

FILED
08-22-2024
Clerk of Court
Marinette County
2024CV000206
Honorable Peggy L. Miller
Branch 1

STATE OF WISCONSIN CIRCUIT COURT MARINETTE COUNTY

STATE OF WISCONSIN
ex rel. THOMAS OLDENBURG

Petitioner,

vs.

Case No.

WISCONSIN ELECTIONS COMMISSION, Marge
Bostelmann, Ann S. Jacobs, Don M. Millis,
Carrie Riepl, Robert F. Spindell, Jr., Mark L. Thomsen
Commissioners,

Case Code: 30952

MEAGAN WOLFE, in her official capacity as
Administrator of the Wisconsin Elections Commission

Respondents.

APPLICATION FOR ALTERNATIVE WRIT OF MANDAMUS

NOW COMES Petitioner Thomas Oldenburg, by his attorneys the Law Office of Kevin M. Scott LLC, by Kevin M. Scott, in order to enforce matters *publici juris*, and as for an Application for the immediate issuance of an Alternative Writ of Mandamus states as follows—

INTRODUCTION

Petitioner seeks a writ of mandamus to correct a deeply troubling violation of voter rights brought to bear by contradictory assertions and actions made by the Wisconsin Elections Commission (“WEC”). WEC—an administrative agency headed by six unelected individuals who may not be removed from office for any reason prior to the expiration of their five-year terms—is arbitrarily taking action that affects millions of Wisconsinites without subjecting those actions to the political process as required by law.

Wisconsin law requires that when an administrative agency takes action to interpret a law it administers, it must do so by promulgating that interpretation as an

administrative rule pursuant to Chapter 227. Specifically, Wis. Stat. § 227.10(1) provides that “[e]ach agency **shall promulgate as a rule** each statement of general policy and **each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.**” (emphasis added)

Promulgating an agency interpretation of law as an administrative rule invokes a series of rights and responsibilities on the part of the legislature to review and approve that interpretation. This is where the citizens of the state—through its elected representatives—have an opportunity to keep the power of an unelected bureaucracy in check.

Recently, WEC has interpreted several statutes related to absentee balloting, culminating in the creation of a form envelope for the return of absentee ballots designated as Form EL-122. Printed upon the EL-122 is a “certificate,” required by Wisconsin law, that a voter must sign affirming certain statements about the voter’s eligibility to cast a ballot and the process for doing so. WEC specifically adopted language for the certificate so as to conform with certain statutes.

However, WEC is attempting to have its cake and eat it, too. On the one hand they have adamantly and successfully argued to a court that neither the EL-122 nor the language of the certificate was an administrative rule. Thus avoiding any legislative oversight of their action in creating the EL-122. On the other hand, they are explicitly requiring the use of the EL-122 by the state’s municipal clerks, and by extension its voters.

In the process WEC adopted novel interpretations of statutes it administers that have a marked effect on the process of absentee balloting. These include—

- Altering statutorily-required language required to be in the “certificate” found on the EL-122 to reflect that rather than a voter being a resident of a

particular voting district **and** that the voter is entitled to vote in that district to reflect only that the voter is a resident of a voting district **or** the voter is entitled to vote there—removing any certification that the person returning the ballot is **actually an eligible elector**; (See Declaration of Kevin M. Scott, ¶ 2, Ex. A); and

- Interpreting Wis. Stat. § 6.86(1)(ac)'s requirement that a copy of the voters request for an absentee ballot **is the envelope returning the ballot itself**.
(*Id.*)

WEC can't have it both ways. It can't interpret Wisconsin law in new and novel ways, declare that all Wisconsin clerks adhere to these new and novel interpretations, and avoid legislative oversight by asserting that the very thing that WEC is requiring isn't really a "rule."

Further, Wis. Stat. § 227.10(2m) provides that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter..." WEC is improperly requiring the clerks—and as a result the voters—of this state to use the EL-122 without any legal basis whatsoever.

By avoiding the political process, WEC is effectively writing their own election law. It is not an overstatement that it is tyrannical for an unelected bureaucracy to make law that affects millions of Wisconsinites, without their representatives having the ability to reject the acts of that bureaucracy. This is especially important in the area of elections. Ultimately, that bureaucracy could place its thumb on the scale in elections to favor those

who would prefer a less restrictive process. WEC **must** be forced to justify its actions via the rulemaking process.

To that end, this application seeks an alternative writ of mandamus compelling WEC to 1) cease attempting to implement and/or enforce use of the EL-122 by anyone; and 2) immediately begin to promulgate the Form EL-122 as an administrative rule pursuant to the tenets of Wisconsin Chapter 227.

PARTIES

1. Petitioner Thomas Oldenburg is an adult resident of the Town of Amberg in the State of Wisconsin. Petitioner brings this matter on behalf of the citizens of the State of Wisconsin as a matter *publici juris*.

2. Petitioner is an eligible elector who has voted in recent elections.

3. Petitioner is also a taxpayer, and asserts that the Respondents are expending state tax money in an unlawful manner in relation to the administration of elections in this state as detailed in the allegations below.

4. Respondent Wisconsin Elections Commission (“WEC”) is an independent agency created under Subchapter III of Wisconsin Statutes Chapter 15.

5. Marge Bostelmann, Ann S. Jacobs, Don M. Millis, Carrie Riepl, Robert F. Spindell, Jr., and Mark L. Thomsen are WEC’s commissioners (the “Commissioners”).

6. The Commissioners are WEC’s “Head” per Wis. Stat. § 15.01(8).

7. Respondent Meagan Wolfe serves as WEC’s administrator and the chief elections officer of the State of Wisconsin. Wis. Stats. § 5.05(3g).

APPLICABLE LAW

8. Article I, § 4, of the U.S. Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”

9. “It is true that...the legislature has the constitutional power to say how, when and where a ballot shall be cast. . . .” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 472 (1949).

10. To that end—

[T]he right as well as the duty is vested in the legislature to prescribe reasonable rules and regulations under which [the franchise] may be exercised. Such rules and regulations tend to certainty and stability in government and render it possible to guard against corrupt and unlawful means being employed to thwart the will of those lawfully entitled to determine governmental policies. Their aim is to protect lawful government, not to needlessly harass or disfranchise any one.

League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker, 2014 WI 97, ¶ 20, 357 Wis. 2d 360, 373, 851 N.W.2d 302, 309 (quoting *State ex rel. Small v. Bosacki*, 154 Wis. 475, 478-79, 143 N.W. 175 (1913)).

11. In pursuance of this goal, the Legislature has enacted laws related to the casting of ballots in Wisconsin. They are primarily found in Chapters 5 to 10 and 12.

12. According to the 2015 Wisconsin Act 118 Legislative Council Act Memo, WEC was created WEC to “administer and enforce election laws.”¹

13. Pursuant to Wis. Stat. § 5.05(1) WEC has “the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing.”

¹ Found at <https://docs.legis.wisconsin.gov/2015/related/lcactmemo/act118.pdf>

14. Wisconsin Law provides that WEC is required to promulgate administrative rules pursuant to Chapter 227 when it adopts general policies related to, and interpretations of statutes it administers.

15. Wis. Stat. § 227.10(1) provides in part—

227.10 Statements of policy and interpretations of law; discrimination prohibited.

(1) Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute...

16. Wis. Stat. § 227.10(2m) provides in part—

(2m) No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter...

17. Wis Stat. § 227.23 provides that an agency may prescribe forms that qualify as a “rule” as set forth in Chapter 227.

18. Wisconsin Law generally requires that a person who votes absentee must return the ballot in an envelope that has a printed “certificate” thereupon.

19. Wis. Stat. § 6.87(2) prescribes the form of the “certificate,” providing in pertinent part—

- 2) Except as authorized under sub. (3) (d), the municipal clerk shall place the ballot in an unsealed envelope furnished by the clerk. The envelope shall have the name, official title and post-office address of the clerk upon its face. The other side of the envelope shall have a printed certificate... **The certificate shall be in substantially the following form:**

[STATE OF

County of]

or

[(name of foreign country and city or other jurisdictional unit)]

I,, certify subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, that I am a resident of the [.... ward of the] (town) (village) of, or of the aldermanic district in the city of, residing at* in said city, the county of, state of Wisconsin, and am entitled to vote in the (ward) (election district) at the election to be held on,; that I am not voting at any other location in this election; that I am unable or unwilling to appear at the polling place in the (ward) (election district) on election day or have changed my residence within the state from one ward or election district to another later than 28 days before the election. I certify that I exhibited the enclosed ballot unmarked to the witness, that I then in (his) (her) presence and in the presence of no other person marked the ballot and enclosed and sealed the same in this envelope in such a manner that no one but myself and any person rendering assistance under s. 6.87(5) Wis. Stats., if I requested assistance, could know how I voted.

Signed

Identification serial number, if any:

The witness shall execute the following:

I, the undersigned witness, subject to the penalties of s. 12.60 (1) (b), Wis. Stats., for false statements, certify that I am an adult U.S. citizen** and that the above statements are true and the voting procedure was executed as there stated. I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk). I did not solicit or advise the elector to vote for or against any candidate or measure.

....(Printed name)

....(Address)***

Signed

* — An elector who provides an identification serial number issued under s. 6.47(3), Wis. Stats., need not provide a street address.

** — An individual who serves as a witness for a military elector or an overseas elector voting absentee, regardless of whether the elector qualifies as a resident of Wisconsin under s. 6.10, Wis. Stats., need not be a U.S. citizen but must be 18 years of age or older.

*** — If this form is executed before 2 special voting deputies under s. 6.875(6) Wis. Stats., both deputies shall witness and sign.

(emphasis added).

20. Wis. Stat. § 6.86(1)(ac) requires all electors requesting a ballot via electronic mail return with the voted ballot a copy of the ballot request form EL-121 “bearing an original signature of the elector.”

21. Wis. Stat. § 6.87(4) also requires an elector who requested a ballot from the local clerk by means of electronic mail under Wis. Stat. §6.86(1)(ac) to enclose in the envelope a copy of the request which bears an original signature of the elector.

FACTS

WEC adopts a new absentee ballot envelope and mandates its use.

22. In August of 2023 WEC approved the design of new “Absentee Certificate Envelope” forms designated form EL-122 (the “New EL-122”).

23. According to a Memorandum authored by WEC Staff and directed to the WEC Commissioners dated August 4, 2023 (the “August 4 Memorandum”) “The redevelopment of the absentee certificate envelope offered an opportunity to review the voter certification language to affirm compliance with relevant provisions of § 6.86 and § 6.87.” (Declaration of Kevin M. Scott, ¶ 3, Ex. B, p. 10)

24. WEC staff further noted in the August 4 Memorandum that—

Commission staff have had additional opportunity to review the voter certification language for substantial compliance and propose two additional changes. First, staff recommend further editing the line to clarify that the certification serves as the original absentee ballot request for certain types of voters. Second, staff recommend editing the line to address the requirement in § 6.86(1)(ac), which requires the voter to submit a copy of the absentee ballot request when returning a completed absentee ballot.

(Declaration of Kevin M. Scott, ¶ 3, Ex. B, p. 10).

25. It is further stated in the August 4 Memorandum—

Commission staff also recommend including the language “or a copy of that request” to satisfy the requirement of § 6.86(1)(ac). An elector requesting an absentee ballot under § 6.86 “shall return with the voted ballot a copy of the request bearing an original

signature of the elector as provided in § 6.87(4).” Wis. Stat. § 6.86(1)(ac) (emphasis added)

(*Id.*)

26. WEC Commissioners then approved the New EL-122 at the August 4 meeting. (Declaration of Kevin M. Scott, ¶ 4, Ex. C)

27. In his Complaint filed in the matter *Thomas Oldenburg v. Wisconsin Elections Commission, et al.* Marinette County Case No. 24CV43 (“*Oldenburg I*”), Petitioner alleged at paragraph 84—

84. As a result, the New EL-122 is the equivalent of a rule as it is a “standard, statement of policy, or general order of general application” that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency.” Wis. Stat. § 227.01(13).

(Declaration of Kevin M. Scott, ¶ 5, Ex. D)

28. WEC denied this allegation at paragraph 84 of its Answer in *Oldenburg I*. (Declaration of Kevin M. Scott, ¶ 6, Ex. E)

29. In support of his motion for judgment on the pleadings in *Oldenburg I*, Petitioner argued that the New EL-122 was a rule, and that “Wis Stat. § 227.23 provides that, generally, an agency may prescribe forms that qualify as a “rule” as set forth in Chapter 227.”

30. However, WEC specifically argued that neither the language interpreting Wis. Stat. § 6.86(1)(ac) nor the New EL-122 as a whole qualified as an administrative rule.

31. At oral argument WEC asserted that “our argument focused on the sentence they're challenging, but all those arguments we made apply to the EL-122 as a

whole; that doesn't meet the requirements of rule in 227.” (Declaration of Kevin M. Scott, ¶ 7, Ex. F, p. 8).

32. Plaintiff responded to WEC’s arguments that the EL-122 is not an administrative rule at oral argument as follows—

...We've now had some assertions made here that neither the EL-121 nor the EL-122 are a rule. Here's the problem, Your Honor: WEC is constantly doing things that are neither fish nor fowl. Is it a form? Is it a rule? Is it a guidance document? We don't know.

The whole idea here should be there should be a definition. There should be definitiveness to what they're doing. It's clear that that EL-122 is a rule. They require the clerks to send them out. They provide a statement under penalty of law that otherwise your absentee ballot is not going to be counted unless you sign it.

Are they saying -- are they willing to go on record in saying somebody could just get an envelope out of their personal stash, write on it, go back to my clerk and mail it in with a witness on the back? Is that good enough? I don't know. But they've now just introduced a whole another level of complexity to this.

(Declaration of Kevin M. Scott, ¶ 7, Ex. F, p. 35).

33. In making its oral ruling, the Court held in part—

Oldenburg's final challenge to the EL-122 envelope is that it constitutes an administrative rule not promulgated in compliance with Wisconsin statutes Chapter 227.

Forms imposing requirements which meet the definition of a rule shall be treated as a rule; Wis. Stat. § 227, 23.

...

Oldenburg's rule argument fails, it seems to this Court, at the first hurdle because he argues the EL-122 is a standard because it is uniformly applied. The recitation of definitional factors makes clear, however, that "standard" is used as a synonym for "regulation," not imposing uniformity.

...

Considering the certification language, it is clear that it is not a rule.

(Declaration of Kevin M. Scott, ¶ 7, Ex. F, pp. 60-62).

34. In other words, the Court held that the new EL-122 was not a “rule” synonymous with “regulation,” nor was the certification language a “rule.”

35. In sum, in creating, adopting, and requiring the use of the New EL-122

- a. WEC has never taken any steps to promulgate the form as a rule;
- b. WEC has taken no steps to promulgate any of the language adopted therein that interprets the statutes WEC administers as a rule;
- c. WEC specifically argued that neither the New EL-122 itself nor any language therein qualified as a rule; and
- d. The Court adopted WEC’s arguments in ruling in WEC’s favor in *Oldenburg I*.

36. On August 19, 2024 the Court entered summary judgment in favor of all Defendants in *Oldenburg I*. (Declaration of Kevin M. Scott, ¶ 8, Ex. G).

37. Although the Court ruled, and WEC never disputed in any court filing or in any hearing, that the EL-122 was not required for use, WEC changed that stance in a Memorandum issued to clerks July 31, 2024 WEC issued “a Memorandum with the subject line **“Litigation Update: *Oldenburg v. WEC* RE: Official Absentee Ballot Application/Certification (EL-122); absentee ballot return envelope”** (the “July 31 Memorandum”). (Declaration of Kevin M. Scott, ¶ 9, Ex. H).

38. In it, WEC posited the following “Frequently Asked Question” and answer thereto—

1. Does this decision mean I have to use the EL-122?

Yes. The court found that the EL-122 fully complies with Wisconsin law. It is therefore unlikely that a challenge based on the same grounds as those brought by Mr. Oldenburg would be successful. Because the decision lifted the temporary injunction, the Commission's previous guidance on use of the EL-122 is back in effect. On April 28, 2023, the Commission unanimously directed staff to implement the new EL-122 design for the February 20, 2024, primary, and also stated that "[o]ld envelope designs shall not remain in use."²

(Declaration of Kevin M. Scott, ¶ 9, Ex. H, pp. 1-2)

APPLICATION

A Writ of Mandamus must be issued compelling WEC to Promulgate the new EL-122 as an administrative rule pursuant to Chapter 227

39. A writ of mandamus requires "(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., In re*, 110 Wis.2d 447, 449, 329 N.W.2d 275 (Ct. App. 1982).

40. All of the criteria to issue a writ of mandamus are present in this matter.

There is a Clear Legal Right to have WEC conform its actions to Statutory Requirements.

41. "It is the settled rule in this state, and is in accord with the great weight of American authority, that, where the relief sought is a matter of public right, the people at large are the real party, and any citizen is entitled to a writ of mandamus to enforce the performance of such public duty. *State ex rel. Burnham v. Cornwall*, 97 Wis. 565, 73 N.W. 63 (1897).

²<https://elections.wi.gov/sites/default/files/documents/Litigation%20Update%20FAQ%20-%20Oldenburg%20v.%20WEC%20-%20EL%20122%20Absentee%20Application%20and%20Certificate%20-%207.31.24.pdf> (emphasis original)

42. Petitioner seeks to have this Court issue a writ of mandamus to compel WEC to conform its actions to the law—a public right.

43. While WEC is charged with administering Wisconsin's elections laws, Wis Stat. § 5.01(1) provides the guiding duty for construing that responsibility:

5.01 Scope.

CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors...

44. The Wisconsin Court of Appeals has held—

The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner. Many public policy concerns could be illuminated through the rulemaking process.

Mack v. DHFS, 231 Wis. 2d 644, 649, 605 N.W.2d 651 (Ct. App. 1999).

45. There is a clear legal right to have WEC conform its actions to statutory requirements and adopt the EL-122 as a formal rule.

46. WEC is headed by six unelected commissioners, each who receive five-year terms and are not subject to removal *for any reason*.

47. As an administrative agency headed by unelected persons who may not be removed for any reason, it is of vital importance that WEC's actions in adopting policy or interpreting statutes be subjected to the political process outlined in the statutes whereby the representatives of the people may be allowed to accept or reject WEC's actions.

A "Plain and Positive Duty" exists for WEC to promulgate the New EL-122 and any Language found therein that Interprets a Statute WC Administers as a Rule

48. Existence of a "positive and plain" duty subject to mandamus is a question of law resolved by the court, even where the question is a "novel" one, not previously

“settled or obvious.” See *State ex rel. Dep’t of Nat. Res. v. Wisconsin Ct. of Appeals, Dist. IV*, WI 25, ¶ 11, 380 Wis. 2d 354, 366, 909 N.W.2d 114, 120, discussed *infra*, § II.A.

49. Wis. Stat. § 227.10(1) provides that “[e]ach agency **shall promulgate as a rule** each statement of general policy and **each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.**” (emphasis added)

50. WEC has adopted the New EL-122 as the envelope in which a voter returns his or her voted absentee ballot to the clerk as is required by Wis. Stat. § 6.87(2).

51. The New EL-122 was adopted by WEC to act as the “certificate” required by Wis. Stat. § 6.87(2).

52. The language of the New EL-122 was specifically chosen “to affirm compliance with relevant provisions of § 6.86 and § 6.87.” (Declaration of Kevin M. Scott, ¶ 4, Ex. E, p. 10)

53. WEC administers Wis. Stat. §§ 6.86 and 6.87.

54. However, in creating the EL-122, WEC altered statutorily-required language from Wis. Stat. § 6.87(2).

55. Section 6.87(2) requires that a certificate found on an absentee ballot return envelope state—

subject to the penalties of s. [12.60\(1\)\(b\)](#), Wis. Stats., for false statements, that I am a resident of the [... ward of the] (town) (village) of, or of the aldermanic district in the city of, residing at* in said city, the county of, state of Wisconsin, ***and*** am entitled to vote in the (ward) (election district) at the election to be held on...

(emphasis added)

56. WEC altered this language to read in the New EL-122—

I am a resident of the ward or of the aldermanic district of the municipality in the county of the state of Wisconsin indicated hereon **OR** I am entitled to vote in the ward or aldermanic district at the election indicated hereon

(Declaration of Kevin M. Scott, ¶ 5, Ex. D)(emphasis original)

57. WEC administers Wis. Stat. § 6.87(2).

58. In addition, WEC adopted and included the language “or a copy of that request” in the New EL-122 to interpret Wis. Stat. § 6.86(1)(ac). (Declaration of Kevin M. Scott, ¶ 4, Ex. E, p. 10)

59. WEC administers Wis. Stat. § 6.86(1)(ac).

60. The language referred to in paragraphs 56 and 58 is heretofore referred to as the “Certification Language.”

61. However, in adopting the New EL-122, WEC did not promulgate either the New EL-122 or the Certification Language found therein as an administrative rule pursuant to Chapter 227.

62. The New EL-122 and the Certification Language have been specifically alleged by WEC, and found by a Court of law, to **not** be administrative rules.

63. The Court specifically held in *Oldenburg I* that clerks were not required to use the New EL-122.

64. WEC never disputed the holding of the Court in a hearing or in any filing with the Court.

65. However, the July 31 Memorandum makes clear that the New EL-122 is, in fact, required to be utilized by clerks.

66. As the adoption of the EL-122 and the Certification Language found therein was done to conform with statutes administered by WEC, Wis. Stat. § 227.10(1) requires

that WEC promulgate the New EL-122 and the Certification Language as administrative rules pursuant to Chapter 227.

67. "For a rule to be properly promulgated, it must be subjected to a notice period, an opportunity for public comment, legislative review and publication. See §§ 227.16-.21, STATS." *Mack v. DHFS*, 231 Wis.2d 644, 648, 605 N.W.2d 651 (Ct. App. 1999)

68. Wis. Stat § 227.23 provides generally that an agency may adopt a form that meets the definition of a rule, and if so "Its promulgation need not be preceded by notice and public hearing." Wis. Stat. § 227.23(1).

69. However, the adoption of EL-122 as a form would still require legislative review and a modified form of publication. See Wis. Stat. § 227.23(3).

70. Promulgating the New EL-122 and the Certification Language as an administrative rule pursuant to Chapter 227 is a "plain and positive duty" that WEC has not performed.

There will be Substantial Damages or Injury should Mandamus not be granted.

71. The public has a substantial interest in seeing that public officers perform duties imposed by law. *State ex rel. Pierce v. Inst*, 158 Wis. 417, 149 N.W. 205 (1914)

72. By the same token, the public is substantially injured when government officials do not perform acts required by law.

73. There is no need to show individualized injury as "any citizen is entitled to the writ of mandamus to enforce the performance of such public duty..." *State ex rel. Pierce v. Inst*, 158 Wis. 417, 149 N.W. 205 (1914).

There is No Other Adequate Remedy at Law.

74. 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.")

75. Upon information and belief, Respondents are expending a significant amount of state tax money to require the use of the EL-122 in the state.

**REQUEST FOR IMMEDIATE ISSUANCE OF
ALTERNATIVE WRIT OF MANDAMUS**

76. Based on the above, Petitioner is entitled to a writ of mandamus compelling WEC to perform its duty to promulgate the New EL-122 and all language therein as an administrative rule.

77. An alternative writ of mandamus is "[a] mandamus issued upon the first application for relief, commanding the defendant either to perform the act demanded or to appear before the court at a specified time to show cause for not performing it." *State ex rel. Milwaukee Police Assoc. v. Jones*, 2000 WI App 146, ¶ 7 & n.7, 237 Wis. 2d 840, 615 N.W.2d 190 (quoting BLACK'S LAW DICTIONARY (7th Ed. 1999)).

78. "The usual practice, if a prima facie case is made out by the petition or application, is to issue an alternative writ of mandamus, directed to the person claimed to be under a duty to act, requiring the person, either to act or to show cause why the person should not be compelled to do so." 9 *Wis. Pleading & Practice Forms*, § 85.37 (5th Ed., June 2021 Update) (footnote omitted).

79. This Petition and exhibits establish a prima facie case that Respondents have failed to perform their clear duties mandated by Chapter 227, and are requiring the use of the New EL-122 without legal basis.

WHEREFORE, Petitioners respectfully request the Alternative Writ of Mandamus submitted concomitantly be issued against the Respondents.

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Dated this 19th day of August, 2024.

ATTORNEYS FOR PETITIONER

By: *Electronically signed by Kevin M. Scott*

Kevin M. Scott, SBN: 1036825

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