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No. 2024AP1298

In the Wisconsin Court of Appeals

DISTRICT II

DISABILITY RIGHTS WISCONSIN, LEAGUE OF WOMEN VOTERS OF WISCONSIN, MICHAEL R. CHRISTOPHER, STACY L. ELLINGEN, TYLER D. ENGEL *and* DONALD NATZKE,
PLAINTIFFS-RESPONDENTS,
v.
WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, *as Administrator of WEC*, DON MILLIS, ROBERT F. SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK THOMSEN AND CARRIE RIEPL, *as Commissioners of WEC*,
DEFENDANTS,
WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLANT.

On Appeal From The Dane County Circuit Court,
The Honorable Everett Mitchell, Presiding
Case No. 2024CV1141

REPLY BRIEF OF INTERVENOR-DEFENDANT-APPELLANT THE WISCONSIN STATE LEGISLATURE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Regulations

Other Authorities

ARGUMENT

I. The Circuit Court's Order Disrupted The Status Quo On The Eve Of An Election

A. Rather than "preserv[ing] the status quo," the Circuit Court's temporary injunction sought to change the existing state of affairs on the eve of an election. Br.15–19 (quoting *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)). The relevant status quo is, of course, Wisconsin's long-standing statutory absentee-voting scheme, which authorizes *only* voters in the military or living overseas to receive absentee ballots electronically, with no mandate that any such ballots be screen-reader accessible. 2011 Wis. Act 75, § 50. As this Court correctly explained in staying the temporary injunction, since that injunction will "sow confusion with clerks and voters, rather than maintain the status quo," the Circuit Court's "erroneous consideration of that factor alone weigh[s] heavily against the circuit court's issuance of the injunction." Order at 11.

B. Plaintiffs take issue with their burden of showing that a temporary injunction is necessary to preserve the status quo, arguing that this would mean courts could never "issue an injunction under the ADA/RA." Resp.19 (emphasis omitted). But the status-quo arguments that the Legislature raised deal with *temporary* injunctions; considerations of the status quo are entirely different when assessing permanent injunctive relief, such as based upon a final judgment that a state statute is preempted by a federal law like the ADA. *See Werner*, 80 Wis. 2d at 520. Regardless, whatever the proper status quo is when a plaintiff

seeks to enjoin temporarily a newly enacted law is irrelevant here, where the statutory status quo has been in place for many years.

Plaintiffs' remaining status-quo arguments fare no better. They concede that Wisconsin's current law provides *only* for military and overseas voters to receive electronic ballots, and *do not seriously dispute that the Circuit Court's screen-reader-accessible-ballots mandate has never been the status quo in Wisconsin*. Resp.19–20. Plaintiffs' claim that "some" ballots that some unidentified clerks send to military and overseas voters are accessible, Resp.10, only highlights that there is not now—nor has there ever been—a statewide mandate for clerks to send accessible ballots to any voters, *id.* Plaintiffs further argue that the Circuit Court did not issue its injunction on the "eve" of an election, Resp.20, but that too is wrong, where the record shows that there would be insufficient time to implement the injunction before the upcoming election without causing confusion for elections officials and voters, R.67 ¶ 27; Br.16–18; Order at 19–20.

II. The Circuit Court's Temporary Injunction Does Not Remedy Plaintiffs' Alleged Harms, As This Court Has Concluded

A. Plaintiffs cannot show that they will suffer irreparable harm absent an injunction, as Wisconsin law provides print-disabled voters with multiple ways to vote. Br.23–24. Indeed, the Circuit Court's order does not remedy Plaintiffs' alleged harms because "the record appears to provide no reason to believe any of the respondents will be unable to vote in the November election," and there is no certainty, based upon that record, that the Circuit

Court's order will allow disabled voters "to vote in a more private and independent manner." Order at 6–7.

B. Plaintiffs' various responses all fail. Resp.17–19. They argue that they will lose their secret-ballot right if the temporary injunction is reversed, *see* Resp.19, but a ballot cast either in person or absentee, with access to an assistant of the voter's choosing who is subject to criminal penalties for divulging the voter's vote, *is* a secret ballot, *see infra* p.12. And even under Plaintiffs' own erroneous understanding of a "secret ballot," they still cannot point to record evidence showing that they would be able "to return a ballot without any assistance" or "utilize [ ] assistance in a manner which successfully conceals their vote." Order at 8–9. While Plaintiffs also assert for the first time in their Response Brief that an ADA violation "presumptively establishes irreparable injury," Resp.18, they waived that argument by not raising it below, *see State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702, and this argument would fail in any event because the injunction does not remedy their claimed ADA harms, for the same reason explained immediately above.

III. Plaintiffs Cannot Overcome The Substantial Record Evidence Showing That The Temporary Injunction Undermines The Public Interest

A. The public interest weighs against temporary injunctive relief, Br.24–26, as this Court has observed, Order at 16–20. To begin, the Circuit Court's order is likely to create confusion for voters and clerks. Br.16–18; Order at 20. Indeed, "WEC's in-court representations . . . give strong indication there is a likelihood of confusion and uncertainty for print-disabled voters" under the

injunction. Order at 19. Moreover, "the public has a strong interest in the laws enacted by the legislators they elect being effectuated and implemented as written and in national elections proceeding smoothly based upon familiar and well-established laws, not laws made by judicial intervention weeks before voting begins." Order at 16–17. The Circuit Court's failure to weigh properly the public interests at stake warrants reversal.

B. In arguing that the temporary injunction serves the public interest, Plaintiffs mischaracterize both the record and the Legislature's arguments. Resp.20–22.

To begin, Plaintiffs' claim that "[t]here is no record evidence that the TI would sow confusion with clerks or voters" is false. Resp.20. In the proceedings below, the WEC Administrator presented sworn testimony as to the temporary injunction's negative impact on clerks and voters, including in terms of sowing confusion. R.93 at 33:16–20; R.67 ¶¶ 21–24, 26–42.

Plaintiffs contend that "injunctions bolstering democratic principles, expanding the right to vote, and eliminating discrimination are in the public interest," Resp.21, but this ignores the well-established principle that changing election rules on the eve of an election undermines voting procedures for all voters and is against the public interest, *see Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877. In any event, as this Court correctly observed, "the record appears to provide no reason to believe any of the respondents will be unable to vote in the November election" absent the injunction. Order at 6.

Plaintiffs assert that the public and the Legislature do not suffer from an injunction enjoining a law that the People's representatives have enacted, Resp.21–22, but our Supreme Court has clearly held to the contrary, App.080; *accord* Order at 17. And Plaintiffs have no answer to uniform caselaw recognizing the People's and the Legislature's sovereign interest in enforcing state statutes as written, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶¶ 8, 13, 394 Wis. 2d 33, 949 N.W.2d 423, even though the Legislature does not itself enforce such statutes.

IV. Plaintiffs Have Not Established A Reasonable Likelihood Of Success On The Merits

A. On the merits, the Circuit Court's order contained no "logical rationale" for its conclusion that Plaintiffs are likely to succeed on their ADA and Rehabilitation Act claims, requiring reversal for that reason alone. Br.22–23 (quoting *Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, 989 N.W.2d 561). Regardless, Plaintiffs cannot show that they have been "excluded from participation in" or "denied the benefits of" Wisconsin's absentee-voting scheme, 42 U.S.C. § 12132, as the Legislature explained, Br.20–24. Given this, and in light of Wisconsin's many accommodations for disabled voters, Br.20–21, Plaintiffs have no chance of success on the merits.

B. To begin, Plaintiffs have no persuasive response to the Legislature's argument that the Circuit Court's temporary injunction fails because that Court did not provide sufficient "legal analysis" for its likelihood-of-success determination. Order at 11–12; *Gahl*, 2023 WI 35, ¶¶ 21–24. Plaintiffs suggest that the three

out-of-state cases that the Circuit Court cited to support its one-sentence holding addressed "similar election statutes," Resp.14, but that is wrong, as the Legislature has explained, Br.23. Although Plaintiffs attempt to blue-pencil other caselaw into the Circuit Court's decision, Resp.14–15, the Circuit Court did not cite to these cases, and there is no indication it found them persuasive, App.008. The Circuit Court also made no findings concerning whether Plaintiffs' proposed accommodation would be "reasonable." *See Alexander v. Choate*, 469 U.S. 287, 301 (1985). Under *Gahl*, the Circuit Court's failure to provide any "logical rationale" for its decision mandates reversal. 2023 WI 35, ¶ 22 (citation omitted).

Plaintiffs' arguments as to their ADA and Rehabilitation Act claims—which rely primarily upon inapposite federal regulations, rather than statutory text—fare no better, although the space limitations of this Reply prevent the Legislature from fully addressing all those assertions here. Plaintiffs argue, for example, that Wisconsin's vote-with-assistance provision, Wis. Stat. § 6.87(5), violates the ADA because that provision does not allow voters with print disabilities to vote "privately and independently." Resp.12–13. But Plaintiffs fail to reconcile this argument with Wisconsin's numerous statutory protections for individuals who require voting assistance: the assistant must faithfully record the voter's vote and is subject to criminal penalties for revealing that vote to others. Wis. Stat. §§ 12.13(3)(j), 12.60(1)(a). These provisions ensure that a print-disabled voter may cast a private and independent absentee ballot. Plaintiffs' reliance on an ADA

regulation, Resp.13, is similarly inapt, including because the cited provision only prohibits public entities from "rely[ing] on an adult accompanying an individual with a disability to interpret or facilitate communication" between the public entity and the disabled individual, and does not speak to absentee voting. *See* 28 C.F.R. § 35.160(c)(2).

Plaintiffs also mispresent the Sixth Circuit's opinion in *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999). *See* Resp.13–14. *Nelson*'s holding has never been "abrogated," contrary to Plaintiffs' assertion. Resp.14. Plaintiffs' citation to an intervening amendment to certain regulations is irrelevant, including because a regulatory change cannot change the meaning of a statute as interpreted by a federal court. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024). Further, *Nelson* never "recognized that Michigan's secret ballot clause could 'requir[e] the state legislature to modify its election law when the technology becomes available that would allow blind voters to exercise their voting rights without third-party assistance.'" Resp.14 (quoting *Nelson*, 170 F.3d at 650). Rather, *Nelson* merely noted this possibility, while concluding that Michigan's vote-with-assistance provision was constitutional. *See* 170 F.3d at 651.

C. Plaintiffs bizarrely criticize the Legislature for not addressing Plaintiffs' other legal theories in fulsome manner in the Opening Brief, *see* Resp.15, even though those theories played no role in the Circuit Court's orders, App.008. Plaintiffs do not cite any case suggesting that an appellant must address in its opening brief issues that formed no basis for the orders it is challenging.

In any event, Plaintiffs fail to show any likelihood of success on these claims.

With respect to the Secret Ballot Provision, all 50 States protect ballot secrecy, *see Burson v. Freeman*, 504 U.S. 191, 206 (1992), and many of those States permit voters with disabilities to use an assistant to help them cast an absentee ballot, *see* R.53 at 23 (citing Fla. Stat. § 101.051, Ga. Code § 21-2-385(b), and additional statutes). That practice is consistent with the ordinary meaning of the term "secret" as "[k]ept from public knowledge . . .; not allowed to be known, or *only by selected persons*." *Secret*, Oxford English Dictionary Online (2023) (emphasis added).[1] Courts, in turn, have consistently rejected Plaintiffs' contention that vote-with-assistance statutes violate the right to a secret ballot. *See Nelson*, 170 F.3d at 651; *Smith v. Dunn*, 381 F. Supp. 822, 823–24 (M.D. Tenn. 1974); *Am. Ass'n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1287 (M.D. Fla. 2002); *see also Peterson v. City of San Diego*, 666 P.2d 975, 978 (Cal. 1983).

As to the equal protection claims, Plaintiffs argue that Wisconsin's electronic ballot delivery provision is unconstitutional only as applied to Plaintiff Ellingen and similarly situated voters, Resp.16, thereby conceding that the statute is not unconstitutional as applied to all voters within the scope of the injunction here. Even with respect to Plaintiff Ellingen, Wisconsin not providing electronic ballot delivery would be subject to, and easily survive, rational basis review, where print-disabled voters may cast an

[1] Available at https://www.oed.com/dictionary/secret_adj?tab=meaning_and_use#23661929 (subscription required) (last visited Sept. 6, 2024).

absentee ballot with an assistant of their choosing, Wis. Stat. § 6.87(5), who is subject to criminal penalties for intentionally failing to faithfully carry out her responsibilities, *id.* §§ 12.13(3)(j), 12.60(a)(1). In any event, "the State has a significant and compelling interest in protecting the integrity and reliability of the electoral process." *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 73, 357 Wis. 2d 469, 851 N.W.2d 262. Plaintiffs fail to address the State's interests at all, *see* Resp.16–17, and so do not come close to demonstrating that their equal protection claims are likely to succeed.

CONCLUSION

This Court should reverse the Circuit Court's grant of temporary injunctive relief to Plaintiffs.

Dated: September 6, 2024

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief and this Court's July 19, 2024 Order. The length of this brief is 2,164 words.

Dated: September 6, 2024

Electronically signed by Misha Tseytlin
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