STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

ARDIS CERNY, et al.,

Petitioners,

v. Case No. 24-CV-1353

WISCONSIN ELECTIONS COMMISSION, et al.,

Respondents.

BRIEF IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

Petitioners Ardis Cerny and Annette Kuglitsch claim that certain Wisconsin statutes have been misinterpreted by the State for nearly 20 years, and that the Wisconsin Department of Transportation (DOT) and the Wisconsin Elections Commission (the "Commission") have a previously undiscovered duty to cross-reference DOT's citizenship data against Wisconsin's voter registration list. This is an incorrect reading of the law. Even the legislative committees interested in this issue understand that there is no such duty.

Setting aside their erroneous reading of the statutes, Petitioners' proposed injunction would not be the election integrity tool that they suggest. DOT has no information regarding the *current* citizenship status of individuals on the voter registration list; DOT only has outdated information about the status of applicants for driver licenses and state ID cards *at the time of application*. Every year, thousands of lawful permanent residents in Wisconsin become naturalized citizens, and these

individuals generally have no reason to update their citizenship status with DOT. So, while DOT could produce a data set identifying individuals who were lawful permanent residents or lawful temporary visitors at the time when they were issued licenses or ID cards, this information would not be useful or reliable in assessing whether this same group of individuals are U.S. citizens today—and therefore properly registered and eligible to vote.

And there is another problem with Petitioners' proposed injunction: DOT is obligated to keep driver license and ID card holder information confidential under both state and federal law. The injunction would require DOT to violate these privacy laws, and therefore this Court cannot order it. Equitable injunctive relief cannot override statutes.

Petitioners want the Court to disregard these inconvenient facts. They request a temporary injunction requiring Respondents to commence this data-matching effort immediately—*and* deactivate the voter registration of any individual marked as a non-citizen based on DOT's outdated data—all less than three weeks before the upcoming presidential election. At bottom, Petitioners' motion must be denied because they cannot satisfy the required criteria for a temporary injunction.

First, Petitioners have no reasonable probability of success on the merits of her mandamus claim. They simply misread the statutes, as explained in Respondents' brief in support of their motion to dismiss. There is no positive and plain duty for DOT and the Commission to cross-reference citizenship data in their respective databases and deactivate voter registrations when the data does not match.

Second, the balance of equities weighs heavily against the injunction. Petitioners have not established that they will be injured without the injunction. Their concerns about vote dilution are speculative at best; they provide no evidence demonstrating that an illegal vote would be prevented if DOT's outdated citizenship data were cross-referenced against Wisconsin's voter registration list.

In contrast to Petitioners' lack of demonstrated injury, the potential harm to recently naturalized citizens—that is, the unjustified deactivation of their voter registrations—is enormous. Petitioners argue that this harm is mitigated because any citizen erroneously removed from the registration list may still cast a provisional ballot and prove eligibility later. But this does nothing to mitigate the harm of requiring a subset of the electorate to overcome additional barriers to exercise their right to vote. It also does not address the due process problems with deactivating voter registrations on the basis of unreliable data just weeks before the election.

The broader public would also be harmed if the injunction issues: last-minute changes to election administration, regardless of the rationale, risk voter confusion and undermine confidence in the election. *See Hawkins v. WEC*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877. And Respondents would be harmed, too, if they are required to undertake the massive project of creating and implementing a new technology platform for use by local election officials in a matter of days or weeks—all in violation of state and federal privacy laws.

Third, Petitioners cannot show that this injunction is necessary to preserve the status quo. Petitioners' injunction would do the very opposite: it would require

Respondents to *change* their practices and create and implement a new system. Petitioners cannot use a temporary injunction to alter the status quo and obtain the final relief requested.

Petitioners' motion for a temporary injunction should be denied for all of these reasons. But, if this Court grants any relief, Respondents respectfully request an immediate stay of that order pending appeal pursuant to *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263.

RELEVANT FACTS[1]

I. Petitioners request an injunction ordering Respondents to cross-reference DOT's citizenship data against Wisconsin's voter registration list, and to create and maintain an electronic system that would allow the Commission and clerks to verify the citizenship of registrants on an instant basis.

Petitioners ask this Court to enter a temporary injunction requiring DOT and the Commission to immediately:

> 1) Match information in their respective databases sufficient to verify United States citizenship of current registrants with records in the WisVote official voter registration list maintained pursuant to § 6.36, Stats., and
>
> 2) Provide and maintain a system enabling Respondent Wisconsin Elections Commission and municipal and county clerks to verify citizenship of voter registration applicants on the same instant basis as they verify proof of residence pursuant to § 6.34(4), Stats.

(Doc. 63:1.) Petitioners also ask for an order providing that if, after data-matching, DOT "has no record" showing that an existing registrant or registration applicant is

[1] To prevent duplicative briefing, this brief summarizes only the additional facts presented and relied upon by Respondents in opposition to Petitioners' motion for a temporary injunction. Respondents incorporate by reference the factual background section of their contemporaneously filed brief in support of their motion to dismiss.

a citizen, the registrant or applicant may not "be deactivated, removed from the [voter registration list], or otherwise denied the opportunity to establish his or her qualification or the right to vote except pursuant to existing notice and challenge procedures." (Doc. 63:1–2.)

II. DOT's data reflects citizenship status only at the time of application for a driver license or ID card, not current citizenship status.

An individual must be legally present in Wisconsin to obtain a driver license or state ID card. DOT's Division of Motor Vehicles (DMV) will verify an applicant's legal presence at the time it issues the license or ID card and then note that information on the customer's record within its database. The options for legal presence within this data field include (1) U.S. citizen; (2) lawful permanent resident; and (3) lawful temporary visitor. DOT's customer database therefore contains information showing whether a customer was a citizen, a lawful permanent resident, or a lawful temporary visitor as of the date on which their product was issued. (Declaration of Tommy Winkler, Jr. ¶ 8.)

Lawful permanent residents receive driver licenses and ID cards that are generally valid for eight years. Lawful temporary visitors are issued driver licenses and ID cards that expire at the end of their legal stay. Nothing in Wisconsin law requires a newly naturalized citizen to update their citizenship status with DOT. (*Id.* ¶ 9.)

As of October 10, 2024, DOT's customer database includes entries for 134,670 individuals with valid, non-expired driver licenses and state IDs cards who were

lawful permanent residents or lawful temporary visitors at the time the product was issued. (*Id.* ¶ 10.)

III. Wisconsin's non-citizen legal residents have multiple pathways to citizenship, many of which are only several years in duration.

Wisconsin's non-citizen legal residents have multiple pathways to citizenship. For example, a lawful permanent resident holding a green card[2] is generally eligible for naturalization after five years. *See* 8 U.S.C. § 1427(a). A spouse of a U.S. citizen may naturalize after three years as a lawful permanent resident, and some foreign nationals who have served in the U.S. military may naturalize with no permanent residency time requirement at all. *See* 8 U.S.C. §§ 1430(a), 1439.

Under Wis. Stat. § 902.01, this Court can take judicial notice of government statistics showing that thousands of lawful, non-citizen residents of Wisconsin naturalize and become U.S. citizens each year. *See* Office of Homeland Security Statistics, *State Immigration Statistics*, https://ohss.dhs.gov/topics/immigration/state-immigration-data-sheets/state-immigration-statistics (last visited Oct. 14, 2024). Approximately 63,685 of Wisconsin's lawful permanent residents were eligible to naturalize as of August 2024. U.S. Citizenship and Immigration Services, *Eligible to Naturalize Dashboard*, https://uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data/eligible-to-naturalize-dashboard (last visited Oct. 14, 2024).

[2] The U.S. Citizenship and Immigration Services issues permanent resident cards—i.e. green cards—to eligible non-citizen residents to allow them to live and work permanently in the United States. *See* U.S. Citizenship and Immigration Services, *Green Card*, https://www.uscis.gov/green-card (last visited Oct. 14, 2024).

IV. The creation of an electronic system enabling the Commission and local election officials to cross-check DOT's citizenship data against voter registration applications is not feasible in the short-term.

As explained in section II. *infra*, DOT is legally prohibited from sharing its citizenship data with the Commission under state and federal privacy laws. But setting aside whether it would be lawful, as a practical reality, DOT and the Commission cannot easily or quickly "[p]rovide and maintain a system" enabling both the Commission and municipal and county clerks "to verify citizenship of voter registration applicants on the same instant basis as they verify proof of residence" for voters registering online. (Doc. 63:1.)

DOT estimates that it would take the agency at least two to three months to update its data set delivery mechanism to provide citizenship data to the Commission on the same instant basis that DOT verifies proof of residence pursuant to Wis. Stat. § 6.34(4). This work would involve making changes to the protocol for searching and delivering the data response, testing response delivery for validity and accuracy, and updating its data-sharing agreement with the Commission. IT staff at DOT and the Commission would then need to analyze, design, and make modifications to the existing web service that supports Wisconsin's online voter registration application to include the indicator and response value for legal presence when matching data the Commission provides with data in the DMV's customer database. DOT estimates

that the cost for this work would be approximately $360,000—an amount that is not currently budgeted.[3] (Winkler Decl. ¶¶ 4–5.)

There is currently no existing system or program allowing DOT to provide real-time information to local election clerks. To do so, DOT would have to create a delivery system for every local election office that is similar to its present delivery system with the Commission. The work, time, and expense that would be required for this project is substantially greater and could not be accomplished in the short term. DOT estimates that the work would take a minimum of six to nine months to complete, assuming all local clerks are able to commit to such an effort. (*Id.* ¶ 6.)

From the Commission's perspective, the time required to complete a technical change to Wisconsin's election systems is difficult to estimate because it is influenced by the software-development process, by the State's infrastructure policies, and the limited staff available to perform the work. The typical development cycle for even a minor change to Wisconsin's electronic election infrastructure generally requires two to three months of work under ideal conditions, while major changes typically require eight to twelve months to complete. The changes proposed by Petitioners in their temporary injunction motion would constitute a major change to the Commission's election systems. Further, a rushed software-development process would raise security concerns. Limited time to test a new system increases the likelihood that it

[3] Further, this cost estimate does not include the ongoing DMV resources that would be required for testing, training, form revision/development, and system maintenance. (Winkler Decl. ¶ 5.)

includes errors and vulnerabilities that could frustrate clerks and compromise the upcoming elections. (Declaration of Robert Kehoe ¶¶ 9, 19.)

V. Wisconsin Statutes do not provide a notice and challenge procedure when a voter registration is deactivated due to non-eligibility to vote.

Wisconsin statutes include some notice and challenge procedures related to voter registration changes, but none apply in the circumstances presented here. There are notice procedures that apply when an election official determines that a voter registration form is insufficient (*see* Wis. Stat. § 6.32(2)), when an elector challenges the registration of another registered elector (*see* Wis. Stat. § 6.48), and when an election official seeks to deactivate a voter registration on the basis of inactivity or information indicating that the elector no longer resides at the same address (*see* Wis. Stat. § 6.50(1)–(3)).

There are no statutory notice or challenge procedures that apply when an election official deactivates a voter registration on the basis of non-qualification to vote because, for example, a clerk receives information indicating that the person is not a U.S. citizen, is not 18 years of age, or is deceased. When an elector's registration is changed from eligible to ineligible status, the statutes simply require the election official to "make an entry on the registration list, giving the date of and reason for the change." Wis. Stat. § 6.50(7).

VI. The November 5 general election has already begun.

The November 5, 2024, general election has already begun. As of October 11, 2024, approximately 524,732 absentee ballots have been mailed by municipal clerks to voters, and approximately 212,518 absentee ballots have been returned by voters

to municipal clerks. (Kehoe Decl. ¶ 7.) Additionally, the deadline for electronic voter registration closes at 11:59 p.m. on the third Wednesday before the election, which, this year, is October 16. *See* Wis. Stat. § 6.28(1)(a).

ARGUMENT

I. A temporary injunction may be issued only when the moving party satisfies four requisite criteria; it cannot grant relief that violates the law, nor can it provide the ultimate relief sought.

A temporary injunction is an extraordinary form of relief and, as such, the law sets a high bar. The moving party must show, among other things, that she is likely to succeed on the merits of her claims; a likelihood of irreparable injury; that, on balance, the competing interests weigh in favor of issuing the injunction; and that an injunction is necessary to preserve the status quo (rather than obtain final relief).

Wisconsin Stat. § 813.02, titled "Temporary injunction; when granted," provides courts with the authority to issue temporary restraining orders and injunctions. Section 813.02(1)(a) is directly relevant and states:

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

Wis. Stat. § 813.02(1)(a).

A court may issue a temporary injunction only if four criteria are met by the moving party: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has

a reasonable probability of success on the merits." *Serv. Emps. Int'l Union, Loc. 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted). Temporary injunctions "are not to be issued lightly. The cause must be substantial." *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) (footnote omitted).

When considering whether to grant a temporary injunction, "competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction." *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Further, a temporary injunction should be issued only to preserve the status quo, not to grant the ultimate relief sought. *SEIU*, 393 Wis. 2d 38, ¶ 93. The purpose is "only to *restrain* an act" that is clearly contrary to equity, not order the parties to undertake new actions. *Bartell Broads., Inc. v. Milwaukee Broad. Co.*, 13 Wis. 2d 165, 171, 108 N.W.2d 129 (1961) (emphasis added). And while injunctions are an equitable remedy, courts cannot issue injunctions that violate state law. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001).

II. Petitioners' requested injunction cannot be granted because it would require DOT to violate state and federal privacy laws.

It is black-letter law that a court cannot issue an injunction that violates state or federal statutes. Courts acting in equity have discretion to fashion relief unless a statute clearly provides otherwise. *Id.* That is because "clearly-worded statutes have the power to divest courts of their equity powers." *Findlay Truck Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 726 F.3d 738, 753 (6th Cir. 2013). For example,

in *Findlay Truck Line*, the Sixth Circuit held that the trial court lacked authority to issue a preliminary injunction that violated plain statutory language. *Id.* Here, federal and state privacy laws expressly prohibit the relief sought.

DOT is obligated to keep driver license and ID card holder information confidential under both federal and state law. *See, e.g.*, 18 U.S.C. § 2721; Wis. Stat § 343.50(8). Improper disclosure of such information carries monetary and criminal penalties, including a liquidated damages penalty of $2,000 per person whose information is improperly disclosed. 18 U.S.C. § 2724. Under the law, and as a matter of protecting Wisconsin residents, DOT takes its confidentiality obligation seriously.

The federal Driver's Privacy Protection Act prohibits a state DMV from releasing or using personal information it obtains in connection with a motor vehicle record unless an exception applies. *See* 18 U.S.C. § 2721(a)(1). One such exception is for "use by any government agency . . . in carrying out its functions." 18 U.S.C. § 2721(b)(1). State law does not require the Commission to cross-reference DOT's citizenship data against the voter registration list, and thus this is not a qualifying agency function authorizing the release of confidential data.

Under state law, DOT is prohibited from sharing ID card applicant data except in limited circumstances that are not present here. Wisconsin Stat. § 343.50(8) prohibits DOT from disclosing any record or other information concerning or relating to an applicant or identification card holder, unless specifically delineated. As relevant here, one such exception is that DOT "may, upon request," provide this confidential data to the Commission "for the *sole* purpose of allowing the chief election

officer to comply with the terms of" the Commission's agreement with the Electronic Registration Information Center, Inc. ("ERIC") under Wis. Stat. § 343.50(8)(c)3.

The ERIC agreement exception has no applicability here because it does not require the Commission to share citizenship information. (*See* Doc. 61.) Indeed, the agreement specifically *prohibits* member states from transmitting DOT records containing information as to citizenship status. (Doc. 61:13 ("Under no circumstances shall the Member transmit an individual's record where the record contains documentation or other information indicating that the individual is a non-citizen of the United States.").)

In short, this Court cannot grant Petitioners' proposed injunction because it would require DOT to violate federal and state privacy laws. Petitioners' temporary injunction motion should be denied for this reason alone.

III. Petitioners are not entitled to a temporary injunction because they do not meet the four requirements.

Petitioners' motion for a temporary injunction should also be denied because of their failure to meet the relevant legal standards.

First, Petitioners have no reasonable probability of success on the merits of their underlying mandamus claim. There is no positive and plain duty for Respondents to cross-reference DOT's citizenship data against Wisconsin's voter registration list because the statutes do not require it. Even the legislative committees interested in this issue understand that Respondents are not required to cross-reference citizenship data, and the Legislature's nonpartisan staff attorneys

confirm this understanding. Without a plain, unequivocal legal duty, the mandamus claim fails.

Second, Petitioners have not established a likelihood of irreparable harm, and the balance of equities weighs heavily against the injunction. The risk of injury to the Wisconsin electorate—including the possible disenfranchisement of thousands of newly naturalized U.S. citizens—*far* outweighs Petitioners' speculative concern that illegal voting may dilute their votes, and precedent demonstrates that it is simply too late to make major changes to election administration given the proximity of the upcoming election. Respondents, too, would be harmed if required to undertake such a massive project on a short timeline, diverting their attention and resources away from critical responsibilities in the weeks leading up to the election.

Third, Petitioners' request goes beyond the permissible scope of a temporary injunction because it would alter the status quo and obtain the final relief they seek.

A. Petitioners have no reasonable probability of success on the merits of their mandamus claim.

Petitioners seek a temporary injunction only in relation to their mandamus claim alleging that DOT and the Commission have a duty to match citizenship information in their respective databases to verify that only U.S. citizens are included on Wisconsin's voter registration list. (Doc. 62:2.) Petitioners, however, have not stated a viable mandamus claim because there is no such duty under Wisconsin law.

"Mandamus is an extraordinary, drastic remedy to be used only where the duty of the public officer is clear . . . ." *State ex rel. Ryan v. Pietrzykowski*, 42 Wis. 2d 457, 462, 167 N.W.2d 242 (1969). The burden for mandamus relief is high, and here, Petitioner has not met that burden.[4]

Petitioners argue that their mandamus claim ordering citizenship data-matching "turns on the meaning of" Wis. Stat. § 85.61(1). (Doc. 62:4.) Their interpretation of this statute is incorrect.

Wisconsin Stat. § 85.61(1) requires DOT and the Commission to enter into an agreement to "match personally identifiable information *on the official registration list maintained by the commission under s. 6.36(1)* and the information specified in s. 6.34(2m)" with information contained in DOT's databases. The "information *on* the official registration list," pursuant to Wis. Stat. § 6.36(1), does not include citizenship status. *See* Wis. Stat. § 6.36(1)(a)1.–16. Nor is citizenship status included within the information specified under Wis. Stat. § 6.34(2m). That statute allows electors to register to vote electronically without providing proof of residence so long as they provide a current and valid driver's license or state ID number. Simply put, there can be no duty to match DOT's citizenship data against the voter registration list because citizenship information is not maintained on that list.

Petitioners' contrary reading of the Wisconsin Statutes is novel and not shared by the legislative parties it tries to involuntarily join in this action. For example, in their recent correspondence to DOT's Secretary, the chairs of the Legislature's

[4] Here, Respondents incorporate by reference their arguments on the merits in their contemporaneously filed brief in support of their motion to dismiss.

election committees "humbly request[ ] WISDOT and WEC to cooperatively share non-citizen information," (Doc. 52), but do not assert any legal requirement. And the Legislature's nonpartisan staff attorneys confirmed this understanding in a June 4, 2024, memorandum, explaining that "[c]urrent state law does not direct DOT to provide citizenship data to WEC, nor does it expressly authorize DOT to generate a list of non-citizens and transmit this to WEC." (Doc. 53:1.)

B. Petitioners have not established a likelihood of irreparable injury, and the balance of equities weighs heavily against the injunction.

Not only is Petitioners' underlying legal theory unsound, but the balance of equities weighs heavily against the injunction. On one side of the ledger, Petitioners advance a speculative and unsupported theory that the absence of citizenship data-matching between DOT and the Commission threatens to dilute their votes. On the other side of the ledger, thousands of newly naturalized citizens would *actually* have their voting rights infringed should the injunction issue and their registrations are deactivated on the basis of DOT's unreliable and out-of-date citizenship data. The broader voting public would also be harmed by the resulting chaos and confusion, and Respondents, too, would be harmed by the unreasonable demands of creating and implementing a new data-sharing system on an impossible timeline, all in violation of state and federal privacy laws.

1. Petitioners provide no evidence of harm to their interests.

"[I]njunctions are not to be issued lightly, but only where necessary to preserve the status quo of the parties and where there is irreparable

injury." *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974) (footnote omitted). Here, Petitioners have provided no evidence of injury at all.

Petitioners' theory of injury is based on several levels of speculation, all related to their generalized concern regarding illegal voting by non-citizens. They allege that, if Respondents completed the data-matching they want, the Commission would find non-citizens who are registered to vote, those individuals would be prevented from voting, and this would prevent Petitioners' votes from being diluted. (*See* Doc. 49 ¶¶ 166, 171.) Federal courts have uniformly rejected this kind of speculative "vote dilution" theory of injury, *Feehan v. WEC*, 506 F. Supp. 3d 596, 608–09 (E.D. Wis. 2020) (collecting cases), and this Court should as well.

Petitioners further speculate that there are 10,000 to 15,000 non-citizens who are unlawfully registered on Wisconsin's voter registration list, based on their unsound extrapolation from a small number of rejected applications from Wisconsin's free identification card petition process ("IDPP").[5] (Doc. 49 ¶¶ 174–75.) But

[5] This extrapolation is both mathematically and logically unsound. DOT Secretary Boardman testified that 11,048 voter ID cards were issued through the IDPP over 10 years. (Doc. 49:9.) The total number of applications submitted over this 10-year period is 21,493. (Winkler Decl. ¶ 11.) Of that number, 53 applications were cancelled due to fraud or ineligibility. This means that just 0.25% of all applications were cancelled due to fraud or ineligibility, not 0.48%, as Petitioners incorrectly calculate. *Id.*

Further, Petitioners' theory that this same percentage of voter registrants are non-citizens is also logically unsound, because they have no evidence showing that all of the cancelled applications—or even any of them—were due to the fact that the applicant was a non-citizen. To the contrary, in the vast majority of cases, the fraud or ineligibility is not related to citizenship but to another issue entirely, such as the applicant misrepresenting themselves as another person, or misstating whether he or she formerly held a Wisconsin driver license or ID card product. (Winkler Decl. ¶ 12.)

importantly, they do not identify a single unlawfully registered voter, a single unlawfully cast ballot by a non-citizen, or any evidence demonstrating that a cross-reference of DOT's outdated citizenship data would effectively prevent a non-citizen from voting.[6] And while Petitioners emphasize the importance of safeguarding the right to vote when asserting their own interests, they forget that their proposed injunction would almost certainly infringe on the voting rights held by a different group: newly naturalized U.S. citizens.

2. The harm to the public, should the injunction issue, would be enormous.

a. The injunction would likely cause thousands of U.S. citizens to be incorrectly tagged as non-citizens, risking their disenfranchisement.

DOT's databases currently show approximately 135,000 individuals with valid driver licenses and ID cards who, at the time of application, were non-citizen lawful residents of Wisconsin. (Winkler Decl. ¶ 10.) Thousands of lawful residents become naturalized citizens in Wisconsin every year. These individuals have no reason to update their citizenship status with DOT, and presumably would only return to DOT after their license or ID card expires after eight years. This means that thousands of newly naturalized U.S. citizens may be properly registered to vote but marked as non-citizens in DOT's database. If the Commission is ordered to deactivate the voter

[6] Further, as pointed out by proposed intervenors Forward Latino and Voces de La Frontera, (Doc. 39:4), non-citizens who register to vote or vote face criminal liability under Wisconsin law, Wis. Stat. § 12.13(1)(a), and under federal law, 18 U.S.C. § 611. Other potential consequences include deportation, being barred from reentry, and being considered ineligible to ever become a citizen in the future. *See* 8 U.S.C. § 1182(a)(6)(C)(ii), (10)(D). These are extremely serious consequences, and Petitioners offer no evidence showing that any meaningful number of noncitizens have voted anywhere in the United States, much less in Wisconsin specifically.

registrations of each registrant flagged as a non-citizen by virtue of DOT's outdated data, these citizens will face unexpected and unjustified hurdles in proving their eligibility to vote—all within three weeks of the upcoming presidential election. The potential harm to their voting rights is enormous.

There are no existing statutory procedures in place for ensuring that these individuals will receive notice if their voter registration is deactivated. Even if the Commission (or more likely, the municipal clerks) were instructed to contact each affected individual to inform them of the deactivation of their voter registration in advance of the election, some people will likely be unreachable, and even those who are will still have to navigate the process of re-registering before election day.

Petitioners do not even try to address these substantial due process concerns. Rather, they suggest that the harm is mitigated because any citizen improperly removed from the voter rolls may still cast a provisional ballot and prove eligibility later. (Doc. 62:6.) This response is wholly inadequate. Even if these individuals are subsequently able to cast a ballot—after being unjustifiably forced to overcome additional barriers—the harm of having to go through the burdensome process of correcting the registration error in time for their ballot to be counted remains.[7]

[7] It is also inaccurate to say that provisional voting is available to prevent any disenfranchisement. In general, only a registered voter may cast a ballot, *see* Wis. Stat. § 6.27, and provisional voting is limited to circumstances that are not present here. *See* Wis. Stat. § 6.97. Thus, if a voter's registration is deactivated between now and election day, he or she *must* re-register to cast a ballot. This includes providing proof of residence and, potentially, naturalization papers. *See* Wis. Stat. §§ 6.325, 6.34. And if the individual does not discover that her registration was deactivated until she arrives at her polling place on election day, she cannot vote unless she is able to gather all needed documentation and re-register before the polls close.

b. Under *Hawkins*, *Purcell*, and persuasive federal authority, it is simply too late to make major changes before the election.

The harm of Petitioners' proposed injunction would extend to the broader electorate as well, given that the November 5 election has already started.

In *Hawkins*, the Wisconsin supreme court recognized that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote," and rejected a petition for preliminary relief on that basis. 393 Wis. 2d 629, ¶ 5. Here, the timing of Petitioners' late request to modify the voter rolls is even worse than in *Hawkins*, as we are less than 30 days out from election day and hundreds of thousands of absentee ballots have already been returned by voters.

Similarly, the U.S. Supreme Court has long emphasized that courts should refrain from making eleventh-hour changes to election procedures that "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). "As an election draws closer, that risk will increase." *Id.* at 5. As such, it is "a basic tenet of election law" that, "[w]hen an election is close at hand, the rules of the road should be clear and settled." *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

Further, large-scale voter registration list modifications based on database comparisons are inherently unreliable, and should therefore be avoided when an election is near and the opportunity to remedy errors diminishes. In *Arcia v. Florida Secretary of State*, the U.S. Court of Appeals for the Eleventh Circuit rejected as unlawful a plan to identify and purge alleged non-citizens from the state's voter rolls using a large-scale "match" of certain government databases within 90 days of an

election. 772 F.3d 1335, 1342 (11th Cir. 2014). The court acknowledged that this type of matching is inherently unreliable, explaining that "the process of matching voters across various databases creates a foreseeable risk of false positives and mismatches based on user errors, problems with the data-matching process, flaws in the underlying databases." *Id.* The court also explained why systematic, large-scale purges of voter registration lists should be avoided in the weeks leading up to an election:

> At most times during the election cycle, the benefits of systematic programs outweigh the costs because eligible voters who are incorrectly removed have enough time to rectify any errors. In the final days before an election, however, the calculus changes. Eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote.

Id. at 1346.

Petitioners' proposed injunction poses an inherent and substantial risk of voter confusion, errors, and chaos in the final days leading up to the November election. This Court should follow the supreme court's direction in *Hawkins* and decline to grant the injunction.

3. Respondents would also be greatly harmed.

Respondents would also be harmed should the injunction issue. DOT and the Commission simply cannot "[p]rovide and maintain" an electronic system enabling the Commission and municipal and county clerks to instantaneously cross-reference voter registration applicants with DOT's citizenship data in a matter of weeks. Even if Respondents are only required to modify the existing data-sharing system between DOT and the Commission, the project would still be incredibly time and resource intensive and divert the Commission's staff away from their existing election

administration responsibilities at a critical time. DOT estimates that the project would take a minimum of two to three months to complete and would cost the agency approximately $360,000 in unbudgeted funds.

Further, as noted above, DOT would be additionally harmed because it would be exposed to liability and monetary and criminal penalties for violation of privacy laws. Under federal law alone, improper disclosure of ID card holder information carries a liquidated damages penalty of $2,000 per person whose information is improperly disclosed. 18 U.S.C. § 2724.

* * *

When considering whether to grant injunctive relief, the court must reconcile the "competing interests" and the plaintiff must satisfy the court "that on balance equity favors issuing the injunction." *Pure Milk Prod. Coop.*, 90 Wis. 2d at 800. Here, those competing interests weigh resoundingly against granting Petitioners' injunction. This Court should deny the motion.

C. Petitioners cannot use a temporary injunction to alter the status quo and obtain the final relief requested.

Further, it is critical to recognize that Petitioners request a temporary injunction that would grant them the ultimate relief they seek. The supreme court has explained that a temporary injunction "is not intended to *change* the position of the parties or to require the doing of an act which constitutes all or a part of the ultimate relief sought in the action. Its purpose is not to decide the action before trial." *Shearer v. Congdon*, 25 Wis. 2d 663, 667, 131 N.W.2d 377 (1964) (emphasis added) (citation omitted). Petitioners' temporary injunction motion asks this Court to do both

things prohibited by this clear precedent: altering the status quo by ordering Respondents to commence new systems, *and* granting final relief.

Here, Petitioners ask this Court to require Respondents to share and cross-reference data not previously exchanged for the purpose of "verify[ing]" the citizenship status of current registrants on Wisconsin's voter registration list, and to create a brand-new system enabling the Commission and municipal and county clerks "to verify citizenship of voter registration applicants on the same instant basis as they verify proof of residence" pursuant to Wis. Stat. § 6.34(4). (Doc. 63:1.) This relief is the opposite of what a temporary injunction is supposed to do: it would change the status quo, not preserve it. *See SEIU*, 393 Wis. 2d 38, ¶ 93. And the temporary injunction Petitioners seek would constitute part of the ultimate relief sought in the case. (*Compare* Doc. 63:1–2, *with* Doc. 49:29–30.)

Petitioners' temporary injunction motion should be denied for this reason, too.

IV. If this Court issues a temporary injunction to Petitioners, it should immediately stay its order pending appeal.

Petitioners have failed to show that they are entitled to any temporary injunctive relief from this Court. In the event this Court disagrees and issues an injunction, Respondents respectfully request that the Court immediately stay that order while they pursue an emergency appeal.

Under Wis. Stat. § 808.07, "a trial court . . . may . . . [s]tay execution or enforcement of a judgment or order" during "the pendency of an appeal" of that order. Wis. Stat. § 808.07(2)(a), (a)1.; *see* Wis. Stat. § (Rule) 809.12. When presented with a request to stay an order pending appeal, the Court must consider whether the moving

party: (1) "makes a strong showing that it is likely to succeed on the merits of the appeal"; (2) "shows that, unless a stay is granted, it will suffer irreparable injury" during the pendency of the appeal; (3) "shows that no substantial harm will come to other interested parties" during the pendency of the appeal; and (4) "shows that a stay will do no harm to the public interest." *Waity*, 400 Wis. 2d 356, ¶ 49. These four factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (citation omitted).

Waity provides guidance on the proper analytical approach to apply in assessing the likelihood of success on appeal, particularly where the court has already ruled against the stay-movant on the merits. A court cannot "simply input its own judgment on the merits of the case and conclude that a stay is not warranted," because the salient issue is "whether the movant made a strong showing of success *on appeal*." *Id.* ¶ 52. Thus, the court "must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." *Id.* ¶ 53.

If this Court enters a temporary injunction, it should immediately stay such injunction pending appeal because Respondents would satisfy all four factors for a stay pending appeal.

First, Respondents would have a sufficient likelihood of success given that the underlying mandamus claim turns on a question of statutory interpretation, and such questions are reviewed *de novo* on appeal. *See id.* ¶ 49.

Second, absent a stay, Respondents would suffer irreparable harm during the pendency of the appeal. (*See* section III.B.3. *supra*.) And importantly, the harms to Respondents (and the public) "can[not] be undone if, on appeal," a temporary injunction from this Court "is reversed." *Waity*, 400 Wis. 2d 356, ¶ 57. If Petitioners' legal arguments are accepted by this Court and Respondents are ordered to commence a citizenship data "matching" effort, the Commission will be forced to immediately divert time and resources away from its current duties to create new systems with DOT. In the final days leading up to a presidential election, even a brief diversion of resources impacts overall election preparedness. And if the Commission is ordered to deactivate registrations based on any mismatched citizenship data, lawful electors may be removed from the registration list before the court of appeals can reverse, resulting in voter alarm and confusion that cannot be undone. (*See* section III.B.2. *supra*.)

Third, Petitioners would not suffer any substantive harm if this Court stayed the injunction during the pendency of the appeal, as they have not identified any actual injury to their interests in the first instance. (*See* section III.B.1. *supra*.)

Finally, a stay pending appeal would protect the public interest, whereas a denial of a stay would harm the public interest. (*See* section III.B.2.–3. *supra*.)

CONCLUSION

This Court should deny Petitioners' motion for a temporary injunction. If it does not, this Court should immediately stay its order pending appeal.

Dated this 14th day of October 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Brief in Opposition to 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 14th day of October 2024.

Electronically signed by:

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