UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

CHRYSTAL EDWARDS, TERRON EDWARDS, JOHN JACOBSON, CATHERINE COOPER, KILEIGH HANNAH, KRISTOPHER ROWE, KATIE ROWE, CHARLES DENNERT, JEAN ACKERMAN, WILLIAM LASKE, JAN GRAVELINE, TODD GRAVELINE, ANGELA WEST, DOUGLAS WEST, and all others similarly situated,

Plaintiffs,

v.

ROBIN VOS, in his official capacity as Speaker of the Wisconsin State Assembly; SCOTT FITZGERALD, in his official capacity as Majority Leader of the Wisconsin State Senate; STATE OF WISCONSIN; WISCONSIN STATE ASSEMBLY; WISCONSIN STATE SENATE; WISCONSIN ELECTIONS COMMISSION; MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and MARK L. THOMSEN, in their official capacities as members of the Wisconsin Elections Commission, and MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants.

Case No. 20-CV-340

REPLY MEMORANDUM OF DEFENDANTS WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, JULIE M. GLANCEY, ANN S. JACOBS, DEAN KNUDSEN, ROBERT F. SPINDELL, JR., MARK L. THOMSEN AND MEAGAN WOLFE IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT AGAINST THEM

The above-named defendants, the Wisconsin Elections Commission ("WEC"), WEC Commissioners Bostelmann, Glancey, Jacobs, Knudsen, Spindell and Thomsen, and WEC Administrator Wolfe, the individuals being sued in their official capacity, have filed a motion to dismiss the amended complaint against them for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted, pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. Proc. This memorandum is filed in reply to the plaintiffs' memorandum in opposition to the motion.

I. The Court Lacks Subject Matter Jurisdiction in Regard to the Claims Against the WEC Defendants.

The plaintiffs assert that the WEC defendants have interests sufficiently adverse to the plaintiffs because they are charged with enforcing the elections laws at issue and would have a role in implementing the injunctive relief sought. Yet the plaintiffs have not brought suit against other parties, most notably Wisconsin county and municipal officials, who have significant roles in the administration of elections. See, e.g., Wis. Stat. §§ 7.10 (county clerks must issue election supplies and ballots) and 7.15 (municipal clerks supervise registration and elections). Numerous officials and offices integral to the conduct of elections in Wisconsin are not involved in this case, yet they will be bound to follow, and may be compelled to follow, any orders of this Court which affect their responsibilities. Alternatively, the Court would not be able to order the relief requested, even if it were justified, because the proper parties are not present. The WEC defendants are bound to follow whatever directives this Court might issue, as has been stated repeatedly in this and other cases. Local municipalities, however, are wholly separate entities not within the WEC's control.

The law is clear that in order for a court to have subject matter jurisdiction over a case, the litigants must have adverse legal interests. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-4, 57 S.Ct. 461 (1937). The plaintiffs cite *United States v. Windsor,* 570 U.S. 744, 759 (2013), *INS*

v. Chadha, 462 U.S. 919, 940 (1983), and their progeny for the proposition that where the government continues to enforce the law being challenged, a justiciable controversy exists. Yet in those cases enforcement of the law involved a specific action government officials intended to undertake, or not undertake, in reliance upon a law that the government did not favor. For example, in *Chadha* the Immigration and Naturalization Service intended to deport an individual upon the demand of one House of Congress even though the Executive Branch viewed the applicable statute to be unconstitutional. 462 U.S at 930. Following its discussion of *Chadha,* the Court in *Windsor* made clear that "the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III." 570 U.S. at 759. Adversity sufficient to give rise to subject matter jurisdiction is not dependent upon what the parties think about a particular law being challenged, but rather upon whether they intend to act in reliance upon that law.

The problem in this case is that with respect to the injunctive relief sought, there is no specific action the WEC defendants intend to take, or not take, that the plaintiffs wish to enjoin. The plaintiffs seek an order requiring the WEC defendants to abide by the ADA and take reasonable, constitutionally sufficient measures to allow the plaintiffs to vote safely. As pointed out in the WEC defendants' initial brief, vague injunctions of the sort sought here are disfavored, in part because they give no specific direction as to the conduct expected. *EEOC v. AutoZone, Inc.,* 707 F.3d 824, 841 (7th Cir. 2013). Regardless, the WEC defendants have not refused to follow the ADA, nor have they refused to undertake any specific measures going forward relative to the relief being sought. Unlike the situation in *Windsor,* where the Court found that the Executive would be harmed by an order requiring a refund from the Treasury, 570 U.S. at 758, the WEC defendants will not be harmed by the type of injunctive relief sought in this case. They have stated that they are bound to follow any order issued in this case and would have no authority to appeal it. Since,

as discussed below, they are not subject to an award of damages for past conduct and they are not in a position to oppose the injunctive relief sought, the WEC defendants should be dismissed from this case.

II. The Amended Complaint Does Not State a Valid Claim for Damages Under the ADA.

The plaintiffs cite two paragraphs in the amended complaint in support of their contention that they have alleged sufficiently that the WEC defendants acted with intent or deliberate indifference, thereby allowing their claim for damages under Title II of the ADA to withstand the motion to dismiss. Those paragraphs allege that the plaintiffs would have voted in the Spring Election had they been afforded reasonable accommodations (AC ¶ 129), and that "upon information and belief Defendants' discriminatory conduct toward the ADA Class caused Plaintiffs to not be able to vote in the Spring Election. (AC ¶ 131.) The plaintiffs also cite to a footnote in *Geinosky v. City of Chicago,* 675 F.3d 743, 745 n.1 (7th Cir. 2012) for the proposition that facts alleged in a complaint can be supported by consistent facts set forth in a brief.

As to the last point, the footnote in *Geinosky* states that a plaintiff *appealing* dismissal of a case under Rule 12(b)(6) "may elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings." The footnote does not purport to alter the rule "that the complaint may not be amended by the briefs in opposition to a motion to dismiss," or that a district court's "consideration of a motion to dismiss is limited to the pleadings." *Car Carriers, Inc. v. Ford Motor Corp.*, 745 F.2d 1101, 1107 (7th Cir. 1984); *see also Frederico v. Home Depot,* 507 F.3d 188, 201-02 (3d Cir. 2007)(courts do not consider after-the-fact allegations in determining sufficiency of the complaint under Rules 9(b) and 12(b)(6)).

The amended complaint is silent as to any reasonable accommodations the WEC defendants refused to provide. The plaintiffs seek to remedy that deficiency by offering some

unwieldy possibilities in their brief. Even if those contentions are appended to the complaint, which they should not, there is no claim that the WEC defendants had the authority or practical ability to employ any such measures prior to the Spring Election. The WEC cannot have failed to act upon a matter, and thereby have intentionally discriminated in violation of the ADA, if the remedial measures were outside its control.

The amended complaint alleges that "(b)y insisting on allowing the Spring Election to proceed without consideration of that decision's impact on individuals with disabilities, the State and the Commission violated the ADA…" (AC ¶ 120.) The amended complaint also acknowledges, however, that the legislature controls the "mode, method and timing of Wisconsin Elections." (AC ¶ 96.) The amended complaint does allege that all of the defendants acted "intentionally, with malice and indifference" in violation of the ADA. (AC ¶ 130.) Yet that is precisely the type of "formulaic recitation of the elements of a cause of action" that is insufficient to state a claim in accordance with Rules 8(a) and 9(b), Fed. R. Civ. P. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). While Rule 9(b) allows a party's intent to be plead "generally," that does not mean that knowledge and intent may be plead in a conclusory fashion. *Ashcroft v. Iqbal*, 556 U.S. 662, 686, 129 S.Ct. 1937 (2009). "(T)he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.* The amended complaint in this case does not allege facts sufficient to support an inference that the WEC defendants intentionally discriminated against the plaintiffs. In fact, it clearly states that the timing and mode of elections are matters outside their control.

III. The Parties Agree that Any Claim for Money Damages under 42 U.S.C. § 1983 is Barred by Sovereign Immunity.

The WEC defendants asserted in their initial brief that any claim for money damages under 42 U.S.C. § 1983 is barred by sovereign immunity. The plaintiffs have agreed that their only claim for money damages arises under the ADA.

IV. CONCLUSION.

For the foregoing reasons, the WEC defendants respectfully request that the Court grant their motion to dismiss them as defendants in this case.

Respectfully submitted this 2nd day of June, 2020

/s/ Dixon R. Gahnz
Dixon R. Gahnz, SBN: 1024367
Daniel P. Bach, SBN: 1005751
Terrence M. Polich, SBN: 1031375
Daniel S. Lenz, SBN: 1082058

LAWTON & CATES, S.C.
345 W. Washington Ave., Suite 201
Madison, WI 53701-2965
PH: 608-282-6200
Fax: 608-282-6252
dgahnz@lawtoncates.com
dbach@lawtoncates.com
tpolich@lawtoncates.com
dlenz@lawtoncates.com

Attorneys for Defendants
Wisconsin Elections Commission,
WEC Commissioners Bostelmann, Glancey,
Jacobs, Knudsen, Spindell and Thomsen,
and WEC Administrator Wolfe