

FILED
07-12-2023
Clerk of Circuit Court
Waukesha County
2022CV001395

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 6

NANCY KORMANIK,
Plaintiff,

v.

WISCONSIN ELECTIONS
COMMISSION,
Defendant,

and

RISE, INC., and the DEMOCRATIC
NATIONAL COMMITTEE,

Intervenor-Defendants.

Case No. 2022CV1395
Case Code: 30701
Hon. Brad Schimel

**INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL
COMMITTEE'S NOTICE OF MOTION AND
CROSS-MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that, on August 28, 2023 at 1:30 p.m., Intervenor-Defendant Democratic National Committee (DNC), by its undersigned counsel, will bring its Cross-Motion for Summary Judgment before the Honorable Brad D. Schimel at the Waukesha County Courthouse, 515 West Moreland Boulevard, Waukesha, Wisconsin, pursuant to Wis. Stats. §§ 802.08 and 227.40.

The grounds for this Cross-Motion are set forth in the Answer of Intervenor-Defendant DNC (Doc. 33), in the supporting brief that accompanies this Cross-Motion, and in DNC's prior filings, all of which are incorporated herein. DNC also agrees with and adopts the arguments of

Defendant Wisconsin Elections Commission (WEC) in opposition to Plaintiff's Motion for Summary Judgment and in support of WEC's Cross-Motion for Summary Judgment.

Dated: July 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, in compliance with Wis. Stat. § 801.18(6), I am filing this Notice of Motion and Cross-Motion for Summary Judgment 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: July 12, 2023

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**INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL
COMMITTEE'S COMBINED BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DNC'S CROSS-MOTION FOR SUMMARY JUDGMENT**

I. Introduction and Summary of the Argument

Intervenor-Defendant Democratic National Committee (DNC) submits this combined brief in opposition to Plaintiff's Motion for Summary Judgment and in support of DNC's Cross-Motion for Summary Judgment. DNC agrees with and adopts the arguments of Defendant Wisconsin Elections Commission (WEC) in opposition to Plaintiff's Motion for Summary Judgment and in support of WEC's Cross-Motion for Summary Judgment. Recognizing that the original parties have filed extensive briefs, affidavits, and exhibits, and that many of the issues involved in these motions were previously briefed in September and October 2022 at the Temporary Injunction

stage, DNC will forego repeating all the factual, procedural, and legal arguments made by WEC and the other Intervenor-Defendant, Rise, Inc., and instead focus on several key points:¹

First, WEC's spoiling guidance was in place from at least 2014 until this Court's October 7, 2022 Temporary Injunction took effect. This guidance was followed for nearly eight years by voters and candidates across the political spectrum, by political parties, and by local election officials through two Presidential elections and dozens of additional federal and state election contests. The guidance reflects Wisconsin's traditional practice (followed by several other states) of allowing voters to "spoil" their previously returned ballots if they decide they made a mistake or in response to late-breaking developments, so long as there is time to spoil the old ballot and return the replacement ballot (all pursuant to appropriate recordkeeping and chain-of-custody procedures).

Second, this longstanding guidance is based on a reasonable reading of the relevant election statutes—a reading that the Legislature has left untouched despite multiple revisions to those statutes since 2014. WEC's reading also best comports with the overarching "will of the electors" standard prescribed at the outset of Wisconsin's election code, *see* Wis. Stat. § 5.01(1), while protecting against any potential risk of double-voting or undermining ballot integrity.

Third, none of the parade of horrors conjured up by Plaintiff occurred during the eight years the spoiling guidance was in effect. Plaintiff has now had a full opportunity to take discovery and assemble a factual record substantiating her claims, but has come forward with no evidence of even a single instance of electors "having their votes changed by someone else, thrown out by

¹ In addition to the ballot-spoilation points specified in this brief, DNC agrees with WEC that the challenged WEC guidance did not require "the affirmative vote of at least two-thirds of the members," Wis. Stat. § 5.05(1e), and did not constitute a "rule" subject to the formal rulemaking requirements of Wis. Stat. ch. 227. DNC joins in full these arguments by WEC and will not address these issues further.

accident, or diluted by unlawful double votes”; being “disenfranchise[d] by identity theft and voter fraud”; or being “subject . . . to endless undue solicitation after they have already voted.” P. Br. at 7, 17. Nor has Plaintiff pointed to even one example of how WEC’s longstanding spoiling guidance has supposedly caused an “unlawfully diluted or polluted vote, or a fraudulent one,” or might be expected to do so in the future. *Id.* at 18. The real risk to voters’ “faith in the system,” *id.* at 17, is not WEC’s longstanding spoiling guidance, but unfounded allegations that the guidance has caused “fraud,” “double voting,” “identity theft,” “dilution,” or other electoral harms in the past or may in the future.

II. Argument

A. The challenged WEC guidance was in effect from at least October 2014 through October 2022.

The challenged WEC guidance on spoiling absentee ballots dates back at least to 2014, when WEC’s predecessor, the Wisconsin Government Accountability Board (GAB), published “comparable,” “substantially similar” guidance on procedures to be followed where an “[a]bsentee ballot has been returned to the clerk” but [t]he voter wishes to vote a new ballot.” October 4, 2022 Affidavit of Meagan Wolfe ¶ 8 & Ex. A (Docs. 56-57). The GAB guidance specified multiple steps a clerk must follow to protect against any improprieties, including verifying the voter’s identity through voter ID or other means; retrieving the returned ballot, while “making a small tear in the envelope containing the ballot and writing ‘spoiled’ on the outside of the envelope”; “[p]lacing the spoiled ballot in the spoiled ballot envelope or container that will be transported to the polling place on Election Day”; and documenting these steps in the official “Absentee Ballot Log.” Wolfe Aff. Ex. A (Doc. 57).

With small revisions, these spoiling procedures have been followed without incident over the past eight years, prior to this Court’s Temporary Injunction last October. The most recent

versions of WEC's spoiling guidance are contained in the now-withdrawn August 1, 2022 guidance document as well as WEC's September 2022 *Election Administration Manual*. See Wisconsin Elections Commission, *Spoiling Absentee Guidance for the 2022 Partisan Primary* (Aug. 1, 2022) ("*August 2022 Guidance*"), attached as Ex. D to June 2, 2022 Affidavit of Kurt A. Goehre (Doc. 130); Wisconsin Elections Commission, *Election Administration Manual for Wisconsin Municipal Clerks*, at 101-02 (Sept. 2022), <https://elections.wi.gov/resources/manuals/election-administration-manual> (*Election Administration Manual*).² Clerks must continue to follow a standard protocol in "destroying" the spoiled ballot by partially tearing the ballot return envelope and marking it "spoiled," safeguarding it in a "spoiled ballot envelope," and following various recordkeeping and chain-of-custody procedures (including recording spoiled and reissued ballots in the official Absentee Ballot Log and in WisVote). Goehre Aff. Ex. D, at 3; *Election Administration Manual* at 101-02. WEC's most recent spoiling guidance and procedures do not contain any new or novel interpretations of Wisconsin law; instead, they emphasize "[t]his has been the law in Wisconsin for many years." *Id.* at 2.

Wisconsin was one of several states in the 2016 and 2020 Presidential campaigns in which candidates openly appealed to voters who already had submitted their ballots to "spoil" those ballots and cast replacements, subject to the deadlines and procedures specified by WEC. See, e.g., *Trump: Go vote again, this time for me*, 11 ALIVE (Nov. 2, 2016),

² In addition to the sources cited in text, see, e.g., WEC, *Spoiling Absentee Ballot Guidance* (Oct. 19, 2020), attached as Ex. F to Oct. 4, 2022 Affidavit of Will M. Conley (Doc. 61); WEC, *Inbound and Outbound Absentee Ballot Considerations* (Sept. 10, 2020), attached as Ex. G to Conley Aff. (Doc. 61). Plaintiff alleges that WEC published an additional "memorandum" regarding the rules governing spoiled ballots on August 2, 2022. P. Br. at 3. But the publication Plaintiff cites was merely a press release reiterating the information WEC provided to election clerks on August 1, 2022. Compare Goehre Aff. Ex. D, with Wisconsin Elections Commission, *Rules about 'Spoiling' Your Ballot* (Aug. 2, 2022), attached as Ex. E to Goehre Aff.

<https://www.11alive.com/article/news/politics/trump-go-vote-again-this-time-for-me/281-346255901>; Rebecca Harrington & Eiza Relman, *If you voted early and changed your mind, you can switch your votes in several states—here's how*, INSIDER (updated Nov. 2, 2020), <https://www.businessinsider.com/how-can-you-change-your-vote-trump-clinton-early-voting-2016-11>.³ More recently, a series of late candidate withdrawals from the August 2022 Democratic primary for U.S. Senate and Republican primary for Governor prompted many voters who had cast early ballots for now-withdrawn candidates to follow WEC's spoiling procedures so that they could cast a meaningful vote for a viable candidate who remained in contention. See Ben Baker, *Already voted for a candidate who dropped out? Here's how you can change your vote*, MILWAUKEE J. SENTINEL (updated Aug. 8, 2022), <https://www.jsonline.com/story/news/politics/2022/07/29/how-change-your-vote-if-candidate-dropped-out-wisconsin-election-primary/10177652002/>.

B. The challenged WEC guidance is consistent with Wisconsin election statutes and the overarching “will of the electors” standard.

The key statutory language appears at Wis. Stat. § 6.86(5), which provides:

(5) Whenever an elector returns a **spoiled or damaged absentee ballot** to the municipal clerk, or an elector's agent under sub. (3) returns a spoiled or damaged ballot to the clerk on behalf of an elector, and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and **shall destroy the spoiled or damaged ballot**. Any request for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3)(c) (emphasis added).

³ The INSIDER article cited in text identified Michigan, New York, Connecticut, and New Hampshire as states in addition to Wisconsin that allowed “voters who have a change of heart [to] alter their early vote after casting it.” *Id.* The ALIVE article pointed to Pennsylvania, Michigan, Minnesota, Connecticut, New York, and Mississippi as other states in addition to Wisconsin that allowed voters to change their absentee votes. *Id.*

Section 6.86(6) in turn provides that, “[e]xcept as authorized in sub. (5) and s. 6.87(9) [which deals with correcting errors and omissions in absentee ballot envelope certifications⁴], if an elector mails or personally delivers an absentee ballot to the municipal clerk, the municipal clerk shall not return the ballot to the elector” (emphasis added).

The interplay of Subsections (5) and (6) is confusing, to say the least. Subsection (6) seems to contemplate the “return” of a ballot spoiled under Subsection (5) “to the elector,” but Subsection (5) prohibits the return of a spoiled ballot to the elector, instead requiring the clerk to “destroy the spoiled or damaged ballot.” As discussed in Part II-A above, a clerk “destroys” a spoiled ballot in this context by partially tearing the ballot-return envelope and marking it “spoiled,” placing it for safekeeping and further verification in an official “spoiled ballots envelope,” and following various recordkeeping and chain-of-custody requirements specified in the *August 2022 Guidance* and the *Election Administration Manual*. Thus, Plaintiff is far off base in her repeated claims that the challenged guidance “instruct[s] municipal clerks to unlawfully return” previously submitted absentee ballot envelopes and thereby violates the “categorical prohibition on returning ballots to voters.” P. Br. 10, 17; *see also id.* at 6, 8. Spoiled ballots are never “returned” to voters but instead are retained by election authorities subject to recordkeeping and chain-of-custody protocols.

Plaintiff also argues that, under Section 6.86(5), *only* “the voter” may spoil her absentee ballot but that WEC’s guidance somehow puts electors “at risk of having their votes changed by *someone else.*” P. Br. at 7 (emphasis added). DNC fully agrees with Plaintiff that only a voter who has completed a ballot may “spoil” that ballot but disagrees that WEC’s guidance in any way

⁴ Wis. Stat. § 6.87(9) provides: “If 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, inside the sealed envelope when an envelope is received, together with a new envelope, if necessary, whenever time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).”

invites other people to change a voter's completed ballot behind the voter's back—an unthinkable result for which there is no evidence in the record. But once a voter has decided in her sole discretion to “spoil” a previously submitted absentee ballot, there is nothing inconsistent with the statutory language for a clerk to follow the voter's instructions to “destroy” the old ballot and issue a new one, provided the request is timely and subject to WEC's recordkeeping and chain-of-custody requirements for spoiled and replacement ballots. Under WEC's guidance, it is the voters—not the election clerks—who have control over whether an absentee ballot is spoiled. The *August 2022 Guidance* provides that “[a]bsentee voters can request to have their returned absentee ballot spoiled.” Goehre Aff. Ex. D, at 1. Under the guidance, without such a request from the voter, an absentee ballot cannot be spoiled. Thus, there is no basis for Plaintiff's apparent contention that the guidance opens the door to rogue clerks spoiling ballots when that is not the intent of the voter.⁵

Plaintiff's principal argument, accepted at the Temporary Injunction stage by this Court and the Wisconsin Court of Appeals, is that Section 6.86(5) only applies to absentee ballots that are declared by the voter to be “spoiled or damaged” at the time they are returned to the clerk, as opposed to those that the voter seeks to “spoil” after return because the voter has decided she made a mistake. In the Court of Appeals' words:

While we do not make a final and definitive ruling on the matter due to the case's procedural posture, the circuit court's interpretation of the relevant statutes appears reasonable. On its face, WIS. STAT. § 6.86(6) generally prohibits a municipal clerk from returning an absentee ballot to the elector. One exception to this rule is found in § 6.86(5), which allows the clerk to issue a new ballot whenever an elector or an elector's agent “returns a spoiled or damaged absentee ballot.” This, of course, implies that the absentee ballot is already spoiled or damaged when it is returned

⁵ Moreover, any suggestion that a clerk cannot spoil a ballot on behalf of an elector or at their request is similarly unfounded. Wis. Stat. § 6.86 provides for how a municipal clerk may respond when an elector returns a spoiled or damaged ballot. Its language does not prescribe or limit the manner of who, how, or when a ballot may be “spoiled.” In addition, allowing the clerk to spoil a ballot at the voters' request is consistent with other ministerial acts the clerk does on behalf of the voter, including casting the ballot itself. *See* Wis. Stat. § 6.88(3).

by the elector. It does not appear to authorize a municipal clerk to return to the elector an unspoiled absentee ballot the elector has previously submitted to the clerk or to authorize a clerk to spoil a previously submitted unspoiled absentee ballot.

Opinion at 3, *Kormanik v. Wis. Elections Comm'n*, No. 22-AP-1720 (Ct. App. Oct. 27, 2022), attached as Ex. H to Goehre Aff.

DNC agrees with the Court of Appeals that Section 6.86(5) does not “authorize a municipal clerk to return to the elector an unspoiled absentee ballot the elector has previously submitted to the clerk.” As discussed above, that provision never authorizes the return of a previously submitted absentee ballot to the voter. Spoiled or damaged ballots must instead be retained and “destroyed” by the clerk following various recordkeeping and retention safeguards. But DNC respectfully disagrees with the Court of Appeals regarding a voter’s ability to “spoil” her previously submitted absentee ballot where she decides she has made a mistake and wants to correct her error. Section 6.86(5) must be read in harmony with other Wisconsin election statutes that permit voters to change their minds and “spoil” their ballots subject to various deadlines and safeguards. For example, Wis. Stat. § 6.80(2)(c) provides that “[a]ny elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in all.” In addition, Wis. Stat. § 5.91(16), which sets requirements for ballots, voting devices, automatic tabulating equipment, and related equipment and materials, requires that any such system must “provide[] an elector with the opportunity to change his or her votes and to correct any error or to obtain a replacement for a spoiled ballot prior to casting his or her ballot.” WEC’s guidance is consistent with these portions of the election code that provide voters an opportunity to correct mistakes or change their minds. “When reasonably possible, we read statutes in harmony, and a harmonious reading is quite reasonable in this case.” *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶ 50, 403 Wis. 2d 607, 976 N.W.2d 519, *reconsideration denied*, 2022 WI 104. Of course, the election code does not create dual classes of voters—one with an

ability to correct mistakes and to change their votes and one without. And Plaintiff cannot argue that both Section 6.80(2)(c) and Section 5.91(16) apply only to non-absentee voters. There is no such limiting language in either statute.

Plaintiff's reading of Section 6.86(5) also squarely conflicts with the election code's overarching rule of construction, codified in its opening provision: "Except as otherwise provided, chs. 5 to 12 shall be construed to **give effect to the will of the electors**, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stat. § 5.01(1). Thus, consistent with the constitutionally guaranteed right to vote, Section 6.86(5) and other election statutes must be construed in a way that honors each voter's discernable "will." See, e.g., *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183, 185-86 (1941) (construing "will of the electors" provision consistent with the "constitutional right to vote"); *Stahovic v. Rajchel*, 122 Wis. 2d 370, 376, 380, 363 N.W.2d 243 (Ct. App. 1984) (emphasizing "the fundamental principle that, in construing election laws, the will of the electorate is to be furthered"; courts should "avoid[] thwarting the will of the electors"); see also *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 851 N.W.2d 262 ("Wisconsin's protection of the right to vote is even stronger [than the protections of federal law] because in addition to the equal protection and due process protections of Article I, Section 1 of the Wisconsin Constitution, the franchise for Wisconsin voters is expressly declared in Article III, Section 1 of the Wisconsin Constitution."); *Ollmann*, 300 N.W. at 185 ("Voting is a constitutional right and any statute that denies a qualified elector the right to vote is unconstitutional and void." (citation omitted)).

This principle applies even though, pursuant to Section 6.84(2), Section 6.86(5) and other statutes "relating to the absentee ballot process ... shall be construed as mandatory." A

“mandatory” designation does not affect how ambiguous statutory language is interpreted; instead, it determines how the statute will be enforced once its provisions have been interpreted under the usual canons of construction. As the Wisconsin Supreme Court explained long ago, “[t]he difference between mandatory and directory provisions of election statutes lies in *the consequence of nonobservance*: an act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid.” *Sommerfeld v. Bd. of Canvassers of St. Francis*, 269 Wis. 299, 303, 69 N.W.2d 235 (1955) (emphasis added) (cleaned up); *see also Teigen*, 2022 WI 64, ¶¶ 75-83; *id.* ¶¶ 108-13 (Roggensack, C.J., concurring); *id.* ¶ 176 (Hagedorn, J., concurring).⁶ Thus, if Section 6.86(5) clearly prohibited a voter from spoiling a previously returned absentee ballot and voting a replacement ballot, any ballot spoiled or replaced in violation of this prohibition would be void.

But Section 6.86(5) includes no such clear prohibition; it provides for the destruction of a “spoiled or damaged ballot” and its “replacement” with a “new ballot,” without dictating when the voter must declare the ballot to be spoiled and request a replacement. The question is, at the very least, ambiguous. In these circumstances, Section 6.86(5) must be “construed to give effect to the will of the electors, if that can be ascertained from the proceedings.” Wis. Stat. § 5.01(1). When a voter clearly expresses to her clerk a change of mind in her voting preference, and it is feasible to retrieve and destroy the prior ballot and issue a new one consistent with statutory deadlines and the WEC’s recordkeeping and chain-of-custody protocols, refusing to honor that change in

⁶ All the *Teigen* opinions cited above discussed *Sommerfeld* and held that a violation of a ballot-return statute that *Sommerfeld* had treated as “directory” must now be treated as “mandatory” (thereby voiding noncompliant ballots) because of the Legislature’s intervening enactment of Section 6.84(2). But *Teigen* did not question the fundamental distinction drawn in *Sommerfeld* between whether a violation has occurred and the *consequences* of a violation. The “mandatory” designation is relevant only to the *consequences* of a violation, not to whether a violation has occurred.

preference undermines the right to vote and violates the “will of the elector” for no sound reason. These principles require construing the term “spoiled absentee ballot” in 6.86(5) to include an absentee ballot that, pursuant to a clear communication from the voter, no longer reflects her discernable intent. This conclusion is supported by the use of both “spoiled” and “damaged” in 6.86(5)—“spoiled” must mean something other than “damaged” or else the Legislature would not have included both terms.

C. Plaintiff’s predicted harms lack any foundation in the record and cannot occur under WEC’s chain-of-custody and recordkeeping safeguards.

Plaintiff claims that she and other Wisconsin voters “face the irreparable harm of disenfranchisement due to the risk of their votes being **changed by someone other than themselves** or diluted by double voting.” P. Br. at 7-8 (emphasis added). Although Plaintiff and her counsel have been given ample opportunity to take discovery from WEC and/or local election officials and to build a record to substantiate these serious allegations, her moving papers fail to cite even a *single* alleged instance of such wrongdoing during the eight years WEC’s challenged guidance was in place—let alone offer any *proof* of any such illegality. This complete evidentiary void speaks volumes. Against this evidentiary void, Plaintiff is asking this Court to adopt a statutory construction that would require clerks to ignore the clearly expressed “will of the electors,” Wis. Stat. § 5.01(1), directly undermining the constitutional right to vote. *See* Wis. Const. art. I, § 1; *id.* art. III, § 1.

Plaintiff also reasons that, “when voters see clerks changing votes based on unmonitored phone calls without sufficient checks built around the process, they can lose faith in the system.” P. Br. at 17. This argument simply ignores the many recordkeeping, chain-of-custody, and voter ID requirements governing the spoliation and replacement process discussed above. Those many safeguards and “checks,” properly understood, should strengthen “faith in the system.”

Plaintiff further warns that WEC's challenged guidance "risks enveloping clerks in an onslaught of phone calls after an October surprise," and "invites chaos and undermines faith and trust in the democratic system." *Id.* at 2, 18. But here again, the guidance was in place from 2014, including through two contentious Presidential elections that produced plenty of "October surprises" and calls for re-voting (*see supra* pp. 4-5), and Plaintiff has pointed to no evidence of any problems with Wisconsin's ballot-spoliation procedures from those campaigns or any others. The best way to avoid "undermin[ing] faith and trust in the democratic system" is to stop making unfounded, unsupported allegations about longstanding bipartisan election administration practices and procedures. Plaintiff has simply produced unsubstantiated rhetoric, without any supporting evidence.

III. Conclusion

Plaintiff has failed to meet the requirements for obtaining summary judgment. Defendant WEC and the Intervenor-Defendants, on the other hand, have established their entitlement to a judgment upholding WEC's *August 2022 Guidance* and dismissing Plaintiff's claims in their entirety.

Dated: July 12, 2023

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