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CIRCUIT COURT
DANE COUNTY, WI
2021CV002552

BY THE COURT:

DATE SIGNED: January 10, 2022

Electronically signed by Rhonda L. Lanford
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 16 DANE COUNTY

WISCONSIN ELECTIONS COMMISSION and MEAGAN WOLFE, in her official Capacity as the Administrator of the Wisconsin Elections Commission,

Plaintiffs,

v. Case No. 21 CV 2552

WISCONSIN STATE ASSEMBLY, ROBIN VOS, in his official capacity as Speaker of the Wisconsin State Assembly, MICHAEL GABLEMAN, in his official capacity as Special Counsel, ASSEMBLY COMMITTEE ON CAMPAIGNS AND ELECTIONS, and JANEL BRANDTJEN, In her official capacity as Chair of the Assembly Committee on Campaigns and Elections,

Defendants.

DECISION AND ORDER

INTRODUCTION

This case arises out of the Wisconsin Legislature's decision to investigate alleged

voter fraud that occurred during the November 2020 election. The Legislature's Assembly Committee on Campaigns and Elections (Committee) appointed Michael Gableman as Special Counsel (Gableman) to investigate the allegations. In that role, Gableman, through Assembly Speaker Robin Vos (Vos), issued subpoenas to Meagan Wolfe (Wolfe), administrator of the Wisconsin Elections Commission (WEC), and to WEC, which included a command to appear before Gableman for a private deposition at Gableman's private office located in Brookfield, Wisconsin. Wolfe, in her official capacity as administrator for WEC, filed this declaratory judgment action under sec. 806.04, Stats. on behalf of herself and WEC, asking this Court to find the subpoenas unlawful, and seeking a temporary injunction under sec. 813.02, Stats., enjoining Gableman from enforcing the subpoenas until the merits of the declaratory action are heard. Plaintiffs also seek a permanent injunction.

This matter was fully briefed, and the parties appeared for oral argument on December 23, 2021. The matters before the Court in this decision are Defendants' Motion to Dismiss, as well as Plaintiffs' Motion for a temporary injunction.

FACTS

The following facts are undisputed.

On March 17, 2021, the Assembly adopted 2021 Assembly Resolution 15 (Resolution) which directed the Committee "to investigate the administration of elections in Wisconsin, focusing in on elections conducted after January 1, 2019." Pl. Compl. Exh. A. The stated purpose of the investigation is to preserve the integrity of the electoral

process and promote citizen confidence in the "fairness of elections and acceptance of election results," and to determine "the extent to which elections in Wisconsin have been conducted in compliance with the law." *Id.* The Resolution further alleged that "the integrity of our electoral process has been jeopardized by election officials who, either through willful disregard or reckless neglect, have failed to adhere to our elections laws by, at various times, ignoring, violating, and encouraging noncompliance with bright-line rules established by the statutes and regulations governing the administration of elections in Wisconsin." *Id.*

Vos was authorized by the Committee to appoint special counsel to oversee and conduct the investigation. Vos appointed Gableman to this position.

On September 30, 2021, Gableman served a subpoena on Wolfe as administrator of WEC, signed by Vos, commanding her to appear before Gableman for a private deposition at his private office located at 200 South Executive Drive, Suite 101 in Brookfield, Wisconsin on October 15, 2021. *Id.* Exh. B. A separate subpoena was served on "a person most knowledgeable" at WEC for a private deposition at Gableman's private office on October 22, 2021. *Id.*

Defendant Janel Brandtjen (Brandtjen), chair of the Assembly Committee on Campaigns and Elections, issued a press release on October 11, 2021, taking issue with Gableman's issuance of subpoenas to various public and elections officials:

> Justice Gableman does not speak for myself or for the Wisconsin Assembly's Campaigns and Elections Committee. The current subpoenas have not been approved by the

> Assembly's Campaigns and Elections Committee that Justice Gableman is supposed to serve, nor have the subpoenas even been submitted to the committee. Like the public, the committee members learned of Justice Gableman's actions by radio interviews, newspaper reports and YouTube videos. His videos must have had approved spending by the speaker, as I have not approved them.

Id. Exh. E. Brandtjen goes on to express her disapproval of subpoenas issued to several Wisconsin mayors, which are the subject of an enforcement action by Gableman in Waukesha County, *Michael J. Gableman v. Eric Genrich, et al.*, Case Number 21-CV-1710, filed after this action was filed in Dane County. The subpoenas challenged in the enforcement action are substantively identical to those before this Court involving Wolfe and WEC.

WEC and Wolfe had several substantive and procedural objections to the subpoenas, and through their counsel, the State of Wisconsin Department of Justice, sent a letter outlining those objections. Pl. Compl. Exh. D. Gableman and Plaintiffs could not resolve those objections, and this lawsuit followed. Plaintiffs made it clear at oral argument that their major concern and objection was the manner in which the testimony was to be obtained through a private deposition at a private law office as well as the scope of the inquiry as violating due process.

Additional facts related to the parties' legal arguments will be set forth in the Analysis section *infra*.

STANDARD OF REVIEW

Two separate motions are before the Court: Defendants' Motion to Dismiss and

Plaintiffs' Motion for a Temporary Injunction pending resolution of the lawsuit on the merits.

Regarding the Motion to Dismiss, Defendants contend that 1) Plaintiffs lack statutory authorization, standing, and capacity to bring this lawsuit against Defendants and that this lawsuit is an *ultra vires* action due to Plaintiffs' failure to comply with Wis. Stat. § 5.05(1e) prior to initiating this lawsuit; and 2) Plaintiffs' lawsuit challenges the Defendants' core legislative functions and, as a result, this Court lacks jurisdiction in the matter and lacks jurisdiction to issue the equitable relief sought by Plaintiffs.

At this stage of the proceedings, a motion to dismiss does not allow the Court to determine whether the facts alleged are true or false, but simply whether the complaint is legally sufficient to go forward. Because of this, a motion to dismiss takes the facts alleged as true, but only for purposes of testing the complaint's legal sufficiency. A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under the facts stated. *Beloit Liquidating Trust v. Grade,* 2004 WI 39, ¶ 17, 270 Wis. 2d 356. Here, the Court must first determine if Plaintiffs' alleged claims are properly before the Court.

If Plaintiffs' survive this challenge to their standing, the Court then turns to their motion for temporary injunction under sec. 813.02, Stats.

Circuit courts have the authority, pursuant to § 813.02, Stats., to grant temporary injunctions. The Court should only grant an injunction when four requirements have been met: 1) the movant is likely to suffer irreparable harm if a preliminary injunction is not

issued; 2) the movant has no other adequate remedy at law; 3) a preliminary injunction is necessary to preserve the status quo; and 4) the movant has a reasonable probability of success on the merits. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313-14 (1977).

A circuit court's decision to grant a temporary injunction is discretionary, and should only be reversed upon an erroneous exercise of discretion. An appellate court will only find an erroneous exercise of discretion "if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or [the appellate] court finds that the trial court applied the wrong legal standard." *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53, 57 (1986). As the Supreme Court stated in *Hartung v. Hartung:*

> It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

102 Wis. 2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

ANALYSIS

I. Motion to Dismiss.

Defendants' Motion to Dismiss challenges Plaintiffs' standing to bring this lawsuit, alleging that Plaintiffs have no statutory authorization under sec. 5.05(1e), Stats.

and have not "alleged or demonstrated with evidence any particularized injury and, thus, again lack standing to bring these claims." Doc. 27 at 8.

A motion to dismiss tests the legal sufficiency of the plaintiff's complaint. When reviewing such a motion, the Court accepts the alleged facts and the reasonable inferences as true, but we draw all legal conclusions independently. *PRN Assocs. LLC v. State Dep't of Admin.*, 2008 WI App 103, ¶ 11, 313 Wis. 2d 263, 266–67, 756 N.W.2d 580, 581–82, *aff'd*, 2009 WI 53, ¶ 11, 317 Wis. 2d 656, 766 N.W.2d 559

A complaint should be liberally construed, and a plaintiff's claims should be dismissed only "if it is 'quite clear' that there are no conditions under which that plaintiff could recover." *Id.*

In their Complaint, Plaintiffs allege they are entitled to declaratory and injunctive relief from the subpoenas issued by Gableman. Compl. ¶ 2. They allege they are proper parties to this action, venue is proper in Dane County and that this Court has the jurisdictional power to provide the relief requested. *Id.* ¶¶ 2-14.

The Complaint consists of four counts. Count 1 claims the non-public deposition procedure commanded by the subpoenas is not statutorily authorized. *Id.*¶¶ 28-33. Count 2 claims that the subpoenas are unlawful because the underlying investigation is not in furtherance of a valid legislative purpose, but rather infringes on the executive function of law enforcement, a constitutional challenge. *Id.*¶¶ 34-41. Count 3 alleges that the subpoenas are not clear enough or definite enough to meet the constitutional

requirements of due process. *Id.*¶¶ 42-49. Count 4 alleges that the subpoenas are overbroad and burdensome. *Id.*¶¶ 50-54.

In their prayer for relief, Plaintiffs seek a temporary injunction prohibiting the Defendants from taking action to enforce the subpoenas, a declaratory judgment that the subpoenas are invalid and unenforceable under the United States and Wisconsin Constitutions and the laws of the State of Wisconsin, and a permanent injunction preventing Defendants from taking any action to enforce the subpoenas. *Id.* at 20-21. In the alternative, Plaintiffs seek an order requiring that the subpoenas be narrowed and clarified. *Id.* at 21.

The Complaint clearly asserts constitutional violations by the Defendants. Regardless of Defendants' arguments in their briefs and at the motion hearing, in a motion to dismiss, the Court must take the allegations in the Complaint as true and construe them in favor of Plaintiffs. It is clear from case law that the Court can review legislative decisions when they implicate constitutional rights. *See e.g. State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 78, 798 N.W.2d 436, 440 (courts will only "intermeddle" in what they review if constitutional issues are presented); *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684, 687 (1983) (courts have had the authority to review acts of the legislature for any conflict with the constitution).

Given that the Complaint alleges constitutional violations by Defendants, and at this stage gives the Court jurisdiction to proceed, the only argument remaining is whether

Plaintiffs have the authority to bring the action in the first place. If they do, they are entitled to proceed on this record. The Court cannot decide based on what has been briefed and argued thus far that the Court is invading any of the legislature's exclusive authority and violating separation of powers by proceeding given the constitutional allegations.

Therefore, the Court now turns to the issue of whether Plaintiffs have authority to bring this lawsuit in Wolfe's official capacity as administrator of WEC and on behalf of WEC.

A. Statutory Authorization to Bring Lawsuit Under Sec. 5.05(1e), Stats.

While Defendants did not file separate briefs in support of their Motion to Dismiss, they rely on the arguments made in their opposition to Plaintiffs' Motion for a Temporary Injunction.

Defendants' first argument is that Wolfe is precluded from bringing this lawsuit in her official capacity and on behalf of WEC because she is not statutorily authorized to do so under sec. 5.05, Stats.

Section 5.05, Stats. sets forth the WEC's powers and duties:

> **(1)** GENERAL AUTHORITY. The elections commission shall have 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. Pursuant to such responsibility, the commission may:
>
> **(b)** In the discharge of its duties and after providing notice to any party who is the subject of an investigation, subpoena and bring before it any person and require the production of any papers, books, or other records relevant to an investigation.

Notwithstanding s. 885.01(4), the issuance of a subpoena requires action by the commission at a meeting of the commission. In the discharge of its duties, the commission may cause the deposition of witnesses to be taken in the manner prescribed for taking depositions in civil actions in circuit court.

(c) Bring civil actions to require a forfeiture for any violation of chs. 5 to 10 or 12. The commission may compromise and settle any civil action or potential action brought or authorized to be brought by it which, in the opinion of the commission, constitutes a minor violation, a violation caused by excusable neglect, or which for other good cause shown, should not in the public interest be prosecuted under such chapter. Notwithstanding s. 778.06, a civil action or proposed civil action authorized under this paragraph may be settled for such sum as may be agreed between the parties. Any settlement made by the commission shall be in such amount as to deprive the alleged violator of any benefit of his or her wrongdoing and may contain a penal component to serve as a deterrent to future violations. In settling civil actions or proposed civil actions, the commission shall treat comparable situations in a comparable manner and shall assure that any settlement bears a reasonable relationship to the severity of the offense or alleged offense. Except as otherwise provided in sub. (2m) (c) 15. and 16. and ss. 5.08 and 5.081, forfeiture actions brought by the commission shall be brought in the circuit court for the county where the defendant resides, or if the defendant is a nonresident of this state, in circuit court for the county wherein the violation is alleged to occur. For purposes of this paragraph, a person other than an individual resides within a county if the person's principal place of operation is located within that county. Whenever the commission enters into a settlement agreement with an individual who is accused of a civil violation of chs. 5 to 10 or 12 or who is investigated by the commission for a possible civil violation of one of those provisions, the commission shall reduce the agreement to writing, together with a statement of the commission's findings and reasons for entering into the agreement and shall retain the agreement and statement in its office for inspection.

> **(d)** Sue for injunctive relief, a writ of mandamus or prohibition, or other such legal or equitable relief as may be appropriate to enforce any law regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensure its proper administration. No bond is required in such actions. Actions shall be brought in circuit court for the county where a violation occurs or may occur.
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> **(e)** Issue an order under s. 5.06, exempt a polling place from accessibility requirements under s. 5.25(4) (a), exempt a municipality from the requirement to use voting machines or an electronic voting system under s. 5.40(5m), approve an electronic data recording system for maintaining poll lists under s. 6.79, or authorize nonappointment of an individual who is nominated to serve as an election official under s. 7.30(4) (e).**(f)** Promulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns, other than laws regulating campaign financing, or ensuring their proper administration.

Then, sec. 505(1e), Stats. requires a 2/3 vote by the WEC to initiate any of the above-referenced actions:

> **(1e)** ACTIONS BY THE COMMISSION. Any action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members.

Defendants contend that sec. 5.05, Stats. is an exhaustive list of the only actions WEC or Wolfe acting in her official capacity can take, and that even if Wolfe could bring this lawsuit, she still requires and did not receive the required 2/3 supermajority vote to proceed under sec. 5.05(1e), Stats. Plaintiffs contend that sec. 5.05, Stats. simply sets forth the actions WEC can take to enforce election violations, and that sec. 5.05(1e),

Stats. applies only to those enforcement actions; therefore, general rules of standing apply.

In order to determine whether this Court can look beyond the language of sec. 5.05(1e), Stats. to determine if Plaintiffs have standing to bring this lawsuit, it must analyze the plain language of the statute and employ the canons of statutory construction. Statutory construction begins with the language of the statute. If the meaning of the statute is plain, the Court ordinarily stops the inquiry. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663–64, 681 N.W.2d 110, 124. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id.*

More importantly, for purposes of this analysis, the Court must look to the context in which sec. 5.05(1e), Stats. is placed. Context is important to meaning as is the structure of the statute in which the operative language appears. *Kalal*, ¶46. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Hoffer Properties, LLC v. State, Dep't of Transp.*, 2016 WI 5, ¶ 15, 366 Wis. 2d 372, 391, 874 N.W.2d 533, 541.

In this case, sec. 5.05(1e), Stats. follows sec. 5.05, Stats.' enumeration of law enforcement actions that WEC may take. In the context in which it is placed, it must be read in conjunction with sec. 5.05, Stats. as part of the whole of the statute. There is

nothing in sec. 5.05, Stats. that suggests that Plaintiffs, especially Wolfe, would be precluded from bringing an action to protect herself or the agency from the enforcement of an alleged unconstitutional subpoena where there is threat of contempt and imprisonment.

In addition, all of the actions set forth in sec. 5.05, Stats. are actions that the WEC can bring on behalf of WEC to enforce election laws; it would not make sense to read sec. 5.05, Stats. to prevent Wolfe and WEC from defending actions. Although they are Plaintiffs here, Wolfe and the WEC brought this lawsuit to defend themselves against unconstitutional acts. In *Coyne v. Walker*, Defendant Gableman, then Justice Gableman, acknowledged that plaintiffs in a declaratory judgment action are "potential defendants." 2016 WI 38, ¶ 29, 368 Wis. 2d 444, 468, 879 N.W.2d 520, 532, *overruled on other grounds by Koschkee v. Taylor*, 2019 WI 76, ¶ 29, 387 Wis. 2d 552, 929 N.W.2d 600.

As a practical matter, if would be nonsensical for this Court to limit authority to bring an action on the claims set forth in the Complaint, because to do so would grant unfettered power to the Defendants to proceed with the investigation in any manner they wished despite constitutional violations. *See State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684, 687 (1983) (acknowledging Court's role since *Marbury v. Madison,* 5 U.S. 1 Cranch 137, 2 L.Ed. 60 (1803) to review acts of the legislature for any conflict with the constitution).

Based on the language of sec. 5.05, Stats. and the context in which to read sec. 5.05(1e), Stats., the Court finds that a 2/3 vote of the WEC was not required to bring this

action, as it does not fall within the purview of elections commission enforcement actions.

B. General Standing to Bring Lawsuit.

Given that sec. 5.05(1e), Stats. does not apply to this action and does not preclude its filing on that ground, the Court next looks to Plaintiffs' right to bring this lawsuit under general notions of standing.

Whether a party has standing is a question of law. *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 12, 391 Wis. 2d 497, 511–12, 942 N.W.2d 900, 907–08). "Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite." *Id*. "One has standing to seek judicial review when one has a stake in the outcome of the controversy and is affected by the issues in controversy." *Id.* "The question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 55, 333 Wis. 2d 402, 431, 797 N.W.2d 789, 803. The only questions the court should consider when analyzing standing are what interests deserve protection against injury, and what should be enough to constitute an injury. Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection. *Id.* ¶ 41 (citation omitted).

"Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as

informing the court of the consequences of its decision." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 16, 326 Wis. 2d 1, 12, 783 N.W.2d 855, 860. "The purpose of the requirement of standing is to ensure that a concrete case informs the court of the consequences of its decision and that people who are directly concerned and are truly adverse will genuinely present opposing petitions to the court." *In re Carl F.S.*, 2001 WI App 97, ¶ 5, 242 Wis.2d 605, 626 N.W.2d 330. Standing should be liberally construed. *City of Mayville v. Dep't of Admin.*, 2021 WI 57, ¶ 18, 960 N.W.2d 416, 421. Even a "trifling interest may be sufficient to confer standing." *Id.* (citation omitted).

Generally, on careful analysis of cases addressing standing, it is clear that the essence of the determination of standing, regardless of the nature of the case and the particular terminology used in the test for standing, is that standing depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 40, 333 Wis. 2d 402, 421–22, 797 N.W.2d 789, 798–99.

Defendant Gableman, then Justice Gableman, recognized that standing in a declaratory judgment action requires a different analysis than standing in other types of lawsuits:

> ¶ 29 Justice Ziegler's assertion that this case is unripe for adjudication is also without merit due to the nature of a declaratory judgment action. *See* Justice Ziegler's dissent, ¶¶ 250–52. We examined the issue of ripeness in the context of the Declaratory Judgment Act in *Olson,* where we stated,
>
> **"By definition, the ripeness required in declaratory judgment actions is different from the ripeness required in other actions.... potential defendants 'may seek a construction of a statute or a test of its constitutional validity without subjecting themselves to forfeitures or prosecution.' Thus, a plaintiff seeking a declaratory judgment need not actually suffer an injury before availing himself of the Act. What is required is that the facts be sufficiently developed to allow a conclusive adjudication."**

Coyne v. Walker, 2016 WI 38, ¶ 29, 368 Wis. 2d 444, 468, 879 N.W.2d 520, 532 (*overruled on other grounds by Koschkee v. Taylor*, 2019 WI 76, ¶ 29, 387 Wis. 2d 552, 929 N.W.2d 600) (internal citations omitted) (emphasis supplied).

It is clear that the statutes contemplated authority to sue in one's official capacity. *See* sec. 803.10(4)(b), Stats. (When a public officer sues or is sued in an official capacity, the public officer may be described as a party by the official title rather than by name; but the court may require the officer's name to be added). The question for this Court is whether Wolfe can bring these particular claims in her official capacity and on behalf of WEC.

At the crux of the Complaint are alleged constitutional claims. The Court finds the Panzer case most instructive:

> As to standing, the crux of the petitioners' claim is that the Governor exceeded his authority and impinged upon the core power and function of the legislature. The petitioners are members of the legislative leadership. If Senator Panzer, as Majority Leader of the Senate, and Representative Gard, as Speaker of the Assembly, acting in concert with the Joint Committee on Legislative Organization, lack standing to assert a claim that the Governor acted to deprive the legislature of the ability to exercise its core function in a specific subject area, then no one in the legislature could make such a claim, and no one outside the legislature would have an equivalent stake in the issue. We disagree with the proposition that petitioners do not have a significant stake in representing the legislative branch when there is a claimed breach of the separation of powers. This conclusion is consistent with our treatment of standing in *Wisconsin Senate v. Thompson.*

Panzer v. Doyle, 2004 WI 52, ¶ 42, 271 Wis. 2d 295, 328–29, 680 N.W.2d 666, 682–83, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 42, 295 Wis. 2d 1, 719 N.W.2d 408.

In *State ex rel. Wisconsin v. Senate v. Thompson*, members of the Senate challenged Governor Thompson's partial veto power on constitutional grounds seeking declaratory judgment and injunctive relief. Regarding standing of the Senate to make this constitutional challenge, the Supreme Court held:

> If this court were to accept any or all of these affirmative defenses, **the governor's challenged partial vetoes in this action would be insulated or immunized from this court's review and possible invalidation**.

State ex rel. Wisconsin Senate v. Thompson, 144 Wis. 2d 429, 435, 424 N.W.2d 385, 387 (1988) (emphasis supplied).

The analysis here is the same as the analysis in *Panzer*: If Wolfe does not have standing to assert a claim that the Defendants' subpoenas violate the constitution, who does? Wolfe as the administrator of the WEC is the logical individual to bring this constitutional challenge to the subpoenas, and no one outside the WEC would have an equivalent stake in the issue. Adopting Defendants' position would give unfettered power to the legislature, even when there are constitutional implications. Finding no standing for the Plaintiffs to bring these claims would insulate or immunize constitutional challenges from this court's review. *See State ex rel. Wisconsin Senate v. Thompson,* 144 Wis. 2d at 435. In addition, Justice Gableman's decision in *Coyne v. Walker* makes clear that "potential defendants," which are what the Plaintiffs are in this case (and which is supported by Defendant Gableman's lawsuits filed in Waukesha County naming as defendants parties whom he subpoenaed with substantively the same subpoenas that were served on Wolfe and WEC), may use a declaratory judgment action to test constitutional validity without subjecting themselves to forfeitures or prosecution. *See Coyne v. Walker*, 2016 WI 38, ¶ 29.

A plaintiff seeking a declaratory judgment need not actually suffer an injury before availing himself of the Act. *Id.* Plaintiffs have standing to bring this claim based on their complaint asserting constitutional violations.

Defendants' Motion to Dismiss is DENIED.

II. Motion for Temporary Injunction Under Sec. 813.02, Stats.

Circuit courts have the authority, pursuant to § 813.02, Stats., to grant temporary injunctions. The Court should only grant an injunction when four requirements have been met: 1) the movant is likely to suffer irreparable harm if a preliminary injunction is not issued; 2) the movant has no other adequate remedy at law; 3) a preliminary injunction is necessary to preserve the status quo; and 4) the movant has a reasonable probability of success on the merits. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313-14 (1977).

Plaintiff also seeks a permanent injunction against Defendants from executing the subpoenas. To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. *Pure Milk Prods. Co-op. v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Furthermore, to invoke the remedy of injunction the plaintiff must establish that the injury is irreparable, that is, not adequately compensable in damages. *Id.* Finally, injunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction. *Id.*

Injunctive relief is not ordered as a matter of course, but instead "rests on the sound discretion of the court, to be used in accordance with well-settled equitable principles and in light of all the facts and circumstances of the case." *Forest County v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998). An appellate court will not

overturn a trial court's decision granting injunctive relief absent a showing that the trial court has erroneously exercised its discretion. With respect to injunctive relief, an erroneous exercise of discretion occurs when the trial court: (1) fails to consider and make a record of the factors relevant to its determination, (2) considers clearly irrelevant or improper factors, or (3) clearly gives too much weight to one factor. *Sunnyside Feed Co. v. City of Portage,* 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998).

Both a temporary and permanent injunction require a showing of irreparable harm. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 521, 259 N.W.2d 310 (1977) ("While standards for the granting of temporary and permanent injunctive relief differ ... a showing of irreparable injury and inadequate remedy at law is required for a temporary as well as for a permanent injunction.")

At this stage, Plaintiffs have not shown irreparable injury, an inadequate remedy at law or preservation of the status quo – elements necessary for the Court to consider in deciding whether to grant a temporary injunction. In their initial brief for a temporary injunction, Plaintiffs did not address the elements the Court must consider in granting a temporary injunction under sec. 813.02, Stats. Plaintiffs addressed the merits of the case, but did not address irreparable harm, inadequate remedy at law, or preservation of the status quo. In their reply brief, Plaintiffs did not address irreparable harm, inadequate remedy at law, or preservation of the status quo. Plaintiffs were given the opportunity to supplement their submission before the December 23, 2021 hearing in this matter, and provided no further evidence or testimony at the hearing.

The law is clear that all four requirements must be met for injunctive relief. At oral argument, the Court specifically asked Plaintiffs to articulate the four factors that would allow the Court to grant a temporary injunction. In arguing the four factors, Plaintiffs stated that irreparable harm is the threat of contempt charges. However, no threat of contempt exists in this record – this action was filed before any action was taken by Defendants, unlike *Michael J. Gableman v. Eric Genrich, et al.*, Waukesha County Case Number 21-CV-1710.

Plaintiffs have failed to provide evidence or argument on all four factors required for a temporary injunction. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313-14 (1977) (the presence of irreparable injury and inadequate remedy at law are required for temporary injunction). However, should Defendants seek to enforce the subpoenas before this case is decided on the merits through contempt, imprisonment or other means similar to the action pending in Waukesha County, *Michael J. Gableman v. Eric Genrich, et al.*, Case Number 21-CV-1710[1], Plaintiffs can certainly file another motion for temporary injunction that the Court will schedule as soon as its calendar permits.

Plaintiffs' Motion for a Temporary Injunction on this record is DENIED.

[1] It should be noted that Gableman sued in his official capacity and sued the parties in Waukesha County in their official and personal capacities.

CONCLUSION

As the Wisconsin Supreme Court stated in *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 436–37, 424 N.W.2d 385, 387 (1988), it is the responsibility of the judiciary to act on constitutional issues notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences:

> Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is. We deem it to be this court's duty to resolve disputes regarding the constitutional functions of different branches of state government; we may not avoid this duty simply because one or both parties are coordinate branches of government. It is the responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences.

This Court will allow this action to proceed, as Plaintiffs have standing. However, at this time and on this record Plaintiffs have not met the legal requirements for a temporary injunction.

IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss is DENIED;

2. Plaintiffs' Motion for a Temporary Injunction is DENIED.