STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

Richard Teigen, *et al*,

Plaintiffs,

vs.

Wisconsin Elections Commission,

Defendant,

and

Democratic Senatorial Campaign Committee, *et al.*,

Defendant-Intervenors.

Case No. 2021CV0958
Case Code: 30701
Hon. Michael O. Bohren

INTERVENOR-DEFENDANT DSCC'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

John M. Devaney (admitted PHV)
JDevaney@perkinscoie.com
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200

PERKINS COIE LLP

Charles G. Curtis, Jr.
Wisconsin Bar No. 1013075
CCurtis@perkinscoie.com
Michelle M. (Umberger) Kemp
Wisconsin Bar No. 1023801
MUmberger@perkinscoie.com
Will M. Conley
Wisconsin Bar No. 1104680
WConley@perkinscoie.com
33 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608.663.7460

ELIAS LAW GROUP LLP

Elisabeth C. Frost (admitted PHV)
EFrost@elias.law
10 G Street, N.E., Suite 600
Washington, D.C. 20002
Telephone: 202.968.4513

Attorneys for Defendant-Intervenor DSCC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

I. Introduction and Summary

In the six state-wide elections in Wisconsin over the past two years, voters have been able to vote absentee by depositing their sealed absentee ballots into secure drop boxes, confident that their ballots would reach election officials in time to be counted. Affidavit of Will M. Conley ("Conley Aff."), Ex. 2. The use of drop boxes was endorsed by the Wisconsin Election Commission ("WEC") in guidance issued on March 31 and August 19, 2020, and Wisconsin election officials and voters have relied heavily on the availability of this voting method. *Id*. Exs. 3, 16. Over 500 drop boxes were used in nearly all the state's 72 counties in the November 2020 election, which contributed to one of the highest voter turn-out rates – 73% of Wisconsin's voting age citizens – in the past 70 years. Compl. ¶ 13; *see also* Conley Aff. Exs. 1, 11 at 46-48. Drop boxes continue to be available to Wisconsin election officials and voters under the still-in-effect WEC guidance, just as they are in a majority of states in the country. *Id*. Ex. 2 at 1.

Plaintiffs' Motion for a Preliminary Injunction seeks to disrupt this status quo by requesting an order that would enjoin WEC's guidance and prohibit the use of drop boxes in Wisconsin while this litigation is pending. But a preliminary injunction is extraordinary relief that courts should grant sparingly and only when necessary to *preserve the status quo* and prevent irreparable harm during the pendency of an action. *See* Wis. Stat. § 813.02; *Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d. 292, 308–09, 234 N.W.2d 289, 299 (1975) (collecting cases). Not only do plaintiffs attempt to *alter* the status quo, they fail to establish that they face any threat of imminent irreparable harm. There is more than enough time for the Court to address plaintiffs' claims on the merits; indeed, the Court has set an expedited schedule under which it plans to hear plaintiffs' Motion for Summary Judgment in just a few weeks on December 16, 2021. Thus, even if plaintiffs could establish that the continued use of secure drop boxes in

elections will result in a particularized, personal harm to them (which they cannot), the threat of that supposed harm (which would arise, at the very earliest, in an election that will still be months down the road after the Court's scheduled hearing on summary judgment) is far too speculative and not nearly imminent enough to justify granting the extraordinary relief that plaintiffs presently seek.

Plaintiffs also cannot satisfy the threshold requirement for preliminary injunctive relief: they cannot show that they have a reasonable probability of prevailing on their claim that WEC exceeded its authority to administer Wisconsin's election laws by interpreting Wis. Stat. § 6.87(4)(b)1 to allow drop boxes. As DSCC describes in its Brief in Opposition to Plaintiffs' Motion for Summary Judgment, filed simultaneously with this Opposition, plaintiffs have beaten a fast retreat from their initial position that absentee ballot drop boxes are *per se* unlawful and now concede that drop boxes staffed and located in municipal clerks' offices are permissible. DSCC Br. in Opp'n to Pl's Mot. for Summ. J. ("DSCC Summ. J. Opp'n") at 2. Moreover, their efforts to impose requirements that such boxes always be "staffed and located at the municipal clerk's office" has no statutory support. *Id.* at 8, 10-11. Returning a sealed ballot envelope to a safe, secure, and monitored location designated by the clerk is returning the ballot "to the municipal clerk," which is all the statute requires. None of plaintiffs' arguments to the contrary hold up under analysis.

Plaintiffs also have no argument that a preliminary injunction would serve the public interest – the reality is precisely the opposite. A temporary injunction suspending WEC's guidance and the availability of drop boxes would pose a significant risk of stoking baseless conspiracy theories about the integrity of elections that threaten our core democratic systems and institutions. It would also needlessly risk voter confusion that could result in disenfranchisement of lawful

Wisconsin voters. In the meantime, elections officials would have to divert resources to create alternative plans for election administration and voter education, should the injunction remain in place in the next election. All of this can be avoided by denying the motion and proceeding quickly to the merits, to make it clear to Wisconsin voters and the public servants who work hard to administer safe and secure elections that this method of absentee voting (which has been used by thousands of voters without incident) remains lawful. There is a compelling public interest in avoiding these harms, particularly when the ultimate interest at stake is ensuring that Wisconsinites have clarity about how to exercise their most sacrosanct constitutional right – the right to vote and participate in our country's democracy.

In sum, plaintiffs have failed to satisfy any of the requirements for a preliminary injunction: they do not have a reasonable probability of success on the merits, they seek to change – not preserve – the status quo, they have not established a likelihood of irreparable harm absent an injunction, and they have not established the absence of an adequate remedy at law. For the reasons stated here and in DSCC's Opposition to Plaintiffs' Motion for Summary Judgment (which is cross-referenced here where appropriate, to avoid duplication), the Court should deny plaintiffs' Motion for a Preliminary Injunction.

II. Background

The relevant background is set forth in more detail in DSCC's Summary Judgment Opposition (DSCC Summ. J. Opp'n at 4–7), which DSCC refers to and incorporates herein.

In summary, plaintiffs are Wisconsin voters who live in jurisdictions where drop boxes have not been available, they have never attempted to use drop boxes, and would not use them if they were available. *Id*. at 17. In this way, plaintiffs are in a distinct minority, as drop boxes have been widely available in at least Wisconsin's last six statewide elections. In the November 2020

election, for example, drop boxes were used in most of Wisconsin's 72 counties, and voters throughout the state relied heavily on the more than 500 drop boxes that local election officials provided. Plaintiffs have failed to allege or prove a single instance of attempted ballot-tampering, ballot theft, or other abuses in any Wisconsin election in which drop boxes were used. The use of secure drop boxes in the state has been endorsed by Republican leaders of the Wisconsin Legislature, the Wisconsin Legislature itself, and Justice Gorsuch in the U.S. Supreme Court's decision last year relating to the state's absentee voting laws. DSCC Summ. J. Opp'n at 7. Nevertheless, plaintiffs originally challenged the use of drop boxes as *per se* invalid. They have since changed their tune, and now ask this Court to engage in a delicate (and entirely inappropriate) dance, of declaring just *some* drop boxes invalid. *Id*. at 2. This change in position reflects plaintiffs coming to grips with one of the many inconvenient realities that refute their narrative.

Many drop boxes that were used throughout the state in last year's elections were located inside clerk's offices and monitored by authorized personnel "in real time"; many others were fully staffed and monitored by election officials outside of clerks' offices. *Id*. at 5. WEC's guidance for "unstaffed" drop boxes followed "best practices [that were] based on advice from the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency [CISA] and included instructions about drop box security and chain of custody procedures for securely emptying the drop boxes on a regular basis." *Id*. at 6. WEC's guidance to local election officials on the use of secure drop boxes remains in effect. As noted, there is no evidence that any of the issues that plaintiffs purport to fear will follow from their use actually occurred in elections in which Wisconsin voters used drop boxes to securely return their voted ballots for counting. Indeed, following the November 2020 election, several lawsuits challenged drop-box voting and all of them failed.

III. Argument

A. Plaintiffs fail to meet the standards for preliminary injunctions.

Wisconsin law requires a plaintiff seeking a preliminary injunction to demonstrate: (1) a reasonable probability of success on the merits; (2) that a preliminary injunction is necessary to preserve the status quo; (3) a likelihood of irreparable harm if a preliminary injunction is not issued; and (4) no other adequate remedy at law exists. *Serv. Emps. Int'l Union, Local 1 v. Vos,* 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35. The fundamental purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm during the pendency of an action where there is no other adequate remedy at law. *See* Wis. Stat. § 813.02; *Werner v. A.L. Grootemaat & Sons, Inc*., 80 Wis. 2d 513, 259 N.W.2d 310 (1977); *Jt. Sch. Dist. No. 1*, 234 N.W.2d at 299 (collecting cases); *Gillen v. City of Neenah*, 219 Wis. 2d 806, 837-38, 580 N.W.2d 628 (1998) (J. Abramson, concurring). Injunctions are "not to be issued lightly. The cause must be substantial." *Werner*, 80 Wis. 2d at 520. Preliminary injunctions also ordinarily are not available to compel the doing of acts which constitute the ultimate relief sought. *See Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 374, 563 N.W.2d 585 (Ct. App. 1997) (citation omitted).[1] Yet, changing the status quo and compelling the doing of acts that constitute

[1] Wisconsin Statutes also mandate that the court require a bond, with sureties, of a party seeking an injunction. Wis. Stat. § 813.06 ("…the court or judge shall, require a bond of the party seeking an injunction, with sureties, to the effect that he or she will pay to the party enjoined such damages").

the ultimate relief plaintiffs seek is exactly what they ask the Court to do in their motion. For the reasons that follow, they have failed to meet their burden of establishing they are entitled to relief.

1. Plaintiffs have not established a reasonable probability of success on the merits.

Plaintiffs' initial burden is to demonstrate they have a reasonable probability of success on the merits. *Serv. Emps. Int'l Union*, 2020 WI 67, ¶ 9. This burden is heightened where the effect of a preliminary injunction would be to grant relief substantially similar to the relief plaintiffs would obtain through a final decree in their favor. *Codept Inc. v. More-Way N. Corp.,* 23 Wis.2d 165, 172, 127 N.W.2d 29, 34 (1964). Here, the relief plaintiffs seek – enjoining WEC's guidance and prohibiting the use of drop boxes – mirrors the final relief plaintiffs seek, requiring plaintiffs to demonstrate their "right to relief is clear." *Id.* For multiple reasons, plaintiffs cannot demonstrate they have a reasonable probability of succeeding on the merits, much less that their right to relief is "clear."

First, because of the jurisdictional, procedural, and equitable reasons described by WEC and the other defendant-intervenors in their oppositions to plaintiffs' Motion for Summary Judgment, the Court should not reach the merits of plaintiffs' claims and should enter summary judgment for defendants. DSCC Summ. J. Opp'n at 7. DSCC joins in those arguments and incorporates them here by reference.

Second, plaintiffs' claims rest entirely on a statutory interpretation argument that ignores the plain language of Wis. Stat. § 6.87(4)(b)1. That provision requires voters to mark and return their absentee ballots in sealed envelopes "mailed by the elector[s], or delivered in person, to the municipal clerk issuing the ballot or ballots." WEC interprets this language to mean that voters may deliver their voted sealed ballots to the municipal clerk by (1) handing them to the clerk or one of the clerk's duly authorized representatives, or (2) depositing them into secure receptacles

designated and maintained by the clerk and under the clerk's jurisdiction, control, and supervision. This entirely reasonable interpretation of delivery "to the municipal clerk" is well within WEC's authority to administer Wisconsin's election laws and provide guidance to local election officials. *See* Wis. Stat. § 5.05(1), (2w), (5t), (6a); *see also* DSCC Summ. J. Opp'n at 8-11.

Third, plaintiffs now concede that deposit into a secure, monitored drop box constitutes the "in person" return of the sealed ballot envelope "to the municipal clerk," and nothing in Section 6.87(4)(b)1 or elsewhere requires that such drop boxes must necessarily be inside the clerk's office. DSCC Summ. J. Opp'n at 2. "[D]elivery in person, to the municipal clerk" also can be accomplished outside the clerk's office, such as into an after-hours deposit drawer on the outside wall of the office or a secure metal fixture bolted to the sidewalk, similar to a U.S. mailbox. And, contrary to plaintiffs' argument, there is no statutory requirement that drop boxes always be "staffed and located at the municipal clerk's office." Section 6.87(4)(b)1 requires delivery of sealed ballot envelopes "in person, to the municipal clerk," not "to the municipal clerk inside the clerk's office in the presence of the clerk or an authorized representative." Returning a sealed ballot envelope to a safe, secure, and monitored location designated by the clerk is return "to the municipal clerk." DSCC Summ. J. Opp'n at 8-11.

Fourth, Plaintiffs do not have standing to pursue this litigation, especially now that they have conceded that drop boxes are not *per se* barred under the governing statutes. The question is no longer "whether," but "under what circumstances" drop boxes may be used. Plaintiffs have neither "voter standing" nor "taxpayer standing" to pursue a declaratory judgment that seeks, in essence, an advisory opinion on the proper siting, monitoring, and use of drop boxes in all 72 counties and 1,850 municipal voting jurisdictions throughout the state. DSCC Summ. J. Opp'n at

2, 15-20. This is particularly so when Plaintiffs have not had access to drop boxes at all. Conley Aff. Exs. 12 at 15; *id*. Ex. 18 at 56-57 (Teigen); *id.* Ex. 19 at 21, 36-37 (Thom).

Finally, where the moving party cannot prove any facts that would entitle them to relief (as is the case here), there is necessarily no probability of success on the merits. *Milwaukee Deputy Sheriffs' Ass'n. v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 659, 883 N.W.2d 154, 161. DSCC Summ. J. Opp'n at 17–18.

Each of these arguments, on its own, requires a finding that plaintiffs have failed to establish a reasonable probability (much less clear likelihood) of success on the merits. Taken together, they establish not just that plaintiffs' Motion for a Preliminary Injunction must be denied, but that the Court should enter summary judgment for defendants. DSCC Summ. J. Opp'n at 20.

2. A preliminary injunction would unravel – not preserve – the status quo.

Preliminary injunctive relief is always disfavored but it is all the more so when the injunction sought would do anything other than preserve the status quo. *Sch. Dist. of Slinger*, 210 Wis. 2d at 373-74.[2] Plaintiffs do not even attempt to argue that the preliminary injunction they seek would maintain the status quo. This is for good reason: it would completely unravel it.

The clear status quo is that the use of drop boxes is permissible, and the WEC guidance endorsing their use remains in effect. Election officials and voters have used drop boxes in each of Wisconsin's six most recent statewide elections; this method of voting absentee has "far predated" even those six elections. Conley Aff. Ex. 2. Moreover, WEC and local election officials have engaged in affirmative campaigns to educate voters about the availability of drop boxes and

[2] *See also supra* n.1; *Mogen David Wine Corp. v. Borenstein,* 267 Wis. 503, 509, 66 N.W.2d 157, 160 (Wis. 1954); *Pure Milk Prod. Co-op v. Nat'l Farmers Org.*, 64 Wis.2d 241, 251, 219 N.W.2d 564, 569 (1974) ("Injunctions are not to be issued lightly, but only where necessary to preserve status quo of parties and where there is irreparable injury.").

the safety, from a health perspective, of using them during the global pandemic. These campaigns have actively encouraged voters to use drop boxes, including a campaign by the Waukesha County Republicans, for whom Plaintiff Thom was a volunteer worker. Conley Aff. Ex. 19 at 42, Ex. 20 at 2. Multiple prior attempts in litigation to invalidate or undermine WEC guidance on drop boxes have failed. DSCC Summ. J. Opp'n at 7. And finally, as previously noted, the "status quo" relating to drop boxes also includes the fact that, as discussed, the use of drop boxes in Wisconsin has been publicly endorsed or recognized by Republican leaders of the Wisconsin Legislature, the Legislature itself, and even the U.S. Supreme Court.

The entire purpose of plaintiffs' Motion for a Preliminary Injunction is to unravel this status quo by eliminating a method of absentee voting that election officials and voters throughout Wisconsin have come to rely upon. Wisconsin law does not permit that result.

3. Plaintiffs have not demonstrated a likelihood of irreparable harm.

Preliminary injunctive relief may be granted only if the moving party establishes it will suffer irreparable injury prior to the final adjudication of the underlying claim, such that, absent preliminary relief, any future injunction sought "would be rendered futile." *Werner*, 80 Wis. 2d at 520; *Waste Mgmt., Inc. v. Wis. Solid Waste Recycling Auth.*, 84 Wis.2d 462, 465, 267 N.W.2d 659 (1978); *Sch. Dist. of Slinger*, 210 Wis. 2d at 371; *Joint Sch. Dist*, 70 Wis.2d 292 at 308-09. Plaintiffs have failed to make this showing.

First, plaintiffs fail to establish a risk of any harm occurring during the *pendency* of this action. On the contrary, they acknowledge that the alleged harm they seek to prevent relates to "future elections" and ensuring those elections are "not tainted" by the use of drop boxes. Pl's Br. at 8. Plaintiffs do not identify any actual election that, in their words, is at risk of being tainted before there is final judgment on the merits of their claim. S*ee* Compl. ¶ 57 ("The time to decide

the questions presented herein is now – during 2021 – a non-election year."). As discussed, this Court has established an expedited schedule for considering the merits of plaintiffs' claims, with the hearing on plaintiffs' Motion for Summary Judgment scheduled to take place just a month from now, which is a full two months before the first 2022 election.

Second, plaintiffs' assertion of alleged harm is not the type of particularized, personal risk of irreparable injury that they must prove to be entitled to relief. Plaintiffs present no more than a "'generalized grievance[]' about the administration" of the election statutes in question. *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Lab. & Hum. Rels.*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (App. 1979). They "claim[] only harm to [their] and every citizen's interest in proper application of [these] laws," and the relief they seek "no more directly and tangibly benefits [them] than it does the public at large . . . ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992). These claims of harm are insufficient to give plaintiffs standing (DSCC Summ. J. Opp'n at 18), but even if that were not the case, they are clearly insufficient to meet plaintiffs' high burden of proving that *they* will suffer irreparable harm entitling them to the extraordinary relief of a preliminary injunction. Simply put, plaintiffs fail to establish that they will ever suffer *any* harm if their fellow Wisconsin voters are permitted to continue to use drop boxes to safely and securely return their voted ballots. There is no evidence whatsoever that the use of drop boxes in prior elections resulted in any voter fraud or in any way harmed plaintiffs, nor do they submit any evidence that even indicates that continuing that practice threatens plaintiffs with harm in the future. This failure of proof itself requires rejection of their Motion for a Preliminary Injunction.

4. Plaintiffs have an adequate remedy at law.

Plaintiffs also fail to show that an adequate remedy at law does not exist, failing to satisfy yet another mandatory requirement for obtaining a preliminary injunction under Wisconsin law.

Joint Sch. Dist, 70 Wis. 2d at 308. An adequate remedy at law exists where the remedy plaintiffs seek can be obtained or adequately compensated in the ultimate resolution of the underlying action. *Codept, Inc*, 23 Wis. 2d at 173; *Shearer v. Congdon*, 25 Wis. 2d 663, 669, 131 N.W.2d 377 (1964).

Here, the denial of Plaintiffs' Motion for a Preliminary Injunction will not prevent plaintiffs from pursuing the remedy they seek – enjoining WEC's guidance and the use of drop boxes – "in the ultimate resolution of the underlying action." In fact, plaintiffs' request for that remedy is already teed up before the Court in Plaintiffs' Motion for Summary Judgment. Because plaintiffs have a full (and in fact, exceedingly imminent) opportunity to make the case to the Court that they are entitled to the relief they are requesting in their Motion for a Preliminary Injunction on the merits, they have an adequate remedy at law.

B. The balance of equities and the public interest weigh strongly in favor of denying injunctive relief.

While the standards for preliminary injunctive relief under Wisconsin law do not require considering the balance of equities and public interest, it is nevertheless notable that these factors also weigh strongly against granting plaintiffs' Motion. In contrast to the absence of any harm to plaintiffs resulting from the denial of injunctive relief, granting a preliminary injunction would materially harm Wisconsin voters and defendants and would undermine the public interest. Specifically, by casting doubt on the availability of drop boxes for the 2022 elections, a preliminary injunction would require WEC and local election officials to educate voters about the potential unavailability of this voting method and to invest time and resources to plan for elections without drop boxes. Similarly, as DSCC demonstrated in its Motion to Intervene, a prohibition against

drop boxes would require it to reeducate Democratic voters in Wisconsin about how to vote absentee and to invest in alternative methods of voter turnout. DSCC Mot to Interv., at 8-9.

The greatest risk of harm, though, is to Wisconsin voters. Eliminating drop boxes on a preliminary basis would create a serious risk of voter confusion. Voters would be told that a method of absentee voting relied upon by at least tens of thousands of Wisconsinites in recent elections is no longer available. But if the Court ultimately rules for defendants on the merits of plaintiffs' claims, voters would then be told that drop boxes are available for absentee voting. There is no reason to create this very real possibility of voter confusion.

This potential harm stands heavily in contrast to the absence of any harm to plaintiffs who have never used a drop box to return a ballot—and particularly so where there is no immediate election to administer. Even on the merits of the ultimate form of relief, plaintiffs (by their own admission) are seeking to make it more difficult to access the ballot box with no corresponding benefit to the public.[3] An injunction resulting in likely disenfranchisement of eligible voters would not serve the public interest. "By definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible.'" *League of Women Voters of N.C v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (alterations in original) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). For these reasons, the balance of equities and the public interest weigh heavily in favor of denying Plaintiffs' Motion for a Preliminary Injunction.

IV. Conclusion

Plaintiffs have failed to meet the requirements for obtaining a preliminary injunction, and their motion should be denied.

[3] Conley Aff. Ex. 18 (Teigen Dep. 59:13-60:1) ("I probably wouldn't have voted if I was forced to quarantine. If I hadn't voted early and I was forced to quarantine, I would not have voted.").

Dated this 15th day of November, 2021.

Respectfully submitted,

PERKINS COIE LLP

By: *Electronically signed by Charles G. Curtis, Jr.*
Charles G. Curtis, Jr.
Wisconsin Bar No. 1013075
CCurtis@perkinscoie.com
Michelle M. (Umberger) Kemp Wisconsin Bar No. 1023801
MUmberger@perkinscoie.com
Will M. Conley
Wisconsin Bar No. 1104680
WConley@perkinscoie.com
33 East Main Street, Suite 201 Madison, WI 53703
Telephone: 608.663.7460
Facsimile: 608.663.7499

John M. Devaney (admitted PHV)
JDevaney@perkinscoie.com
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

ELIAS LAW GROUP LLP

Elisabeth C. Frost (admitted PHV)
EFrost@elias.law
10 G Street, N.E., Suite 600
Washington, D.C. 20002
Telephone: 202.968.4513

Attorneys for Intervenor-Defendant DSCC