

WISCONSIN ELECTIONS COMMISSION
and MEAGAN WOLFE, in her official
capacity as the Administrator of the
Wisconsin Elections Commission,

Plaintiffs,

v.

Case No. 21-CV-

WISCONSIN STATE ASSEMBLY,
ROBIN VOS, in his official capacity as
Speaker of the Wisconsin State Assembly,
MICHAEL GABLEMAN, in his official
capacity as Special Counsel, ASSEMBLY
COMMITTEE ON CAMPAIGNS AND
ELECTIONS, and JANEL BRANDTJEN,
in her official capacity as Chair of the
Assembly Committee on Campaigns
and Elections,

Defendants.

**BRIEF IN SUPPORT OF MOTION FOR EX PARTE TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

The Wisconsin Office of Special Counsel has issued numerous subpoenas to state and local election officials in furtherance of an unlawful investigation focused on debunked theories about the November 2020 Election. This motion concerns two subpoenas (“the Subpoenas”) which that Office issued to the Wisconsin Elections Commission and its Administrator Meagan Wolfe. This

Court should immediately restrain and enjoin enforcement of these two Subpoenas.

Most importantly, the Subpoenas suffer multiple legal defects and should be invalidated on those legal bases. For one, the procedure by which the Subpoenas propose to take “depositions” has no basis in statute. Second, the Subpoenas—and the legislative resolution authorizing the investigation—exceed the scope of proper legislative action and instead constitute law enforcement activity reserved to the Executive branch. Third, the Subpoenas violate due process because they are so vague and broad that they provide no meaningful notice of what they command to be produced, on penalty of contempt. And fourth, aside from these more fundamental errors, the subpoenas are overbroad and vague, and would have to be quashed on those bases alone.

In addition to these legal errors, additional factors support *ex parte* temporary relief now. The balance of equities weighs heavily in favor of immediately blocking enforcement of the Subpoenas. Despite having weeks to fix legal errors identified in the Subpoenas, the Office of Special Counsel has refused to do so, leaving the unlawful Subpoenas to linger as an apparent bargaining chip. On the other side of the equitable ledger, the Commission, by Administrator Wolfe, has already provided testimony to the relevant assembly committee, has already provided numerous documents to that committee, and,

in a show of extreme good faith, has provided those same documents to the Office of Special Counsel, subject to the various objections discussed. With all that Plaintiffs have done thus far, equity demands that these unlawful Subpoenas be invalidated now.

Finally, the public interest also weighs heavily in favor of an immediate injunction. The process by which this investigation and these Subpoenas have been handled poses grave risks for public confidence in our legal system, to say nothing of the public's faith in our elections. Enjoining these unlawful Subpoenas will prevent any further erosion of the public's faith in those systems.

To be perfectly clear, both the Wisconsin Elections Commission and Administrator Wolfe stand ready to provide testimony or additional documents to the Wisconsin Legislature or one of its committees, whenever lawfully requested to do so, just as they have done previously. But the current Subpoenas, infected with the numerous legal flaws discussed herein, cannot be lawfully enforced and must therefore be immediately enjoined.

FACTS

The facts relevant to this motion are fully set forth in the complaint and its exhibits, all of which are fully incorporated by reference here.

ARGUMENT

I. Standard for temporary restraining order.

The purpose of a temporary restraining order is to preserve the status quo between parties until the court may hear the parties on more permanent injunctive relief. *See Sch. Dist. of Slinger v. WIAA*, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997). Temporary injunctive relief is appropriate when the opposing party is doing or is about to do some act that would violate a party's rights and would "tend[] to render the judgment ineffectual." Wis. Stat. § 813.02(1)(a).

Proper considerations for granting a TRO include "the equities between the parties, the availability of other remedies, the damages which may be sustained if the temporary injunction or restraining order is granted, and other relevant matters." Wis. Stat. § 813.02(1)(b). Granting a TRO is within the circuit court's discretion, and reviewing courts will not reverse the entry of a TRO absent a showing of an erroneous exercise of discretion. *See Madison Gas & Elec. Co. v. Pub. Serv. Comm'n*, 250 Wis. 59, 62, 26 N.W.2d 285 (1947).

II. The Subpoenas are unlawful on multiple grounds, and immediate court action is necessary to protect Plaintiffs from enforcement of the Subpoenas and possible contempt charges.

The Subpoenas at issue are unlawful for multiple reasons, including that they are not in furtherance of a valid legislative purpose, they are so unclear and overbroad that they fail to meet the constitutional requirement of due

process, the secretive deposition procedure commanded by the Subpoenas is not authorized in any statute, and, even putting aside all of these serious flaws, the Subpoenas are unreasonably overbroad and burdensome. Allowing these subpoenas to stand creates a serious risk of legal jeopardy to Plaintiffs, at great detriment to the public as well.

A. The Subpoenas' proposed procedures for a nonpublic deposition are not authorized by statute.

The Subpoenas at issue here rely on Wis. Stat. § 13.31 as the sole basis to compel testimony and point to Wis. Stat. § 13.26(1)(c) as the basis for a potential charge of contempt for failure to comply. (Compl. Ex. B, C.) Those statutes do not authorize the current demand for sworn testimony, and therefore the Subpoenas must also be enjoined for this reason.

The legislative subpoena statute, Wis. Stat. § 13.31, provides that a witness may be compelled to testify and to produce documents “before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter.” Wisconsin Stat. § 13.26(1)(c) then authorizes punishment for contempt where a witness refuses to provide testimony ordered to occur “before the *house or a committee*, or before any person authorized to take testimony *in legislative proceedings*.” Those statutes do not authorize compelling a witness to appear before a person or entity other than a house of the Legislature or a legislative committee. They would authorize subpoenas

compelling a witness to appear before the Committee, but not before the Special Counsel or his staff apart from any meeting of the Committee.

The Subpoenas do not comply with the plain language of Wis. Stat. §§ 13.31 and 13.26(1)(c). They call for testimony “before the Special Counsel or his designee.” (Compl. Ex. B, C.) While the Special Counsel and his staff have apparently been charged with assisting the Committee, they are not themselves a house of the Legislature or a legislative committee. The Subpoenas command the witnesses to appear not in the state capitol or any other location in which a legislative committee would ordinarily meet, but rather in a non-public office “at 200 South Executive Drive, Suite 101, Brookfield, WI 53005.”

There is also no indication that the testimony commanded by the Subpoenas would be taken in a legislative proceeding within the meaning of Wis. Stat. § 13.26(1)(c). This is confirmed in Wis. Stat. § 13.32(1), which provides for summary process to compel the attendance of a witness who has “failed or neglected to appear *before the committee* in obedience to the mandate of [a subpoena issued under Wis. Stat. § 13.31].” Again, the statutes contemplate compelled legislative testimony before a committee, not in a closed proceeding before an attorney.

In fact, although the Subpoenas do not use the label “deposition,” the contemplated non-public appearance before the Special Counsel or his

designee appears to possess all the hallmarks of the type of deposition procedure typically used to examine a witness in the context of a judicial proceeding. But Wis. Stat. §§ 13.31 and 13.26(1)(c) plainly contemplate compelling a witness to testify in a *legislative* proceeding, not a judicial proceeding. Nothing in those statutes authorizes the use of such mechanisms of civil procedure in a non-judicial, legislative proceeding.

Moreover, far from complying with Wis. Stat. § 13.31, the Subpoenas are apparently wholly untethered from the activities of the Committee that the Special Counsel is supposed to be serving. The Chair of the Committee, Defendant Brandtjen, has publicly stated that Special Counsel Gableman “does not speak for myself or for the Wisconsin Assembly’s Campaigns and Elections Committee.” (Compl. Ex. E.) Indeed, Brandtjen forthrightly stated that the Subpoenas “have not been approved by the Assembly’s Campaigns and Elections Committee that Justice Gableman is supposed to serve, nor have the subpoenas even been submitted to the committee.” (*Id.*)

In sum, the Subpoenas are statutorily unauthorized because they purport to command sworn testimony not before a house of the Legislature or a legislative committee, but before an attorney at a non-public office in Brookfield. With no authority in statute for anything like the civil deposition called for here, the Court should declare the Subpoenas invalid and enjoin their enforcement for this reason, as well.

B. The Subpoenas are not in furtherance of a valid legislative purpose.

While the Legislature unquestionably has authority to investigate matters in the discharge of its legislative function, that power is not without meaningful limits. *See Watkins v. United States*, 354 U.S. 178, 197 (1957). A subpoena from the Legislature, one of its committees, or any authorized agent “is valid only if it is ‘related to, and in furtherance of, a legitimate [legislative] task.’” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031–32 (2020) (quoting *Watkins*, 354 U.S. at 187); *see also State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176–77, 119 N.W. 894 (1909); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). While the Legislature has “the authority to make laws,” that is where its constitutional role ends—it has no authority “to enforce them.” *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (quoting *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996)); *see also Mazars USA, LLP*, 140 S. Ct. at 2032.

Nothing in these Subpoenas or their authorizing Resolution (2021 Assemb. Res. 15) demonstrates any legitimate legislative purpose. The Resolution is pointedly focused on law enforcement, not lawmaking, asserting that action is needed based on vague and unsubstantiated allegations that election officials violated state law. (*See Compl. Ex. A.*) The Resolution makes no indication that the Legislature is focused on obtaining information

pertinent to future legislative efforts to *improve* Wisconsin's election statutes, but rather on enforcing compliance with *existing* "bright-line rules." (*See id.*) The language of the Resolution thus is plainly directed at the executive function of law enforcement, not at facilitating future legislative activity.

In fact Speaker Vos recently acknowledged that the Special Counsel's investigation is effectively equivalent to a law enforcement investigation. (*See* Compl. ¶ 40.) Vos publicly announced that he is resisting any public release of records related to the investigation because it would be akin to a district attorney releasing records in the middle of a murder investigation: "If you think about just the basic way an investigation is conducted, if the district attorney decides they're going to try to find out who killed somebody on the street corner, they do not put out for public display, for everybody to read, who they're talking to and who they're investigating—giving an advantage to the people who actually committed the crime to avoid prosecution," Vos said. (*See* Compl. ¶ 40.) "That's exactly what would happen if we decided to put all the documents out." (*See* Compl. ¶ 40.) It could hardly be clearer that Speaker Vos, who hired the special Counsel to conduct the investigation at issue here, considers the investigation to be in furtherance of the executive functions of law enforcement, rather than in furtherance of a legitimate legislative purpose.

The Subpoenas are directed at the same invalid purposes set forth in the Resolution, and thus lack a legitimate legislative purpose as well. On that

basis, the Court should declare the Subpoenas invalid and immediately restrain their enforcement.

C. The Subpoenas are so unclear and indefinite as to violate due process.

Due process requires that the subject matter of a legislative investigation be “defined with sufficient explicitness and clarity to provide a reasonable basis for judgment by the witness whether a specific question put to him is pertinent to that subject matter.” *Goldman v. Olson*, 286 F. Supp. 35, 43 (W.D. Wis. 1968). Just like in any other context in which a witness is required to testify under oath and on penalty of perjury or contempt, due process requires that the subject be informed of the subject of questioning “with the same degree of explicitness and clarity that the Due Process clause requires in the expression of any element of a criminal offense.” *Watkins*, 354 U.S. at 209. To avoid this “vice of vagueness,” the authorizing committee and any authorized agents must make clear the “question under inquiry.” *Id.* (citation omitted).

Neither the Resolution nor the Subpoenas here are sufficiently clear or definite to avoid this vice of vagueness and satisfy the demands of due process. As explained, the Resolution broadly directs the Assembly Committee on Campaigns and Elections to “investigate the administration of elections in Wisconsin,” which, even limited to a single election, comprises

locally administered elections in all of Wisconsin's 72 counties and 1,850 municipalities. (Compl. Ex. A.)

Like the Resolution, the Subpoenas also fail to provide the explicitness and clarity necessary to compel testimony under oath. Although the Subpoenas, unlike the Resolution, seek evidence related only to the November 2020 general election, each subpoena nonetheless lists as possible topics of inquiry “potential irregularities and/or illegalities *related to* the Election.” (Compl. Exs. B, C.) (emphasis added). Even when limited to November 2020, that includes nearly 2,000 separately administered election jurisdictions throughout the State. Moreover, the Subpoenas purport to demand testimony “including, *but not limited to*” this already sweeping topic. (*Id.*)

Both the Subpoenas and the underlying Resolution are of such sweeping and uncertain scope that they fail to inform the subpoenaed witnesses of the subjects of questioning with sufficient clarity and definiteness to satisfy the constitutional requirement of due process. On this basis, too, the Court should declare the Subpoenas invalid and restrain their enforcement.

D. The Subpoenas are also overbroad and burdensome.

Even aside from the preceding flaws in the Subpoenas, their demands for testimony and document production are unreasonably overbroad and burdensome, and must be narrowed before the Subpoenas can be enforced. *Cf.* Wis. Stat. § 804.01(3)(a).

As previously noted, the Subpoenas demand documents and testimony “including, but not limited to, potential irregularities and/or illegalities related to the [2020 General] Election.” (See Compl. Ex. B, C.) The use of “but not limited to” makes this already broad demand unlimited in scope. In particular, the command that the Commission and Administrator Wolfe produce “all documents contained in [their] files and/or in [their] custody, possession, or control, pertaining to the Election” would cover millions of election-related documents in the files and databases of the Commission. (*Id.*) That request sweeps far more broadly than the purposes of the investigation authorized by the Resolution. It also imposes an extreme burden on the Commission and Administrator Wolfe, both in terms of effectively preparing to give testimony and in terms of the impossible logistics of producing such a massive quantity of documents.

Even the somewhat more specific requests enumerated in the exhibits attached to the two Subpoenas are unreasonably overbroad as written. (See *id.*) For example, Exhibit B to the Commission subpoena demands documents containing communications between any Commission personnel and various municipal officials, and between any Commission personnel and various non-governmental persons and organizations, “regarding or in any way related to the Election.” (See Compl. Ex. C.) Similarly, the topics of testimony enumerated in Exhibit A to the Commission subpoena include the same

categories of communications “regarding or in any way related to the Election in Wisconsin.” (*Id.*) The demand for documents and testimony regarding or in any way related to the November 2020 general election is unreasonably overbroad and imprecise.

The exhibits to the Subpoenas also try to identify the communications in question as involving not only specified municipal officials, and specified non-governmental persons and organizations, but also communications with “any other employee, representative agent, or other person affiliated with them.” (*See* Compl. Ex. B, C.) That demand is also unreasonably overbroad and imprecise.

All of these objectionable demands must be narrowed and clarified before Administrator Wolfe and the Commission can reasonably be required to comply with the Subpoenas.

III. The balance of equities, the status quo, and the public interest all favor enjoining enforcement of the Subpoenas.

In addition to the legal flaws in the Subpoenas, this Court may consider additional factors as support for the temporary relief requested here. *See* Wis. Stat. § 813.02(1)(b); *see also Madison Gas & Elec. Co.*, 250 Wis. at 62 (court’s exercise of discretion will be upheld unless clearly erroneous).

For one, the balance of equities favors immediate relief. To date, despite ongoing attempts by Plaintiffs to obtain agreement with the Office of Special Counsel about Plaintiffs' various objections to the Subpoenas, that Office has made no meaningful effort to address those objections. The Office has refused to commit to conducting any hearings within the statutory limitations (i.e., in the context of a Legislative hearing), refused to commit to any narrower terms for the subpoenas, and refused to withdraw the subpoenas while the parties negotiate. (Compl. ¶¶ 26–27.)

Conversely, Administrator Wolfe, on behalf of the Commission, previously provided testimony to the Committee on matters closely related to some of the topics in the Subpoenas. (*See* Compl. Ex. D.) Plaintiffs have also provided numerous documents to that Committee and have, as a show of extreme good faith, reproduced those documents to the Office of Special Counsel (subject to objections previously raised). Given the respective actions of the parties, equity strongly favors enjoining enforcement of the Subpoenas now, to protect Plaintiffs from the demand for a deposition whose legitimacy and scope are in serious legal doubt.

Finally, the public's interest will be best served by invalidating the unlawful Subpoenas. The process by which this investigation was undertaken, how the Office of Special Counsel has conducted itself, and how these Subpoenas were issued and pursued—mostly through YouTube videos and radio appearances—risk leaving the public with no faith in our laws or our legal system. Enjoining these patently unlawful Subpoenas is one immediate step toward preserving that faith in our systems.

CONCLUSION

This Court should enter an *ex parte* temporary restraining order prohibiting Defendants, their attorneys, or other representatives or agents, from taking any actions to enforce the Subpoenas or to seek sanctions for noncompliance with the Subpoenas, until such time as the Court may hear and decide Plaintiffs' request for a temporary injunction.

After a hearing, if the Court deems one necessary, this Court should enter a temporary injunction pursuant to Wis. Stat. § 813.02(1), prohibiting Defendants, their attorneys, or other representatives or agents, from taking

any actions to enforce the Subpoenas or to seek sanctions for noncompliance with the Subpoenas during the pendency of this case.

Dated this 21st day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that, unless personal service is waived, a copy of the above document will be personally served on:

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Dated this 21st day of October, 2021.

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