STATE OF WISCONSIN CIRCUIT COURT MARINETTE COUNTY

THOMAS OLDENBURG,

Plaintiff,

Case No. 24CV000043

v.

Case Code: 30701

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

Defendant Wisconsin Elections Commission ("WEC"), assisted by Defendant Meagan Wolfe, has promulgated absentee ballot envelopes that all municipal clerks in the state are required to use for all future elections. Problematically, the envelopes ask persons to certify false statements in conjunction with returning absentee ballots for voting—a crime. An immediate injunction needs to be issued to stop the use of these envelopes and preserve the integrity of all upcoming elections.

This Court recognized the need to address the merits of this action expeditiously at the status conference held on May 6, 2024. However, Defendants indicated at that time that, rather than allowing the Court to do so, they would insist on filing a motion for change of venue that if denied will immediately be appealed and an emergency stay on this action will be sought. This will result in weeks, if not months of delay. The upshot being that Defendants are intending to utilize specious motion practice to create delay that will result in the merits of this action being unaddressed in time for before the next statewide elections in August.

An injunction is warranted. Allowing the envelopes to be utilized in any election going forward will disenfranchise voters and put unsuspecting voters and election officials in legal jeopardy. As such, Plaintiff requests that this Court enter an Order restraining WEC from taking any action that would have the effect of requiring any municipal clerk to utilize the promulgated envelopes until the merits of this action can be addressed.

FACTS

Plaintiff incorporates the "Undisputed Facts" section from his Brief in Support of Judgment on the Pleadings. (Document # 24, pp. 3-9) In summary, Defendants admit that all absentee ballots requested through the website maintained by WEC—myvote.wi.gov ("MyVote")—are "electronic mail" requests as set out in Wis. Stat. § 6.86(1)(a)(6). They further admit that, in such cases the document that constitutes the actual "request" for the absentee ballot is the "EL-121" generated and attached to the email from the MyVote system that is sent to the municipal clerk.

Further, WEC has promulgated new absentee ballot envelopes, designated as Form EL-122. This new EL-122 requires an elector to certify that the *EL-122 is itself* the original, or is a copy of, the elector's "request" for the ballot. Municipal Clerks are required to utilize the EL-122s in every upcoming election. (Document # 24, pp. 8-9).

Plaintiff filed a motion for judgment in the pleadings on May 6, 2024. (Document # 23). This Court held a status conference on May 8, 2024. During that conference, the Court recognized the time-sensitive nature of the case and set the matter for a hearing on Plaintiff's motion for June 5.

However, Defendants' counsel then indicated that Defendants would be moving for discretionary change of venue. Plaintiff's counsel then raised a concern that if denied, Defendants would move for permissive appeal or file a petition for supervisory writ under Chapter 809, and concomitantly seek an emergency stay upon the action from the Court of Appeals or Supreme Court, preventing the merits of the action from being addressed in a timely manner.

Defendants' counsel indicated that this was possible as it was Defendants' legal right to do so. Plaintiff's counsel protested as the matter of venue is not threshold in nature; but indicated that any objection would be mooted if Defendants would agree to a stay on utilizing the envelopes until the merits of the action were addressed. Defendants' counsel would not agree and indicated it was reserving all legal rights in that regard.

ARGUMENT

I. TEMPORARY INJUNCTION

Wis Stat § 813.02(1) provides—

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

To receive a temporary injunction, a movant must demonstrate—

(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued;

(2) the movant has no other adequate remedy at law;

(3) a temporary injunction is necessary to preserve the status quo; and

(4) the movant has a reasonable probability of success on the merits.

Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty., 370 Wis.2d 644, 659-60, 883 N.W.2d 154 (Ct. App. 2016)(citing *A.L. Grootemaat & Sons, Inc.*, 80 Wis.2d at 520-21).. However, "[w]here one party is prohibited from acting only until the question of legal rights can be resolved, a showing of irreparable damage would not be as critical." Shearer v. Congdon, 25 Wis.2d 663, 669, 131 N.W.2d 377 (1964).

II. PLAINTIFF MEETS THE ELEMENTS FOR GRANTING A TEMPORARY INJUNCTION.

A. Plaintiff is likely to suffer Irreparable Harm if an Injunction is not issued.

WEC's promulgation of, and requirement that all municipal clerks utilize the new EL-122s creates legal peril for voters and clerks and will disenfranchise voters, including the Plaintiff. If Plaintiff attempts to exercise his legal right to vote absentee in the future, for his vote to count, he is required to return the ballot in the new EL-122 and certify to a false statement—that the EL-122 itself is an original or a copy of his request for an absentee ballot. The EL-122 is not a copy of any request for an absentee ballot. It is its own separate document. Allowing WEC to continue to implement the rule that is the new EL-122, and require its use in all upcoming elections, will have the effect of disenfranchising Plaintiff as well as any other voter who would refuse to falsely certify that *the EL-122 itself* is the request for the absentee ballot being returned or a copy thereof.

Plaintiff and other similarly-situated voters are left with a Hobson's choice—sign the certification or your absentee ballot is not counted. What if Plaintiff, relying on

WEC's "blessing" of this language, decides to sign the certification so that his absentee ballot may be counted? Doing so, the voter is "[f]alsely mak[ing a] statement for the purpose of obtaining or voting an absentee ballot under ss. 6.85 to 6.87" and is subject to the penalty of section 12.60(1)(b). (*See* Document # 24, pp. 22-24). Any vote cast or counted in such a manner will likely lead to irreparable harm if the Defendants are not restrained from continuing to implement the EL-122.

As was noted by the Wisconsin Supreme Court in *Teigen v. Wis. Elections Comm'n*, 2022 WI 64 (2022)(Opinion filed July 8, 2022), when elections are conducted outside the law, "the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate." *Id.* at ¶ 23. Every Wisconsin elector, including the Plaintiff, suffers an injury in fact when votes are cast via an unlawful method. Id. at ¶ 24. The Court further noted—

> the failure to follow election laws is a fact which forces everyone——even DSCC——to question the legitimacy of election results. Electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government. Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results.

Id. at ¶ 25.

Importantly, no one has identified a remedy for the injury caused by illegally cast ballots. Under current Wisconsin precedent, "a vote cast in reliance on a document produced by the WEC's staff to be counted even if the vote's counting is unlawful under the statute the staff purportedly interpreted." *Id*. at ¶ 129 (REBECCA GRASSL BRADLEY, J. (concurring)(citing *Trump v. Biden*, 2020 WI 91, ¶ 27, 394 Wis. 2d 629, 951 N.W.2d 568).

In *Trump*, the Court refused to consider the incumbent President's challenge to the legality of absentee votes asserted to be cast in violation of several provisions of Wisconsin law. In deciding that laches prevented the consideration of the various challenges, in part the Court held that it would be prejudicial to those who cast votes in reliance on WEC guidance—

> [T]he respondents, and indeed all voters, are prejudiced if the ballots collected at the "Democracy in the Park" events are invalidated. Voters were encouraged to utilize the events, and 17,000 voters did so in reliance on representations that the process they were using complied with the law. Striking these ballots would disenfranchise voters who did nothing wrong when they dropped off their ballot where their local election officials told them they could.
>
> In short, if the relief the Campaign sought was granted, it would invalidate nearly a quarter of a million ballots cast in reliance on interpretations of Wisconsin's election laws that were well-known before election day.
> …
>
> In each category of ballots challenged, voters followed every procedure and policy communicated to them, and election officials in Dane and Milwaukee Counties followed the advice of WEC where given.

Trump, 2020 WI 91 at ¶ 28-29, 31.

In other words, in *Trump* the Court took issue with the timing of the incumbent President's challenges to certain votes because the voters relied on previously issued guidance by election officials, relying on advice given to them by WEC. Plaintiff fears that the same issues will arise regarding illegal advice provided by the Defendants in future elections when, again, there is little to no time to challenge any faulty interpretation of Wisconsin election law.

The problem above is magnified when the agency statutorily-charged with administering elections essentially requires unlawful activity on the part of voters and clerks. WEC's promulgation is of the EL-122, which foments election fraud, is an *ultra vires* act. WEC does not have the authority to require that anyone make a false statement to have their vote count. Votes and clerks rely on WEC for the provision of forms and information so that they can cast votes without running afoul of laws surrounding voting. WEC has completely abdicated that duty in this instance.

In addition, an injunction is required by Defendants' actions in requesting a discretionary change of venue. It was clearly indicated at the status conference that Defendants intend to seek an immediate appeal and a stay in this action should their motion not be granted. Such an action would thwart the process that the Court believed, and Plaintiff agrees, should be implemented. That is to address the merits of this action in an expeditious manner.

Defendants' effort to change venue requires this court act now to issue an injunction. Defendants want to "run out the clock" on this action. If the motion to change venue is denied, followed by the likely significant delay at the Court of Appeals, as sure as the sun rises in the east Defendants will assert—

> … precedent dictates that the rules of election administration should not be changed in the midst of an ongoing election. Hawkins v. WEC, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; see also Purcell v. Gonzalez, 549 U.S. 1 (2006). The granting of Plaintiff's motion would not only alter the status quo, but it would do so by changing election rules in the midst of, or at least on the eve of, the November 2020 general election. Plaintiff's motion may be denied on this basis, as well.
>
> In *Hawkins*, the Wisconsin Supreme Court recognized that last-minute election changes can "cause confusion and undue

> damage to . . . the Wisconsin electors who want to vote." 393 Wis. 2d 629, ¶ 5.[8] In that case, the petitioner asked for relief that would disturb an ongoing election mere days before the deadline to return absentee ballots, and the court rejected that effort. Id. ¶¶ 2–5.
> …
> 8 The U.S. Supreme Court concurs with this reasoning. "As an election draws closer," "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). It has therefore "insisted that federal courts not change electoral rules close to an election date." Democratic *Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020).

Scott Aff., ¶ 2, Ex. A, pp. 23-24 (Brief filed by WEC in Waukesha County Case Number 2021CV001620 Paul Archambault et al vs. Wisconsin Elections Commission et al.).

Certainly, there is almost always an election "drawing closer." The purpose of the upcoming venue motion is essentially to delay this matter until either the merits could not be addressed before the August elections and/or Defendants could argue precedent it hopes would get this court, and any appellate court, to do nothing for fear of "voter confusion."

The EL-122s must not be used in any upcoming election. It is imperative the Court act immediately in this regard. Issuing an injunction now will allow Defendants to pursue whatever procedural motions they wish and there will be no risk that any voters are disenfranchised or put in legal jeopardy by the illegal EL-122s.

B. Plaintiff has no adequate Remedy at Law.

Here, the injury sustained cannot be compensated by an award of monetary damages and as such, this element is satisfied. *See American Mut. Liability Ins. Co. v.*

Fisher, 58 Wis.2d 299, 305, 206 N.W.2d 152 (1973)(To receive an injunction there must be an "irreparable injury that cannot be compensated by money damages.")

C. A Temporary Injunction is necessary as the Status Quo is causing Irreparable Harm.

A temporary injunction is necessary to restrain the Defendants from taking further illegal or *ultra vires* action that would have the effect of polluting upcoming elections and/or causing irreparable harm to Plaintiff, other Wisconsin voters and clerks as well. While a temporary injunction is generally designed to preserve the status quo of the parties and prevent irreparable loss, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." *Canal Auth. Of the State of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir.1974). Thus, "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id*; *Or. Pub. Interest Research v. Pac. Coast Seafoods*, 374 F.Supp.2d 902, 907 (D. Or. 2005).

Here it is the status quo that is causing irreparable injury. The EL-122s are in use and required by WEC. Every one that signed and returned by a voter, or every voter that refuses to do so and therefore does not have a ballot counted, constitutes a potential irreparable injury. This element weighs in favor of Plaintiff.

D. Plaintiff has a reasonable probability of Success on the Merits.

The facts are not disputed, and the law is clear. Requiring voters to attest that the EL-122 itself is the request for the absentee ballot being returned or a copy thereof is requiring them to make a false statement in violation of the law. Defendants admit that, in the case of MyVote absentee ballot requests, the "request" is the is the EL-121 generated and attached to the email from the MyVote system that is sent to the

municipal clerk, based on the "requester" completing the online request process. (Document # 3, ¶¶ 35-36, Document # 22, ¶¶ 35-36).

WEC's admissions in this matter foreclose any other interpretation as to what the law requires when returning such a ballot—Wis. Stat. §§ 6.86(1)(ac) and 6.87(4) require that when returning an absentee ballot requested via MyVote that the elector must also return "in the envelope" a copy of the "EL-121" form generated by the MyVote system bearing an original signature of the elector.

Any other interpretation would lead to absurd results. *See State ex rel. Sielen v. Circuit Court for Milwaukee County*, 176 Wis.2d 101, 109, 499 N.W.2d 657, 660 (1993) (courts should interpret statutes to avoid absurd outcomes). The statutes require that a signed copy of the request be returned "in the envelope" in which the voted ballot is returned. WEC admits the EL-121 is the request. The EL-122 ***is*** the envelope in which the ballot is returned. The EL-122 is ***not*** a "copy" of the EL-121. It would be plainly absurd to interpret otherwise, and Plaintiff has more than a reasonable probability of success on the merits.

CONCLUSION

Defendants have created a situation where the integrity of future elections is being placed in doubt. They have also created a situation where hundreds of thousands of people are being asked to certify to a false statement in the act of voting—a crime. Defendants' promulgation of the EL-122 envelopes, that has created this situation must be corrected immediately. Any other result would be a disservice to every Wisconsin voter and election official that has been put in harm's way by the actions of the Defendants.

Dated at New Berlin, Wisconsin, this 14th day of May, 2024.

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