty and right to act on behalf of the State and speak for its citizens in any proceeding where the public interest is gravely endangered.

Representing the State in actions of *publici juris* is an essential role of the Governor. *SEIU*, 946 N.W.2d at 53-54. That role originates from Wisconsin's Constitution and is detailed in Wis. Stat. §§ 14.11 and 165.25. The Governor has authority to inform the Attorney General when representation of the State is needed. *See* Wis. Stat. §§ 14.11(1), 165.25(1m). Further, "if in the governor's opinion the public interest requires such action," the Governor has the authority to hire special counsel to replace or oppose the Attorney General in "any action or proceeding." Wis. Stat. § 14.11(2). The Wisconsin Attorney General withdrew from these proceedings in March 2020 due to a potential conflict of interest. Therefore, the Governor appears in this matter through special counsel.

The Governor swore an oath to "support the constitution of the United States and the constitution of the state of Wisconsin, and... faithfully and impartially

discharge the duties of the office.” Wis. Stat. § 19.01; Wis. Const. art. IV, § 28. As such, Governor Evers has a duty to act on behalf of the people to support their constitutionally protected state and federal voting rights. Wis. Const. art. III, § 1; U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXVI. the Governor, in the capacity of *parens patriae*, is empowered “to enforce the constitutional rights of [Wisconsin’s] citizens” pursuant Wis. Stat. §§ 14.11 and 165.25. *State ex rel. Reynolds v. Smith*, 19 Wis. 2d 577, 585-86, 120 N.W.2d 664, 669 (1963). This grant of power extends to engaging in litigation to protect citizens’ federal voting rights from violations of the Fourteenth amendment’s equal protection clause. *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556, 126 N.W.2d 551, 552–53 (1964). Unlike the Legislature, the Governor has capacity to act as *parens patriae* because his office is not only vested with the executive power but is also indispensable to the legislative process. The Governor also represents all the people of Wisconsin. *Zimmerman*, 126 N.W.2d at 557 (“Both the Governor and the legislature are indispensable parts of the legislative process....the Governor is given such an important role by our constitution in the entire legislative process....[He] is the only person involved in the legislative process that represents the people as a whole.”).

In addition, the Governor oversees the Wisconsin’s Department of Health Services, the administrative agency charged with promoting the public health of Wisconsin. Wis. Stat. §§ 15.001(2)(a)-(d), 250.03. The Governor appoints a Secretary of the Department of Health Services, and together they enforce public health policy

and issue emergency orders to safeguard the people during pandemics. Wis. Stat. §§ 252.02, 250.04(1). State and federal law have long recognized the role of public health departments in responding to extraordinary public health emergencies. *State ex rel. Nowotny v. City of Milwaukee*, 140 Wis. 38, 121 N.W. 658 (1909); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 25, 27 (1905) (confirming validity of the legislature’s delegation of authority to local boards of health); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344 (7th Cir. 2020).

This case involves the interaction of voting rights and public health. Governor Evers should be heard because he has a demonstrated interest in protecting Wisconsin citizens’ interests in both. Information about the current state of the pandemic in Wisconsin, discussed in the *amicus curiae* brief, will provide necessary, current information to this Court. Governor Evers can also provide the State Executive’s position on the district court order—information this Court has previously found to be relevant, as the dissenting judge on the Seventh Circuit noted. *Bostelmann, supra*, Slip Op. at 20 (Rovner, J., dissenting) (“None [of the district court’s modifications] are opposed here by the Wisconsin Executive, which is charged with administering the election.”) (citing *Repub. Nat’l Com. v. Common Cause Rhode Island*, ___ S.Ct. ___, 2020 WL4680151, at *1 (U.S. Aug. 13, 2020)).

To be clear, the Wisconsin Legislature has done nothing to address the state’s worsening public health crisis and its potential impact on the voting rights of Wisconsin’s citizens. The Wisconsin Legislature has neither convened any study committees nor held any hearings on the safety of in-person voting during the

pandemic, the effective staffing of polls during a pandemic, or whether statutes should be modified to protect the constitutional rights of Wisconsin citizens. In fact, the Legislature has not enacted legislation of any kind since April 14, 2020—a six-month period of inaction. Eric Litke, *Fact check: Wisconsin legislators have gone about 6 months without passing a bill*, USA Today, Oct. 7, 2020.¹

Nor has the Wisconsin Legislature, as a body, considered or voted on whether to support or oppose the various terms of the injunction entered by the district court in this case. At most, the decision to intervene in the district court was made solely by the two committee chairpersons of a legislative committee called the Joint Committee on Legislative Organization, which consists of ten members from the Wisconsin Assembly and Senate.² The Wisconsin Assembly has ninety-nine members and Wisconsin Senate has thirty-three.³

Moreover, despite the limited opinion of the Wisconsin Supreme Court with respect to the Wisconsin Legislature's ability to defend the validity of a statute, *DNC v. Bostelmann*, 2020 WI 80, ¶14, ___ Wis. 2d ___, ___ N.W.2d ___ it remains an open question whether the Legislature itself actually has any authority to challenge an order temporarily enjoining certain Wisconsin Statutes to ensure that voters are not unconstitutionally disenfranchised during a pandemic. Hence, Governor Evers might be the only representative of the State of Wisconsin who is constitutionally authorized to represent the interests of Wisconsin's voters before this Court.

¹ Available at <https://www.usatoday.com/story/news/factcheck/2020/10/07/fact-check-wisconsin-legislators-havent-passed-bill-since-april/5917707002/>

² <https://docs.legis.wisconsin.gov/2019/committees/joint/1972> (last visited 10/13/2020)

³ <https://legis.wisconsin.gov/assembly/> and <https://legis.wisconsin.gov/senate/> (last visited 10/13/2020)

Conclusion

The Court should grant leave to Wisconsin Governor Tony Evers to file the accompanying *amicus curiae* brief in support of the Plaintiffs-Applicants' Emergency Applications to vacate the stay imposed by the Seventh Circuit of the preliminary injunction issued by the district court.

Respectfully submitted this 14th day of October 2020.

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**MOTION FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11-INCH PAPER FOR
AMICUS CURIAE, THE GOVERNOR OF WISCONSIN, TONY EVERS**

Movant Tony Evers, the Governor of the State of Wisconsin (“the Governor”), respectfully moves the Court for leave to file this *amicus* brief in support of emergency applications to vacate a stay imposed by the Court of Appeals on 8½ by 11-inch paper rather than in booklet form. In support of his motion, the Governor asserts that the Emergency Applications to Vacate the Stay filed by Applicants in this matter were filed on October 13 and October 14, 2020. The expedited filing of the applications and the expected compressed deadline for any response impairs the ability of *amicus curiae* to have this brief prepared for printing and filing in booklet form. Nonetheless, the Governor desires to be heard as *amicus curiae* on the

emergency applications and requests that the Court grant this motion and accept the paper filing.

Respectfully submitted this 14th day of October 2020.

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To the Honorable Brett M. Kavanaugh, Associate Justice
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**BRIEF OF *AMICUS CURIAE*, TONY EVERS, GOVERNOR OF WISCONSIN
IN SUPPORT OF PLAINTIFFS'-APPLICANTS' EMERGENCY
APPLICATIONS TO VACATE SEVENTH CIRCUIT
COURT OF APPEALS STAY**

Parties to the Proceeding

This *amicus curiae* brief is filed in support of three emergency applications being filed in four consolidated lawsuits. The parties to the four proceedings are:

Jill Swenson, *et al* v. Marge Bostelmann

Applicants Jill Swenson, Melody McCurtis, Maria Nelson, Black Leaders Organizing for Communities, and Disability Rights Wisconsin were plaintiffs in the district court and appellees in the court of appeals.

Defendants below, Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, are the members of the Wisconsin Election Commission. None has appealed the district court's injunction.

Respondents Republican National Committee and the Republican Party of Wisconsin were intervenor-defendants in the district court. They have pursued their own appeal from the district court's injunction, but the court of appeals denied their motion to stay the injunction because lack standing to bring the appeal.

Respondent Wisconsin Legislature was an intervenor-defendant in the district court and an appellant in the court of appeals.

Democratic National Committee, *et al* v. Marge Bostelmann

Applicants Democratic National Committee and the Democratic Party of Wisconsin were plaintiffs in the district court and appellees in the court of appeals.

Defendants below, Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, are the members of the Wisconsin Election Commission. None has appealed the district court's injunction.

Respondents Republican National Committee and the Republican Party of Wisconsin were intervenor-defendants in the district court. They have pursued their own appeal from the district court's injunction, but the court of appeals denied their motion to stay the injunction because lack standing to bring the appeal.

Respondent Wisconsin Legislature was an intervenor-defendant in the district court and an appellant in the court of appeals.

Sylvia Gear, *et al* v. Marge Bostelmann, *et al*

Applicants Sylvia Gear, Claire Whelan, Katherine Kohlbeck, Diane Fergot, Gary Fergot, Bonibet Bahr Olsan, Sheila Jozwik, Gregg Jozwik, League of Women Voters of Wisconsin, and Wisconsin Alliance for Retired Americans were plaintiffs in the district court and appellees in court of appeals.

Defendants below were Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, the members of the Wisconsin Election Commission, and Meagan Wolfe, Administrator of the Wisconsin Elections Commission. None has appealed the district court's injunction.

Respondents Republican National Committee and the Republican Party of Wisconsin were intervenor-defendants in the district court. They have pursued their own appeal from the district court's injunction, but the Seventh Circuit denied their motion to stay the injunction for lack of standing to appeal.

Respondent Wisconsin Legislature was an intervenor- defendant in the district court proceedings and an appellant in the court of appeals.

Chrystal Edwards, *et al* v. Robin Vos

Respondents in support of the emergency application are Chrystal Edwards, Terron Edwards, John Jacobson, Catherine Cooper, Kileigh Hannah, Kristopher Rowe, Katie Rowe, Charles Dennert, Jean Ackerman, William Laske, Jan Graveline, Todd Graveline, Angela West, Douglas West, and others similarly situated were plaintiffs in the district court and appellees in the court of appeals.

Defendants below, Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., Mark L. Thomsen, are the members of the Wisconsin Elections Commission. None have appealed the district court's injunction.

Respondents Republican National Committee and the Republican Party of Wisconsin were intervenor-defendants in the district court. They have pursued their own appeal from the district court's injunction, but the Seventh Circuit Court of Appeals denied their motion to stay the injunction because of a lack of standing to bring the appeal. The Seventh Circuit dismissed their appeal on standing grounds on October 13, 2020 but permitted the RNC and RPW to file arguments as amici curiae.

Respondent Wisconsin Legislature was a defendant in the district court and an appellant in the court of appeals. The Legislature also has pursued its own appeal from the district court's injunction.

Statement of Related Proceedings

The related proceedings below are:

1. *Democratic National Committee, et al. v. Bostelmann, et al.*, Nos. 20-2835 & 20-2844 (7th Cir.) – Order entered October 8, 2020;
2. *Democratic National Committee, et al. v. Bostelmann, et al.*, No. 2020AP1634-CQ (Wis.) – Order entered October 6, 2020;
3. *Gear, et al. v. Dean Knudson, et al.*, No. 3:20-cv-278 (W.D. Wis.) – Order entered September 21, 2020;
4. *Edwards et al. v. Vos et al.*, No. 3:20-cv-340 (W.D. Wis.) – Order entered September 21, 2020; and
5. *Swenson v. Bostelmann*, No. 3:20-cv-459 (W.D. Wis.) – Order entered September 21, 2020.

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Interest of *Amicus Curiae*

Wisconsin is facing twin crises: a surging COVID-19 epidemic that is currently breaking records in the state on a daily basis, and an upcoming election that threatens the health of those who show up to vote or work the polls in person. Based on facts that the district court found after an evidentiary hearing about these crises, the district court ordered Wisconsin election officials to take modest steps to make voting during the pandemic more accessible and safer. The Seventh Circuit Court of Appeals stayed that order. *Democratic Nat’l Committee v. Bostelmann*, Nos. 20-2835 & 20-2844, Slip Op. (Oct. 8, 2020).

In the district court, “[t]he Wisconsin Election Commission signaled a preparedness and ability to comply with [the district court’s] modifications . . . and the State Executive is not here to contend otherwise.” *Id.* at 11 (Rovner, J., dissenting). Tony Evers, the Governor of the State of Wisconsin, is here now. By submission of this *amicus curiae* brief, the Governor supports the district court order.

As Governor, Tony Evers has a special interest in protecting Wisconsin residents’ right to vote, the efficient and effective operation of elections, and sound public health policy to protect the health and well-being of Wisconsin citizens. Governor Evers is uniquely positioned to provide this Court with current relevant information regarding Wisconsin’s public health emergency and the impact it may have on voting.

Governor Evers is interested in ensuring the right of Wisconsin citizens to vote in the upcoming election without sacrificing their health. The district court's order properly balances these concerns and can be implemented, without burden, by the Executive Branch, which is responsible for administering the election.

Summary of Argument

Wisconsin is currently experiencing one of the nation's worst COVID-19 outbreaks as the general election approaches. Conditions have worsened since the district court issued the preliminary injunction—not improved.

The district court's injunction is narrowly tailored to protect voters' rights in the face of a public health emergency and will not confuse or disenfranchise voters. This Court should vacate the stay imposed by the court of appeals.

Argument

I. Despite Efforts to Combat the Pandemic, Wisconsin is Suffering a Severe COVID-19 Outbreak.

When COVID-19 reached Wisconsin, Governor Evers and his cabinet took swift measures to control it. Those efforts appeared to contain the virus, but legal attacks on the Executive Branch's authority to issue public health orders—including some initiated by Wisconsin's Legislature—have weakened the State's response. Coronavirus cases are now surging at the worst possible time, just weeks before the November 2020 election and as exacerbating factors like flu season set in.

A. Wisconsin's Initial Response to the Virus.

COVID-19 appeared at Wisconsin's doors swiftly, with the first confirmed case on January 29, 2020.⁴ By mid-March, the virus had taken hold across the state, and officials confirmed first deaths.⁵

As the State's chief executive officer, Governor Evers did not hesitate in the face of the growing danger. By March 12, 2020, he had declared a statewide public health emergency.⁶ On March 24, his Department of Health Services Secretary-Designee issued "Safer at Home" Emergency Order #12, requiring Wisconsin residents to remain at home except in limited circumstances.⁷ Confirmed cases in Wisconsin plateaued for several weeks.⁸

The Governor and his team did not let up. With an April 7 primary election approaching in the state, Governor Evers called for a special session of the Legislature to extend the April election, conduct it wholly by absentee ballot, and suspend the witness signature requirement on those ballots.⁹ The Legislature

⁴ Wis. Dep't of Health Servs., *Number of reported confirmed COVID-19 cases by date of symptom onset or diagnosis: Wisconsin* (as of October 12, 2020), available at <https://www.dhs.wisconsin.gov/covid-19/county.htm#number>.

⁵ Wis. Dep't of Health Servs., *Cumulative total number of reported confirmed COVID-19 deaths by date of death: Wisconsin* (as of October 12, 2020), available at <https://www.dhs.wisconsin.gov/covid-19/county.htm#cumulative%20deaths>.

⁶ Executive Order No. 72, Office of Wisconsin Governor (Mar. 12, 2020), available at <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>.

⁷ Emergency Order No. 12, Wis. Dep't of Health Servs. (Mar. 24, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

⁸ Wis. Dep't of Health Servs., *Number of reported confirmed COVID-19 cases by date of symptom onset or diagnosis: Wisconsin* (as of Oct. 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/county.htm#number>.

⁹ Executive Order No. 73, Office of the Wisconsin Governor (Apr. 3, 2020), available at <https://evers.wi.gov/Documents/COVID19/EO073-SpecialSessionElections%20searchable.pdf>.

declined to consider or adopt any of these measures, with each chamber holding its special session for no more than two minutes.¹⁰

At the same time, a district court issued injunctive relief extending the deadlines for absentee ballots to be requested by voters and received by election officials and suspending the witness signature requirement for voters affirming they were unable to safely obtain one. *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 957 (W.D. Wis. 2020). This Court partially stayed the injunction, but continued the portion of the injunction that allowed counting absentee ballots received after April 7 but by April 13 at 4 p.m., adding that the ballots arriving after April 7 must have been postmarked on or before that date. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020).

Although Wisconsin officials fulfilled a record 1,303,985 absentee ballot requests, the April 7 primary proceeded largely in-person.¹¹ Municipalities across Wisconsin reported a shortage of more than 7,000 poll workers, with 111 jurisdictions describing their shortage as “critical,” defined as not being able to staff any polling places, and 126 jurisdictions describing their shortage as “severe,” meaning they could not fully staff all polling places.¹² The Governor called on the National Guard to act as poll workers, but like civilian poll workers, members of the

¹⁰ See State of Wisconsin Assembly Journal: August 2020 Special Session (Aug. 31, 2020), <https://docs.legis.wisconsin.gov/2019/related/journals/assembly/20200831au0>; State of Wisconsin Senate Journal: August 2020 Special Session (Aug. 31, 2020), <https://docs.legis.wisconsin.gov/2019/related/journals/senate/20200831au0>.

¹¹ Wisconsin Elections Commission, *April 7, 2020 Absentee Voting Report* at 6 (May 15, 2020), available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf>.

¹² Wisconsin Elections Commission, *April 7, 2020 Election Summary Report* at 21 (Apr. 18, 2020), available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%207%20Election%20Summary%20and%20Next%20Steps.pdf>.

National Guard were limited by statute to serve only in their counties of residence.¹³ Municipalities were forced to consolidate polling places *en masse*. Milwaukee, a city of almost 600,000 people which typically has 180 polling locations, had just five.¹⁴ Green Bay, Wisconsin's third largest city and usually host to 31 polling places, had only two—only 17 of the city's usual 270 poll workers were willing to work on election day.¹⁵ Unfortunately, in-person voting wrought the tragic consequences the Governor had warned it would, including a cluster of COVID-19 cases among in-person voters and poll workers.¹⁶

The Governor and his team pressed on in response to the constantly shifting environment. On April 16, the Department of Health Services issued a second “Safer at Home” emergency order, tailoring more detailed restrictions to specific types of activities and individuals.¹⁷ Days later, Emergency Order No. 31 established a “Badger Bounce Back” plan for a phased reopening of Wisconsin, built upon the science and public health expertise of the Governor's executive officials,

¹³ Molly Beck, *Gov. Tony Evers to use National Guard members to work the polls amid massive shortage of workers*, MILWAUKEE J. SENTINEL (Apr. 1, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/01/tony-evers-use-national-guard-members-work-polls-amid-massive-shortage-workers/5102869002/>.

¹⁴ Mary Spicuzza, *Election day blog recap: Milwaukee releases Tuesday's voter turnout; late lines after polls closed*, MILWAUKEE J. SENTINEL (Apr. 8, 2020), <https://www.jsonline.com/story/news/politics/2020/04/07/wisconsin-april-7-presidential-primary-election-updates-voting-pandemic-milwaukee-polling-places/2959757001/>

¹⁵ New York Times reporters, *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>.

¹⁶ See David Wahlberg, *71 people who went to the polls on April 7 got COVID-19; tie to election uncertain*, WIS. STATE J. (May 16, 2020), https://madison.com/wsj/news/local/health-med-fit/71-people-who-went-to-the-polls-on-april-7-got-covid-19-tie-to/article_efab183-8e29-579a-a52b-1de069c320c7.html; see also Chad Cotti, Ph.D., et al., *The Relationship between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary*, Nat'l Bureau of Economic Research, Working Paper No. 27187 (May 2020, revised Oct. 2020), <https://www.nber.org/papers/w27187>.

¹⁷ Emergency Order No. 28, Wis. Dep't of Health Servs. (Apr. 16, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf>.

including the Department of Health Services Secretary-Designee and the state's Chief Medical Officer.¹⁸ Three additional orders quickly followed, one temporarily suspending certain administrative rules during the crisis in order to allow health care providers flexibility to meet the onslaught of demand while maintaining the supply of health care workers, and the others reducing restrictions on those businesses whose operations would have minimal impact on the spread of COVID-19.¹⁹

Meanwhile, some members of the Legislature rushed to the Wisconsin Supreme Court with an emergency motion to enjoin the state's "Safer at Home" order, arguing that the Department of Health Services had usurped legislative authority over rulemaking. *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. In a decision filed May 13, 2020, on a 4-3 vote, the Wisconsin Supreme Court agreed with the Legislature. Thereafter, the Legislature made no effort of its own to protect Wisconsin citizens from the virus's deadly spread. And spread it did.

¹⁸ Emergency Order No. 31, Wis. Dep't of Health Servs. (Apr. 20, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO31-BadgerBounceBack.pdf>.

¹⁹ See, respectively, Emergency Order No. 35, Wis. Dep't of Health Servs. (May 5, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO35-DHSandDSPS.pdf>; Emergency Order No. 34, Wis. Dep't of Health Servs. (Apr. 27, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO34-SAHdialTurn.pdf>; and Emergency Order No. 36, Wis. Dep't of Health Servs. (May 11, 2020), available at <https://evers.wi.gov/Documents/COVID19/EMO36-SAHdialTurn2.pdf>.

B. By July 2020, COVID-19 Cases Began to Spike Again.

Despite concerted efforts to curb the Executive's authority to contain the pandemic, Wisconsin managed to keep the number of cases to approximately 20,000 total from March through the end of May.²⁰ Six weeks later on July 17, however, that number had more than doubled.²¹ Three weeks later, it doubled again.²² By July 30, it became clear Wisconsin's trajectory was only accelerating, and the Governor again declared a public health emergency.²³

On August 1, the Governor placed into effect a statewide emergency order requiring all individuals age five or older to wear a face mask when inside spaces other than a private residence, with individuals who are not members of the individual's own household.²⁴ For several weeks following the Governor's order, new infection rates slowed noticeably.²⁵ Nonetheless, members of the Legislature filed a non-party brief in support of a lawsuit to enjoin and strike down the face mask order and end the declared public health emergency. On October 12, 2020, a Wisconsin circuit court refused to issue the injunction. Notably, the circuit court rebuked the Legislature's request for relief from the court in light of the Legislature's own inaction, reasoning "if the legislature is unconvinced that a state

²⁰ Wis. Dep't of Health Servs., *Number of reported confirmed COVID-19 cases by date of symptom onset or diagnosis: Wisconsin* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/county.htm#number>.

²¹ *Id.*

²² *Id.*

²³ Executive Order No. 82, Office of Wisconsin Governor (July 30, 2020), available at <https://evers.wi.gov/Documents/COVID19/EO082-PHECOVIDSecondSpike.pdf>.

²⁴ Emergency Order No. 1, Office of Wisconsin Governor (July 30, 2020), available at <https://evers.wi.gov/Documents/COVID19/Em001-FaceCoverings.pdf>.

²⁵ Wis. Dep't of Health Servs., *Number of reported confirmed COVID-19 cases by date of symptom onset or diagnosis: Wisconsin* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/county.htm#number>.

of emergency does exist, the legislature has the ultimate power to terminate it” (citing Wis. Stat. § 323.10, “The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.”). *Derek Lindoo, et al. v. Tony Evers*, No. 20-CV-219 (Wis. Cir. Ct. Polk Cty. Oct. 12, 2020).

The virus has raged on in Wisconsin, setting record highs in almost every category in the last month. With the onset of the fall school openings, confirmed cases reached almost 100,000 within two weeks.²⁶ On September 17, Wisconsin reached a record high number of COVID-19 cases in a single day.²⁷ The very next day shattered that record. September 26 set a new record again, and September 29 yet again.²⁸ Although Department of Health Services officials credited the fall school semester for the surge in new cases, primarily among 18 to 24-year-olds, other age groups quickly succumbed to even higher infection rates.²⁹

On September 22, the Governor declared a public health emergency for the third time.³⁰ The Department of Health Services subsequently ordered an emergency limit on indoor public gatherings to no more than 25% of total occupancy

²⁶ Wis. Dep’t of Health Servs., *Number of reported confirmed COVID-19 cases by date of symptom onset or diagnosis: Wisconsin* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/county.htm#number>.

²⁷ Wis. Dep’t of Health Servs., *New confirmed COVID-19 cases by date confirmed, and 7-day average* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed>.

²⁸ *Id.*

²⁹ Wis. Dep’t of Health Servs., *Cumulative case number by age group* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/cases.htm#by%20age>.

³⁰ Executive Order No. 90, Office of Wisconsin Governor (September 22, 2020), available at <https://evers.wi.gov/Documents/COVID19/EO090-DeclaringPublicHealthEmergency.pdf>.

limits through at least November 6, to stem the “deadly, uncontrolled, and exponentially growing spike in cases.”³¹

With hospital beds nearly filled to capacity statewide, increasing infection rates among health care workers leading to staff shortages, and the rapid rise in confirmed cases, the Governor announced the State Fair Grounds in Milwaukee will be opened as a field hospital, accepting COVID-19 patients by October 14.³² Currently, fifty-five of Wisconsin’s seventy-two counties are rated “very high” for disease activity, a parameter measuring the rate of infection per 100,000 people and the trajectory, or percent change in number of cases.³³

Amidst all of this, Wisconsin’s Executive Branch has made exhaustive efforts to ease Wisconsin’s suffering in other ways, too. These include opening new COVID-19 community testing sites; launching an online registration system to increase the speed and efficiency of those sites; distributing personal protective equipment to schools, food processors, and businesses around the state; and distributing millions of dollars in additional funding to Wisconsin’s schools, farms, and small businesses.³⁴

³¹ Emergency Order No. 3, Wis. Dep’t of Health Servs. (October 6, 2020), available at https://content.govdelivery.com/attachments/WIGOV/2020/10/06/file_attachments/1564232/EmO03-LimitingPublicGatherings.pdf.

³² Office of Governor Evers, *Due to Increased Hospitalizations in the Fox Valley, Gov. Evers Announces Wisconsin State Fair Park Alternate Care Facility to Accept COVID-19 Patients October 14* (Oct. 7, 2020), available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/2a4aff3>.

³³ Wis. Dep’t of Health Servs., *COVID-19: Disease Activity by Region and County* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/disease.htm>.

³⁴ See Office of Wisconsin Governor, *Gov. Evers announces launch of COVID-19 Response and Recovery Investment Dashboard* (Aug. 13, 2020), available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/29a1842>; *Gov. Evers Announces \$41.6 Million Distributed Through Wisconsin Farm Support Program* (July 27, 2020), available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/297343e>; *Gov. Evers Announces More Than \$80 Million in COVID-19 Financial Assistance to K-12 Schools and Higher Education*

But quite simply, the state is reaching its breaking point.

C. Wisconsin Is Currently Experiencing One of the Nation's Worst COVID-19 Outbreaks as the Election Approaches.

On October 13, Wisconsin broke yet another daily record with 3,279 new COVID-19 cases, raising the seven-day average to a record 2,727 per day.³⁵ As of October 9, Wisconsin was ranked the third highest state in the nation for number of confirmed cases reported in the last seven days.³⁶ Wisconsin trails only Texas and California—states with more than *five and six times the population* of Wisconsin, respectively, and topping other far more populous states like New York, Florida, and Illinois.³⁷ Wisconsin metropolitan areas account for a shocking *ten of the top twenty* metropolitan areas *nationwide* with the greatest number of new COVID-19 cases relative to their population within the last two weeks.³⁸ The state's hospitals are on the verge of being overwhelmed: 83.1% of all hospital beds in the state are full, as well as 85.1% of intensive care unit (ICU) beds.³⁹ The Governor has released

Institutions (June 17, 2020) available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/2913a7e>; *Gov. Evers Announces Additional Community Testing Events in Northwest Wisconsin* (May 3, 2020), available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/2899f47>; *Gov. Evers Announces Statewide Efforts to Distribute PPE to Schools, Food Processors, Businesses* (July 7, 2020), available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/2944abb>; *Gov. Evers Announces Successful Roll Out of Online COVID-19 Test Registration at National Guard Testing Sites* (July 9, 2020) available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/294dfae>.

³⁵ Wis. Dep't of Health Servs., *New confirmed COVID-19 cases by date confirmed, and 7-day average* (as of Oct. 13, 2020), available at <https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed>.

³⁶ Centers for Disease Control and Prevention, *United States COVID-19 Cases and Deaths by State* (as of October 12, 2020), available at https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days.

³⁷ *Id.*; see also United States Census, *Quickfacts* (October 11, 2020), available at <https://www.census.gov/quickfacts/fact/table/FL,WI,TX,CA/PST045219>.

³⁸ New York Times reporters, *Monitoring the Coronavirus Outbreak in Metro Areas Across the U.S.*, N.Y. TIMES (as of October 12, 2020), <https://www.nytimes.com/interactive/2020/04/23/upshot/five-ways-to-monitor-coronavirus-outbreak-us.html>).

³⁹ Wis. Dep't of Health Servs., *COVID-19: Hospital Capacity by Region and County* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/capacity.htm>.

an urgent plea to Wisconsinites: “We’re in a crisis right now and need to immediately change our behavior to save lives.”⁴⁰

The numbers continue to skyrocket as Wisconsin sits at the precipice of the winter months, which medical experts predict will bring a devastating COVID-19 resurgence.⁴¹ As of this writing, Wisconsin has climbed to an all-time high seven-day average of 18.6% positive results of all people tested and 2,547 new confirmed cases per day.⁴² On October 12, 2020, a record of 950 people were hospitalized in the state with COVID-19, a figure nearly three times higher than just one month ago.⁴³ In a state of little more than 5.5 million people, the number of confirmed COVID-19 cases has surpassed 150,000,⁴⁴ and 1,474 Wisconsinites have perished in the pandemic.⁴⁵

In sum, the Governor and his executive team have battled the virus using the latest science-based research and recommendations from the world’s leading public health experts. Wisconsin’s Executive Branch is at the forefront of the battle against COVID-19 and is best positioned to synthesize the dire reality of the virus’

⁴⁰ Office of Wisconsin Governor, *Gov. Evers Directs Department of Health Services to Limit Indoor Public Gatherings* (October 6, 2020), available at <https://content.govdelivery.com/accounts/WIGOV/bulletins/2a47827>.

⁴¹ See The Academy of Medical Sciences, *Preparing for a challenging winter 2020/21* (July 14, 2020), <https://acmedsci.ac.uk/file-download/51353957> (discussing challenges of COVID-19 winter resurgence and setting forth recommendations for prevention and mitigation).

⁴² Wis. Dep’t of Health Servs., *New confirmed COVID-19 cases by date confirmed, and 7-day average* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/cases.htm#confirmed>.

⁴³ Mary Spicuzza and Sophie Carson, *Wisconsin Reports all-time high 950 people hospitalized with COVID-19*, MILWAUKEE J. SENTINEL (Oct. 12, 2020), available at <https://www.jsonline.com/story/news/2020/10/12/wisconsin-coronavirus-state-reports-nearly-2-000-new-cases-9-deaths/5970999002/>.

⁴⁴ Wis. Dep’t of Health Servs., *Cumulative total confirmed COVID-19 cases by date confirmed* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/cases.htm>; U.S. Census Bureau, *Quickfacts: Wisconsin*, available at <https://www.census.gov/quickfacts/WI>.

⁴⁵ Wis. Dep’t of Health Servs., *Cumulative total deaths among confirmed COVID-19 cases by date reported* (as of October 12, 2020), <https://www.dhs.wisconsin.gov/covid-19/deaths.htm#cumulative>.

trajectory with the predicted consequences of an election on November 3, if the election is not modified, as set forth in the preliminary injunction.

Meanwhile, the Legislature has sat on its hands, ignored the dangers of in-person voting during growing COVID-19 infections—except to hire counsel to intervene in litigation, including here in the district court and the Seventh Circuit, where it contends that the State is somehow injured if the minimal adjustments related to absentee ballots and poll workers are implemented, as ordered by the district court.

II. The District Court’s Injunction Is Narrowly Tailored to Protect Voters’ Rights in the Face of Wisconsin’s Severe COVID-19 Outbreak and Will Not Confuse or Disenfranchise Voters.

In light of these circumstances, the Governor views the district court’s preliminary injunction to be appropriate to the extent it (1) lengthens the deadline for receipt of absentee ballots until November 9, 2020, for all ballots mailed on or before election day; (2) extends online access for replacement absentee ballots or emailing replacement ballots from October 22 to October 29, 2020; and (3) suspends the requirement that an election official be a resident of the county in which the municipality is located in order to serve as an election official for the November 3, 2020, election. These terms of the district court’s injunction are narrowly tailored to meet the *Anderson-Burdick* balancing test for changes to election rules, while eschewing the circumstances in which the *Purcell* concerns for voter confusion and disenfranchisement might apply.

The *Anderson-Burdick* balancing test, which applies to burdens placed on voters exercising their First and Fourteenth Amendment rights, provides that “when those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Norman v. Reed*, 502 U.S. 279, 289 (1992). At the same time, *Purcell* cautions against changes in election administration laws close to an election when those changes risk “voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). As more fully set forth in the Emergency Applications, the district court’s injunction risks no such voter confusion and disenfranchisement. Instead, it will only facilitate the exercise of voting rights during the pandemic, either by facilitating more reliable absentee options, or by helping to ensure adequate staffing of polls to help prevent consolidating polls, which in turn leads to crowding, longer wait times, and increased potential exposure to the virus.

Since the district court issued its preliminary injunction on September 21, 2020, the COVID-19 situation in Wisconsin has only deteriorated. As described above, this situation shows no signs of abating, and will likely worsen with the oncoming flu season and colder weather.

Meanwhile, without the injunction, the conditions that led to the April 7 primary election day debacle are set to repeat with greater force. The Wisconsin Elections Commission again expects a substantial shortage of poll workers based on the advanced age of significant numbers of poll workers—the very problem which

caused overwhelming polling place consolidations in April.⁴⁶ Wisconsin Elections Commission recruitment efforts underway just one month out from election day describe the vacancies as “critical.”⁴⁷ Election officials have now mailed out 1.2 million absentee ballots—already a record—but are braced for an even greater wave of requests in the coming days.⁴⁸

Without the district court’s injunction, untold numbers of Wisconsin voters will be faced with the choice between voting in person and their health—or potentially their lives. Following an evidentiary hearing, the district court considered this when it extended the deadline for receipt of absentee ballots by six days, extended online access for requesting or emailing replacement ballots by one week, and suspended the requirement that a poll worker be a resident of the county of her polling place in order to work. The extensions pertaining to absentee ballots will only encourage, not confuse, voters who wish to avoid voting in person due to the virus’ aggressive, near-exponential growth in recent weeks. As the April 7 primary ballot counts show beyond dispute, nearly 80,000 voters would have been disenfranchised *without* court-ordered protective measures adapted to the pandemic.⁴⁹

⁴⁶ Wisconsin Elections Commission, *Wisconsin needs poll workers for November!* (August 31, 2020), available at <https://elections.wi.gov/node/7069>.

⁴⁷ Wisconsin Elections Commission, *Poll Worker Recruitment Program* (October 5, 2020), available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Poll%20Worker%20Recruitment%20Memo_1.pdf.

⁴⁸ WisconsinEye, *WisEye Morning Minute: WEC's Meagan Wolfe on Early Voting Numbers* (October 2, 2020), available at https://madison.com/news/local/govt-and-politics/wiseye-morning-minute-wecs-meagan-wolfe-on-early-voting-numbers/video_950372bd-6150-5ca1-b7a1-63fe62d49bb3.html

⁴⁹ Wisconsin Elections Commission, *April 7, 2020 Absentee Voting Report*, at 6 (May 15, 2020), available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf>

The poll worker residency requirement will ensure that poll workers are evenly distributed as needed across the state, leaving no municipality unable to staff its polls while others have more than enough workers. This directly and narrowly responds to the conditions of the April 7 primary, when a city as large as Milwaukee had just five polling places.⁵⁰

This Court need not fear acting as a “second-guessing” judiciary, lacking both the “background, competence, and expertise to assess public health” and “accountab[ility] to the people.” *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). The district court’s injunction is narrowly tailored to the emergent circumstances on the ground in Wisconsin and carries the endorsement of the branch of Wisconsin’s government that *has* the background, competence, and expertise to assess public health and is accountable to the people: the Executive. *Bostelmann, supra*, Slip Op. at 20 (Rovner, J., dissenting) (“None [of the district court’s modifications] are opposed here by the Wisconsin Executive, which is charged with administering the election.”) (citing *Repub. Nat’l Com. v. Common Cause Rhode Island*, __ S.Ct. __, 2020 WL4680151, at *1 (U.S. Aug. 13, 2020)); *see also* Slip Op. at 11 (Rovner, J., dissenting) (“The Wisconsin Election Commission signaled a preparedness and ability to comply with these modifications . . . and the State Executive is not here to contend otherwise.”).

⁵⁰ Allison Durr and Mary Spicuzza, *What we know so far about why Milwaukee only had 5 voting sites for Tuesday’s election while Madison had 66*, MILWAUKEE J. SENTINEL (April 9, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/09/wisconsin-election-milwaukee-had-5-voting-sites-while-madison-had-66/2970587001/>.

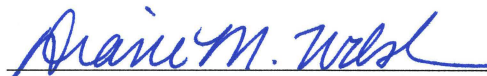
The injunction is necessary to protect the First and Fourteenth Amendment right to vote, avoid voter confusion and disenfranchisement, and save Wisconsin lives. The Seventh Circuit's stay must be vacated.

Conclusion

For the foregoing reasons, to protect Wisconsin citizens' right to vote and health, the Court should grant Plaintiffs-Applicants' Emergency Motion to Vacate the Circuit Court Stay of the district court's preliminary injunction.

Respectfully submitted,

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