UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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 all others similarly situated*,

Plaintiffs,

v.

Robin Vos, *in his official capacity as Speaker of the Wisconsin State Assembly*; Scott Fitzgerald, *in his official capacity as Majority Leader of the Wisconsin State Senate*; Wisconsin State Assembly; Wisconsin State Senate; Wisconsin Elections Commission; Marge Bostelmann, Julie M. Glancey, Ann S. Jacobs, Dean Knudson, Robert F. Spindell, Jr., *and* Mark L. Thomsen, *in their official capacities as members of the Wisconsin Elections Commission*, and Meagan Wolfe, *in her official capacity as the Administrator of the Wisconsin Elections Commission*,

Defendants,

and

Republican National Committee *and* Republican Party Of Wisconsin,

Intervenor Defendants.

Case No. 3:20-cv-340-wmc (consolidated with Nos. 3:20-cv-249, 3:20-cv-278-wmc, 3:20-cv-284-wmc, and 3:20-cv-459-wmc)

LEGISLATIVE DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT

ROBERT E. BROWNE, JR.
(State Bar No. 1029662)
KEVIN M. LEROY
(State Bar No. 1105053)
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)

MISHA TSEYTLIN
(State Bar No. 1102199)
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street, Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com

Attorneys for Legislative Defendants

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. Plaintiffs' Near-Boundless Challenge To Wisconsin's Election Laws, Broader Than The Challenge In *DNC v. Bostelmann*, Is Unripe 2

II. The Amended Complaint Fails To State A Claim 4

A. Plaintiffs' *Anderson/Burdick* Claim, Which Differs From The *Anderson/Burdick* Claim In *DNC v. Bostelmann*, Fails 4

B. Plaintiffs' Americans With Disabilities Act Claim, Which Has No Counterpart In *DNC v. Bostelmann*, Also Fails 7

III. As Plaintiffs' Rightly Concede, They May Not Seek Damages From The State For Their *Anderson/Burdick* Claim 11

IV. Speaker Vos And Leader Fitzgerald May Remain As Defendants *Only* Because The Legislature May Speak For The State's Interests In Defense Of State Law 11

V. *Burford* Abstention Applies Here, Including Because The Presence Of A "Specialized" State Tribunal Is Not An Absolute Prerequisite 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

A.H. by Holzmueller v. Ill. High Sch. Ass'n,
881 F.3d 587 (2018) 8, 11

Amundson ex rel. Amundson v. Wis. Dep't of Health Servs.,
721 F.3d 871 (7th Cir. 2013) 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 10

Bogan v. Scott-Harris,
523 U.S. 44 (1998) 12

Car Carriers, Inc. v. Ford Motor Co.,
745 F.2d 1101 (7th Cir. 1984) 9

CMFG Life Ins. Co. v. Banc of Am. Sec. LLC,
No. 13-CV-579-wmc, 2014 WL 2986474 (W.D. Wis. July 2, 2014) 8

Frank v. Walker,
768 F.3d 744 (7th Cir. 2014) 6, 7

Frank v. Walker,
819 F.3d 384 (7th Cir. 2016) 7

Geinosky v. City of Chicago,
675 F.3d 743 (7th Cir. 2012) 3

Griffin v. Roupas,
385 F.3d 1128 (7th Cir. 2004) 4, 8

Hildreth v. Butler,
960 F.3d 420 (7th Cir. 2020) 9, 10

Luft v. Evers,
___ F.3d ___, 2020 WL 3496860 (7th Cir. June 29, 2020) 1, 5, 6

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 7

New Orleans Pub. Serv., Inc. v. Council of New Orleans,
491 U.S. 350 (1989) 13

Oconomowoc Residential Programs v. City of Milwaukee,
300 F.3d 775 (7th Cir. 2002) 9

Olmstead v. L.C.,
527 U.S. 581 (1999) 11

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) 13

Reeder v. Madigan,
780 F.3d 799 (7th Cir. 2015) 12

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 6

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 3

Texas Democratic Party v. Abbott,
961 F.3d 389 (5th Cir. 2020) 4, 7, 8

US Airways, Inc. v. Barnett,
535 U.S. 391 (2002) 9

W. Bend Mut. Ins. Co. v. Schumacher,
844 F.3d 670 (7th Cir. 2016) 10

Wis. Right to Life State Political Action Comm. v. Barland,
664 F.3d 139 (7th Cir. 2011) 3

Other Authorities

Memo of Administrator Meagan Wolfe, Curbside Voting, Drive-Through Voting And Outdoor Polling Places (Mar. 29, 2020) 9

Memo of Administrator Meagan Wolfe, Hospitalized Electors And Public Health Guidance (Mar. 29, 2020) 10

Wis. Elections Comm'n, *Update on Commission Actions 5/27- COVID-19* (May 27, 2020) 2

INTRODUCTION

Plaintiffs' Amended Complaint differs in numerous ways from the complaint that this Court recently declined to dismiss in *Democratic National Committee v. Bostelmann*, No. 3:20-cv-249-wmc, Dkt. 217 (W.D. Wis. June 10, 2020), and this Court should grant Legislative Defendants' motion to dismiss here. Among other key differences, (1) the claims in this case are far broader than in *DNC*, seeking more intrusive, speculative relief against Wisconsin's election system; (2) many of Plaintiffs' legal theories and assertions are premised upon allegations relating to the claimed subjective motives for Legislative Defendants' decision not to postpone the April 7 Election, which, as the Seventh Circuit very recently held in *Luft v. Evers*, ___ F.3d ___, 2020 WL 3496860, at *2–3 (7th Cir. June 29, 2020), are completely improper; (3) Plaintiffs' lawsuit involves a claim under Title II of the Americans with Disabilities Act ("ADA"), where Plaintiffs have not even attempted to allege elements of such a claim; and (4) Plaintiffs seek to bring claims against legislators for their legislative actions, something that legislative immunity plainly forbids.

Further, and in addition, the Seventh Circuit's post-*DNC* decision in *Luft* provides additional, powerful reasons requiring dismissal of the Amended Complaint.

This Court should thus dismiss Plaintiffs' Amended Complaint in whole or, at the very minimum, in part.

ARGUMENT

I. Plaintiffs' Near-Boundless Challenge To Wisconsin's Election Laws, Broader Than The Challenge In *DNC v. Bostelmann*, Is Unripe

Plaintiffs' claims are unripe because they depend on the course of the COVID-19 pandemic in the months ahead, medical advances developed during that time, and the government's mitigating responses. Dkt. 13 at 10–11. Since Legislative Defendants filed their Motion to Dismiss, the Wisconsin Elections Commission ("Commission") has taken steps that alleviate Plaintiffs' concerns, including as to the mailing of absentee ballots, further demonstrating the contingent nature of Plaintiffs' claims. *See* Wis. Elections Comm'n, *Update on Commission Actions 5/27- COVID-19* (May 27, 2020).[1] Nor would Plaintiffs suffer any hardship from the Court refusing to adjudicate their claims now, since they have ample opportunities to vote in the upcoming 2020 elections. *See* Dkt. 13 at 12–13.

The breadth of Plaintiffs' claims and requested relief distinguishes this case from *DNC*, in terms of ripeness. The *DNC* plaintiffs' now-operative complaint "identifie[d] specific burdens" from "[s]pecifically" challenged provisions of Wisconsin election law. *DNC*, No. 3:20-cv-249-wmc, Dkt. 217 at 3, 11. Those specific challenges were ripe, this Court concluded, because no defendant had "argue[d] that *any* of the challenged provisions will *not* be enforced in the upcoming elections." *Id.* at 6. Importantly, the Court also noted "that some unforeseen, future event" could "call into reasonable question plaintiffs' claims for relief," which would allow the Court "to

[1] Available at https://elections.wi.gov/node/6915 (all websites last visited July 1, 2020).

take up [a] ripeness argument again[.]" *Id.* at 8; *accord* Dkt. 25 at 8. Here, Plaintiffs near-boundless challenge fails to identify any "specific burdens" from "specifically" challenged Wisconsin statutes. To the contrary, Plaintiffs have requested that the Court enjoin any election law that they find "[un]reasonable." Dkt. 5 ¶ 8.b. So, without any guiding or limiting principle to sharpen this request, further factual development is necessary, unlike in *DNC*. Dkt. 13 at 9. Additionally, Plaintiffs have requested universal mail-in voting as a remedy, yet the Commission's decision to mail absentee-ballot applications to certain registered voters "call[s] into reasonable question" this claim for relief. *DNC*, No. 3:20-cv-249-wmc, Dkt. 217 at 8.

Plaintiffs criticize Legislative Defendants for "present[ing] additional facts" in their Motion to Dismiss. Dkt. 25 at 2–5. As Legislative Defendant's explicitly stated, these facts are all drawn from publicly available government sources and so are "subject to proper judicial notice" at this stage, Dkt. 13 at 1 n.1, as even Plaintiffs' cited authority recognizes, *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012); Dkt. 25 at 2.

Finally, invoking *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011), and *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), Plaintiffs claim that this Court must review their claims now, since any delay would force them to "forego[ ]" their right to vote. Dkt. 25 at 7–8. However, both *Wisconsin Right to Life*, 664 F.3d at 148–49, and *Susan B. Anthony List*, 573 U.S. at 167–68, rejected ripeness challenges because the laws at issue already chilled plaintiffs' speech, such that plaintiffs were experiencing immediate burdens on their

rights, *see* Dkt. 13 at 9–10. Here, in contrast, Plaintiffs' voting rights are burdened only if they cannot cast a ballot in a future 2020 election. Dkt. 13 at 12–13. Since those elections are months away, and since Plaintiffs may request absentee ballots for them *immediately*, no such burden exists. Dkt. 13 at 12–13.

II. The Amended Complaint Fails To State A Claim

A. Plaintiffs' *Anderson/Burdick* Claim, Which Differs From The *Anderson/Burdick* Claim In *DNC v. Bostelmann*, Fails

Plaintiff's sweeping *Anderson/Burdick* claim—premised on Legislative Defendants' "failure" to postpone the April 7 Election—fails because their Amended Complaint does not sufficiently allege that the (unidentified) election laws that Plaintiffs challenge imposed anything more than reasonable burdens on their right to vote. Dkt. 13 at 19; *see* Dkt. 5 at 50 ¶ b, ¶¶ 99, 102, 112. Further, their request for universal mail-in voting is legally foreclosed, Dkt. 5 ¶¶ 8.b., 54, 112; *id.* at 50, because "it is obvious that a federal court is not going to decree . . . all-mail voting" or "unlimited absentee voting," Dkt. 13 at 22 (quoting *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)); *accord Texas Democratic Party v. Abbott*, 961 F.3d 389, 409 (5th Cir. 2020) ("The Virus's emergence has not suddenly obligated [the State] to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail."). And their stray references to understaffed polling locations in some parts of the State also fail, since local election officials—not Legislative Defendants or the operation of Wisconsin law—were responsible for the ill-advised decisions that caused those election-day delays. Dkt. 13 at 20.

The Seventh Circuit's very recent, post-*DNC* decision in *Luft* further demonstrates why the Court must dismiss this claim. There, the court rejected plaintiffs' "challenges to more than a dozen provisions" of Wisconsin's election law, including their *Anderson/Burdick* claims. 2020 WL 3496860 at *1, 6–8; *compare id.* at *6 (upholding injunction of one provision on preemption, not *Anderson/Burdick*, grounds). In rejecting these claims, the Seventh Circuit repeatedly emphasized that *Anderson/Burdick* requires consideration of "the state's election code *as a whole*," rather than "evaluat[ion] [of] each clause in isolation." *Id.* at *3. So, for example, a "state with liberal access to absentee ballots," like Wisconsin, "may well offset this with more stringent verification of eligibility." *Id.* Indeed, Wisconsin in particular "has lots of rules that make voting easier," and "[t]hese facts matter when assessing challenges to a handful of rules that make voting harder." *Id.* This binding decision defeats Plaintiffs' challenge here: They make no effort to allege that Wisconsin's "election code *as a whole*" imposes anything more than a reasonable burden, especially in light of the State's generous, no-excuses-needed absentee-voting regime. *Id.*; *compare* Dkt. 25 at 13–14. And while "some voters [ ] might be inconvenienced by," for example, the "rule" requiring them to actually request an absentee ballot, invalidating such a provision on those grounds alone would "not [be] a plausible application of *Anderson* and *Burdick*." *Luft*, 2020 WL 3496860 at *7.

Plaintiffs' arguments in support of their *Anderson/Burdick* claim fail.

First, contrary to their assertions, Dkt. 25 at 14, Plaintiffs' *Anderson/Burdick* claim differs fundamentally from the claim in *DNC*. While the *DNC* plaintiffs

challenge significant portions of Wisconsin's election regime, their now-operative complaint at least "identifie[d] *specific* burdens that allegedly will be imposed by each of [an enumerated number of] challenged provisions, and further aver[red] that no state interest can justify their enforcement in light of the alleged burdens." *DNC*, No. 3:20-cv-249, Dkt. 217 at 11 (emphasis added). Here, however, Plaintiffs do not identify *any* of the specific election laws under challenge; instead, they ask the Court to enjoin any election law (without discernible limitation) that seems "[un]reasonable." Dkt. 5 at 50 ¶ b. Further, the "heart" of the claim here is Legislative Defendants' "failure" to postpone the April 7 Election, *see* Dkt. 5 ¶¶ 61, 65, an allegation that the now-operative complaint in *DNC* does not make, and one that this Court refused to entertain in its pre-election *DNC* order, *DNC*, No. 3:20-cv-249, Dkt. 170 at 28–36.

Second, Plaintiffs argue that Legislative Defendants "afford[ed] no weight to," or exhibited "lack of concern for," Plaintiffs' voting rights when they "refused" to postpone the April 7 Election. Dkt. 25 at 13–14. Plaintiffs are speculating about the subjective intent of Legislative Defendants, without any supporting factual allegations. *See* Dkt. 25 at 13–14. In any event, such subjective intent is legally irrelevant to the *Anderson/Burdick* framework, as the Seventh Circuit recently reaffirmed. *Luft*, 2020 WL 3496860 at *2–3 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)); *see also Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) ("*Frank I*"). As the Fifth Circuit also recently explained, "drive-by speculation about

the state's covert motives" for holding in-person voting during the COVID-19 pandemic "is utterly impermissible." *Texas Democratic Party*, 96 F.3d at 407.

Third, Plaintiffs argue that their *Anderson/Burdick* claim survives because "[n]ine plaintiffs aver that they requested absentee ballots, but did not receive them before the election." Dkt. 25 at 13. Even if those claims did sufficiently allege more-than-reasonable burdens on the right to vote, they would not support the facial invalidation against any "[un]reasonable" election law that Plaintiffs seek. Dkt. 5 at 50 ¶ b. These allegations could only possibly support limited, as-applied relief under *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"). Dkt. 13 at 22–23.

Finally, Plaintiffs complain about a "shortage of poll workers" in "Milwaukee and Green Bay," but they do not address that this shortage stemmed solely from the decisions of local officials. Dkt. 25 at 13. The Court cannot grant Plaintiffs relief against Legislative Defendants for the "independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted); *accord Frank I*, 768 F.3d at 753, 755. This also defeats Plaintiffs' argument about other "voters [ ] not wearing masks or gloves." Dkt. 25 at 13.

B. Plaintiffs' Americans With Disabilities Act Claim, Which Has No Counterpart In *DNC v. Bostelmann*, Also Fails

Plaintiffs' claim under Title II of the ADA alleges that the "failure" to postpone the April 7 Election amounted to a "refus[al] to accommodate" Plaintiffs' disabilities for this election. *See* Dkt. 5 ¶¶ 130–31; Dkt. 13 at 23–24 (listing the three elements of this claim). As Legislative Defendants explained, Plaintiffs' Amended Complaint fails at the first element of this claim because it does not include a request for a

reasonable accommodation. Dkt. 13 at 25–26. The Amended Complaint also fails at the second and third elements, since Plaintiffs' difficulties in receiving absentee ballots were due to, at most, inadvertent mistakes in ballot delivery through the mail, not Plaintiffs' disabilities. Dkt. 13 at 26–27; *see A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 593 (2018). Finally, Plaintiffs' Amended Complaint has not plausibly alleged "deliberate indifference" on behalf of Legislative Defendants, foreclosing any damages recovery, even if Plaintiffs had otherwise stated a valid ADA claim. Dkt. 13 at 27–28.

In response, Plaintiffs do not even attempt to argue that the absentee-ballot-mail-delivery failures were caused by their disabilities. *See* Dkt. 25 at 14–16; *A.H. by Holzmueller*, 881 F.3d at 593. Given that this is an essential element of Plaintiffs' claim, this failure alone requires dismissal. *See CMFG Life Ins. Co. v. Banc of Am. Sec. LLC*, No. 13-CV-579-wmc, 2014 WL 2986474, at *2 (W.D. Wis. July 2, 2014) (holding that by failing to respond to argument in brief in opposition, party "waived any argument to the contrary").

Further, on the issue of reasonable accommodation, Plaintiffs do not explain how automatic, universal mail-in voting could possibly be reasonable, especially when "it is obvious that a federal court is not going to decree . . . all-mail voting" or "unlimited absentee voting." Dkt. 13 at 22 (quoting *Griffin*, 385 F.3d at 1130); *see also id.* at 26; *accord Texas Democratic Party*, 961 F.3d at 409. Instead, Plaintiffs argue that the reasonable-accommodation question is immune from dismissal at the motion-to-dismiss stage, since it requires a "highly fact-specific" inquiry. Dkt. 25

at 15. This overlooks an important threshold step—namely, that Plaintiffs first "show that an 'accommodation' *seems reasonable on its face*, *i.e.*, ordinarily or in the run of cases." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (emphasis added); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 783–84 (7th Cir. 2002). Only *after* the plaintiff meets this initial burden does the analysis proceed to a more fact-specific inquiry. *US Airways*, 535 U.S. at 401; *Oconomowoc*, 300 F.3d at 783. Since Plaintiffs have not alleged that their accommodation is reasonable "on its face," dismissal at the motion-to-dismiss stage is required.

Plaintiffs next attempt to smuggle in other accommodation requests, like "enhanced drive-up voting" or "sending teams of election officials to the homes of disabled voters." Dkt. 25 at 15. Those requests are missing from Plaintiffs' Amended Complaint, as Plaintiffs admit, *see* Dkt. 25 at 15, so they cannot satisfy Plaintiffs' pleading burden, *see Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984). Regardless, these new requests do not save their claim because, among other reasons, Plaintiffs' Amended Complaint does not allege why existing accommodations in Wisconsin law are unreasonable. *See Hildreth v. Butler*, 960 F.3d 420, 431 (7th Cir. 2020). Wisconsin already provides for safe "curbside voting" for voters with disabilities. Dkt. 13 at 2–3, 27; Memo of Administrator Meagan Wolfe, Curbside Voting, Drive-Through Voting And Outdoor Polling Places at 2–5 (Mar. 29, 2020).[2] And "hospitalized electors"—who may receive ballot-casting assistance—

[2] Available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Clerk%20comm%20re%20Curbside%2C%20Drive-Through%2C%20Outdoors%203.29.20_0.pdf.

"include voters who are quarantined" due to COVID-19. *See* Memo of Administrator Meagan Wolfe, Hospitalized Electors And Public Health Guidance at 1 (Mar. 29, 2020);[3] Dkt. 13 at 2–3, 27.

Finally, Plaintiffs argue that they are entitled to damages for their ADA claim since Legislative Defendants acted with "deliberate indifference" to their rights, but the only two allegations that they cite do not plausibly support that conclusion. Dkt. 25 at 15–16; *Hildreth*, 960 F.3d at 431. As for Legislative Defendants' refusal to postpone the election after the Governor called special legislative sessions for this purpose, Dkt. 25 at 15 (citing Dkt. 5 ¶ 65), this could only plausibly show that Legislative Defendants disagreed with the Governor's late-breaking desire to delay the election, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). And as for the allegation that at "'every opportunity'" Legislative Defendants "'chose to adhere to a process they knew would restrict the franchise in violation of the Plaintiffs' constitutional rights,'" Dkt. 25 at 16 (quoting Dkt. 5 ¶ 68), this is "no more than conclusions" about subjective intent, which do not meet Plaintiffs' burden, *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016) (citation omitted).[4]

Amicus American Diabetes Association argues that the inadvertent-mailing-failure allegations support an ADA claim because "Title II prohibits public entities

[3] Available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Hospitalized%20Electors.pdf.

[4] Plaintiffs have also argued that "deliberate indifference" is a free-standing ADA claim. Dkt. 25 at 15–16. Alleging "deliberate indifference" is a requirement to recover damages under the ADA, not an independent claim. *Hildreth*, 960 F.3d at 431.

from administering their programs, even unintentionally, in such a way that excludes individuals with disabilities[.]" Dkt. 23-1 at 9. This is just another way to state that "the ADA requires proof of causation," *A.H. by Holzmueller*, 881 F.3d at 593, which, again, Plaintiffs' have not alleged, Dkt. 13 at 26–27. Neither does *Amicus*' citation of *Olmstead v. L.C.*, 527 U.S. 581 (1999), change the outcome, Dkt. 23-1 at 9, as that decision simply held that "discrimination" under the ADA "also" includes "undue institutionalization of disabled persons, no matter how anyone else is treated," *Amundson ex rel. Amundson v. Wis. Dep't of Health Servs.*, 721 F.3d 871, 874 (7th Cir. 2013) (emphasis omitted). That method of proof is not applicable here.

III. As Plaintiffs' Rightly Concede, They May Not Seek Damages From The State For Their *Anderson/Burdick* Claim

Plaintiffs' Amended Complaint appears to seek damages for their *Anderson/Burdick* claim, but the Eleventh Amendment bars those damages. Dkt. 13 at 28–29. Plaintiffs have rightfully conceded that the Court may not award damages against the State for their *Anderson/Burdick* claim. Dkt. 25 at 16.

IV. Speaker Vos And Leader Fitzgerald May Remain As Defendants *Only* Because The Legislature May Speak For The State's Interests In Defense Of State Law

Plaintiffs have named Speaker Vos and Majority Leader Fitzgerald as Defendants in their official capacities *as legislators*, and then allege only that these legislators' inaction supports their claims. Dkt. 5 ¶¶ 23–24. But legislative immunity prohibits such claims, since "state and regional legislators are entitled to absolute immunity from liability under [42 U.S.C.] § 1983 for their legislative activities," including legislative decisions *not* to enact legislation. Dkt. 13 at 29 (quoting *Bogan*

v. Scott-Harris, 523 U.S. 44, 49 (1998)). Therefore, the Court must dismiss Speaker Vos and Majority Leader Fitzgerald *as legislators*.

Plaintiffs' incorrectly argue that Speaker Vos and Majority Leader Fitzgerald have only asserted their "legislative immunity under Wisconsin law." Dkt. 25 at 16. Legislative Defendants made clear that they are claiming the legislative immunity afforded them by the United States Constitution. Dkt. 13 at 29 (citing, among other authorities, *Reeder v. Madigan*, 780 F.3d 799, 802 (7th Cir. 2015)); *Reeder*, 780 F.3d at 801–02 (holding state legislators immune under the U.S. Constitution's Speech and Debate Clause from § 1983 claims). That federal legislative immunity mandates dismissal of Speaker Vos and Majority Leader Fitzgerald *as legislators*, and Plaintiffs have waived any arguments to the contrary. *See* Dkt. 25 at 16.

While the Court must dismiss Speaker Vos and Majority Leader Fitzgerald as legislators, they are nonetheless proper defendants here—just in a different capacity than that envisioned by Plaintiffs. Under Wisconsin law, the leaders of the Legislature may appear as parties on behalf of the Legislature's express authority to speak *for the State's interests in defending State law*. Dkt. 13 at 29–31. And while Plaintiffs' criticize this distinction as "confused," Dkt. 25 at 16, Speaker Vos and Majority Leader Fitzgerald have regularly exercised this authority, Dkt. 13 at 30–31.

V. *Burford* Abstention Applies Here, Including Because The Presence Of A "Specialized" State Tribunal Is Not An Absolute Prerequisite

The Court should abstain under *Burford*, given the State's important regulatory interests in election administration, Dkt. 13 at 14, and the extreme disruption that Plaintiffs' requested relief would cause, Dkt. 13 at 13–16 (citing *New*

Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) ("*NOPSI*")). Plaintiffs argue that *Burford* abstention is categorically unavailable because Wisconsin election-law issues are not "committed . . . to specialized tribunals." Dkt. 25 at 11–12. But that is not an absolute prerequisite, especially since there is no "formulaic test for determining when dismissal under *Burford* is appropriate." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996). That also suffices to defeat Plaintiffs' attempt to distinguish *NOPSI*: because the sweeping injunctions requested here would harm federalism, *Burford* abstention is justified even if this case does not precisely mirror *NOPSI*. *See Quackenbush*, 517 U.S. at 727 (no "formulaic test"). And, again, Plaintiffs seek far more sweeping relief than that sought in the now-operative complaint in *DNC,* thus the Court's *Burford* decision there does not control here. *See DNC*, No. 3:20-cv-249, Dkt. 217 at 3, 11.

CONCLUSION

The Court should dismiss the Amended Complaint.

Dated, July 2, 2020

Respectfully Submitted,

/s/ Misha Tseytlin

MISHA TSEYTLIN
(State Bar No. 1102199)
ROBERT E. BROWNE, JR.
(State Bar No. 1029662)
KEVIN M. LEROY
(State Bar No. 1105053)
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com
robert.browne@troutman.com
kevin.leroy@troutman.com
sean.dutton@troutman.com

Attorneys for Legislative Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2020, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ Misha Tseytlin

MISHA TSEYTLIN
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe Street
Suite 3900
Chicago, IL 60606
(608) 999-1240
(312) 759-1939 (fax)
misha.tseytlin@troutman.com