

FILED
10-27-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

RISE, INC. and JASON RIVERA,

Plaintiffs,

v.

Case No. 22-CV-2446

WISCONSIN ELECTIONS COMMISSION
and MARIBETH WITZEL-BEHL,

Defendants,

v.

WISCONSIN STATE LEGISLATURE,

Intervenor.

**DEFENDANT WISCONSIN ELECTIONS COMMISSION'S
RESPONSE IN OPPOSITION TO PLAINTIFFS' SECOND MOTION
FOR TEMPORARY INJUNCTION**

INTRODUCTION

Plaintiffs' second motion for a temporary injunction recycles the same arguments rejected by this Court in its first motion for a temporary injunction. The new evidence cited by Plaintiffs does nothing to change the calculus. Plaintiffs' second motion for a temporary injunction should be denied for the same reasons this Court denied their first and nearly identical motion for temporary injunction just weeks ago.

RESPONSE TO PLAINTIFFS' BACKGROUND

In Plaintiffs' brief in support of their second motion for a temporary injunction, for "more fulsome backgrounds," they direct the Court to their Brief in Support of their Motion for Summary Judgment (Dkt. 87) and Brief in Support of their Motion for Temporary Injunction (Dkt. 8). (*See* Dkt. 104:4 n.1.) While the Commission objects to Plaintiffs' attempt to incorporate by reference facts from a summary judgment brief to which the Commission is not required to respond on an expedited basis, *see* Decision on Motion for Expedited Briefing Schedule, October 21, 2022 (Dkt. 102), the Commission responds to the facts incorporated from Plaintiffs' first motion for a temporary injunction by respectfully directing the Court to its Response to Plaintiffs' Statement of Facts in its brief opposing that motion. (*See* Dkt. 76:4–6).

Plaintiffs also supply this Court with new evidence in support of its second motion for a temporary injunction. (*See* Dkt. 104:5–6.) For the purposes of this pending motion, the Commission objects to the new evidence in two respects.

First, Plaintiffs' use of an October 20 *Milwaukee Journal Sentinel* article in support of facts about clerk activity should be rejected because it is "clearly hearsay." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 359 n.4, 526 N.W.2d 822 (Ct. App. 1994); Wis. Stat. § 908.01(3).

Second, the Commission disputes Plaintiffs' assertion that the Commission took a position in *League of Women Voters of Wisconsin v. WEC*, No. 22-CV-2472 (Dane County Circuit Court, Br. 6), that is "contrary to the position it has taken in this litigation." (Dkt. 104: 6.) The Commission's position in litigation is consistent in both cases: a witness address on an absentee ballot certificate that contains three components—street number, street name, and municipality—is sufficient and need not be returned to the elector by the clerk under Wis. Stat. § 6.87(9). Moreover, a certificate *may be* sufficient under Wis. Stat. § 6.87(6d), even if it does not contain the three components. Indeed, the Commission has never issued guidance as to which ballots should not be counted under Wis. Stat. § 6.87(6d). Put another way, the Commission has never taken the position that a three-component witness address is a minimum requirement to make an absentee ballot certificate sufficient in all circumstances under Wis. Stat. § 6.87(9) or (6d).

SUPPLEMENTAL LEGAL BACKGROUND

Plaintiffs' brief in support of its second motion for a temporary injunction conflates two distinct statutory issues. To aid the Court in its review, the Commission clarifies this distinction and the relevant law as follows.

Plaintiffs ask the Court to issue temporary declaratory and injunctive relief adopting either their definition of a witness address¹ or the Commission's three-component definition—*i.e.* street number, street name, and name of municipality²—and to then declare that an absentee ballot certificate that includes witness address information satisfying the adopted definition thereby also satisfies the witness address requirement in Wis. Stat. § 6.87(2) for the purposes of both the initial processing of absentee ballots by municipal clerks and the counting of those ballots in the 2022 general election. Plaintiffs' request for relief thereby implicates two distinct statutory issues.³

First, they ask the Court to hold that a three-component ballot certificate is not “improperly completed” under Wis. Stat. § 6.87(9). Plaintiffs suggest that, under such a holding, municipal clerks should be prohibited from returning a three-component ballot to the voter for the addition of any other

¹ Plaintiffs propose that a sufficient witness address must include enough information to enable an election official to reasonably discern where the witness may be communicated with. As shown in the Commission's brief opposing Plaintiffs' first temporary injunction motion, that definition was not contained in the Commission's 2016 guidance. (*See* Dkt. 76:3.)

² For the sake of verbal economy, a certificate satisfying the Commission's definition will be referred to in this brief as “a three-component ballot certificate.”

³ This Court has already ruled that Plaintiffs' proposed new definition of witness address is not the status quo and, as shown in the Argument below, the new evidence they have now presented supplies no basis for the Court to change that ruling at the current stage of this litigation. Therefore, the following discussion will refer to the Commission's three-component definition, with the understanding that the distinction between the statutory responsibilities of municipal clerks and of the officials who actually count absentee ballots would be the same under either definition.

components of a typical postal address, such as state or zip code. (See Pl. Br. 13) (asking Court to compel the Commission to instruct clerks that certain ballot certificates “are valid *and should not be returned to voters*”) (emphasis added).

Second, they ask the Court to hold that a three-component ballot certificate must be *counted* if the ballot is otherwise lawful. That request necessarily implicates Wis. Stat. § 6.87(6d), which provides that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” Although Plaintiffs’ proposed orders do not cite that statute, their argument necessarily amounts to a request that the Court hold that an absentee ballot with a three-component ballot certificate cannot be rejected—*i.e.* not counted—under Wis. Stat. § 6.87(6d) on the ground that it is missing the address of a witness.

Plaintiffs move back-and-forth between these two statutory issues as if they were one and the same, but they are not. The determination of when a clerk may return an absentee ballot to a voter under Wis. Stat. § 6.87(9) and the determination of when an absentee ballot may be rejected under Wis. Stat. § 6.87(6d) are conceptually related, to be sure, but they are, nonetheless, distinct determinations made by different election officials under different circumstances and with different consequences. To avoid confusion, the Court should bear in mind the distinctions between these two statutes.

I. Return of an absentee ballot to the voter under Wis. Stat. § 6.87(9).

Under Wis. Stat. § 6.87(2), a completed absentee ballot must include a certificate (printed on the absentee ballot envelope) in which the absentee voter certifies compliance with specified procedural requirements for absentee voting, and a witness certifies that the statements in the voter's certification are true and that the procedures were properly executed. The certificate must include, inter alia, the witness' signature and address. The completed absentee ballot must be sealed in the envelope bearing the certificate and returned to the appropriate municipal clerk via mail or in-person delivery. Wis. Stat. § 6.87(4)(b)1.

Under Wis. Stat. § 6.87(9), “[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot [in time for it to be delivered to the appropriate ballot counting location on election day].” This statute plainly authorizes municipal clerks, upon receipt of an absentee ballot, to make an initial determination whether the certificate accompanying that ballot is “improperly completed.” That determination logically includes a determination whether the witness address portion of the certificate is improperly completed.

If a clerk determines that a certificate is improperly completed, the clerk “may return the ballot to the elector.” Wis. Stat. § 6.87(9). By using the word “may,” the statute gives clerks discretion to decide whether to return a particular ballot to the voter. The only statutory restriction on that discretion is that the clerk may return the ballot to the voter only if there is sufficient time for the voter to receive the returned ballot, correct the certificate, and get the ballot back to the clerk prior to election day. *See id.* Apart from that time-limited restriction, § 6.87(9) is not mandatory and neither requires nor prohibits a clerk from returning an absentee ballot to the voter.

Whenever a clerk receives an absentee ballot and does not return it to the voter under Wis. Stat. § 6.87(9),⁴ the clerk is required to enclose it, unopened, in a sealed and endorsed carrier envelope, store it in the clerk’s office until election day, and then deliver it either to the election inspectors of the proper ward or to the municipal board of absentee ballot canvassers (if the municipality is one that canvasses absentee ballots under Wis. Stat. § 7.52). Wis. Stat. § 6.88(1)–(2).

Contrary to Plaintiffs’ suggestions, then, the statutes do not give municipal clerks the power to simply reject—i.e., not count—an absentee ballot

⁴ This might happen either because the clerk has determined that the certificate is properly completed or because the clerk has determined that the certificate is improperly completed but there is not enough time to return the ballot to the voter.

based on a clerk's initial determination that a certificate was improperly completed. A clerk may either return a ballot to the voter under § 6.87(9), or store it and deliver it on election day to the officials charged with counting the ballot. *Id.* But the decision whether to count or reject a ballot—including a decision to reject a ballot under § 6.87(6d)—is made by the latter officials, not by the municipal clerk.

II. Rejection of an absentee ballot under Wis. Stat. § 6.87(9)

On election day, after the clerk has delivered the absentee ballots to the appropriate officials pursuant to Wis. Stat. § 6.88(1)–(2), the ballots then are counted either by the election inspectors at the polling place in the ward where the absentee voter resides, or by the municipal board of absentee ballot canvassers (for municipalities that have chosen to use that system). *See* Wis. Stat. §§ 6.88, 7.52.

For municipalities that use the ward system, rather than the municipal board of canvassers system, all absentee ballots must be processed in the same room in which votes are cast, before the polls close. To process absentee ballots, the election inspectors must open the carrier envelopes containing the absentee certificate envelopes, remove each individual absentee certificate envelope, and announce the absentee voter's name and address in such a manner that any interested observer is able to hear the announcement. *See* Wis. Stat. § 6.88(3)(a). Any observer who is a qualified elector of Wisconsin,

including an election inspector, can challenge an absentee ballot using the same procedures used for challenging an in-person voter. *See* Wis. Stat. §§ 6.92, 6.925, and 6.93.

Following the opening of the carrier envelope, the inspectors review the absentee certificate envelope to determine (a) whether the envelope has been opened or tampered with; and (b) whether all the required information appears in the certificate section of the envelope. Wis. Stat. § 6.88(3)(a).

If everything is proper, then the inspectors open the envelope and the ballot gets counted. *Id.*

If the inspectors find that a certification is insufficient, then the ballot is not counted. Instead, the ballot is endorsed as “rejected (giving the reason),” and the ballot and certificate envelope are placed in an envelope marked for rejected absentee ballots, which must be signed by the chief inspector and one of the inspectors representing each of the two major political parties. *See* Wis. Stat. § 6.88(3)(b). When the process is completed, the envelope is returned to the municipal clerk. *Id.*

For municipalities that use the municipal board of canvassers system, the process is similar and is governed by the procedures detailed in Wis. Stat. § 7.52. The municipal board of canvassers is required to meet and process the absentee ballots before 10:00 p.m. on election day. Wis. Stat. § 7.52(1). Like the ward inspectors acting under § 6.88, the municipal board of canvassers must

open the carrier envelopes, announce the absentee voter's identity, and determine whether the certification has been properly executed. Wis. Stat. § 7.52(3)(a).

If the certification is sufficient, the board opens the absentee certificate envelope and places the ballot into the proper ballot box for counting. *Id.*

If the board finds that the certification is insufficient, then “the board of absentee ballot canvassers shall not count the ballot.” Wis. Stat. § 7.52(3)(b). Instead, each member of the board must endorse the ballot as “rejected (giving the reason),” and the ballot and certificate envelope are placed in an envelope marked for rejected absentee ballots, which must be endorsed and signed by the board members. *Id.* After the process has been completed, the board “shall then return the envelope containing the ballots to the municipal clerk.” *Id.*

The above provisions plainly give the power to count or reject an absentee ballot not to the municipal clerk, as Plaintiffs wrongly suggest, but rather to either the ward inspectors or the municipal board of absentee ballot canvassers. Those officials are empowered to reject a ballot if the accompanying certificate is insufficient, including, “[i]f a certificate is missing the address of a witness.” Wis. Stat. § 6.87(6d). A clerk's initial determination under § 6.87(9) as to whether the witness address portion of a certificate was improperly completed thus does not govern whether the absentee ballot

connected to that certificate will ultimately be counted or rejected under § 6.87(6d).

ARGUMENT

I. This Court should deny the first request for relief in Plaintiffs' second motion for a temporary injunction.

Plaintiffs' second temporary injunction motion includes two, alternative requests for relief. First, Plaintiffs again ask this Court to issue temporary declaratory and injunctive relief adopting their definition of a witness address as "a place where the witness can be communicated with." (Dkt. 104:12–13 ("Conclusion"); 105 (Proposed Order for Temporary Injunction).) They then ask the Court to additionally declare that an absentee ballot certificate with a witness address meeting their definition is properly completed under Wis. Stat. § 6.87(9) and, further, that the corresponding ballot should be counted.

This Court should deny this first request for relief. Plaintiffs' proposed definition of witness address as "a place where the witness can be communicated with" is no different than the definition proposed in their first motion for a temporary injunction (Dkt. 5; 8:23). When this Court denied that motion, it concluded that this proposed definition was not the existing status quo for temporary injunction purposes. (Dkt. 79.) Plaintiffs have put forward no persuasive argument why this Court should change its mind regarding the status quo as to the definition of "address."

There is no merit to Plaintiffs' suggestion that this Court should now reconsider their proposed definition based on an alleged change in the status quo (Dkt. 104:3). Less than three weeks ago, this Court found that "that the definition of an absentee ballot witness 'address' contained in the October 18, 2016 Wisconsin Elections Commission memorandum and the September 14, 2022 memorandum to clerks from the Elections Commission, namely that an address is sufficient if it contains a street number, street name and name of municipality, is the status quo and that the requested temporary injunction is unnecessary to preserve the status quo." (Dkt. 79.) Adopting Plaintiffs' proposed definition of address remains just as unnecessary today as it was then. The new evidence Plaintiffs supply—that some clerks in Wisconsin are returning absentee ballots to electors under Wis. Stat. § 6.87(9) because the witness address on the certificate does not contain a state or zip code (Dkt. 104:5–6)—does not warrant revisiting that proposed definition. The relevant status quo is the *existence* of the Commission guidance adopting a three-component address (*see* Dkt. 79), and that status quo has not changed merely because some municipal clerks do not follow Commission guidance. Indeed, because the Commission's policy on witness address is merely guidance, Plaintiffs are wrong by arguing that the status quo is defined by whether all or some clerks follow it. In other words, uniform application of

Commission guidance by clerks statewide was never the status quo as determined by this Court and it should not be now.⁵

Although no change in the status quo is solid ground to summarily reject Plaintiffs' proposed definition of a witness address, an alternative ground exists. Wisconsin precedent dictates that the rules of election administration should not be changed in the midst of an ongoing election. *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877. *See also Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) ("As an election draws closer," "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls."). This rule that courts should not issue orders in the midst of ongoing elections because they can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote," *Hawkins*, 393 Wis. 2d 629, ¶ 5, still rings true today. And it does so even more, given that more absentee ballots have been sent out by clerks and more have been returned by

⁵ The Commission respectfully directs this Court to its brief in opposition to Plaintiffs' first motion for a temporary injunction for further argument that Plaintiffs' motion would alter, not preserve, the status quo. (Dkt. 76:11–12.) The Commission also incorporates its arguments from its previous brief regarding Plaintiffs' failure to meet the other temporary injunction requirements. (Dkt. 76:12–15.)

electors than at the time this Court denied Plaintiffs' first motion for a temporary injunction.⁶ (Affidavit of Meagan Wolfe ¶¶ 4–5.)⁷

In short, because Plaintiffs identify no good reason why this Court should grant the first request for relief in their second temporary injunction motion, and that request thus should be denied.

II. This Court should deny the second request for relief in Plaintiffs' second motion for a temporary injunction.

In the alternative, Plaintiffs ask the Court to issue temporary declaratory and injunctive relief holding that a three-component ballot certificate satisfies the witness address requirement in Wis. Stat. § 6.87(2) for the purposes of processing and counting absentee ballots in the 2022 general election. The Court should deny this motion for two primary reasons. First, the status quo, as determined by the Court following the first injunction hearing, has not changed. The new evidence submitted by Plaintiffs is inapposite. Second, the injunction, if issued, would change the status quo. The motion may be denied on this basis alone.

⁶ Due to the extremely short briefing schedule ordered by this Court (*see* Scheduling Order on Second Motion for Temporary Injunction, October 26, 2022 (Dkt. 106)), the Commission respectfully directs this Court to its response brief in opposition to Plaintiffs' first motion for temporary injunction for further argument on this alternative reason to deny Plaintiffs' pending motion. (Dkt. 76:8–10).

⁷ Also due to time constraints, Administrator Wolfe was not able to provide a notarized affidavit to counsel before today's 4 p.m. filing deadline. Consequently, counsel has filed a signed-only affidavit at this time. However, counsel will file her signed and notarized affidavit as soon as possible.

A. The status quo, as determined by the Court following the first injunction hearing, has not changed.

Plaintiffs' lawsuit "presents a single and narrow question of statutory interpretation." (Dkt. 96:2 (Plaintiffs' October 19, 2022 correspondence to the Court.) Specifically, "[w]hat does 'address' in Wis. Stat. § 6.87(2) mean as a matter of Wisconsin law?" (Dkt. 96:2.) At the first injunction hearing, this Court determined that the status quo, for purposes of this litigation, is the Commission's three component definition of address communicated in its October 18, 2016, and September 14, 2022, guidance memoranda to clerks. (Dkt. 79.) That status quo has not changed. The Commission's guidance regarding the definition of "address" has existed since 2016 and continues to exist and today.

The Court did not find, as Plaintiffs now contend, that the status quo is the uniform statewide *application* of this guidance. Indeed, prior to the first injunction hearing, there was no evidence in the record as to how uniformly clerks across the state are applying the Commission's guidance, nor does the record contain any evidence of how uniformly they have applied that guidance for the last six years. The reality is that the Commission's guidance is and has always been just that—guidance. It is not binding on clerks, and it does not preclude them from exercising their discretion under § 6.87(9) to return a ballot to a voter for the addition of witness address information beyond the

Commission's three-component guidance to ensure a properly completed witness certificate under Wisconsin law.

In addition to not being binding on clerks, the Commission's interpretation of election statutes in its guidance also is subject to review by the courts. In several recent and consequential cases, courts have determined that the Commission's interpretation of an election statute was erroneous and have enjoined guidance based on that interpretation. *See, e.g., Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (holding that Wisconsin's election statutes do not permit the use of absentee ballot drop boxes or the in-person return of absentee ballots to the clerk's office by anyone other than the absentee voter); *White, et al. v. Wisconsin Elections Commission, et al.*, No. 22-CV-1008 (Wis. Cir. Ct. Waukesha Cnty) (holding that clerks cannot add missing witness address information to absentee ballot certificates). As this litigation works its way through the courts, it is possible that an appellate court will determine that the witness address requirement under Wis. Stat. § 6.87(2) demands more than the Commission's three-component definition of address. Given this possibility, it is understandable that conscientious and risk-averse clerks may return an absentee ballot to the voter for the addition of witness address information—such as state and zip code—that goes beyond the Commission's three-component guidance to minimize any risk that the voter's ballot might ultimately be rejected based on a subsequent court

decision. This appears to be the calculus for at least some clerks. (See Affidavit of Steven Kilpatrick, Ex. A) (the clerk for the City of Racine is returning absentee ballot certificates to voters with instructions for completion if there are any omissions in the witness address field “out of an abundance of caution lest a later court ruling require state name and zip code be placed on the ballot certificate and those voters would thereby be disenfranchised.”)

In summary, variations in clerks’ application of the witness address requirement—notwithstanding the Commission’s guidance—does not mean that the status quo for purposes of this litigation has changed. The status quo is the Commission’s three-component definition of address, (Dkt. 79), and that status quo has not changed.

B. Plaintiffs requested injunction would change the status quo.

Next, Plaintiff’s injunction should be denied because it would disrupt rather than maintain the status quo.

The purpose of a temporary injunction is to maintain the status quo. See *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶ 60, 403 Wis. 2d 539, 977 N.W.2d 756. If the movant cannot show that the temporary injunction would maintain the status quo, one of four required elements, the motion should be denied. *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154

(citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520–21, 259 N.W.2d 310 (1977)). Here, Plaintiffs cannot meet this requirement. Even if the Court were to agree with the Commission and declare that “address” under Wis. Stat. § 6.87 means street name, street number and municipality, the requested injunction still would disrupt rather than maintain the status quo as it relates to local election officials’ application of Wis. Stat. § 6.87(9) and 6.87(6d). Additionally, Plaintiffs’ request for relief relating to the “counting” of absentee ballots should be denied because it is beyond the scope of this lawsuit.

1. An order prohibiting clerks from returning three-component ballots to voters under Wis. Stat. § 6.87(9) would change the status quo.

As noted above, Wis. Stat. § 6.87(9) provides clerks with discretion to return an absentee ballot to an elector for correction if the certificate is “improperly completed,” so long as time permits the elector to correct the defect and return the ballot in time to be counted on election day. Plaintiffs’ requested temporary injunction includes an order that, for the 2022 general election, a three-component ballot certificate is not “improperly completed” under Wis. Stat. § 6.87(9). (Dkt. 107:2.) Plaintiffs suggest that, under such a holding, municipal clerks would be prohibited from returning a three-component ballot to the voter for the addition of any other components of a typical postal address, such as state or zip code. *See* Pl. Br. at 13 (asking Court to compel the

Commission to instruct clerks that certain ballot certificates “are valid and should not be returned to voters”) (emphasis added).

The Commission has never issued guidance stating that clerks cannot exercise discretion to require additional witness address information beyond the Commission’s three-component definition of address. And a court has never issued such an order, either. Plaintiffs’ new evidence shows that, indeed, clerks are presently exercising the discretion afforded to them under Wis. Stat. § 6.87(9) to return three-component ballots to the voter for the addition of additional witness address information. (Dkt. 89:2 ¶ 6; 94:3.) Issuing injunctive relief that prohibits clerks from exercising this discretion, for the first time, would be a departure from the status quo.

2. Plaintiffs’ request for an order requiring three-component ballots to be counted under Wis. Stat. § 6.87(6d) should be denied because it is improper as beyond the scope of this lawsuit and would disrupt the status quo on the eve of the general election.

Next, Plaintiffs’ requested temporary injunction includes an order that, for the 2022 general election, an absentee ballot with a three-component ballot certificate “must be counted.” (Dkt. 107:2.) This request for relief cannot reasonably be construed as anything other than a request for a ruling about the meaning of Wis. Stat. § 6.87(6d), which provides that “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” This question

has not previously been answered either by the Commission or by a court. Moreover, the question is currently before Branch 6 of this Court, in *League of Women Voters of Wisconsin vs. Wisconsin Elections Commission, et al.* No. 22-CV-1008.

Plaintiffs' requested injunction regarding which absentee ballots may be "counted" is improper because it is beyond the scope of this lawsuit. Plaintiffs' complaint does not contain any reference to Wis. Stat. § 6.87(6d). (Dkt. 3.) Rather, it asks the court to declare the meaning of "address" for purposes of Wis. Stat. § 6.87(2) and (9) only. (Dkt. 3 ¶¶ 4–5. ("Rise seeks declaratory and injunctive relief to ensure that voters. . . are not denied the right to vote . . . as a result of Wisconsin election officials' failure to correctly apply two state election statutes: [Wis. Stat. § 6.87(2) and (9), referred to as the "Witness Address Requirement."]) Presumably, Plaintiffs have avoided directly citing § 6.87(6d) to reinforce their position that the legal issues in this case do not substantially overlap the issues in *League of Women Voters*. By Plaintiffs' own telling, this case concerns the definition of "address" in Wis. Stat. § 6.87(2) and (9), whereas *League of Women Voters* concerns the definition of "missing" in Wis. Stat. § 6.87(6d). (See Dkt. 96:3 ("The League has raised . . . a state-law statutory claim that turns on the word 'missing' in Wis. Stat. § 6.87(6d) rather than on the word 'address'").) This Court should take Plaintiffs at their word

and decline to issue injunctive relief regarding the counting or rejection of absentee ballots under Wis. Stat. § 6.87(6d).⁸

In the alternative, the Court should deny Plaintiffs request for a temporary injunction directing that absentee ballots with a three-component ballot certificate “must be counted” because it would disrupt the status quo on the eve of the November 8 general election. The Commission’s 2016 guidance necessarily implied that an absentee ballot accompanied by a three-component ballot certificate should not be rejected, but it took no position on the overall range of circumstances in which a ballot should be counted or rejected under Wis. Stat. § 6.87(6d). Moreover, as explained above, the Commission’s guidance regarding the definition of “address” was directed at the actions of *clerks* pursuant to Wis. Stat. § 6.87(9), not at the actions of the separate election officials who count ballots pursuant to Wis. Stat. §§ 6.88 or 7.52, and who, as part of that counting, may count or reject a ballot pursuant to § 6.87(6d). The Commission’s brief in opposition to Plaintiffs’ first request for a temporary injunction also referenced this distinction.⁹

⁸ If the Court does elect to consider Plaintiffs’ request for relief regarding the counting or rejection of ballots, then the Commission respectfully suggests that it would be appropriate for the Court to reconsider its earlier decision not to consolidate this case with *League of Women Voters*. (See Dkt. 101.)

⁹ Regarding the 2016 guidance containing its three-component definition of “address,” the Commission explained as follows:

Therefore, as to the meaning and application of Wis. Stat. § 6.87(6d), the proper status quo for this Court to consider is the status quo for the last six years, during which time the Commission has given the above advice, but there has been no authoritative judicial interpretation of § 6.87(6d).¹⁰ Any temporary injunctive relief from this Court declaring which ballots shall be “counted” under Wis. Stat. § 6.87(6d), would disrupt the status quo on the eve of the general election and would potentially confuse voters and election officials, especially if this Court’s decision is appealed and promptly stayed or reversed. This is exactly the type of situation courts are advised to avoid by *Hawkins* and *Purcell*.

As a matter of public policy, it may be desirable for the courts—including the appellate courts—to authoritatively resolve the existing uncertainties

[T]he 2016 guidance did not discuss whether an absentee ballot should be rejected due to insufficient witness address information if it omits one or more of the three components in the Commission’s definition *and* that omission is not corrected prior to the ballot being counted. The 2016 guidance necessarily implied that an otherwise lawful ballot should *not* be rejected if it includes the three components in the Commission’s definition of “address,” but it took no position on whether an absentee ballot that is missing one or more of those components can ever be counted. Contrary to Plaintiffs’ suggestion, then, the Commission did not express any determination in the 2016 guidance as to whether Wis. Stat. § 6.87(6d) requires rejection of an absentee ballot if the certificate does not include all the components of a complete witness address.

(Dkt. 76:5.)

¹⁰ The Court in *League of Women Voters* agreed with this characterization of the status quo regarding the counting or rejection of ballots under § 6.87(6d) and denied temporary injunctive relief in that case in part because it would disrupt that status quo. (Second Aff. of Steven Kilpatrick, Ex. B.)

about the meaning and application of Wis. Stat. § 6.87(9) and (6d). But such a resolution should not be imposed via a temporary injunction, especially one that is issued just days before the general election. Plaintiffs' second temporary injunction motion should be denied.

CONCLUSION

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

Dated this 27th day of October 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a *Defendant Wisconsin Elections Commission's Response in Opposition to Plaintiffs' Second Motion for Temporary Injunction* with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 27th day of October 2022.

Electronically signed by:

Lynn K. Lodahl
LYNN K. LODAHL
Assistant Attorney General