

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 17

DANE COUNTY

JOSEPH ALAN BINS, THOMAS J. ELERT, AND
SUSAN ROBERTS,

Plaintiffs,

Case No. 26-CV-2400

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**NONPARTY BRIEF OF
WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.**

WISCONSIN INSTITUTE FOR LAW
& LIBERTY

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INTRODUCTION

Plaintiffs filed this lawsuit just *days* before early in-person absentee voting was set to begin *and* while mail-in votes have *already been* and are *continuing to be* returned statewide. Plaintiffs seek an unlawful “do-over” of their mail-in absentee votes, alleging that guidance issued by the Wisconsin Elections Commission (“WEC”) on July 10, 2026, is inconsistent with state law. But WEC’s July 10 guidance *does not* violate the law and instead reflects a proper interpretation of a statute validly enacted by the Legislature.

Accordingly, this Court should deny Plaintiffs’ request for immediate temporary relief, as well as the relief they ultimately seek in this lawsuit.

ARGUMENT

I. Plaintiffs are Wrong on the Merits.

Plaintiffs’ claims are wrong on the merits, and this is fatal to their claim for emergency preliminary relief. Indeed, one of the factors courts must consider when evaluating motions for emergency injunctive relief is the movants’ ultimate “probability of success on the merits.” *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, ¶ 17, 413 Wis. 2d 418, 989 N.W.2d 561 (citation omitted). Any likelihood of success on the merits is wholly absent here.

As explained below, WEC’s July 10 guidance is exactly what the governing statute requires, and Plaintiffs’ arguments to the contrary cannot succeed.

Pursuant to Wis. Stat. § 6.86(5):

Whenever an elector returns a spoiled or damaged absentee ballot to the municipal clerk, or an elector's agent under sub. (3) returns a spoiled or damaged ballot to the clerk on behalf of an elector, and the clerk believes that the ballot was issued to or on behalf of the elector who is returning it, the clerk shall issue a new ballot to the elector or elector's agent, and shall destroy the spoiled or damaged ballot. Any request for a replacement ballot under this subsection must be made within the applicable time limits under subs. (1) and (3) (c).

The first significant problem with the Plaintiffs' complaint is that they do not appear to understand the meaning of the word "spoiled" in Wis. Stat. § 6.86(5), which is the sole applicable statute. Read in context, the word "spoiled" is an adjective in the statute modifying the noun "ballot." The ballot which is returned by the voter under this statute must already be "spoiled" at the time it is returned to the clerk under § 6.86(5). Whatever action occurred to cause the ballot to be spoiled is an action that has *already occurred*, not an action to be performed in the future.

Here, Plaintiffs rely on § 6.86(5) to demand future action, and more specifically, to demand the opportunity to "spoil" their already-returned ballots at some point in the future. For example, the Plaintiffs say in Paragraphs 40 and 41 of the Complaint that:

40. When Bins originally requested his absentee ballot and returned it to the Waunakee Clerk, ***he believed that he would be able to spoil it*** and receive a new ballot if he changed his mind about who he wished to vote for or if his preferred candidate dropped out of the race.

41. Bins believed absentee ballots could be spoiled under these circumstances because he was aware of WEC's previous guidance that ***would allow someone to spoil their ballot if they wished to vote for a different candidate.***

(emphasis added to both paragraphs to illustrate future tense)

The same is true for Plaintiff Elert (Compl. ¶ 47) and Plaintiff Roberts (Compl. ¶ 54). Their allegations are not that their ballots were already “spoiled” when they completed and returned them to their municipal clerk (which is what Wis. Stat. § 6.86(5) covers), but that they want to take some future action to change their vote and submit a different ballot from the one they had already submitted. But that is not what § 6.86(5) contemplates, much less permits.

The Plaintiffs want to incorporate Wis. Stat. § 6.80(2)(c) into Wis. Stat. § 6.86(5) (*see* Compl. ¶ 17) but § 6.80(2)(c) applies solely to in-person voting on election day. No part of § 6.80 applies to absentee ballots. Nor is it possible to graft any part of the process for in-person voting on election day to the process for absentee voting. They are conducted by very different methods.

Under Wis. Stat. § 6.80(2)(c), if a voter makes a physical mistake of some kind on her ballot at the polling place on election day, she can fix it by turning it over to the clerk, who destroys it and gives her a new ballot. That does not work in the absentee ballot process because of all the additional steps required in absentee voting. Thus, the statute which governs absentee voting—Wis. Stat. § 6.86(5)—is different from the statute that governs in-person voting on election day.

Furthermore, to the extent these statutes are intended to be parallel in some fashion, Plaintiffs still misconstrue them. The process that occurs when a voter makes a mistake while filling out her ballot on election day and fixes it under Wis. Stat. § 6.80(2)(c) is analogous to the following scenario in the absentee ballot context:

A voter receives her absentee ballot from the clerk by mail and fills it out. While she still has the ballot in her possession, she realizes that she made a mistake. She can take the ballot back to the clerk's office—in fact, § 6.86(5) says *she* must “return” the already spoiled ballot to the clerk—and then get a new one. Presumably, she would then complete the replacement absentee ballot, put it into the absentee ballot envelope already in her possession, have someone who knows her witness her doing so, and then return the ballot, inside the original absentee ballot envelope, to the clerk.

That is very different from what the Plaintiffs propose. Here, the Plaintiffs do not want to return a spoiled ballot under § 6.86(5), they want the clerk to locate the voter's completed and submitted absentee ballot envelope, open it, allow the voter to destroy the ballot, give the voter a new ballot and a new absentee ballot envelope, and then allow the voter to revote and submit a new ballot. That is a completely different process from what is described in § 6.86(5) and it is a process not provided for anywhere in the Wisconsin statutes.

One other point about the relationship, if any, between Wis. Stat. § 6.80(2)(c) and Wis. Stat. § 6.86(5): What constitutes a “spoiled or damaged absentee ballot” is not defined in § 6.86(5) or in any of the other statutes that govern absentee voting. However, § 6.80(2)(c) does provide that, with respect to in-person voting on election day, “any elector who, by accident or mistake, spoils or erroneously prepares a ballot may receive another, by returning the defective ballot, but not to exceed 3 ballots in

all.” It may be appropriate to borrow that definition and use it to fill in the gap in § 6.86(5).

If that were done, then the way to read § 6.86(5) is that, to be covered under that statute, a voter must return a ballot that is physically defective or damaged, or which has been improperly marked, *before* it has been submitted. There is no reference anywhere in § 6.86(5) to re-voting ballots that a voter intentionally submits, but then later regrets submitting for political reasons. Nor does anything in the statute mention a new ballot when an elector changes their mind, let alone provide that subsequent campaign developments could be grounds for a replacement ballot. Had the Legislature intended to authorize re-voting whenever a voter wanted prior to an election, rather than only in the event of “accident or mistake,” it could have easily said so. It plainly did not.

Moreover, think of the ramifications of Plaintiffs’ position. If Plaintiffs are right that because the candidate they voted for has dropped out of the race, their ballots are “spoiled” (and thus were “spoiled” when they were delivered to the clerk (so they meet the past tense definition required by § 6.86(5)), then how would anyone distinguish Plaintiffs’ ballots from every other absentee ballot that that was cast for a candidate (or candidates) who dropped out ahead of election day? Under Plaintiffs’ reading of the statute, every such ballot is “spoiled,” and in Wisconsin, spoiled ballots cannot be counted. Indeed, under Wis. Stat. § 7.37(11), spoiled ballots are not counted, they are destroyed. Must each clerk search for each ballot marked for each candidate that dropped out of the race and destroy them? That would be a chaotic result.

II. The Remedy Plaintiffs Seek Also Poses a Significant Problem.

Plaintiffs' Complaint is brought under Wis. Stat. § 227.40(1) which is a valid method for challenging guidance documents. In fact, that statute provides that a declaratory judgment action under § 227.40(1) is “*the exclusive* means of judicial review of the validity of a rule or guidance document.” (emphasis added). But that means that the exclusive remedy is a declaration as to whether the guidance is valid or not valid. As set forth above, the answer should be that the guidance is valid, but if the Court concludes otherwise, then there are additional issues to be considered.

All three Plaintiffs allege that they voted for Sara Rodriguez, who has since dropped out of the gubernatorial race (Compl. ¶¶ 36, 45, 52), and they want the Court to declare that their municipal clerks must allow them to revote. But as of July 24, 2026, some 91,000 Wisconsin electors have likewise returned already-voted absentee ballots (and, of course, more will come in every day).¹ This presents what could easily be a logistical nightmare for clerks, depending on the number of those voters who wish to vote anew, in support of a different candidate.

The voting process is serious. This means that appropriate election integrity measures and processes must be in place *before* granting injunctive relief that requires clerks to allow electors to redo already-submitted absentee ballots. But putting these safeguards into place poses questions for which there are not immediate, adequate answers.

¹ See CBS News, *Nearly 91,000 Wisconsin absentee ballots already cast as lawsuit challenges rule blocking new ballot requests* (July 24, 2026), available at <https://www.cbsnews.com/minnesota/news/wisconsin-absentee-ballot-rule-91000-voters/>

For example, are all 91,000+ voters allowed to revote? Is everyone who ever submits an absentee ballot allowed to revote that ballot up to election day, or just Sara Rodriguez voters? Does the clerk have to review the ballot (violating the constitutional protection to a secret ballot) to see if the voter cast a ballot for Sara Rodriguez? Does a voter seeking to change their already-returned ballot have to make that request in person? Does the voter need to present a valid form of identification? How is the already-returned ballot retrieved? What does it mean for the already-returned ballots and ballot envelopes to be “destroyed”? What if the voter or the clerk just throws them in the garbage can (leaving hundreds of ballots and ballot envelopes in the garbage can would present a profound election security/election integrity problem)? How does the clerk comply with all of the requirements in Wis. Stat. §§ 6.87 and 6.88 for voting and processing absentee ballots? Does the clerk issue a new ballot **and** a new ballot envelope? Can the voter revote the ballot immediately in the clerk’s office? Is the original witness required to be present as well? What if the voter demands the revote at a time when early, in-person absentee voting is not in process? How does the clerk deal with the fact that the voter was already recorded as having “voted” when the absentee ballot envelope was first received as required in Wis. Stat. § 6.36(1)(a)14. (this is the process in place to ensure that a voter cannot vote twice)?

These questions illustrate the substantial problems that this Court would have to deal with if it grants an injunction while an election is in process. Even if the Court agrees with the Plaintiffs on the merits regarding the WEC guidance (and, as explained above, the Court should not), Plaintiffs’ requested injunctive relief would

pose substantial fairness and process questions sufficient to deny their request for injunctive relief.

CONCLUSION

For the foregoing reasons, Plaintiffs' request for immediate temporary relief should be denied, as should the relief they ultimately seek in this lawsuit.

Dated: July 27, 2026.

Respectfully Submitted,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Electronically signed by Nathalie E. Burmeister

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