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DISTRICT II

August 19, 2024

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You are hereby notified that the Court has entered the following order:

2024AP1298 Disability Rights Wisconsin v. Wisconsin Elections Commission (L.C. # 2024CV1141)

Before Gundrum, P.J.

The intervenor-appellant, the Wisconsin State Legislature (the legislature) has filed a motion for relief pending appeal. Specifically, it asks for an order staying the circuit court's

temporary injunction pending a final decision in this appeal. Respondent Disability Rights Wisconsin (DRW), on its own behalf and on behalf of the other respondents to this action, has filed a response opposing a stay.

Respondents filed a complaint seeking declaratory relief and an injunction preventing municipal clerks, via Wisconsin Elections Commission (WEC), from applying WIS. STAT. §§ 6.87(3) and (4) so as to "deny voters with [print] disabilities the ability to receive, mark, and return their absentee ballot electronically." These statutes allow only military and overseas voters the option to receive their ballots via email, but still require that the ballots be mailed back to the municipal clerks. *See* § 6.87(3)(d). Before the circuit court, the WEC opposed the grant of the temporary injunction, as did the legislature, which was allowed to intervene in the action.

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The circuit court held a hearing and granted the temporary injunction, requiring municipal clerks to allow voters who "self-certify" as suffering from print disabilities, which refers to people who are blind or have manual dexterity issues, to receive absentee ballots via email and mark them electronically with the help of a "screen reader" or other technology. The court concluded that the statutory provisions that allow only military and overseas voters to receive ballots by email are "unenforceable as applied to absent electors … who self-certify to having a print disability," because said provisions "plainly appear to violate" the Americans with Disabilities Act and Rehabilitation Act.

The legislature appealed the injunction order to us[1] and also moved the circuit court for a stay of its order granting the temporary injunction. After holding a hearing, the circuit court denied the legislature's motion for a stay. The legislature then filed with us this motion for relief pending appeal, seeking a stay of the circuit court's order granting the temporary injunction.

When presented with a motion for relief pending appeal where, as here, the circuit court has already denied the same, this court must review the circuit court's decision under an erroneous exercise of discretion standard. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995). We will uphold the circuit court's decision if the circuit court "(1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** at 440.

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A stay pending appeal is appropriate when the moving party:

> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) shows that no substantial harm will come to other interested parties; and
>
> (4) shows that a stay will do no harm to the public interest.

Id. at 440. "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." ***Id.*** "[A] movant need not always establish a high probability of

[1] The appeal of the injunction order is currently pending before us with briefing scheduled to be completed by the end of August.

success on the merits." ***Id.*** at 441. "[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay." ***Id.*** "[M]ore of one factor excuses less of the other." ***Id.*** "However, the movant is always required to demonstrate more than the mere 'possibility' of success on the merits." ***Id.***

The factors related to a stay overlap some with those for the issuance of a temporary injunction. A circuit court may issue a temporary injunction if four criteria are fulfilled: (1) the movant[2] is likely to suffer irreparable harm if an injunction is not issued; (2) the movant has no other adequate remedy at law, (3) an injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. ***Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.***, 2023 WI 35, ¶17, __Wis. 2d __, 989 N.W.2d 561 (citing ***SEIU v. Vos***, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35). "The issuance of a temporary injunction is reviewed for an erroneous exercise of discretion." ***Id.*** at ¶18. Here, we consider whether the circuit court erroneously exercised its discretion in denying the legislature's request for a stay of the injunction order. For that, we review the stay factors in light of the injunction order factors.

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Whether "a 'strong showing" has been made that the legislature "is likely to succeed on the merits" of its appeal of the injunction order

For the first stay factor, the circuit court needed to consider, and we also consider, whether the movant, here the legislature, has made "a strong showing that it is likely to succeed

[2] In this case, the "movant" for the temporary injunction is the respondents, but the movant for the stay is the legislature.

on the merits of the appeal." Our supreme court has directed that "[w]hen reviewing the likelihood of success on appeal, circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis." ***Waity v. LeMahieu***, 2022 WI 6, ¶53, 400 Wis. 2d 356, 969 N.W.2d 263. In this case, we do review the injunction order under the erroneous exercise of discretion standard, as noted, however, we are also mindful that a significant underlying question is whether WIS. STAT. §§ 6.87(3) and (4) violate the Americans With Disabilities Act and Rehabilitation Act, as well as constitutional provisions, which are questions of law we review de novo. *See* ***In re Gwenevere T.***, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854 ("Whether a statute and the application of a statute are constitutional are … questions of law that we review independently."); ***Hazelton v. State Personnel Comm'n***, 178 Wis. 2d 776, 785, 505 N.W.2d 793 (Ct. App. 1993) ("Whether federal law preempts state law is a question of law.").

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Because full briefing on the merits of the appeal of the injunction order has not been completed, specific issues or arguments will not be discussed in extensive detail. Thus, this court's assessment of the merits of that appeal at this stage is necessarily preliminary. That said, we conclude there has been a "strong showing" the legislature will prevail on its appeal, because, at this stage, there is strong indication the circuit court erroneously exercised its discretion in issuing the injunction order. We explain why by considering each of the injunction factors.

With regard to the first injunction factor, in granting the injunction, the circuit court stated in its order that the respondents "showed they are likely to suffer irreparable harm because they showed, absent this injunction, they may be denied the right to vote. The loss of the right to vote is plainly not reparable." This appears erroneous, as the individual disabled respondents all unanimously indicated in their affidavits that they "have voted in nearly every election, whether

local, state, or federal" for more than the last decade, since at least as early as 2010. This means they have been able to successfully cast their votes—routinely and repeatedly—under the statutory voting scheme that, prior to the circuit court's injunction order, had been in place since 2011 Wis. Act 75 was enacted—which is the same voting scheme that would be back in place if we stay the circuit court's injunction order. Furthermore, all of the individual disabled respondents additionally averred, two months before the issuance of the injunction, that they also "plan to vote in the August 2024 primary and the November 2024 general election," indicating they are still able to vote under the pre-injunction absentee voting scheme.

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Less than two weeks after the circuit court issued the injunction order, it revised its view of "irreparable harm," as relevant to this case, with its order denying the legislature's stay request. In the stay order, the circuit court identified the "irreparable harm" inquiry as related to the respondents' "right to a *secret* ballot" and stated that *that* right "would be impaired at the November 2024 election" absent its issuance of the injunction order.

Two particular observations come to mind here. First, the record appears to provide no reason to believe any of the respondents will be unable to vote in the November election if we stay the injunction order because, as indicated, doing so would simply put back in place the voting scheme under which they have successfully voted time and time again since the enactment of Act 75. The fact that they may only be able to do so with the assistance of another person is the same circumstance under which they have regularly and successfully voted, even if that is in a less private and independent manner than they desire.

And second, as to a "secret" ballot, while the circuit court's injunction order *may* allow for some voters with a print disability to vote in a more private and independent manner, at this

early stage of the proceedings, it is not clear if that will actually prove to be true and for how many voters. The respondents not only sought an injunction that would allow them to receive and mark their ballot electronically, but they also sought to be able to *return* it to the elections clerk electronically. Yet, the circuit court intentionally left out this latter request from its injunction order by stating that "this order shall *not* be construed to permit electronic return of a marked absentee ballot."[3] (Emphasis added.) That would appear to mean that while print-disabled voters may be able to receive and, *if* they have the necessary technology, mark their ballot electronically, they would still have to retrieve their completed, printed-off ballot from a printer, fold it, place it into an envelope that meets statutory requirements, and then return it to the elections clerk.[4]

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[3] We assume the circuit court declined to order electronic return of ballots due to security concerns that would accompany such a manner of return.

[4] As the injunction is written and in light of comments the circuit court made in its order denying the stay, there is strong reason to believe WEC will follow procedures similar to those required by the statutes for electronically sending ballots to military and overseas voters. *See*, *e.g.*, WIS. STAT. § 6.87 (3), (4). The circuit court stated: "The Court has heard that municipal clerks already send ballots by email to overseas and military voters who self-certify their eligibility. The only difference in the Temporary Injunction is that the ballots sent by the municipal clerks to voters with print disabilities must be accessible."

Significantly, the statutes further provide that the ballot "shall not be counted" unless it is cast in the specifically described manner.[5] The affidavits of the four print-disabled respondents raise serious question, based on the extent of their self-identified and explained disabilities, as to whether they would be able to execute in the first instance all of the necessary functions to return a ballot without any assistance, and if needing assistance, whether they could utilize the assistance in a manner which successfully conceals their vote from that person and also does not

[5] Our statutes provide significant specificity with regard to how absentee voting is to proceed. For example, WIS. STAT. § 6.87 provides:

> (2) … [that the absentee voter] certif[ies] that [he/she] exhibited the … ballot unmarked to the witness, that [*the absentee voter*] then in [the witness's] presence and in the presence of no other person marked the ballot *and enclosed and sealed the same in this envelope in such a manner that no one but [himself/herself]* and any person rendering assistance under [WIS. STAT. §] 6.87(5), if [he/she] requested assistance, *could know how [he/she] voted*.
>
> …
>
> (3)(d) … If the clerk transmits an absentee ballot to a military or overseas elector electronically, the clerk shall also transmit a[n] … electronic copy of the text of the material that appears on the certificate envelope prescribed in sub. (2), together with instructions prescribed by the commission. The instructions shall *require* the military or overseas *elector* to make and subscribe to the certification as required under sub. (4)(b) and *to enclose the absentee ballot in a separate envelope* contained within a larger envelope, that shall include the completed certificate…. Except as authorized in [WIS. STAT. §] 6.97(2), an absentee ballot received from a military or overseas elector who receives the ballot electronically *shall not be counted unless* it is cast in the manner prescribed in this paragraph and sub. (4) and in accordance with the instructions provided by the commission.
>
> (4)(b) … The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast. *The elector shall* then, still in the presence of the witness, *fold the ballots* so each is separate *and so that the elector conceals the markings thereon and deposit them in the proper envelope*.

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invalidate their ballot.[6] It is not at all clear that the injunction order as structured would enhance privacy or independence in respondents' casting of their votes in the November 2024 election, and attempting to cast their votes in the manner directed by the circuit court in its injunction order creates an additional risk that their ballots might not be counted.

Thus, even if we ultimately determine these voters have a right to the more private and independent voting process they seek, because the injunction order as structured does not appear to satisfactorily protect that "right," it is not at all clear that staying the injunction order will irreparably harm these or other print-disabled voters. We conclude the circuit court erred in denying the stay motion on the basis that, absent the injunction, respondents' right to vote in the November election would be harmed and, alternatively, because the circuit court's order does not appear to alleviate the privacy and independence harms respondents seek to alleviate.

As to the second injunction consideration, whether the respondents have any other adequate remedy at law, the circuit court merely stated in its injunction order that the respondents "have no other adequate remedy at law because 'an individual cannot vote after an

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[6] Respondents indicate in their complaint, for example, that two of the respondents "do not have sufficient control of their hands" to mark a ballot; the affidavits of those two respondents support that assertion. Several of the respondents indicate in their affidavits that they would be able to mark their ballot themselves electronically with the assistance of audible technology. WISCONSIN STAT. § 6.87(4)(b) states that "[t]he absent elector, in the presence of [a] witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast." If a voter marks his or her ballot both audibly and in the presence of a witness, such audible marking would appear to run the risk of exposing the voter's preferences to the witness. Respondents indicate in their complaint, for example, that two of the respondents "do not have sufficient control of their hands" to mark a ballot; the affidavits of those two respondents support that assertion. Several of the respondents indicate in their affidavits that they would be able to mark their ballot themselves electronically with the assistance of audible technology. WISCONSIN STAT. § 6.87(4)(b) states that "[t]he absent elector, in the presence of [a] witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast." If a voter marks his or her ballot both audibly and in the presence of a witness, such audible marking would appear to run the risk of exposing the voter's preferences to the witness.

election has passed,'" citing ***Common Cause Ind. v. Lawson***, 327 F. Supp. 3d 1139, 1154 (S.D. Ind. 2018), *aff'd*, 937 F.3d 944 (7th Cir. 2019). As indicated above, however, the record directly contradicts the circuit court's implicit conclusion here that respondents will not be able to vote in the November election without the injunction.

Again revising itself in its subsequent order denying the stay request, the circuit court stated that the injunction it issued was the only adequate remedy at law because "the right to a *secret* ballot or any other fundamental part of the right to vote, once lost in an election, cannot be reclaimed for that election" and without the injunction, the respondents "and similar voters with print disabilities … could be forced to compromise their right to a secret ballot so that they could exercise their right to vote in the November 2024 election." (Emphasis added.) But, as also indicated above, it is not at all clear that the injunction as the circuit court structured it is itself an "adequate remedy at law" to ensure the privacy and independence of a print-disabled person's vote.

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On the third injunction factor, whether an injunction is necessary to preserve the status quo, there is strong indication the circuit court clearly erred. The circuit court stated that this factor supported its issuance of the injunction because the respondents "showed an injunction is necessary to preserve the status quo *because* nobody disputes that '*before* [2011 Wis.] Act 75's passage, voters with disabilities could request and receive an electronic absentee ballot by email that 'allowed a voter to use a screen reader to mark their ballot.'" But the law *before* passage of Act 75 is not the pre-injunction status quo—the law *after* its passage is the status quo. Here, issuance of the injunction upends the status quo—the very status quo that had allowed the individual respondents to repeatedly and routinely successfully cast their ballots. This factor

bears all the hallmarks of an erroneous exercise of discretion in that the circuit court appears to have clearly misunderstood this important injunction factor.

At one point, our supreme court stated that "[t]emporary injunctions are to be issued *only when* necessary to *preserve* the status quo." ***Werner v. A.L. Grootemaat & Sons, Inc.***, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Just two years ago, our court reiterated, but somewhat softened, this holding, stating that "[a]t times, this court has also noted that '[t]emporary injunctions are to be issued only when necessary to preserve the status quo." ***Waity***, 400 Wis. 2d 356, ¶49 (quoting ***Werner***, 80 Wis. 2d at 520). Because in issuing the injunction, the circuit court appears to have misunderstood the status quo as relevant to this case, and issued the injunction not to preserve the status quo but to do exactly the opposite—disrupt it—the status quo factor and the court's erroneous consideration of that factor alone weigh heavily against the circuit court's issuance of the injunction and thus also its denial of the stay. Were this August 19, 202***3***, the question before us would have a slightly different flavor to it. But it is August 19, 2024—just weeks from the distribution of absentee ballots. To sow confusion with clerks and voters, rather than maintain the status quo, weighs heavily in favor of granting the stay.

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With regard to the final injunction factor—whether the respondents have a reasonable probability of success on the merits—the circuit court issued its injunction based on its conclusion that "the statutes they seek to enjoin plainly appear to violate federal protections for the disabled under the Americans with Disabilities Act and the Rehabilitation Act." The court also noted several nonbinding cases from other jurisdictions that respondents had cited in support of their position. The court provided no legal analysis for its "plainly appears" conclusion, in either its injunction order or its order denying the stay request, which failure could be considered

an erroneous exercise of discretion in and of itself. Moreover, its determination with regard to this injunction factor appears at odds with its conclusion in its order denying the stay request that given the fact that the legal issues in this case are "unsettled" and "*de novo* review" applies, "the legislature benefits from the presumption of constitutionality on at least some of the claims and may prevail on the merits of the appeal." Such a determination, of course, supports the issuance of a stay of the injunction order, yet the circuit court denied the stay request.

Respondent's injunction request, granted in part[7] by the circuit court, appears to be challenging the constitutionality of the state's statutory scheme for absentee voting—challenging duly enacted statutes as well as the absence of legislative enactments, the combination of which, respondents assert, results in a violation of respondents' rights. But, as our supreme court has stated, "regularly enacted statutes are presumed to be constitutional," and thus, "for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal" where the challenge is to the constitutionality of the statutes. ***Gudenschwager***, 191 Wis. 2d at 441. As to the interplay between the Americans With Disabilities Act and the Rehabilitation Act and the challenged statutes, again, the circuit court provided no legal analysis to hang its hat on, and without the benefit of more thorough briefing, which we expect to be forthcoming in the substantive appeal of the injunction order, we must continue to presume that the duly enacted statutes the respondents challenge are legally sound.

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[7] We say granted "in part" because, as noted, the circuit court's injunction did not allow for electronic return of ballots as the respondents requested.

Based upon the foregoing, there is more than a "mere possibility" the legislature will succeed on the merits in its appeal of the circuit court's injunction order; rather, a strong showing has been made that it is "likely to succeed" in showing that the circuit court erroneously exercised its discretion in issuing the order.

Injury to the legislature, harm to other interested parties, and the public interest

The final three stay factors are whether the legislature has shown that "unless a stay is granted, it will suffer irreparable injury," that "no substantial harm will come to other interested parties," and that "a stay will do no harm to the public interest." ***Gudenschwager***, 191 Wis. 2d at 440.

As part of the irreparable harm consideration, we evaluate "whether the harm can be undone if, on appeal, the circuit court's decision is reversed." ***Waity***, 400 Wis. 2d 356, ¶57. "If the harm cannot be 'mitigated or remedied upon conclusion of the appeal,' that fact must weigh in favor of the [stay] movant," here the legislature. ***Id.*** (quoted source omitted). The legislature will suffer "substantial and irreparable harm" from a duly enacted statute being declared unenforceable and enjoined before any appellate review of that decision can occur. As to harm to other interested parties, the record indicates that if the interested parties experience any harm, that harm will not be substantial. And as to harm to the public, it appears as if the public will suffer no harm by a stay but will in fact be benefitted by it.

Despite denying the stay request, the circuit court stated in its order that "the legislature has shown that it will suffer this irreparable injury—that of a statute being enjoined—if the stay is not granted." We agree.

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In briefing opposing the legislature's stay request, respondents in essence assert that the legislature would suffer no harm if the stay is not granted because it "plays no role in *enforcing* the law." (Emphasis added.) But, the legislature did play a very necessary and critical role in enacting the current statutory voting scheme, and it did not do so so that scheme could be ignored or unenforced. Disregard of duly enacted laws of course harms the legislature and the public it represents; laws are not enacted for the purpose of accomplishing nothing. As respondents indicated in their complaint, the pre-injunction absentee ballot voting scheme—which does not allow for the sending of ballots via email except to military and overseas voters—was not adopted by the legislature as a "mere oversight"; rather, it "[is] the product[] of a legislative choice."

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Indeed, the legislature's interest here is highlighted by WIS. STAT. § 803.09(2m), which provides:

> When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene … at any time in the action as a matter of right….

As the circuit court acknowledged in its order denying the stay, "the legislature has an interest in defending the validity of the statutes." *See* ***Democratic Nat'l Comm. v. Bostelmann***, 2020 WI 80, ¶8, 394 Wis. 2d 33, 949 N.W.2d 423 (stating that WIS. STAT. § 803.09(2m) "unmistakably grants the legislature an interest in defending the validity of state law when challenged in court."). While the question of the legislature's intervention is not before us in this particular appeal, § 803.09(2m) and ***Bostelmann*** highlight the legislature's interest in protecting its lawmaking/public policy making function. In this case, the circuit court's injunction order

appears to usurp that function by essentially rewriting WIS. STAT. § 6.87 to effectively add "print-disabled" electors to the list of electors who currently may electronically receive ballots, those being only military and overseas electors, while also adding the additional requirement that the email ballots be "accessible absentee ballots."[8] The court's order appears to be an attempt to amend the statutes by judicial fiat rather than the bicameral process for an amendment of a statute, where legislation passes both houses of the legislature and then is either signed by the governor or if vetoed, the veto overridden by two-thirds of both houses of the legislature. Usurping the legislature's lawmaking/policymaking role harms not only the legislature as an institution and separate branch of government but the public interest the legislature represents as well.

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After recognizing the legislature's interest, the circuit court erred in then concluding that the legislature would not suffer irreparable injury absent a stay of the court's temporary injunction order because it has been allowed to intervene in this case and appeal the injunction order. But, the legislature has an interest in protecting its role in enacting laws/public policy for the state, and here, again, the irreparable harm is that the injunction order appears to undermine that role with the judiciary effectively enacting public policy contrary to that enacted by the legislature. The injunction order upsets the apple cart in this regard and causes irreparable harm to the legislature's role as the lawmaking/policy making branch of government. The legislature intended its chosen absentee ballot voting scheme to be in place for every election, and certainly one as important as a national presidential election.

[8] In its injunction order, the circuit court defines an "accessible absentee ballot" as a ballot that is "capable of being read and interacted with, including marked, by a voter with a print disability using digital assistive technology such as a screen reader."

In considering whether any "substantial harm will come to other interested parties," we again note that the "substantial harm" respondents hang their hat on in this lawsuit is not that the state of the law pre-injunction *prohibits* them from voting; indeed, as noted, each has averred that they have voted in nearly every election for over the past decade and intend to do so again in the November election. The harm they rely on is their inability to vote "independently and privately," i.e., without the assistance of another person in casting their vote.

While we may ultimately agree that the inability to vote independently and privately, as nondisabled voters are able to do, is a "harm" for the respondents, we cannot conclude that casting one more vote, in the November 2024 election, in the same manner each has done for well over a decade, rises to the level of "substantial" harm, especially in light of the fact that the injunction order itself does not appear to meaningfully enhance their independence and privacy in voting. Significantly, with the stay, respondents will still be able to cast their ballot, again, in the same manner they have successfully done repeatedly over the years.

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In considering potential harm to the public interest, strong indications are that the public will be benefitted by a stay, not harmed by it. The circuit court concluded that "granting the stay would tend to exacerbate" the same harms the legislature claims are caused by the granting of the injunction—"confusion and that there is not enough time before the November 2024 election for WEC to implement the remedy ordered in the Temporary Injunction … [without] increasing confusion among the affected voters." This is an erroneous conclusion. With the granting of a stay, print-disabled voters will simply proceed with the same voting processes that have been in place for over a decade now and that have successfully enabled each of the individual respondents in this case to "vote in nearly every election, whether local, state, or federal" over those years. Moreover, as indicated, the public has a strong interest in the laws enacted by the

legislators they elect being effectuated and implemented as written and in national elections proceeding smoothly based upon familiar and well-established laws, not laws made by judicial intervention weeks before voting begins. As our supreme court has stated: "[T]he public as a whole suffers irreparable injury of the first magnitude where a statute enacted by its elected representatives is declared unenforceable and enjoined before any appellate review can occur." ***SEIU, Local 1 v. Vos***, No. 2019AP622, Wis. S. Ct. Order at 8 (June 11, 2019).

Further related to the public interest, as well as the consideration of whether respondents are "likely to suffer irreparable harm if an injunction is not issued," we note insightful comments from counsel for WEC at the hearing on the legislature's motion to stay the injunction order. Counsel made clear that WEC "is not opposing or supporting the Legislature's motion" to stay, but also explained that that "does not mean that [WEC is] now fully in favor of the Temporary Injunction … Order." "[G]iven the proximity to the election," counsel stated, WEC "felt it had no choice but to begin the *complex process* of determining how to comply with the Temporary Injunction Order without the back and forth and the potential uncertainty of an appeal." (Emphasis added.) Counsel explained WEC's understanding that pursuant to the injunction "its duties include to provide guidance and training to Clerks about the existence of the Temporary Injunction Order and what it means …[:]

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> For example, what the definition of "Print Disability" is [and] explaining that further to the Clerks in a written guidance;
>
> What it means to self-certify as having a Print Disability and how one would do that;
>
> What it means to have an accessible ballot;
>
> That this only applies to the November Election, and that it only applies to sending and marking of ballots; but that return of ballots would still have to be done in the normal way, meaning by mail with all the requirements for returning an absentee ballot by mail.

> The guidance I think would also generally explain what the commission understands would be needed to make a ballot accessible; so what technology would be needed.

Counsel made clear that WEC "does not control what the clerks do and don't do," and added:

> And as we understand it, we can provide guidance to the clerks, but we can't guarantee that they will understand it. We can explain what technology [WEC] believes would be necessary to make a ballot accessible, but we're not providing that technology, and we don't know what clerks may or may not be able to provide ….
>
> And then … there would also be some information provided to voters. Again, similarly, we don't know what technology voters may or may not have, and, again, they may not understand the information that is provided to them.

Counsel stated that "this is what WEC is working on in order to comply with the Court's order."

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The circuit court then asked counsel: "So in terms of the work that has been done, you kind of mentioned some different pieces related to technology, education. Has [WEC] already begun most of that work?" Counsel responded: "[WEC] has begun *discussions* on it, and … there has been some *research and discussion* on how to do it. The guidance has not been developed yet …." (Emphasis added.) When the circuit court asked counsel if granting the legislature's request for a stay of the injunction "would … complicate [WEC's] work as its getting ready to prepare for the Election," counsel responded, "It would *not* complicate [WEC's] work at this point.… We're still at the planning stages at this point." (Emphasis added.) Of course granting the stay would not complicate matters, because granting it allows WEC to stop diverting staff time, resources and thought processes to trying to sufficiently implement the circuit court's new voting procedures and instead allows it to simply proceed with absentee ballot procedures in the same manner they have for years.

WEC's in-court representations—from less than three weeks ago—give strong indication there is a likelihood of confusion and uncertainty for print-disabled voters if the injunction is not stayed. Statutory provisions previously referenced appear to indicate there is an increased risk that print-disabled voters' ballots may not be counted under the circuit court's injunction procedures. Absentee ballots will be going out from local clerks within weeks. If the stay is granted, the November election will proceed in the same manner it has for years, creating no confusion for voters, disabled or otherwise. Moreover, a stay will alleviate the apparent injunction-created risk of print-disabled voters' ballots not being counted due to a physical inability to properly execute the statutorily required absentee ballot procedures or due to confusion by either clerks and/or voters as to issues WEC counsel raised and other obvious issues, such as who qualifies as having a "Print Disability," "[w]hat it means to self-certify as having a Print Disability and how one would do that" (including adequate safeguards to limit opportunities for fraudulent representations of a print disability in order to receive a ballot by email), what to do if the technology on the voter's computer does not work as needed, among multiple other issues. The question of "what technology would be needed" "to make a ballot accessible"—technology WEC will not be providing and has no idea as to "what clerks may or may not be able to provide" is also a consideration. Counsel was frank in her representation to the court that voters may not have the necessary technology, clerks may not understand guidance provided by WEC in an attempt to satisfy the injunction order, and voters "may not understand the information that is provided to them" regarding procedural changes for print disabled voters.

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The new procedures ordered by the circuit court with its injunction order *might* be a step in the right direction to increase privacy and independence for print-disabled voters *if* WEC can develop proper guidance and sufficiently educate clerks and voters regarding the new procedures

and what technology may be necessary to utilize the new procedures. However, to try to shoehorn in such a step at this late stage of the election cycle through the "complex process" the circuit court has ordered with its injunction, creates a risk of disenfranchisement due to clerk or voter error, or both. While voters with a "Print Disability" do not appear to in any way be required to utilize the new procedures ordered by the court's injunction, that does not reduce the risk of disenfranchisement due to confusion for the, no doubt, many voters that would attempt to rely on the circuit court's new procedures. Granting a stay appears to safeguard print-disabled voters' right to vote, while denying it appears to put that right at risk. And as to the secrecy of the vote for print-disabled voters, again, it is not at all clear that the circuit court's injunction will improve secrecy. There does not appear to be a significant privacy and independence advantage of the court's injunction order over the pre-injunction status quo.

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Respondents' objectives to cast their vote privately and independently are important and must be given full and fair consideration upon full briefing. But to sow the confusion that could well be caused by jamming those objectives on WEC, local clerks, and voters in the weeks leading up to the November national elections runs a substantial risk of doing more harm than good, even for print-disabled voters.

This court concludes the circuit court erroneously exercised its discretion in declining to stay its order granting respondents' temporary injunction and that the temporary injunction must be stayed pending the disposition of this appeal. Therefore,

IT IS ORDERED that the legislature's motion for a stay is granted and the circuit court's temporary injunction is stayed pending disposition of this appeal.

Samuel A. Christensen
Clerk of Court of Appeals