

FILED
10-17-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

STATE OF
WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

RISE, INC., and
JASON RIVERA

Plaintiffs,

v.

Case No. 22-CV-2446
Declaratory Judgment
Case Code: 30701

WISCONSIN ELECTIONS COMMISSION, and
MARIBETH WITZEL-BEHL, in her official
capacity,

Defendants,

WISCONSIN STATE LEGISLATURE,

Intervenor-Defendant.

NOTICE OF MOTION AND MOTION FOR EXPEDITED BRIEFING SCHEDULE

TO: Wisconsin Elections Commission
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PLEASE TAKE NOTICE that Plaintiffs Rise, Inc. and Jason Rivera, by their attorneys, Diane M. Welsh and Leslie A. Freehill of Pines Bach LLP; John Geise, Spencer Klein, Samuel T. Ward-Packard, and Makeba Rutahindurwa of Elias Law Group; and Kathryn Ali and Elizabeth Lockwood of Ali & Lockwood LLP, hereby move the Court per Wis. Stat. § 802.10(3), to issue the following Expedited Briefing Schedule on Plaintiffs' Motion for Summary Judgment, filed herewith. More specifically, Plaintiffs respectfully request the Court enter the following scheduling order:

1. Monday, October 17, 2022: Plaintiffs' Motion and Brief in Support of Motion for Summary Judgment filed.
2. Monday, October 24, 2022: Defendants' response brief due by 12:00 p.m.
3. Wednesday, October 26, 2022: Plaintiff's reply brief due by 12:00 p.m.
4. Friday, October 28, 2022: Court holds oral argument (if necessary), issues ruling, or both.

The grounds for this Motion are more fully set forth in Plaintiffs' Brief in Support of Expedited Briefing and Decision on Plaintiffs' Motion for Summary Judgment, filed herewith.

Plaintiffs have consulted with counsel for Defendants, but as of the time of the filing, neither have indicated they will join this motion.

This motion will be heard, if necessary, at the above date and time to be set by the Court.

WHEREFORE, Plaintiffs respectfully requests that the Court issue the aforementioned briefing schedule for Plaintiffs' Motion for Summary Judgment, filed herewith.

Respectfully submitted this 17th day of October, 2022.

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Electronically signed by Diane M. Welsh

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**PLAINTIFFS' MOTION FOR EXPEDITED BRIEFING AND DECISION
ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Rise, Inc. and Jason Rivera, by their undersigned attorneys, respectfully move this Court to order an expedited schedule for briefing and decision on their contemporaneously filed Motion for Summary Judgment. In support thereof, Plaintiffs state the following:

INTRODUCTION

Developments over the past ten days make clear that urgent action by this Court is necessary to ensure that Wisconsin voters are not arbitrarily and unlawfully disenfranchised in the upcoming general election. New evidence shows that clerks across Wisconsin are applying varying interpretations of the absentee ballot witness address requirement, with varying results as to which voters' ballots are accepted and which are rejected. In Dane County, for example, some clerks are applying a five-component definition of address (street

number, street name, municipality, state, zip), and returning ballots that do not satisfy these criteria—while others are accepting ballots that have a three-component witness address (street number, street name, municipality). And in a survey of municipalities across the state, fifteen municipalities reported that they are requiring the five-component address—among them several of the state’s largest cities.

Concern over the widespread variation in how Wisconsin’s more than 1,800 local election officials are interpreting the term “address” is not merely academic. In many cases, their chosen definition will be the dispositive factor as to which ballots are counted on election night and which are not. And as it currently stands, a ballot that would be counted in certain Wisconsin municipalities will be disqualified in other parts of the state. This is—obviously—unacceptable. And it is entirely avoidable. But only a decision by this Court—and only one that comes before ballots start to be counted on election day—declaring what the term “address” means as it is used in Wis. Stat. § 6.87(2) (and applied in Wis. Stat. § 6.87(9) and Wis. Stat. § 6.88) can solve the problem.

For these reasons, and because Plaintiffs’ declaratory judgment claim presents a clean and narrow question of statutory interpretation that is ripe for final resolution, Plaintiffs have moved for summary judgment and now ask the Court to expedite briefing on and consideration of that motion. Specifically, Plaintiffs request that this Court set a schedule that resolves the summary judgment motion on or before October 28, 2022. Should this Court find that oral argument would aid the Court’s decision, Plaintiffs request that any hearing occur on or before October 28, 2022, to ensure Plaintiffs’ motion is resolved in a timely enough manner to prevent the disenfranchisement of scores of Wisconsinites.

LEGAL STANDARD

Courts have broad discretion to grant motions to expedite under their inherent authority to take actions to ensure their efficient and effective function. *See City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749–50, 595 N.W. 2d 635, 641 (1999); *Hefty v. Strickhouser*, 2008 WI 96, ¶31, 312 Wis. 2d 530, 752 N.W.2d 820 (“Wisconsin circuit courts have discretion to control their dockets.”).

ARGUMENT

An expedited briefing and decision schedule is necessary to prevent disparate and erroneous application of the witness-address requirement. The problem this lawsuit (and Plaintiffs’ summary judgment motion) seeks to solve is newly minted. Every statewide election in Wisconsin since 2016—including the August 2022 primary—has proceeded according to guidance from the Wisconsin Elections Commission (“WEC”) instructing local election officials that an absentee ballot certification containing sufficient information to enable an official to discern the witness’s complete address—generally street number, street name, and municipality—requires no further action from the voter to be counted. In September, another circuit court enjoined aspects of that WEC memorandum that it found unlawful, which prompted WEC to remove the two memoranda in their entirety from its website and issue a communication characterizing them as “invalidated” and “withdrawn.”

WEC and the Wisconsin Legislature have argued in this litigation that WEC’s prior guidance concerning the meaning of “address” was unaffected by that injunction and thus that clerks across Wisconsin have the clear guidance they need to conduct the upcoming general election. New evidence roundly disproves these arguments. And, compounding the confusion, WEC itself took the position in an October 14 hearing in another case that (i) a

witness address that does not contain the witness's street number, street name, and municipality could still be counted in some circumstances, and (ii) WEC's guidance documents are "not law," but rather just "advice."

Unless this Court declares—once and for all—what "address" means for purposes of absentee ballot witness certifications, this confusion and uncertainty will remain. Plaintiffs have prosecuted this case efficiently and expeditiously, and the expedited schedule they seek here is consistent with how Wisconsin courts have traditionally handled elections matters. There is no risk of prejudice to Defendants from this expedited schedule. The risk of harm to Plaintiffs and voters across the state if the Court does not act, on the other hand, is certain and grave. For these reasons, the Court should grant Plaintiffs' motion.

I. New evidence demonstrates that clerks are confused and are applying different standards to witness addresses.

Over the course of the last ten days, new evidence has come to light that local election officials across Wisconsin are applying inconsistent definitions of "address" under Wis. Stat. § 6.87(2), and thus making inconsistent decisions about whether to accept or reject absentee ballots. County Clerk Scott McDonell reports that clerks in Dane County are taking different, inconsistent approaches. While some municipal clerks are accepting ballots so long as certificates contain enough information for the witness to be contacted—*e.g.*, a street number, street name, and a municipality or a zip code—others are requiring five components (street number, street name, municipality, state, and zip code). Affidavit of Scott McDonell (McDonell Aff.) ¶¶3–6. A survey conducted on October 14 confirmed Clerk McDonell's observations, finding that both Middleton and Fitchburg—the only two Dane municipalities surveyed—report using a five-component definition. Affidavit of Delia Goldin ("Goldin

Aff.”) ¶9. In short, identical ballots are being treated differently by different clerks in this Court’s own back yard.

Looking more broadly, that same survey showed that, of 21 municipalities surveyed across the state, fifteen reported that they are requiring a five-component address (street number, street name, municipality, state, zip) on witness certificates. Goldin Aff. ¶¶8–10. Among those municipalities are several of the state’s largest cities, including Milwaukee, Appleton, Janesville, and Racine. *Id.* In the same survey, two other municipalities, Ashland and Fond du Lac, indicated that, although five-component addresses are not *required* for a ballot to be accepted, clerks in these locales are urging voters to include to include all five because of confusion surrounding and potential election day-challenges to the definition of address. *Id.* Only four municipalities indicated that they are faithfully applying WEC’s three-component definition. *Id.* The problem is thus a statewide one. And relative to the last gubernatorial election (2018), the use of a five-component definition has been accompanied by a notable uptick in absentee ballot rejection frequency in many municipalities. *See* Affidavit of Sara Meyers (“Meyers Aff.”) ¶¶9-12 & Exh. A. All this increases the risk that lawful voters will be disenfranchised and that clerks across Wisconsin will be unduly burdened during the busiest time of their year. *See* McDonell Aff. ¶7.

Further compounding this uncertainty are the inconsistent positions that WEC is taking in litigation regarding the proper definition of “address.” At a hearing last Friday, October 14, in a case concerning the interpretation of another subpart of Wis. Stat. § 6.87, WEC’s counsel represented in open court that a three-part address on a witness certificate (one containing a street number, street name, and municipality) was sufficient—but not necessary—for a ballot to be counted. Affidavit of Spencer Klein at ¶7. Counsel also

represented that WEC's guidance constituted mere "advice to clerks," and was "not law." *Id.* at ¶8. Given WEC's own apparent ambivalence about what a witness "address" requires, it is unsurprising that clerks are confused, too. Only a declaration by this Court can remedy this problem and ensure that clerks around the state know what the law is when they start counting votes on November 8.

II. Plaintiffs' requested expedited schedule is consistent with Wisconsin Courts' consideration of elections matters and will not prejudice Defendants.

Courts in Wisconsin historically have acted swiftly to decide questions of statutory interpretation related to elections to ensure that elections proceed in a consistent and lawful manner. See *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶63, 393 Wis. 2d 629, 948 N.W.2d 877 (Ziegler, J., dissenting) (noting that the Supreme Court decided a question of statutory interpretation "in a matter of hours" in *Wisconsin Legislature v. Evers*, No. 2020AP608-OA, unpublished order (Wis. Apr. 6, 2020)). Resolving this issue before the November 2022 election is critical, and Plaintiffs ask this Court to ensure that this is done here by setting a schedule that resolves the summary judgment motion on or before October 28, 2022. In addition to ensuring clerks receive clarity as soon as possible, Plaintiffs' proposed expedited schedule takes into account the potential for appellate review in advance of the November election, should that be necessary. This will allow complete resolution of the issue prior to the election, with time for local election officials to familiarize themselves with court rulings before counting ballots.

The requested expedited schedule will not prejudice Defendants in any way. *Cf. Schopper v. Gehring*, 210 Wis. 2d 208, 215, 565 N.W.2d 187, 190–91 (Ct. App. 1997) (recognizing that courts may alter default briefing schedules "so long as each party as a fair opportunity to prepare and be heard."). The issue raised by Plaintiffs' motion for summary

judgment is narrow and asks the Court to resolve a purely legal question: what is the meaning of “address” under Wis. Stat. § 6.87(2) in relation to the processing and counting of absentee ballots. No discovery is necessary to decide this issue, which turns on ordinary principles of statutory interpretation; it is ripe for resolution now. WEC and the Legislature both have recently been involved in several matters concerning the meaning of “address” within the relevant statutory framework, and so are familiar with the issue. And, as explained above, *supra* at 4-6, this Court’s immediate resolution of this issue is necessary to prevent the inconsistent and arbitrary application of rules concerning which ballots should be counted, which will inevitably result in Wisconsin voters having their ballots unlawfully rejected. Regardless of how the Court decides the ultimate issue, the most important thing is that the Court does, in fact, decide the ultimate issue before election day. All parties would benefit from this clarity and certainty.

CONCLUSION

To minimize confusion, ensure voters are not wrongfully disenfranchised, and lessen the risk of numerous lawsuits being filed on the heels of the election, Plaintiffs respectfully request that this Court grant their motion for expediting briefing and decision on Plaintiffs’ Motion for Summary Judgment. They accordingly propose the following schedule:

- October 24: Responses to Plaintiffs’ Motion for Summary Judgment are due by 12 pm.
- October 26: Plaintiffs’ Reply brief is due by 12 pm.
- October 28: the Court hears oral argument, issues its ruling, or both.

Defendants have not consented to this schedule. Plaintiffs are of course amenable to an alternative schedule proposed by the Court, but stress again their belief in the need for a speedy resolution here prior to October 28, 2022.

Dated this 17th day of October, 2022.

Respectfully submitted,

Electronically signed by Diane M. Welsh

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