

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 10

DANE COUNTY

RISE, INC. and JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION and
MARIBETH WITZEL-BEHL,

Defendants,

MICHAEL WHITE and EVA WHITE,

Proposed Intervenor Defendants.

Case No. 2022-CV-002446

Case Code: 30701

Declaratory Judgment

**MEMORANDUM IN SUPPORT OF [PROPOSED] INTERVENOR DEFENDANTS'
MOTION TO TRANSFER**

INTRODUCTION

This Court need not decide any of the issues Plaintiffs raise in this case. Instead, the Court should transfer this case to the judge whose order Plaintiffs challenge.

BACKGROUND

The Court is familiar with the background of this case. On July 12, 2022, Michael White, Eva White, Edward Winiecke, and the Republican Party of Waukesha County filed a lawsuit in the Waukesha County Circuit Court. *See White v. Wisconsin Elections Commission*, 2022-CV-001008, Doc. 1 (July 12, 2022). The plaintiffs in *White* obtained a temporary injunction on September 7 that prevents the Wisconsin Elections Commission (WEC) from instructing municipal clerks and local elections officials that they may modify information on incomplete absentee ballot certifications. *White*, 2022-CV-001008, Doc. 167 (Sept. 7, 2022). On October 3,

the court converted the temporary injunction into a permanent injunction, with some modifications. *See White*, 2022-CV-001008, Doc. 188 (Oct. 3, 2022).

Plaintiffs filed this lawsuit on September 27 to “restore the functional result” of WEC’s guidance that the Waukesha County Circuit Court had enjoined. Doc. 1 at 9. Plaintiffs’ complaint asserts that the *White* injunction removed guidance on how to determine whether a witness address is sufficient. Doc. 1 at 7. It faults the Waukesha County Circuit Court for causing confusion and disenfranchisement. Doc. 1. at 7-9. The Proposed Intervenors moved to intervene in this case to defend the injunction that was entered in their favor.

LEGAL STANDARD

“When actions which might have been brought as a single action under [section] 803.04 are pending before different courts, any such action may be transferred upon motion of any party or of the court to another court where the related action is pending.” Wis. Stat. § 805.05(1)(b). Whether the case may be transferred thus depends on whether the cases may be joined:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Id. § 803.04(1). “A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.” *Id.*

“The consolidation statute requires that any right to relief ‘asserted against’ the defendants in the cases proposed for consolidation ‘*might have been* brought as a single action’ under the permissive joinder statute, not that they were in fact brought as a single action.” *Bourne v. Melli L.*, S.C., 2019 WI App 1, ¶ 24, 385 Wis. 2d 210, 923 N.W.2d 177 (quoting Wis. Stat.

§ 805.05(1)(b)). “In exercising its discretion to decide whether to consolidate multiple actions, a circuit court must consider if prejudice will result to any party and if consolidation promotes judicial economy.” *Id.* ¶ 19. A court may transfer a case to another court “only by the joint written order of the transferring court and the court to which the action is transferred.” *Id.* § 805.05(1)(b).

ARGUMENT

This Court and the Waukesha County Circuit Court should jointly transfer this case to Branch 9 of the Waukesha County Circuit Court for consolidation with *White v. Wisconsin Elections Commission*, 2022-CV-001008. Transfer is appropriate because the cases may be consolidated under Wis. Stat. § 803.04(1). And transferring is the procedurally correct and most efficient route to resolving this case.

Both cases are still “pending.” Wis. Stat. § 805.05(1)(b). This case is just beginning. The Court has not yet issued any substantive orders, so there is little chance of confusion or prejudice by transferring this case at its early stage. The *White* case is also still pending. Although the court issued a permanent injunction, no party has filed a notice of appeal. The Waukesha County Circuit Court thus retains jurisdiction over the case. *Cf.* Wis. Stat. § 808.075. The parties have until November 17 to file a notice of appeal. *See id.* § 808.04(1). Even if a party appeals the injunction, the court retains certain powers over the case. *See id.* § 808.075. For example, a party may move for reconsideration up to twenty days after the entry of judgment. *Id.* § 805.17(3). And even “[d]uring the pendency of an appeal,” a trial court may stay execution of a judgment, modify an injunction, or “[m]ake any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.” *Id.* § 808.07.

All these options are still open to Plaintiffs. The deadlines to file an appeal, move to reconsider, or request modification of the injunction have not lapsed. Plaintiffs may still move to intervene in *White*, and likely have substantial grounds to do so (particularly if no party in *White*

will pursue any of these options). But Plaintiffs have inexplicably not sought intervention in the case that they say causes their injuries. Plaintiffs instead request that this Court modify the “functional” result of the Waukesha County Circuit Court’s injunction. Doc. 1 at 9. Only the Waukesha County Circuit Court may entertain that request. *See* Wis. Stat. § 808.07.

Consolidation is permissible and appropriate. Plaintiffs raise an “alternative” right to relief as the plaintiffs in *White*, “in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences,” and the cases raise questions of law and fact “common to all these persons.” *Id.* § 803.04(1). That these cases are so closely related is unsurprising. Plaintiffs made the *White* injunction the subject of their complaint. Doc. 1 at 6-9. They ask for a competing injunction from this Court to defeat the *White* injunction. Doc. 1 at 20. And both cases raise common legal issues, most of which the Waukesha County Circuit Court has already resolved. Consolidation is thus appropriate. *See Bourne, S.C.*, 2019 WI App 1, ¶ 21.

Consolidation will promote judicial economy and will not prejudice any party. That *White* has reached final judgment does not foreclose consolidation, as consolidation for purposes of trial is a different issue. *In re T.M.S.*, 448 N.W.2d 282, 289 (Ct. App. 1989) (“Whether to consolidate separate actions or proceedings for trial (as opposed to whether consolidation is permissible) is discretionary with the trial court. Consolidation for purposes of trial will usually be granted in the administration of justice when prejudice will not result.” (citation omitted)). Transfer will not prejudice any party and will promote judicial efficiency, as “it is efficient to centralize all litigation of a given subject matter in a single forum.” *New York v. Pruitt*, No. 18-cv-1030, 2018 WL 2411595, at *4 (S.D.N.Y. May 29, 2018).

Indeed, consolidation is appropriate *because of* the Waukesha County Circuit Court’s final judgment, not despite it. Transfer will “minimize the risk of inconsistent results” with the court’s

injunction. *Id.* “In any event, it is elementary that a court of equity having taken jurisdiction of the controversy will retain jurisdiction to do complete justice to all the parties interested in the controversy.” *Penn. Oil Co. of Wis. v. Andrew*, 288 N.W. 246, 249 (1939). The Waukesha County Circuit Court’s injunction is the professed source of Plaintiffs’ grievances. The Waukesha County Circuit Court should hear them.

CONCLUSION

The Waukesha County Circuit Court can and should hear Plaintiffs’ arguments in support of modifying its injunction. This Court and the Waukesha County Circuit Court should therefore jointly order the transfer of this case to be consolidated with *White v. Wisconsin Elections Commission*, 2022-CV-001008. A contemporaneous motion to transfer has been filed in *White* pursuant to Wis. Stat. § 805.05(1)(b).

Dated: October 5, 2022

Electronically signed by Bryant M. Dorsey
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* Application for admission *pro hac vice*
pending