STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 1

RICHARD TEIGEN, et al.,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant,

Case No. 21-CV-958

and

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, et al.,

Defendant-Intervenors.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

This case is straightforward and can be resolved now on summary judgment. If this Court disagrees, however, it should grant a preliminary injunction to ensure that upcoming elections are conducted in accordance with state law.

ARGUMENT

I. A preliminary injunction is warranted if this Court does not rule on summary judgment

A. Plaintiffs are likely to succeed on the merits

As explained in their summary judgment reply, Plaintiffs are not only likely to succeed on the merits, their claims will succeed, as Defendants have no good textual response in defense of WEC's memos. Plaintiffs incorporate those arguments here.

B. Plaintiffs and all Wisconsin voters will be irreparably harmed if WEC's illegal memos remain in place during the next election

This case is about the integrity of the election process—whether future elections will be conducted in accordance with state law, or will follow WEC's different and unlawful approach. Yet Defendants make the extraordinary argument that there is no irreparable harm to Plaintiffs or anyone else when WEC does not follow election laws. WEC Br. 3–5; DSCC Br. 9–10; DRW Br. 7–9. They are wrong. Wisconsin voters have a right and legally recognized interest in ensuring that elections are conducted consistently and in accordance with the rules their representatives in the Legislature have established. *E.g.*, Wis. Stat. § 5.06 (allowing "any elector" to raise election law violations). An election under a different set of rules that conflict with state law and depend solely on the say-so of unelected agency officials undermines public faith and confidence in the election process, causes voter confusion about how one can lawfully vote, and dilutes the value of votes lawfully cast. Indeed, the Wisconsin Supreme Court recently granted a temporary injunction in similar circumstances—where the Dane County clerk issued election advice inconsistent with state law. Order Granting Temporary Injunction, *Jefferson v. Dane County*, 2020AP557 (March 31, 2020).[1]

It is beyond dispute that these harms are irreparable, and there will be no adequate remedy at law, after an election has taken place. In *Trump v. Biden*, 2020 WI 91, ¶ 32, 394 Wis. 2d 629, 951 N.W.2d 568, the Wisconsin Supreme Court held,

[1] Available at https://www.wpr.org/sites/default/files/2020ap557-oa_3-31-20_order.pdf.

under the laches doctrine, that it is too late to challenge the election "rulebook" after an election is over. In light of that holding, were this Court to accept Defendants' arguments that there is insufficient harm or standing to challenge illegal voting rules *before* an election, it would effectively make WEC's actions unreviewable, giving it unchecked power to rewrite election procedures however it sees fit.

C. Defendants' "status quo" arguments are a distraction

Defendants argue that Plaintiffs cannot get an injunction because WEC's illegal memos are now the "status quo" and are therefore insulated from an injunction. WEC Br. 5–8; DSCC Br. 8–9; DRW Br. 5–7. That cannot be how the "status quo" requirement works (to the extent it is a requirement at all, *see infra*). If existing illegal action by the defendant is the relevant "status quo," *no one would ever get an injunction*, because the entire purpose of an injunction is to halt illegal behavior that causes irreparable harm. *See Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 117, 393 Wis. 2d 38, 946 N.W.2d 35 ("If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not."). The relevant status quo here is *state law*, which was in place long before WEC's illegal memos changed the election rules. The principle behind the status-quo language found in some cases is to prevent a temporary injunction from establishing "new rights." *E.g.*, *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377 (1964). Plaintiffs do not ask for any "new rights"; they simply ask this Court to require WEC to conform its guidance to the law and correct its prior misstatements before they affect the next election.

Even though an injunction will preserve the status quo, it is not clear that is actually a requirement for an injunction. The Wisconsin Supreme Court has not consistently included "preserving the status quo" as a separate requirement for injunctions. In *Jefferson v. Dane County*, the Wisconsin Supreme Court granted a temporary injunction in a case very similar to this, and the Court's order granting an injunction listed the requirements without mentioning "preserving the status quo." Order, *Jefferson v. Dane County*, 2020AP557 (March 31, 2020), *supra* n. 1. Likewise, in *Wisconsin Legislature v. Evers*, the Court's order granting a temporary injunction did not include "preserving the status quo" as one of the requirements. Order, No. 2020AP608 (Apr. 6, 2020).[2] In another case, *James v. Heinrich*, the Court's order granting a temporary injunction first listed the requirements without any "status quo" requirement, then noted that the Court has "at times" (i.e. inconsistently) mentioned a status quo requirement (the Court did not resolve the inconsistency). Order at 2, 5 n.4, *James v. Heinrich*, No. 2020AP1419 (Sept. 10 2020).[3] And the older cases mentioning the "status quo" hedge carefully, stating that "the [injunction] remedy *usually* [i.e., but not always] is made available only when necessary to preserve the status quo." *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966). A separate "status quo" requirement also has no basis in the text of the temporary injunction statute, Wis. Stat. § 813.02, which only

[2] *Available at* https://www.wicourts.gov/news/docs/2020AP608_2.pdf

[3] *Available at* http://www.thewheelerreport.com/wheeler_docs/files/91120wsc.pdf

mentions the likelihood of success ("when it appears … the party is entitled to judgment"), the potential for "injur[y]," and the "equities between the parties."

Defendants cite *SEIU v. Vos*, 2020 WI 67, ¶ 93, and *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶ 9 n.3, 396 Wis. 2d 434, 957 N.W.2d 261, as recent cases where the Supreme Court has listed the requirements and included a separate "status quo" requirement. But, as they point out is also true of *Kocken*, 301 Wis. 2d 266, ¶ 22 (summarizing the requirements without mentioning status quo), the Court was not analyzing the question, but was simply listing the requirements copied from a prior case. Regardless, even the Court in SEIU did not view "preserving the status quo" as a hard requirement. 2020 WI 67, ¶ 117 ("If the status quo would not change without a temporary injunction, would that mean the unconstitutional law could remain in effect? Obviously not.").

Even if "preserving the status quo" is one of the factors and this Court concludes that an injunction would not preserve the status quo, that still is not a reason to deny an injunction. As the Supreme Court has explained in the related context of temporary relief pending appeal, the factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). In other words, more of one factor excuses less of another. Thus, as the Supreme Court in *SEIU* explained, "an unconstitutional law could [not] remain in effect" even "[i]f the status quo would not change without a temporary injunction." 2020 WI 67, ¶ 117. So too here. WEC's memos are clearly illegal, and cannot remain in effect for another election.

II. Intervenors' exhaustion argument is meritless

The nonprofit intervenors argue that Plaintiffs' injunction motion should be denied (and suggest their whole case should be dismissed) because they did not first file a complaint *with* WEC under Wis. Stat. § 5.06. DRW Br. 2–4. This argument is not properly raised in a response to Plaintiffs' injunction motion. Intervenors could have raised this argument in their own motion, but they did not, so this Court should reject it for that reason alone.

In any event, this argument is meritless, for multiple reasons (notably, *WEC itself* does not make this argument). First, the complaint process in § 5.06(1) does not apply when WEC violates the law. That section's text clearly distinguishes between the "election official" alleged to have violated the elections laws and "the commission," which acts on the complaint. That process makes no sense as applied to WEC itself—is WEC supposed to issue an order "restrain[ing]" itself or ordering itself to "conform [its] conduct to the law"? Allowing WEC to sit in judgment of its own illegal actions would also raise significant due process concerns.[4]

[4] In the same vein, Wisconsin Courts have recognized "numerous exceptions" to exhaustion rules, including where "[r]ecourse to the administrative agency would be a futile or useless act," *Nodell Inv. Corp. v. City of Glendale, Milwaukee Cty.*, 78 Wis. 2d 416, 426 n. 12, 254 N.W.2d 310 (1977), or where "the agency has already informed the party of its position on a question of law," *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 15, 305 Wis. 2d 788, 803, 741 N.W.2d 244.

Second, even putting aside the scope of § 5.06, Wis. Stat. § 227.40 provides a separate—and exclusive—process to challenge an illegal rule or guidance document, and there is no dispute that plaintiffs have followed that process here.

Third, even if § 5.06 did apply when WEC itself violates the law, another voter (represented by undersigned counsel) *did* file a complaint with WEC that mirrors this lawsuit (not against WEC, but against a local election official that followed WEC's memos). *Pellegrini v. Igl*, Case No. EL 21-35.[5] That complaint was filed on June 30, a response on July 8, and a reply on July 22, yet WEC has done nothing, sitting on the complaint for almost five months now. It cannot go both ways, such that voters must first file a complaint under § 5.06, but WEC can refuse to act on such a complaint and evade timely judicial review before the next election. WEC's delay alone provides a basis for an exception to any exhaustion requirement. *E.g.*, *Nodell*, 78 Wis. 2d at 426 n. 12 (exception where "administrative remedy is inadequate to avoid irreparable harm.")

CONCLUSION

This Court should resolve this case on summary judgment, but if it believes it cannot, it should grant a preliminary injunction as set forth in Plaintiffs' motion.

Dated: November 24, 2021.

Respectfully Submitted,

[5] https://elections.wi.gov/node/7462

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