

RICHARD TEIGEN, et al.,

Plaintiffs,

v.

WISCONSIN ELECTION COMMISSION,

Defendant

Case No. 21-CV-958

and

DEMOCRATIC SENATORIAL CAMPAIGN
COMMITTEE, et al.,

Defendant-Intervenors.

**BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Richard Teigen and Richard Thom have filed this action seeking a declaration that the Wisconsin Election Commission's decision to unilaterally create two new methods of returning absentee ballots not authorized by the Legislature is invalid. WEC issued these directives in the form of two memos released in March and August of 2020 (the "Memos"). Spitz S.J. Aff. Exs. 1, 2. As the next cycle of elections is set to begin in a few short months, time is of the essence. Consequently, Plaintiffs have filed the instant motion seeking a preliminary injunction, along with their summary judgment materials seeking judgment in their favor on the merits of their claims as a matter of law.

ARGUMENT

I. Standard of Review

To prevail on a motion for preliminary injunction, Plaintiffs must establish 1) they are likely to succeed on the merits; 2) they are likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in their favor; and 4) an injunction is in the public interest. *State v. Crute*, 2015 WI App 15, ¶ 39, 360 Wis. 2d 429, 860 N.W.2d 283 (citation omitted). Granting injunctive relief is discretionary with the trial court. *Milw. Deputy Sheriffs' Ass'n v. Milw. Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154 (citation omitted).¹

Plaintiffs satisfy all four elements consistently recognized by Wisconsin courts to secure a preliminary injunction. As outlined below and explained in full in Plaintiffs' summary judgment papers, Plaintiffs have a high likelihood of prevailing on the merits of their claims. As the Wisconsin Supreme Court has explained in the analogous context of a request for relief pending appeal, the factors for temporary relief are "interrelated considerations that must be balanced together." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995); see *In re A & F*

¹ Plaintiffs anticipate other parties may argue that a preliminary injunction would not "preserve the status quo" because WEC's Memos are already in place and being used by municipal clerks throughout the State. Wisconsin appellate courts have not treated this as strict requirement for an injunction. See *Crute*, 2015 WI App 15, ¶ 39; *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d 828; *Spheeris Sporting Goods, Inc. v. Spheeris on Capitol*, 157 Wis. 2d 298, 306, 459 N.W.2d 581 (Ct. App. 1990). Nor is there any basis in the text of the temporary injunction statute for such a requirement. Wis. Stat. § 813.02. In any event, the relevant "status quo" is following the text of the statute that has been the law in this state for the last three and a half decades.

Enterprises, Inc. II, 742 F.3d 763, 766 (7th Cir. 2014) (“The standard for [relief] pending appeal mirrors that for granting a preliminary injunction.”). In other words, the likelihood of success and irreparable injury are “inversely proportional,” *Gudenschwager*, 191 Wis. 2d at 441, such that “the greater the moving party’s likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa.” *A & F Enters.*, 742 F.3d at 766.

II. Plaintiffs have satisfied the elements necessary for a preliminary injunction.

A. Plaintiffs have more than a reasonable likelihood of success on the merits of their claim.

As set forth more fully in Plaintiffs’ summary judgment submissions, Plaintiffs are likely to succeed on their claim that WEC acted unlawfully when it unilaterally created additional methods of casting an absentee ballot not authorized by Wisconsin’s election statutes.

The Legislature has declared that “voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place” and, as such, “the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud and abuse,” including the need “to prevent overzealous solicitation of absent electors who may prefer not to participate in an election” and “to prevent undue influence on an absent elector.” Wis. Stat. § 6.84(1). The Legislature further emphasized the importance of construing the absentee voting statutes in strict accordance with their text when it specifically directed that the provisions of Wis. Stat. §§ 6.87(3) to (7) “shall be construed as mandatory.” Wis. Stat. § 6.84(2). This directive includes Wis. Stat. § 6.87(4)(b)1, the statute primarily at issue here.

Because the Legislature has unequivocally stated that Wis. Stat. § 6.87(4)(b)1 is mandatory, any ballots cast in a manner inconsistent with statute “may not be included in the certified result of any election” *Jefferson v. Dane Cty.*, 2020 WI 90, ¶ 16, 394 Wis. 2d 602, 951 N.W.2d 556, and WEC does not have the authority to change that legislative decision.

The plain language of Wis. Stat. § 6.87(4)(b)(1) provides, in pertinent part, that “the envelope [containing an absentee ballot] shall be mailed *by the elector*, or *delivered in person, to the municipal clerk issuing the ballot or ballots. . . .*” (emphasis added). WEC’s new, unpromulgated rules provide that the words “by the elector” can include “a family member or another person”—in other words, literally anyone—and the language “deliver[] in person, to the municipal clerk issuing the ballot or ballots” to allow dropping a ballot into a drop box, whether staffed or unstaffed, at virtually any location, without any restriction on who monitors it.

As explained in more detail in Plaintiffs’ summary judgment brief, these interpretations violate the text of the statute for four independent reasons. Pls. S.J. Br. 6–15.

Summarized briefly here, WEC’s interpretation that “another person” (be it a spouse, a child, or a paid campaign worker) can return the ballot on behalf of the voter is blatantly contrary to the statutory text, which specifies that an absentee ballot must be returned “by the elector.” This is not a matter of the agency taking advantage of an unstated ambiguity or an opening in the statutory language; WEC has written the words “the elector” out of the text altogether and replaced them with

“any person,” a position completely contrary to the Legislature’s intent for several reasons more fully explained in Plaintiffs’ summary judgment brief. *See* Pls. S.J. Br. at 6-9.

Similarly, WEC’s interpretation that “delivered in person, to the municipal clerk” includes an unstaffed drop box contravenes the statutory text. An inanimate drop box is obviously not the “municipal clerk” or one of his or her “authorized representatives,” nor does it satisfy the remainder of the clause in the text—“issuing the ballot or ballots.” Pls. S.J. Br. 9–11. A drop box does not and cannot issue ballots. Shoehorning the concept of a drop box—which is not mentioned anywhere in the text—into the terms “in person, to the municipal clerk issuing the ballot or ballots” is contrary to common sense and is in conflict with the Legislature’s stated intent that the absentee balloting statute be strictly construed. Additionally, permitting staffed drop boxes in locations besides the municipal clerk’s office that have not been designated as alternate sites under Wis. Stat. § 6.855, and placing no limitation on who may staff such drop boxes, is likewise contrary to the text enacted by the Legislature. *See* Pls. S.J. Br. at 11-15.

Furthermore, while it is Plaintiffs’ position that WEC does not have the authority to promulgate rules that go against the text of enacted statutes, as WEC’s memoranda do here, it is clear that WEC would at least have to go through the statutory rulemaking process to create these new methods of voting (if it had authority to do so, which it does not). While the Memos at issue have the force of law and purport to direct municipal clerks in how to conduct elections and electors in how

to vote in them, WEC did not promulgate the changes as rules—either through the standard rulemaking process or the more expedited emergency rulemaking process—and as a result they must be invalidated. *See Palm*, 2020 WI 42, ¶ 58; Pls. S.J. Br. at 16-20.

This is *not* to say that drop boxes could never be legal. The Legislature could pass, and the Governor sign, a law authorizing their use at any time, or the Legislature could have delegated authority to WEC to promulgate rules (through the proper rulemaking process) concerning the return of absentee ballots. The Legislature has taken neither action, and the statute that has been the law for the last thirty-five years provides for only two methods of returning an absentee ballot: 1) by mail; and 2) in person to the municipal clerk. Both the absence of any references to drop boxes in the statute and the failure of logic that results from stretching the definition of “municipal clerk” to include an inanimate object demonstrate that the agency’s interpretation of the statute conflicts with legislative intent. WEC’s interpretation of these provisions writes the procedural safeguards on absentee ballots that the Legislature included out of the statute. If the agency can act in this manner, there is nothing to prevent WEC from vitiating other statutory safeguards like the voter identification requirement or the requirement that senior living centers not allow staff members to serve as voting deputies. *See Wis. Stats. §§ 6.79(2)(a), 6.875(4)(b)*. Permitting WEC’s staff to alter the absentee voting procedures without any check leaves very little the agency cannot do with regard to elections.

Because WEC's interpretation of the absentee ballot statute goes against the text of the law and because that interpretation was never promulgated as a rule, Plaintiffs have a very strong likelihood of prevailing on the merits of their claims. This Court should therefore issue a preliminary injunction preventing further instructions to election officials that are in contradiction with the election statutes, including WEC's Memos authorizing ballot harvesting and unmanned drop boxes, suspending the directives in those two memoranda pending a final judgment on the merits, and directing WEC to inform municipal clerks of this ruling within 10 days.

B. Plaintiffs will suffer irreparable harm absent an injunction.

"Irreparable harm is that which is not adequately compensable in damages." *Allen v. Wis. Pub. Serv. Corp.*, 2005 WI App 40, ¶ 30, 279 Wis. 2d 488, 694 N.W.2d 420 (citing *Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979)). This element is met by demonstrating that, absent the injunction, the permanent injunction sought in the action would be rendered futile. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 520, 259 N.W.2d 310 (1977). Plaintiffs can readily demonstrate irreparable harm. Every election that is conducted under either illegal or unpromulgated rules causes further harm to Plaintiffs and to the public at large because the inclusion of potentially unlawful votes in elections dilutes the value of a ballot validly cast. Furthermore, running an election that violates the statutes undercuts public confidence in the integrity of those elections. An election that is later found to have been conducted improperly cannot be remedied with a damages award or other post-judgment remedy. Once an election is conducted improperly, the proverbial horse is out of the barn and there is no practical way to

remedy the harm—one cannot simply call for a “revote” under the circumstances in which the election should have been held in the first place. Plaintiffs seek prospective injunctive relief in order to ensure that future elections are not tainted—and the public’s confidence in those results undermined—by the illegal actions of WEC.

Wisconsin’s spring election takes place on April 5, 2022, with the primary election to precede it on February 15, 2022. Elections are scheduled for the State Court of Appeals, and for a number of Circuit Courts and local offices. By law, absentee ballots may be available earlier but *must* be available to the public at least 21 days before the Spring Primary. Wis. Stat. § 7.15(1)(cm). That means that, if the Memos remain in place, absentee ballots could be cast by depositing them in drop boxes (illegally, as Plaintiffs maintain) by January 24, 2022 (and perhaps earlier). To avoid that result, this Court needs to act far enough in advance of that date to make sure that no ballots are cast illegally and that the State’s election laws are followed.

A speedy disposition at this stage serves not only Plaintiffs’ interests, but the interests of all constituencies involved in the election process. Candidates of all stripes will know how to correctly encourage their supporters to vote. Municipal clerks can be assured that they are administering elections properly and in accordance with the law. Advocacy organizations can guide their supporters to vote so that they know that all ballots cast in accordance with the law will count.

C. The balance of equities tips in Plaintiffs’ favor.

The third element necessary to an injunction is that the balance of equities must tip in the Plaintiffs’ favor. “[C]ompeting interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the

injunction.” *Pure Milk Prods.*, 90 Wis. 2d at 800, 280 N.W.2d 691 (citations omitted). Plaintiffs satisfy this element as well. Wisconsin citizens have an interest in public employees and officials upholding the law and acting within their authority.

In the absence of the requested injunction, Plaintiffs and other electors will suffer harm. Eligible electors in Wisconsin like Plaintiffs have an interest in public authorities conducting elections in accordance with the statutes, and specifically in knowing how to properly and legally cast a ballot so they know it will be counted. In the absence of an injunction, their votes may be diluted by ballots that are cast improperly that are nevertheless counted in election results. On the flip side of the coin, there is no interest in having a vote that is illegally cast counted.

While other parties may argue that the equities tip in their favor because WEC’s decision to unilaterally create new methods of absentee ballot return could encourage more eligible electors to vote absentee, the question in this case is not, and never has been, whether ballot harvesting or voting by drop box are good ideas as a matter of policy. The Legislature could pass, the Governor could sign, bills permitting these methods of returning absentee ballots—were that the case, Plaintiffs would not be bringing this lawsuit. Rather, the heart of the balancing inquiry is whether the equities favor permitting an agency to contravene the language used by the Legislature and to do so without going through the statutory rulemaking process. The inquiry is not the policy inquiry—reserved to the elected members of the Legislature—of whether providing additional methods of absentee voting is a good idea or not. The question is whether it is better, on balance, to permit a state agency

to alter the exercise of a fundamental right in a manner that goes against the text of the law without any check on that authority or that state actors be required to confine their conduct to the bounds set by the law. Requiring public officials to work within the bounds of their authority is indisputably a public good.

Defendant may also argue that revoking the Memos at this juncture would cause confusion for municipal clerks, candidates, advocacy organizations, and electors in general. But this possibility is precisely why relief is needed now and not at some future date closer to the time absentee ballots are issued and cast for the 2022 elections. If WEC's Memos are illegal, as Plaintiffs assert, Defendant should not be permitted to perpetuate that error in the future elections simply because the agency acted improperly in the first instance. To deny an injunction on the basis that "we've already done it this way once, so now it cannot be changed" does nothing short of reward the agency for skirting the rulemaking procedures and could encourage other state actors to do the same in other contexts. The balance of equities favors deciding this issue now, and not after another election or two has occurred.

D. An injunction serves the public interest.

For similar reasons, an injunction in this instance serves the public interest. An order directing that future elections must be conducted in accordance with the statutes means that municipal clerks across the state can be confident that they are conducting elections legally and correctly, providing electors with the maximum opportunity to cast their ballots consistent with the law. An injunction to this effect would also go a long way in undercutting a narrative that might otherwise continue to poison the public discourse—namely, that elections are being stolen.

On the other hand, there is no public interest in continuing an unlawful policy. If the argument is that the public interest is served by the policies WEC promoted in its Memos, there are legal, legislative methods of putting those methods of returning absentee ballots in place. An unelected administrator with a word processor should not be permitted to take these important policy decisions affecting the right to vote out of the hands of elected officials. Officials who run on the ballot can be held electorally accountable for their actions on this issue (or for their failure to act on it). The author of the two Memos at issue is not even an appointee of an elected official (who could be held at least indirectly responsible at the ballot box for any actions of his or her chosen appointees) such as, for example, one of the six members of WEC itself. Instead, the unelected WEC administrator has unilaterally declared that the policy choices of the Legislature to permit the return of absentee ballots using only two specified methods—by mail or by the elector in person to the municipal clerk—should be and therefore are overruled. Issuing an injunction prevents the concentration of authority in one individual and preserves elected officials' proper role in deciding, as a matter of policy, whether the law governing the return of absentee ballots should be changed.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court enter a preliminary injunction 1) enjoining WEC from issuing any further rules or guidance inconsistent with the voting statutes; 2) suspending the use of WEC's March 2020 and August 2020 memos pending a final resolution of the questions Plaintiffs have

raised on the merits; and 3) directing WEC to inform municipal clerks across the state within ten (10) days of this Court's ruling that its March 2020 and August 2020 guidance is suspended pending the result of this litigation.

Dated this 15th day of October, 2021.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

/s/ Electronically signed by Katherine D. Spitz

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