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Outagamie County
2024CV000774

STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

CRYSTAL RECKER and
NANCY WHITE,

Plaintiffs,

Case No.: 24-CV-_____
Code No.: 30704, 30701, 30952

v.

CITY CLERK FOR THE CITY OF APPLETON,

Defendant.

**BRIEF IN SUPPORT OF MOTION FOR EMERGENCY EX-PARTE
TEMPORARY RESTRAINING ORDER, TEMPORARY
INJUNCTION, DECLARATORY RELIEF, AND ORDER**

The above-named Plaintiffs, by their attorneys, the Law Firm of Conway, Olejniczak & Jerry, S.C., submit this Brief in Support of the above-referenced motion. For the reasons stated below, the City Clerk for the City of Appleton (“Defendant”) must be immediately restrained from violating Wis. Stat. § 6.875 and § 7.30, which require that Defendant give preference to and schedule Plaintiffs, and other individuals nominated by the Republican Party and appointed by the Appleton Common Council, to serve as special voting deputies at qualified retirement homes and residential care facilities in the City of Appleton for the August 13 Partisan Primary.

The rights afforded under Wis. Stat. § 6.875 and § 7.30 grant the Republican and Democratic parties the ability to nominate election officials to conduct our elections and provide priority to such nominations before non-affiliated individuals are allowed to serve, and are essential to the open and transparent administration of our elections. Such nominations by the Republican and Democratic parties must be given preference before Defendant appoints or schedules any non-affiliated special voting deputy. Yet, Defendant has rejected all 15 of the

Republican party special voting deputies, including Plaintiffs, and refused to schedule them to act as special voting deputies for the August 13th Partisan Primary.

Plaintiffs, as nominated and appointed election officials, are harmed since their right to act as special voting deputies, as provided under Wis. Stat. § 6.875 and 7.30, is being denied. Furthermore, the blatant violation of these statutes raises the real risk of unequal administration of Wisconsin's election system where, in other municipalities conducting voting at qualified residential homes or residential care facilities, absentee voting in such homes or facilities is conducted by special voting deputies nominated by the two recognized political parties. Lastly, Plaintiffs and the public, as a whole, are harmed since the public is entitled to participate in elections that are administered in accordance with the law. If Defendant is allowed to arbitrarily reject previously nominated Republican Party special voting deputies, in violation of the law and purely based on their party affiliation, it will only cast doubt on the administration of elections and harm voters' confidence in the electoral process.

FACTS

Wisconsin law offers residents of residential care facilities and qualified retirement homes the opportunity to cast in-person absentee ballots from their facility or home in a process overseen by special voting deputies. Wis. Stat. § 6.875. The law provides that absentee voting inside residential care facilities and qualified retirement homes "shall be conducted by municipalities only in the manner prescribed in [§ 6.875]" and is "the exclusive means of absentee voting in person inside that facility or home for electors who are occupants of the facility or home." Wis. Stat. § 6.875(2)(a).

Special voting deputies are a type of "election official," which is defined as "an individual who is charged with any duties relating to the conduct of an election." Wis. Stat. §

5.02(4e). Nominations of individuals to act as special voting deputies “may be submitted by the 2 recognized political parties whose candidates for governor or president received the greatest number of votes in the municipality at the most recent general election” and “shall be specially appointed to carry out the duties under par. (a) for the period specified in s. 7.30(6)(a).” Wis. Stat. § 6.87(4)(b). The “[a]ppointment of election officials” is governed by Wis. Stat. § 7.30 and provides that “only those persons submitted by the chairperson” of the 2 political parties “may act as election officials.” Wis. Stat. § 7.30(4)(b)2.a. As long as nominees are available from a political party, “appointments may be made only from the lists of nominees submitted” by the political parties. Wis. Stat. § 7.30(4)(c). The Wisconsin Elections Commission has issued substantially similar guidance to clerks and the general public expressly indicating that, only when “no nominations are submitted” by the political parties, “then the municipal clerk may appoint qualified electors of the county without regard to party affiliation.” (Compl. Ex. G at 11—12; see also Compl. Ex. F at 126).

The deadline for political parties to submit a list of nominees for special voting deputies to municipalities was November 30, 2023. Wis. Stat. §§ 6.875(4) and 7.30(4). *See also* Wis. Elec. Comm’n, *Calendar of Election Events Nov. 2023 – Jan. 2025*, at 1, located at: <https://elections.wi.gov/sites/default/files/documents/Wisconsin%20Elections%20Commission%202024%20Calendar%20of%20Election%20Events%20%28Rvsd%20Feb19.2024%29.pdf> (last visited July 15, 2024). Pursuant to the procedures set forth in Wis. Stat. § 6.785, a municipality is required to “appoint at least 2 special voting deputies for the municipality” in the event that absentee voting in a qualified retirement home or residential care facility takes place and “shall dispatch 2 special voting deputies to visit the home or facility for the purpose of supervising absentee voting procedure by occupants of the home or facility.” *Id.* (4)(a). The deadline for the

governing body of a municipality to appoint election inspectors and special voting deputies for the 2024—2025 term was December 31, 2023. *Id.* The municipal clerk is required to maintain a list of each home or facility where special voting deputies are dispatched, including the date and time the deputies intend to visit each home or facility. *Id.*

The first day for special voting deputies to conduct absentee voting for residents of qualified retirement homes and residential care facilities in Wisconsin for the upcoming August 13th Partisan Primary is July 22, 2024, and the last day for special voting deputies to conduct absentee voting for residents of qualified retirement homes and residential care facilities for the upcoming Partisan Primary is August 12, 2024. Wis. Stat. § 6.875(6). The Plaintiffs are residents of Outagamie County and qualified to act as special voting deputies in the City of Appleton. (Recker Aff. ¶¶ 2-11; White Aff. ¶¶ 2-11). Plaintiffs are affiliated with the Republican Party and were previously nominated by the Outagamie County Republican Party—along with 15 other nominees—prior to November 30, 2023, the county committee for one of the two recognized political parties in Wisconsin, to serve as an election officials, more specifically identified as a special voting deputies or “SVDs” in the City of Appleton. (Compl. Ex. A; Recker Aff. ¶¶ 12-13; White Aff. ¶¶ 12-13. Both Plaintiffs were included in the nomination list, which specifically requested appointment as an “SVD.” (*Id.*).

On December 6, 2023, the City of Appleton Common Council considered the nominations submitted by the Republican Party, as part of Item No. 23-1421, and appointed Plaintiffs.¹ (Compl. Exs. B and C; Recker Aff. ¶ 14; White Aff. ¶ 14). On or about July 12, 2024, a representative of Defendant provided notice of the locations, dates, and times for absentee voting at qualified residential homes and residential care facilities in the City of Appleton related

¹ See a recording of that December 6, 2023 Common Council meeting at: https://cityofappleton.granicus.com/player/clip/4344?view_id=3&meta_id=348664&redirect=true (see 2:47 – 4:45 of the video recording related to the discussion and passage of).

to the August 13th Partisan Primary, as well as identifying by name the special voting deputies who were scheduled. (Compl. Exs. D and E (the “ Schedule”); Goehre Aff. ¶ 5, Ex. B). The Schedule provides for special voting deputies to conduct absentee ballot voting at 7 different qualified retirement homes or residential facilities in the City of Appleton from July 23, 2024 through August 7, 2024. (*Id.* Ex. E). Contrary to the aforementioned statutes, and Commission instructions, it appears that Defendant’s practice is to only allow political party special voting deputies if both political parties have nominated individuals to act as special voting deputies. (Goehre Aff. ¶ 4, Ex. A). Neither Plaintiffs nor any other Republican Party nominated special voting deputy is identified in the Schedule. (White Aff. ¶¶ 15-18; Recker Aff. ¶¶ 15-18).

STANDARD

Wis. Stat. § 813.02 makes injunctive relief available to a litigant facing the threat of irreparable injury. The standard for issuance of injunctive relief is well known. As summarized in the seminal Wisconsin Supreme Court case, the standard is as follows:

A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

Werner v. A.L. Grootemat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W. 2d 310, 313-314 (1977); *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263 (noting that whether “public interest” favors relief should also be considered).

Although the grant or denial of injunctive relief is a matter of discretion for the circuit court, *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, it may become mandatory once a reasonable probability of success is shown and the threat

of irreparable injury exists. *Shearer v. Congdon*, 25 Wis. 2d 663, 668 (1964) (emphasis added) (internal citation omitted). Furthermore, the enforcement of a statute to protect a person's statutory right is regularly recognized as a basis for injunctive relief. *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 47, 380 Wis. 2d 354, 909 N.W.2d 114 (“It is nearly tautological to observe that losing a statutorily-granted right is a harm. Losing the right with no means to recover it makes the harm irreparable.”).

ARGUMENT

I. PLAINTIFFS HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

The requirements of Wis. Stat. § 6.875 and § 7.30 are the established law and policy of the State of Wisconsin, as mandated by the Wisconsin Legislature. Defendant does not have the authority to set aside or disregard the political parties' clear right to have their nominated and appointed special voting deputies actually conduct absentee voting at qualified retirement homes and residential care facilities before any individual undertakes those duties who is not affiliated with those parties. But, Defendant did the exact opposite of what the law requires. By rejecting Plaintiffs and all of the Republican Party nominees (all of which were approved of and appointed by the Common Council), and only scheduling non-affiliated individuals, Defendant has flagrantly disregarded the express obligation to, first, utilize political party special voting deputies before non-affiliated individuals are utilized. Moreover, there is no basis to reject Plaintiffs simply because they were nominated by the Republican Party or simply because the Democratic Party may not have expressly nominated any special voting deputies.

To establish a “reasonable probability of success,” Plaintiffs do not need to actually prove their case. Rather, the “threshold is low” at this particular stage, and “it is enough that the plaintiff's chances are better than negligible.” *Roland Mach. Co. v. Dresser Indus., Inc.*, 749

F.2d 380, 387 (7th Cir. 1984) (applying Wisconsin law). Furthermore, when faced with questions of statutory interpretation, courts must adhere to the plain, clear words of the statute. *Brown Cnty. v. Brown Cnty. Taxpayers Ass'n*, 2022 WI 13, ¶ 3, 400 Wis. 2d 781, 971 N.W.2d 491. In fact, courts are duty-bound to apply and enforce the plain language of a statute enacted by the Legislature. *Valadez v. Valadez*, 2022 WI App 2, ¶ 20, 400 Wis. 2d 523, 969 N.W.2d 770.

Here, Plaintiffs seek relief for ongoing violations of Wisconsin's election statutes by Defendant, which deprive them of their right to serve as special voting deputies, as provided by Wis. Stat. § 6.875 and § 7.30. Wisconsin's election statutes on this topic are clear and unambiguous. First, Wis. Stat. § 5.02(4e) defines "election official" as "an individual who is charged with any duties relating to the conduct of an election." This would include, among others, special voting deputies who are charged with conducting absentee voting in qualified residential homes and residential care facilities within a municipality. Wis. Stat. § 6.875(2)(a).

Second, Wis. Stat. § 7.30, titled "Appointment of Election Officials," generally provides that nominations of individuals to act as special voting deputies "may be submitted by the 2 recognized political parties whose candidates for governor or president received the greatest number of votes in the municipality at the most recent general election" and "shall be specially appointed to carry out the duties under par. (a) for the period specified in s. 7.30(6)(a)." Wis. Stat. § 6.87(4)(b).² The "[a]ppointment of election officials" is governed by Wis. Stat. § 7.30 and provides that "only those persons submitted by the chairperson" of the 2 political parties "may act as election officials." Wis. Stat. § 7.30(4)(b)2.a. As long as nominees are available from a

² The "[d]eadline for political parties to submit [the] list of nominees for . . . special voting deputies to municipalities" was November 30, 2023 and the "[d]eadline for [the] governing body of a municipality to appoint . . . special voting deputies for the 2024-2025 term" was December 31, 2023. Wis. Elec. Comm'n, *Calendar of Election Events Nov. 2023 – Jan. 2025*, at 1, located at: <https://elections.wi.gov/sites/default/files/documents/Wisconsin%20Elections%20Commission%202024%20Calendar%20of%20Election%20Events%20%28Rvsd%20Feb19.2024%29.pdf> (last visited July 15, 2024); Wis. Stat. §§ 6.875(4) and 7.30(4).

political party, “appointments may be made only from the lists of nominees submitted” by the political parties. Wis. Stat. § 7.30(4)(c).

By the December 31st deadline, the municipality is required to “appoint at least 2 special voting deputies for the municipality” in the event that absentee voting in a qualified retirement home or residential care facility takes place and “shall dispatch 2 special voting deputies to visit the home or facility for the purpose of supervising absentee voting procedure by occupants of the home or facility.” Wis. Stat. § 6.875(4)(a). Additionally, whenever special voting deputies representing different political parties are available, the “2 deputies designated to visit each qualified retirement home and residential care facility shall be affiliated with different political parties.” Wis. Stat. § 6.875(4)(a).

The law is clear that if either the Democratic or Republican Party submits nominees to act as special voting deputies, Defendant is required to allow them to act as special voting deputies. There is no authority granted to the Defendant to disregard Plaintiffs purely based on their party affiliation, and there is certainly no authority for the suggestion that non-affiliated individuals should be given preference over political party nominees for special voting deputy—indeed, the exact opposite is what is required. Not only is Defendant’s practice contrary to law, but it is also contrary to guidance from the Wisconsin Elections Commission—which is consistent with Plaintiffs’ interpretation—indicating the following:

Selection and Appointment

1. Nominations for special voting deputy positions may be submitted by the two dominant political parties at the same time as election inspector nominations are submitted. If no nominations are submitted, **then** the municipal clerk may appoint qualified electors of the municipality of his or her choosing, without regard to party affiliation.
2. The two deputies designated to conduct absentee voting at each facility should be affiliated with different political parties whenever possible.

(Compl. Ex. F (Wis. Elec. Comm'n, *Election Administration Manual*, pp. 125-126, Feb. 2024, located at: https://elections.wi.gov/sites/default/files/documents/EA%20Manual-February%202024_format%20update.pdf (last visited on July 15, 2024)(emphasis added)).

Likewise, the Commission's Election Day Manual instructs clerks as follows:

Nominations for special voting deputy positions may be submitted by the two dominant political parties at the same time as election inspector nominations are submitted. **If no nominations are submitted, then the municipal clerk may appoint qualified electors of the county without regard to party affiliation.** At least two SVDs must be appointed, if any.

(Compl. Ex. G (Wis. Elec. Comm'n, *Election Day Manual*, pp. 11-12, Feb. 2024, located at: <https://elections.wi.gov/sites/default/files/documents/ED%20Manual-February%202024.pdf> (last visited on July 18, 2024). *See also* Wis. Elec. Comm'n, *Manual on Absentee Voting in Residential Care Facilities and Retirement Homes*, pp. 125-126, Jan. 2024, located at: <https://elections.wi.gov/sites/default/files/documents/Absentee%20Voting%20in%20Residential%20Care%20Facilities%20and%20Retirement%20Homes%20%282024-01%29.pdf> (last visited on July 16, 2024) (As long as there are submissions from a political party, "SVDs must be selected from the lists.")).

Furthermore, it is important to remember that the provisions related to absentee voting conducted by special voting deputies are mandatory, subject to strict compliance, and Defendant has no discretion to disregard those requirements. Wis. Stat. § 6.84(1), (2), and § 6.86(1)(a)5 (referencing the procedure to apply to vote "to a special voting deputy"). Indeed, there are strong justifications for strict application of the laws governing absentee ballot voting, including the increased risk of voter fraud and abuse, which the Legislature has expressly noted:

[V]oting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional

safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1) (emphasis added). By arbitrarily rejecting or otherwise refusing to schedule Plaintiffs and other Republican Party nominees to act as special voting deputies for the August 13th Partisan Primary, the Defendant has clearly violated the law.

II. WITHOUT INJUNCTIVE RELIEF, PLAINTIFFS WILL SUFFER IRREPARABLE INJURY AND HAVE NO ADEQUATE REMEDY AT LAW OTHER THAN RESTORATION OF THE STATUS QUO.

The irreparable harm that Plaintiffs and the public are exposed to, as a result of Defendant's arbitrary and unlawful actions, is self-evident. Defendant's current policy resulting in the Plaintiff's and other Republican Party's nominees inability to serve as special voting deputies and conduct in-person absentee ballot voting in qualified residential homes or residential care facilities in Appleton, despite being properly nominated and appointed by the City, blatantly infringes on their rights as set forth in Wis. Stat. § 6.875 and §7.30. Aside from the equitable relief requested herein, there are no other means to retroactively remedy the Plaintiffs' inability to serve as special voting deputies for the August 13th Partisan Primary as a result of Defendant's actions. Furthermore, Defendant's continued violations will further infringe on Plaintiff's rights in relation to the November 5th General Election, and will continue to tarnish election administration in the City of Appleton.

The refusal to allow Plaintiffs to invoke their rights under Wis. Stat. § 6.875 and § 7.30 constitutes irreparable harm. *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 47, 380 Wis. 2d 354, 909 N.W.2d 114 ("It is nearly tautological to observe

that losing a statutorily-granted right is a harm. Losing the right with no means to recover it makes the harm irreparable.”); *Pure Milk Prod. Co-op v. Nat. Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (an “injury is irreparable” where it is “not adequately compensable in damages”); *Joint Sch. Dist. No. 1, City of Wisconsin Rapids v. Wisconsin Rapids Educ. Ass’n*, 70 Wis. 2d 292, 310–11, 234 N.W.2d 289, 300 (1975) (an “unlawful activity may be enjoined in the absence of an express showing of irreparable damage” since the unlawful activity reflects a “legislative . . . determination that such activity will cause irreparable harm to the public”).

The return to special voting deputy appointments and absentee voting practices consistent with the clear commands of the Wisconsin State Legislature and Wisconsin Statutes is worthy of injunctive relief. Such relief will ensure that Plaintiffs do not suffer significant and irreparable harm to their right to serve as special voting deputies. Moreover, such relief will return us to the proper *status quo*—Plaintiffs appointment by the Common Council on December 6, 2023 to serve as special voting deputies in the elections in 2024—the *status quo* that existed before Defendant unilaterally refused to allow Plaintiffs to serve as special voting deputies as of July 12, 2024. *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958) (“The status quo is the last uncontested status which preceded the pending controversy.”); *LTD Commodities, Inc. v. Perederij*, 699 F.2d 404, 406 (7th Cir. 1983) (“[I]t is the last uncontested status preceding the controversy which is to be maintained by the court, rather than a status wrongfully altered by unilateral action after a dispute has arisen.”).

III. CONSIDERATION OF THE PUBLIC INTEREST FAVORS GRANTING INJUNCTIVE RELIEF.

The public interest, including the lawful administration of the absentee voting process in qualified retirement homes and residential care facilities, clearly demonstrates the need for injunctive relief. By prohibiting Plaintiffs from exercising their right to serve as special voting

deputies in the City of Appleton and conduct in-person absentee voting at qualified retirement homes and residential care facilities, the voting procedure at such homes is tainted and it seriously impairs the integrity of those votes. Defendant has clearly demonstrated that unless Defendant is enjoined, it will continue to administer in-person absentee ballot voting in qualified retirement homes and residential care facilities contrary to law.

Additionally, voters are now faced with the very real prospect of election laws being administered inconsistently throughout different parts of the state since most clerks will follow the guidance provided by the Wisconsin Election Commission that is consistent with the relief sought by Plaintiffs—but contrary to Defendant’s arbitrary refusal to allow political party special voting deputies to serve. Preventing non-uniform, disparate election policies and practice by municipal clerks is of paramount importance to the public’s interest in having elections that are administered properly and in accordance with the law.

Accordingly, Plaintiffs respectfully requests that this Court order an immediate restraining order and temporary injunction, consistent with the relief requested in the Complaint, through the November 5, 2024 General Election.

Dated this 19th day of July, 2024.

THE LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
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