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CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2022AP0091

RICHARD TEIGEN
and RICHARD THOM,

Plaintiffs-Respondents,

v.

WISCONSIN ELECTION COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATE CAMPAIGN
COMMITTEE,

Intervenor-Defendant,

DISABILITY RIGHTS WISCONSIN,
WISCONSIN FAITH VOICES FOR JUSTICE and
LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Intervenors-Defendants-Appellants.

**REPLY IN SUPPORT OF DEFENDANT-CO-
APPELLANT'S MOTION FOR AN EMERGENCY STAY
OF A FINAL ORDER OF THE WAUKESHA COUNTY
CIRCUIT COURT ENTERED JANUARY 20, 2022, AND
A MODIFIED PERMANENT INJUNCTION ORDER
ISSUED JANUARY 21, 2022**

The Commission's emergency motion, dated January 21, 2022, seeks an order from this Court staying the circuit court's final order entered January 20, 2022, and its modification of the permanent injunction portion of the final order issued on January 21, 2022.¹ Pursuant to this Court's January 23, 2022 Order, the Commission replies to Plaintiffs-Respondents' response filed the same day.

I. Plaintiffs-Respondents rely on inapposite authority for stays pending an election.

Plaintiffs-Respondents rely on the wrong law regarding the standard for relief. Citing *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35 ("SEIU"), and *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, they assert that "the bar for allowing an ultra vires policy or law to remain in place is, and should be, very high." (Plaintiffs-Respondents' Response 5.) Neither of these cases involved a stay pending appeal, and neither involved the changing of

¹ The circuit court had not issued a written order by the time the Commission filed its emergency motion for a stay and has not as of the time of the finalizing of this reply brief.

election rules while an election was already under way, as is the case here.

For precedent relevant to stays either shortly before an election or once an election has begun, the U.S. Supreme Court decision of *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and Wisconsin Supreme Court decision of *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, are directly on point.

Plaintiffs-Respondents argue that *Purcell* only applies to federal courts. Whether this decision does or does not bind Wisconsin courts is academic because the reasoning behind the decision can be applied here. Further, the Wisconsin Supreme Court has adopted its reasoning in *Hawkins*. 393 Wis. 2d 629, ¶¶ 2–5. In that case, the petitioner asked for relief that would disturb an ongoing election mere days before the deadline to return absentee ballots, and the supreme court rejected that effort. The court explained that last-minute election changes can “cause confusion and undue damage to . . . the Wisconsin electors who want to vote.” *Id.* ¶ 5.

Plaintiffs-Respondents note that the particular source of voter confusion in *Hawkins*, varying versions of absentee ballots, was different (Plaintiffs-Respondents' Response 11 n.8.), but that is a distinction without a difference. The court did not rely on that fact. Instead, the supreme court recognized that changes to the election should not occur once absentee ballots have been sent to electors. *Id.* That is what has happened here.

Plaintiffs-Respondents also argue that *Purcell* applies only where a court seeks to “change” a state’s election laws but not when it “enforces” them. (Plaintiffs-Respondents' Response 11.) This is also incorrect. The cases counsel against a change in the voting status quo for upcoming or ongoing elections. If the court’s “enforcement” of a statute (presumably, Plaintiffs-Respondents mean to say “interpret”) changes that status quo, it should be stayed.

Here, the status quo is the interpretation of the law in effect prior to the court’s ruling—*i.e.*, the Commission’s interpretation as stated in the memoranda. Rather than keep the status quo, the circuit court’s final order upends it. A stay

here would do exactly what *Purcell* and *Hawkins* counsel: prevent the voter confusion resulting from eleventh-hour changes made to election rules.

Plaintiffs-Respondents suggest the last-minute change is no big deal because the interpretation is “recent.” (Plaintiffs-Respondents’ Response 5.) *Purcell* and *Hawkins* focus on the status quo, not just very longstanding practices. But at any rate, the challenged Commission memoranda were not issued recently but in early and mid-2020, and voters have relied on them in major elections. Moreover, until the final order of the circuit court here, there has never been a court ruling or other guidance notifying electors voting by absentee ballot that (1) they could not have another person mail or deliver an absentee ballot for them, or (2) that drop boxes—used throughout Wisconsin in the last several elections—were unlawful. Those rulings are entirely new. Indeed, Wisconsin residents heard praise for drop boxes from the Legislature almost a year and a half ago.²

² Tseytlin letter to Witzel-Behl, Sept. 25, 2020, available at http://www.thewheelerreport.com/wheeler_docs/files/092520troutman.pdf.

Plaintiffs-Respondents contend that changing the date by which the Commission must withdraw its memoranda to January 24 will have the guidance withdrawn before absentee ballots are sent out to electors. (Plaintiffs-Respondents' Response 7.) They misunderstand the laws underlying when clerks mail out ballots.

1. As the Commission explained at the circuit court January 21 hearing, each county clerk must deliver ballots to all the municipal clerks in his or her county *no later than* the 22nd day before the Spring Primary, *i.e.*, January 24, 2022. *See* Wis. Stat. § 7.10(3)(a). In turn, municipal clerks are statutorily required to deliver those absentee ballots to electors, and military and overseas electors, who have previously requested them, *no later than* the 21st day before the Spring Primary, *i.e.*, January 25, 2022, if the request is made before that day. *See* Wis. Stat. § 7.15(1)(cm). These two dates, therefore, *are deadlines*—the last day when these events can happen—not the first day. And, importantly, there is evidence that absentee ballots have indeed been mailed to electors. According to WisVote, where municipal clerks track

their absentee ballots as they are issued, as of 7:57 am on January 24, 2022, clerks had reported that 8,398 ballots had been sent out (based on the ballot-sent date they recorded in WisVote). (Affidavit of Meagan Wolfe ¶ 4.) In addition, some of those ballots have United States Postal Service (USPS) intelligent mail barcodes, where the USPS reports that 1,845 ballots have been delivered (or are out for delivery). (Affidavit of Meagan Wolfe ¶ 5.) The Spring Primary is therefore already underway.

Standing alone, the *Purcell/Hawkins* analysis compels a stay through the February 15 election. And the harm to the voters shows why those cases make sense.

Incredibly, Plaintiffs-Respondents shrug off any harm to the electorate if a stay is not granted. (Plaintiffs-Respondents' Response 5–6.) Their suggestion that municipal clerks can notify electors about the circuit court's proffered options for returning absentee ballots fails to grapple with how such notice can be provided in a timely and meaningful way to electors who may have already been sent their absentee ballots. (Plaintiffs-Respondents' Response 5.)

And their assertion that clerks should have taken action sooner—based on an oral ruling in a case none of the clerks were parties to (Plaintiffs-Respondents' Response 6)—is absurd. They offer no evidence that any clerks took such steps at that time or before they mailed out ballots. Electors received no notice and now would have to rely on confusing (and possibly conflicting) stories in the media about how to lawfully return their absentee ballots. Some may decide not to vote at all for fear of violating state election law. And what becomes of the votes of those electors who did not receive notice from the clerks but already had spouses place their absentee ballots in mailboxes or return them to the clerk's office? Will their votes be counted?

Plaintiffs-Respondents' "solution" for indefinitely confined voters who cannot go to a mailbox is perhaps even more distressing. The "numerous exceptions and carve-outs for voters with physical challenges" they cite (Plaintiffs-Respondents' Response 8) do not cover people with physical disabilities who live at home.

Implicitly recognizing that fact, they suggest that such voters seek a special service from the USPS. But that service is for *delivery* of mail to one's door, rather than to a curbside mailbox. And according to the website, it requires a doctor's recommendation and an evaluation by the USPS to see whether the applicant qualifies: "write a letter requesting this change and attach a statement from a Doctor. The doctor's statement should indicate you are unable to collect your mail from a curb or centralized mailbox. . . . Final determination on whether or not door delivery will be granted will be made by the Post Office." <http://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery>. This process is in no way an adequate or relevant remedy in the present circumstances for a disabled absentee voter to personally mail her ballot. If such voters follow the court's order, they will not be able to vote.

Plaintiffs-Respondents' determination to ignore the harm to the electors continues with a series of gotcha-type arguments, noting that the intervenors took too long to litigate the case, or that the Commission filed only an oral

motion for stay and joined Disability Rights Wisconsin's emergency motion for stay in the circuit court. They offer no support for their theory it is acceptable to harm the public because of the timetable of a case, or that the Commission's efforts to obtain an emergency stay in the circuit court required more than the steps it took.

Plaintiffs-Respondents complain that the Commission did not raise an argument in support of having more than mere possibility of success on the merits. (Plaintiffs-Respondents' Response 2 n.1); *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W. 225 For the purposes of an emergency motion for a temporary stay of the circuit court's final order and modified permanent injunction through the Spring Primary, *Purcell* and *Hawkins*, and certainly the harm to the voters, suffice. The emergency motion seeks a stay only for the time the ongoing election continues, not pending the entirety of the appeal. Under the *Gudenschwager* sliding scale, those facets of the third and fourth factors counsel granting the temporary stay.

The Commission focused on those factors because of the exigent time, not because the arguments on the merits lack merit. Just a brief summary illustrates that it has far more than a mere possibility of success on the merits of its appeal.

First, as to who may return an absentee ballot, the Commission's guidance conforms with state law. An elector "mails" or "delivers" her ballot under Wis. Stat. § 6.87(4)(b)1.³ when an agent acting on behalf of an elector mails or otherwise delivers her absentee ballot to the clerk or an authorized representative. "To mail" means "to send by the nation's postal system." *See Mail*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/mail> (last visited Jan. 24, 2022). And "to send" means "*to cause* a letter or package to go or to be carried from one place or person to another." *See Send*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/send> (last visited Jan. 24, 2022) (emphasis added). As long as the elector begins the mailing process—causing it to be send through the mail—she complies

³ "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1.

with the statute's language. Throughout the case, Plaintiffs-Respondents offered no other provision of law where an individual must himself place mail inside a USPS postal box in order to satisfy a statutory mailing or service requirement.

A contrary reading probably violates federal law. Under 52 U.S.C § 10508, “[a]ny voter who requires assistance to vote by reason of . . . disability . . . may be given assistance by a person of the voter’s choice.” The circuit court’s narrow “elector-only” interpretation of Wis. Stat. § 6.87(4)(b)1. forbids such assistance and would be vulnerable to pre-emption or constitutional attack to the extent the elector was disabled and could not bring the ballot to a mailbox herself. A stay by this Court would ensure the circuit court’s interpretation does not infringe on the voting rights of the disabled.

Second, the Commission’s guidance on drop boxes comports with state law, as well. Wisconsin Stat. § 6.87(4)(b)1. permits absentee ballots to be returned by “deliver[y] in person, to the municipal clerk.” On its face, the statute does not say “clerk’s office,” as many other election statutes do; it just says “clerk.” Where a municipal clerk has

authorized a secure drop box, an elector delivers a ballot to the clerk by placing it in that authorized box. Under the Commission's guidance, authorized representatives of the clerk who are election officials under Wis. Stat. § 5.02(4e), and who are legally equivalent to the clerk under Wis. Stat. § 5.02(10) then retrieve the ballots and return them to the clerk's office.

Plaintiffs-Respondents complain that drop boxes do not comply with the alternate site process under Wis. Stat. § 6.855, but they do not need to. That statute provides a way to creating alternate sites where the entire in-person absentee voting process takes place: a location where “electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned.” Wis. Stat. § 6.855(1). In contrast, all that happens at a drop box is the *delivery* of ballots. Indeed, Justice Hagedorn noticed that difference in his concurrence in *Trump v. Biden*, noting that section 6.855 procedures covered “a location not only where voters may return absentee ballots, but also a location where voters ‘may request and vote absentee ballots.’” 2020 WI 91,

¶ 56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (citation omitted).

Third, on Plaintiffs-Respondents' ch. 227 rule claims, the circuit court's declaration that the Commission memoranda are administrative "rules" was plainly wrong. The memoranda are not rules because they do not have "the effect of law." *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 942 N.W.2d 900. The Commission memoranda direct or impose no restrictions or requirements; they "provide information and guidance." The memoranda impose no criminal or civil forfeitures for violations. The circuit court's theory that they were "rules" because clerks tend to follow them ignored the statutory definition of what a rule is.

"As an election draws closer," "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 5. The circuit court's final order and modified permanent injunction do just that. Thus, the Commission respectfully asks this Court, no later than 2:00 p.m. today, Monday, January 24, 2022, to stay both orders of the circuit

court to allow the Commission's memoranda to remain in effect for the Spring Primary election running now through February 15.

Dated this 24th day of January 2022.

Respectfully submitted,

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