

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

STATE OF WISCONSIN EX REL. ARDIS CERNY, et al.

Petitioners,

ASSEMBLY COMMITTEE ON CAMPAIGNS
AND ELECTIONS, et al.

Case No. 24CV1353

Case Code: 30952

Involuntary Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION, et al.

Respondents.

**PETITIONERS' NOTICE AND MOTION FOR ORDER GRANTING
TEMPORARY RELIEF OR PRELIMINARY INJUNCTION**

PLEASE TAKE NOTICE that pursuant to § 781.02, Stats., and in the alternative pursuant to § 813.02, Stats., Petitioners by their attorneys move the Court for an Order granting temporary relief or a preliminary injunction directing that Respondents Wisconsin Elections Commission and Department of Transportation immediately

1) Match information in their respective databases sufficient to verify United States citizenship of current registrants with records in the WisVote official voter registration list maintained pursuant to § 6.36, Stats., and

2) Provide and maintain a system enabling Respondent Wisconsin Elections Commission and municipal and county clerks to verify citizenship of voter registration applicants on the same instant basis as they verify proof of residence pursuant to § 6.34(4), Stats.,

Petitioners further request that the Order direct that in the event the match of information or verification indicates that the Department of Transportation has no record that an existing registrant or registration applicant is a citizen, no such registrant or applicant may be deactivated,

removed from the List, or otherwise denied the opportunity to establish his or her qualification or the right to vote except pursuant to existing notice and challenge procedures provided in §§ 6.32 and 6.326, Stats., or subch. V of ch. 6, Stats., or other applicable statutory provisions, and that any such registrant or applicant may utilize the ID Petition Process provided by Respondents Department of Transportation to obtain a birth certificate or other documentary proof of citizenship as provided in §§ 343.165(8)(a) and 343.50(1), (3), Stats., and Wis. Admin. Code Trans §§ 102.15(2)(bm), 102.15(5m).

This motion is supported by Petitioners' Amended Verified Petition and Complaint for Writ of Mandamus, Declaratory Judgment and Common Law Certiorari Review and Petitioners' Brief in Support of Motion for Order Granting Temporary Relief or Preliminary Injunction filed herewith.

September 30, 2024.

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**PETITIONERS' BRIEF IN SUPPORT OF MOTION FOR ORDER GRANTING
TEMPORARY RELIEF OR PRELIMINARY INJUNCTION¹**

Petitioners have moved for temporary relief or preliminary injunction pursuant to §§ 781.02 and 813.02, Stats. The relief available under § 781.02 appears intended to provide a provisional or preliminary remedy in an action or proceeding seeking a “writ of mandamus, prohibition, quo warranto, certiorari or habeus corpus” provided in § 781.01. There appears to be no case law developing standards under § 781.02 for temporary relief in those actions any different than the elements of the claims themselves, and in any event the expedited treatment contemplated in mandamus actions and the ex parte emergency relief authorized under § 781.02 are subject to the current scheduling order, so customary standards applicable to motions for a preliminary injunction under § 813.02 seem most appropriate.

Petitioners’ Motion seeks a preliminary injunction related only to their claim that citizenship information provided by every voter registration applicant (except those in military service) is “personally identifiable information” that §§ 5.056 and 85.61(1) require WEC and DOT to match

¹ Referred to herein as “Amended Pleadings” or “Amd. Pld.”

“to the extent required to enable the secretary of transportation and the administrator of the elections commission to verify the accuracy of the information provided for the purpose of voter registration.” Sec. 85.61(1).²

STANDARDS

Standards for mandamus and injunction are similar, but not identical. To obtain temporary relief pursuant to § 781.02, Petitioners must apparently show probability of success pursuing mandamus under § 781.01, which requires showing “(1) a clear legal right; (2) a plain and positive duty; (3) substantial damages or injury should the relief not be granted, and (4) no other adequate remedy at law.” *State ex rel. S.M.O.*, 110 Wis.2d 447, 449, 329 N.W.2d 275 (Ct. App. 1982).

To obtain a preliminary injunction, Petitioners must show: (1) likelihood of success on the merits; (2) irreparable harm; (3) necessity to preserve the status quo; and (4) no other remedy at law. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310, 314 (1977); *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.*, 2016 WI App. 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154.

² Sec. 5.056 provides:

5.056 Matching program with secretary of transportation. The commission administrator shall enter into the agreement with the secretary of transportation specified under s. 85.61 (1) to *match personally identifiable information on the official registration list* maintained by the commission under s. 6.36 (1) and the information specified in s. 6.34 (2m) *with personally identifiable information maintained by the department of transportation.*

(Emphases added.)

Sec. 85.61(1) provides:

85.61 Compliance with federal Help America Vote Act.

(1) The secretary of transportation and the administrator of the elections commission *shall* enter into an agreement to match personally identifiable information on the official registration list maintained by the commission under s. 6.36 (1) and the information specified in s. 6.34 (2m) with personally identifiable information in the operating record file database under ch. 343 and vehicle registration records under ch. 341 *to the extent required to enable the secretary of transportation and the administrator of the elections commission to verify the accuracy of the information provided for the purpose of voter registration.*

(Emphases added.)

ARGUMENT

Regarding substantial damages/irreparable harm and no adequate remedy at law, there is no question that if Petitioners' voting rights are violated by the violations Petitioners allege, they will suffer irreparable damage and harm for which no adequate remedy is available at law. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). Amd. Pld. ¶¶ 171 – 179).

In this case, the question of clear legal rights, plain and positive duties, and likelihood of success are dispositive of the status quo factor for injunctive relief because, given the nature of the rights and duties alleged, success on the merits warrants issuing a “mandatory injunction” which “commands acts to be done or undone” and “compels the performance of some affirmative action.” *Carpenter Baking Co. v. Bakery Sales Drivers Loc. Union No. 344*, 237 Wis. 2d, 296 N.W. 118, 122 (1941) (cleaned up, citations omitted).

To obtain such an injunction, success on the merits must be clear. *Bartell Broadcasters, Inc. v. Milwaukee Broad. Co.*, 13 Wis. 2d 165, 172, 108 N.W.2d 129, 133 (1961) (where an injunction “would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, ordinarily it will not be granted, unless complainant’s right to relief is clear,” citations omitted). Mandatory or affirmative preliminary injunctions are common in cases such as this one addressing the existence and violation of civil rights.³

As alleged in Petitioners’ Amended Pleadings, ¶¶ 83 – 91), citizenship is “personally identifiable information.” *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020) (holding that state statute requiring disclosure of students’ citizenship in dorm list used for voter identification violates Family Educational Rights and Privacy Act prohibiting disclosure of “personally identifiable

³ See e.g. *Consol. Paving, Inc. v. Cnty. of Peoria, Ill.*, No. 10-CV-1045, 2013 WL 916212, at *4 (C.D. Ill. Mar. 8, 2013) (collecting decisions where preliminary injunction effectively decided cases “on the merits,” justifying award of attorney fees).

information”).

Again, Petitioners here seek only preliminary relief on their claim that WEC and DOT likely have the obligation (the preliminary injunction standard) or the clear and positive duty (mandamus standard) to match personally identifiable citizenship information” in their respective databases necessary to verify citizenship information that voter registration applicants provide to WEC.

Existence of non-discretionary official duties subject to mandamus is a question of law – including existence of duties related to election laws. *Mount Horeb Cmty. Alert v. Vill. Bd. of Mt. Horeb*, 2003 WI 100, ¶¶ 9, 10, 263 Wis. 2d 544, 552, 665 N.W.2d 229, 233 (discussing existence of a municipality’s duty regarding direct legislation under § 9.20, Stats.). Discussing *Mt. Horeb*, the appellate court in *State ex rel. Kenneth S. v. Cir. Ct. for Dane Cnty.* noted that “although issuance of a writ of mandamus against a municipality lies within the discretion of the circuit court, *whether the municipality was required to comply with the statute presents a question of law.*” 2008 WI App 120, ¶ 9, 313 Wis. 2d 508, 513, 756 N.W.2d 573, 576 (emphasis added).

For that reason, a duty subject to mandamus may not be settled at the time the action is commenced, but the duty *does* exist if and when the court rules that the respondent officer does have the duty alleged. As the court noted in *State ex rel. Dep’t of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*:

A plain duty is one that is “clear and unequivocal and, under the facts, the responsibility to act is imperative.” “Clear and unequivocal” does not require the duty to be settled or obvious. There may be a plain duty even when it involves “a novel question of law requiring harmonization of several statutory provisions.”

WI 25, ¶ 11, 380 Wis. 2d 354, 366, 909 N.W.2d 114, 120 (cleaned up, citations omitted).

Thus, resolution of Petitioners’ “matching” claim and their entitlement to preliminary relief is a question of law that turns on the meaning of the last phrase in § 85.61(1), “the information provided for the purpose of voter registration.” More precisely, it turns on the meaning of the first

word in that phrase, “*the* information”

Broadly, which Petitioners contend is reasonable, “*the* information” means WEC must compare “*any* information provided [to WEC] for the purpose of voter registration” with information in DOT’s operating record and vehicle registration record databases.

Narrowly, which Respondents apparently contend, “*the* information” means WEC must compare “*only* information provided [to WEC] for the purpose of voter registration” that is also “on the official registration list maintained by the commission under s. 6.36 (1)” or “specified in s. 6.34 (2m).” (Sec. 6.34(2m) specifies an applicant’s driver’s license or state ID card number.”

Pars. 165) – 170) of Petitioners’ amended pleadings explain the basis for reading “*the* information” broadly. Voting rights of *legally* qualified electors are protected under the Wisconsin Constitution and 1st and 14th Amendments, and laws administered by WEC, including § 85.61(1), “shall be construed to give effect to the will of the electors.” The “will of the electors” is that the “person receiving the greatest number of legal votes for the office shall be declared elected.” Secs. 5.01(1), (3)(a).

Thus, the guiding statutory purpose for construing §85.61(1) is to “give effect” to the will of electors casting “*legal* votes.” *Wanish v. Lab. & Indus. Rev. Comm’n*, 163 Wis. 2d 901, 908, 472 N.W.2d 596, 598 (Ct. App. 1991) (“The primary objective in construing a statute is to achieve a reasonable construction that will effectuate the statutory purpose.”)

Respondents’ narrow reading yields the same result as Petitioners’ broad reading. The very first information item provided in § 6.36(1) is “The name and address of each *registered elector* in the state.” Subsec. (a)1. A Wisconsin “elector” must be a United States citizen, 18 years of age or older, and a “resident of an election district in this state.” WI Const art. III Sec. 1. Wis. Stat. § 6.02(1) defines an “eligible elector” as “[e]very U.S. citizen age 18 or older who has resided in an

election district or ward for 28 consecutive days before any election where the citizen offers to vote.”

Every voter registration applicant provides those three items of information (citizenship, age, 28-day residency) in the very first box of EL-131. Amended Pleadings, Exh. A. That information is therefore included in “*the* information provided for the purpose of voter registration,” and § 85.61(1) requires WEC and DOT to match that information against information in DOT’s operating record and vehicle registration databases to “verify the accuracy.”

Last, this is not a case where granting relief will result in “voter confusion” as “an election draws closer,” *Purcell v. Gonzalez*, 549 U.S. 1, 5, 127 S. Ct. 5, 7 (2006), or where correcting error would “result in confusion and disarray and would undermine confidence in the general election results.” *Hawkins v. Wisconsin Elections Comm’n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 635–36, 948 N.W.2d 877, 880.

As stated in Petitioners’ motion, a match of information indicating that DOT has no record that an existing registrant or applicant is a citizen would not, in itself, require the registrant or applicant to be deactivated, removed from the List, or otherwise denied the opportunity to establish his or her qualification or the right to vote. Rather, at worst, the person would be entitled to cast a provisional ballot, and any challenge to the person’s citizenship qualification would be subject to long standing notice and challenge procedures requiring proof beyond a reasonable doubt, the same as with any other challenge. *See, e.g.*, §§ 6.32 and 6.326, Stats., and subch. V of ch. 6, Stats..

Further, Petitioners allege that any such registrant or applicant is entitled to and may utilize the DOT ID Petition Process to obtain a birth certificate or other documentary proof of citizenship as provided in §§ 343.165(8)(a) and 343.50(1), (3), Stats., and Wis. Admin. Code Trans §§ 102.15(2)(bm), 102.15(5m).

Finally, requiring WEC and DOT to match citizenship information would *enhance* voter “confidence in the general election results,” not undermine it. If matching data proves that non-citizen registrants included in the WisVote List are few and far between, as proposed Intervenor allege, public confidence would be strengthened. On the other hand, if matching data proves there are a substantial number of non-citizen registrants included in the WisVote List, Amd. Pld. ¶¶ 55, 122, identifying them and commencing notice and challenge procedures now would avoid the devastation to public confidence if they are identified only *after* the election when their votes **have** already been counted.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners’ Motion for Order Granting Temporary Relief or Preliminary Injunction.

September 30, 2024.

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