

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

REVEREND GREG LEWIS, et al.,

Plaintiffs,

v.

Case No. 20CV284

DEAN KNUDSON, et al.,

Defendants.

AMICUS BRIEF OF WISCONSIN GOVERNOR TONY EVERS

INTRODUCTION

As this Court is well-aware, Wisconsin faces a sobering challenge. In the midst of the COVID-19 public health emergency, our scheduled April 7 election—to determine thousands of local government positions, several state offices, the major-party presidential primaries, acceptance or rejection of a proposed amendment to the state constitution, and more than 130 county, local, and school board referenda—is rapidly approaching. Governor Tony Evers submits this amicus brief not to support any party, but rather to provide the Court with up-to-date information and to outline the Governor’s proposals were this Court to order short-term changes to the election process under these extraordinary circumstances.

BACKGROUND

In December 2019, a novel strain of the coronavirus was detected, now named COVID-19. It has spread throughout the world, including every state in the United States. On January 30, 2020, the World Health Organization declared COVID-19 to be a Public Health Emergency of International Concern. As that threat became increasingly present and serious in Wisconsin, on March 12, 2020, Governor Evers issued Executive Order #72.¹ The next day, on March 13, 2020, President Donald Trump proclaimed a National Emergency concerning COVID-19.

These orders were timely and necessary. In the weeks since, the presence of COVID-19 in Wisconsin, and the threat it poses to Wisconsinites, has dramatically increased. For example, on March 15, 2020, Wisconsin had roughly 30 diagnosed COVID-19 cases; in the just over *two* weeks since, that number has risen to more than 1,350 diagnosed cases.² The number of diagnosed cases, and the resulting death count, continues to increase daily.

¹ Wis. Governor Tony Evers, *EXECUTIVE ORDER #72, Relating to a Proclamation Declaring a Health Emergency in Response to the COVID-19 Coronavirus* (Mar. 12, 2020), <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>.

² See Wis. Dep't of Health Servs., *Outbreaks in Wisconsin*, <https://www.dhs.wisconsin.gov/outbreaks/index.htm> (last revised Mar. 31, 2020) (information updated daily).

In Executive Order #72, the Governor used his emergency powers to declare a public health emergency, and to direct all resources needed to respond to and contain COVID-19 in Wisconsin. *See* Wis. Stat. §§ 323.10, 323.12. As part of the emergency declaration, the Governor designated the Wisconsin Department of Health Services (DHS) as the lead agency to respond to the emergency and directed DHS to take all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in Wisconsin.

In Executive Order #72, the Governor also directed all other state agencies to assist as appropriate in the State's response to the public health emergency, and further authorized the Adjutant General to activate the Wisconsin National Guard as necessary to support the State's response. *See also* Wis. Stat. §§ 323.10, 323.12, 323.13. Wisconsin statutes contemplate that during a public health emergency—in addition to working with DHS—the Governor also will also work with the Administrator of the Wisconsin Division of Emergency Management and the Adjutant General, to coordinate emergency management. Wis. Stat. §§ 323.10, 323.12(3), 323.13.

Part of this collaboration includes reliance on an already-developed emergency plan, Wis. Stat. § 323.13(1)(b); Wisconsin's emergency plan involves activation of the State Emergency Operations Center (SEOC)—the physical home base for the coordination of information and resources for emergency

management.³ The COVID-19 emergency has triggered a Level 1 status—full-scale operation—for the SEOC.⁴

Since issuing Executive Order #72, the Governor and other state leaders at the helm of emergency management have continued to take necessary, aggressive steps to respond to the COVID-19 pandemic.⁵ Following multiple less-restrictive orders, on March 24, 2020, DHS Secretary-designee Andrea Palm warned that, without further restrictions to limit human interaction, between 440 and 1,000 Wisconsinites could die within two weeks.⁶ That same day, DHS Secretary-designee Andrea Palm, at the direction of the Governor,

³ Wisconsin Emergency Management's emergency plan is set forth in full online. Wis. Emergency Mgmt., Wis. Dep't of Military Affairs, *Wisconsin Emergency Response Plan* (Nov. 2017), [https://dma.wi.gov/DMA/divisions/wem/preparedness/2017_WERP\(Full37M\).pdf](https://dma.wi.gov/DMA/divisions/wem/preparedness/2017_WERP(Full37M).pdf). This is not a COVID-19 specific plan, but rather the already-established general emergency plan.

⁴ Wis. Emergency Mgmt., Wis. Dep't of Military Affairs, *Wisconsin State Emergency Operations Center*, <https://dma.wi.gov/DMA/wem/home/current-status> (last visited March 31, 2020) (reflecting that the SEOC is currently in Level 1, or full operation, status).

⁵ All of the Governor's executive orders related to COVID-19 are available online. Wis. Governor Tony Evers, *Executive Orders*, <https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx> (last updated March 31, 2020).

⁶ *Models show that without current restrictions, Up to 1,000 could die in Wisconsin*, WQOW.com (Mar. 24, 2020, 3:00 PM), <https://wqow.com/2020/03/24/models-show-that-without-current-restrictions-up-to-1000-could-die-in-wisconsin/>.

issued Emergency Order #12, the Safer at Home Order.⁷ With certain limited exceptions, the Safer at Home Order—effective March 25, 2020, through April 24, 2020—directs all Wisconsinites to stay at their homes or places of residence; closes non-essential businesses and operations, including schools, public libraries, and places of amusement; prohibits public and private gatherings of people who do not belong to a single household or living unit; and restricts non-essential travel. The Governor’s Office has publicly explained that the Safer at Home Order is not intended to eliminate in-person absentee voting for the April 7, 2020, election.⁸

Wisconsin has a decentralized election system overseen by the Wisconsin Elections Commission (WEC). Wis. Stat. § 5.05(1). Wisconsin’s 1,850 municipal clerks or boards of election commissioners, and 72 county clerks, collectively administer both absentee voting and in-person voting at thousands of polling locations on election day. Administering elections in Wisconsin is resource-intensive, especially with respect to the necessary assistance of poll workers.

⁷ Wis. Dep’t of Health Servs., *EMERGENCY ORDER #12: SAFER AT HOME ORDER* (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

⁸ *Emergency Order #12 Does Not Eliminate In-Person Absentee Voting – COVID-19*, Wis. Elections Commission, <https://elections.wi.gov/node/6773> (last visited Mar. 31, 2020). Additionally, the Governor’s Office does not interpret the Safer at Home Order as prohibiting in-person voting on the scheduled election date, or prohibiting any work necessary to facilitate the election or to determine its results.

According to WEC, roughly 30,000 poll workers serve at Wisconsin polling places.⁹

The April 7, 2020, election has the following state and local seats on the ballot: a Wisconsin Supreme Court justice; three Wisconsin Court of Appeals judges; 34 Wisconsin circuit court judges; 102 municipal court judges; 1,596 county supervisors and officers; 763 alders, mayors, and other city offices; 464 village board trustees, board members, and other offices; 291 town supervisors, clerks, and other offices; 565 school district board positions; and 12 sanitary district supervisory board positions. Many of these positions have terms scheduled to begin as soon as April 21, 2020.

The April 7, 2020, election will also decide a state-wide referendum on a proposed amendment to the Wisconsin Constitution, as well as 132 county, school district, and local referenda. Lastly, the April 7, 2020, election will serve as the Wisconsin presidential preference primaries for both major national political parties.

⁹ *Wisconsin Needs Poll Workers to Deal with COVID-19 Situation*, Wis. Elections Commission, <https://elections.wi.gov/node/6766> (last visited Mar. 31, 2020).

DISCUSSION

I. Up-to-date information from Wisconsin's Department of Health Services and State Emergency Operations Center.

While the parties presumably will provide this Court with certain information related to COVID-19 and its impact on the election, this brief seeks to provide the most up-to-date information, to the extent it may benefit the Court. The following summarizes the developments as of this filing.¹⁰

First, as to the COVID-19 pandemic in Wisconsin, DHS reports that as of March 31, 2020, 1,351 Wisconsinites have tested positive for COVID-19, and 16 have died from the virus.¹¹ DHS's chief medical officer and state epidemiologist for communicable diseases estimates that the actual number of Wisconsinites with COVID-19 is up to ten times higher than the number of individuals who have tested positive.¹² Unfortunately, existing data suggests

¹⁰ The Governor's Office represents that this brief summarizes the information provided by the SEOC and DHS, both of which are extremely busy addressing these extraordinary circumstances. However, if this Court wishes to receive additional information about the circumstances summarized here, the Governor's Office will make every effort to provide that information in the form most useful to the Court, if so directed.

¹¹ Wis. Dep't of Health Servs., *Outbreaks in Wisconsin*, <https://www.dhs.wisconsin.gov/outbreaks/index.htm> (last revised Mar. 31, 2020).

¹² Dr. Ryan Westergaard, *COVID-19 Media Briefing 3/27/2020*, YouTube, https://www.youtube.com/watch?v=rHZfvmu-TN0&list=PLrVDlKoVyjBRHeqq9sVg_YGSiovQlj5nk&index=5 (last visited Mar. 31, 2020) (the cited portion occurs at timestamp 36:30).

that the COVID-19 epidemic in Wisconsin will get worse before it gets better. At the same time, it remains difficult to estimate exactly when Wisconsin will return to normalcy.

On March 30, 2020, DHS Secretary-Designee Andrea Palm warned that it could be “10-plus days” before the growth curve of COVID-19 flattens out in Wisconsin.¹³ Recent data from an institute at the University of Washington predicts that Wisconsin’s peak strain on hospital beds will occur on April 27, 2020; right now, that same data does not predict the total number of Wisconsin deaths from COVID-19 plateauing until late May.¹⁴ Predictions, however, continue to change regularly—often on a daily basis. Multiple factors, including significant limitations on available testing, make it difficult to offer more concrete projections.

Second, as to the April 7 election, as this Court is aware, WEC administers Wisconsin’s election laws and processes. Wis. Stat. § 5.05(1). However, under the present circumstances, the SEOC, together with DHS, has also been working to help prepare for the election and mitigate risks to the

¹³ Mary Spicuzza, *Wisconsin prepares for possible next stage of coronavirus spread with more testing, scouting locations for response*, Milwaukee Journal Sentinel (Mar. 30, 2020), <https://www.jsonline.com/story/news/2020/03/30/wisconsin-coronavirus-testing-could-double-army-scouts-locations/5089808002/>.

¹⁴ Univ. of Wash. Institute for Health Metrics & Evaluation, *COVID-19 Projections, Wisconsin*, <https://covid19.healthdata.org/projections> (last visited Mar. 31, 2020) (note: Wisconsin needs to be selected from the drop-down menu).

public posed during this public health emergency. To these ends, the SEOC has created a taskforce to assist WEC with preparations for the April 7 election. This taskforce has been helping polling places with staffing challenges, acquisition and distribution of election materials, and acquisition and distribution of sanitization materials. DHS, in turn, has worked with WEC to provide guidance on ways to increase the safety of in-person voting.

With regards to staffing, as of March 31, 2020, 111 municipalities (6%) reported being unable to staff even one polling place; 126 municipalities (nearly 7%) reported being unable to staff all normal polling places; 530 municipalities (over 28.5%) did not provide an update on their status with respect to poll workers. Governor Evers has agreed to use members of the Wisconsin Army National Guard to assist as poll workers, but it is anticipated that the assistance of the National Guard will not satisfy all of the current staffing needs. The National Guard is currently determining how many personnel it can make available for each county.

Additionally, as of 7:30 a.m. on March 31, 2020, 972,232 absentee ballots have been requested for the April 7 election, and 942,350 absentee ballots have been sent to voters. At the same time, only roughly 337,563 of those absentee ballots have been returned.

With regard to acquisition and distribution of election materials, the SEOC has helped source paper, pens, and other materials for the localities

responsible for administering the election. Notably, the SEOC has acquired, and is distributing, envelopes to help local clerks alleviate the shortfall caused by the dramatic increase in mail-in absentee ballot requests.

The SEOC has also helped source and provide sanitization materials to polling places. As of March 31, 2020, the SEOC has obtained the necessary quantities of hand sanitizer and hand wipes to distribute to polling places. The SEOC is also currently working to procure special sanitizing wipes for cleaning the voting machines themselves.

The SEOC's efforts to procure and provide sanitization materials helped DHS in turn work with WEC to, on March 29, 2020, provide detailed public health guidance for municipalities, county clerks, and local boards of election commissioners about how to conduct an in-person election that accounts for the COVID-19 public health concerns, by utilizing sanitizers, social distancing, and other measures.¹⁵

¹⁵ This extensive guidance includes signs to display, questionnaires for poll workers, and a checklist for poll workers that includes suggestions for crowd and line management, as well as sanitization of polling places. *Public Health Guidance for Elections – COVID-19*, Wis. Elections Commission, <https://elections.wi.gov/node/6787> (last visited Mar. 31, 2020).

In short, as Governor Evers explained on March 30, 2020, Wisconsin is still approaching the worst of the COVID-19 pandemic.¹⁶ But no one can say with confidence when the pandemic will subside. Moreover, though the many Wisconsin state agencies working tirelessly to help prepare for our April 7 election in the midst of this pandemic have made tremendous strides, challenges still remain and will continue to remain through election day.

II. In the event this Court orders relief, it may wish to consider a middle path.

To the extent that this Court concludes that relief is appropriate, the Governor respectfully submits that this Court should consider a middle path that maintains the democratic process, while also implementing appropriate measures to save lives. The Governor provides the following general proposals.¹⁷

¹⁶ Riley Vetterkind, *Tony Evers calls for agreement on emergency legislation as unemployment claims skyrocket amid COVID-19 pandemic*, Madison.com (Mar. 31, 2020), https://madison.com/wsj/news/local/govt-and-politics/gov-tony-evers-calls-for-agreement-on-emergency-legislation-as/article_c4098526-d042-5efe-9f6c-03be4ba9890c.html.

¹⁷ It is worth noting that some members of the Wisconsin Legislature have asserted that the Governor lacks authority to effectuate these changes through his emergency powers, meaning that any attempt by the Governor to do so would be mired in legal challenges and delay, imposing further uncertainty on the election process and all Wisconsinites. Thus, in the absence of action by the Legislature, even after repeated urging, the Governor therefore provides his suggestions to this Court, in the event it were to issue relief.

To start, the Governor believes that COVID-19's transmission through direct interactions among people in close proximity should weigh heavily in any potential remedy fashioned by this Court. In general, Wisconsin elections are conducted mostly in-person.¹⁸ But for the April 7, 2020, election, in-person interactions should be minimized. This would be best achieved through a predominantly by-mail election, with in-person voting available as necessary.

The Governor offers three main suggestions to help achieve a predominantly by-mail election, in the event that this Court were to issue relief in this case.

First, steps should be considered to make it easier for Wisconsin voters to obtain mail-in absentee ballots. *See generally* Wis. Stat. § 6.86. Many Wisconsinites who have not yet requested mail-in absentee ballots likely plan to vote in person. Inevitably, some of those individuals who have not yet requested mail-in absentee ballots lack either the technology (*i.e.*, a smart phone or copier) or the technical skills required to submit the requisite documentation to obtain a mail-in absentee ballot while complying with the Safer at Home order. Moreover, public places where individuals could use this

¹⁸ For example, only roughly 27% of Wisconsin voters in the November 2016 election voted absentee. Additionally, nearly 13% of voters in that election registered to vote on election day. *Wisconsin Voter Turnout Statistics "General Election Voter Registration and Absentee Statistics 1984-2016,"* Wis. Elections Commission, <https://elections.wi.gov/elections-voting/statistics/turnout> (last visited Mar. 31, 2020).

technology, or receive technological assistance, such as public libraries, are closed due to the COVID-19 response.

If the Court makes it easier for registered voters to request mail-in absentee ballots, it should also consider giving them an opportunity to avail themselves of this option; the general cut-off for requesting a mail-in absentee ballot is currently 5:00 p.m. on Thursday, April 2. *See* Wis. Stat. § 6.86(1)(b).¹⁹ If the deadline to request absentee ballots were extended, the Wisconsin Elections Commission could promptly execute an already-prepared public education campaign to promote increased participation in the election by mail-in absentee ballot.²⁰

Second, steps should be considered to make it easier for Wisconsin voters to return absentee ballots quickly and without in-person contact. One way to do this is to relax enforcement of the witness requirement for mail-in

¹⁹ If this Court were to decide to extend the deadline to request absentee ballots, it may wish to extend the deadline for voter registration accordingly. *See generally* Wis. Stat. § 6.28. Just as many electors who have not yet requested mail-in absentee ballots may plan on voting in-person, because Wisconsin allows in-person election-day voter registration, many may also be planning to register at the same time. *See* n.17, *supra*. Extending the deadline for online voter registration, in conjunction with efforts to make it easier for registered voters to request mail-in absentee ballots, would alleviate the need for some prospective voters, who have not yet registered, to show up for in-person voting.

²⁰ The details of this plan are available in the WEC's March 27, 2020, meeting materials. *Special Teleconference-Only Meeting Agenda*, Wis. Elections Commission 21–23 (Mar. 27, 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/3.27.20%20Commission%20Materials.pdf>.

absentee ballots. With certain limited exceptions, Wisconsin law generally requires that, for an absentee ballot to be counted, another adult U.S. citizen must witness the elector signing an absentee ballot and must countersign the ballot so attesting. Wis. Stat. §§ 6.87(2), (4). Those electors who do not live with another adult U.S. citizen cannot comply with this requirement for mail-in absentee ballots while also protecting their personal health and complying with national and state mandates to socially distance. Given that most electors do not have the step-by-step sanitization guide or supplies that the SEOC and WEC have provided to municipal and county clerks and elections commissions to make in-person voting as safe as possible, it would be problematic to require Wisconsin voters, particularly elderly or at-risk individuals, to seek out in-person interactions to obtain a witness certification.²¹

Further, a short extension (by one week, for example) of the deadline for receipt of absentee ballots returned via mail may also help facilitate a predominantly-by-mail election. *See* Wis. Stat. § 6.87(6) (general rule that

²¹ Nor would changes to the witness requirement in this extraordinary circumstance invite voter fraud. Wisconsin's election code contains multiple levels of protections against voter fraud, and no absentee ballot will be left without some protection. The vast majority of the nearly one million electors who have already requested mail-in absentee ballots have been required to provide copies of their photo ID with their requests. And, even if this Court were to relax that requirement to facilitate other voters obtaining mail-in ballots before the election, those individuals would still be required to sign the certifications on their ballots, *see* Wis. Stat. § 6.87(2), which is yet another layer of protection against fraud. Thus, adapting the witness requirement to accommodate the current public health emergency will not vitiate Wisconsin's protections to safeguard elections.

absentee ballots must be returned so that they are delivered to the polling place no later than 8 p.m. on election day). A short extension would allow Wisconsinites an opportunity to avail themselves of the opportunity to request mail-in absentee ballots in the wake of any order by this Court, provide more time for those requested ballots to be sent to electors who request them, and provide more time for those electors to complete and return their ballots.

Additionally, to facilitate electors returning their ballots in a timely manner without in-person contact, municipalities could be ordered to set up return drop boxes for absentee ballots. *See* Wis. Stat. §§ 6.87 (general process for completion and return of absentee ballots); 6.855 and 6.88 (general return locations for processing absentee ballots). With public libraries already closed by the Safer at Home order, the book-return drops at every public library provide available, secure, conveniently located potential drop locations in communities all around the State.²²

Third, steps should be considered to increase efficiency and accuracy of counting votes in a predominantly by-mail election. Permitting the counting of ballots to (1) begin early, and (2) extend after the election to account for any

²² On March 31, 2020, WEC advised municipal and county clerks, and boards of local election commissioners, about the possibility of using of drop boxes—including library book return slots—to better accommodate safe return of absentee ballots. *Special Teleconference-Only Meeting Agenda*, Wis. Elections Commission 1–3 (Mar. 31, 2020) <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Complete%20Packet%2031.pdf>

extension to the time for receipt of mail-in absentee ballots, would help alleviate logistical concerns about the timely processing of an unprecedented volume of mail-in absentee ballots, and—as discussed further below—concerns about poll workers’ ability to perform their jobs while socially distancing. *See* Wis. Stat. §§ 6.88, 7.51, 7.52(1) (general procedures for election-day counting of absentee ballots). This is particularly true given the high number of mail-in absentee ballots—over 600,000 as of March 31, 2020—that have been sent to voters, but have yet to be returned.²³

Additionally, this Court could provide that all municipalities are authorized to conduct a centralized canvass process for counting absentee ballots under Wis. Stat. § 7.52 (authorizing municipalities to, by ordinance, decide to count absentee ballots in a single location on election day). This would increase efficiency and minimize the number of poll workers and observers necessary to monitor the counting process.

If the measures described above for providing for a predominantly-by-mail election occurred, the amount of in-person voting would be greatly reduced. Such a reduction would help ensure that those voters who cannot or will not avail themselves of mail-in absentee ballots can participate in the

²³ If this Court so ordered, it could, for example, instruct WEC to provide municipal and county clerks, and local boards of election commissioners, guidance on how to count votes if the volume of mail-in absentee ballots is so large that they cannot all be counted in one session.

election safely. Thus, in conjunction with moving to a predominantly-by-mail election, the remaining in-person voting could proceed on April 7, or as soon as possible thereafter if the Court deems April 7 to be impossible. Such an approach will promote stability and avoid the uncertainty inherent in extending the election date into the future, given that Wisconsin's exposure to COVID-19 continues to expand, and it remains unclear when the situation will improve.

A predominantly-by-mail election would also mitigate many of the concerns about direct contact between groups of people at polling places—as it relates to the safety of both voters and poll workers. With the specific guidance already provided by WEC—discussed above—as to how to hold an in-person election that comports with social distancing and accounts for COVID-19 public health concerns, an opportunity for in-person voting should still exist for the few voters who are unable to vote absentee. These voters include, for example, voters who require assistive technology to vote or voters who are unable to read and write in English without assistance.

Ultimately, a predominantly-by-mail election, with limited but available in-person voting, would be an achievable middle ground that would help protect Wisconsin's right to vote, while also helping to keep them safe.

CONCLUSION

Wisconsin Governor Tony Evers respectfully requests that this Court consider this information as it decides this matter.

Dated this 31st day of March 2020.

Respectfully submitted,

s/ Hannah S. Jurss
HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

Attorney for Governor Tony Evers

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8101
(608) 267-2223 (Fax)
jursshj@doj.state.wi.us