

1 STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

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2 PAUL ARCHAMBAULT et al.,  
3 Plaintiffs,

4 -vs-

Case No. 21-CV-1620

5  
6 WISCONSIN ELECTIONS COMMISSION, et al.,  
7 Defendants.

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8  
9 September 21, 2022

Honorable Michael J. Aprahamian  
Circuit Court Judge, presiding

10 MOTION HEARING

11  
12 A P P E A R A N C E S:

13 KEVIN SCOTT, Attorney at Law, appeared by Zoom on  
14 behalf of the Plaintiffs.

15 STEVEN KILPATRICK and LYNN LODAHL, Attorneys at Law,  
16 appeared by Zoom on behalf of the Wisconsin Elections  
17 Commission.

18 DANIEL LENZ, Attorney at Law, appeared by Zoom on  
19 behalf of the Disability Rights Wisconsin.

20 JEFFREY A. MANDELL and ELIZABETH M. PIERSON,  
21 Attorneys at Law, appeared by Zoom on behalf of  
22 Disability Rights Wisconsin.

23  
24 Lori Schiek

25 Official Court Reporter

1 EXCERPT OF PROCEEDINGS

2 THE COURT: All right. I want to thank you for  
3 briefing and argument. Based upon my review of the  
4 submissions and the arguments I make the following  
5 finding of fact and conclusions of law.

6 Plaintiffs filed this action on November  
7 9, 2021. The complaint sought declaratory and injunctive  
8 relief relating to memoranda issued by WEC and its staff  
9 directing municipal clerks and local election officials  
10 from dispatching special voting deputies to care  
11 facilities for elections in 2020 and the 2021 spring  
12 primary due to the COVID 19 pandemic.

13 Plaintiffs contended that the memorandum  
14 and directives violated specific State laws regarding  
15 absentee voting inside residential care facilities and  
16 qualified retirement homes.

17 Plaintiffs also allege that the defendants  
18 evaded the rule-making process and that the defendants  
19 should be enjoined from issuing any directive that  
20 interprets or implements Wisconsin election law without  
21 following the rule-making procedure in Wisconsin Stat.  
22 Chapter 227.

23 On March 7, 2022, the City of Brookfield  
24 and Defendant Renee Tadych, its interim clerk, moved to  
25 dismiss the claims against them on the ground that the

1 Court lacks competency to address the matter because the  
2 Plaintiffs did not exhaust their administrative remedies  
3 under Wis. Stat. 5.06.

4 On April 25, 2022, WEC, Wolfe and Rydecki,  
5 I may refer to them as WEC or WEC defendants, filed their  
6 motion to dismiss the complaint on the ground that the  
7 case is moot. That WEC defendants contend that the  
8 challenged memoranda related to specific directives for  
9 elections 2020 and 2021. They related to those specific  
10 elections.

11 The current challenge does not present a  
12 current controversy because there is no reason to believe  
13 that the directives about special voting deputies during  
14 a pandemic will reoccur.

15 In response the Plaintiffs conceded that  
16 they are no longer challenging the specific directives  
17 relating to special voting deputies and residential care  
18 facilities but more broadly challenging any directive or  
19 action on the part of WEC or its staff that does not  
20 comport with the rule-making process in Chapter 227.

21 On June 23, 2022 Disability Rights  
22 Wisconsin moved to intervene in the case. Judge Carter  
23 held a hearing on the pending motions on June 27 of 2022.  
24 At that time he granted the City of Brookfield's motion  
25 and denied the WEC Defendants' motion to dismiss. Near

1 the end of the hearing, the Plaintiffs stated that they  
2 intended to file a motion for a temporary injunction and  
3 the Court scheduled briefing and a hearing to address the  
4 motion to intervene and the anticipated motion for a  
5 temporary injunction.

6 Due to judicial rotation on August 1,  
7 Judge Schimel took over the case and signed an order from  
8 the motion hearing on August 8. That order included a  
9 briefing schedule on pending and contemplated motions.

10 On July 18 of 2022, Plaintiffs filed their  
11 motion for a temporary injunction. On August 15th of  
12 2022, Judge Schimel entered an order granting Disability  
13 Rights Wisconsin's motion to intervene.

14 On August 16 the very next day Disability  
15 Rights Wisconsin requested judicial substitution which  
16 was approved and on August 23, the case was assigned to  
17 me, Branch 9.

18 So now I turn to the request for  
19 injunctive relief filed by the Plaintiffs. Section  
20 813.02 deals with a temporary injunction. Sub (1)(a)  
21 provides, "when it appears from a party's pleading that  
22 the party is entitled to judgment and any part thereof  
23 consists in restraining some act, the commission or  
24 continuance of which during the litigation would injure  
25 the party, or when during the litigation it shall appear

1 that a party is doing or threatens or is about to do, or  
2 is procuring or suffering some act to be done in  
3 violation of the rights of another party and tending to  
4 render the judgment ineffectual, a temporary injunction  
5 may be granted to restrain such act."

6 A Court may issue a temporary injunction  
7 when the moving party demonstrates four elements. One,  
8 the movant is likely to suffer irreparable harm if the  
9 temporary injunction is not issued. Two, the movant has  
10 no other adequate remedy at law. Three, a temporary  
11 injunction is necessary to preserve the status quo. And  
12 four, the movant has a reasonable probability of success  
13 on the merits. And here I'm citing Milwaukee Deputy  
14 Sheriffs' Association v. Milwaukee County, 2016 WI App 56  
15 at paragraph 20. And that cites the Werner case.

16 Further, temporary injunctions are not to  
17 be issued lightly. The cause must be substantial.

18 At bottom, injunctions are equitable  
19 relief. Whether to grant an injunction is a matter  
20 within the discretion of the trial Court, weighing the  
21 equities in accordance with the law and the facts before  
22 it.

23 I'll address in turn the four elements and  
24 considerations for temporary injunction. Before doing  
25 so, however, the Court will review the specific relief

1 requested by Plaintiffs in their complaint to determine  
2 what is currently active and what is at issue. Items A  
3 through K are listed as the requested relief in the  
4 complaint. The first four, A through D, request  
5 declaratory relief. E through J request injunctive  
6 relief and K is for any other relief deemed just and  
7 equitable.

8 A. Asks for a declaration that WEC  
9 violated Wisconsin Statutes in issuing the Memoranda and  
10 the training documents. C. Asks for a declaration that  
11 to the extent that the Memoranda are intended as guidance  
12 documents, they are invalid. D. A declaration that to  
13 the extent that the Memoranda are intended as agency  
14 rules, they are invalid.

15 All three of those I believe are moot.  
16 And they have essentially conceded that they're not  
17 seeking that relief any longer.

18 Sub B is a declaration that the Wisconsin  
19 Elections Commission violated Wisconsin Statutes in  
20 taking any official action, the purpose of which was to  
21 interpret or implement Wisconsin law, outside of the  
22 rule-making procedures found in Chapter 227.

23 E. Asks for an injunction essentially  
24 prohibiting Wisconsin Elections Commission from authoring  
25 or issuing and/or distributing any directive or document

1 that does not comply with rule-making procedures.

2 So one asks for a declaration, the other  
3 asks for an injunction that essentially any sort of  
4 advice or document or memoranda must comply with the  
5 rule-making procedures.

6 Sub F, G, H and I all relates to employees  
7 or staff issuing any sort of publication or document or  
8 directive, including the administrator and the assistant  
9 administrator unless that directive complies with the  
10 rule-making procedures under Chapter 227.

11 J, related to the City of Brookfield and  
12 the interim clerk which has already been resolved by  
13 Judge Carter and then as I mentioned, K is seeking such  
14 other relief as the Court deems appropriate.

15 So as I mentioned there is three issues  
16 that were already decided based on mootness and a  
17 concession. And that there were no longer challenging  
18 the memoranda relating to special veto deputies and  
19 residential care facilities from the 2020 election and  
20 2021 primary.

21 Based on the concession and the compelling  
22 mootness arguments presented by the WEC defendants, those  
23 requests are moot and stricken. The remainder of the  
24 requests, one for declaratory relief and the remaining  
25 for injunctive relief are still down to the following.

1 One, the Commission lacks the authority to issue any  
2 memoranda, training documents or other informal documents  
3 interpreting or implementing Wisconsin election law  
4 unless those documents are promulgated as rules under  
5 Chapter 227.

6 Two. The Administrator, Assistant  
7 Administrator and staff have no authority to issue  
8 memoranda, training documents or other informal documents  
9 interpreting or implementing Wisconsin election law  
10 unless those documents are promulgated as rules. The  
11 Court interprets a corollary to this contention being  
12 that the Administrator, Assistant Administrator and staff  
13 have no authority to issue memoranda and guidance not  
14 approved and adopted by the Commission which would  
15 require a two-thirds vote of the commissioners.

16 I'm first going to address success on the  
17 merits. And I'm going to address success on the merits  
18 with respect to each of those still requesting injunctive  
19 relief in the complaint and what's still pending.

20 First, as to the contention that the  
21 Commission lacks the authority to issue any memoranda,  
22 training documents or other informal documents  
23 interpreting or implementing Wisconsin election law  
24 unless those documents are promulgated as rules, the  
25 Court disagrees with the Plaintiffs. For the reasons



1 outlined in the WEC Defendants and the intervenors'  
2 opposition, the Court concludes that the Plaintiffs are  
3 unlikely to succeed on the merits of this contention.

4 The Commission like just every other  
5 administrative agency, has inherent authority to issue  
6 guidance documents without rule promulgation under  
7 Wisconsin Stat. Chapter 227.

8 Wisconsin Administrative Procedure Act  
9 describes guidance documents as any formal or official  
10 document or communication issued by an agency including a  
11 manual, handbook, directive or informational bulletin,  
12 that does any of the following. One, explains the  
13 agency's implementation of a statute or rule enforced or  
14 administered by the agency, including the current or  
15 proposed operating procedure of the agency. Two,  
16 provides guidance or advice with respect to how the  
17 agency is likely to apply a statute or rule enforced or  
18 administered by the agency, if that guidance or advice is  
19 likely to apply to a class of persons similarly affected.  
20 That's Wisconsin Statute 227.01(3m) (a)1-2.

21 There is no exclusion for the Commission  
22 in Wis. Stat. Chapter 227 that prevents it from issuing  
23 guidance documents as distinct from administrative rules.  
24 Wis. Stat. 5.05(5t) directs the Commission to issue  
25 updated guidance within two months following the

1 publication of a binding election law decision of the  
2 State or Federal Court. Further, it is evident that the  
3 Legislature contemplated that such guidance be issued  
4 without rule promulgation, as both actions are listed as  
5 separate alternatives to address the import of new case  
6 law precedent.

7 The Wisconsin Supreme Court articulated  
8 the basis of agency authority to issue guidance documents  
9 two years ago in SEIU v. Vos 2020 WI 67. In the opinion  
10 by Justice Kelly, which held a majority of justices, the  
11 Court held that the Legislature could not require  
12 legislative preclearance of guidance documents nor  
13 mandate that guidance include specific content. By their  
14 nature, guidance documents in Wisconsin law, "explain  
15 statutes and rules, or they provide guidance or advice"  
16 about how the executive branch by the agency is likely to  
17 apply a statute or rule. That's paragraph 102.

18 I'm quoting Paragraph 105 of Justice  
19 Kelly's decision. We conclude that the creation and  
20 dissemination of guidance documents fall within the  
21 executive's core authority. Guidance documents, as the  
22 legislature has defined them, necessarily exist outside  
23 of the legislature's authority because of what they are  
24 and who creates them. As we explained above, a guidance  
25 document is something created by executive branch

1 employees through the exercise of executive authority  
2 native to that branch of government. Creation of a  
3 guidance document requires no legislative authority and  
4 no legislative personnel. A guidance document cannot  
5 affect what the law is, cannot create a policy, cannot  
6 impose a standard and cannot bind anyone to anything.

7 Although the Court agrees with the WEC  
8 defendants that the WEC can provide guidance outside the  
9 rule-making process, the Court agrees with the Plaintiffs  
10 that such rule guidance, excuse me, such non-rule  
11 guidance must come from the Commission and not from  
12 staff.

13 Plaintiffs challenge guidance from  
14 administrators and staff not authorized or approved by a  
15 majority vote of the Commission. To the extent such is  
16 to happen, the Court concludes that Plaintiffs have a  
17 substantial likelihood of success in showing that such a  
18 practice violates Wisconsin law.

19 In their individual capacity neither Wolfe  
20 nor Rydecki nor any other WEC staffer has the authority  
21 to provide legal advice to municipal clerks or local  
22 election officials regarding compliance with Wisconsin  
23 Election laws. In their official capacity, neither Wolfe  
24 nor Rydecki nor any other WEC staffer has any authority  
25 to provide legal advice or guidance regarding compliance

1 with Wisconsin Election Law except as authorized by a  
2 majority vote of the Commission two-thirds vote.

3 Wis. Stat. 5.5(1e) provides actions by the  
4 Commission. Any action by the Commission except an  
5 action relating to procedure of the Commission, requires  
6 the affirmative vote of at least two-thirds of the  
7 members.

8 The unique nature and structure of the  
9 Commission, comprised of political appointments to  
10 provide equal representation for the two major political  
11 parties, confirms the need for all the guidance and  
12 advice to have the approval of the Commission, which is  
13 to say, from the affirmative vote of at least two-thirds  
14 of the members.

15 Irreparable harm. Plaintiffs contend that  
16 they will suffer irreparable harm if a temporary  
17 injunction does not issue. Plaintiff's theory is (1)  
18 Defendants have demonstrated a willingness to defy  
19 Wisconsin election law by issuing unauthorized memoranda.  
20 (2) these actions lead to votes being cast illegally and  
21 (3) every Wisconsin elector, including the Plaintiffs,  
22 suffer an injury in fact when votes are cast illegally.

23 The WEC Defendants and intervenors  
24 opposing the motion contend that injunctive relief is not  
25 appropriate because the Plaintiffs cannot show

1 irreparable harm because any claimed harm is speculative  
2 and too generalized. For the reasons outlined by the WEC  
3 Defendants and intervenor, the Court agrees that the  
4 claimed irreparable harm here is too generalized and too  
5 speculative.

6           Once the Plaintiffs disavowed any relief  
7 associated with the historical guidance involving special  
8 voting deputies and residential care facilities, the  
9 Plaintiffs do not identify any rule or guidance for this  
10 Court to enjoin. In this vacuum, the Court is unable to  
11 assess whether the guidance, whatever it is or whenever  
12 it comes, is likely to cause irreparable harm to the  
13 Plaintiffs.

14           In addition, the Court is persuaded by the  
15 WEC Defendants' argument that the delay in seeking  
16 temporary injunctive relief undermines any claim of  
17 irreparable harm. Here, the lawsuit was filed on  
18 November 9 of 2021 and the motion for a temporary  
19 injunction was not filed until July 18 of 2022 -- eight  
20 months later and only after the defendants filed their  
21 motions to dismiss. The Court takes judicial notice of  
22 the fact that, in the time period between the filing of  
23 the complaint and the motion for a temporary injunction,  
24 the Spring election occurred on April 5 with a primary  
25 for that election on February 15.

1                   The delay here in pursuing the temporary  
2                   injunctive undermines the claim of emergent circumstances  
3                   and irreparable harm in the absence of the requested  
4                   temporary relief.

5                   Three. Necessary to preserve the status  
6                   quo. The Court must next consider whether a temporary  
7                   injunction is necessary to preserve the status quo. In  
8                   Hawkins, the Wisconsin Supreme Court recognized that last  
9                   minute election changes can cause confusion and undue  
10                  damage to the Wisconsin electors who want to vote.  
11                  Absent identification of any specific guidance or  
12                  memoranda and when it was issued, the Court concludes  
13                  that a temporary injunction is not warranted.

14                  Four. I'm considering the public interest  
15                  as well. Finally, in matters of public concern, the  
16                  Court should assess whether issuing temporary injunctive  
17                  relief supports the public interest or works against it.  
18                  For the reasons previously identified, including  
19                  specifically the failure to identify any specific  
20                  guidance or memoranda necessary to void or enjoin in  
21                  order to protect the rights and privileges of the  
22                  Plaintiffs and others, the Court concludes that this  
23                  factor weighs against entering a temporary injunction.

24                  At this juncture for all these reasons the  
25                  Court concludes in the exercise of its discretion that a

1 temporary injunction is not appropriate.

2 Ms. Lodahl, will you prepare an order for  
3 the reasons stated on the record the motion for a  
4 temporary injunction is denied.

5 MS. LODAHL: I will, Your Honor.

6 THE COURT: So tell me where we are in the  
7 case. We don't have a scheduling order. I'm not sure  
8 where this is headed. Mr. Scott, do you want to  
9 enlighten me?

10 MR. SCOTT: Well, Your Honor, in light of  
11 today's ruling I'm trying to, honestly, I'm trying to  
12 think, could I have a day to think about it and provide a  
13 status up to the Court?

14 THE COURT: Sure. Why don't you discuss this  
15 with the other attorneys, kind of what's going on in the  
16 case. Next, if there is additional discovery, additional  
17 litigation, I would ask you to submit a scheduling order.  
18 We have a meet and confer order. I'm going to tell my  
19 clerk to file it in the case at this point that obliges  
20 you to meet and confer and prepare a scheduling order  
21 based on our template. If the case is going to be in  
22 litigation further, you'll be obliged to file that after  
23 you meet and confer with counsel and we'll see where the  
24 case goes. If it's going to go in a different direction,  
25 I'll look for some sort of stipulation or letter alerting

1 me to that.

2 MR. SCOTT: Okay. Thank you, Your Honor.

3 THE COURT: Is there anything else we need to  
4 take up at this time, Mr. Scott?

5 MR. SCOTT: No, thank you, Your Honor.

6 THE COURT: Ms. Lodahl?

7 MS. LODAHL: No, Your Honor.

8 THE COURT: Mr. Lenz?

9 MR. LENZ: No, Your Honor. Thank you.

10 THE COURT: All right. Thank you for your  
11 efforts on behalf of your clients. Have a good day.

12 MR. LENZ: Thank you, Your Honor.

13 MR. SCOTT: Thank you.

14 (Proceedings concluded.)

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1 STATE OF WISCONSIN )  
2 WAUKESHA COUNTY )SS  
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4 I, Lori Schiek, do hereby certify that I am an  
5 Official Court Reporter assigned to report the  
6 proceedings herein in Waukesha County, Waukesha,  
7 Wisconsin; that the foregoing 17 pages are a true and  
8 correct transcript of my stenographic notes taken in the  
9 proceedings held on September 21, 2022, and reduced to  
10 typewritten form.

11 Dated this 1st day of October, 2022.

12  
13 Lori Schiek  
14 Lori Schiek,  
15 Official Court Reporter  
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