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 THE WISCONSIN STATE LEGISLATURE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR A TEMPORARY INJUNCTION OR, ALTERNATIVELY, FOR A WRIT OF MANDAMUS

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INTRODUCTION

This is a straightforward case calling for immediate relief: the Wisconsin Elections Commission ("WEC") has taken it upon itself to supplemental Wisconsin law by inventing a non-statutory mandate that clerks must themselves correct errors in witness certificates, and then continued to enforce this mandate even after the Joint Committee for Review of Administrative Rules ("JCRAR") vetoed its efforts. The oppositions filed by WEC, the Waukesha County Democratic Party ("WCDP") and the League of Women Voters of Wisconsin ("LWVWI"), try to distract from WEC's unlawful actions, opining on what they believe constitutes a sufficient witness address, the meaning of far-flung federal statutes, and the like. While these parties are wrong on the merits of each of these arguments, their assertions on these scores are entirely beside the point because they cannot find any Wisconsin or federal statute that authorizes WEC to mandate that clerks correct witness certificates, let alone in the teeth of a contrary JCRAR veto. And these parties' equitable arguments are similarly wrong. The Legislature came to the courts only after WEC remarkably declared that it would ignore JCRAR's veto, and the Legislature is only asking for relief for future elections, so that all voters and clerks will know the rules in time.

ARGUMENT

I. The Legislature Has An Extremely High Likelihood Of Success On The Merits

A. The 2016 Mandate Violates Wisconsin Statutes

The 2016 Mandate obviously violates Section 6.87. Leg.'s Mem. In Supp. Of Temp. Inj. Or, Alternatively, For A Writ Of Mandamus ("Mot.") at 10–13. Section

6.87 provides clerks only two options when encountering absentee ballots with "an improperly completed certificate or with no certificate," Wis. Stat. § 6.87(9): (1) "return[ing] the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary," if there is sufficient time to cure, or (2) rejecting the ballot when there is insufficient time to cure, because "[i]f a certificate is missing the address of a witness, the ballot may not be counted," Mot.11 (quoting Wis. Stat. §§ 6.87(6d), (9)). The 2016 Mandate requires clerks to take another path—correcting witness errors—and its thus unlawful. Mot.11–12.

WEC, WCDP, and LWVWI claim that the 2016 Mandate is lawful because Section 6.87 does not tell clerks that they are not allowed to alter witness certificates, *see* WEC Resp.12–15, does not define "address," WEC Resp.7–12; WCDP Resp.9–10, and allegedly permits clerks to accept (and correct) incomplete addresses, as somehow distinguished from missing addresses, *see* WCDP Resp.11.

As a threshold matter, and dispositive of all of these arguments, Section 6.87 gives clerks only two options when receiving "an improperly completed certificate" or "no certificate," Wis. Stat. § 6.87(9), and WEC has no statutory authority to invent a third. Mot.10–13. ***In short, clerks simply have no statutory authority to add any information to a witness certificate, no matter their claimed justification, and WEC has no statutory right to give them that authority***. After all, WEC "possess[es] only those powers . . . expressly conferred or . . . necessarily implied by the statutes under which [it] operate[s]." *Koschkee v. Taylor*, 2019 WI 76, ¶ 14, 387 Wis. 2d 552, 929 N.W.2d 600 (citation omitted). That should be the end of this case.

In any event, these parties' arguments noted above—even if they were relevant to this case—are wrong. When reading statutory language, courts must consider "the context in which it is used" and "in relation to the language of surrounding or closely-related statutes," *Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Wisconsin election law explains that an address for voter identification purposes "includ[es] a numbered street address, if any, and the name of a municipality," and so it makes no sense to read the witness address requirement not to include this vital information. *See* Wis. Stat. § 6.34(3)(b)(2); *accord* Wis. Stat. § 6.87(2) ("I am a resident of . . . the city of . . . , residing at . . .* in said city, the county of . . . , state of Wisconsin" (second through fourth ellipses in original)). Thus, the context of Section 6.87(6d), *see Kalal*, 2004 WI 58, ¶ 46, shows that the "address" in a witness certificate requires, at a minimum, the street address, street name, and municipality of the witness. Similarly, the distinction between incomplete and missing addresses is nowhere in the statue. Section 6.87(9) provides the two options that a clerk has when "receiv[ing] an absentee ballot with an improperly completed certificate or with no certificate," thus only a "[ ]properly completed" witness certificate falls outside of this provision. Wis. Stat. § 6.87(9).

B. The 2016 Mandate Contradicts JCRAR's Veto

The Legislature is also extremely likely to succeed in this case because JCRAR vetoed the substantively identical Emergency Rule 2209, and WEC cannot re-impose the same mandate in a different form under *Martinez v. Department of Industry, Labor & Human Relations*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992). *See* Mot.13–16.

WCDP's contention that JCRAR's rejection of the substance of the 2016 Mandate is irrelevant to the Mandate's legality, WCDP Resp.15–19, asks this Court to flout *Martinez*. There, the JCRAR rejected a DILHR rule allowing for sub-minimum-wage pay for certain workers as "fail[ing] to meet statutory requirements" and "fail[ing] to comply with legislative intent," after which DILHR issued a notification to employers "that they should ignore" the JCRAR veto and DILHR "would not take action against employers who paid the sub-minimum wage in violation of JCRAR's amended rule." *Martinez*, 165 Wis. 2d at 692–93. The Supreme Court concluded that this subsequent announcement was unlawful, as "DILHR does not have the authority to declare JCRAR's rule changes void," and it did not matter that DILHR's subsequent notification to employers was not itself embodied in a subsequent rule. *Id.* at 699. What happened here is unlawful for the same reasons. After JCRAR rejected WEC's purported authority to mandate that clerks correct incomplete witness certificates, JCRAR, Record of Committee Proceedings (July 20, 2022),[1] WEC ordered clerks to continue to follow the 2016 Mandate's materially identical requirement as if JCRAR had never acted, Wis. Elections Comm'n, *Statement Regarding JCRAR Emergency Rule Suspension* (July 25, 2022).[2] The

[1] 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.

[2] Available at https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension.

effect of WEC's conduct was to "declare JCRAR's rule changes void," just as in *Martinez*. *See* 165 Wis. 2d at 698–99.

C. The 2016 Mandate Constitutes An Unlawful Rule Issued Without Following Relevant Procedures

The Legislature also has a strong likelihood of success because the 2016 Mandate is a rule, issued outside of the mandatory rule promulgation procedures. Mot.16–20. The 2016 Mandate satisfies all five elements for a rule under the Supreme Court's controlling test, and is thus unlawful because WEC did not follow the rulemaking process in issuing the Mandate. *See* Mot.18–20; *see generally Wis. Legis. v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

While WCDP claims that WEC had authority to issue "formal or informal opinions" directed specifically to clerks, WCDP Resp.15–17, that is irrelevant here because under the Supreme Court's five-part test, the 2016 Mandate is a rule that can only be issued following rulemaking procedures, Mot.18–20. In particular, it does not matter that WCDP characterizes the mandate as an "opinion[ ]," WCDP Resp.15–16, because the 2016 Mandate uses mandatory language—"shall" and "must"—to *require* clerks to "obtain any information that is missing from the witness address," Wis. Elections Comm'n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes* (Oct. 18, 2016),[3] which means that it is, at a minimum, a "statement of policy" satisfying the legal test for a rule, *Wis. Leg. v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 942 N.W.2d 900. Nor does it matter that the 2016

[3] Available at https://elections.wi.gov/memo/amended-missing-or-insufficient-witness-address-absentee-certificate-envelopes.

Mandate is directed only at all clerks in the State, rather than to ordinary citizens. *Contra* WCDP Resp.16–17. The 2016 Mandate applies to *all* "clerks," Wis. Elections Comm'n, *Amended: Missing or Insufficient Witness Address*, *supra*, meaning it is "of general application," because that is an "open[ ] . . . group[ ] of people regulated," and "people not regulated by the order one day could [ ] be[ ] regulated the next," *Palm*, 2020 WI 42, ¶¶ 23, 25, such as when a new clerk is elected or appointed.

D. Federal Law Does Not Authorize The 2016 Mandate

WCDP and LWVWI bizarrely attempt at significant length to invoke federal law to justify the 2016 Mandate, LWVWI Resp.4–8; WCDP Resp.12–15, but this argument is a nonstarter for multiple, independent reasons.

First, WEC did not base its justification for the 2016 Mandate on federal law during the administrative process, and thus the Mandate cannot be upheld on that basis under the *Chenery* doctrine. *See Transp. Oil Inc. v. Cummings*, 54 Wis. 2d 256, 264, 195 N.W.2d 649 (1972) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943)); *accord Behnke v. Dep't of Health & Soc. Servs. of State of Wis.*, 146 Wis. 2d 178, 182 n.2, 430 N.W.2d 600 (Ct. App. 1988). Tellingly, none of the cases that WCDP and LWVWI cite here upheld an agency action on the basis of a federal-law justification that the agency did not invoke during the administrative proceedings below.

Second, nothing in 52 U.S.C. § 10101(a)(2)(B)—which merely prohibits denying an individual the right to vote based on an "error or omission," if such error or omission is not "material in determining whether such individual is qualified

under State law to vote in such election"—purports to require WEC to take any affirmative steps, such as issuing the 2016 Mandate, which is the issue in this case.

Third, reading 52 U.S.C. § 10101(a)(2)(B) as mandating that WEC issue any particular mandate to clerks—including in a form, as here, that violates JCRAR's veto authority and Wisconsin's rulemaking procedures—would be obviously unconstitutional under the United States Constitution's anti-commandeering doctrine, which prohibits the Federal Government from "compel[ing] the States to . . . administer" federal law. *New York v. United States*, 505 U.S. 144, 188 (1992).

Fourth, as to the merits of whether 52 U.S.C. § 10101(a)(2)(B) preempts Section 6.87—which issue, to be clear, is not properly part of this case, as noted above—the Legislature only briefly explains why there is no preemption. To "prevent the potential for fraud or abuse," Wisconsin law imposes on voters who want to take advantage of the "privilege of voting by absentee ballot," Wis. Stat. § 6.84(1), the obligation that such voters comply with certain provisions of Section 6.87, *see id.* § 6.84(2). Thus, the requirement that all absentee ballots include a witness certificate properly and completely filled out by a witness, *see* Wis. Stat. § 6.87(6d), (9), is a specific qualification under Wisconsin law applicable to all voters who wish to vote absentee, meeting 52 U.S.C. § 10101(a)(2)(B)'s materiality requirement. This makes *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022)—a Pennsylvania-related decision resting in large part upon concessions by the defendants in that case, *see id.* at 165–66 (Matey, J., concurring in judgment)—wholly distinguishable. There, the Third Circuit invalidated the practice of rejecting absentee ballots that did not include a

handwritten date next to the voter declaration signature under 52 U.S.C. § 10101(a)(2)(B). *See id.* at 162–64. Among other failures, the Third Circuit noted this requirement was not "material" to voter qualifications under Pennsylvania law because only ballots with missing dates were not counted, whereas "ballots that were received with an erroneous date were counted." *Id.* at 163. Here, in contrast, providing an accurate witness certificate is both itself a qualification to vote absentee under Wisconsin law, and relevant to confirm other qualifications for absentee voters, as LWVWI admits, LWVWI Resp.7—so it is "material" under § 10101(a)(2)(B).

Finally, LWVWI's U.S. Constitution-based objections to Section 6.87 are similarly not properly part of this case, so the Legislature again addresses them here only briefly. LWVWI's claim that Section 6.87(6d) violates the First and Fourteenth Amendments, LWVWI Resp.9–11, is foreclosed by *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). In *Luft*, the Seventh Circuit upheld Wisconsin's restrictions on the duration of in person absentee voting, explaining that although state election regimes "invariably impose some burden upon individual voters," it is only when those burdens as a whole "severely restrict[ ]" voting rights that states must "have compelling interests and narrowly tailored rules." *Id.* at 671–72 (citation omitted). Further, "electoral provisions cannot be assessed in isolation," and the *Luft* Court identified numerous ways in which Wisconsin's election laws operated for the benefit of the franchise. *Id.* at 675. Here, Section 6.87 imposes a minimal burden on voters who want to use the privilege of voting absentee by requiring those voters to submit accurate witness information, and does so within the broad context of Wisconsin's

permissive voting scheme that *Luft* extoled and upheld. Nor does Section 6.87 deny procedural due process, LWVWI Resp.16, as that provision just imposes a minimal burden on voters who want to vote absentee, and provides reasonably calculated remedial measures to facilitate the correction of errors, Wis. Stat. § 6.87(9).

II. All Equitable Considerations Support Temporary Injunctive Relief

Considerations of the equities and the public interest all favor injunctive relief. WEC's nullification of Section 6.87, JCRAR's authority to review agency rulemaking, and the Chapter 227 rulemaking process triply violates the separation of powers, thus inflicting *per se* irreparable harm on the Legislature. Mot.21–22. Further, a temporary injunction would not harm WEC, as such an order would merely require compliance with the existing legal regime. Mot.23. Finally, the public's interest supports an injunction, as the public always has an interest in the execution of valid laws and the administration of free and fair elections. Mot.23–24.

The contrary equitable arguments of WEC, LWVWI, and WCDP all fail.

The Legislature did not "unreasonably delay[ ]" bringing this lawsuit, *contra* WCDP Resp.23–24; LWVWI Resp.19, so the doctrine of laches is inapplicable. The Legislature laudably used the statutory tools available to it, through the statutory JCRAR rule-review process, before coming to court. It was not until WEC announced that it would violate JCRAR's veto of the substantively identical Emergency Rule 2209, Mot.8–9, that the Legislature sought this Court's assistance. And the Legislature only sought prospective relief for future elections, not retroactive relief as in *Trump v. Biden*, 2020 WI 91, ¶¶ 13–22, 394 Wis. 2d 629, 951 N.W.2d 568.

Next, in claiming that the Legislature suffers no harm and the public interest does not support a temporary injunction, LWVWI and WCDP ignore the fact that allowing WEC's conduct to stand would cause irreparable harm of the "first magnitude" to both the Legislature and the public by undermining Section 6.87, JCRAR's authority to review agency rulemaking, and the Chapter 227 rulemaking process itself. Mot.21 (citing Tseytlin Aff. Ex. 2 at 8 (Order, *SEIU v. Vos*, No.2019AP622 (June 11, 2019)); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)).

Enjoining WEC from enforcing the 2016 Mandate is necessary to preserve the status quo. *Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356, 969 N.W.2d 263; *contra* WEC Resp.20–21; WCDP Resp.21–22; LWVWI Resp.2. Here, JCRAR's veto of Emergency Rule 2209 brought Wisconsin's absentee-ballot-correction procedures back into compliance with the State's election statutes, and WEC disturbed the status quo by continuing to enforce the 2016 Mandate's plainly unlawful requirements.

Finally, an order temporarily enjoining WEC from enforcing the 2016 Mandate would not "compel[ ] the acts which constitute[ ] all or part of the ultimate relief sought" by the Legislature, WCDP Resp.20–21, because that injunction would only stay in place until final judgment. Mandamus—which the Legislature has also sought—would, of course, grant full relief and the Legislature has fully demonstrated its entitlement to that complete relief. Mot.24–25.

CONCLUSION

This Court should grant the Legislature a temporary injunction or, alternatively, a writ of mandamus.

Dated: August 30, 2022

Respectfully Submitted,

Electronically signed by Misha Tseytlin

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