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

TIMOTHY CAREY, MARTHA CHAMBERS, SCOTT LUBER, MICHAEL REECE,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, in her official capacity as Administrator of WEC

Defendants.

No. 3:22-cv-00402

Judge Peterson

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND EMERGENCY DECLARATORY RELIEF

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INTRODUCTION

Defendants attempt to evade adjudication of Plaintiffs' preliminary injunction motion—and this action entirely—by taking a vague "litigation position" that they agree with Plaintiffs' recitation of the law. But Defendants' public position is clear and materially different. A justiciable controversy between the parties thus remains. On July 14, 2022—six days after the Wisconsin Supreme Court's decision in *Teigen v. WEC*—Defendant Wolfe, speaking in her official capacity as WEC Administrator, declared plainly, unequivocally, and sweepingly at a press conference that "the voter is the one required to mail the [absentee] ballot." Her statement left no room for debate and, more troubling, made no exception for voters with disabilities. Media channels throughout Wisconsin and nationally reported her remarks as telling Wisconsinites that "voters must place their own absentee ballots in the mail and can't have someone do it for them."[1]

In short, the public position of the state's chief election officer, taken on behalf of the government entity charged by statute to administer Wisconsin's elections, and

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[1] *Administrator: Wisconsin Voters Must Mail Their Own Absentee Ballots*, CBS NEWS, (July 14, 2022), https://www.cbsnews.com/minnesota/news/administrator-wisconsin-voters-must-mail-their-own-absentee-ballots; *Administrator: Voters Must Mail Their Own Absentee Ballots*, U.S. NEWS & WORLD REP. (July 14, 2022), https://www.usnews.com/news/best-states/wisconsin/articles/2022-07-14/administrator-voters-must-mail-their-own-absentee-ballots; Todd Richmond, *Wisconsin Elections Commission Administrator: Voters Must Mail Their Own Absentee Ballots*, PBS WIS. (July 14, 2022), https://pbswisconsin.org/news-item/wisconsin-elections-commission-administrator-voters-must-mail-their-own-absentee-ballots; *Administrator: Voters Must Mail Their Own Absentee Ballots*, TMJ4/WTMJ-TV MILWAUKEE https://www.tmj4.com/news/political/elections-local/administrator-voters-must-mail-their-own-absentee-ballots.

broadcast widely throughout the state, is that Wisconsin voters must personally place their own absentee ballot in the mail. WEC has done nothing to suggest that its position is anything different. WEC has not spoken publicly at all about the import or scope of the *Teigen* decision. Voters are left only with WEC's inaction and Administrator Wolfe's public statements. That WEC's lawyers have taken a "litigation position" in court filings makes no difference. There is a sharp controversy between Plaintiffs' and WEC's positions on the question of ballot return assistance. Consequently, there is a case or controversy within the scope of Article III that this Court must adjudicate. The Court should grant the preliminary relief Plaintiffs request.

Defendants' apparent position is that Administrator Wolfe's comments to the press "do[] not contradict the Commission's litigation position in *Teigen*." Dkt. 26 at 9. Yet, the very evidence Defendants' lawyers cite in support are two documents that were issued to ***clarify*** those statements and walk them back precisely because Administrator Wolfe's statements ***departed*** from WEC's litigation position in *Teigen*. Even these supposed clarifications cast doubt on how Plaintiffs may vote. Rather than submit evidence to the Court in a declaration from Administrator Wolfe that Wisconsin law permits disabled voters to receive assistance with returning absentee ballots—the position that Defendants would have the Court believe reflects their views—Defendants have done no more than tell municipal clerks, outside this forum, to obtain their own guidance on the law.

Against this muddled and uncertain backdrop, and absent the injunctive and declaratory relief requested here, Plaintiffs are left to wait and see if their local municipal clerks—who must somehow parse the meaning of Wisconsin and federal election law, the *Teigen* decision, and Defendants' inconsistent positions on this question—will count their ballots. In this regard, this controversy is live. Tellingly, on August 3, 2022, WEC convened, and the Commissioners considered a proposal granting the very relief Plaintiffs seek. However, that proposal was rejected, establishing that WEC's position on ballot-return assistance is far from concrete. Thus, despite their counsel's arguments in legal briefs, Defendants' statements and actions outside the courtroom are adverse to Plaintiffs, such that a case and controversy endures.

As a backstop, Defendants claim that Plaintiffs have no injury because Wisconsin law gives municipal clerks the discretion to assess and provide an accommodation if feasible, and only upon request. Such a discretionary allowance (which clerks could freely deny) does not comport with either federal voting rights or disability law, which, respectively, allow assistance without request and forbid Defendants from administering elections in a way that discriminates on the basis of disability. The United States agrees with Plaintiffs—Wisconsin law is insufficient to guarantee Plaintiffs' federal rights. *See* U.S. Dep't of Justice, Statement of Interest, Dkt. 29. The Court should grant Plaintiffs' requested relief and declare that federal law requires Wisconsin to allow disabled voters, like Plaintiffs, to have a person of their choice assist with returning their absentee ballots, by mail or in-person.

I. Defendant's "Litigation Position" Does Not Eliminate Adversity, and Plaintiffs Thus Have Standing To Sue

Defendants say there is no adversity because WEC has taken the "litigation position" that it "agrees with Plaintiffs." Dkt. 26 at 7, 9. Those words—"litigation position"—are carefully selected: Defendants know that this is only their position in litigation and is indeed not their position for purposes of the administration of elections in Wisconsin. Despite Defendants' carefully chosen words, a litigation position does not, and cannot, demonstrate a lack of case or controversy.

Courts regularly find that a position taken for the purpose of litigation does not establish the actual policy of the entity being challenged. *See Huppeler v. Oscar Mayer Foods Corp.*, 32 F.3d 245, 252 (7th Cir. 1994) ("[A] litigation position is not an 'agency interpretation.' This is especially true when the agency's formal and published interpretation contradicts this position."); *see also Richardson v. Chi. Transit Auth.*, 926 F.3d 881, 890 n.5 (7th Cir. 2019) (noting a "litigation position [is not] entitled to our deference" when in conflict with a regulation); *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010) ("[T]he government's disavowal [of enforcement] must be more than a mere litigation position."); *Poe v. Snyder*, 834 F. Supp. 2d 721, 730 (W.D. Mich. 2011) ("Defendants have made numerous statements in both their briefs and at oral argument tending to suggest that they would not enforce [the] restriction … these equivocal statements cannot be accepted as a disavowal; 'the government's disavowal must be more than a mere litigation position.'" (citation omitted)); *cf. Tees-*

dale v. City of Chi., 690 F.3d 829, 835 (7th Cir. 2012) (rejecting argument that a "litigation position taken by a municipality can, by itself, constitute an official policy"). WEC's litigation position thus cannot be used to defeat Article III standing.

The voluntary cessation doctrine is an instructive parallel. Just as "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued" a defendant cannot take one action, and then when challenged, have its lawyers backpedal. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot [or in this case to have the case dismissed for lack of standing], then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.* It follows that just like a defendant who claims "its voluntary compliance moots a case," a defendant who claims its litigation position removes adversity similarly "bears the ***formidable burden*** of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (emphasis added). That is especially true where, as here, Defendants' position outside of litigation is at best inconsistent and at worst—as seen in Administrator Wolfe's public comments and WEC's own debates about post-*Teigen* guidance to clerks—is plainly at-odds with Plaintiffs' view of the law.

Defendants cannot meet their "formidable burden" because they fail to present the necessary (and, in fact, any) factual evidence that WEC has taken the position that disabled voters may use ballot-return assistance. This is unsurprising. At an

August 3, 2022 WEC meeting held after the filing of Plaintiffs' motion, WEC Commissioners considered a proposal to take a formal position with respect to ballot-return assistance for voters with disabilities. The Commissioners acknowledged on the record that WEC has not taken a position on this issue in how it ***actually*** administers Wisconsin's election laws. Despite what WEC argues here about its "litigation position," when it comes to WEC's position for the purpose of administering the state's elections, it is clear that WEC has no position other than the one expressed by Administrator Wolfe. And that is critical. Wisconsin law irrefutably establishes who is in charge of the administration of elections—WEC and its administrator, Meagan Wolfe. *See* Wis. Stat. § 5.05(1), (2w), (3d), (3g).

To support their "litigation position" Defendants say they "have no dispute with the vast majority of Plaintiffs' proposed facts." Dkt. 26 at 2. To begin, the vast majority is not all. There are material facts in dispute, and those disputed facts form the crux of this controversy and establish adversity, as is true in all litigation. *Cf.* Fed. R. Civ. P. 56. Defendants contend that Administrator Wolfe's statement to the press that Wisconsin voters must return their own ballot was accurate, and dispute Plaintiffs' characterizations of it. Here, too, Defendants parse their words carefully. Defendants do not say that Administrator Wolfe's statements were an accurate representation of WEC's position on how Wisconsin law should be applied; rather, Defendants state only that Administrator Wolfe's statement "does not contradict the Commission's litigation position in *Teigen*." Dkt. 26 at 9.

Defendants' counsel's tortured reading of Administrator Wolfe's statement is entirely implausible. Administrator Wolfe said that "as of right now, the voter is the one required to mail their ballot." That statement is not ambiguous. As she put it "the voter is the one." So, "the voter"—meaning the voter personally—must mail their own absentee ballot. Defendants say this statement is "consistent" with their litigation position in *Teigen* where they asserted:

> "To mail" means "[to send by the] nation's postal system." And "to send" means "to ***cause*** a letter or package to go or to be carried from one place or person to another." That is why it is well understood that mailing an item does not require the sender to personally deposit it into the USPS box—that an agent may carry out that mailing on the sender's behalf.[2]

No lay person could possibly understand Administrator Wolfe's straightforward, unambiguous language to tacitly incorporate by reference the hyper-technical meanings of those words that Defendants assert to be embedded in the relevant statutes. And as shown by the state and national media's reporting of Administrator Wolfe's statement, the media did not understand it that way. This incredible reading of Administrator Wolfe's statement belies common sense and ignores the plain impact that the statement has and will continue to have on Wisconsin voters, particularly in light of the media's characterization and broad dissemination of the statement.

And if this was, indeed, what Administrator Wolfe meant, then her failure to submit a declaration to the Court is glaring. A preliminary injunction hearing is an evidentiary hearing where the Court takes evidence and renders a ruling based on

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[2] WEC First Brief at 18, *Teigen v. Wis. Elections Comm'n*, No. 2022AP91 (Wis. Feb. 17, 2022).

the record evidence. Defendants' decision to substitute argument of counsel characterizing what a defendant meant in a statement—rather than submit evidence in the form of testimony by that defendant herself about what she meant—is telling.

WEC's own actions show that it, too, understood Administrator Wolfe to have said that voters—including disabled voters—must personally mail their own absentee ballots. Administrator Wolfe's statement was made six days after the *Teigen* decision was issued, and her statement that this was her view "as of right now" suggests that either (1) her views had changed on how voters may mail their ballots post-*Teigen*; or (2) that it was subject to change in the future. Indeed, the lower court in *Teigen* explicitly found that absentee ballots had to be personally mailed by the voter, and although the Wisconsin Supreme Court in *Teigen* did not decide the issue, it also did not clearly vacate the lower court's ruling.[3] Moreover, Wisconsin Supreme Court Justice Roggensack (in concurrence) ***did*** address how voters must mail their ballots and concluded that "under Wisconsin statutes, it is the elector who shall mail the absentee ballot" and that "when [Wis. Stat.] § 6.87(4)(b)1. says 'the elector[,]' it means, the voter." *Teigen v. WEC*, 976 N.W.2d 519, 547, 551 (¶¶ 88, 106) (Wis. 2022) (Roggensack, J., concurring). Thus, Administrator Wolfe's statements are more clearly read (as nearly every media outlet reporting on the issue represented and as Plaintiffs understood) to reflect a legal interpretation prohibiting ballot-return assistance for absentee ballots submitted by mail. *See* Pls.' Proposed Statement of Facts

[3] Indeed, the mandate in italics at the beginning and the end of the lead opinion "*By the court*" simply say that "The judgment and order of the Circuit Court is affirmed." *Teigen v. WEC*, 976 N.W.2d 519, 547 (Wis. 2022).

¶ 40 n.16.[4] For this reason, WEC issued a "clarification" that "Administrator Wolfe's comments should not be interpreted as a policy statement or statutory interpretation," and incorrectly reminded municipal clerks that they alone are responsible for interpreting the law.[5] Thus, to the extent WEC's position in the *Teigen* litigation was that ballot-return assistance ***is*** permitted for disabled voters, Administrator Wolfe's statement—as shown by WEC's own subsequent actions—is not consistent with that position, and WEC has done nothing outside court filings to show that its position on ballot-return assistance remains the same following the ruling in *Teigen*.

There is even more evidence that WEC's position has changed since *Teigen*. Just two weeks ago, at its August 3, 2022 meeting, WEC considered whether to grant the relief Plaintiffs seek. *See* WIS. ELECTIONS COMM'N, *Special Meeting* at 1:58:02-1:59:37; 2:11:14-2:13:03 (Aug. 3, 2022), https://invintus-client-media.s3.amazonaws.com/2789595964/4726e2e383522571f2dbff2812caf7e03c59cb0a.mp4 ("*Special Meeting*"). The Commissioners decided not to do so; instead, they instructed staff to

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[4] *See also* Todd Richmond, *Wisconsin Elections Commission Administrator: Voters Must Mail Their Own Absentee Ballots*, PBS WIS. (July 14, 2022), https://pbswisconsin.org/news-item/wisconsin-elections-commission-administrator-voters-must-mail-their-own-absentee-ballots ("Wisconsin's chief election administrator said July 14 that Wisconsin voters must place their own absentee ballots in the mail and can't have someone do it for them[.]"); Mitchell Schmidt, *WEC Administrator Says Voters Should Mail Their Own Absentee Ballots Following Wisconsin Supreme Court Ruling*, WIS. STATE J. (July 15, 2022) ("Those looking to mail their ballots in upcoming Wisconsin elections should do so themselves, rather than have someone assist them in that process.").

[5] The Kilpatrick Declaration, Ex. A is incorrectly cited for this proposition, which is available here: WIS. ELECTIONS COMM'N, Clarification on Absentee Ballot Return Comments (July 25, 2022), https://elections.wi.gov/news/clarification-absentee-ballot-return-comments.

issue a non-binding "clerk communication" containing a "noncomprehensive list of legal considerations that clerks may wish to discuss with counsel." Kilpatrick Decl., Ex. A. In that communication, WEC avoided making any "statement on the applicability or viability of such questions and challenges" regarding "whether or not a disabled Wisconsin voter may request assistance with the return or mailing of their absentee ballot." *Id*. This is in sharp contrast from statements made at the August 3 meeting by WEC's current chair, Commissioner Don Millis, who explained: "I feel that we are dropping the ball if we just abdicate this to the federal courts when we have an opportunity to provide guidance … that possibly could be accepted by the Court." *Special Meeting* at 1:56:03. WEC's administrative position—that is, its actual, non-litigation position—remains adverse to Plaintiffs, leaving a controversy for the Court to resolve.[6]

Based on their actions to date, Defendants have "not announced that the [restrictions on ballot-return assistance are] a dead letter, never to be enforced." *Hays v. City of Urbana*, 104 F.3d 102, 103-04 (7th Cir. 1997) (holding that the "City Attorney's representation that no prosecution is in the offing, because he has no evidence of any violation, therefore does not deprive the plaintiffs of standing"). Defendants could have submitted an affidavit supporting their litigation position, but have not; they could have issued guidance to the clerks, *see* Wis. Stat. § 5.05(1)(f), (5t), (6a), and

[6] Moreover, WEC could have issued guidance or an advisory opinion regarding its views on *Teigen*'s effect. *See* Wis. Stat. § 5.05(5t) (requiring updated guidance following publication of binding state court decision), (6a) (providing ability to issue advisory opinion if "supported by specific legal authority"). It has not.

have not done that either. Instead of providing evidence of their position, they hide behind their lawyers. *Cf. Koschkee v. Evers*, 913 N.W.2d 878, 883 (Wis. 2018) (allowing substitution of counsel where counsel here, the Wisconsin "DOJ has indicated that it will not argue the [defendant's position], but its own"). Defendants' silence on the key question of how Wisconsin clerks should actually apply the law is deafening.

Further, if past is prologue, this Court should be wary of taking Defendants, (or any litigant) at their word that a litigation position their attorneys argue in a brief is dispositive of how they will discharge their election administration obligations such that a lawsuit should be dismissed. As this Court knows all too well, in *League of Women Voters of Wisconsin v. Knudson*, the League of Women Voters of Wisconsin ("LWVWI") filed a complaint and moved for preliminary injunction in December 2019, seeking to enjoin WEC from deactivating the registrations of approximately 234,000 registered Wisconsin voters. *See* No. 19-cv-1029-jdp (W.D. Wis.), Dkts. 1, 7. WEC, represented there, as here, by the Wisconsin Department of Justice, told the Court that WEC "has adopted no plan to deactivate any voter registrations" and that the case was therefore unripe and should be dismissed. *Id.*, Dkt. 42 at 2. Based at least in part on WEC's representations to the Court in its brief, the Court dismissed the action, holding in part that because "the Commission has never indicated that it is planning to deactivate voter registration … the court lacks subject matter jurisdiction." *Id.*, Dkt. 62 at 3. Yet a year and a half later, in July 2021, WEC and its counsel acknowledged that their representations to the Court were in error. WEC had indeed approved a definitive deactivation plan in June 2019. *Id.*, Dkt. 64. Another federal

lawsuit was required to reinstate those voters' registrations, which was accomplished by stipulation earlier this month. *See League of Women Voters of Wis. v. Millis*, No. 21-cv-805-jdp (W.D. Wis.), Dkts. 20, 21.

Just as in *LWVWI v. Knudson*, Plaintiffs here have provided the Court with evidence of a position that WEC has stated as part of its election administration obligations, outside of the courtroom. And just like in that case, WEC's counsel here offers only what it claims is WEC's "litigation position" in opposition to Plaintiffs' injunction motion. Unless and until WEC (and not just its lawyers) disavow the prohibition on ballot-return assistance, statements like Administrator Wolfe's are likely to recur. This is especially true given that WEC has effectively passed the buck on this issue to Wisconsin municipal clerks despite WEC's responsibility to "prescribe uniform instructions for municipalities to provide to absentee electors." Wis. Stat. § 6.869; *cf. Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (until WEC speaks there is a continuing controversy and "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges"). Actions that can be reversed at the stroke of a pen or otherwise face minimal hurdles to re-enforcement do not defeat adversity in a case. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68-69 (2020) (per curiam).

II. Plaintiffs' Injuries Are Caused By Defendants And Are Redressable By The Relief They Request.

Plaintiffs' proposed statement of record facts—almost entirely undisputed by Defendants—provides a clear path between their concrete injury and Defendants'

conduct: Defendants caused Plaintiffs' injury by making statements interpreting Wisconsin law in a way that conflicts with federal law while also abdicating their responsibility to ensure the election laws are uniformly administered by municipal clerks. As Commissioner Spindell admitted, WEC's failure to act now creates a vacuum that tortures the election process for voters with disabilities, such as Plaintiffs. "We cannot have 1,850 [clerks] out there making their own rules." *Special Meeting* at 1:57:36. Yet, WEC has not provided requisite guidance, and instead opted to let Administrator Wolfe's comments stand largely intact. WEC is responsible for the mess it created regarding ballot-return assistance and that it refuses to clean up.

For one, WEC is charged with "the responsibility for the administration of … laws relating to elections" and "[p]ursuant to such responsibility" may "[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections." Wis. Stat. § 5.05(1)(f); *see also id.* § 5.05(2w) ("[t]he elections commission has the responsibility for the administration of chs. 5 to 10 and 12"). Likewise, Wolfe, as WEC Administrator, is charged with "perform[ing] such duties as the commission assigns to [] her in the administration of chs. 5 to 10 and 12." *Id.* § 5.05(3d). Wisconsin law makes Administrator Wolfe "the chief election officer" of Wisconsin. *Id.* § 5.05(3g).

WEC is also charged with ensuring elections are administered in a uniform manner. These duties include the mandatory requirement that WEC "***shall*** conduct regular information and training meetings at various locations in the state for county

and municipal clerks … to ***explain the election laws*** … to promote uniform procedures." Wis. Stat. § 5.05(7) (emphases added). This uniformity requirement extends specifically to absentee voting: "The commission ***shall*** prescribe uniform instructions for municipalities to provide to absentee electors." *Id.* § 6.869 (emphasis added). Failure to provide these instructions and guidance caused Plaintiffs' injuries and thus the conduct is traceable to WEC.

Yet despite these mandatory responsibilities, Defendants state that it is the "clerks who are responsible for the actions implicated by Plaintiffs' claims" and say that "meaningful, concrete relief cannot be provided to Plaintiffs here because no such clerk is before the Court." Dkt. 26 at 14, 16. Defendants argue that "under Wisconsin's decentralized system of election administration, it is the municipal clerks and their staffs—not the Commission—who are responsible for the actions by which Plaintiffs claim they would be harmed, and who thus would be in a position to provide meaningful relief." Dkt. 26 at 13. Defendants cannot escape this lawsuit by pointing their fingers at municipal clerks. *Cf. NRDC v. Dep't of State*, 658 F. Supp. 2d 105, 107 n.4 (D.D.C. 2009) ("That an agency's delegated authority can be revoked is too speculative to defeat standing on redressability grounds.").

To the contrary, the Legislature has expressly delegated to WEC the responsibility to administer elections state-wide and has made Administrator Wolfe the chief election officer. Indeed, Commissioner Spindell acknowledged that WEC is the responsible entity. "That's one of the reason's we exist, is to provide guidance …. That's why, … we are relevant, because we can provide good guidance to the clerks on this

very, very important matter." *Special Meeting* at 1:57:40. Thus, as some of WEC's own commissioners recognize, WEC is positioned to resolve this matter, and as a result it is the proper defendant from whom Plaintiffs must seek relief. Indeed, WEC has taken the position in other litigation that it is the correct entity to defend suits like this one. For example, it never disputed this issue in *Teigen*. There, WEC admitted that its guidance was relied upon by municipal clerks to create ballot drop boxes; it never pointed a metaphorical finger at the municipal clerks for actually erecting the ballot drop boxes. *Compare Compl.* ¶ 13, *Teigen v. WEC*, Case No. 21CV958 (Waukesha Cnty. Cir. Ct. June 28, 2021), Dkt. No. 2, *with* Answer ¶ 13, *Teigen v. WEC*, Case No. 21CV958 (Waukesha Cnty. Cir. Ct. Aug. 13, 2021), Dkt. No. 19. WEC should be estopped from stating otherwise now.

Should the Court agree with Plaintiffs and enjoin Defendants from administering elections in Wisconsin in ways that conflict with federal law and declare that Wisconsin voters with disabilities may have a person of their choice assist with returning their absentee ballots, by mail or in-person, for the upcoming November 2022 general election, that decision will be binding on WEC and Administrator Wolfe. Following a binding court decision, Wisconsin law provides that, "the commission shall issue updated guidance or formal advisory opinions" regarding that decision. Wis. Stat. § 5.05(5t). Relief in Plaintiffs' favor will redress these injuries by ensuring that WEC and Administrator Wolfe require clerks to allow Plaintiffs to have assistance returning their ballots (either by mail or in-person) without violating Wisconsin law.

Thus, the Court can redress Plaintiffs' injuries by ensuring that WEC and Administrator Wolfe administer elections in such a way that does not violate federal statutory and constitutional law, which would then be passed on to the clerks.

Even without a binding court opinion, Defendants have abdicated their responsibilities under Wis. Stat. § 6.869 to "prescribe uniform instructions for municipalities to provide to absentee electors." Defendants' post-*Teigen* "clerk communication" does not provide "uniform instructions" for whether absentee ballot-return assistance is permitted. It says only that clerks should discuss the list of "legal considerations" with their local legal counsel. Kilpatrick Decl. Ex. A. Clerks (and any counsel they consult) may well have disparate views on what is acceptable under Wisconsin and federal law. This can be redressed by an order declaring what Wisconsin law requires, forcing WEC to provide the uniform instructions mandated by Wisconsin law to clerks.

Finally, all of this is easily resolvable. If Defendants agree to be bound by the "litigation position" advanced here, they can issue guidance and appear at the hearing scheduled for August 24, 2022 to report that they have done so. But unless and until they do so, the state of law in Wisconsin is unsettled and Plaintiffs' injury remains.

III. Wisconsin Law Is Insufficient to Guarantee Plaintiffs' Federal Rights.

Defendants argue in the alternative that Wisconsin state law already provides all the relief Plaintiffs seek. Again, not true. WEC Commissioner Spindell admitted that without a clear right to ballot-return assistance, "people [do] not have a chance

to vote." *Special Meeting* at 1:56:17. But unlike federal voting rights and disability law—which mandate disabled voters be provided assistance and the benefits of the absentee ballot program on equal terms—Wisconsin law merely instructs clerks to "make reasonable efforts" to accommodate disabled voters "whenever feasible." Wis. Stat. § 7.15(14). Defendants' suggestion that the protections for disabled voters under Wisconsin law are coextensive with those under federal law is belied by the plain text of the statutes and undisputed evidence that clerks have categorically prohibited such assistance previously. *See* Dkt. 28 ¶¶ 32-33; *see also* Dkt. 29 at 9, 12-13. The United States Department of Justice agrees and, in its filing, makes clear that federal law requires greater protection. *See* Dkt. 29; *compare* 42 U.S.C. § 12132, 29 U.S.C. § 794(a) ("no qualified individual … shall … be excluded" from the services of a public entity), *and* 52 U.S.C. § 10508 "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance …"), *with* Wis. Stat. § 7.15(14) ("Each municipal clerk shall make ***reasonable efforts*** to comply ***with requests*** for voting accommodations made by individuals with disabilities ***whenever feasible***." (emphases added)). That Wisconsin law allows the rejection of an accommodation based on "those local officials' subjective sense of reasonableness and feasibility … unlawfully narrows the scope of Section 208's right to assistance," as well as the affirmative obligations under ADA, and the Rehabilitation Act. Dkt. 29 at 9, 12-13. Plaintiffs are thus likely to succeed on the merits of their ADA and Rehabilitation Act and VRA claims because the state law here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"

and is preempted. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (internal citation omitted); *see also* Dkt. 29 at 11-12.

Defendants' reading of Wis. Stat. § 7.15(14) is undercut by their brief. As Defendants put it, "***if*** in-person ballot return assistance ***is allowed*** … ***then*** state election law does not conflict with" federal law. Dkt. 26 at 17-18 (emphases added). Defendants, and Wisconsin state law, thus add two preconditions to Plaintiffs' rights to assistance that do not exist under federal law. *See also* Dkt. 29 at 12-13. "[T]he Rehabilitation Act ***requires*** public entities to modify federally assisted programs[.]" *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 748 (7th Cir. 2006) (emphasis added). And such modifications are required when "necessary to avoid discrimination on the basis of a disability." *Id.* (emphasis in original). Similarly, the ADA's use of the mandatory "shall," requires that public entities do more than merely consider a disabled person's request for a non-discriminatory program and accommodate when feasible. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"). Yet, under Wisconsin law, clerks are not ***required*** to provide an accommodation if—under their discretion—they conclude it is not feasible to do so. *See* Wis. Stat. § 7.15(14); Dkt. 29 at 12.

Where, as here, the nature of the disabled individual's limitation is open and obvious, WEC must affirmatively offer reasonable accommodations to ensure that those with disabilities are able to enjoy the same benefits as those without them. *See*

Cadena v. El Paso Cnty., 946 F.3d 717, 723 (5th Cir. 2020) ("In addition to their respective prohibitions of disability-based discrimination, both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals."); *Wis. Cmty. Servs.*, 465 F.3d at 747 ("[T]he Supreme Court has located a duty to accommodate in the [Rehabilitation Act] generally."); *cf. Garcia–Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 n.9 (1st Cir. 2000) ("[T]he ADA … imposes an affirmative obligation to provide reasonable accommodation to disabled employees.") Defendants do not dispute that Plaintiffs are disabled voters who cannot personally mail their absentee ballots. Defendants do not dispute that Plaintiffs require accommodations—ballot-return assistance—to access the franchise. And Defendants do not dispute that ballot return assistance is a reasonable accommodation.[7] *See, e.g.*, Dkt. 28 ¶¶43-75. And given that Defendants "litigation position" is that their laws require ballot-return assistance, providing such assistance affirmatively cannot fundamentally alter the absentee voting program, including because "it is required by … federal law—the Voting Rights Act." Dkt. 29 at 11. It cannot be that Plaintiffs are required to request an accommodation and hope that it is allowed. The VRA, Title II of the ADA, and Section 504 require WEC to affirmatively accommodate Plaintiffs by allowing ballot-return assistance. *See also* Dkt. 29 at 9-13.

[7] Even if Defendants did dispute the reasonableness of ballot return assistance, "[i]t is the state's burden to prove that the proposed changes would fundamentally alter their programs." *Steimel v. Wernert*, 823 F.3d 902, 916 (7th Cir. 2016). Defendants have certainly not met their burden.

Further, even if Wis. Stat. § 7.15(14) provided sufficient protections under federal law (and it does not), Plaintiffs are entitled to relief. Today, there exists no clear directive that local clerks must allow qualified disabled voters to use ballot-return assistance. Administrator Wolfe stated that such return assistance is not allowed. And Defendants' "clerk communication" gives discretionary power to clerks where none exists as a matter of federal law. That local clerks "may" consider Wis. Stat. § 7.15(14) does not comport with federal law's mandatory provisions that require the state absentee ballot program does not discriminate against voters with disabilities, like Plaintiffs. Consistent with WEC's communications, and Defendants' "litigation position," a clerk could consider and deny a disabled voters request for assistance as not feasible, disenfranchising that voter. Absent relief from this Court, clerks are free to administer absentee balloting program in that unlawful manner.

IV. The Declaration That Defendants Request Does Not Sufficiently Guarantee Plaintiffs' Vote Will Count.

Defendants ask the Court to enter a declaration that simply restates one federal law—52 U.S.C. § 10508. Adequate relief requires more. ***First***, sufficient relief must address Plaintiffs' ADA, Rehabilitation Act, and constitutional claims. A declaration that simply restates the provisions of the VRA does nothing to ensure disabled Wisconsin voters, like Plaintiffs', can access a non-discriminatory absentee balloting program as guaranteed by the ADA and Section 504. Nor does it guarantee that Plaintiffs' constitutional rights are sufficiently protected.

Second, a declaration—while necessary—is insufficient to fully protect Plaintiffs' rights. A declaration does not require WEC to prospectively administer elections

in a nondiscriminatory manner. As described above, Wisconsin' election-administration system is helmed by WEC, but provides some discretion to local clerks. Without an affirmative order from this Court, there is no guarantee that WEC or local clerks will take any action. They certainly have not to date. Further, there is no guarantee local clerks will even be made aware of this Court's declaration (nor any guarantee local clerks will interpret the ramifications of any such declaration consistent with this Court's intent). WEC must be ordered to take affirmative action not only to remedy its prior unlawful statements as to ballot-return assistance but also to ensure a non-discriminatory absentee-balloting program. At the very least, relief requires that local clerks be made aware of their obligations to Plaintiffs under federal law.

Third, the declaration, limited to "the upcoming November 2022 general election in Wisconsin," Dkt. 26 at 19, while appropriate in scope at this preliminary stage, does not defeat Plaintiffs' standing or otherwise moot the case. The requested declaration does not make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," because Plaintiffs will be forced to again request accommodation at every future local, primary, or general election. *Parents Involved in Comm. Schs. v. Seatlle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). Because Plaintiffs challenge the validity of Wisconsin's absentee ballot statute, WEC's harmful interpretation would continue to operate past the election for which Defendants' proffered declaration purports to remedy, and so this challenge must continue. *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992) (challenge to election code not moot because "there was every reason to suspect that the parties would bring the same challenge … in the

future"); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir. 1997) (challenge to Indiana law not moot once election had passed because same challenge could be raised to the same statute during the next election); *cf. N.Y. State Rifle & Pistol Assoc. v. New York*, 140 S. Ct. 1525, 1526 (2020) (case moot only where "the City amended the rule" to provide "the precise relief that petitions requested in the prayer for relief in their complaint") (per curiam).

Fourth, Defendants' proposed declaration is insufficient to ensure that voters with disabilities will have their votes counted in the event of a recount or recanvass. Indeed, these very ballots may be a target for candidates in close races. In a contested election, candidates have the right to challenge ballots they believe to be illegally cast. *See* Wis. Stat. § 7.54 ("In all contested election cases, the contesting parties have the right to have the ballots opened and to have all errors … either in counting or refusing to count any ballot, corrected by the board of canvassers or court deciding the contest."). By asserting their right to vote, Plaintiffs are now easily identifiable as, generally speaking, absentee voters who require ballot-return assistance. Absent an injunction and clear declaration of what Wisconsin law allows, a candidate may timely challenge a disabled person's ballot as invalid for being illegally cast using ballot-return assistance even though Plaintiffs here have argued those ballots are valid under federal law. Without a declaration from WEC (which WEC has thus far refused to give) an inspector may disqualify the ballot based on a misunderstanding or misapplication of the law. Plaintiffs should have confidence that casting their vote

with ballot-return assistance also means that their vote will count. Additional clarity beyond WEC's proposal is thus necessary.

CONCLUSION

WEC consists of its commissioners. Its commissioners recognize that WEC "dropped the ball" even though they "learned during the April election that there were a number of people with disabilities who were told by the clerks no, you cannot have somebody else drop this off for you." *Special Meeting* at 1:52:09. WEC's power lies in its ability to "provide good guidance to the clerks on this very, very important matter." *Id.* at 1:57:40. But for a "litigation position," WEC insists that there is no dispute here. Given the comments of its own commissioners—directly aligned with the public statements WEC's Administrator made—this "litigation position" is a paltry one. The distance between WEC's statements (through its commissioners and administrator) and the position WEC takes in litigation is vast and insurmountable. Yet, Plaintiffs' sacred rights to vote hang in the balance. To protect their rights against the reality of WEC's actual position, this Court should grant Plaintiffs' pending motion, and issue the requested declaratory and injunctive relief.

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Respectfully submitted

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