

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

MICHAEL WHITE, EVA WHITE, EDWARD
WINIECKE, and REPUBLICAN PARTY OF
WAUKESHA COUNTY,

Plaintiffs,

Case No. 2022CV1008

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PROPOSED-INTERVENOR PLAINTIFF'S NOTICE OF MOTION AND MOTION
FOR A TEMPORARY INJUNCTION OR, ALTERNATIVELY, FOR A WRIT OF
MANDAMUS**

TO: Michael White
4650 Lake Club Circle
Oconomowoc, WI 53066

Eva White
4650 Lake Club Circle
Oconomowoc, WI 53066

Edward Winiecke
1134 Majestic View Lane
Oconomowoc, WI 53066

Republican Party of Waukesha County
1701 Pearl Street, Suite #5
Waukesha, WI 53186

Wisconsin Elections Commission
201 West Washington Ave., Second Floor
Madison, WI 53707

PLEASE TAKE NOTICE that Proposed-Intervenor Plaintiff the Wisconsin State Legislature (“Legislature”), by its undersigned attorneys at Troutman Pepper Hamilton Sanders LLP, hereby moves the Court under Wis. Stat. §§ 813.02 *et seq.* for a temporary injunction or, alternatively, under Wis. Stat. §§ 783.01 *et seq.*, 801.02(5), for a writ of mandamus, requiring Defendant Wisconsin Election Commission (“WEC”) to rescind and refrain from enforcing the guidance document titled “Missing or Insufficient Witness Address on Absentee Certificate Envelopes” issued October 18, 2016 (“2016 Witness Certificate Alteration Mandate” or “2016 Mandate”).

The grounds for this Motion are as follows, and explained in more detail in the accompanying Memorandum:

1. Section 6.87 of the Wisconsin Statutes outlines the procedures and requirements for completing and counting absentee ballots. Wis. Stat. § 6.87. Subject to a few exceptions not relevant here, voters must mark their absentee ballots in the presence of a witness who must also sign the absentee-ballot certificate and include his or her address on the certificate. *Id.* § 6.87(2), (4)(b)(1). Section 6.87(6d) states that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” *Id.* § 6.87(6d). However, if a clerk “receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector,” if “time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” *Id.* § 6.87(9).

2. Despite the clear language of Section 6.87, WEC has, since 2016, required municipal clerks to remedy absentee ballots returned without a witness's address by making a correction directly to the absentee certificate envelope if the clerk is able to discern the witness's address from extrinsic sources. *See* Wis. Elections Comm'n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes* (Oct. 18, 2016).¹

3. Pursuant to its authority under Section 227.26 of the Wisconsin Statutes, the Joint Committee for the Review of Administrative Rules ("JCRAR") ordered WEC to promulgate the 2016 Mandate as an emergency rule. Wis. Stat. § 227.26(2). WEC promulgated Emergency Rule 2209, which codified the substance of the 2016 Mandate. Wis. Elections Comm'n, Emergency Rule 2209 (July 18, 2022) ("Rule" or "Emergency Rule 2209").² Following a public hearing, JCRAR voted to suspend Emergency Rule 2209, concluding that it was contrary to law and conflicted with legislative intent. JCRAR, Record of Committee Proceedings (July 20, 2022).³

4. On July 25, 2022, WEC announced that because it had not formally rescinded its 2016 Witness Certificate Alteration Mandate, the 2016 Mandate remained in effect. Wis. Elections Comm'n, *Statement Regarding JCRAR Emergency*

¹ Available at <https://elections.wi.gov/memo/amended-missing-or-insufficient-witness-address-absentee-certificate-envelopes> (all websites last visited on Aug. 10, 2022).

² Available at https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209_rule_text/emr2209_rule_text.

³ Available at https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209.

Rule Suspension (July 25, 2022).⁴ Therefore, municipal clerks are currently being instructed to correct deficient absentee ballots in a manner that is contrary to Wisconsin law.

5. WEC's continuing enforcement of the 2016 Mandate has caused, and is causing, irreparable harm to the Legislature and the public's interest in the integrity of the electoral process, Wis. Stat. § 6.87(6d), (9), the "prompt execution of [valid laws]," *Nken v. Holder*, 556 U.S. 418, 436 (2009), and the protection of the separation of powers "inherent in the Wisconsin Constitution." *Wis. Leg. v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900.

PLEASE TAKE FURTHER NOTICE that Proposed-Intervenor Plaintiff requests that this Court align the schedule for responsive briefing to this Motion with the motion-for-temporary-injunction briefing schedule the parties have stipulated to, such that all pending motions can be decided together.

⁴ Available at <https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension>.

Dated: August 11, 2022

Respectfully submitted,

Electronically signed by Misha Tseytlin

MISHA TSEYTLIN

State Bar No. 1102199

Counsel of Record

KEVIN M. LEROY

State Bar No. 1105053

EMILY A. O'BRIEN

State Bar No. 1115609

TROUTMAN PEPPER

HAMILTON SANDERS LLP

227 W. Monroe, Suite 3900

Chicago, Illinois 60606

(608) 999-1240 (MT)

(312) 759-1938 (KL)

(312) 759-5939 (EO)

(312) 759-1939 (fax)

misha.tseytlin@troutman.com

kevin.leroy@troutman.com

emily.obrien@troutman.com

*Attorneys for the Wisconsin State
Legislature*