

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

MICHAEL WHITE
4650 Lake Club Circle
Oconomowoc, WI 53066,

EVA WHITE
4650 Lake Club Circle
Oconomowoc, WI 53066,

Case No. 2022CV1008

EDWARD WINIECKE,
1134 Majestic View Lane,
Oconomowoc, WI 54066,

and

REPUBLICAN PARTY OF WAUKESHA COUNTY
1701 Pear Street Suite #5
Waukesha, WI 53186,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,
201 West Washington Ave., Second Floor
Madison, WI 53707,

Defendant,

and

WISCONSIN STATE LEGISLATURE
2 East Main Street
Madison, WI 53703,

Proposed-Intervenor Plaintiff.

**COMPLAINT OF PROPOSED-INTERVENOR PLAINTIFF THE WISCONSIN
STATE LEGISLATURE**

Proposed-Intervenor Plaintiff the Wisconsin State Legislature, by its undersigned attorneys at Troutman Pepper Hamilton Sanders LLP, hereby alleges as follows:

NATURE OF THE ACTION

1. In 2016, the Wisconsin Elections Commission (“WEC”) issued what it called a “guidance” document (hereinafter “2016 Witness Certificate Alteration Mandate” or “2016 Mandate”), which mandated that all county and municipal clerks unilaterally correct missing or insufficient witness addresses on absentee ballots, in violation of Wisconsin law. In 2022, the Legislature’s Joint Committee for Review of Administrative Rules (“JCRAR”) exercised its statutory authority to order WEC to promulgate a formal rule codifying the 2016 Mandate and then vetoed the near verbatim formal rule (“Emergency Rule 2209”) as unlawful. Remarkably, WEC then continued its unlawful conduct, advising all county and municipal clerks that this 2016 Witness Certificate Alteration Mandate remained in effect even after JCRAR’s veto of its proposed formal rule. Meanwhile, in Spring of 2022, the Legislature adopted a solution to the issue of insufficient or missing witness address information by passing a bill that made it easier for voters to address any such errors, but the Governor vetoed that bill for political reasons. The Legislature now moves for a temporary injunction or, in the alternative a writ of mandamus, seeking to bar WEC’s continuation of the unlawful 2016 Mandate to county and municipal clerks.

2. A temporary injunction is plainly warranted. The Legislature is extremely likely to succeed on the merits of its challenge to the 2016 Witness

Certificate Alteration Mandate for multiple reasons, including because (1) the 2016 Mandate is inconsistent with election statutes, (2) its continued application unlawfully attempts to circumvent JCRAR's veto of substantively identical Emergency Rule 2209, and (3) WEC unlawfully issued the 2016 Mandate without following mandatory rule promulgation procedures. WEC's unlawful conduct in mandating an ultra vires ballot-witness-information-correction procedure on all county and municipal clerks imposes grave harms on the Legislature and the public interest by nullifying state election laws and infringing on the separation of powers.

PARTIES

Plaintiffs

3. As Plaintiffs' Complaint alleges, Plaintiff Michael White is a citizen of the State of Wisconsin, who is registered to vote and resides in Waukesha County. Plaintiff Michael White's mailing address is 4650 Lake Club Circle, Oconomowoc, Wisconsin 53066. Plaintiff Michael White intends to vote in the upcoming elections by absentee ballot.

4. As Plaintiffs' Complaint alleges, Plaintiff Eva White is a citizen of the State of Wisconsin, who is registered to vote and resides in Waukesha County. Plaintiff Eva White's mailing address is 4650 Lake Club Circle, Oconomowoc, Wisconsin 53066. Plaintiff Eva White intends to vote in the upcoming elections by absentee ballot.

5. As Plaintiffs' Complaint alleges, Plaintiff Edward Winiecke is a citizen of the State of Wisconsin, who is registered to vote and resides in Waukesha County.

Plaintiff Winiecke's mailing address is 1134 Majestic View Lane, Oconomowoc, Wisconsin 53066. Plaintiff Winiecke intends to vote in the upcoming elections by absentee ballot.

6. As Plaintiffs' Complaint alleges, Plaintiff Republican Party of Waukesha County ("RPWC") is a political organization in the State of Wisconsin that maintains its office at 1701 Pearl Street, Suite #5, Waukesha, Wisconsin 53186. RPWC's members have an interest in ensuring that elections in the State of Wisconsin are lawfully conducted.

7. As Plaintiffs' Complaint alleges, Plaintiff Edward Winiecke is a citizen of the State of Wisconsin, who is registered to vote and resides in Waukesha County. Plaintiff Winiecke's mailing address is 1134 Majestic View Lane, Oconomowoc, Wisconsin 53066. Plaintiff Winiecke intends to vote in the upcoming elections by absentee ballot.

Defendant

8. Defendant Wisconsin Election Commission is a state agency charged with administering elections in accordance with Chapters 5 through 10 and 12 of the Wisconsin Statutes. WEC issued the 2016 Mandate and promulgated Emergency Rule 2209, which purport to direct municipal clerks to manually correct deficient absentee ballot certificates. WEC is located at 201 West Washington Ave., Second Floor, Madison, Wisconsin 53707.

Proposed-Intervenor Plaintiff the Wisconsin State Legislature

9. Proposed-Intervenor Plaintiff the Wisconsin State Legislature is the legislative branch of the Wisconsin State Government, vested by Article IV, § 1 of the Wisconsin Constitution with the “legislative power” of the State. The Legislature assembles at the Wisconsin State Capitol, 2 East Main Street, Madison, Wisconsin 53703.

JURISDICTION AND VENUE

10. This Court has jurisdiction to hear this case pursuant to Wis. Stat. §§ 227.40 and 806.04.

11. Venue in this County is proper pursuant to Wis. Stat. §§ 227.40 and 801.50(3)(b) of the Wisconsin Statutes because Plaintiffs are located in this County.

12. The Legislature has standing to join this action and assert its claims because it has been, and will continue to be, harmed by WEC’s conduct if WEC is not required both to cease enforcing the 2016 Mandate and to comply with Wisconsin law regarding absentee-ballot-certificate-correction procedures.

13. Proposed-Intervenor Plaintiff satisfies the legal requirements for intervention under Wisconsin law, including under Section 803.09 of the Wisconsin Statutes.

STATEMENT OF FACTS

A. WEC’s 2016 Mandate Endorsing Wisconsin Clerks’ Practice Of Altering Witness Information On Absentee Ballots, Contrary To Wis. Stat. § 6.87

14. Wisconsin law provides for absentee voting, which is “carefully regulated to prevent” any potential “fraud or abuse,” “overzealous solicitation of

absent electors who may prefer not to participate in an election,” “undue influence on an absent elector,” or “other similar abuses” that may occur “outside the traditional safeguards of the polling place.” Wis. Stat. § 6.84.

15. Section 6.87 of Wisconsin Statutes outlines the procedures and requirements for completing and counting absentee ballots. Wis. Stat. § 6.87. Unless an absentee voter is in the military, is overseas, or resides at certain residential care facilities, an absentee voter must mark and fold his or her absentee ballot in the presence of a witness and then place it within the official absentee-ballot envelope. *Id.* § 6.87(4)(b)(1). The witness must sign the absentee-ballot certificate printed on the absentee-ballot envelope, while also, generally, writing his or her address on the certificate. *Id.* § 6.87(2).

16. Under Section 6.87, “[i]f a certificate is missing the address of a witness, the ballot may not be counted.” *Id.* § 6.87(6d) (emphasis added). However, if a clerk “receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector,” but only if “time permits the elector to correct the defect and return the ballot within the period authorized under sub. (6).” *Id.* § 6.87(9) (emphasis added).

17. During the Fall 2016 election cycle, WEC issued a document requiring Wisconsin’s county and municipal clerks to alter unilaterally the information on

absentee ballots. Wis. Elections Comm’n, *Amended: Missing or Insufficient Witness Address on Absentee Certificate Envelopes* (Oct. 18, 2016) (“2016 Mandate”).¹

18. Pursuant to the 2016 Mandate, “clerks *must* take corrective actions in an attempt to remedy a witness address error.” *Id.* (emphasis added). The 2016 Mandate states that “clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope” if the clerks “are reasonably able to discern any missing information from outside sources.” *Id.* While clerks have the option to “contact voters and notify them of the address omission,” “contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources.” *Id.*

19. The 2016 Mandate *requires* clerks to amend absentee-ballot certificates to supplement witness identification information, stating that “[c]lerks shall assist in rehabilitating an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address” and “shall do all that they can reasonably do to obtain any missing part of the witness address.” *Id.*

B. JCRAR Orders WEC To Promulgate A Formal Rule Codifying The 2016 Mandate, And Then JCRAR Strikes Down WEC’s Formal Rule As Contrary To State Law And Legislative Intent

20. The Wisconsin Legislature’s Joint Committee for Review of Administrative Rules (“JCRAR”) is a bipartisan standing committee empowered by

¹ Available at <https://elections.wi.gov/memo/amended-missing-or-insufficient-witness-address-absentee-certificate-envelopes> (all websites last visited on August 10, 2022).

statute to review rules promulgated by state agencies. Wis. Stat. § 13.56; *see* Wis. Stats. §§ 227.19, 227.24, 227.26. Among JCRAR’s many powers under Wisconsin law, JCRAR may both order state agencies to promulgate guidance or policy statements as formal rules and, if JCRAR chooses, suspend agency rules after a post-promulgation review. Wis. Stat. §§ 227.19(4)(d), 227.26(2)(b), (d).

21. On January 10, 2022, JCRAR acted under its statutory authority “to require WEC to show statutory authority for [the 2016 Mandate] . . . and promulgate it as an emergency rule or cease issuing such guidance to clerks.” Ex. 1 at 1 to Affidavit of Misha Tseytlin (“Tseytlin Aff.”) (JCRAR Notification Letter to WEC, (Jan. 10, 2022) (hereinafter “JCRAR Notification Letter”)).

22. The JCRAR Notification Letter to WEC caused WEC to change the plans that it had been carrying out with its 2016 Mandate. Prior to receiving the JCRAR Notification Letter, on December 1, 2021, WEC had directed its staff to draft a scope statement for the promulgation of the 2016 Mandate as a rule, “as well as a scope statement on the best alternative to existing guidance [*i.e.*, the 2016 Mandate], one of which would be authorized for consideration and promulgation into a permanent administrative rule.” *See* Wis. Elections Comm’n, Statement of Scope: Emergency Rule Relating To Correction of Absentee Ballot Certificate Envelopes (Feb. 3, 2022) (“WEC Scope Statement” or “Scope Statement”);² *see* Wis. Stat. § 227.135 (scope statements are a necessary preliminary step in the rule-promulgation process).

² Available at https://docs.legis.wisconsin.gov/code/register/2022/794a1/register/ss/ss_009_22/ss_009_22.

23. In response to the JCRAR Notification Letter, WEC changed course and directed its staff to proceed only with drafting a scope statement for an emergency rule mirroring the 2016 Mandate, while removing the option of an alternative rule. *See* WEC Scope Statement, *supra*.

24. On February 3, 2022, WEC published this Scope Statement after securing the Governor’s approval, with the Commission formally adopting the statement at its March 9, 2022 meeting. Wis. Elections Comm’n, Emergency Rule 2209 (July 18, 2022) ("Rule" or "Emergency Rule 2209").³ WEC’s Scope Statement explicitly acknowledges the agency’s intent to “codify longstanding guidance” about missing or insufficient witness addresses “into a formal rule.” WEC Scope Statement, *supra*.

25. Thus, exactly as the 2016 Mandate provided, the WEC Scope Statement explains that, under the proposed rule in the Scope Statement, “clerks must take corrective actions to remedy a witness address error,” and “[i]f clerks are able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope.” *Id.*; *see* 2016 Mandate, *supra*.

26. On July 18, WEC filed Emergency Rule 2209 with the Legislative Reference Bureau, consistent with the Scope Statement. Emergency Rule 2209, *supra*. The Rule “define[d] what constitutes a complete address, mandate[d] that

³ Available at https://docs.legis.wisconsin.gov/code/register/2022/799a3/register/emr/emr2209_rule_text/emr2209_rule_text.

clerks take corrective measures to try and remedy address insufficiencies, detail[ed] what clerks are lawfully able to self-correct, outline[d] how clerks should perform outreach to voters and witnesses, allow[ed] for the return of the certificate for correction, and specif[ied] when voters or witnesses must appear to correct the certificate.” WEC Scope Statement, *supra*; see Emergency Rule 2209, *supra*. Mirroring the 2016 Mandate, the Rule required clerks to continue their practice of unilaterally amending witness information on absentee ballots certificates. *Compare* Emergency Rule 2209, *with* 2016 Mandate, *supra*.

27. On July 20, 2022, JCRAR held a public hearing to consider testimony on WEC’s Emergency Rule 2209. JCRAR, Record of Committee Proceedings (July 20, 2022).⁴ Following the hearing, JCRAR then voted to suspend the Rule “on the grounds that the rule conflicts with state law and fails to comply with legislative intent.” *Id.*

28. JCRAR emphasized that WEC “exceeded the provisions of state law and acted in violation of the limited delegation of authority granted to it by the legislature” by “improperly authoriz[ing] municipal clerks” to correct ballot information “without the knowledge of the voter or the voter’s witness.” Sen. Steve Nass, Press Release, JCRAR Suspends WEC Emergency Rule on Absentee Ballot Certification Curing (July 20, 2022).⁵ JCRAR further criticized the Emergency Rule

⁴ Available at https://docs.legis.wisconsin.gov/code/register/2022/799b/register/actions_by_jcrar/actions_taken_by_jcrar_on_july_20_2022_emr2209/actions_taken_by_jcrar_on_july_20_2022_emr2209.

⁵ Available at <https://legis.wisconsin.gov/senate/11/nass/news/press-releases/jcrar-suspends-wec-emergency-rule-on-absentee-ballot-certification-curing/>.

for unlawfully “mandat[ing] municipal clerks to take certain actions in processing the incomplete absentee ballot certifications directly in conflict with the optional language in state law.” *Id.* As JCRAR explained, “[c]urrent state law makes clear that if an absentee ballot certification is missing elements, it can only be corrected by the voter or the voter’s witness. . . . The WEC emergency rule was an attempt to circumvent state law.” *Id.*

C. WEC Maintains That Its 2016 Mandate Is Still In Force

29. Following JCRAR’s vote to suspend the Rule, WEC issued a statement on its public website to Wisconsin clerks, communicating its belief that the 2016 Mandate remains in force. Wis. Elections Comm’n, *Statement Regarding JCRAR Emergency Rule Suspension* (July 25, 2022).⁶ WEC claims that because its “Commissioners have not yet authorized retracting the Commission’s separate 2016 Guidance on Absentee Ballot Certificate Correction, upon which the 2022 emergency rule was based,” the 2016 Mandate “continues to remain intact, as it has since 2016,” despite JCRAR’s suspension of the Rule. *Id.*

30. Thus, despite JCRAR’s suspension of Emergency Rule 2209, WEC continues to instruct clerks to unlawfully correct deficient absentee-ballot certificates.

⁶ Available at <https://elections.wi.gov/news/statement-regarding-jcrar-emergency-rule-suspension>.

D. WEC's Conduct Is Causing, And Will Continue To Cause, Irreparable Harm To Proposed-Intervenor Plaintiff

31. Proposed-Intervenor Plaintiff the Wisconsin State Legislature has been, and will continue to be, significantly harmed by WEC's enforcement of the 2016 Mandate in several ways.

32. The Legislature always suffers "a substantial and irreparable harm of the first magnitude" when administrative agencies purport to nullify the Legislature's laws. *See* Ex. 2 to Tseytlin Aff. (Order at 8, *SEIU v. Vos*, No.2019AP622 (June 11, 2019) ("*SEIU* Stay Order"). Here, WEC's enforcement of the 2016 Mandate despite the suspension of Emergency Rule 2209 effectively nullifies Sections 6.87(6d) and (9), which plainly set forth the exclusive requirements for the correction and treatment of deficient absentee ballots, and so inflicts *per se* irreparable harm to the Legislature, *SEIU* Stay Order at 8; *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

33. WEC's conduct also harms the Legislature by threatening vital procedural safeguards designed to protect the separation of powers "inherent in the Wisconsin Constitution." *Wis. Legis. v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900. Specifically, WEC's continuing enforcement of the 2016 Mandate contravenes both the mandatory statutory rulemaking process and the Legislature's constitutional power to provide legislative accountability over rule-making, which power is reflected in the statutes creating JCRAR and authorizing it to review and temporarily suspend agency rules post-promulgation, Wis. Stats. §§ 13.56, 227.19, 227.24, 227.26.

34. Finally, WEC's conduct harms the Legislature's compelling interest in "preserving the integrity of its election process," *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Specifically, WEC's conduct directly contravenes the exclusive absentee ballot correction methods set forth in Sections 6.87(6d) and (9), which are designed to ensure the orderly administration of absentee voting in the State of Wisconsin.

CAUSES OF ACTION

COUNT I

Declaratory Relief Under Sections 227.40 And 806.04 Of The Wisconsin Statutes

35. The preceding paragraphs are incorporated and restated here.

36. The 2016 Witness Certificate Alteration Mandate is contrary to Wisconsin's election laws, Wis. Stat. § 6.87(6d), (9), which set forth the exclusive requirements for the correction and treatment of deficient absentee ballots.

37. Specifically, Section 6.87 gives clerks two options when they encounter ballots with errors or omissions in the witness information on the absentee-ballot certificate.

38. First, "the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary." Wis. Stat. § 6.87(9).

39. Second, if there is insufficient time for a voter to "correct the defect and return the ballot," *id.*, the clerk must reject the ballot, because "[i]f a certificate is missing the address of a witness, the ballot may not be counted." *Id.* § 6.87(6d), (9).

40. The 2016 Mandate is plainly unlawful because it requires clerks to violate the law by “tak[ing] corrective actions to remedy a witness address error,” and allows alterations of ballot information without voter notification, involvement, or consent. WEC Scope Statement, *supra*.

41. WEC’s continuing enforcement of the 2016 Mandate has caused, and is causing, irreparable harm to the Legislature and the public’s interest in the integrity of the electoral process, Wis. Stat. § 6.87(6d), (9), the “prompt execution of [valid laws],” *Nken v. Holder*, 556 U.S. 418, 436 (2009), and the protection of the separation of powers “inherent in the Wisconsin Constitution.” *Palm*, 2020 WI 42, ¶ 13.

42. The validity of the 2016 Mandate is challengeable in an action for declaratory judgment. *See* Wis. Stat. § 227.40(1).

COUNT II

Declaratory Relief Under Sections 227.40 And 806.04 Of The Wisconsin Statutes

43. The preceding paragraphs are incorporated and restated here.

44. WEC’s continuing enforcement of the 2016 Mandate is unlawful in light of JCRAR’s suspension of the substantively identical Emergency Rule 2209. Wis. Stat. § 227.19(4)(d).

45. An agency may not circumvent JCRAR’s rule-suspension authority by enforcing the substance of a suspended rule under the guise of a claimed guidance document.

46. Agencies are legislative creations, vested *solely* with the powers delegated to them by the Legislature, *Martinez v. Dep’t of Indus., Lab. & Hum. Rels.*,

165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992), and “cannot, at any time, possess powers superior to” the Legislature itself, *Milwaukee v. Railroad Comm’n*, 182 Wis. 498, 501, 196 N.W. 853 (1924).

47. Thus, when JCRAR exercises its statutory rule-suspension power to command an agency to cease the underlying action or practice, and the agency continues to engage in the underlying action or practice under the façade of nonbinding guidance, the agency violates the law. *See Martinez*, 165 Wis. 2d at 698.

48. WEC’s continued enforcement of the 2016 Mandate is plainly unlawful because it defies JCRAR’s veto of the substantively identical Emergency Rule 2209, in violation of the law and core separation-of-powers principles. *See id; accord Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶ 52, 976 N.W.2d 519.

49. As previously explained, *supra* ¶ 41, WEC’s defiance of JCRAR’s statutory veto has caused, and is causing, irreparable harm to the Legislature and the public’s interest in the integrity of the electoral process, Wis. Stat. § 6.87(6d), (9), the “prompt execution of [valid laws],” *Nken*, 556 U.S. at 436, and the protection of the separation of powers “inherent in the Wisconsin Constitution.” *Palm*, 2020 WI 42, ¶ 13.

50. The validity of the 2016 Mandate is challengeable in an action for declaratory judgment. *See* Wis. Stat. § 227.40(1).

COUNT III

Declaratory Relief Under Sections 227.40 And 806.04 Of The Wisconsin Statutes

51. The preceding paragraphs are incorporated and restated here.

52. WEC's continuing enforcement of the 2016 Mandate is unlawful because the 2016 Mandate is a "rule" that was "promulgated . . . without compliance with statutory rule-making procedures." Wis. Stat. § 227.40(4)(a).

53. Specifically, the 2016 Mandate is a "rule" because it is a formal agency action that purports to require clerks to act in a certain way on a statewide basis, in a reflection of WEC's "subjective judgment." *Palm*, 2020 WI 42, ¶ 28.

54. However, WEC never formally promulgated the 2016 Mandate as a rule in compliance with Chapter 227's specific requirements.

55. Because WEC did not follow mandatory rule-making procedures, which are intended to protect the careful separation of powers inherent in the State's constitutional design, the 2016 Mandate "is unenforceable" and "invalid." *Id.* ¶ 58.

56. And, again, *supra* ¶¶ 41, 49, WEC's failure to comply with mandatory rule-making procedures has caused, and is causing, irreparable harm to the Legislature and the public's interest in the integrity of the electoral process, Wis. Stat. § 6.87(6d), (9), the "prompt execution of [valid laws]," *Nken*, 556 U.S. at 436, and the protection of the separation of powers "inherent in the Wisconsin Constitution." *Palm*, 2020 WI 42, ¶ 13.

57. The validity of the 2016 Mandate is challengeable in an action for declaratory judgment. *See* Wis. Stat. § 227.40(1).

WHEREFORE, Proposed-Intervenor Plaintiff requests the following relief:

1. A declaration that the 2016 Mandate is unlawful because it requires clerks to manually correct absentee ballot certificates in a manner that directly conflicts with Wisconsin Statutes § 6.87(6d), (9);
2. A declaration that the 2016 Mandate is unlawful because JCRAR vetoed the substantively identical Emergency Rule 2209;
3. A declaration that the 2016 Mandate is unlawful because it is a “rule” that was “promulgated without following required statutory [rule-making] procedures” set forth in Chapter 227, *Palm*, 2020 WI 42, ¶ 13;
4. A declaration that clerks can only respond to absentee ballot certificate errors in the manner set forth in Wisconsin Statute § 6.87(9);
5. A temporary and permanent injunction barring enforcement of the 2016 Mandate;
6. A writ of mandamus ordering WEC to comply with its duties under the Wisconsin Statutes regarding insufficient or missing absentee-ballot-witness information;
7. Costs and attorney’s fees;
8. Such other relief as the Court deems just and proper.

Dated: August 11, 2022.

Respectfully submitted,

Electronically signed by Misha Tseytlin

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