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Clerk of Circuit Court
Waukesha County
2021CV000958

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

Branch 1

RICHARD TEIGEN, et al.,

Plaintiff,

-vs-

File No. 2021-CV-000958

WISCONSIN ELECTION COMMISSION,

Defendant.

MOTION HEARING

Proceeding held on January 21, 2022

BEFORE THE HONORABLE MICHAEL O. BOHREN
CIRCUIT COURT JUDGE, PRESIDING

A P P E A R A N C E S

LUKE N. BERG, Attorney at Law, appeared on behalf of the Plaintiffs.

STEVEN CARL KILPATRICK, Attorney at Law, appeared on behalf of Defendant, Wisconsin Election Commission.

JOHN M. DEVANEY, Attorney at Law, appeared on behalf of Defendant, Democratic Senate Campaign Committee.

SCOTT THOMPSON, Attorney at Law, appeared on behalf of Defendants, Disability Rights of Wisconsin, Faith Voices for Justice, and the League of Women Voters of Wisconsin.

ORIGINAL

ROSE MARIE RODERICK
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

1
2 THE COURT: The Court will call the matter
3 of Richard Teigen, Richard Thom versus Wisconsin Election
4 Commission; Intervening Defendant, Democrat Senate
5 Campaign Committee; Intervening Defendants, League of
6 Wisconsin -- League of Women Voters of Wisconsin,
7 Disability Rights of Wisconsin, and Faith Voices for
8 Justice, 21-CV-935. This is a motion hearing. All
9 appearances today are by Zoom. We are Live streaming the
10 proceedings as well.

11 So who appears for the Plaintiffs
12 today?

13 MR. BERG: Luke Berg with the Wisconsin
14 Institute for Law and Liberty on behalf of Plaintiffs.

15 THE COURT: Thank you. Good afternoon.
16 Who appears for the Elections Commission?

17 MR. KILPATRICK: Assistant Attorney
18 General, Steven Kilpatrick, with the Wisconsin Department
19 of Justice for the defendant, Wisconsin Election
20 Commission.

21 THE COURT: Thank you. Who appears for the
22 the Democratic Senate Campaign Committee?

23 MR. DEVANEY: Good afternoon, Your Honor,
24 John Devaney on behalf of the DSCC.

25 THE COURT: Thank you. Good afternoon.

1 Who appears for the League of Wisconsin Women Voters of
2 Wisconsin, Disability Rights of Wisconsin, and Faith
3 Voices for Justice?

4 MR. THOMPSON: Good afternoon, Your Honor.
5 Scott Thompson from Law Forward appears on behalf of those
6 intervener defendants.

7 THE COURT: Thank you. Good afternoon.
8 Thank you for being able to come in a half-hour later.
9 The morning calendar lasted longer than we anticipated,
10 but we're here today on the motion filed by the
11 intervening defendants. I'm going to call them the League
12 Group just for shorthand. That's Attorney Thompson's
13 group.

14 We met here on the 19th, on Wednesday, to
15 schedule it. We put it off to this afternoon to give
16 Plaintiffs an opportunity to respond. I did receive
17 yesterday a timely Plaintiff response, and I have received
18 nothing else with regard to the motion.

19 So with that then, I'm prepared to
20 proceed and I'll hear from Attorney Thompson.

21 MR. THOMPSON: Thank you, Your Honor. Your
22 Honor, I'd just like to acknowledge here from the outset
23 that our two-page motion received an eleven-page response,
24 so I'm going to structure my argument to somewhat mirror
25 the way that Plaintiffs presented their arguments, mostly

1 for the Court's convenience, and sort of follow them in
2 that order.

3 THE COURT: Thank you.

4 MR. THOMPSON: Of course. So your Honor,
5 there are three key issues I would like to rebut from the
6 Plaintiff's motion. They make three central arguments,
7 all of which this Court should disregard, and I'm going to
8 start with the first one. Defendants argue that *Purcell*,
9 which is the United States Supreme Court decision upon
10 which our motion is premised, that it applies only to
11 federal courts.

12 THE COURT: You said Defendants, I think
13 you meant the Plaintiffs.

14 MR. THOMPSON: I certainly did. Thanks for
15 catching me there, Your Honor. Late on Friday, hopefully
16 it will be the last one.

17 THE COURT: That's okay. We're all
18 understanding.

19 MR. THOMPSON: Appreciate it. Your Honor,
20 regardless, *Purcell* is not limited to federal courts.
21 That's true for four reasons: First, decisions of the
22 Supreme Court of the United States on voting rights issues
23 like this one are supreme in Waukesha County and
24 everywhere else in our country. *Purcell* weighs on the
25 protection of the right to vote. The core policy concern,

1 as Plaintiffs concede, is with threats to voter confusion,
2 that the voter is the issue. This is indisputably federal
3 constitutional grounds to which the Supreme Court has the
4 final say, and say it has.

5 Now practically speaking, this concern
6 about voter confusion exists, regardless of whether it is
7 a federal court or state court hearing the dispute. And
8 it makes sense that the Supreme Court's direction from
9 *Purcell* applies here today. Second, the *Purcell* decision
10 is not self-limiting. You will find nothing in the
11 language of the *Purcell* decision confining its rules to
12 federal courts.

13 Defendants have -- strike that. Plaintiffs
14 have not offered anything that would rewrite or limit
15 *Purcell*. Frankly, there is nothing that has rewritten or
16 limited *Purcell*. There is no subsequent decision
17 affirmatively ruling that it can be ignored by state
18 courts. That's just not the law.

19 Now relevant here, the operating language
20 from *Purcell*, what we're really concerned about, it
21 actually mirrors the scenario before this court. *Purcell*
22 concerned a situation like here where a lower court had
23 issued an injunction. The relevant portion reads: "Given
24 the imminence of the election and the inadequate time to
25 resolve the factual disputes, our action today shall of

1 necessity allow the election to proceed without an
2 injunction."

3 Now, the factual dispute in *Purcell*, at
4 least as it was pending at that moment, was largely over
5 potential voter disenfranchisement, so that's key. The
6 only difference here between *Purcell* and the instant case
7 weighs in favor of a stay and my clients, because the only
8 evidence in the record demonstrates that undoubtedly this
9 decision will trigger disenfranchisement in Wisconsin.
10 Third, although subsequent decisions generally describe
11 *Purcell* in relation to federal courts, this must not be
12 mistaken for a new decision that truncated or otherwise
13 limited *Purcell*.

14 Again, no one has rewritten that decision.
15 It makes sense, Your Honor, that subsequent decisions
16 would refer to *Purcell's* relationship with federal courts.
17 It makes sense as dicta. And that's because most
18 challenges to election law and voting rights are filed in
19 federal courts, who generally oversee this variety of
20 constitutional questions.

21 Finally, if there was any doubt, Your
22 Honor, on *Purcell's* application in Wisconsin, I argue that
23 our Supreme Court has removed it. The Wisconsin Supreme
24 Court has invoked *Purcell* repeatedly, once in a
25 controlling opinion that assessed the viability of the

1 state election statute, that was *Milwaukee Branch of the*
2 *NAACP v. Walker*, 2014 WI 98, Paragraph 94; twice in
3 dissents that were offered by Justice Grassl Bradley last
4 year, that was in *Zignego v. WEC* case and the *Trump v.*
5 *Biden* case.

6 In total, Your Honor, it's clear that
7 *Purcell* certainly applies in the circumstance, and the
8 practical concern, the policy concerns, about voter
9 confusion are going to be present, regardless if a federal
10 court is intervening in an election statute right before
11 an election or if it's a state court. We can all
12 recognize that no matter who's making the ruling, the
13 people of Wisconsin are going to be affected.

14 The second larger point, Your Honor,
15 Plaintiffs argue that *Purcell* is designed to prevent
16 changing the law. Plaintiffs argue that this court has
17 not changed the law, so *Purcell* is irrelevant. Ultimately
18 what this question is about, Your Honor, is about what the
19 world was like two weeks ago before this Court issued its
20 decision. What was the status quo and did it change, did
21 this court change the law.

22 In a case that the Plaintiffs cited out of
23 the Fourth Circuit, *Wise v. Circosta*, the court said it's
24 state decisions that establish the status quo. So Your
25 Honor, I want to take you through the state decisions that

1 demonstrate that the status quo is not the law in relation
2 to how this court ruled last week.

3 Former Governor Scott Walker signed the
4 2015 Wisconsin Act 118 in December of 2015. This act
5 created the Elections Commission. This act, this
6 decision, vested the Elections Commission with the power
7 to administer our elections. This body, through its
8 administrator, issued the guidance documents in 2020. The
9 status quo ante here, Your Honor, is in these guidance
10 documents. And the legislature of the State of Wisconsin
11 certainly agreed.

12 In a letter dated September 25, 2020, after
13 both the relevant guidance documents were issued through
14 Counsel Assembly Speaker Robin Vos and former State Senate
15 Leader Scott Fitzgerald wrote to the Municipal clerk of
16 Madison and said, I quote, Voters may deposit their
17 completed absentee ballots in authorized drop boxes, which
18 must be secured and locked at all times to protect ballot
19 integrity.

20 They went on, "We wholeheartedly support
21 voters' use of any of these convenient, secure, and
22 expressly authorized absentee ballot return methods." So
23 the governor authorized the Elections Commission to issue
24 this guidance. The state legislature clearly understood
25 that it complied with the law.

1 Now Plaintiffs, they try to conceal this as
2 best as they can, but even the language in their brief
3 reflects a change in the law. On Page 5 of their brief
4 they sort of inartfully claim that this court has, quote,
5 unquote, restored as opposed to changed the laws.

6 Anyone who has restored anything can tell
7 you the process of restoration is one of change. And
8 Plaintiff's other representations to this court confirm
9 this. Plaintiff's counsel went so far as to request that
10 this Court take judicial notice of the fact that drop
11 boxes exist in Plaintiff's community. Now, they had to do
12 this because Plaintiffs testified that they had no idea if
13 there were drop boxes in their community.

14 And again, one of the Plaintiffs doesn't
15 know who the Elections Commission is and, before he was
16 deposed, had never even looked at the guidance documents.
17 So drop boxes exist in our communities, it's undisputed.
18 I think our court might have taken judicial notice of that
19 fact. The status quo, Your Honor, will change as a result
20 of this Court's ruling.

21 Now, it's important to recognize that the
22 change here is the result not of a new statute, Your
23 Honor, but it's a result of how this court has construed a
24 statute. So until this Court ruled, this was not clearly
25 the law. Plaintiffs themselves submitted an affidavit in

1 support of their summary judgment motion to this court
2 where they said they were confused about what the law was.

3 Your Honor, other examples crystalize this
4 point. One that I think is extremely helpful is actually
5 qualified immunity. In qualified immunity, a court has to
6 ask two questions: First, was the constitution violated;
7 second, was it clear that the violation was known to the
8 police officer or the violator when it occurred. Now,
9 this is a perspective standard. It's overlooked. It
10 recognizes that when the Supreme Court of the United
11 States, for example, construes the Fourth Amendment, it
12 provides new standards that police officers must follow.

13 That doesn't mean that the language of the
14 Fourth Amendment is changing, but it certainly means that
15 the law is changing. The same is true here. When this
16 Court construes our election laws for the first time, our
17 understanding changes. The law has changed. Again,
18 former Governor Walker, in concert with the legislature,
19 made a decision to create the Elections Commission and
20 empower it to administer our election.

21 The State itself, through the Department of
22 Justice, is here defending the case. The legislature
23 itself has the power, if it so decides, to intervene on
24 its own and provide its own expression of its position.
25 It has refused to do so. The only people identified in

1 the record, Your Honor, who understood or believed this
2 law was as it is now construed under this Court's previous
3 ruling are the two voters in Waukesha, against literally
4 everybody else.

5 So in order to follow the direction of the
6 Supreme Court of the United States in recognition of the
7 change of the law, that is now just weeks away from the
8 next election, this Court should stay the decision as
9 requested.

10 And finally, Your Honor, I want to touch on
11 confusion. Plaintiffs make the argument that *Purcell*,
12 even if it does apply, there's no confusion in the record
13 because the state law is clear. Again, first, the
14 Plaintiffs themselves have testified in the complete
15 opposite direction, submitting an affidavit to this court
16 saying that they were confused about the law. So that's
17 just simply not true. In fact, it's undisputed.

18 As was raised here during our summary
19 judgment motions, confusion is everywhere because we have
20 a direct conflict between our state law and a federal law.
21 52USC10508 is a controlling federal law signed into effect
22 by, I believe, President George W. Bush. It demands, "Any
23 voter who requires assistance to vote by reason of
24 disability may be given assistance by a person of the
25 voter's choice."

1 Now, that is in direct contravention of the
2 state of the law as it is today. There is certainly
3 confusion amongst certainly the people in this room, as
4 well as the clerks of the State of Wisconsin. So making
5 this problem worse, the Plaintiffs continue to just
6 gesture wildly at Wisconsin statutes, claiming that
7 somewhere in there, Your Honor, you're going to find
8 exceptions that are going to prevent the massive
9 disfranchisement that we're concerned about.

10 Now, as our affidavits identified for this
11 court, the key group who will lose the right to vote are
12 those who are confined in their homes and are unable to
13 use their limbs or body to return their ballots to vote,
14 to be counted. Now, Plaintiffs offer this court and
15 repeatedly offers a set of statutes that they claim will
16 resolve these problems.

17 To make this point crystal clear, I'm going
18 to go through all of them for everybody today. The first
19 one is 6.82(1). That's about helping someone vote at a
20 polling place. I don't think it has anything to do with
21 absentee ballots. The second is 6.82(2). That's in
22 marking a ballot at a polling place. Again, they have
23 submitted something that has nothing to do with absentee
24 ballots.

25 They then go to 6.86(1)(ag). That's about

1 aid in applying to simply receive a ballot. Again,
2 nothing about returning the ballot. Then they point to
3 6.86(2). That's about requesting a ballot to be delivered
4 to the place where you live. Nothing about returning the
5 ballot. Then they point to 6.86(3). This section has to
6 do only with hospitalized electors, not to those
7 Wisconsinites or to whom the right to vote requires
8 someone else to help them to return their ballot from
9 their house.

10 The next is 6.87(5). This only has to do
11 with marking a ballot, not returning it, which again is
12 the key provision being construed in this case. The next
13 provision, 6.87(5), has to do with a subset of residential
14 care facilities and retirement homes. Again, nothing to
15 help Wisconsinites who are in their homes who don't have
16 the same bodily capabilities to return a ballot in the
17 mail or in person as other folks in Wisconsin.

18 Those are all the provisions they've
19 offered this court. Literally none of them help this
20 situation, none of them. They do now identify a website
21 they found from the postal service about door delivery,
22 and I want to point this out as well. This has nothing to
23 do with ballot return as far as the submission to the
24 court, as far as the website they provided.

25 This has to do with making sure that mail

1 can be dropped off at someone's door. It has nothing to
2 do with going into someone's house and helping them
3 retrieve their mail, should they not be able to get to the
4 door on their own. And then I think they cross the line,
5 Your Honor, frankly.

6 Plaintiffs argue to this court that none of
7 the affidavits allege any confusion. No confusion. In a
8 country where voting is one of the most key aspects to
9 life for what it means to be an American, central to why
10 people volunteer for the armed services, these affidavits
11 demonstrate that these people cannot vote. And as the
12 Plaintiffs claim, there is no confusion. They cannot
13 vote.

14 Again, this is beyond the line. There
15 are -- it is undisputed in the record. There are people
16 across the State of Wisconsin who believe they cannot
17 vote. February 15 will come and go and they will be
18 disenfranchised. That cannot stand, Your Honor.

19 Now, in the interim, it's key that in line
20 with the Supreme Court decision from *Purcell*, that this
21 decision be stayed so this confusion can be resolved so
22 that we can figure out how these people can actually vote.
23 The Supreme Court is clear, the deadline is not disputed.
24 February 15th is the election. And I think the Court can
25 even take judicial notice of the fact that there is

1 confusion. There's been significant public coverage of
2 the fact that municipal clerks have no idea really what to
3 do. So all of the prerequisites of *Purcell* are met, the
4 risk of Wisconsin voters is extreme, and Your Honor, I
5 would encourage this Court to enter a stay to prevent such
6 confusion on the eve of an election. Thank you.

7 THE COURT: All right. Thank you. I'll go
8 to Attorney Kilpatrick.

9 MR. KILPATRICK: Thank you, Your Honor. I
10 will be as brief as I can. The Wisconsin Elections
11 Commission joins the league interveners' emergency motion
12 for stay of this court's ruling, at least -- in the
13 commission's position, at least through the
14 February 15th election.

15 The Commission does not understand the
16 emergency motion to be a full motion for a stay pending
17 the entire appeal but an emergency basis only, and the
18 commission joins in that. The commission again agrees
19 with the defendant interveners that *Purcell* does apply and
20 the reasoning applies. The *Purcell* court has given the
21 opinion that courts should not change the election rules
22 close to an election.

23 And again, February 15th is election day
24 of the spring primary, but there are some statutes that
25 show that the election likely is already underway with

1 regard to absentee ballots. In the league's motion, they
2 referenced Wis. Stat. 7.15(1)(cm), and that is the statute
3 that talks about the deadline by which municipal clerks
4 send out absentee ballots for those electors who have
5 already requested one. And that's the deadline. It's not
6 the first day, it's the last day.

7 And another statute, 7.10(3)(a) governs
8 when county clerks deliver ballots to those municipal
9 clerks, and that deadline is 22 days before the spring
10 primary and that's January 24th. So it is quite
11 possible that, as of right now, according to the statutes,
12 county clerks have delivered absentee ballots to municipal
13 clerks and it is possible that municipal clerks have sent
14 out absentee ballots to those electors who have requested
15 some. By January 25th, that will be the deadline, and
16 we're almost guaranteed that that will happen.

17 So for those reasons, the commission urges
18 a stay, because not only is this close to an election, it
19 may be in the midst of an election as with regard to
20 absentee voters. And following the *Purcell* principle, the
21 Court should stay its decision to minimize voter
22 confusion. Thank you, Your Honor.

23 THE COURT: Thank you. Then on to the
24 Democratic Senate Campaign Committee.

25 MR. DEVANEY: Thank you, Your Honor. John

1 Devaney of the DSCC. I'll be very brief. We join in the
2 motion, and the only point I would add is we ask that if
3 the Court does grant a stay, that the Court make it
4 expressly clear in the stay order that the WEC's guidance
5 with respect to both issues involving the delivering of
6 ballots and use of drop boxes remain in effect while the
7 stay is in place. And that's all I have, your Honor.

8 THE COURT: Thank you. Then on to Attorney
9 Berg.

10 MR. BERG: Thank you, Your Honor. I just
11 want to begin by emphasizing that the change we're talking
12 about by the commission in these memos is a recent change.
13 It happened in the last two years during COVID.
14 Defendants would have this Court believe that hundreds and
15 thousands of voters are going to be disenfranchised if
16 this court returns the state of the law to what it was
17 before the commissioner illegally changed the law.

18 But people in Wisconsin voted in many
19 elections before these changes were made without drop
20 boxes and had no problem with voting. No cases were
21 brought alleging that people were disenfranchised under
22 the law that existed before the commission's illegal memo,
23 at least on this topic. So the idea that all sorts of
24 people will be disfranchised if we return to the rules
25 that were in place for years before COVID just is not

1 possible.

2 As to stay, Your Honor, our position is
3 that the Defendants are applying the wrong standard. The
4 proper standard for a stay in Wisconsin courts is set
5 forth in *Gudenschwager*, it's a well-known standard,
6 likelihood of success on appeal, irreparable harm to
7 either side, and the public interest. The interveners
8 don't even attempt to apply that standard. Here they
9 argue only under *Purcell*, which is not even applicable
10 here for reasons I'll get to.

11 First I want to go through the stay factors
12 as they should be applied. First, the Defendants and the
13 defendant interveners have little-to-no likelihood of
14 success on appeal. The law is not complicated here. It's
15 only a few words, and those words are very
16 straightforward. Ballots have to be mailed by the elector
17 and delivered in person to the municipal clerk. It's not
18 a complicated case.

19 Second, the harm and public interest weigh
20 heavily against a stay. The legislature has already told
21 us in 6.84 that strict adherence to the absentee voting
22 procedures is critically important, so is the Wisconsin
23 Supreme Court. In *Jefferson v. Dane County*, it quickly
24 issued an injunction against unlawful guidance issued by
25 the Madison and Milwaukee clerks and then in its opinion

1 later stated that the proper interpretation and
2 application of election procedure is a matter of great
3 public importance.

4 *Purcell* too says that states have a
5 compelling interest in the integrity of their election
6 process. And they know that there is simply no way to
7 undo an election that's been conducted in violation of
8 state law. So for all those reasons, there's significant
9 irreparable harm and harm to the public interest if this
10 court grants a stay, because it will mean multiple more
11 elections conducted under rules that are inconsistent with
12 state law.

13 Finally, there's no harm from following
14 state law. This is not a particularly complicated issue.
15 It won't be hard for clerks to adjust. They can simply
16 remove any illegal drop boxes or cover them up. They can
17 put a sign on them, send a notice to voters, and if any
18 voter happens to show up at a drop box, they can read the
19 sign and they can deliver their ballot in one of two other
20 simple ways; they can mail it or they can drop it off at
21 the clerk's office.

22 Finally, I'll just emphasize *SCIU* and *Palm*,
23 which we cited in our brief, which both show how the
24 Wisconsin Supreme Court thinks about a stay in the context
25 of an ultra vires policy or law. It should be a very high

1 bar to allow such a policy or law to be in place when it's
2 been declared illegal.

3 Finally, turning to *Purcell*, as we've
4 argued in our brief, *Purcell* does not apply to state
5 courts. Now, Mr. Thompson argues that this is a U.S.
6 Supreme Court opinion and invokes the supremacy clause,
7 but he misunderstands our federal system. The U.S.
8 Supreme Court does not have general supervisory authority
9 over the administration of the state courts.

10 The *Purcell* principle is a pragmatic rule
11 of court administration about when to grant a stay, and
12 the U.S. Supreme Court certainly has control over federal
13 courts, but it does not have control over state courts.
14 State courts can have different rules for when to grant a
15 stay and when not to grant a stay.

16 Now, maybe *Purcell* applies when there is a
17 federal election coming up. Some justices and judges have
18 argued for that in dissents, but there is no federal
19 election at stake here. This is a state election. We're
20 talking about state election rules and we're talking about
21 the test for a stay in state court.

22 No Wisconsin court, certainly not the
23 Wisconsin Supreme Court, has adopted the *Purcell*
24 principle. Now, Mr. Thompson cites three cases that he
25 says did adopt the *Purcell* principle. There are three

1 cases citing *Purcell*, but not a single one of them
2 actually adopted the rule with respect to stays.

3 They cited *Purcell* only for general
4 principles of voter fraud. So the first case he cited is
5 *NAACP v. Walker*, Paragraph 74, all it says is -- citing
6 *Purcell* -- voter fraud drives honest citizens out of the
7 democratic process and breeds distrust of our government.
8 It cited *Purcell* for the principle that we are bringing
9 this case forth, which is enforcing and following state
10 law. He did not cite *Purcell* to adopt its principle with
11 respect to the law. It's simply not true that Wisconsin
12 law has adopted that principle.

13 We've also cited a Fourth Circuit case, *en*
14 *banc*, which held that *Purcell* doesn't apply to state
15 courts, and we cited a U.S. Supreme Court case. There
16 were two Supreme Court cases actually, one that denied an
17 injunction and one that granted an injunction. The one
18 that denied an injunction was when the state court made a
19 change to election laws right before an election. The
20 court denied an injunction and Justice Roberts explained
21 that the rule is different when a state court makes a
22 change versus a federal court. So the first reason
23 *Purcell* does not apply is because it doesn't bind state
24 courts.

25 The second reason is it doesn't apply when

1 a court simply enforces state law. Defendants have not
2 cited a single case where *Purcell* has been applied in that
3 context. It doesn't make any sense in that context. The
4 justification for *Purcell* is separation of power
5 principles. The courts should not change the law on the
6 eve of an election. That's not what's happening here.
7 The court is simply enforcing state law.

8 Finally, even if *Purcell* applied, there is
9 no confusion here. This is, again, a simple change to
10 make. It's not hard for people to understand there are
11 two simple ways to return a ballot, mailing it or
12 delivering it person. And clerks can notify voters of
13 that, so there's no risk that voters will be confused in
14 the next month. And there's plenty of time to make this
15 change before the February 15th election.

16 Finally, the last point I would like to
17 make is that Mr. Thompson has alleged that it is
18 undisputed in the record that many voters will be
19 disenfranchised if this court does not grant a stay.
20 Presumably he is referring to the affidavits that he
21 submitted two days ago that we had less than 24 hours to
22 respond to.

23 Respectfully, Your Honor, our position is
24 that it is not appropriate for them to submit this
25 evidence at this late stage in the case, pad the record

1 for appeal, make it seem as if that evidence is undisputed
2 when we've had no chance or reasonable opportunity to
3 dispute it. That's simply not fair.

4 And none of the affidavits clearly show
5 that these voters would not be covered by some other
6 exception or provision under the law. The point for
7 citing the other exceptions under the law for disabled
8 voters is simply to show that there are a lot of different
9 ways for voters to vote. There are a lot of methods that
10 make it easier. So for each of these voters, what a court
11 would have to determine in an as-applied challenge -- this
12 is not it -- would be, is there some gap, are there some
13 voters for which none of these exceptions apply and they
14 truly have no way to vote under state law.

15 Intervenors haven't shown that, and even if
16 they could show that, they would need to show that in a
17 separate case. And it would require, at most, an
18 as-applied exception for one or two voters, not a
19 wholesale change in state law. This case is about the
20 default rule under state law for all Wisconsin voters.
21 This Court has already declared the law and it should
22 allow the law to be in place for upcoming elections.
23 Thank you.

24 THE COURT: All right. Thank you. Back to
25 Attorney Thompson.

1 MR. THOMPSON: Yes, Your Honor. I'll try
2 to be brief. Thankfully, attorney for Plaintiff referred
3 to this exercise as a quote-unquote simple change to make.
4 Let it be clear for this Court that this would be a change
5 in election law.

6 Your Honor, I would like this Court to
7 understand, the justification of *Purcell* is not separation
8 of powers. I would encourage anyone to simply read the
9 case. It's not very long. It only has to do with voter
10 confusion. Counsel for Plaintiffs suggested there were no
11 suits before the 2020 election regarding access to the
12 ballots and that this is somehow a reason to suggest that
13 this would be a quote-unquote simple change to make.

14 Your Honor, the reason there weren't suits
15 about this issue before the 2020 election is people were
16 simply able to vote. I doubt you could find many, if any,
17 people in the State of Wisconsin who thought that it was
18 illegal for a spouse to put their absentee ballot in the
19 mail. This was a concept that became an issue only
20 recently because of the instant lawsuit.

21 Counsel for Plaintiffs also cite to *Palm*
22 and *SCIU*, two decisions that, frankly, don't complicate
23 the significant constitutional questions raised in
24 *Purcell*. Of course, they reached different decisions --
25 determinations. They have completely different facts at

1 issue. They were not dealing with the same *Purcell*
2 question, the same severity of it, that this Court has to
3 grapple with now.

4 Finally, your Honor, again, I'm surprised,
5 I suppose, Plaintiffs continue to argue that there will be
6 no harm. Again, the affidavits that this Court has seen
7 demonstrate that upwards of 80,000 Wisconsinites require
8 assistance of others simply to be active in the community.
9 Plaintiffs themselves, in their submission to the court,
10 cited eight or ten of our affidavits that identified
11 individuals who in just a matter of days came forward to
12 the court expressing their concern that they're going to
13 lose the right to vote.

14 That is an incredible harm. I think that
15 everyone here on this hearing thinks that the right to
16 vote is quite important and consequential. Plaintiffs
17 have not carried their own burden to identify anything to
18 the contrary. There is nothing to suggest that a stay is
19 going to keep people from voting. It's just this
20 allegation, Your Honor, that these two individuals claim
21 some confusion and that their confusion about what the law
22 is is the harm. That pales in comparison to what, at
23 least according to the record as it stands today, is
24 massive disenfranchisement.

25 Finally, Plaintiffs are upset apparently

1 that they haven't been able to depose the people who
2 signed these affidavits or do any discovery. We would
3 welcome such depositions, because we think it might help
4 Plaintiffs understand the severity of the problem,
5 something that they seemingly insist on rejecting. Thank
6 you.

7 THE COURT: Thank you. Then on to Attorney
8 Kilpatrick.

9 MR. KILPATRICK: Thank you, Your Honor.
10 I appreciate you giving me one last attempt to speak on
11 the issue. I would just kind of piggyback on what counsel
12 for the league has said in regard to the statutes that the
13 Plaintiffs say expressly allow agents to assist electors,
14 as alleged by the Plaintiffs. It's the commission's
15 position that there likely be will be confusion with these
16 people.

17 If these people do not fit within the types
18 of statutes that cover folks who need assistance, well,
19 they are out in the cold. Life seems to be saying, too
20 bad, what you have to do is bring a lawsuit separately.
21 What would be easier and better and a more just resolution
22 is a stay of this Court's order through the
23 February 15th election. Thank you.

24 THE COURT: Thank you. Then on to Attorney
25 Devaney.

1 MR. DEVANEY: Thank you, Your Honor.

2 Nothing further, except to say that we join in the
3 rebuttal arguments of both the league and Elections
4 Commission.

5 THE COURT: All right. Thank you. In
6 listening to the arguments, the Defendants and the
7 Plaintiffs really come from two different perspectives.
8 The Defendants -- certainly, the defendant league speaks
9 of massive voter confusion. That's never been an issue in
10 this case. They submitted some affidavits which talk
11 about that, but there's been no fact-finding on it.
12 There's been no conclusions drawn. The issues in this
13 case were initially legal issues with regard to the nature
14 of the statute and the nature of the administrative
15 guidance that the Elections Commission then had issued.
16 The league and the Defendants then argue
17 from an entirely new perspective as to what took place in
18 this case. That, in fact, did not take place. There's
19 been no factual determinations with regard to confusion
20 with regard to the voters. There's been accusations
21 raised after the -- certainly if they were raised during
22 the initial hearing, they've been raised as the central
23 part of the Defendants' argument for a stay in this
24 proceeding based upon the affidavits that were filed.

25 This Court continues to look at the issue

1 as a legal issue, not as a fact issue, at this stage of
2 the proceedings. When the Court issued its ruling, it
3 looked to the statutes as to what the statute said, and
4 did the commission -- the Elections Commission follow it.
5 I concluded -- the Court concluded the Elections
6 Commission had not, that the guidance issued did not
7 follow the statutes. It was really a legislative action
8 by the Elections Commission with regard to the statute.

9 The changes were made by the Elections
10 Commission in how they looked at those statutes. In
11 reading them, the Elections Commission was really
12 responding to efforts to, if you will, make absentee
13 voting easier, to some extent, not to what the law said.
14 This isn't about whether the proposals for lock boxes is a
15 good idea or a bad idea. What it's about is, is there
16 authority to do it. It's plain and simple.

17 This Court found that not only was there
18 not authority for the Elections Commission to do it, the
19 statutes are unambiguous, they're clear. Nobody can be
20 confused in reading them. Nobody was apparently confused
21 in reading the statutes for a number of years. The Court
22 also found that the commission had acted in proposing --
23 in using the guidance, the commission had actually set
24 forth rules that needed to be adopted properly under
25 Wisconsin law, and they had not done that.

1 Evidence came in -- I don't know if it's
2 evidence, but it was a submission by the Plaintiffs from
3 action by a legislative oversight committee when they were
4 going to look at one of the guidances and proposed that it
5 should come in as a proposed rule. That is the point that
6 the Plaintiffs made and that the Court recognized in its
7 initial decision.

8 There simply is no basis for the guidance
9 issued by the Elections Commission. It was challenged in
10 this lawsuit. In looking at *Purcell*, *Purcell* and the
11 cases under it, this Court is satisfied, from a procedural
12 standpoint clearly relate to federal courts interfering
13 with state election proceedings. *Purcell*, although it was
14 minutes ago argued that *Purcell* dealt with massive voter
15 confusion, that was -- I read the case a number of times.
16 I understand the issues in the case, but it never was laid
17 out quite the way as dramatically as Attorney Thompson
18 did.

19 Remember, in the *Purcell* case, it was about
20 Arizona law that required proof of citizenship to register
21 and then at voting there had to be an ID used to vote. In
22 that case the district court had -- the lawsuit was
23 started by the plaintiffs, the district court had
24 essentially denied the lawsuit, the defendants went to the
25 Ninth Circuit and had a stay issued. It was that stay

1 that was the focus of the *Purcell* decision, and the
2 Supreme Court said they were reversing the Ninth Circuit
3 with regard to the stay for a number of reasons that were
4 really procedural, didn't really go to the merits of the
5 issue, but it was clear that it was going to go back to
6 the state and the state law would prevail.

7 In the other cases that -- some Seventh
8 Circuit cases and other matters that were cited by the
9 Defendants, it's really the same issue. The federal
10 courts had taken some steps to change what the state law
11 was and how the state election laws were implemented, and
12 that action was stopped based upon the concept in *Purcell*
13 that the federal courts could not enjoin what was going on
14 in the states. That's a simplistic analysis. I'm not
15 going to brief each of the cases cited and go through it,
16 but that's essentially how this Court understands it.

17 *Purcell*, I'm satisfied, addresses federal
18 court interference with state election procedures. Now,
19 the concept in *Purcell* is just what the Defendants argue
20 and that is the issue of voter confusion. When you make
21 changes, does that throw off the election to the extent
22 that it becomes unfair to those who want to vote and
23 you're interfering with the right to vote.

24 That is a concept, but it doesn't mean that
25 just because it's alleged, that it's actually present. It

1 hasn't been proved in this case. This Court looked at the
2 statutes and adopted, this Court believes, a
3 straight-forward reading of what the statutes say, didn't
4 embellish it, didn't try and color it, didn't legislate
5 what the statutes mean.

6 *Purcell* doesn't stand for the proposition,
7 as I read it, that any change in the status quo all of a
8 sudden results in some disenfranchisement to the voters.
9 It's not present in *Purcell*. It's not present in the
10 other cases that were cited about *Purcell* and it's not
11 present in this matter, even with the affidavits that were
12 filed by the Defendants.

13 This Court enforced an existing statute.
14 It's the commission that entered these guidances that
15 changed the law. This Court simply ruled that the law
16 should be followed. There's plenty of time, in this
17 Court's view, for the election clerks to be able to issue
18 the necessary guidelines and to conduct their elections
19 following these laws that the Court talked about and the
20 Court enforced.

21 I'm satisfied, in looking at the basis for
22 a temporary injunction, the burden has not been met. This
23 Court is satisfied that there's not a great likelihood of
24 success on the Defendant's behalf as to the merits and the
25 substance of the Court's decision. The Court is satisfied

1 that in following the statutes, the public is not harmed.

2 Certainly in following the statutes, the
3 public is benefited by elected public officials who adopt
4 laws, having those laws followed, as opposed to
5 administrative appointees making changes to those laws and
6 then having those laws, if you will, foisted upon the
7 public without any type of legislative review by the
8 individuals and entities who should be making those policy
9 changes.

10 That's not what Wisconsin law provides for.
11 That's why there's a method to adopt rules through Chapter
12 227 of the Wisconsin statutes, and that wasn't done in
13 this case. This Court is satisfied that there's not
14 irreparable harm for the ruling to continue. There's not
15 a chance of success, and the public interest is really
16 benefited by the statutes being administered, according to
17 what they say as opposed to what other people think they
18 say and as opposed to what individuals try to and do to
19 change the process without going through the proper
20 legislative process.

21 The country, the United States, has a
22 system of due process in law that requires that laws'
23 policy changes be legislative, not that policy changes are
24 permitted by the appointed individuals trying to
25 administer those laws. What is somewhat of an affront to

1 society generally is that the Elections Commission took a
2 stance that didn't really modify the statute, they changed
3 it. They dramatically changed what the wording of the
4 statute is. That shouldn't happen through an
5 administrative body without the proper process. This
6 Court's ruling went to that. Does following that process
7 harm individuals generally in the public? This Court is
8 satisfied it does not.

9 So I'm satisfied that the basis for a
10 temporary injunction pending the election, the
11 February 17th election, has not been set forth by the
12 parties. Attorney Kilpatrick said it well, that he looked
13 at the proposed motion as going toward the February 15th
14 primary election and not going toward the general election
15 thereafter in April. So I looked at it from that
16 standpoint, too, but are we at that point when the Court
17 should issue a stay relative to the Court's decision based
18 on the February 15th primary.

19 In a way, it's an easier call for the
20 Court. If I wanted to make that call, I could say, sure,
21 let's do it and stay it. But that's not following the
22 law. I'm satisfied the law is clear. The communities,
23 the public, deserve to have the election in February
24 guided and administered according to the statutes adopted
25 by their elected representatives, not called out by the

1 individuals who were on the Elections Commission. So
2 I deny it as to that.

3 What I am concerned about is that Attorney
4 Kilpatrick I think said that the deadline for the election
5 clerks to send out their absentee ballot materials was
6 January 24th.

7 Attorney Kilpatrick?

8 MR. KILPATRICK: Yes, Your Honor, the
9 deadline for the county clerks to send out the ballots to
10 the municipal clerks. And then there's a different
11 deadline for the municipal clerks to send out the ballots
12 to the voters.

13 THE COURT: So the key is really the
14 January 24th date, or is it the 25th?

15 MR. KILPATRICK: The 25th, I believe.

16 THE COURT: In my order, when I issued the
17 order initially, I had said that no later than
18 January 27th the Elections Commission should withdraw
19 their memo and issue its statements to the court that the
20 memos were declared invalid by the court.

21 That would come late, and I'm going to
22 change that. I'm going to order that that be submitted by
23 January 24, 2022. And that's a Monday. That's this
24 coming Monday, but there's certainly been sufficient
25 publicity to be sure that that's done accordingly.

1 From the publicity that the cases had, I'm
2 satisfied that anybody who has an interest in elections is
3 aware of what the Court ruled and what the process is. So
4 that will be -- I'll make that modification to my order
5 that was signed by the Court on Wednesday.

6 MR. KILPATRICK: Your Honor, if I may, then
7 for the commission, because of this change, I believe
8 there is another need for me to ask for a stay of that
9 change because, pending appeal, the commission has filed
10 an appeal, but the change that the commission must act no
11 later than Monday, it does not give sufficient time for
12 the commission to file a stay motion with the Court of
13 Appeals before having to comply with your deadline.

14 So I'd ask that the Court reconsider
15 changing at least the deadline by which the commission
16 must withdraw its memoranda.

17 THE COURT: Any other responses?

18 MR. BERG: No, Your Honor.

19 THE COURT: I am going to deny that
20 request. I'm satisfied there's sufficient time for the
21 commission to act. And if they're filing an appeal,
22 there's still plenty of time to file it today and on
23 Monday. So I deny that request.

24 I'll ask Attorney Berg to draft the
25 necessary order and submit it to the court. I ask that

1 you submit it either later today or Monday morning.

2 MR. BERG: I will submit it as soon as
3 possible, Your Honor.

4 THE COURT: All right. Thank you.
5 Anything else from Attorney Thompson?

6 MR. THOMPSON: No, Your Honor. Thank you.

7 THE COURT: Anything else from Attorney
8 Kilpatrick?

9 MR. KILPATRICK: No, Your Honor.

10 THE COURT: Anything else from Attorney
11 Devaney?

12 MR. DEVANEY: No, Your Honor.

13 THE COURT: Anything else from Attorney
14 Berg?

15 MR. BERG: No, Your Honor.

16 THE COURT: All right. Thank you.

17 MR. KILPATRICK: Your Honor, I do have one
18 more.

19 THE COURT: Sure, go ahead.

20 MR. KILPATRICK: In my request, what I
21 didn't factor in is that what we have here is a public
22 body that needs to get together and meet, and to take
23 action in order to fulfill the request or the directive of
24 this court. And as I had said before, there was possibly
25 a meeting that was going to take place on the 28th to

1 address the JCRAR's directive to promulgate rules. That
2 was, I believe, the last scheduled meeting of the
3 commission.

4 And with the Court's change in the 27th
5 deadline to the 24th, I simply cannot guarantee that the
6 commission would be able to get together and to meet and
7 to take any action. That would require -- it would be
8 required to follow this court's order, given that it is
9 late in the afternoon on a Friday, and we've got a
10 commission, a body of six separate commissioners. I feel
11 that that may be very difficult to do, so that's another
12 factor that I apologize for not raising sooner.

13 THE COURT: Well, one of the Court's
14 concerns is that with the initial deadline that the Court
15 had said to the 27th, even though the knowledge of the
16 decision is known, that would permit the Defendants to
17 argue that the commission could send out documents under
18 the old directive without -- and then claim, well, we
19 didn't have to do it until the 27th, which is after our
20 mailing.

21 So I know that wasn't anybody's intent, but
22 in looking at that, I'm concerned with that; thus I looked
23 at those dates and thought that -- and still concluded
24 it's better to have the date there for the commission to
25 act by the 24th in order to provide the necessary

1 notice. Through e-mail, it's certainly easy to do.
2 Otherwise with the publicity the case has, I'm satisfied
3 that the commission knows about the case.

4 I note in looking at the court docket that
5 the commission, at least in the Circuit Court of Waukesha,
6 hasn't filed an appeal. The league parties filed an
7 appeal.

8 MR. KILPATRICK: We did file yesterday.
9 Looking at my computer screen, it may have just come
10 through e-mail notification. The commission did file the
11 notice of appeal yesterday. It may have just come through
12 now.

13 THE COURT: It wasn't filed with the
14 Circuit Court in Waukesha. It was filed with the Court of
15 Appeals.

16 MR. KILPATRICK: No, no, I'm sorry. The
17 notice of appeal was filed in this court, Your Honor, your
18 court, along with the docketing statement. I believe it
19 just came through e-mail notification. The other parties
20 will be able to confirm if they have theirs.

21 THE COURT: I was just looking at our court
22 records. But at this point I'll deny your request. So
23 ordered.

24 MR. KILPATRICK: Okay.

25 THE COURT: That should end our hearing

1 then. Thank you all. Everybody have a good day, good
2 weekend.

3 MR. THOMPSON: Thank you, Your Honor.

4 (Whereupon, proceedings were concluded.)

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STATE OF WISCONSIN)
) SS.
COUNTY OF WAUKESHA)

I, ROSE MARIE RODERICK, certify that I am the official court reporter assigned to report the proceedings herein for the Circuit Court; that the foregoing pages, numbered 1 through 40 inclusive, have been carefully compared by me with my stenographic notes; that the same is a true and correct transcript of all such proceedings taken on the 21st day of January, 2022.

Dated this 24th day of January, 2022.

ELECTRONICALLY SIGNED BY:

Rose Marie Roderick

ROSE MARIE RODERICK
Official Court Reporter