STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN and
RICHARD THOM,

Plaintiffs,

v.

Case No. 2021CV0958
Declaratory Judgment: 30701

WISCONSIN ELECTIONS
COMMISSION,

Defendant, and

DEMOCRATIC SENATE CAMPAIGN
COMMITTEE, DISABILITY RIGHTS
WISCONSIN, WISCONSIN FAITH VOICE FOR
JUSTICE, and LEAGUE OF WOMEN VOTERS,

Intervenors-Defendants.

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

Plaintiffs Richard Teigen and Richard Thom are Wisconsin voters. Their complaint challenges certain pieces of Commission guidance, contained in two advisory memoranda to local officials issued on March 31 and August 19, 2020. (Dkt. 2 ¶¶ 8, 10 (complaint), Ex. A & B; 19 ¶¶ 8, 10 (Commission answer).) The guidance advised election officials that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the voter, and that drop boxes in public locations

authorized by the clerk can be used for voters to return completed absentee ballots, subject to measures to ensure ballot security and proper chain of custody. Plaintiffs claim that the memoranda are contrary to statute or, in the alternative, that they should have been promulgated as an administrative rule. The present motion asks this Court to temporarily enjoin use of the guidance pending a final resolution of the merits of this case.

Plaintiffs' motion should be denied because they cannot show that they have met the requirements for a temporary injunction. Plaintiffs have not shown that they will suffer irreparable harm if this Court does not enter the injunction, they do not need an injunction to preserve the status quo, and they have no reasonable likelihood of success on the merits of their declaratory judgment claims.

Temporary injunctions "are not to be issued lightly. The cause must be substantial." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 259 N.W.2d 310 (1977) (footnotes omitted). Plaintiffs' cause here is not substantial. The Commission's guidance regarding absentee voting should remain intact while Plaintiffs' action is pending.

STATEMENT OF FACTS

Plaintiffs do not include a specific section in their brief establishing any facts. They do, however, submit and reference two affidavits from Plaintiffs, and one from counsel, in support of their motion. The Commission also submits an affidavit in support of its opposition response. All these affidavits will be referenced in the Argument section of this brief.

LEGAL STANDARD

A court may issue a temporary injunction when the moving party demonstrates four elements: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary

to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 114, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*") (citing *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154).

ARGUMENT

Plaintiffs' motion for a temporary injunction should be denied because they cannot meet the required elements.

I. Plaintiffs will not suffer irreparable harm if a temporary injunction is denied.

Plaintiffs' motion for a temporary injunction should be denied because they have not shown a sufficient likelihood that, during the course of this litigation, the challenged Commission guidance will cause them irreparable harm. *Werner*, 80 Wis. 2d at 521 ("a showing of irreparable injury and inadequate remedy at law is required for a temporary . . . injunction").

Plaintiffs argue that they will suffer irreparable harm without an injunction because future elections conducted in accordance with the challenged Commission guidance would result in the counting of potentially unlawful votes, thereby diluting the value of their own validly cast ballots. Plaintiffs' theory of injury through vote dilution is too generalized and too speculative to satisfy the irreparable harm requirement.

Plaintiffs speculate that *other* Wisconsin electors may vote unlawfully, but they have not shown how that possibility would cause them concrete, irreparable injury. Most notably, they have not shown this Court that *they* will cast their own votes lawfully. That is, Plaintiffs' affidavits lack necessary statements for irreparable harm purposes. Plaintiffs do not state that they will not cast absentee ballots and return them via drop box. Nor do they state that they will not direct a family member or other agent to mail or return their absentee ballots to the clerk. Rather, they merely

assert that they are "uncertain" whether they can cast an absentee ballot via drop box. In sum, Plaintiffs state nothing about how they intend to cast their own ballots in the upcoming spring election. (Dkt. 65 ¶¶ 3–4; 66 ¶¶ 3–4.) Based on the information they have provided to this Court, Plaintiffs could vote in a way that they allege is unlawful.[1] Given that possibility, Plaintiffs are no different than the other Wisconsin voters who they speculate will cast unlawful absentee ballots. Consequently, Plaintiffs' irreparable harm argument fails because they have not shown this Court that *their* votes will be diluted in future elections, even assuming other voters return absentee ballots via drop boxes.

Further, even if Plaintiffs had shown that they would themselves vote lawfully, they still have failed to make any factual showing that any other voters would cast unlawful absentee ballots in the next election that would dilute Plaintiffs' votes. Again, their affidavits are devoid of statements as to whether they know that drop boxes will be used in the next election or whether they are aware of family members returning electors' absentee ballots to local election officials. The evidentiary record submitted by Plaintiffs is thin, to say the least. To obtain the drastic preliminary relief they seek, Plaintiffs must be required to do more than merely allege an abstract possibility of voter fraud by other Wisconsin electors.

Finally, even if Plaintiffs had shown both that they would vote lawfully and that other voters cast unlawful absentee ballots, their vote dilution theory still is too generalized to constitute irreparable harm. Any illegal counting of unlawful votes in a future election would equally dilute the influence of all other voters. Absent any showing that the challenged Commission guidance would result in their votes being diluted more than the votes of others, their assertions of

[1] For example, Plaintiffs could place their absentee ballots in drop boxes that are not considered "at" the municipal clerks' offices, whatever that means. Or Plaintiffs' family members could hand their absentee ballots to the clerks. (Dkt. 63:11 n.2.)

irreparable harm to the weight of their own votes is entirely speculative. At most, Plaintiffs have asserted an abstract interest in election integrity that is shared by all citizens. Such a generalized interest in ensuring compliance with the law cannot support a claim of irreparable harm.

Plaintiffs' temporary injunction motion thus should be denied because they have not shown that the continued use of the challenged guidance during this litigation will cause them irreparable harm.

II. Plaintiffs have no reasonable probability of success on the merits of their claims.

"A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits." *Werner*, 80 Wis. 2d at 520. Here, because Plaintiffs have not shown a reasonable probability of ultimate success, this Court can deny their motion on this basis, as well. Rather than repeat the argument made in its response brief opposing Plaintiffs' motion for summary judgment, the Commission respectfully directs the Court to that brief, as it equally applies to Plaintiffs' lack of probability of success on the merits. Plaintiffs have no reasonable probability of success on their declaratory judgment claims.

III. Plaintiffs have failed to prove that a temporary injunction is necessary to preserve the status quo.

Plaintiffs contend that they do not have to prove that a temporary injunction is necessary to preserve the status quo. (Dkt. 67:2–3, n.1.) Not only are Plaintiffs wrong, their failure to address this required element sinks their motion.

A. Plaintiffs' cited decisions do not support their position.

Plaintiffs contend that the status quo factor is not a strict requirement to obtain a temporary injunction in Wisconsin. They cite three decisions in support of their argument, but none helps their position.

First, Plaintiffs reference *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d 828, (Dkt. 67:2, n.1), but the paragraph they cite merely restates the requirements that the *circuit court* found for a *permanent* injunction. Moreover, later in the opinion, the court makes clear that it did not review any of the injunction requirements other than the law on the merits. *Kocken*, 301 Wis. 2d 266, ¶ 27. Thus, *Krocken* does not contain any holding as to the requirements for a temporary injunction under Wisconsin law.

Second, Plaintiffs cite *State v. Crute*, 2015 WI App 15, ¶ 39, 360 Wis. 2d 429. (Dkt. 67:2, n.1.) This court of appeals decision also fails to support their position because it cites the preliminary injunction requirements that a party was required to meet in a *federal* district court case. *Id.* (citing *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 984 (W.D. 2013)). So, *Crute* is inapplicable here because it references the federal law requirements for preliminary relief, not the state law requirements.

Finally, Plaintiffs cite *Spheeris Sporting Goods, Inc. v. Spheeris on Capitol*, 157 Wis. 2d 298, 306, 459 N.W.2d 581 (Ct. App. 1990), (Dkt. 67:2, n.1), which admittedly does not refer to the requirement that a movant show that a temporary injunction is necessary to preserve the status quo. However, this decision is irrelevant because "[t]he decision to grant a preliminary injunction [wa]s not challenged" in the case. *Id.* at 307. Further, Plaintiffs' take on *Spheeris Sporting Goods* cannot be squared with the Wisconsin Supreme Court's decision in *Werner* which the court of appeals even cites. *Spheeris Sporting Goods*, 157 Wis. 2d at 306. Indeed, the *Werner* court expressly held: "Temporary injunctions are to be issued only when necessary to preserve the status quo." 80 Wis. 2d at 520. While Plaintiffs are correct that this status quo requirement is not statutory one (Dkt. 63: 2, n.1), neither this Court nor the parties can ignore binding supreme court precedent. Moreover, the supreme court more recently confirmed that a movant seeking a temporary

injunction must show that it is necessary to preserve the status quo. *See SEIU*, 393 Wis. 2d 38, ¶ 93 (citing *Werner*, 80 Wis. 2d at 520–21, and *Milwaukee Deputy Sheriffs' Ass'n*, 370 Wis. 2d 644, ¶ 20).

In short, more recent binding appellate court decisions than those cited by Plaintiffs hold that a movant must show that "a temporary injunction is necessary to preserve the status quo." *SEIU*, 393 Wis. 2d 38, ¶ 93.

B. Plaintiffs' argument is forfeited and it fails on its merits.

Likely because Plaintiffs realize that they cannot show this Court that they need a temporary injunction to preserve the status quo, they merely put forth a one sentence argument buried in a footnote. Plaintiffs claim that the status quo is the Commission "following the text of the statute" and, because the Commission's memoranda do not allegedly do that, they need a temporary injunction. (Dkt. 67:2, n.1.) This argument should be rejected for two reasons.

First, this Court should disregard Plaintiffs' one-sentence argument because it is not developed, especially when they cite no case law in support. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."), *see also Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 87, n.30, 277 Wis. 2d 635, 691 N.W.2d 658 ("An appellate court need not consider arguments that are inadequately briefed.").

Second, Plaintiffs' argument fails on the merits. The status quo is represented by the current facts on the ground— the memoranda represent the Commission's current position, and they were issued several months ago and prior to previous elections. Plaintiffs don't need a temporary injunction to preserve the status quo. Instead, they want one to upend it.

Plaintiffs contend that if no temporary injunction is issued and this Court were ultimately to invalidate the challenged Commission guidance, their votes could be diluted in the interim by other votes cast in accordance with guidance that was later invalidated. (Dkt. 67:7–8.)

On the other hand, if a temporary injunction is issued and if this Court were ultimately to uphold the validity of the Commission guidance, the status quo would be disrupted during the next elections. This would likely cause significant voter confusion across the state as to absentee voting. For instance, the temporary injunction would apply only to the Commission and would not preclude local election officials from continuing to interpret and apply the absentee ballot statutes consistent with the challenged guidance. So, while it may be true that some local election officials would change their practice and cease the use of drop boxes as a result of the Court suspending the Commission guidance, it is also equally likely that some may continue to use drop boxes, especially since clerks inquired of the Commission about using drop boxes before the Commission ever issued guidance on the subject. (Dkt. 2:15, Ex. A; Affidavit of Meagan Wolfe, ¶ 6.) In particular, the security protocols for drop boxes (included in the second memo) rely on *federal* guidance, (Wolfe Aff. ¶ 7; Dkt. 2, Ex. B; 19 ¶ 10), which would still apply across the state. Consequently, if a temporary injunction is entered, voters across the state may (incorrectly) believe that local election officials can no longer use drop boxes—when that would not necessarily be true. Voter confusion is something courts must prevent, not create. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.").

Plaintiffs' failure to show this Court that they need a temporary injunction to preserve the status quo is yet another reason to deny their motion.

CONCLUSION

Defendant Wisconsin Elections Commission respectfully asks this Court to deny Plaintiffs' motion for a temporary injunction.

Dated this 15th day of November 2021.

Respectfully submitted,

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