

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

Donald J. Trump, et al.

Plaintiffs,

v.

Joseph R. Biden, et al.,

Defendants.

Case No. 20CV7092

**MOTION AND NON-PARTY BRIEF OF
THE LIBERTY JUSTICE CENTER
IN SUPPORT OF PLAINTIFFS**

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December 9, 2020

MOTION

The Liberty Justice Center respectfully moves this Court for permission to file the attached nonparty brief *amicus curiae*. Although no rule of civil procedure provides for it directly, Wisconsin's circuit courts have in the past accepted or even invited briefing by *amicus curiae*, and Wisconsin's appellate courts have noted such decisions without criticism. *See, e.g., Solowicz v. Forward Geneva Nat'l, LLC*, 2010 WI 20, ¶ 19 n.16, 323 Wis. 2d 556, 574, 780 N.W.2d 111, 120 (appellate decision recognizes *amicus* participation below at the circuit court level); *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 32 & n.20, 307 Wis. 2d 1, 18, 745 N.W.2d 1, 9 (same); *Juneau Cty. v. Courthouse Emples., Local 1312*, 221 Wis. 2d 630, 641, 585 N.W.2d 587, 591 (1998) (same); *State ex rel. B'Nai B'Rith Found. v. Walworth Cty. Bd. of Adjustment*, 59 Wis. 2d 296, 299, 208 N.W.2d 113, 115 (1973) (syllabus) (same); *Chauffeurs, Teamsters & Helpers "Gen." Union v. Wis. Emp't Relations Comm'n*, 51 Wis. 2d 391, 405 n.19, 187 N.W.2d 364, 370 (1971) (same); *Madison v. Appeals Comm. of Madison Human Servs. Com.*, 122 Wis. 2d 488, 490, 361 N.W.2d 734, 736 (Ct. App. 1984) (same). Milwaukee County's Circuit Court is among those that have permitted *amicus* participation. *See, e.g., Schultz et al. vs. Wisconsin Injured Patients & Families Compensation Fund et al.*, Milw. Cty. No. 2007CV000296, Hearing on 12-18-2007 (Judge Hansher grants motions of Wisconsin Hospital Association and Wisconsin Medical Society to file *amicus* briefs).

Under the rules of appellate procedure, to which this Court can look for guidance in such a circumstance, a motion should "identify the interest of the person and

state why a brief filed by that person is desirable.” Wis. R. App. Pro. 809.19(7)(a). Similarly, the filing deadline for a nonparty brief is tied to the deadline for the Respondent’s brief. Wis. R. App. Pro. 809.19(7)(b)

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. The Liberty Justice Center is interested in this case because its commitment to protecting freedom includes a commitment to clean and fair elections. *See, e.g., Cook County Republican Party v. Pritzker*, 1:20-cv-04676 (N.D. Ill. 2020); *Cooke v. Illinois State Bd. of Elections*, 2019 IL App (4th) 180502. The Center also filed an amicus brief in support of the President’s petition for an original action at the Wisconsin Supreme Court. *Trump v. Evers*, No. 2020AP1971-OA (Wis.).

This brief is desirable because it directly addresses a core issue in the case, namely the legal status of the Wisconsin Election Commission’s manuals and memoranda. It does not add a new issue to the case but adds additional arguments and authorities on one of the main issues brought forward by the parties.

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STATEMENT OF INTEREST

The Liberty Justice Center is a national public-interest law firm based in Chicago. Liberty Justice Center frequently litigates on behalf of integrity in election and campaign-finance administration. *See, e.g., Cook County Republican Party v. Pritzker*, 1:20-cv-04676 (N.D. Ill. 2020); *Cooke v. Illinois State Bd. of Elections*, 2019 IL App (4th) 180502.

STATEMENT OF THE ISSUE

Did the Wisconsin Election Commission exceed its lawful authority by issuing manuals and memoranda in conflict with governing state statutes?

ARGUMENT

Introduction

One of the issues at the heart of this case is the fact that the Wisconsin Election Commission (WEC) “has been advising clerks to add missing information to ballot envelopes for years . . .” The same is true “for the collection of votes more than 14 days before the November 3 election.” *Trump v. Evers*, No. 2020AP1971-OA, Order at 4 (Wis. Dec. 3, 2020) (Roggensack, C.J., dissenting from denial of petition for original action). WEC has made these interpretations through a series of manuals and memoranda issued in the past decade.

If these manuals and memoranda are merely “advising clerks” and “advice,” *id.*, then they are guidance documents wholly without legal authority. “A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold, including as a term or condition of any license.” Wis. Stat. § 227.112(3). Guidance documents “are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions.” *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶ 102. “A guidance document cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything.” *Id.* at ¶ 105. In fact, the majority in *SEIU v. Vos* specifically cautions that if officials treat guidance documents as binding, they “would be making a mistake” that would justify judicial intervention. *Id.* at ¶ 134.

If the WEC’s manuals and memoranda are only guidance documents, then they provide no warrant for the actions of Defendant Election Officials, because they were following only the informal musings of bureaucrats who lacked actual authority over the situations at hand. If these are only guidance documents, then it is no answer to say, “Well, we just did what WEC told us to do.”

If, on the other hand, WEC’s manuals and memoranda are authoritative interpretations of state statute, treated by commissioners, clerks, and canvass-

ers as mandatory, then they should have been issued as rules through the administrative rules process. The failure to promulgate them according to the statutory process for administrative rules vitiates their legal authority and renders them invalid. *Wis. Hosp. Ass'n v. Nat. Res. Bd.*, 156 Wis. 2d 688, 704 (Ct. App. 1990). If in fact the WEC has “decree[d] its own election rules” and “ma[d]e the law governing elections,” *Trump*, 2020AP1971-OA, Order at 5 (R.G. Bradley, J., dissenting from denial of petition for original action), without following the proper procedure for doing so, this renders those rules invalid.

In other words, either the Defendants were following nonbinding guidance documents wholly lacking in legal authority, or they were following unpromulgated rules wholly lacking in legal authority. Neither is much of a safe harbor. As will be explained below, Amicus believes that the WEC’s manuals and memoranda meet the statutory definition of rules and should have been promulgated as such, and are invalid for failing to have done so.

I. The WEC consistently issues manuals and memoranda that provide instruction to county and municipal clerks.

The WEC pumps out volumes of manuals and memoranda on a regular basis, much of which is relevant to this case. For instance, the WEC instructions regarding in-person absentee balloting, made in its Election Administration Manual, provides regarding in-person absentee voters: “The applicant does not need to fill out a separate written request if they only wish to vote absentee for

the current election. The absentee certificate envelope doubles as an absentee request and certification when completed in person in the clerk's office.”¹

Numerous WEC documents concern the witness-address requirement. The WEC Election Administration Manual separately provides: “Clerks may add a missing witness address [to an absentee ballot envelope] using whatever means are available.”² A memorandum from Meagan Wolfe, WEC administrator, to all municipal and county clerks, dated October 19, 2020, states, “[T]he clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness).”³ And an October 18, 2016, memorandum from Michael Haas, WEC interim elections administrator, to all county and municipal clerks: “The WEC has determined that clerks **must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to

¹ Election Administration Manual for Wisconsin Municipal Clerks, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>, pg. 91.

² Election Administration Manual for Wisconsin Municipal Clerks, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>, pg. 99.

³ Available online at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

contact the voter before making that correction directly to the absentee certificate envelope. Clerks may contact voters and notify them of the address omission and the effect if the deficiency is not remedied but contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources.”⁴

For a final example, concerning indefinitely confined voters in the era of COVID-19, a March 24, 2020, website FAQ and a March 29, 2020, memorandum from WEC administrator Meagan Wolfe to all clerks stated: “There may be a need to do some review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis would like to continue that status.”⁵

These are just examples of all the instruction streaming forth from the WEC. The Election Administration Manual is where much of the real work gets done, weighing in at 250 pages.⁶ There’s also a separate Recount Manual, Referenda Manual, and Recall Manual, to mention only those starting with the letter “R,” of the 33 total manuals.⁷ Then there are the “clerk communications,”

⁴ Available online at https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/guidance_insufficient_witness_address_amended_10_1_38089.pdf (bold original).

⁵ Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Clerk%20comm%20re.%20Indefinitely%20Confined%203.29.20.pdf>.

⁶ Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>.

⁷ Available at <https://elections.wi.gov/publications/manuals>.

50 of which have been issued since August 19, 2020.⁸ All of these manuals and memoranda are instructions that should have been issued through the administrative rules process and were not. That is a serious failure by the WEC.

II. The manuals and memoranda at the center of this case should have been issued as rules.

By contrast to all that flows forth from the WEC in an informal way, the Wisconsin Administrative Code chapter promulgated by the WEC is all of 16 pages long, and covers such riveting and election-deciding topics as the filing of documents with the WEC by email or facsimile. EL 6.04.⁹ The brevity of the Code in contrast to the voluminousness of the manuals and memoranda shows that much of what's in the manuals and memoranda should be in rule.

The Wisconsin Supreme Court has recently reiterated its longstanding principle “that a rule for purposes of ch. 227 is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency.” *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 22 (quoting *Citizens for Sensible Zoning, Inc. v. Dep’t of Nat. Res.*, 90 Wis. 2d 804, 814 (1979)); *id.* at ¶ 198 (Hagedorn, J., dissenting).

⁸ Available at <https://elections.wi.gov/clerks/recent-communications>.

⁹ Available at https://docs.legis.wisconsin.gov/code/admin_code/el.

Certainly the WEC's manuals and memoranda fit this bill. *Will v. Dep't of Health & Soc. Servs.*, 44 Wis. 2d 507, 517 (1969) (agency "manual material" constitutes a rule). "It is immaterial that the Manual does not describe itself as a rule and that DILHR's published rules do not describe the Manual as a rule." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 320 (Ct. App. 1992). A rule may even be in a document facially denominated as a nonbinding guideline. *Wis. Tel. Co. v. DILHR*, 68 Wis. 2d 345, 364 (1975); *In re Paternity of A.S.D.*, 125 Wis. 2d 529, 536-37 (Ct. App. 1985) (Dykman, J., dissenting). A rule is any government promulgation meeting the five-part test of *Citizens for Sensible Zoning*, which itself is based on Wis. Stat. § 227.01(13). And these WEC materials should be rules.

(1) They are statements of policy by the state's primary election authority. See Wis. Stat. § 5.05(1) ("The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns . . .").

(2) They are sent out to all municipal and county clerks responsible for election administration to govern this election and future elections, so they are general in application. See *Josam Mfg. Co. v. State Bd. of Health*, 26 Wis. 2d 587, 595 (1965); *Frankenthal v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 257 (1958).

(3) The WEC and the clerks treat them as definitive statements of legal authority. The Election Administration Manual uses the phrase “clerk shall” 43 times, ordering county and municipal clerks to undertake a variety of activities. Similarly, the Haas memorandum told the clerks, using bold, that they “**must** take corrective actions in an attempt to remedy a witness address error.”

“[P]rovisions using express mandatory language are more than informational. In those provisions, the agency speaks with an official voice intended to have the effect of law.” *Cholvin v. Wis. Dep’t of Health & Family Servs.*, 2008 WI App 127, ¶ 29 (quoting *Milwaukee Area Joint Plumbing Apprenticeship Comm.* 172 Wis. 2d at 321 n.12). Clerks are also aware that WEC has been charged by statute to provide them with “regular information and training meetings . . . to explain the election laws and the forms and rules of the commission, to promote uniform procedures and to assure that clerks and other officials are made aware of the integrity and importance of the vote of each citizen.” Wis. Stat. § 5.05(7). This statute further reinforces clerks’ perception that WEC “information and training” is binding on their actions. WEC also

carries a hammer on the back end: if a clerk or any person violates its interpretation of the laws it administers, it may investigate, prosecute, and penalize anyone who violates the election laws it is charged to administer. *Id.* at (2m).¹⁰

(4) The WEC is a state agency.

(5) The WEC’s manuals and memoranda interpret (often incorrectly) Wisconsin’s elections statutes, which the WEC is charged with administering.

In sum, the WEC’s manuals and memoranda are rules, and the WEC’s failure to promulgate these interpretations of law and statements of policy as rules undermines important constitutional principles like the separation-of-powers and public accountability.

III. WEC’s avoidance of the rule-making process undermines core democratic values.

Rules, rightly promulgated, “are published in official registers. They require public hearings, written input, and a series of complicated bureaucratic checks before being implemented.” *Palm*, 2020 WI 42, ¶ 217 (Hagedorn, J., dissenting). These opportunities for public review, through notice-and-comment, and legislative review, through the Joint Committee on Review of Administrative Rules (JCRAR), are essential “checks and balances” to make sure an agency is following the law and staying in its lane. In many cases, these memoranda are

¹⁰ Though criminal or civil penalties are not necessary for a rule to have “the effect of law.” *Froedtert Mem’l Lutheran Hosp., Inc. v. Wis. Dep’t of Health & Soc. Servs.*, 110 Wis. 2d 741, 330 N.W.2d 247 (Ct. App. 1982).

staff documents which may not even receive review by the Commissioners of the WEC themselves, little less the public and legislature.

Administrative law in Wisconsin underwent a sea-change from 2011 to 2018. Governor Scott Walker, the Legislature, and the Wisconsin Supreme Court all took huge steps forward to reign in an administrative state that had exceeded its appropriate boundaries. *See Kirsten Koschnick, Making “explicit authority” explicit: deciphering Wis. Act. 21’s prescriptions for agency rulemaking authority*, 2019 Wis. L. Rev. 993, 996.

Each of these actions reflected a shared commitment across our state government to three basic principles for a good administrative procedure regime: transparency, accountability, and public input. These principles are the cornerstones of Wisconsin’s administrative procedure. And they are all undermined by the WEC’s practice of governing by manual and memorandum. The Plaintiffs raise important questions that go to the heart of proper administrative procedure, which itself reflects fundamental principles at the heart of our republican form of government.

The first of these principles is transparency. Administrative rule-making provides clear rules for the regulated community. Though the WEC’s manuals are available on its website, this does not provide notice-and-comment review. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) (binding interpretations may “appear only in a legal brief, press release, or guidance document issued without

affording the public advance notice or a chance to comment.”). These WEC manuals and memoranda emerge from a black box without any transparency as to the process by which they were developed or what special interests or outside advisors were consulted. Instead, law was made in secret, outside public view. We have no idea whether legislators were consulted, what lobbyists weighed in, who approved or who objected. There is no record of reasons, data, or analysis, just the sheer exercise of will.

The second principle the WEC’s practice undermines is accountability. No one ever voted for a bureaucrat. The rule-making process insists on two levels of accountability: executive and legislative. Both are essential to democratic development of the law.

Legislative accountability, exercised in this case through the Joint Committee for the Review of Administrative Rules (JCRAR), ensures oversight by the branch that originates the delegated power to write rules. *Martinez v. DILHR*, 165 Wis. 2d 687, 701 (1992). This legislative check ensures we are not governed by laws that lack the support of lawmakers. Otherwise, law is made without popular consent. Christopher DeMuth & Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1081 (1986).

The strictures of Chapter 227 also ensure agencies are accountable to the governor who heads the executive branch. Wis. Const. Art. V, Sec. 1. Otherwise

agencies may issue binding interpretations that are given the force of law without the knowledge or approval of the governor. *See* Lucas Vebber & Daniel Suhr, “Coronavirus ‘guidelines’ breaking the law,” Empower Wisconsin (April 16, 2020)¹¹ (Board of Aging & Long-term Care issues a memorandum which bars window visits to elderly relatives without gubernatorial approval). *See* DeMuth & Ginsburg, 99 Harv. L. Rev. at 1083; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1242 (1994).

Finally, the rules process ensures agencies will receive public input, enabling them to craft a better rule than they otherwise could. “[T]he primary purpose of Congress in imposing notice and comment requirements for rulemaking [is] to get public input so as to get the wisest rules.” *Dismas Charities, Inc. v. United States DOJ*, 401 F.3d 666, 680 (6th Cir. 2005). Public participation helps “ensure fair treatment for persons to be affected by” regulation. *Id.* at 678. This “chance to participate” by affected interests (such as campaigns and political parties in this instance) is “one of the central purposes” of the notice-and-comment requirement. *Id.*

These principles, when embodied in Wisconsin’s administrative rulemaking statute (Ch. 227), are inconvenient for bureaucrats. So from time immemorial,

¹¹ Available at <https://empowerwisconsin.org/coronavirus-guidelines-breaking-the-law/>.

bureaucrats have engaged in “rule avoidance” so their schemes are not reviewable by politically accountable actors like the elected executive and legislators.

See SEIU, Local 1, 2020 WI 67, ¶¶ 143-144 (Roggensack, C.J., dissenting).

Scholars of administrative law have documented how federal agencies use various tactics to avoid having to secure approval from the Executive Office of the President by, for instance, issuing informal documents rather than a rule. Gabriel A. Cohen, Note, *OIRA Avoidance*, 124 Harv. L. Rev. 994 (2011); Alex Acuña & Charles Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?*, 43 Presidential Studies Q. 443 (2013); Nina Mendelson & Jonathan Wiener, *Executive discretion and the rule of law: responding to agency avoidance of OIRA*, 37 Harv. J.L. & Pub. Pol'y 447 (2014).

The courts of this state have voided numerous attempts by agencies to engage in rule avoidance through the creative issuance of law by other means, whether an “agency directive,” a “limitation in [a] permit,” a “manual provision,” a “guideline,” “instructions regarding renewal of licenses,” or a “letter.”

Milwaukee Area Joint Plumbing Apprenticeship Comm., 172 Wis. at 320-21 (collecting cases). After this case, we can add “manuals and memoranda” to that list of government documents that should have been issued as rules.

CONCLUSION

Though it is no fault of the voters who in good faith followed the instructions they were given by the Defendant Election Officials, the WEC's failure to act thru appropriate legal channels is glaring and should undermine the authority given to their interpretations of these statutes. Either the WEC issued guidance documents or it illegally issued rules without following the rulemaking process. In either case, its interpretation lacks legal authority.

Respectfully submitted,

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CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,898 words in the body, as counted by Microsoft Word.

CERTIFICATE OF SERVICE

I certify that on December 9, 2020, this document was e-filed with the WiCourts.gov website and therefore simultaneously served on all parties.

CERTIFICATES SIGNED:

*/Electronically signed by
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