



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
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July 22, 2024

TESTIMONY ON BEHALF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC. IN SUPPORT OF SUSPENDING EMRs 24-07, 24-08, & 24-09

Co-Chairs Nass & Neylon:

I am Skylar Croy, an attorney with the Wisconsin Institute for Law & Liberty. WILL is a non-partisan, non-profit law and policy center dedicated to safeguarding individual liberty by, among other things, promoting the constitutional separation of powers.

I am here on WILL's behalf to explain one reason why this Committee should suspend three emergency rules promulgated by the Wisconsin Elections Commission. WILL takes no position on the substance of the rules; however, the Commission violated Wisconsin Statutes and the constitutional separation of powers when it skipped permanent rulemaking procedures, instead taking advantage of a purported emergency. Because a genuine emergency does not exist, the Commission acted in the "absence of statutory authority," "fail[ed] to comply with legislative intent," and proceeded in a manner that "conflict[s] with state law."¹ Additionally, the "[a]rbitrariness and capriciousness" of the Commission in declaring an emergency is unacceptable.² This Committee has the statutory power—and, frankly, the duty—to suspend the rules for each of these reasons.

As this Committee knows, enacting a law is hard. Wisconsin's founders, like this nation's, went to great lengths to prevent an "excess of law-making," which was thought to be one of "the diseases to which our governments are most liable."³ Wisconsin's founders went about accomplishing this goal by vesting "[t]he legislative power" in "a senate and assembly"⁴ and then authorizing law to be made only "by

¹ Wis. Stat. § 227.19(4)(d); *see also* Wis. Stat. § 227.26(2)(d).

² Wis. Stat. § 227.19(4)(d).

³ *See The Federalist No. 62*, at 378 (C. Rossiter ed. 1961) (Madison).

⁴ Wis. Const. art. IV, § 1.

bill.”⁵ To quote one Wisconsin Supreme Court justice, “[b]icameralism and presentment . . . are the crucible that bills must overcome to become law.”⁶

Rulemaking is a suspect practice because it is essentially lawmaking that is not subject to these requirements.⁷ At a minimum, rulemaking must be exercised under procedural safeguards that mirror the difficulty of bicameralism and presentment if rules are to have even an appearance of legitimacy.⁸

Generally, administrative agencies must comply with “notice, hearing, and publication requirements” when promulgating a rule.⁹ Historically, however, agencies have tried to circumvent these requirements through various means, such as by issuing guidance documents.¹⁰

Emergency rulemaking procedures offer another shortcut—one that may be tolerable when a genuine emergency exists—but bureaucrats’ ever-expanding reliance on the label “emergency” threatens individual liberty. Among other things, such procedures permit an administrative agency to skip holding a public hearing and comment period, which is required under permanent rulemaking procedures.¹¹

⁵ Wis. Const. art. IV, § 17(2).

⁶ *In re Amending Wis. Stats. § § 48.299 & 938.299 Regulating the Use of Restraints on Child. in Juv. Ct.*, No. 21-04, ¶55 n.11 (May 2, 2024) (Rebecca Grassl Bradley, J., dissenting).

⁷ *Bartlett v. Evers*, 2020 WI 68, ¶186 n.3, 393 Wis. 2d 172, 945 N.W.2d 685 (Kelly, J., concurring/dissenting).

⁸ *Wis. Legislature v. Palm*, 2020 WI 42, ¶¶32–33, 391 Wis. 2d 497, 942 N.W.2d 900.

⁹ Wis. Stat. § 227.24(1)(a).

¹⁰ Andrew C. Cook, *Extraordinary Session Laws: New Limits on Governor and Attorney General*, 92 Wis. Law. 26, 27 (2019) (discussing the problem created when “guidance documents contain new interpretations that operate essentially as administrative rules but without going through the proper rulemaking process”); Written Testimony of Senator David Craig on Senate Bill 745 Before the Senate Committee on Labor and Regulatory Reform (Feb. 6, 2018), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/sb745/sb0745_2018_02_06.pdf (explaining that guidance documents have been used “to avoid the deliberative process of rulemaking”); Floor Speech by Andre Jacque Floor Session on 2017 Assembly Bill 1072 (2017 Wis. Act 369), at 3:25, <https://wiseye.org/2018/12/05/assembly-floor-session-part-2-8/> (last visited June 25, 2020) (explaining the assemblyman “frequently heard from constituents, small businesses [and] local government” about “how guidance documents have been abused as a vehicle to actually change the law” and how they are sometimes “hidden from sight or dusted off after decades”).

¹¹ Mark R. Thompson, *Emergency Rulemaking: No Paddle Necessary*, Wis. Law. (Apr. 2024), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=97&Issue=4&ArticleID=30345#:~:text=Stat.,rule%20promulgation%20steps%20under%20Wis.>

The danger of emergency powers, including emergency rulemaking, became apparent during the COVID-19 outbreak.¹² In 2020 alone, administrative agencies promulgated 48 emergency rules, 26 of which allegedly responded in some way to COVID-19¹³—and these numbers do not account for the many times that bureaucrats just issued general orders without going through any rulemaking procedures.

For example, in *Wisconsin Legislature v. Palm*, the Wisconsin Supreme Court struck down a so-called “Safer-at-Home” order, which was issued by an unconfirmed cabinet secretary who did not even attempt to follow rulemaking procedures.¹⁴ In discussing these procedures, the Court noted that an emergency is a “new” and “extraordinary circumstance[]”¹⁵—and even then, bureaucrats are constrained by law.

Like the Court in *Palm*, Wis. Stat. § 227.24(1)(a), in discussing emergency rulemaking, refers to the necessity—not helpfulness—of preserving “public peace, health, safety, or welfare.” An emergency is not whatever a bureaucrat says.

The Commission, like other administrative agencies in recent years, has not complied with permanent rulemaking procedures. The Commission claims that it need not follow such procedures because the 2024 election cycle will have “high voter turnout” and “high levels of scrutiny,” but it has not explained how either threatens public peace, health, safety, or welfare.

Unlike some 2020 elections, which took place during the COVID-19 outbreak, the Commission cannot point to a new and extraordinary circumstance that might—when combined with high voter turnout—create an emergency. Instead, the Commission insinuates that high voter turnout is itself an emergency because it creates administrative burdens. Notably, the Commission does not describe these burdens whatsoever. Whatever they may be, they do not threaten public peace, health, safety, or welfare.

Additionally, high levels of scrutiny cannot justify rushed procedures. If anything, the Commission should proceed in a methodical and ordinary manner if it is truly worried. When the Commission waits until a few months before an election

¹² *Id.*

¹³ Daniel P. Lenington, *More than “A Little Danger”: Reforming Wisconsin’s Emergency Powers After COVID-19* (2021), <https://will-law.org/wp-content/uploads/2021/02/EmergencyPowers-web.pdf>.

¹⁴ 391 Wis. 2d 497, ¶31.

¹⁵ *Id.*, ¶29.

and then acts on a purported emergency basis, its conduct creates an appearance of impropriety.

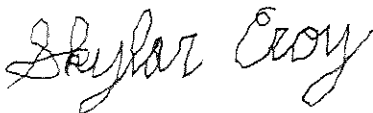
The Commission also says, “[t]here simply is not enough time to promulgate permanent rules,” which reminds me of a saying from my time in the Army: “A lack of planning on your part does not create an emergency on my part.” The Commission issued scope statements in September 2023. It then took until late-Spring 2024 for Governor Tony Evers to approve the emergency rules.

The Commission waited until six months before the beginning of the 2024 election cycle to begin emergency rulemaking and then took several months thereafter to finish. Even assuming six months is insufficient time to comply with permanent rulemaking procedures (which is questionable), the Commission could have begun such procedures in April 2023 after the Spring Election, which would have given the Commission plenty of time. Instead, the Commission inexplicably waited. What occurred between April and September that was new and extraordinary? Nothing. The Commission cannot manufacture an emergency by waiting until the last minute.

The Commission’s argument is especially troubling because Wisconsin always or at least almost always has multiple elections each year. The Commission’s reasoning, taken to its logical endpoint, would effectively allow it to avoid permanent rulemaking procedures altogether.

At bottom, this Committee should not allow an administrative agency to just mouth the word “emergency” as a means of avoiding permanent rulemaking procedures. I urge this Committee to suspend the three emergency rules. I look forward to answering any questions. Thank you.

Respectfully,

A handwritten signature in cursive script that reads "Skylar Croy".

Skylar Croy
Associate Counsel

Official Absentee Ballot Certificate & Application

CLERK OR DEPUTY >>
Initial Here >>

In-person absentee voter showed valid POI

Voter exempt from or met POI requirement

STEP 1

CLERK OR VOTER must complete this part

Voter Information

____/____/____
Election Date (mm/dd/yyyy)

- City Name:
- Village Name:
- Town Name:

Name (Last, First, Middle)

Street Address

County

City

State

Zip

Ward

Ald. Dist

STEP 2

VOTER must complete this part

I certify, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), that:

- I am a resident of the ward or of the aldermanic district of the municipality in the county of the state of Wisconsin indicated hereon
- OR I am entitled to vote in the ward or aldermanic district at the election indicated hereon
- I am not voting at any other location in this election
- I am unable or unwilling to appear at the polling place in the ward on Election Day, or I have changed my residence within the state from one ward to another less than 28 days before the election
- I displayed the ballot unmarked to the witness and in the presence of no other person marked the ballot and enclosed and sealed it in this envelope in a manner that no one but myself and an assistant under s. 6.87 (5), if I requested assistance, could know how I voted
- I requested this ballot and this is the original or a copy of that request

X

Voter Signature

Certification of Assistant (if applicable)

I certify that the voter is unable to sign their name due to a disability and that I signed the voter's name at the direction and request of the voter

Assistant Signature

STEP 3

WITNESS must complete this part

I the undersigned witness, subject to the penalties for false statements of Wis. Stat. § 12.60(1)(b), certify that:



WITNESS REQUIRED

- I am an adult U.S. citizen
- The above statements are true and the voting procedure was executed as stated
- I am not a candidate for any office on the enclosed ballot (except in the case of an incumbent municipal clerk).
- I did not solicit or advise the elector to vote for or against any candidate or measure

X

Witness Signature

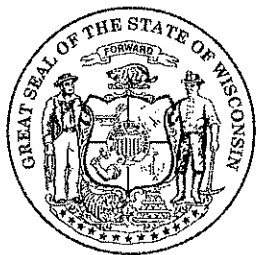
Witness Printed Name

Witness Address (Number, Street Name, City)

Absentee Ballot Return Envelope

Ballot must arrive
by 8 p.m. on
Election Day

EL-122



FIRST
CLASS
POSTAGE
REQUIRED

FILED
05-17-2024
Clerk of Court
Marinette County
2024CV000043

DATE SIGNED: May 17, 2024

Electronically signed by Judge James Morrison
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MARINETTE COUNTY

THOMAS OLDENBURG,

Plaintiff,

Case No. 24CV000043

v.

Case Code: 30701

WISCONSIN ELECTIONS COMMISSION,
et al.,

Defendants.

ORDER ON MOTION FOR TEMPORARY INJUNCTION

This matter came before the Court on Plaintiff's Motion for Temporary Injunction on May 15, 2024. For the reasons stated on the record,

IT IS HEREBY ORDERED:

Plaintiff's Motion for Temporary Injunction is **GRANTED**, and Defendants are hereby enjoined from requiring that Form EL-122 to be used by the clerks of this state. This injunction will continue until further Order of this Court.



Wisconsin Elections Commission

201 West Washington Avenue | Second Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

Good morning,

My name is Don Millis, and I serve as a Republican member of the Wisconsin Elections Commission. First, I would like to thank the co-chairs and members of this committee for inviting me to provide comment. I appreciate the committee's willingness to hear from the WEC as you consider several of its proposed emergency rules today.

I also want to apologize that I am unable to appear in person. Due to a family health emergency, I am not able to appear in person.

These remarks are intended to provide context about these critical rules, all of which received bipartisan support from the members of the Wisconsin Elections Commission.

But before I proceed to the details of each rule, I want to ensure that each committee member understands the importance of implementing or amending these administrative rules in advance of the upcoming election cycles.

Above all else, the three administrative rules before you today provide two things: consistency and predictability. They create agreed-upon guidelines that address important election-related processes before presidential candidates are placed on the ballot in Wisconsin, and before Election Day.

These rules reduce the possibility for surprises, increase fairness in how elections are run in small towns and large cities, and ensure that a candidate's placement on the ballot cannot be threatened by strategies that both major political parties have rejected.

In brief, the rules do the following:

- EmR 2407 requires that clerks across the state – from the smallest town to our largest cities, are providing their voters the same instructions for how to cast their absentee ballot.
- EmR 2408 sets clear guidelines for what constitutes a sufficient declaration of candidacy, and the proper grounds on which a challenge against a candidate based upon their declaration of candidacy may be brought.
- EmR 2409 does the same, but in relation to a candidate's nomination papers.

It would already be unlikely for the Commission to sustain a novel challenge against a candidate based upon their character or fitness. However, these rules – by clearly establishing the grounds on which a challenge may be brought – act as a barrier to these types of challenges that many members of the public have been concerned could be brought against well-known candidates. I believe these rules rule out a challenge to a candidacy based on any grounds other than compliance with the law. Moreover, we know that the U.S. Supreme Court's decision

Wisconsin Elections Commissioners

Ann S. Jacobs, chair | Marge Bostelmann | Don M. Millis | Carrie Riepl | Robert Spindell | Mark L. Thomsen

Administrator
Meagan Wolfe

in *Trump v. Anderson*, the case arising from Colorado relating to the presidential primary ballot made it clear that states have no role in enforcing Section 3 of the 14th Amendment to the U.S. Constitution.

I hope the committee can recognize the need for these emergency rules, as they directly address the changes many lawmakers called for following the previous General Election. Lawmakers and the Legislative Audit Bureau asked the Commission to consider creating administrative rules to address more of the agency's actions.

That's exactly what we're doing here.

Some members of the public have recently questioned why we're creating these rules under the emergency provisions. We did so because of the quickly approaching November election. Creating a permanent rule can take years, and state law provides a clear and accessible option to get rules in place on an expedited basis for situations such as these. That said, the Commission is also pursuing permanent rules in tandem with these emergency rules, and those processes are well underway.

It's critical to have the rules of the process set up in advance to prevent unnecessary disagreements during the middle of the election cycle.

Now, I'd like to provide additional context about each rule.

EmR 2407 - Relating to: mandatory use of uniform instructions for absentee voting

- Wisconsin Statute § 6.869 directs the Commission to prescribe a set of uniform instructions for absentee voting: The commission shall prescribe uniform instructions for municipalities to provide to absentee electors. The instructions shall include the specific means of electronic communication that an absentee elector may use to file an application for an absentee ballot and, if the absentee elector is required to register, to request a registration form or change his or her registration. The instructions shall include information concerning whether proof of identification is required to be presented or enclosed. The instructions shall also include information concerning the procedure for correcting errors in marking a ballot and obtaining a replacement for a spoiled ballot. The procedure shall, to the extent possible, respect the privacy of each elector and preserve the confidentiality of each elector's vote.
 - The WEC has long prescribed and published these uniform instructions (since at least 2007). However, there were an increasing number of reports that municipalities were adding their own substantive instructions within absentee ballot envelopes, or worse, that municipalities were modifying the Commission's instructions. These changes went beyond basic and allowable local instructions (e.g. clerk's office hours, locations, etc.).
 - If approved, this rule will ensure mandatory use of the Commission's uniform instructions, in accordance with statute, while also guaranteeing uniformity in voter instructions and voting processes. This is critical in Wisconsin's decentralized election system.
- For all the reasons above, this rule has full and bipartisan support of the Wisconsin Elections Commission.
 - The Commission unanimously expressed its support for a rule and directed scope statement submissions for an emergency and permanent rule at its September 7, 2023, meeting. This followed an August 30, 2023, directive to WEC staff to begin the rulemaking process.
 - The Commission considered this matter, and performed public discussion and editing of rule language, at no less than 10 public meetings.

- This activity followed an extensive redesign and testing process for the absentee ballot application and certificate envelope. Piggybacking on that effort, the Commission also updated the format and performed usability testing on the new uniform instructions before unanimously approving the new format at its December 19, 2023, meeting.
- A public hearing on the emergency and permanent versions of this rule was held on November 9, 2023, in addition to the public comments that were otherwise received and considered throughout the meeting and rulemaking processes.
- Various third-party organizations have also noted formal support for this rule (*e.g.* Disability Rights Wisconsin, The League of Women Voters of Wisconsin)
- The proposed rule draft would allow municipalities to include additional administrative and logistical instructions, provided they do not conflict with the uniform instructions prescribed by the Wisconsin Elections Commission.
- The rule would also allow enforcement of non-compliance via existing, statutory administrative complaint processes found in Wis. Stats. §§ 5.05 & 5.06.

EmR 2408 - Relating to: challenge procedures for declarations of candidacy

- The Commission has long conducted ballot access challenge processes, by which nomination papers can be challenged as non-compliant. The Commission has included the Declaration of Candidacy form in its consideration of “nomination papers,” given that it is required by law. This process is currently detailed in Wis. Admin. Code EL Chapter 2.
- In the Declaration of Candidacy, each candidate states that he or she either meets, or will at the time he or she assumes office meet, any applicable requirements for holding office. Wis. Stat. § 8.21(2). Section 8.30 is the companion statute to § 8.21. The Commission and local filing officers have statutory authority to refuse to place a candidate’s name on the ballot if any of the specified situations in § 8.30(1)(a), (b), or (c) apply, or if the Declaration of Candidacy is not timely filed. Wis. Stat. § 8.30(4). The proposed rule would create a clear administrative process for an individual to challenge any aspect of a candidate's sworn Declaration of Candidacy, but not their nomination papers.
- The proposed rule would identify the legal grounds for bringing these types of challenges by incorporating or cross-referencing the appropriate provisions in § 8.21, § 8.30, or both. The proposed rule would also describe the procedures by which the Commission or filing officer hear and decide these complaints, as well as the ability of an individual to seek review of the Commission’s or filing officer’s decision on their complaint.
 - A challenge can only be based on statutory or other legal requirements. It CANNOT be based on nondescript or unlawful requirements (character and fitness to hold office).
- This rule has full and bipartisan support of the Wisconsin Elections Commission to initiate the rule.
 - The Commission unanimously expressed its support for a rule and directed scope statement submissions for an emergency and permanent rule at its September 7, 2023, meeting. This followed an August 30, 2023, directive to WEC staff to begin the rulemaking process.
 - The Commission considered this matter, and performed public discussion and editing of rule language, at no less than nine public meetings.

- During this process, a single Commissioner expressed concerns that unlawful grounds for challenges might be allowable under the current language of the rule. The Commission stated on the record that this was not the intent of the rule and the final proposed rule language prevents challenges not based in law from being brought.
- A public hearing on the emergency and permanent versions of this rule was held on November 9, 2023, in addition to the public comments that were otherwise received and considered throughout the meeting and rulemaking processes.
- This rule would ensure uniformity, enforceability, and timeliness in the consideration of Declaration of Candidacy challenges and bring it in line with existing and proposed rules relating to other nomination paper review and challenge processes.

EmR 2409 - Relating to: challenge procedures for nomination papers

- The Commission has long conducted ballot access challenge processes, by which nomination papers can be challenged as non-compliant. This has been governed by formal rulemaking on these nomination paper challenge processes, as codified in Wis. Admin. Code EL §§ 2.05 & 2.07.
- However, the current rules have long required general modernization and the correction of several identified issues.
 - The current rule, EL 2.07, includes cross-references to other types of complaint processes that are not relevant or applicable to ballot access. The current rule also includes ambiguous language regarding the grounds for challenges to nomination papers.
 - The proposed administrative rule would amend prior EL 2.07 to remove cross-references to other complaint procedures and would supplement the existing procedures for challenges to nomination papers. The proposed rule would also clarify ambiguous language throughout EL 2.07 and update the relevant provisions of EL 2.05 so that they are consistent with the new amended rule EL 2.07.
 - Finally, the proposed rule would also incorporate existing Commission guidance and address common issues relating to the sufficiency of nomination papers. (*i.e.* a set of definitions would clear up current ambiguities or codify past Commission decisions, filing deadlines will be solidified, etc.).
- This rule has full and bipartisan support of the Wisconsin Elections Commission.
 - The Commission unanimously expressed its support for a rule and directed scope statement submissions for an emergency and permanent rule at its September 7, 2023, meeting. This followed an August 30, 2023, directive to WEC staff to begin the rulemaking process.
 - The Commission considered this matter, and performed public discussion and editing of rule language, at no less than ten public meetings.
 - A public hearing on the emergency and permanent versions of this rule was held on November 9, 2023, in addition to the public comments that were otherwise received and considered throughout the meeting and rulemaking processes.

Thank you for your consideration.
Don Millis

Joint Committee for Review of Administrative Rules
July 22, 2024 Public Hearing
EmR 2407 Relating to:
Mandatory Use of Uniform Instructions for Absentee Voting
(Wisconsin Elections Commission)

Date: July 19, 2024

To: Co-chairs Senator Nass and Representative Neylon and Members of
the Joint Committee for Review of Administrative Rules

From: Barbara Beckert, bpbeckert@gmail.com

Thank you for considering these comments in support of EmR 2407 Relating
to: mandatory use of uniform instructions for absentee voting.

The Uniform Instructions for Absentee Voting provide voters who use
absentee voting with clear and accurate instructions on how to properly
complete and return their absentee ballots. This administrative rule requires
all municipalities to use the Commission approved version of the Uniform
Instructions without changes to ensure that all absentee voters receive
consistent information regarding the process of completing and returning
absentee ballots. It will eliminate the current practice where some
municipalities send different and conflicting instructions for completion and
return of absentee ballots.

Prior to my retirement from Disability Rights Wisconsin (DRW) at the end of
2023, I assisted voters with disabilities including providing training on voting
and staffing the DRW Voter Hotline. In my role assisting voters with
disabilities, I was surprised and concerned to find that the Uniform
Instructions for Absentee Voters were not uniformly used. A number of
Municipal Clerks developed and distributed their own instructions for
absentee voting and often these did not align with the Uniform Instructions
and with some state and/or federal voting laws.

For example, some disabled voters who contacted DRW received instructions
for absentee voting from their Municipal Clerk with incorrect information
regarding ballot return assistance for disabled voters. The instructions had
incorrect information that did not align with federal law and inaccurately
restricted the right for voters with disabilities to have ballot return assistance
from a third party, resulting in some disabled voters being disenfranchised.

Requiring Mandatory Use of Uniform Instructions for Absentee Voting will
ensure that all voters utilizing absentee voting will receive accurate,

complete, and consistent instructions. This requirement will help to address these serious violations of voting rights that were reported by disabled

voters. Instructions for absentee voting should be consistent statewide; voting rights should not vary depending on where the voter lives. In addition, Municipal Clerks should have the option to also include an insert with voting information specific to their municipality such as locations for returning the completed witnessed absentee ballot.

Thank you for moving this rule forward to ensure that all Wisconsin voters receive consistent information regarding the process of completing and returning absentee ballots, regardless of their municipality.

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