

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SUSAN LIEBERT, et al.,

Plaintiffs,

v.

Case No. 23-CV-672

WISCONSIN ELECTIONS
COMMISSION, et al.,

Defendants.

**COMMISSION DEFENDANTS' RESPONSE TO WISCONSIN
LEGISLATURE'S ALTERNATIVE MOTION TO STAY THIS ACTION**

INTRODUCTION

By order dated December 5, 2023, this Court granted the Wisconsin Legislature's motion to intervene and set a briefing schedule on its motion to dismiss. (Dkt. 47:7.) Defendants Wisconsin Elections Commission, individual Commissioners, and Administrator Wolfe oppose the Legislature's proposal to stay this action while multiple cases proceed in the Wisconsin state courts.

ARGUMENT

This Court should deny the Wisconsin Legislature's alternative motion to stay this action.

Intervenor-Defendant Wisconsin Legislature asks this Court, under abstention doctrines, to dismiss this action or, in the alternative, to stay it while state court actions challenging Wisconsin's absentee ballot witness

requirement in Wis. Stat. § 6.87(4) play out. (Dkt. 49:12–17.) The Commission Defendants oppose that proposal.

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936). As this Court has recognized, a court’s power to issue a stay is “not boundless.” *Grice Eng’g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis. 2010). The U.S. Supreme Court and the Seventh Circuit have repeatedly stated that “federal courts have a ‘virtually unflagging obligation’ absent ‘exceptional circumstances’ to exercise jurisdiction when a case is properly before it.” *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *R.R. Street & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009)).

Citing *SKS & Associates v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010), the Legislature seeks a stay of this action until the resolution of two state court actions currently pending in the Dane County Circuit Court: *Priorities USA v. WEC*, 2023CV001900 (Wis. Cir. Ct. Dane Cnty.), and *League of Women Voters v. WEC*, No. 2022CV2472 (Wis. Cir. Ct. Dane Cnty.). (Dkt. 49:13, 17.) *SKS* considered the standards for when federal courts should abstain in light of state civil proceedings under *Younger v. Harris*, 401 U.S. 37 (1971).

SKS, 619 F.3d at 677. This case does not meet the criteria for *Younger* abstention.

In *SKS*, the court explained that, in civil proceedings, *Younger* extends only “to a federal suit filed by a party that is the target of state court or administrative proceedings in which the state’s interests are so important that exercise of federal judicial power over those proceedings would disregard the comity between the states and federal government.” *Id.* This case presents nothing like the novel situation that met those criteria in *SKS*.

First, of course, no party is the “target of state court or administrative proceedings” that may run afoul of their federal constitutional rights. Second, nothing about these federal proceedings disregards the comity between the states and federal government. *League of Women Voters* challenges Wisconsin’s absentee ballot witness address requirement under the same federal law as this case—the materiality provision of the Civil Rights Act. *Priorities* is a facial challenge under the Wisconsin Constitution to any absentee ballot witness requirement at all. The Legislature offers no clue as to how this Court’s adjudication of whether a witness requirement is preempted by federal law impedes on the state courts’ adjudication of those issues.

The Legislature cites the four stay factors: “(1) whether the litigation is at an early stage, (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court,” *Grice Eng’g, Inc.*, 691 F. Supp. 2d at 920, and contends that the first, third, and fourth weigh in favor of a stay. The Commission Defendants disagree with the Legislature’s argument as to the second, third, and fourth factors.

Waiting until next year to adjudicate this case will disadvantage the Commission and the public, putting them in litigation about the rules of absentee voting immediately before the 2024 election. And for naught.

The Legislature contends that a stay “could simplify the issues in this lawsuit and significantly reduce the burden of litigation on both the parties and on the court.” (Dkt. 49:17.) This is highly unlikely to be correct.

As to *Priorities USA*, the plaintiffs there bear a heavy burden: “We presume that the statute is constitutional, and the party raising a constitutional challenge must prove that the challenged statute has been applied in an unconstitutional manner beyond a reasonable doubt.” *State v. Roundtree*, 2021 WI 1, ¶ 18, 395 Wis. 2d 94, 952 N.W.2d 765, 769, *cert. denied*, 142 S. Ct. 100 (2021). Assuming the plaintiffs in *Priorities* do not meet their

burden to show that the law is facially unconstitutional beyond a reasonable doubt, this Court will have exactly the same job it does today of determining whether state law is preempted. It is just that the timing will be worse: even with an expedited state court appeal, this matter would be before the federal court in the midst of the Presidential election year. Commission Defendants' desire to avoid this scenario is why they sought an expedited—not a delayed—resolution of this federal case.

And in *League of Women Voters*, the question is one of federal law—not a question this Court would defer to a state court about. Moreover, the question is specifically about the absentee ballot witness *address* requirement, not the absentee ballot witness requirement generally.

A stay of this action until resolution of one or two state court actions would likely result in only a delay of the determination of the issues in this case. A stay would not “simplify the issues in question [or] streamline the trial; . . . [or] reduce the burden of litigation on the parties and on the court.” *Grice Eng’g, Inc.*, 691 F. Supp. 2d at 920. The Legislature has not shown that a stay is necessary or proper here. Its alternative motion to stay the action based on abstention doctrines should be denied.

CONCLUSION

Commission Defendants respectfully ask this Court to deny the Wisconsin Legislature's alternative motion to stay this action.

Dated this 18th day of December 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

Attorneys for Commission Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 (CJG)
(608) 264-6365 (KZK)
(608) 266-1792 (SCK)
(608) 294-2907 (Fax)
gibsoncj@doj.state.wi.us
keckhaverkz@doj.state.wi.us
kilpatricksc@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that on December 18, 2023, I electronically filed the foregoing *Commission Defendants' Response To Wisconsin Legislature's Alternative Motion To Stay This Action* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 18th day of December 2023.

s/Charlotte Gibson
CHARLOTTE GIBSON
Assistant Attorney General