

FILED
11-02-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

BY THE COURT:

DATE SIGNED: November 2, 2022

Electronically signed by Juan B. Colas
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
Branch 10

DANE COUNTY

Rise, Inc. et al.,
Plaintiffs

vs.

Case No. 22CV2446

Wisconsin Elections Commission, et al.,
Defendants

vs.

Wisconsin State Legislature,
Intervenor-Defendant

ORDER DENYING PLAINTIFFS' SECOND MOTION FOR TEMPORARY INJUNCTION

On October 7, 2022, I denied Plaintiffs' Motion for a Temporary Injunction following a hearing. On October 17, Plaintiffs filed a Motion for Summary Judgment and a Motion for an Expedited Briefing and Decision Schedule. I denied the Motion for Expedited Briefing on October 21, 2022. On October 25, the plaintiffs filed the present Second Motion for a Temporary Injunction. I decide the motion on the written submissions without a hearing.

The October 7 motion sought a temporary injunction ordering the Wisconsin Elections Commission ("WEC") to instruct local clerks that in applying Wis. Stat. §§6.87(2) and 6.87(9), regarding witness certifications on absentee ballot envelopes that:

- (1) an "address" on a witness certificate requires only the information necessary to reasonably discern the location where the witness may be communicated with; and (2) an

absentee ballot containing such a witness address is not “improperly completed” under § 6.87(9) and must be counted if it is otherwise lawful.

R.-Doc. 5, p.2

The October 7 Order Denying Temporary Injunction, a reduction to writing of an order orally made at the October 7 hearing, stated:

[T]he 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.

R-Doc. 79

The present motion seeks the same relief as the first Motion for Temporary Injunction, with the alternative relief that if I decline to adopt Plaintiffs’ preferred definition, I order WEC to instruct clerks that certificates meeting the definition in the WEC memoranda are valid. R-Doc. 104, p. 4.

As grounds for again seeking a temporary injunction, plaintiffs say there is substantial new evidence that clerks are not using the WEC definition. (R-Doc. 104, p.5) In addition to the evidence previously submitted, they offer:

(1) An affidavit from the Dane County Clerk attesting that there is variation among local clerks in Dane County in the witness address information they are requiring (R-Doc. 89),

(2) A letter from the City Attorney for Green Bay stating that the City Clerk there is requiring either state or zip code in addition to the name of the municipality (R-Doc. 94)

(3) An article from the Milwaukee Journal Sentinel reporting on the Green Bay letter and on allegations that Racine has a similar policy (citation to online article at R-Doc. 104, p.6, fn.2),

(4) A survey conducted on October 14 showing that 15 of 21 municipalities surveyed reporting they were requiring state and zip code on addresses (R-Doc. 91),

(5) An October 4 affidavit by the Racine City Clerk filed in *League of Women Voters v. WEC*, Dane County No. 22CV2473 at R-Doc. 17, and

(6) A statement made by WEC counsel at an October 14 hearing in *League of Women Voters* that a witness address may be sufficient even if it does not contain street number, street name and municipality, the three components in the WEC guidance (R-Doc. 90, pp. 2-3, R-Doc. 126, Exh. 1, Tr. of October 14, pp. 83-84).

The temporary relief plaintiffs seek are a legally binding definition of the term “address” in Wis. Stat. §6.87(2), referring to the witness address in the absentee ballot envelope certification and that I order WEC to instruct local election clerks to apply that definition. “Temporary injunctions are to be issued only when necessary to preserve the status quo” in order to prevent irreparable harm. *Werner v. Grootemat*, 80 Wis.2d 513, 520 (S. Ct. 1974) citing *Pure Milk Products Co-op. v. NFO*, 64 Wis. 2d 241, 251 (S.Ct. 1974). In this

case, the Second Temporary Injunction is not necessary to preserve the status quo.

Section 6.87(2), allowing citizen-witnessed absentee ballots (as an alternative to notarized ballots), was first enacted as part of a larger election law reform by 1965 WI Act 666, eff. September 25, 1966 (1965 Laws of Wisconsin, Vol. II, p. 1245). It does not appear that there has ever been a definition of that term in that statute, legislative, administrative or judicial, that was legally binding on local clerks. The enjoined October 18, 2016 memoranda was not legally binding, nor is the September 14, 2022 WEC memorandum.

For the past 56 years Wisconsin elections have been conducted, and absentee ballots counted, apparently without a legally binding definition of the witness address. Since then, until the present, clerks have been legally free to interpret the term. They presumably have done so in good faith, in keeping with their oaths of office, and drawing on the non-binding guidance issued by the WEC and its predecessors, and perhaps also on advice from their jurisdictions' attorneys.

All that has changed with respect to witness address from past elections is that that the October 18, 2016 WEC memorandum was withdrawn following a permanent injunction issued by Judge Aprahamian in *White et al. v. WEC*, Waukesha County Case No. 22CV1008 (found in this case at R-Doc. 38, pp. 105-107). In addition to containing the WEC standard that number, street and municipality are sufficient for a witness address, the 2016 memorandum also instructed clerks that they could correct or supplement the witness certification, including the address. The court enjoined WEC from advising clerks that they could "modify or add information to absentee ballot certifications." *Id.* The court expressly did not enjoin WEC from giving advice about a definition of "address" or attempt to define "address." *Id.*

The September 14, 2022 memorandum, sent to all local clerks by the WEC explained the effect of the Waukesha injunction. (R-Doc. 38, pp. 88-89). It included a statement advising clerks that the Waukesha court had not ruled on a definition of witness address and had not overturned any existing WEC definition of "address," and for emphasis restated the definition in italics. *Id.*, p. 88.

In short, the legal status quo with respect to the definition of "address" is the same as it has been for 56 years. Local clerks apply their understanding of the term "address" to absentee ballot certifications, relying on non-binding advice from state elections authorities and, at least in some cases, advice from their municipal attorneys. Evidence that there is variation in how clerks interpret the term (even evidence of increased variation), does not change the status quo, which is that the law has always left room for local clerks to interpret and apply the term to the ballot envelope before them.

The Second Motion for a Temporary Injunction would change, not preserve, that status quo before the November 8 election, by declaring, for the first time, a legally binding interpretation of "address" in Wis. Stat. §6.87(2). Such a pronouncement, in the form a declaratory judgment, may be appropriate final relief in this case. It is inappropriate, though, to grant a temporary injunction that changes the status quo, rather than preserves it.

For the reasons stated above, the Second Motion for a Temporary Injunction is DENIED.

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