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Waukesha County
2022CV001395

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

NANCY KORMANIK

Plaintiff,

Case No.: 22-CV-_____

Case Code No.: 30701

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PLAINTIFF’S BRIEF IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER AND TEMPORARY
INJUNCTION**

The above-named Plaintiff, by her attorneys, the Law Firm of Conway, Olejniczak & Jerry, S.C., submits this Brief in Support of Motion for Temporary Restraining Order and Temporary Injunction.

BACKGROUND

The above-identified Plaintiff, who is a registered voter in Waukesha County and qualified absentee ballot voter, filed this action related to the proper construction and enforcement of certain Wisconsin Statutes that set forth rules and prohibitions on spoiling and/or returning a previously completed and submitted absentee ballot. (Compl. ¶¶ 1, 15-17; *see* Aff. of Nancy Kormanik ¶¶ 1-4). Specifically, this action focuses on Defendant, Wisconsin Elections Commission’s (“WEC”) published memoranda to municipal clerks on the foregoing rules and prohibitions that contradict the express and mandatory language of Wis. Stat. §§ 6.84, 6.86(5), and 6.86(6). (Compl. ¶¶ 10-14).

By way of background, following the November 2020 election, WEC noted “clerks in nearly every town, village, and city in Wisconsin processed more absentee ballot requests than

ever before—nearly 2 million statewide.” (Dorsey Aff., ¶ 5, Ex. A). More recently, during the August 2022 Partisan Primary, there were over 358,000 completed absentee voters submitted to municipal clerks across the state, including 295,059 absentee ballots returned by mail or in person to clerks. (Dorsey Aff., ¶ 6, Ex. B). Consequently, the meteoric rise of the voting by absentee ballot has “revealed public confusion about the process and differing opinions about previously obscure statutory provisions and administrative procedures.” (Dorsey Aff., ¶ 5, Ex. A, at 3).

WEC has contributed to such confusion by erroneously informing municipal clerks that they are permitted to engage in certain actions that directly contravene Wis. Stat. §§ 6.84, 6.86(5), and 6.86(6). (Dorsey Aff., ¶¶ 8-9, Exs. C and D). For example, WEC has instructed, through memoranda and other publications, that a clerk may return a previously completed and submitted absentee ballot to the elector, despite the clear and mandatory language of Wis. Stat. § 6.86(6) providing that “if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector.” Similarly, WEC has expressly informed clerks that they may spoil¹ a previously submitted absentee ballot on behalf of an elector, which directly conflicts with the clear language of Wis. Stat. § 6.86(5) providing that only “an elector returns a spoiled or damaged ballot”—meaning the absentee ballot must already be spoiled at the time the elector returns it. *Id.*

¹ Spoil is generally defined as “to damage seriously” or “to impair the quality or effect of” something. *Spoil*, Merriam-Webster Dictionary, located at: <https://www.merriam-webster.com/dictionary/spoil> (last visited Sept. 23, 2022); *Stroede v. Soc’y Ins.*, 2021 WI 43, ¶ 12, 397 Wis. 2d 17, 24, 959 N.W.2d 305, 308 (Courts may “consult a dictionary in order to guide our interpretation of the common, ordinary meanings of words.”). Spoiling a ballot, in the election context, takes place before the voter returns the ballot. *See* Wis. Stat. § 6.80(c) (on election day, an elector who “spoils” his or her ballot, “may receive another, by returning the defective ballot”); Wis. Stat. § 6.86(5) (“Whenever an elector returns a spoiled . . . absentee ballot to the municipal clerk . . . the clerk shall issue a new ballot to the elector[.]”)

Specifically, Wisconsin law provides that an elector (or an elector's agent) possesses the exclusive authority to "spoil" his or her absentee ballot *before* it is submitted. Wis. Stat. § 6.86(5) (emphasis added). If an absentee ballot is spoiled by the elector who was issued the absentee ballot, the elector is required to return his or her spoiled absentee ballot to the clerk before being issued a new absentee ballot. *Id.* Importantly, a municipal clerk may never return a previously completed and submitted absentee ballot to an elector that was not spoiled at the time it was submitted to the clerk—even if the elector changes his or her mind about who to vote for after submitting the absentee ballot.² Wis. Stat. § 6.86(6). Moreover, a clerk is responsible for verifying the identity of a person before issuing any absentee ballot requested in person. Wis. Stat. §§ 6.86(5), 6.86 (1)(ar) ("the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification"). Finally, upon verification of an elector's identity, a clerk may then issue a new absentee ballot to the elector so long as the spoiled absentee ballot is destroyed by the clerk and the appropriate deadline to request a new absentee ballot has not yet expired. Wis. Stat. § 6.86(5).

WEC's recently published materials directly contradict the express, clear, and mandatory provisions of Wis. Stat. §§ 6.84, 6.86(5), and 6.86(6). Specifically, in its August 1, 2022 published memorandum sent to all Wisconsin municipal clerks titled "Spoiling Absentee Guidance for the 2022 Partisan Primary" ("August 1st Published Memorandum"), WEC instructs that, after a voter has submitted his or her absentee ballot to the clerk's office, the voter "can request to spoil that ballot and receive a new one in the event the voter makes a mistake or changes their mind."

² The only two exceptions to the statute are set forth in Wis. Stat. § 6.86(5) and § 6.87(9). Wis. Stat. § 6.86(5) indicates that the ballot must be spoiled at the time it is returned by the elector. Wis. Stat. § 6.87(9) only applies when a certification on an absentee ballot is missing or incomplete and, in that event, the clerk may return the ballot to the elector. Neither statute authorizes a clerk to spoil a previously submitted absentee ballot or to issue a new absentee ballot when the elector previously submitted an absentee ballot.

(Dorsey Aff., ¶ 8, Ex. C at 1). The August 1st Published Memorandum further explains that “voters can request to have their returned absentee ballot spoiled and instead vote in person, either during the in-person absentee period or at their polling place on election day.” *Id.*

Likewise, in an August 2, 2022 publication titled “Rules About ‘Spoiling’ Your Ballot” (“August 2nd Published Memorandum”), WEC advises that a voter may “spoil his or her absentee ballot” due, in part, to “the voter changing his or her mind after returning the absentee ballot.” (Dorsey Aff., ¶ 9, Ex. D). In such instances, WEC advises that a municipal clerk is authorized to “invalidate” such a “spoiled ballot” on behalf of the elector. *Id.*

The purpose of Wis. Stat. § 6.86(6) is, in part, to “prevent the potential for fraud or abuse” in the absentee voting process, which is a process that the Legislature finds as “exercised wholly outside the traditional safeguards of the polling place.” Wis. Stat. § 6.84(1). The Legislature has expressly instructed that the procedure in Wis. Stat. § 6.86 “shall be construed as mandatory” and that “ballots cast in contravention of the procedures specified in those provisions may not be counted.” Wis. Stat. § 6.86(2). As such, the plain language of Wis. Stat. §§ 6.86(5) and 6.86(6) requires election officials to strictly follow and comply with the statute. Otherwise, electors are at risk of having their vote changed by someone else, without the elector’s express authorization. Indeed, should WEC’s foregoing memoranda related to returning and/or spoiling an absentee ballot persist, then Wisconsin voters, including Plaintiff, will be faced with the significant and irreparable risk that the voting process could result in disenfranchisement due to an elector’s lawful vote being illegally changed by someone other than the elector.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION.

The requirements of Wis. Stat. §§ 6.86(5) and 6.86(6) are the established law and policy of the State of Wisconsin, as mandated and enacted by the Wisconsin Legislature. WEC does not have the power to set aside the laws and policy decisions of the Wisconsin Legislature. WEC does not have the authority to create directives, guidance, or rules that are contrary to law, and it certainly does not have the authority to create new laws. But that is exactly what WEC has attempted to do here, cavalierly providing, promoting, and insisting upon guidance to municipal clerks that is directly contrary to Wisconsin law.

WEC's incorrect interpretation of the election statutes harms Plaintiff in several ways. Plaintiff, as an individual voter, is harmed because WEC has created uncertainty as to whether a lawful vote submitted by absentee ballot to a municipal clerk may later be invalidated. Plaintiff also is harmed by the unequal administration of Wisconsin's election system, as some municipal clerks may comply with WEC's incorrect memoranda, while others may follow the law as set forth in Wisconsin's statutes. Plaintiff is further harmed by the counting of votes cast in violation of Wisconsin law, as such votes dilute or otherwise diminish the value of her vote and/or other lawful votes. Finally, voters are entitled to participate in elections that are administered properly and in accordance with the law. If WEC is allowed to continue its administration of the 2022 election and future elections in a manner contrary to law, it will cast doubt on the administration of elections and harm voters' confidence in the electoral process. For these reasons, WEC's August 1st Published Memorandum and August 2nd Published Memorandum relating to clerks spoiling a previously submitted absentee ballot or returning a previously submitted absentee ballot to an individual, and any other such information published by WEC, must be immediately enjoined.

A. Standard.

Wis. Stat. § 813.02 makes injunctive relief available to a litigant facing the threat of irreparable injury. The purpose of injunctive relief is to protect a person's legal rights. *Wisconsin Bankers Ass'n (Inc.) v. Mut. Sav. & Loan Ass'n of Wisconsin*, 103 Wis. 2d 184, 187 (1981). The standard for issuance of injunctive relief is well known. As summarized in the seminal Wisconsin Supreme Court case, the standard is as follows:

Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. 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. As the Wisconsin Supreme Court has explained:

Where complaint states cause of action and motion papers disclose reasonable probability of plaintiff's ultimate success, it is well-nigh imperative duty of court to preserve status quo by temporary injunction, if its disturbance pendente lite will render futile in considerable degree judgment sought or cause serious and irreparable injury to one party; especially if injury to other is slight, or of character easily compensable in money; and discretion vested in court is largely over question of terms of restraint and protection of rights by bonds from one party to another.

Shearer v. Congdon, 25 Wis. 2d 663, 668 (1964) (emphasis added) (internal citation omitted). Notably, with regard to the third factor, “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.” *Id.* at 371, 563 N.W.2d at 588.

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.”). Here, the clear and present danger of diluted votes and harm to Plaintiff’s rights, as a result of WEC’s illegal policies and practices, satisfies that standard. *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶ 14, 976 N.W.2d 519, 527 (“WEC’s memos interfere[] with or impair, or at the very least, threaten[] to interfere with or impair, the Wisconsin voters’ legal rights and privileges—specifically, their rights and privileges as registered voters.” (citation and internal quotations omitted)).

B. Plaintiff has a reasonable probability of success on the merits of her claim for declaratory relief.

To establish a “reasonable probability of success,” Plaintiff need not actually prove her case. Rather, the “threshold is low” at this 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).

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, Plaintiff seeks declaratory relief for ongoing violations of Wisconsin's election statutes by WEC's policies and practices related to municipal clerks or local election officials returning and/or spoiling already submitted absentee ballots. In particular, WEC's continued instruction to municipal clerks and election officials that they can return a previously cast absentee ballot to an elector because that elector wants to change his or her vote or that a clerk may spoil a previously cast absentee ballot, pursuant to the August 1st and August 2nd Published Memoranda, is contrary to law. (Dorsey Aff., ¶¶ 8-9, Exs. C and D).

Wisconsin's election statutes related to the procedures for returning and/or spoiling absentee ballots are clear and unambiguous. Wis. Stat. §§ 6.84, 6.86(5), and 6.86(6). First, Wis. Stat. § 6.86(6) explicitly provides, in part, that once an elector submits his or her absentee ballot to a municipal clerk, the clerk "shall not return the ballot to the elector" except as provided in Wis. Stat. § 6.86(5) or § 6.87(9).³ Second, Wis. Stat. § 6.86(5) further provides that only an absentee elector may spoil his or her absentee ballot and, in the event that occurs, the elector is responsible for returning the "spoiled or damaged absentee ballot to the municipal clerk" and the clerk "shall issue a new ballot" at the time the spoiled ballot is returned by the elector only if the elector's identity is verified and the new ballot request is made prior to the deadlines set forth by statute. This section is unquestionably clear that the ballot must be spoiled by the elector before it is returned to the clerk—not after. These statutes make it unambiguously clear as to who possesses

³ As noted above, Wis. Stat. § 6.87(9) only applies when a certification on an absentee ballot is missing or incomplete and, in that event, the clerk may return the ballot to the elector. It does not authorize a clerk to return an absentee ballot to the elector under any other circumstance.

the authority to spoil an absentee ballot, when an absentee ballot may be spoiled and/or returned, and other vitally important safeguards and procedures to prevent absentee voting fraud or abuse.

The statutes related to returning and/or spoiling absentee ballots, and the requirements set forth therein, cannot be disregarded—by WEC or any other individual administering Wisconsin’s elections. They are not advisory directives subject to administrative discretion. They are, as the law clearly establishes, explicitly mandatory and subject to strict compliance. Wis. Stat. § 6.84(2) (“With respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted.”) (emphasis added); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 951 N.W.2d 556; *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶ 54, 976 N.W.2d 519.

There are particularly strong justifications supporting the strict application of the laws governing absentee balloting. In particular, the Wisconsin Legislature has noted an increased risk of voter fraud and abuse with respect to absentee balloting:

[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).

WEC’s policies and practices authorizing or instructing municipal clerks or local election officials to unlawfully spoil previously cast absentee ballots and/or return a previously cast absentee ballot to an elector wishing to change his or her vote fails to comply with Wis. Stat.

§§ 6.84, 6.86(5), and 6.86(6). The information, opinions, and guidance contained in WEC's published memoranda to all Wisconsin municipal clerks is in direct contradiction of the plain and clear statutory text. Specifically, one cannot deny that WEC's August 1st and August 2nd Published Memoranda, which authorize municipal clerks and local election officials to return already cast absentee ballots or spoil absentee ballots previously submitted and issue a new absentee ballot, without requiring verification of identification, contravenes Wis. Stat. § 6.86(5) and (6).

There is simply no authority granted in the statutes that allows clerks to either spoil previously submitted absentee ballots or return absentee ballots previously submitted because an elector changes his or her mind. As such, the Plaintiff has a reasonable probability of success on the merits of her claim.

C. Without injunctive relief, Plaintiff will suffer irreparable injury and have no adequate remedy at law other than restoration of the status quo.

The irreparable harm to which WEC has exposed Plaintiff is self-evident. WEC's current policies and practices instructing municipal clerks to unlawfully return and/or spoil already submitted absentee ballots exposes Plaintiff, and Wisconsin absentee ballot voters in general, to potential disenfranchisement by identity theft and voter fraud. Once this occurs, there are no means of recovery or a retroactive remedy available to the Plaintiff. There can be no re-vote or an election do-over. The only available remedy is injunctive relief.

"Electoral outcomes obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government," and unlawful votes "pollute" lawful votes, "which in turn pollutes the integrity of the results." *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 25, 976 N.W.2d 519. There is no rectifying that, and as a consequence, there is no means to rectify an unlawfully diluted or polluted vote, or a fraudulent vote. This is 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”).

Indeed, issuing an injunction to halt erroneous guidance that violates election laws to avoid voter harm is not only proper, it is required. Order, *Jefferson v. Dane Cnty.*, No. 2020AP557-OA (Supreme Ct. Wis. Mar. 31, 2020) (Dorsey Aff. Ex. E). In *Jefferson*, the petitioners sought leave to commence an original action against Dane County and its County Clerk, and they requested temporary injunctive relief ordering that the respondents remove their guidance indicating that voters could declare themselves indefinitely confined due to illness solely because of the Safer at Home Order. *Id.* at 1-2. The injunction was sought just weeks before the April election and presidential primary. In issuing the injunction, the court noted that the unlawful advice would harm voters since they “may be misled to exercise their right to vote in ways that are inconsistent with” the law. *Id.* at 3. *See also* Order, *SEIU v. Vos*, No. 2019AP622 (Supreme Ct. Wis. June 11, 2019) (Dorsey Aff. Ex. F) (the “Legislature . . . and public suffer a substantial and irreparable harm” when agencies undo the Legislature’s laws). The same irreparable harm will result here if an injunction is not issued. *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 restoration of absentee voting policies and practices consistent with the clear commands of the Wisconsin State Legislature and Wisconsin Statutes is worthy of injunctive

relief. Such relief will ensure that Plaintiff does not suffer significant and irreparable harm to her fundamental right to vote during the 2022 election. Moreover, such relief will return us to the proper *status quo*—the *status quo* that existed before WEC launched its flagrantly illegal spoiling guidance. *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.”).

D. Consideration of the public interest favors granting injunctive relief.

The public interest—namely, protecting Wisconsin voters—clearly demonstrates the need for injunctive relief. Without it, the entire voting populace is exposed to the risk of elections conducted outside of the law as well as irreparable harm to their right to an undiluted or unpolluted vote. WEC has clearly demonstrated, through its actions and statements, that unless it is enjoined, it will continue to advise, and municipal clerks will continue to follow, unlawful guidance that will harm Wisconsin voters and seriously impair the integrity of our elections. Issuing the injunction here is appropriate, regardless of the fact that WEC’s guidance was not enjoined for the prior August primary election. *See Order, Teigen v. WEC*, No. 2022AP91 (Supreme Ct. Wis. Feb. 11, 2022) (Dorsey Aff. Ex. G) (in denying the request to stay an injunction against use of absentee ballot drop boxes, the Supreme Court allowed WEC’s guidance to remain for the primary on February 15, 2022, but enjoined it for the April 5, 2022 election).

Consequently, Wisconsin voters are now faced with the very real prospect of election laws being administered inconsistently throughout different parts of the state. As discussed, WEC provided advice in its August 1st and August 2nd Published Memoranda to all 1,850 Wisconsin

municipal clerks that clearly contradicts Wisconsin absentee ballot statutes. Now these 1,850 municipalities are left to make 1,850 different absentee ballot decisions. It is reasonably foreseeable that some clerks, relying upon WEC's unlawful guidance, may engage in unilateral modification of absentee ballots, which is inconsistent with the law, while others comply with the mandatory language of Wis. Stat. § 6.86. Preventing non-uniform, disparate election policies and practice by municipal clerks and local election officials is of paramount importance to the public's interest in having elections that are administered properly and in accordance with the law. This weighty public interest can be achieved through the requested injunctive relief.

Accordingly, Plaintiff requests that this Court order immediate injunctive relief, prior to the start of absentee ballot voting for the November 8, 2022 election.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court issue a temporary restraining order and temporary injunction against Defendant WEC.

Dated this 23rd day of September, 2022.

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