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STATE OF WISCONSIN - COURT OF APPEALS
DISTRICT I
CASE NO. 2024AP001347

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, as Commissioner of WEC, ROBERT SPINDELL, JR., as
Commissioner of WEC, MARGE BOSTELMANN, as Commissioner of WEC,
ANN JACOBS, as Commissioner of WEC, MARK THOMSEN, as Commissioner
of WEC and CARRIE RIEPL, as Commissioner of WEC,
Defendants-Appellants,

WISCONSIN STATE LEGISLATURE,
Intervenor-Defendant-Respondent.

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

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INTRODUCTION

Despite the Wisconsin Elections Commission's decision not to appeal the circuit court's temporary injunction granting the Plaintiffs limited relief, the Wisconsin State Legislature's intervention and use of the special venue statute in this case has stymied Plaintiffs-Respondents' case. Because of the Legislature's intervention, Plaintiffs-Respondents ("Plaintiffs") have been unable to vindicate their rights under a range of statutory and constitutional provisions, including the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* (the "ADA") and the Rehabilitation Act, 29 U.S.C. §§ 701, *et seq.* (the "RA"). Plaintiffs join the Wisconsin Elections Commission ("WEC") in asking that this Court reverse the circuit court's decision granting the Legislature's motion to intervene.

Plaintiffs, comprised of four Wisconsin voters with print-disabilities¹ ("Individual Plaintiffs") and two organizations dedicated to supporting Wisconsinites with disabilities in exercising their right to vote, were successful in obtaining temporary injunctive relief in the circuit court well ahead of the November general election. This temporary injunctive relief provided voters with print disabilities the ability to vote absentee independently and privately on equal terms as other Wisconsin voters.

WEC, its Commissioners, and Administrator (the only named Defendants in Plaintiffs' action) did not appeal the temporary injunction, favoring consistency and predictability in their election administration efforts over an appeal. (*See* R. 130 at 7-8.) The Legislature was granted intervention and vitiated WEC's discretion by appealing the temporary injunction on its own.

¹ A "print disability" is any condition whereby "[a] person [] is unable to read or use regular print materials as a result of temporary or permanent visual or physical limitations [T]his includes those who are blind or have a visual or physical disability that prevents them from reading or handling print materials," as well as those "who cannot effectively read print because of a visual, physical, perceptual, developmental, cognitive, or learning disability." *See* Nat'l Inst. of Standards & Tech., U.S. DEP'T OF COMMERCE, *Promoting Access to Voting: Recommendations for Addressing Barriers to Private and Independent Voting for People with Disabilities*, NIST SP 1273, 81 (2022).

But for the Legislature’s interference with the trajectory of this litigation, Plaintiffs would have benefited from injunctive relief in advance of the November election and would be reaching the underlying merits of this case. This brief illuminates the havoc the Legislature’s inappropriate intervention has wreaked on this case and how Plaintiffs’ federal and constitutional claims consequently remain unaddressed.

STATEMENT ON ORAL ARGUMENT

Oral argument is not warranted in this matter because the issues will be fully presented on the briefs.

STATEMENT ON PUBLICATION

Publication is warranted under Wis. Stat. § 809.23(1)(a)1. and 5. because the Court’s opinion in this matter will decide a case of substantial and continuing public interest and is likely to enunciate a new rule of law or modify or clarify an existing rule of law.

STATEMENT OF THE CASE

WEC’s brief contains a scant two-page statement of the case (WEC Br. 12-14) and includes only limited discussion of the complicated procedural posture, underlying merits, and factual background. Plaintiffs submit this Statement of the Case to provide a completed presentation.

A. Background on the Underlying Litigation

Since 2011, Wisconsin law has prohibited election officials “from sending absentee ballots via email . . . to all but a few categories of voters[.]” *Luft v. Evers*, 963 F.3d 665, 676 (7th Cir. 2020); *see* 2011 Wis. Act 75. Those “few categories” are—*exclusively*—military and overseas electors. *See* 2011 Wis. Act 75, § 50 (striking out “an absent elector” and replacing it with “a military elector . . . or an overseas elector”). Consequently, Wisconsin voters with print disabilities are among those statutorily barred from receiving their absentee ballots electronically.

Individual Plaintiffs, because of their various print disabilities, cannot independently vote by paper absentee ballot without the assistance of another person. (*See, e.g.*, R. 14, ¶10.) Absent accommodation, each time they access the franchise of absentee ballot voting, Individual Plaintiffs and other voters with print disabilities must disclose their vote to an assistant. (*See, e.g.*, R. 13, ¶7.)

Plaintiffs in the underlying litigation are seeking a solution to remedy this unlawful constraint. Individual Plaintiffs have access to at-home accessibility technology that would enable them to review, mark, and return an absentee ballot both independently and privately if they could receive their absentee ballots in an accessible, electronic format. (*See, e.g.*, R. 13, ¶¶8-9; R. 14, ¶¶13-16.) Plaintiffs brought this action seeking accommodation under the law to receive the same.

B. Circuit Court Proceedings

Plaintiffs' complaint seeks emergency declaratory relief from Wisconsin statutes (*e.g.*, Wis. Stat. § 6.87(3)(a)) denying Individual Plaintiffs and other Wisconsin voters with print disabilities the ability to receive, mark, and return their absentee ballots electronically. (R. 9, ¶1) More specifically, Plaintiffs seek to remove statutory barriers that prohibit electronic delivery and return of absentee ballots to and by Individual Plaintiffs and other Wisconsin voters with print disabilities because such barriers violate the ADA and the RA, as well as certain state and federal constitutional guarantees. (*See generally* R. 9.)

Shortly after filing this case, Plaintiffs moved for a temporary injunction seeking a portion of the relief requested in their complaint on an emergency basis. Specifically, they sought an order compelling WEC "to make available for the upcoming August 2024 primary and November 2024 general elections an option to request and receive an electronic absentee ballot that can be marked electronically using an at-home accessibility device." (R. 42 at 35) As temporary relief, Plaintiffs sought only accessible electronic ballot delivery via email and Wisconsin's electronic voting system, MyVote, for the August 2024 election November 2024

general election, *not return*. (See R. 42 at 35; *id.* at 21-22 (“Military voters and overseas voters already receive a copy of their ballot via email or as a download through MyVote”).)

Nearly a month-and-a-half after Plaintiffs filed suit, and three weeks after they moved for temporary injunctive relief, the Legislature moved to intervene, which WEC opposed. (See R. 51-52; R. 68) Plaintiffs did not take a position on the Legislature’s motion to intervene in the circuit court. (R. 89 at 3 n.1)

Both the Legislature and WEC opposed Plaintiffs’ request for a temporary injunction on near-identical grounds. (See *generally* R. 53; R. 69.)

Before the injunction hearing, and in light of Administrator Meagan Wolfe’s deposition testimony the week prior about what relief could be implemented before the upcoming elections if ordered by a court given the timing (*see generally* R. 93), Plaintiffs narrowed the temporary injunctive relief they were seeking by withdrawing their requests with respect to the August 2024 primary election and requesting only electronic ballot delivery *via email*, as opposed to through MyVote, for the November 2024 general. (R. 112 at 7:14-19; R. 139 at 2)

On June 24, 2024, the circuit court held a hearing on Plaintiffs’ motion for temporary injunction and the Legislature’s motion to intervene. Over the course of the more than three-hour hearing, the court heard arguments from the parties and the Legislature, and asked questions. (See *generally* R. 112.) The next day, the court entered a temporary injunction providing Plaintiffs with the narrowed relief they sought, and granted the Legislature’s motion to intervene. (See R. 103-104.)

C. Proceedings in Two Districts of the Court of Appeals

This single June hearing has since become the source of two separate appeals in two separate districts of Wisconsin's court of appeals.

First, the Legislature (notably not WEC) appealed the grant of temporary injunctive relief (the "Legislature's Appeal"). *See generally Disability Rights Wis. v. Wis. Elections Comm'n*, Case No. 2024AP1298 (Ct. App. filed Jun. 28, 2024). While WEC opposed the Plaintiffs' motion for temporary injunction (*see generally* R. 69), it intentionally chose not to appeal that decision because overturning it could cause voter confusion in the runup to the November election. (*See* R. 130 at 7-8 ("If an appellate ruling lifts the injunction before the election, the Commission will be forced to reverse its compliance efforts and again modify absentee ballot delivery. This confusion will harm [WEC], municipal clerks, Wisconsin voters, and predictability in the elections process").) *Second and separately*, WEC sought review of the circuit court's decision to grant the Legislature's motion to intervene by filing *this* appeal. (*See* R. 125; R. 130.)

The Legislature has continued to zealously oppose the temporary injunction. The Legislature selected District II as the venue for its appeal,² pursuant to Wis. Stat. § 752.21(2), the special appellate venue statute. (*See* R. 114.) After filing its notice of appeal, the Legislature then moved the circuit court to stay the temporary injunction pending appeal. (R. 135) While Plaintiffs opposed the Legislature's stay motion (*see* Appendix of Plaintiffs-Respondents ("P. App.") 004-024), WEC did not take a position. (*See* P. App. 028-029.) The circuit court denied the Legislature's stay motion. (*See generally* P. App. 067-077.)

² Plaintiffs challenged the Legislature's designation of District II as the venue for its appeal. *See Disability Rights Wis. v. Wis. Elections Comm'n*, Case No. 2024AP1298 (Ct. App. Jul. 22, 2024). Specifically, Plaintiffs challenged the applicability of Wisconsin Statutes section 752.21(2) to the Legislature's Appeal, arguing that this case is not one in which the "sole defendant" is the State. *See id.* Chief Judge White disagreed with Plaintiffs' contention and determined that the Legislature's Appeal could proceed in District II. *See id.* (Jul. 25, 2024).

Approximately one week after the circuit court denied the Legislature's stay motion, the Legislature moved District II for an emergency stay of the temporary injunction pending appeal. *See* Case No. 2024AP1298 (Aug. 6, 2024). District II entered an order expediting the Legislature's motion the following day. *See id.* (Aug. 7, 2024).

Knowing WEC had appealed the circuit court's decision on the Legislature's motion to intervene, Plaintiffs asked District II to hold the Legislature's emergency stay motion in abeyance until the threshold intervention question pending before this Court was answered. *See id.* (Aug. 12, 2024). As Plaintiffs argued, "the Legislature [will] be stripped of party status and standing to appeal the circuit court's decision to issue the [temporary injunction]" if this Court determines the Legislature was not a proper party in the first instance. *Id.* Rather than slow down, District II issued a decision staying the temporary injunction just two days later, ignoring Plaintiffs' questions raised pursuant to Wis. Stat. § 808.07(2)(a)3. about whether the effectiveness of its eventual ruling in that appeal would stand if this Court ultimately reversed the circuit court's order granting the Legislature's motion to intervene. *See* Wis. Stat. § 808.07(2)(a)3. (allowing appellate courts to "[m]ake any order appropriate to preserve ... the effectiveness of the judgment subsequently to be entered"; *see generally* P. App. 078-097.)

Plaintiffs have since petitioned the Wisconsin Supreme Court to take jurisdiction of the Legislature's District II appeal on bypass. (*See generally* P. App. 098-129.) As grounds for that petition, Plaintiffs argued that "the merits of this case present issues of first impression concerning voting rights of Wisconsinites," as well as federal preemption. (*Id.* at 102) Plaintiffs also asserted that this case is an opportunity for the supreme court to resolve significant and outstanding questions pertaining to the standards for mandatory temporary injunctions and stays pending appeal where the Legislature is an intervening party. (*Id.* at 103) These are key questions of Wisconsin law, as the errors in District II's stay analysis will inevitably

recur, including here when Plaintiffs seek to vindicate their rights for future Wisconsin elections.

Plaintiffs also noted in their Petition for Bypass that the Wisconsin Supreme Court could take jurisdiction over *this* appeal. (*See id.* at 127 (“the Court could decide [an] important separation of powers question . . ., which is a threshold, dispositive issue here”).) As Plaintiffs reasoned, it would be prudent for the supreme court to address the intersecting issues in both appeals at once given that if the Legislature is denied intervention, it would necessarily moot the issues presented in District II as the Legislature would lose its standing to appeal the temporary injunction decision in the first instance. (*See id.*) The supreme court has not yet ruled on Plaintiffs’ petition.³

ARGUMENT

Plaintiffs join WEC in its request that this Court reverse the circuit court’s decision granting the Legislature’s motion to intervene. The circuitous path of the appeals in this voting rights lawsuit, which is not yet even beyond the temporary injunction stage, is a case study on the real-world consequences of legislative intervention where the Legislature endeavors to control the strategy, handling, and disposition of a case in contravention of the authority of and decision-making by the executive branch agency responsible for administering the challenged laws. Plaintiffs are and represent voters with print disabilities who simply want to vote by absentee ballot in the same manner as other Wisconsin voters (*i.e.*, privately and independently). But instead of being able to vindicate their rights, including rights guaranteed under the ADA and RA, Plaintiffs are caught between two branches of government. As a result, they have been obstructed from judiciously, sensibly, and

³ The Legislature only presented its opposition to Plaintiffs’ petition on October 11, 2024, having been granted an extension (with Plaintiffs’ consent) by the Wisconsin Supreme Court. *See* Case No. 2024AP1298.

economically obtaining the temporary injunctive relief that the law supports and the circuit court deemed fit to grant.

WEC argues in its brief that the executive branch “is no mere ‘legislatively-controlled automaton[,]’” and that, therefore, “the executive must [be able to] use discretion[.]” (WEC Br. 19) With that discretion, WEC decided not to appeal the entry of the temporary injunction. (*See* R. 130 at 7-8.) It has represented that it chose not to appeal after considering the law and also the impact further litigation over the temporary injunction could have on its ability to effectively administer upcoming elections: “If an appellate ruling lifts the injunction before the election, the Commission will be forced to reverse its compliance efforts and again modify absentee ballot delivery. This confusion will harm [WEC], municipal clerks, Wisconsin voters, and predictability in the elections process.” (*Id.*)

Nevertheless, *the Legislature* has appealed the circuit court’s issuance of a temporary injunction; a decision that has nothing to do with its lawmaking authority.⁴ The Legislature’s Appeal is in direct tension with the discretionary choice made by the executive branch *not* to appeal the temporary injunction and to proceed with litigating the merits of the case.

The impacts of this tug of war over who gets to defend duly enacted statutes in an as-applied challenge are neither theoretical nor rhetorical. Plaintiffs are now Respondents to (and the taxpayers are now funding) two appeals. Here, from a single disability rights voting case, are two separate appeals pending in two separate districts which must both be resolved (with unanimity of voice) before attention can return to the merits of Plaintiffs’ underlying claims.

This circuitous path is in stark tension with commonly held and cited principles of judicial economy. *See, e.g.*, Wis. Stat. § 801.01(2) (“[the Wisconsin Rules of Civil Procedure] shall be construed, administered, and employed by the

⁴ To be clear: the temporary injunction left the challenged laws intact and enforceable, other than as applied to voters with print disabilities.

court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding”); *Neylan v. Vorwald*, 124 Wis. 2d 85, 94, 368 N.W.2d 648 (1985) (discussing courts’ “inherent power” to take action “consistent within the Constitution and statutes” in the interest of judicial economy (internal quotations omitted)). In addition, it is well-settled law in Wisconsin that the court of appeals “must speak with a unified voice” and should not “become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel, and the circuit courts[.]” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). The Legislature’s intervention vitiates these principles, waylaying Plaintiffs’ case by ensnaring it in two separate appeals in two separate districts, where one such appeal may be dispositive as to the other.

The fact that Plaintiffs did not contest the Legislature’s motion for intervention before the circuit court is of no moment to the issues they present in this brief. **First**, Plaintiffs could hardly be expected to anticipate the procedural quagmire that has resulted from their request for accommodation. The Legislature specifically represented that its intervention would not cause “any issues in the orderly or efficient resolution” of this case. (R. 52 at 21) Plaintiffs took the Legislature at its word in pursuit of a more speedy, efficient resolution of the underlying merits of the case.

Second, just days after the circuit court granted the Legislature’s motion to intervene, the Wisconsin Supreme Court issued its decision in *Evers v. Marklein*, reaffirming the separation of governmental powers enshrined in the Wisconsin Constitution by holding that certain committee powers “effectively create[d] a legislative veto” in violation of the separation of powers because they allowed a legislative committee to “interfere with and even override the executive branch’s core power of executing the law.” 2024 WI 31, ¶24, 412 Wis. 2d 525, 8 N.W.3d 395. *Marklein* undercuts the Legislature’s intervention (here, the Legislature has also overridden a core executive branch power—one that it expressly delegated to

WEC⁵—and vetoed an executive decision) and was not issued until *after* the circuit court had granted intervention.

Finally, to the extent (if any) that this brief raises arguments or issues that were not preserved below, “an appellate court may . . . exercise its discretion to hear an issue not preserved . . . where the issue raised is a legal question, the parties have thoroughly briefed the issue, and there are not disputed issues of fact.” *Miller v. Storey*, 2017 WI 99, ¶67, 378 Wis. 2d 358, 903 N.W.2d 759.

Legislative intervention, when the executive branch is already defending a case on behalf of the State, results in a legislative eclipse of the executive branch’s exercise of discretion in carrying out the law. Plaintiffs know this to be true because they are experiencing it. If the Legislature is allowed to intervene wherever and whenever it pleases, including by making litigation choices it views as preferable to those exercised by the executive branch agency with the responsibility and authority to administer the laws at issue, litigants seeking to vindicate their rights, including the right to accommodation as a voter with a disability, must now anticipate circuitous, extended, and unpredictable litigation. This is not a constitutional state of affairs.

CONCLUSION

Plaintiffs join WEC in asking that this Court reverse the circuit court’s decision allowing the Legislature to intervene in this action.

⁵ Through Wisconsin Statutes section 5.05(9), the Legislature specifically delegated to WEC “standing to commence or intervene in any civil action or proceeding for the purpose of enforcing the laws related to the conduct of elections.”

Dated: October 24, 2024.

Respectfully submitted,

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules in Wis. Stat. § 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 3,048 words.

Dated: October 24, 2024.

Electronically signed by Erin K. Deeley
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