STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
CASE NO. 2022AP000091

Richard Teigen and Richard Thom,

Plaintiffs-Respondents

v.

Wisconsin Elections 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.

APPEAL FROM A FINAL ORDER OF
THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE MICHAEL O. BOHREN, PRESIDING

REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY THE CIRCUIT COURT'S JANUARY 19, 2022 ORDER AND JANUARY 21, 2022 ORAL RULING

INTRODUCTION

Voting by casting an absentee ballot has been a part of Wisconsin's election landscape for decades. Since the COVID-19 pandemic reached Wisconsin in March 2020, return of absentee ballots has been transformed from a convenience to a fundamental necessity for more than ***half*** of Wisconsin voters' ability to exercise their constitutional right to vote. For example, 59.7% of participating electors—that is, nearly 2 million Wisconsinites—cast their votes by absentee ballot in the November 2020 election.[1] And a critical aspect of absentee voting throughout the state during the COVID crisis—***which is at its apex right now***—has been the ability to return absentee ballots in a drop box.

Regardless of the method by which voters will choose to return their absentee ballots for the February nonpartisan primary, clerks throughout the state must mail absentee ballots for the February primary to voters in just one day – tomorrow, January 25 – ***at the very latest***. *See* Wis. Stat. § 7.15(1)(cm). Yet, on the eve of that deadline, as COVID continues to ravage Wisconsin and require voters to maintain physical distance from one another, a circuit court order upending this process is set to go into effect. Unchecked, the order would create ***new*** prohibitions on how these ballots can be returned, banning drop boxes and outlawing Wisconsinites helping one another to

[1] *See* www.wispolitics.com/wp-content/uploads/2021/01/D.-November-2020-Election-Data-Report-Updated.pdf at table 11.

return ballots. Still, Respondents claim "irreparable harm and public interest factors … cut heavily against a stay." Resp. Br. at 4. Far from it.

Appellants have satisfied the criteria for an emergency stay, identifying two specific grounds justifying a stay here, neither of which Respondents refute.

- ***First***, the circuit court orders will conflict with the practical necessity that clerks in 1,850 municipal jurisdictions must complete mailing absentee ballots to voters with instruction on how to return those ballots via the absentee process ***less than 36 hours*** from when this brief is filed. That is incompatible with reality and with the *Purcell* principle.
- ***Second***, the factors to stay the circuit court's order under *Gudenschwager* are present here, providing a separate and additional basis for staying the circuit court's orders.

ARGUMENT

I. The circuit court's orders will conflict with the practical necessity that no later than *tomorrow*, 1,850 municipal clerks must mail absentee ballots to voters along with instructions on how to return them.

Respondents have created a mess. They have strong policy preferences for how Wisconsin elections should be administered. Those preferences run counter to how Wisconsin elections have been administered for years. Fifteen months after the disputed guidance was issued and had been relied on by Wisconsin voters through two elections, when Respondents' policy preferences were not enacted into law through the legislative process, they filed suit in the circuit court. They slow-played the litigation, rejecting invitations to expedite the intervention proceedings at the outset. Ultimately,

their approach led the circuit court to issue an order that changes longstanding policies of Wisconsin election administration just days before the deadline for clerks to mail ballots to voters with instructions on how to return them to vote in Wisconsin's next election.

Respondents now seek to blame everyone else. They assert that the Wisconsin Elections Commission ("WEC") should know if absentee ballots have been sent out. But this just underscores their ignorance of Wisconsin election law: absentee ballots are sent by the ***municipal clerks*** in Wisconsin's 1,850 local voting jurisdictions, not by WEC. And they assert that municipal clerks had ample time to adopt the circuit court's oral ruling. But election officials diligently apply the law. They do not run elections according to media reports of oral rulings. Respondents' repeated suggestion that election officials should alter their policies based on media reports summarizing oral rulings is antithetical to the rule of law.

The circuit court issued its written order on January 19. It expressly provided WEC until January 27 to implement the order. Before issuing its written order, the circuit court announced that it would hear arguments on whether to stay the order on the afternoon of Friday, January 21. Given the scheduled stay argument, no one can be surprised that WEC did not convene before the January 21 hearing. And, at that hearing, the circuit court pulled a switcheroo, deciding *sua sponte* to accelerate the deadline for compliance with its order to Monday, January 24. The circuit court did so because it

learned, as part of the stay arguments, that absentee ballots were already in the process of being prepared and mailed. It wanted to get out in front of that process. But there was no time to get out in front of that process. The circuit court's solution — to force everyone to work faster and cram implementation into an impossibly short time frame — is impractical, impossible, and unlawful. The circuit court's order should be stayed until after the spring elections.

This Court is not the first to confront the challenge of a court order that seeks to compel significant changes to election law shortly before an election. Indeed, this situation arises with sufficient frequency that the U.S. Supreme Court has adopted a rule—the *Purcell* principle—that forbids such changes as an election nears. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). The *Purcell* principle is rooted in the constitutional guarantee of each eligible voter's right to participate in an election. As applied by the Supreme Court and interpreted by the Seventh Circuit, the *Purcell* principle necessitates a stay here.

Respondents wrongly argue that *Purcell* does not apply to state courts.[2] But the Wisconsin Supreme Court has repeatedly cited to *Purcell*.

[2] Respondents rely heavily on Chief Justice Roberts's five-sentence concurrence in *Democratic Nat'l Comm. v. Bostelmann*, 141 S. Ct. 28 (2000), in which he reconciles the decision to stay the federal-court injunction in that case with two decisions not to stay an order from the Pennsylvania Supreme Court that granted similar relief. But the Roberts concurrence is inapposite here. What Chief Justice Roberts noted was that the Pennsylvania cases were not about whether *Purcell* applies where (as here) state courts interpret state election statutes on the eve of the election, but instead about whether *Purcell* allows the

See State ex rel. Zignego v. Wis. Elections Comm'n, 2021 WI 32, ¶60, 396 Wis. 2d 391, 957 N.W.2d 208 (R.G. Bradley, J., dissenting); *Trump v. Biden*, 2020 WI 91, ¶153, 394 Wis. 2d 629, 951 N.W.2d 568 (R.G. Bradley, J., dissenting); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶74, 357 Wis. 2d 469, 851 N.W.2d 262. Though the Wisconsin Supreme Court has not had the opportunity to apply the *Purcell* principle, the mere fact that court has repeatedly relied upon the case without disclaiming the applicability of its namesake principle to state courts undermines Respondents' position. Moreover, *Purcell* is not, as Respondents would have this Court believe, a prudential rule of federal procedure; it is a constitutional precept forestalling disenfranchisement by avoiding opportunities for voter confusion. In that respect, it absolutely applies here, where the circuit court's order will necessarily cause (and already is causing) confusion and consternation among voters and election officials alike.

U.S. Supreme Court to interfere with a ruling that a state court determines is commanded by its state constitution. That is, the Roberts concurrence stands for nothing more than the unremarkable observation that *Purcell* does not empower federal courts to set aside a state supreme court's interpretation of its state constitution, on which it alone is the ultimate judicial authority. Because the circuit court order at issue here is rooted in statutory interpretation, rather than the state constitution, and because this Court does indeed have supervisory authority over the circuit court on the subject matter here, the Roberts concurrence sheds no light.

Respondents fare no better with the Fourth Circuit case they cite. In that case, the Fourth Circuit declined to issue an injunction as part of a collateral attack on an ongoing state-court proceeding. The decision applies *Purcell* to determine that the status quo protected by the *Purcell* principle militates against injunctive relief; only after that holding—"*Purcell* and *Andino* therefore require that we refuse to enter an injunction here"—does the majority then, in dicta, venture into the language that Respondents mislabel as a holding. *Wise v. Circosta*, 978 F.3d 93, 98-99 (4th Cir. 2020) (en banc).

Respondents also argue that *Purcell* does not apply because the circuit court's order does not change Wisconsin law, but simply restores the law to what it was until 2020. This is factually false. Where, as here, courts issue orders that alter how elections are and have been for years administered in practice—even if the courts think they are merely restoring the statutory text—that necessarily works to alter election procedures. Huge numbers of Wisconsin voters, and a significant number of Wisconsin election officials, have never participated in a Wisconsin election administered under the rules Respondents convinced the circuit court to impose; to implement those rules days before an election is indeed to change how elections function in Wisconsin. And such a change triggers application of the *Purcell* principle. Indeed, application of *Purcell* is even more compelling now, when the conditions – a pandemic that already has cost the lives of 10,000 Wisconsinites and even now is infecting 17,500 Wisconsinites each week and killing 33 of them, *see* https://www.dhs.wisconsin.gov/covid-19/data.htm#summary – is the very reason that drop boxes were implemented in the 2020 elections and have proved so popular with Wisconsin voters.

This Court may consider the *Purcell* principle an independent basis for entering a stay of the circuit court's order. Or the Court may incorporate *Purcell* into the *Gudenschwager* analysis (discussed in Section II, *infra*), as a clear indication of the harm that will follow if a stay is not entered. The *Purcell* principle reflects that the practicalities of the imminent election

necessitate a stay. However this Court chooses to approach the issue, the outcome is the same.

II. Movants have demonstrated that the four factors necessary to justify an emergency stay under Wisconsin authority are satisfied.

Each of the four *Gudenschwager* factors favors a stay. Respondents repeatedly assert this is not true, but they make no compelling showing on any, much less all, of the factors.[3]

A. The circuit court erred in holding that Movants have not shown a likelihood of success on appeal.

The first *Gudenschwager* factor focuses on the likelihood that Movants will succeed on the merits of their appeal. Movants satisfy this factor for four reasons.

First, as explained in Movants' motion, the circuit court misapplied this element of the *Gudenschwager* analysis. The question is not whether the circuit court believes it reached the right outcome such that the appellate court should agree. As the Supreme Court recently noted, "[i]f that is all that is involved in analyzing the likelihood of success on appeal in deciding a stay motion, very few stays pending appeal would ever be entered because almost no circuit court judge would admit on the record that he/she could have

[3] Respondents argue the Movants have forfeited the opportunity to address the *Gudenschwager* factors. They are incorrect. Movants sought a stay in the circuit court, as required before seeking a stay here. *Gudenschwager* is the seminal case setting out the four factors necessary to a stay analysis. The circuit court, as it must, invoked those factors. Respondents' assertion that Movants cannot appeal from the circuit court's application of the *Gudenschwager* factors to reach an erroneous conclusion is simply bizarre and illogical.

reached a wrong interpretation of the law." *Waity v. LeMahieu*, No. 2021AP802, unpublished order at 9 (Wis. July 15, 2021) (Exhibit 3 to Appellants' Emergency Motion to Stay). The proper focus is on the likelihood that the appellate court will reach a different outcome, and where, as here, the appellate court will apply *de novo* review to interpret a statute that has not been previously construed by an appellate court, that alone means that the likelihood is *per se* significant enough to satisfy this factor. *Id.* at 8-9. Respondents cannot rebut this because it is the rule that our Supreme Court has enunciated.

Second, with respect to the merits, the statutory interpretation is not as clear-cut as Respondents assert. The relevant provision reads as follows: "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. The circuit court held—without any articulated rationale—that the phrase "mailed by the elector" necessarily may be satisfied only if the elector personally places the ballot in the mail. But that is highly contested. Similarly, the circuit court held that no one but the elector may deliver the elector's ballot in person to the municipal clerk; but the Legislature specifically appended the modifier "by the elector" to the verb "mailed" and not to the verb "delivered," so that this reading too is highly contested.[4]

[4] Notably, while Respondents argue that theirs is the only possible reading of the statute, many legislators disagree. There were repeated efforts, just last year, to amend this

Moreover, the circuit court disregarded the text's reference to "ballot *or ballots*," an overt invitation for an elector to return more than their own, individual, ballot. Again, highly contested. From this same text the circuit court proscribed drop boxes, holding that an elector who returns their absentee ballot to a drop box has not "delivered [it] in person." Once more, reasonable minds will differ on the meaning of the statutory text.

Even assuming—counter to the Supreme Court's rationale in *Waity*—that the proper question under this factor of the *Gudenschwager* analysis is whether the circuit court's ruling will withstand scrutiny, the answer is far from clear. Or, put another way, there is a significant chance that appellate courts will reach a different conclusion. That militates in favor of a stay.

Third, the circuit court order is preempted by both federal statute and constitutional guarantees. For one thing, federal law promises that "Any voter who requires assistance to vote by reason of … disability … may be given assistance by a person of the voter's choice." 52 U.S.C. § 10508. But the circuit court chose to read Wis. Stat. § 6.87(4) in a way creates a conflict between state and federal law and thereby invites a preemption problem. For

statutory provision to have it embody the policy that Respondents convince the circuit court to impose. 2021 S.B. 209, https://docs.legis.wisconsin.gov/2021/related/proposals/sb209; 2021 S.B. 203, https://docs.legis.wisconsin.gov/2021/related/proposals/sb203; 2021 A.B. 177, https://docs.legis.wisconsin.gov/2021/related/proposals/ab177; 2021 A.B. 192, https://docs.legis.wisconsin.gov/2021/related/proposals/ab192. Were it as abundantly clear as Respondents contend that the statute as it is written cannot tolerate any other interpretation, the Legislature would not have sought to amend the provision. Thus far, no effort to amend this provision to limit who may return an absentee ballot has been enacted into law.

another thing, Respondents continue to rely heavily on Wis. Stat. § 6.84(1)'s assertion that absentee ballot rules—as opposed to other election rules, which are liberally construed under Wis. Stat. § 5.01(1)—must be strictly construed. The circuit court relied heavily on this principle in its ruling. (Kilpatrick Aff., Ex. 1003 at 7:1-14) But this differential treatment of absentee voters violates the constitutional guarantee of equal protection. Movants raised both of these arguments in the circuit court (Cir. Ct. Dkt. 118 at 10-11), but the circuit court never addressed either issue. These unadjudicated conflicts between the circuit court order, on the one hand, and federal statute and constitutional guarantees, on the other, further demonstrate that Movants have a likelihood of success on appeal.

Fourth, this entire case suffers from a jurisdictional defect, which Movants raised below and the circuit court never addressed. Fundamental principles of sovereign immunity hold that the state cannot be sued unless it has expressly consented. Here, Respondents sued WEC, a state agency. To do so consistent with the state's consent, they must follow the procedures set forth in relevant state law. As applicable to a suit against WEC, those procedures require first filing a complaint with WEC itself and seeking judicial review only if WEC fails to provide the relief requested through administrative channels. *See Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224-25, 487 N.W.2d 639 (Ct. App. 1992) (holding that circuit court lacked jurisdiction over election-related complaint filed not under Wis. Stat.

§ 5.06, but instead as an action for declaratory and injunctive relief). Sections 5.05 and 5.06 foreclose voters, including Respondents, from seeking judicial review in the first instance. Movants raised this clear jurisdictional defect in the circuit court (Cit. Ct. Dkt. 119 at 2-4), but the circuit court never addressed it. In cases filed against state agencies (such as the instant one), such failures are of jurisdictional concern, where sovereign immunity will operate to bar the action altogether. *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶61, 317 Wis. 2d 656, 766 N.W.2d 559. Respondents' failure to exhaust their administrative remedies, which like any jurisdictional issue must be reviewed de novo on appeal, is yet another reason Movants have a likelihood of success on the merits.

B. The balance of harms tips strongly in favor of Movants.

The second and third *Gudenschwager* factors require comparing the harms that denying a stay would impose upon Movants with the harms that imposing a stay would impose upon Respondents. Here, the balance tilts decisively in Movants' favor.

Respondents make no effort to address the harm Movants would suffer in the absence of a stay. That is because promoting voter participation is central to Movants' mission and Respondents recognize that the substance and the timing of the circuit court's order makes it nearly impossible for Movants to perform that mission effectively. The harm is significant.

Movants have also shown substantial harm to Wisconsin voters if the circuit court's order goes into effect so soon before an election. While the WEC memos at issue here were adopted in 2020, those memos did not announce new policies but simply provided uniform guidance on longstanding practice. As to ballot assistance, Wisconsinites have, characteristically, been helping each other return ballots for many decades. *See, e.g.*, *Sommerfeld v. Bd. of Canvassers of City of St. Francis*, 269 Wis. 299, 301, 69 N.W.2d 235 (1955) ("[A group of electors] caused [their ballots] to be returned to the Clerk of the City of St. Francis by a third person, who returned the sealed envelopes to the said Clerk."). Similarly, as to drop boxes, the undisputed record evidence is that absentee ballot drop boxes predate the pandemic. (Aff. of Meagan Wolfe, Cir. Ct. Dkt. 121, at ¶9) It is, therefore, false for Respondents to argue that an eleventh-hour reversion to the circuit court's cramped reading of the law will do no harm. To the contrary, denying a stay here will require longstanding rules to change on the eve of an election, causing confusion (among voters and election officials alike) and disenfranchising some unknown number of voters.

Respondents claim this defies belief. Their ridicule is not an argument, however, and is belied both by common sense as well as the voluminous sworn statements filed in the circuit court. In the four days following the circuit court's initial oral ruling (in a bit of kismet, over the Martin Luther King, Jr., holiday weekend) twenty-nine Wisconsinites

submitted sworn statements confirming that, based on their understanding of the circuit court's oral ruling (which at that point had not yet been reduced to a written order), they believed they lost the right to vote or had personal knowledge of specific other Wisconsinites who they believed would be unable to vote. Many of these voters are disabled and live at home. They cannot, by themselves, return an absentee ballot. For example, one Milwaukee "veteran receiving hospice support for military-related terminal illness" expressed that he is "unable to leave the house" and requires "assistance to fill out and mail [his] ballot." (Cir. Ct. Dkt. 138 at 2) As he put it, "I will be unable to vote based on my understanding of the Court's January 13, 2022 ruling." (*Id*.) Many individuals living with ALS, cerebral palsy, multiple sclerosis, and other chronic conditions expressed similar concerns. (*Id*. at 1-58) Even crediting arguendo Respondents' glib insistence that the circuit court's order in no way impairs these individuals' right to vote, the sworn statements evidence the existence of voter confusion and perceived disenfranchisement arising from that order.

Nor should Respondents' insistence that the circuit court's order will not cause disenfranchisement be taken at face value. Respondents point to provisions of law that do not in any way answer the concerns that Movants and WEC alike have raised. None of the statutes Respondents cite will authorize the affiants to return their ballot with someone else's assistance:

- Wis. Stat. § 6.82(1) provides for assistance *at a polling place*, not for absentee ballot return from someone who is unable to travel to a polling place;

- Wis. Stat. § 6.82(2) provides for aid in marking a ballot *at a polling place*, not for absentee ballot return from someone who is unable to travel to a polling place;

- Wis. Stat. § 6.86 (1)(ag) provides a mechanism to apply and receive an absentee ballot, but says nothing about returning the ballot;

- Wis. Stat. § 6.86(2) provides for absentee ballot delivery to the elector, but makes no special provision for returning that ballot;

- Wis. Stat. § 6.86(3) applies only to hospitalized electors, not those who are disabled at home;

- Wis. Stat §. 6.87(5) provides for assistance in *marking* a ballot, but makes no special provision for returning that ballot;

- Wis. Stat. § 6.875 applies only to certain residential care facilities and retirement homes, not all, and does not apply to disabled voters who live at home.

Ultimately, ***none*** of these provisions will aid a voter who is disabled, lives at home, and requires assistance to return their ballot. Thus, certainly, the February 15, 2022 election would transpire in violation of the law, as these individuals would be precluded from exercising their constitutional right to vote.

Practical reality further reinforces that confusion is all but guaranteed. Respondents claim there is ample time to comply with the relevant order because the circuit court announced its oral ruling on January 13 (which is itself unacceptably close to the spring primary). But the ruling has no efficacy

until reduced to a written ruling, which did not happen until January 19. And the circuit court itself set a January 27 deadline for compliance, which it then *sua sponte* and without notice accelerated by three days, late on a Friday afternoon. Consistent with this oral ruling, this last-second modification ignores the reality that election administration is complex and multi-faceted, requiring a meeting and deliberation by WEC, then communication with municipal clerks, and then time for those clerks to assimilate the communication and implement it. The courts cannot reasonably expect all of this to happen before absentee ballots—and instructions on how to complete and return them—go in the mail, which must happen no later than tomorrow.

For their part, Respondents can make only an anemic attempt to demonstrate any harm will follow from a stay. Respondents' central argument on this point is an exercise in misdirection. They assert a generalized "interest in elections being held in accordance with state law." Resp. Br. at 5. The truth, however, is that Respondents themselves have little or nothing at stake, an uncontroverted fact revealed during discovery. Respondent Thom, for example, does not know who the Wisconsin Elections Commission is. (Cir. Ct. Dkt. 115 at 19:8-13) Thom had not even seen the two WEC guidance documents as of the date of his deposition. (*Id*. at 20:5-17) Respondent Teigen, a former law partner at Foley and Lardner, admitted (contrary to the arguments made through his counsel throughout this dispute) that Wis. Stat. § 6.87(4)(b)1., along with the entire statutory election scheme,

requires a "common sense" interpretation. (Cir. Ct. Dkt. 114 at 55:12-18) It seems Respondents have nary a grasp on the incredible and irreversible harm the pending circuit court order threatens.

Putting all of this together requires comparing the nonexistent and purely hypothetical harm that Respondents claim against all-but-certain confusion and disenfranchisement caused by the circuit court imposing a last-minute change to longstanding principles of Wisconsin election administration. There is no contest: the balance of harms tips decisively in favor of Movants—and therefore favors entrance of a stay.

C. The public interest strongly favors a stay.

The final *Gudenschwager* factor focuses on the public interest. Here, too, Respondents rely on hand-waving at a generalized interest in seeing elections administered lawfully. Greater precision provides clarity. The public interest is in efficient, fair, free elections administered in accord with constitutional guarantees and legal processes. The only way to vindicate that interest under these circumstances is to enter the emergency stay Movants and WEC have requested.

One example in particular lays this bare. While Respondents insist that the circuit court order will not cause confusion, they never provided—or prompted the circuit court to provide—information on what their remedy looks like in practice when the circuit court orders are implemented. Consider Respondents' insistence that it is simple to administer the circuit

court's ruling that an individual elector may return only their own ballot to the clerk's office. But how is the clerk to know whether the person returning the ballot is the voter to whom the ballot was issued? In smaller communities, the clerk may know most residents. But in villages and cities, that is less likely. (The absence of any guidance on this question underscores that, contrary to Respondents' blithe insistence, this was not the governing interpretation prior to WEC's 2020 guidance memo.) Perhaps Respondents would suggest that clerks should check photo identification before accepting absentee ballots that are returned in person. But that leads right into a thicket: the statutes do not prescribe such an additional ID check, and election officials are not permitted to erect additional barriers to voting that are not expressly authorized in the statutes. As WEC staff explained early in the COVID-19 pandemic, that is why, notwithstanding any statewide or local mask mandates, municipal clerks could not require voters to be masked in order to vote in person. *See* https://elections.wi.gov/node/6981 ("The WEC, along with state agencies, county or local governing bodies and/or election officials, cannot pass ordinances or establish rules that add qualifications for an eligible elector to cast a ballot…No voter should be refused a ballot for lack of wearing a face covering.").

CONCLUSION

For the reasons articulated above and in Movants' emergency motion, this Court should stay the circuit court's order issued January 19, 2022 and its oral ruling issued January 21, 2022.

Dated: January 24, 2022 Respectfully submitted,

Electronically signed by Scott B. Thompson
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