FILED
01-12-2024
CIRCUIT COURT
DANE COUNTY, WI
2023CV002428

BY THE COURT:

DATE SIGNED: January 12, 2024

Electronically signed by Ann Peacock
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

WISCONSIN ELECTIONS COMMISSION, et al.,

Plaintiffs,

v. Case No. 23-CV-2428

DEVIN LEMAHIEU, et al.,

Defendants.

DECISION AND ORDER

INTRODUCTION

The Wisconsin Elections Commission ("WEC") and its Administrator, Meagan Wolfe, brought this action seeking declaratory and injunctive relief about WEC's process for choosing its administrator and, specifically, Wolfe's status in that role. Although Plaintiffs sought declarations about five legal conclusions, the Defendants admitted in their Answer that they agreed with Plaintiffs on all but one legal conclusion: whether Wis. Stat. § 15.61(1)(b)1 creates a duty for WEC to appoint a new administrator in the event of a holdover. On that legal conclusion, the Defendants filed a counterclaim and seek a writ of mandamus. The parties' remaining disputes center on the legal analysis of the one disputed legal conclusion and what relief is appropriate for all five legal

conclusions set forth in the Plaintiffs' Complaint.

I conclude the plain statutory text of § 15.61(1)(b)1 does not create a duty for WEC to appoint a new administrator in the event of a holdover. I further conclude Plaintiffs satisfy their burden to show they are entitled to a declaratory judgment and permanent injunctive relief on each of their legal conclusions. Accordingly, I grant Plaintiffs' motion for judgment on the pleadings and deny the Defendants' motion.

BACKGROUND

WEC is charged with the administration of Wisconsin's election laws. Answer ¶4, dkt. 21. The Defendants are three members of the Wisconsin Legislature: Senator and Majority Leader Devin LeMahieu, Senator and Co-Chair of the Joint Committee on Legislative Organization ("JCLO"), Chris Kapenga, and Assemblyman and Co-Chair of the JCLO, Robin Vos. Def. Resp. Br, dkt. 40:2.

Meagan Wolfe began as Interim Administrator of WEC in 2018. On May 15, 2019, the Senate confirmed her appointment to a four-year term as WEC's Administrator. Answer ¶7, dkt. 21. Her term expired on July 1, 2023. Id. On June 27, 2023, three of the six WEC commissioners voted to appoint Wolfe to a new term. *Id.* ¶9. The remaining three commissioners abstained. *Id.* The next day, June 28, the Senate passed 2023 Senate Resolution 3. *Id.* ¶11. It stated that the Senate "considers Meagan Wolfe to have been nominated" to serve as Administrator. *Id.*

On September 14, 2023, consistent with its June resolution, the Senate voted on something related to Wolfe's appointment, although the parties dispute what that vote meant. According to the Defendants, the vote "was symbolic and meant to signal disapproval of Administrator Wolfe's performance." *Id.* ¶15. Plaintiffs, however, contend that the vote was to "(1) deem Administrator Wolfe nominated based on the Senate's June resolution and (2) reject the 'appointment' of

Administrator Wolfe." Compl. ¶15, dkt. 4.

The same day the Senate held its vote, Plaintiffs commenced this action for declaratory judgment. As ultimate relief, Plaintiffs ask the Court to declare the following:

1. Wolfe remains a lawful holdover in the appointive office of WEC administrator,

2. WEC's June 27 vote had no legal effect,

3. The Senate's September 14 vote had no legal effect,

4. WEC has no duty to appoint a new administrator, and

5. JCLO has no authority to replace a lawful holdover with an interim administrator.

Compl., dkt. 4:12.

On October 13, the Defendants answered the Complaint and admitted many of the allegations in the Complaint. Answer ¶¶6-7, dkt. 21. This included admission that four of Plaintiffs' five legal conclusions were accurate. Answer ¶¶6-7, dkt. 21; Def. Resp. Br, dkt. 40:4-5. Defendants also filed a counterclaim and seek a writ of mandamus.

On October 27, the Court entered a temporary injunction to preserve the status quo. Decision and Order, dkt. 45. Both parties then filed motions for judgment on the pleadings. On November 21, the Court granted leave for an *amicus* brief from the Wisconsin Business Leaders for Democracy and the Leadership Now Project. Dkt. 67. The parties have now fully briefed their motions and also responded to the *amicus*.

LEGAL STANDARD

Judgment on the pleadings is essentially "summary judgment minus affidavits and other supporting documents." *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988) (citation omitted). This process takes two steps:

> We first examine the complaint to determine whether a claim has been stated. We then turn to the responsive pleadings to ascertain whether a material factual issue exists. If the complaint is sufficient to state a claim and the responsive pleadings raise no material issues of fact, judgment on the pleadings is appropriate.

Freedom from Religion Found., Inc. v. Thompson, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991) (internal citations omitted).

A declaratory action requires a justiciable controversy. A controversy is justiciable when four factors are present: "(1) A controversy in which a claim of right is asserted against one who has an interest in contesting it. (2) The controversy must be between persons whose interests are adverse. (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectable interest. (4) The issue involved in the controversy must be ripe for judicial determination." *Loy v. Bunderson,* 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982).

DISCUSSION

Plaintiffs filed this case for declaratory and injunctive relief relating to Wolfe's status and the procedure for appointment of the WEC administrator. Defendants' attorneys admit that Plaintiffs have accurately applied the law as to all but one of the five legal conclusions raised in Plaintiffs' Complaint. The parties remaining dispute centers on two principal issues. The first issue is whether Wis. Stat. § 15.61(1)(b)1 creates a duty for WEC to appoint an administrator in the event of a holdover. The second issue is what relief is appropriate for disposition of this case. The proper posture for resolution of this case is judgment on the pleadings because neither party raises any disputes of material fact.

I. The parties agree that the Plaintiffs' Complaint contains four accurate legal conclusions.

Defendants, through their counsel, admit the following: "[Claim One] Defendants admit that Administrator Wolfe is lawfully holding over; [Claim Two] Defendants admit that the Commission's June 27, 2023, vote did not appoint Administrator Wolfe to a new term; [Claim Three] . . . Defendants' vote on September 14, 2023, was [a] symbolic [vote of no confidence] and thus had no legal effect on Administrator Wolfe's status as a lawful holdover; . . . and [Claim Five] Defendants admit that [JCLO] has no power to appoint an interim administrator while Administrator Wolfe is holding over." Answer ¶¶6-7, dkt. 21; Def. Resp. Br, dkt. 40:4-5.

Based on these admissions, there is no question as to the accuracy of the following legal conclusions sought by the Plaintiffs' Complaint:

- Wolfe remains a lawful holdover in the appointive office of WEC administrator;
- WEC's June 27 vote had no legal effect;
- The Senate's September 14 vote had no legal effect; and
- JCLO has no authority to replace a lawful holdover with an interim administrator.

II. Wis. Stat. § 15.61(1)(b)1 does not create a positive and plain duty to appoint an administrator in the event of a holdover.

The parties' first dispute is about the meaning of § 15.61(1)(b)1, which creates the procedure for the appointment of WEC's administrator. To determine what the statute means, "[a]s always, we look first at the language of the statute." *State v. Derango*, 2000 WI 89, ¶16, 236 Wis. 2d 721, 613 N.W.2d 833. Here, in full, is the text of § 15.61(1)(b)1:

> The elections commission shall be under the direction and supervision of an administrator, who shall be appointed by a majority of the members of the commission, with the advice and consent of the senate, to serve for a 4-year term expiring on July 1 of the odd-numbered year. Until the senate has

> confirmed an appointment made under this subdivision, the elections commission shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission. If a vacancy occurs in the administrator position, the commission shall appoint a new administrator, and submit the appointment for senate confirmation, no later than 45 days after the date of the vacancy. If the commission has not appointed a new administrator at the end of the 45-day period, the joint committee on legislative organization shall appoint an interim administrator to serve until a new administrator has been confirmed by the senate but for a term of no longer than one year. If the administrator position remains vacant at the end of the one-year period, the process for filling the vacancy described in this subdivision is repeated until the vacancy is filled.

Wis. Stat. § 15.61(1)(b)1.

Wisconsin courts have "repeatedly held that statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). In addition to the plain meaning of the text, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶46. When the meaning of the statute is plain, "there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.*

Plaintiffs read § 15.61(1)(b)1 to create a duty to appoint an administrator only upon the occurrence of a vacancy. According to Plaintiffs, the first sentence's instructions about appointment "simply tells the reader who appoints the administrator and describes the length of a term." Plf. Br., dkt. 51:12. To find out *when* that appointing authority should act, Plaintiffs go to the third sentence, which answers: "If a vacancy occurs in the administrator position, the commission shall appoint a new administrator."

Plaintiffs say their interpretation of § 15.61(1)(b)1 must be correct for at least three reasons.

First, they say the Legislature clearly knew how to create a duty to appoint because it created exactly that sort of duty, but only "if a vacancy occurs." Given the absence of similarly plain language beyond the occurrence of a vacancy, Plaintiffs conclude that WEC has no regular duty to appoint an administrator. Second, Plaintiffs point to other statutes in chapter 15 containing similar instructions about the appointment of other government officials. No court has interpreted those statutes to create a duty to appoint, but this is not very persuasive because no court has interpreted those statutes in Plaintiffs' favor, either. Third, Plaintiffs highlight several passages from *State ex rel. Kaul v. Prehn*, 2022 WI 50, 402 Wis. 2d 539, 976 N.W.2d 821. There, in a discussion of a different statute containing the same "shall be appointed" wording also present in § 15.61(1)(b)1, the Wisconsin Supreme Court characterized the appointment not as a duty but instead as a "prerogative."[1] *Prehn* 2022 WI 50, ¶¶23, 29.

The Defendants read § 15.61(1)(b)1 to instead create a positive and plain duty to appoint an administrator upon the expiration of each four-year term. Def. Br., dkt. 22:16. In their view, any other interpretation would give the incumbent administrator the "superpower of indefinitely holding onto an expired term." *Id.* at 17. Like Plaintiffs, the Defendants also find support for their position in *Prehn.* They quote the *Prehn* court's statement that the governor "'must nominate' a successor as part of his 'prerogative.'" *Id.* (quoting *Prehn*, 2022 WI 50, ¶¶18, 23). The Defendants further point to Wisconsin's general historical practice of appointing new government officers at the end of a term, notwithstanding the absence of any vacancy in that appointive office. As examples, the Defendants point out that the governor did not wait for a vacancy before he appointed officers to the Board of Veteran Affairs and the University of Wisconsin Board of

[1] Prerogative means: "An exclusive right, power, privilege, or immunity, usu. acquired by virtue of office." *Black's Law Dictionary* (11th ed. 2019).

Regents.[2]

The Defendants criticize Plaintiffs' interpretation as untenable for several additional reasons. First, the Defendants say the Plaintiffs' interpretation would only give it the authority to appoint an administrator upon the occurrence of a vacancy. Def. Resp. Br., dkt. 55:4. In other words, if Plaintiffs are right about the first sentence of § 15.61(1)(b)1, then WEC could never appoint a new administrator even after the expiration of the term of office, unless it resorted to first removing the holdover. But this fails to recognize that WEC can appoint a new administrator whenever there is a vacancy and WEC itself can create the vacancy. As set forth in the Plaintiffs' brief, "WEC has the power to remove an administrator at its pleasure, Wis. Stat. § 15.61(1)(b)2., but no member of the Commission has moved to remove Administrator Wolfe. (Doc. 4 ¶ 8; Doc. 21 ¶ 8.)." Plf. Br., dkt. 51:4.

Second, the Defendants highlight the use of the mandatory "shall" in § 15.61(1)(b)1. They assert a "well-established Wisconsin presumption that 'shall,' when it appears in a statute, imposes a duty." *Id.* at 5. However, the only case they cite to show such a duty simply recites the uncontroversial proposition that "the word 'shall' is presumed mandatory when it appears in a statute." *Bank of New York Mellon v. Carson*, 2015 WI 15, ¶21, 361 Wis. 2d 23, 859 N.W.2d 422 (quoted source omitted). Elsewhere, the Defendants cite many other cases that repeat this general proposition, but they do not cite authority helpful to determining whether the first sentence of § 15.61(1)(b)1 merely describes *who* should appoint an administrator or *when* it creates a duty to do so. For example, the Defendants use *Kraus v. City of Waukesha Police & Fire Comm'n,* 2003 WI 51, ¶18, 261 Wis. 2d 485, 662 N.W.2d 294, as an example of a statutory obligation to make an

[2] Tony Evers, *Nomination of William Schrum to the Board of Veterans Affairs* (June 16, 2023), available online at https://perma.cc/H4KB-2X8J; Office of the Governor, *Gov. Evers Appoints Three Regents to the UW Board of Regents* (May 2, 2023), available online at https://perma.cc/6QYL-PBJ5.

appointment upon the expiration of an appointive officer's term. The statutory text examined in that case, however, was far clearer—it says Wisconsin police and fire chiefs "shall appoint subordinates …." Wis. Stat. § 62.13(4)(a). The first sentence of § 15.61(1)(b)1 does not contain any similar mandatory language.

As a third criticism of the Plaintiffs' interpretation, the Defendants cite two foreign cases that found a mandatory duty based on the phrase that an officer "shall be appointed." In *Hanabusa v. Lingle,* 198 P.3d 604 (Hawaii 2008), Hawaiian legislators sued the governor to compel the appointment of new members to the University of Hawaii Board of Regents. Like § 15.61(1)(b)1's provision for appointment of an administrator, the Hawaii Constitution requires regents "shall be nominated" by the governor. *Hanabusa,* 198 P.3d at 611. Unlike Wolfe, however, the Hawaiian regents in *Hanabusa* were not lawfully holding over and so there was a vacancy in the office. *Id.* at 613. As the Hawaii Supreme Court observed in a footnote, the unlawful appointment and holdover of those regents "raises the issue of the validity of the BOR's decisions made since [their appointment]." *Id.* n.3. So, faced with a vacant office and the requirement that the governor shall nominate regents, the court ordered Hawaii's governor to appoint new regents within a reasonable time. *Id.* at 614. The second foreign case to which the Defendants cite follows essentially the same trajectory. In *State ex rel. Hartman v. Thompson,* 627 So. 2d 966 (Ala. Civ. App. 1993), the Alabama Court of Appeals first found a vacancy in the office of Alabama's state banking superintendent. *Id.* at 969. Once again faced with a vacant office and the requirement that an officer "shall be appointed," the court ordered Alabama's governor to fill the vacancy within a reasonable time. *Id.* at 971. In the present matter, however, everyone agrees that there is no vacancy in the office of WEC's administrator. Def. Answer, ¶17, dkt. 21 ("Defendants admit that Administrator Wolfe is lawfully holding over …."). These foreign cases on the duty to fill vacancies therefore

offer little guidance.

Fourth, the Defendants point to a series of other nearby statutes that also require an officer "shall be appointed." According to the Defendants, the Plaintiffs' interpretation of § 15.61(1)(b)1 would create absurd results because it would upend the operation of all of these other appointments. But none of those other statutes contain analogous, express instruction for when an appointment must happen. Put differently, none of the other appointment statutes cited by the Defendants contains any requirement similar to § 15.61(1)(b)1's requirement for WEC to appoint an administrator "if a vacancy occurs." *See* Wis. Stat. §§ 15.103(1) (requiring the administrator of the division of hearings and appeals "shall be appointed," but providing no express instruction similar to § 15.61(1)(b)1 for when the appointment should happen); 15.165(3)(b) (same, but for the Wisconsin retirement board); 15.253(3) (same, but for the director of the office of school safety); 15.255(2)(c) (same, but for the crime victims rights board); 15.347(12) (same, but for the metallic mining council); 15.347(19)(b) (same, but for the council of forestry); 15.374(1)(a) (same, but for the director of the office of educational accountability); 27.11(2)(a) (same, but for the board of public land commissioners); 43.17(4) (same, but for the head librarian of the public library system board). Other statutes cited by the Defendants in support of this absurd results argument are even less analogous to § 15.61(1)(b)1. For example, not only do the other statutes cited by the Defendants omit anything similar to the vacancy language in § 15.61(1)(b)1, but each specifies that the appointive officer shall "serve at the pleasure of the governor." *E.g.*, Wis. Stat. §§ 15.105(32) (the director of the office of business development); 15.185(7)(a) (director of the office of credit unions); 15.194(1) (director of the office of children's mental health); 16.28(2) (deputy director of office of business development).

Fifth, the Defendants contend that Plaintiffs' interpretation would violate the separation of

powers. They ask how, if the appointment of WEC's administrator must be "with the advice and consent of the senate," that administrator can stay in office beyond the four-year term to which the senate consented? These are valid concerns—after all, Wisconsin has long "contemplated a strong role for the Legislature in appointment decisions." *Prehn*, 2022 WI 50, ¶50. But these are the same separation of powers concerns the Wisconsin Supreme Court rejected as an excuse to depart from the statutory procedure for appointive office in *Prehn*. In that case, a member of the Natural Resources Board refused to leave office after the expiration of his six-year appointive term. *Id.* ¶5. The Wisconsin Supreme Court explained that the holdover's continued exercise of power, despite the governor's desire to appoint a new board member, did not offend the separation of powers:

> As has been true since the enactment of the Wisconsin Constitution, the Governor may of course work with the senate to obtain a mutually satisfactory outcome on appointments and selections for administrative offices.
>
> …
>
> While we must be assiduous in patrolling the borders between the branches, based on the available record we have before us, we cannot conclude that providing Prehn for cause protection so offends the separation of powers that he must as a matter of law be removable at the Governor's pleasure.

Id. ¶¶53, 55 (alteration, quotation marks, and citation omitted). Of course, just as the governor had the option to remove Prehn for cause, the legislature has also chosen the manner in which Wolfe may be removed. *See, e.g.*, Wis. Stat. § 15.61(1)(b)2.

Ultimately, both parties offer ways to read § 15.61(1)(b)1 and the parties seek an answer to the question of when WEC should appoint a new administrator. Plaintiffs have the better interpretation because "the court is not at liberty to disregard the plain, clear words of the statute." *Banuelos v. Univ. of Wisconsin Hosp. & Clinics Auth.*, 2023 WI 25, ¶16, 406 Wis. 2d 439, 988 N.W.2d 627 (quoting *Kalal*, 2004 WI 58, ¶46). The plain text of § 15.61(1)(b)1 provides that

answer: WEC "shall appoint a new administrator" if a vacancy occurs. Plaintiffs' position in this case is also consistent with the controlling case law under *Prehn*. Accordingly, I agree with Plaintiffs' interpretation of § 15.61(1)(b)1. The statute plainly tells WEC it has a duty to appoint a new administrator "if a vacancy occurs." Given this plain instruction, it is not reasonable to infer a second duty to appoint a new administrator at other times.

III. The appropriate relief in this case is a declaratory judgment and permanent injunction.

A. Plaintiffs are entitled to declaratory and injunctive relief on their claims.

The parties' second dispute concerns the appropriate relief for Plaintiffs' claims, including the four claims on which the Defendants agreed with Plaintiffs in their Answer. To repeat, the Defendants admit that Wolfe lawfully holds over as WEC's administrator, admit that neither WEC nor the Senate have voted to remove Wolfe, and admit that JCLO lacks authority to replace a holdover. Def. Answer, ¶¶17-22, dkt. 21. Notwithstanding the admissions in Defendants' Answer, Plaintiffs seek declaratory and injunctive relief confirming the parties' agreement on these issues. Plaintiffs also seek a declaration and injunction with regard to the disputed legal conclusion.

Permanent injunctions are not to be issued lightly. The cause must be substantial. *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). To be entitled to a permanent injunction, a plaintiff must meet three requirements: there must be a "sufficient probability that future conduct of the defendant" will cause injury; (2) that the "injury is irreparable;" and (3) "on balance equity favors issuing the injunction." *Id.* Courts have discretion to grant injunctive relief in aid of a declaratory judgment, "where necessary or proper to make the judgment effective." *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957) (citing *Morris v. Ellis*, 221 Wis. 307, 315, 266 N.W. 921 (1936)).

In October, I concluded Plaintiffs had satisfied all of the elements for a temporary

injunction and, pending a final decision, I ordered the Defendants not to take further actions to remove Wolfe as WEC's administrator. Decision and Order (Oct. 27, 2023), dkt. 45. Having now reached a final decision on the parties' claims, I conclude for similar reasons that Plaintiffs satisfy the requirements for a declaratory judgment and permanent injunctive relief.

Plaintiffs show a justiciable controversy and a sufficient probability that the Defendants will violate their rights by attempting to unlawfully remove Wolfe as administrator. This is evident from the admitted allegations in the pleadings that the Defendants tried to previously unlawfully remove Wolfe. The fact that Defendants' attorneys now agree with four of the Plaintiffs' five legal conclusions does not justify denial of equitable relief: "numerous courts have held that a litigation position doesn't eliminate a threat of enforcement because a litigation position isn't binding, and the relevant parties could change their mind on a whim." *Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1030 (W.D. Wis. 2022).

The probability of future violation is further confirmed by the Defendants' continued statements inaccurately characterizing the status of WEC's administrator. As just one example, Defendant Kapenga's December 4, 2023 statement on a social media website labeled Wolfe as "the former administrator of the Wisconsin Elections Commission." Hipsman Aff. ¶2, dkt. 70.[3]

[3] After filing his answer, Defendant Vos also made a series of conflicting statements. On October 15, a television station reported Vos said "the position [of WEC Administrator] in my mind is vacant." Lodahl Aff. ¶3, dkt. 43. Vos continued to say "I certainly think in my mind that the law is crystal clear: The position is vacant, she [Wolfe] was not confirmed, we need a new person selected by WEC, and if they refuse to do that, JCLO is the natural [inaudible]." *Id.*

Vos reportedly spoke to journalists again on October 17. A newspaper article credited Vos as saying that if WEC did not appoint a new administrator, "there's a process in the law that says this is the exact way JCLO appoint somebody." *Id.* ¶4. When asked whether he disagreed with the answer filed in this matter, Vos replied: "So the Senate took that position. I don't necessarily agree with it. But again, it's their lawsuit with their attorneys." *Id.* Vos further appeared to disclaim that he was represented by any of the attorneys who filed an Answer on his behalf—he said "I was named in the lawsuit, but the attorneys are not ours," and "[w]e were not involved in any of that. That's the Senate's thing." *Id.*

This statement was issued despite this Court entering a temporary injunction on October 27, 2023 declaring, in part, that "[f]urther official actions by Defendants to remove or attempt to remove Meagan Wolfe from the Administrator position . . .do not have legal effect." I note that the affidavits setting forth the Defendants' recent contradictory statements are outside of the pleadings. Given that the current posture of this case is a motion for judgment on the pleadings, the statements are included in this opinion for illustrative purposes only. The statements are not dispositive to the Court's decision on this motion because the relief requested by the Plaintiffs would still be appropriate even in the absence of those statements. *See Carey*, 624 F. Supp. 3d at 1030.

With regard to irreparable injury, any legally indefensible removal WEC's administrator would cause irreparable injury because such an action is "not adequately compensable in damages." *See Pure Milk Prod. Co-op.*, 90 Wis. 2d at 800. Money damages are neither appropriate nor ascertainable for the harm that would be caused if Defendants decide to again take actions contrary to the law. With regard to the equity of entering a permanent injunction, an injunction is in the public's interest because it avoids confusion and disruption to Wisconsin's decentralized system of election administration. I agree with WEC that the public expects stability in its elections system and this injunction will provide stability to protect against any further legally unsupported removal attempts. The Defendants argue that "[t]he permanent injunction Plaintiffs seek is also the most drastic form of judicial intervention imaginable because Plaintiffs seek an order that would *forever* 'preserve[] Administrator Wolfe's role as the lawful administrator and prevent[] future actions to remove her from having legal effect.'" Def. Resp. Br., dkt. 55:4 (emphasis added). Not so. As set forth in the Plaintiffs' brief, "WEC has the power to remove an administrator at its pleasure, Wis. Stat. § 15.61(1)(b)2., but no member of the Commission has moved to remove Administrator Wolfe. (Doc. 4 ¶ 8; Doc. 21 ¶ 8.)." Plf. Br., dkt. 51:4.

B. The Defendants are not entitled to a writ of mandamus.

The Defendants seek a mandamus order commanding WEC to appoint a new administrator. However, to be entitled to mandamus relief, a party must show "a clear, specific legal right which is free from doubt. A party seeking mandamus must also show that the duty sought to be enforced is positive and plain …." *State ex rel. Zignego v. WEC,* 2021 WI 32, ¶38, 396 Wis. 2d 391, 957 N.W.2d 208 (quoting *Lake Bluff Hous. Partners v. City of South Milwaukee,* 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995)). For the reasons explained above, the Defendants fail to demonstrate that WEC has a positive and plain duty to appoint an administrator when its administrator lawfully holds over. Accordingly, the Defendants are not entitled to mandamus relief.

One last argument of the Defendants deserves mention. The Defendants argue that "a writ of mandamus is in the public interest because a prompt appointment will restore public confidence in the integrity and reliability of the state's elections." Def. Br., dkt. 22:23. In advancing that argument, Defendants claim that "the abstaining Commissioners are unnecessarily calling into question the authority of the current administrator and undermining public confidence in the integrity of the upcoming elections." *Id.* at 25. This argument wholly ignores the Defendants' own role in undermining the "public confidence in the integrity and reliability of the state's elections." The Legislature has fanned the hyper-partisan flames by engaging in several high-profile unequivocal official acts to purportedly remove Administrator Wolfe without publicly disclosing for months that their acts were "symbolic" rather than supported by the law. That lack of transparency and their willingness to attempt actions contrary to the law are precisely the reasons why a permanent injunction is appropriate in this case.

ORDER

For the reasons stated above, the Court orders:

1. The Court declares Meagan Wolfe is lawfully holding over as Administrator of the Wisconsin Elections Commission ("WEC").

2. The Court declares WEC's June 27, 2023, vote did not appoint Wolfe to a new term.

3. The Court declares the Wisconsin Senate's September 14, 2023, votes to (1) deem Wolfe nominated and (2) to reject Wolfe's putative June 27 appointment have no legal effect.

4. The Court declares Wis. Stat. § 15.61(1)(b)1 does not create a positive and plain duty for WEC to appoint an administrator while an administrator lawfully holds over.

5. The Court declares the Joint Committee on Legislative Organization has no power to appoint an interim WEC administrator while an administrator lawfully holds over.

6. The Court enjoins the Defendants from taking any official action contrary to these declarations.

7. The Defendants' counterclaim is dismissed and their pending motions are denied.

This is a final order for purpose of appeal.