Appeal No. 2022-AP-91

SUPREME COURT OF WISCONSIN

RICHARD TEIGEN AND RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant-Co-Appellant-Respondents,

DEMOCRACTIC SENATORIAL CAMPAIGN COMMITTEE,
Intervenor-Defendant-Co-Appellant-Respondent,

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

Intervenors-Defendants-Appellants-Respondents.

On Appeal from the Circuit Court for Waukesha County
The Honorable Michael Bohren, Presiding
Circuit Court Case No. 21-CV-958

RESPONSE TO EMERGENCY MOTION TO LIFT STAY

INTRODUCTION

Petitioners' request that this Court vacate the stay issued by the court of appeals should be denied. As detailed below, the court of appeals did not erroneously exercise its discretion in applying the relevant legal test and granting the stay. Moreover, the circuit court—whose ruling on the stay Petitioners want to restore—made no effort to apply the proper standard. This morning's decision in *Waity v. Vos*, 2022 WI 6, --- Wis. 2d ---, --- N.W.2d ---, is definitive on this point. The account there of the circuit court's error in evaluating the stay request could easily have been written about this case:

> The circuit court's error was not that it continued to agree with its previously announced merits analysis. The circuit court's error was thinking that referencing to its prior decision was all it needed to say about the likelihood of success on appeal.

Id., ¶67, n.8 (Hagedorn, J., concurring). Compare that to the circuit court's analysis here of Respondents' likelihood of success on the merits: "The statutes are unambiguous. They're clear. Nobody can be confused in reading them." (App. 65) The circuit court's abbreviated analysis gave no consideration to the *de novo* standard of review that would apply on appeal, no consideration to the relative strengths of various of Respondents' arguments it had dismissed, and not even a mention of several arguments, including issues of federal preemption and constitutional avoidance, that

Respondents had raised and it had never acknowledged. The circuit court's analysis was insufficient under controlling legal authority; this morning's decision in *Waity* only underscores that conclusion.

Moreover, these methods of ballot return are familiar to Wisconsin process. For absentee voters, there is no time separating the pending motion to vacate with the upcoming election: that election is already underway. From the municipalities' perspective, the final predicate procedural step in the absentee ballot process ended on January 25, 2022, the deadline by which all absentee ballots had to be mailed out to voters who had requested them by that date. The deadline passed, and (as the court of appeals noted) thousands of absentee ballots were issued in advance of that deadline. Any Court order issued to change the election process at this point would run afoul of the United States' Supreme Court's rule against late-in-the-game changes to election law. This prohibition is known as the *Purcell* principle, after the Court's decision in *Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006). The premise is simple: intervention on the eve of an election unleashes confusion and uncertainty, unconstitutionally impinging upon the right to vote. Certainly, as the election is already underway, any new construction of Wis. Stat. § 6.87(4)(b)1. will confuse and likely disenfranchise Wisconsin voters.

And all four of the *Gudenschawager* factors that comprise the controlling legal standard, whether applied individually or taken together in a sliding scale, favor Respondents' position here. For those reasons, detailed below, the motion to lift the stay should be denied.

PROCEDURAL HISTORY[1]

On June 28, 2021, Petitioners filed suit in Waukesha County Circuit Court against the Wisconsin Elections Commission ("WEC"). (Dkt. 2)[2] Petitioners alleged that memoranda issued by WEC dated March of 2020 and August of 2020 (the "Memos") gave improper guidance that induced local municipal clerks to employ absentee-ballot drop boxes and to permit ballot assistance in ways Petitioners deem unlawful. Petitioners sought a declaration regarding the proper construction of Wis. Stat. § 6.87(4)(b)1. and a permanent injunction regarding WEC's publication and dissemination of the Memos and the guidance contained therein.

[1] This procedural history contains the background necessary for both the response to the emergency motion to lift the stay and the response to the emergency petition for bypass. In an effort to avoid repetition, the Respondents will not repeat this procedural history in their response to the emergency petition for bypass.

[2] As the appellate record has not yet been compiled, docket references are to the circuit court docket.

The Democratic Senatorial Campaign Committee ("DSCC") moved to intervene in the action about two weeks later. (Dkt. 8) The League of Women Voters of Wisconsin, Disability Rights Wisconsin, and Wisconsin Faith Voices for Justice ("Respondents") subsequently also moved to intervene in the action. (Dkt. 30) The circuit court, the Honorable Michael Bohren presiding, held a status and scheduling conference and, due to Petitioners' unwillingness to stipulate to the intervention motions, set a briefing schedule on the motions. (Dkt. 33) Roughly two months later, the circuit court granted both motions to intervene and set a briefing schedule for Petitioners' forthcoming motion for summary judgment and motion for preliminary injunction (Dkt. 69) Briefing on Petitioners' two merits motions was completed by November 24, 2021. The circuit court was set to hear oral argument on the motions on December 16, 2021, but twice postponed the hearing on the court's own initiative. (Dkt. 129 and 130)

On January 13, 2022, the circuit court held a hearing on Petitioners' pending motions. (Dkt. 131) The circuit court granted the motion for summary judgment and subsequently issued a permanent injunction and a declaratory judgment. (Dkt. 11-13)[3] Pursuant to the injunction, the circuit

[3] All cites to "App." are to the Appendix to Petition for Bypass.

court ordered that WEC withdraw the Memos and issue a statement to clerks notifying them that its interpretation in the Memos had been declared invalid by the court no later than January 27, 2022. (*Id.*) After the circuit issued its oral ruling, Respondents specifically preserved the record regarding *Purcell*-related concerns due to the upcoming February 15, 2022 primary election: "Your Honor, I was just going to say in order to preserve the record, that the intervener defendants I represent would submit that such an order is too adjacent or close to the upcoming election to survive that *Purcell* decision." (App. 35) In accord with this concern, Respondents filed a motion for emergency stay the next day, January 14, 2022. (Dkt. 135)

The circuit court, prior to hearing Respondents' motion for emergency stay, signed the order on January 20, 2022. (Dkt. 142) Respondents accordingly filed a notice of appeal the same day. (Dkt. 144) The next afternoon, the circuit court held a hearing on Respondents' motion for emergency stay and orally denied the motion late in the afternoon on Friday, January 21, 2022. (App. 38-71) Additionally, the court *sua sponte* accelerated the deadline it had prescribed in its previous order, changing the deadline by three calendar days and requiring WEC to withdraw its Memos

and inform clerks of such no later than Monday, January 24, 2022. (App. 71-72)

Late in the evening of January 21, 2022, Respondents and WEC both filed emergency motions for a stay with the court of appeals. The following afternoon, the court of appeals issued an order directing Petitioners to respond to the motions by 7:00 p.m. on Sunday, January 23, 2022. (Dkt. 154) On Sunday afternoon, the court of Appeals authorized reply briefs on the pending motion to be filed by 9:00 a.m. on Monday, January 24, 2022. (Dkt. 155). Mid-afternoon on January 24, the court of appeals entered an emergency stay of the circuit court's order through the nonpartisan spring primary election on February 15, 2022. (App. 1-10) The court of appeals expressly reserved the question of whether a longer stay would be appropriate. (App. 9)

The ourt of appeals also issued a subsequent order noting that its goal was to expedite the appeal to resolution on the merits "before the election process begins for the April 2022 election, if possible." (Dkt. 170) To that end, the court of appeals asked the parties to determine the date "by which such an opinion should be issued to minimize uncertainty in that election"

and to propose, no later than Friday, January 28, 2022, an expedited schedule for the administrative steps and the briefing itself. (*Id.*)

On Wednesday, January 26, 2022, Petitioners filed an emergency motion to vacate the stay and an emergency petition for bypass with this Court. The Court issued an order directing Respondents to file a response and a separate letter brief answering several questions related to election administration by 5:00 p.m. on Thursday, January 27, 2022.

LEGAL STANDARDS

The question presented by Petitioners' motion to vacate is whether the court of appeals improvidently granted the governing stay order. The court of appeals affords parties relief pending appeal at its discretion. *State v. Scott*, 2018 WI 74, ¶36, 382 Wis. 2d 476, 914 N.W.2d 141. To properly exercise this discretion, the court of appeals "must explain the reasons underlying its discretionary decision-making." *Id.*, ¶38. To affirm a circuit court decision to grant or deny a stay pending appeal, the court of appeals must find that the circuit court, "using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). This Court reviews such discretionary determinations of the court of appeals for an erroneous exercise of that

discretion. *State v. Avery*, 2013 WI 13, ¶23, 345 Wis. 2d 407, 826 N.W.2d 60. To properly exercise its discretion, the court of appeals "must explain the reasons underlying its discretionary decision-making." *Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶38, 374 Wis. 2d 513, 893 N.W.2d 212.

A circuit court's consideration of a motion to stay pending appeal follows the *Gudenschwager* factors, the considerations for a stay pending appeal. *Gudenschwager*, 191 Wis. 2d at 440. Just today, this Court reiterated those factors a court must consider:

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

Waity v. Lemahieu 2022 WI 6, ¶49, ___ Wis. 2d ___, ___ N.W.2d ___.

I. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN STAYING THE CIRCUIT COURT'S ORDER.

To carry their burden of showing that this Court should lift the emergency stay imposed by the court of appeals, Petitioners must

demonstrate that the court of appeals' order was an erroneous exercise of discretion. Petitioners leave this issue largely unexamined, spending only two disjointed paragraphs of their twenty-nine page brief addressing it. (*See* Pet'rs' Br. at 4, 11.) This Court will "not usually address undeveloped arguments," *Parsons* 2017 WI 37, and it need not do so here. Even if this Court chooses to reach the issue, it is clear that the court of appeals did not erroneously exercise its discretion in imposing the stay that Petitioners seek to lift.

The court of appeals' reasoning for its discretionary decision is easy to determine from the express language of the Order. First, the court of appeals walked through the rationale underlying its expedited decision-making process "the short time period that has resulted from the circuit court's Friday order directing action by Monday." Order at 4. Next, it analyzed the parties' arguments under the *Gudenschwager* factors. *Id*. at 4-10. Throughout this examination, the court of appeals explained precisely why it was rejecting all of Petitioners' arguments *Id*.

Following this examination, the court of appeals clarified why the circuit court erred in denying the stay: the requisite *Gudenschwager* burden was indisputably carried by Intervenor-Defendants below who sought the

stay in the circuit court (Respondents here); *i.e.*, the court of appeals was unable to conclude—as it must in order to affirm the circuit court's denial of the stay motion—that the circuit court "reached a conclusion that a reasonable judge could reach." *Gudenschwager*, 191 Wis. 2d at 440. Incorporating its reasoning from the entirety of the Order, the court of appeals explained:

> For all of these reasons, we conclude that the circuit court erroneously exercised its discretion in denying the motion for a stay because the movants have shown more than a mere possibility of success on the merits, have identified irreparable injury to the election system as a whole for the February 2022 election in the absence of a stay, and have refuted the respondents' assertions that a stay will cause harm to other interested parties and to the public interest.

Order at 9. Thus, the court of appeals clearly explained the reasoning for its Order, and properly applied the requisite standard. As such, its ruling was within its discretion, and that discretion was not erroneously exercised, and the stay it issued should not be vacated.

Petitioners' arguments to the contrary are easily dispatched. First, Petitioners claim the court of appeals failed to identify how the circuit court abused its discretion. This is untrue, as the preceding paragraph quoting from the Order demonstrates.

Next, Petitioners stretch this Court's *Scott* opinion beyond recognition. *Scott* reviewed a court of appeals order that was unaccompanied

by ***any*** rationale. In issuing an order to stay in that case, the court of appeals "did not explain its reasons for exercising its discretion to deny the defendant's motion for a stay." *Scott*, 2018 WI 74, ¶37. This Court explained that a bare exercise of discretion is an impediment to the appellate process. As a result, "[t]he court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review. *Id*., ¶40. *Scott* is inapposite here, where the court of appeals took deliberate care, even under a tight timeline, to express the rationale underlying its decision. As the Order itself demonstrates beyond question, the court of appeals provided its reasoning for granting the stay. It thereby easily clears the low hurdle *Scott* established.

Last, Petitioners claim prejudice in the briefing process: "the Court allowed Respondents to wait until their reply briefs to discuss their likelihood of success." (Pet'rs' Br. at 11) As an initial matter, Petitioners have no authority for the proposition that this claimed grievance amounts to an erroneous exercise of discretion by the court of appeals in issuing its order. The general rule against raising arguments in reply exists to "prevent[]the opposing party from having an adequate opportunity to respond." *Paynter v.*

ProAssurance Wis. Ins. Co., 2019 WI 65, ¶108, 387 Wis. 2d 278, 929 N.W.2d 113. None of these concerns are present in this case.

Here, the substance of these same arguments was briefed in the circuit court for over a month before Intervenors-Defendants filed their emergency motion to stay in the court of appeals. Petitioners were thus well-positioned to respond to those arguments, regardless of the content of the initial motion. Put simply, there was no unfair surprise. Further, Petitioners themselves took the opportunity to address the "likelihood of success" question in their response brief in an attempt to rebut the arguments Intervenors-Defendants presented in support of their motion for an emergency stay. As a result, to the extent Intervenors-Defendants addressed the "likelihood of success" issue in their reply to the court of appeals, it was done so appropriately as a ***reply*** to the argument that Petitioners expressly presented in their response.

Ultimately, none of Petitioners' under-developed arguments suffice to show that the court of appeals erroneously exercised its discretion. On that basis alone, this Court should deny Petitioners' motion to vacate the pending stay.

II. PETITIONERS FAIL TO CARRY THEIR BURDEN OF SHOWING THAT THE STAY SHOULD BE LIFTED BECAUSE THE CIRCUIT COURT'S ORDER WILL NOT INTERFERE WITH ADMINISTRATION OF AN ELECTION THAT IS ALREADY UNDERWAY.

Both the spring primary and the spring election, in which candidates for the spring election are selected, are already underway. Petitioners' counsel has conceded the point, publicly stating that "[w]e have an election underway." Jason Calvi, *Ballot box drop challenge asks Wisconsin Supreme Court to rule*, FOX6, Jan. 26, 2022, https://www.fox6now.com/news/ballot-box-legal-challenge-wisconsin-supreme-court. Wisconsin law required municipal clerks, by January 25, 2022, to distribute absentee ballots for the upcoming election to all voters who had requested them. Wis. Stat. § 7.15(1)(cm). That deadline passed on Tuesday, the day after the court of appeals issued the relevant stay. As the court of appeals recognized, thousands of ballots had, in fact, already been issued in advance of its order. Order at 6. The election had by then already commenced.

With the election even further underway now, vacating the stay of the court of appeals would trigger a massive disruption in the absentee ballot return process. Vacating the stay during the election would discriminate against voters whose ballots have yet to be cast. For those voters, imposing

the circuit court's order would prohibit drop boxes and perhaps render as criminal the simple act of placing a family member's ballot in the mailbox. It is easy to fathom how confusion would metastasize: with two competing sets of election rules, two neighbors could disagree about the process to return their ballots—and both would be right.

This fractured reality is the relief petitioners seek before this Court. (Pet'rs' Br. at 21 ("This Court can give clerks a few days to respond to an order vacating the stay, and make clear that any ballots received prior to that date can and should be counted.") Thankfully, the law forecloses that relief. To protect voters against confusion and associated disenfranchisement, the U.S. Supreme Court adopted a rule—the *Purcell* principle—that forbids such changes as an election nears. *Purcell v. Gonzalez*, 549 U.S. at 4-5.

The *Purcell* principle is rooted in the constitutional guarantee of each eligible voter's right to participate in an election. It prohibits changes to election law well in advance of the deadline to transmit absentee ballots. The Seventh Circuit confirmed that changes to election law in the **months** leading up to an election require the imposition of *Purcell* stays.:

> In *Frank* this court had permitted Wisconsin to put its photo-ID law into effect, staying a district court's injunction. But the Supreme Court deemed that change (two months before the election) too late, even though it came at the state's behest. (*Frank* did not give reasons, but *Republican National Committee* treated *Frank* as an example of a change made too late.) Here

> the district court entered its injunction on September 21, only six weeks before the election and less than four weeks before October 14, the first of the deadlines that the district court altered. If the orders of last April, and in *Frank*, were too late, so is the district court's September order in this case.

Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 641–42 (7th Cir. 2020). It follows that a change occurring **while an election is ongoing** would also require a stay.

The reasoning from *Purcell* and its progeny extend to Wisconsin courts. This Court recognized the importance of protecting voters against electoral process confusion in the leadup to an election day. "[I]t is too late to grant … relief that … would not cause confusion and undue damage to … the Wisconsin electors who want to vote." *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam). Both decisions, *Purcell* and *Hawkins* caution against measures that trigger voter confusion on the eve of an election cycle. The driving concerns of *Purcell* and *Hawkins* are thus in harmony, and they uniformly weigh against Petitioners' motion.

Petitioners argue that *Purcell* does not apply to state courts. This is incorrect. In reaching this conclusion, Petitioners rely heavily on Chief Justice Roberts's five-sentence concurrence in *Democratic National 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.

The Roberts concurrence is inapposite here. Chief Justice Roberts noted that the Pennsylvania cases considered whether *Purcell* allows the U.S. Supreme Court to interfere with a state court's construction of its own state constitution. Thus, 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. This is of no consequence here because the circuit court order 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. Alas, the Roberts concurrence sheds no light.

Petitioners fare no better with the Fourth Circuit case they cite, *Wise v. Circosta*, 978 F.3d 93, 98-99 (4th Cir. 2020) (en banc). In *Wise*, 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 Petitioners mislabel as a holding. *Wise v. Circosta*, 978 F.3d 93, 98-99 (4th Cir. 2020) (en banc).

Here, both *Purcell* and *Hawkins* urge a stay to avoid disrupting an ongoing election. That is what the court of appeals' Order does. Petitioners' arguments to vacate that order fail.

III. PETITIONERS FAIL TO DEMONSTRATE THAT APPLICATION OF THE *GUDENSCHWAGER* FACTORS MERITS LIFTING THE COURT OF APPEALS' STAY; ALL SUCH FACTORS RESOLVE IN RESPONDENTS' FAVOR.

Petitioners spend the lion's share of their "combined memorandum" addressing the *Gudenschwager* factors, primarily at the expense of any discussion of whether the court of appeals properly applied those factors. Misapplication of this standard has been cause for this Court's recent concern. *See Waity*, 2022 WI 6, ¶¶48-61; *id.*, ¶¶64-68 (Hagedorn, J., concurring). Nevertheless, the *Gudenschwager* factors resolve squarely in favor of maintaining the operative stay. The circuit court ruled against Respondents' initial motion, and then, "pro forma, conclude[d] [its] ruling means there is little to no likelihood of success on appeal and den[ied] [the] stay." *Id*., ¶64 (Hagedorn, J. concurring). Such a ruling is an "improper understanding of the law" that merits reversal on appeal. *Id*. As such, the

court of appeals decision to enter a stay order was a proper application of the law under the circumstances—a proper exercise of the court of appeals' discretion that should not be overturned.

A. Respondents are likely to succeed on the merits of their appeal to the court of appeals. Like the circuit court, Petitioners misapply the Gudenschwager "likelihood of success" factor.

The first *Gudenschwager* factor focuses on the likelihood that Respondents will succeed on the merits of their appeal. The court of appeals found that Respondents here are likely to succeed on the merits of their appeal of the circuit court's order. Order at 9. Petitioners' motion to lift the stay fails to demonstrate that the court of appeals committed error in reaching that conclusion. Indeed, Respondents are likely to succeed on the merits of their appeal for many independent reasons.

1. The court of appeals will review the circuit court's statutory interpretations under a de novo standard of review, which lends itself to a successful merits appeal.

As an initial matter, the appropriate question under the *Gudenschwager* analysis is not whether the circuit court believes it reached the right outcome such that the appellate court should agree. As this Court recently noted, "[w]hen reviewing a motion for a stay, a circuit court cannot simply input its own judgment on the merits of the case and conclude that a

stay is not warranted. The relevant inquiry is whether the movant made a strong showing of success on appeal." *Waity*, 2022 WI 6, ¶52. The proper focus is on the likelihood that the appellate court will reach a different outcome, and where, as here, the court of appeals 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*., ¶¶53-54.

Contrary to *Waity*, the circuit court never considered whether Respondents made a strong showing of success on appeal. Instead, it "simply input its own judgment on the merits of the case," *id.*, ¶52, glibly denying that the statute could be open to contrary interpretation. In denying the motion to stay, the circuit court shrugged: "The statutes are unambiguous. They're clear. Nobody can be confused in reading them." (App. 65) This is precisely how a circuit court *should not* apply the "likelihood of success" factor. "Even accepting the circuit court's disagreement with the Petitioners' arguments, they surely had some nontrivial likelihood of persuading a higher court that their legal arguments were correct." *Waity*, 2022 WI 6, ¶67 (Hagedorn, J., concurring.)

2. The Plain Text of Wis. Stat. § 6.87(4)(b)1. Does Not Support Petitioners' Arguments.

Nowhere in Petitioners' submission will this Court find a verbatim reproduction of the full sentence at the epicenter of this dispute. The provision describes how an elector's absentee ballot envelope is returned. In full, it reads: "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.

Each key determination from the circuit court is subject to reasonable disagreement among the parties. The circuit court held—without articulated rationale—that the phrase "mailed by the elector" necessarily may be satisfied only if the elector personally places the ballot in the mail. (App. 23) Similarly, the circuit court held that no one but the elector may deliver the elector's ballot in person to the municipal clerk. *Id*. at 87:16-22. In neither instance did the circuit court explain its textual exegesis. Moreover, the circuit court disregarded the text's reference to "ballot or ballots," an overt indication that the Legislature anticipated an elector returning more than their own individual ballot. Wis. Stat. § 6.87(4)(b)1. 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."

Each of these issues is highly contested, and strong arguments in Respondents' favor attach to each. Even assuming—counter to this Court's holding 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 an appellate court will reach a different conclusion. Under *Waity*, a stay is appropriate.

a. "[B]y the elector" modifies only the mailing procedure under Wis. Stat. § 6.87(4)(b)1.; construing it otherwise requires additional language and leads to absurd results.

This case presents a question of statutory interpretation. The purpose of statutory interpretation is to "determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Analysis of a statute begins with the language of the adopted text. *Id.*, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* This language is "interpreted in the context in which it is used, not in isolation but as part of a whole, in

relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶46.

Wisconsin Stat. § 6.87(4)(b)1., the primary statutory provision at issue in this case, reads in part: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." According to Petitioners, this statutory text restricts the return of absentee ballots to only two methods: (1) the voter handing the envelope containing the ballot in person to the municipal clerk at the office of the municipal clerk or to an election official appointed pursuant to Wis. Stat. § 7.30 to act as the authorized representative of the municipal clerk or (2) the voter placing the envelope containing the ballot in the U.S. Mail. (Pet'rs' Br. at 13-15) In line with their reading of § 6.87(4)(b)1., Petitioners assert that the express language of the statute does not permit the use of drop boxes to return an absentee ballot, and that it similarly does not permit any third party to return an absentee ballot to the municipal clerk on an elector's behalf. For at least three reasons, that reading must be rejected.

First, Petitioners' cramped reading of § 6.87(4)(b)1. would improperly insert words into the statute that the legislature did not include. The express language of Wis. Stat. § 6.87(4)(b)1. provides voters with two

separate options to return their absentee ballots: 1) the envelope may "be mailed by the elector … to the municipal clerk"; or 2) the envelope may be "delivered in person[] to the municipal clerk." Significantly, the express language of the statute defines that the act of ***mailing*** in relation to "the elector," but there is no such limiting linkage with who returns the ballot "in person" to the municipal clerk. If the Legislature had intended the phrase "by the elector" to modify both the mail and the in-person option, there are numerous ways it could have done so:

- "The envelope shall be mailed by the elector, or delivered in person by the elector, to the municipal clerk issuing the ballot or ballots"; or
- "The envelope shall be mailed by the elector or delivered personally by the elector…"; or
- "The envelope shall be personally mailed or delivered by the elector…"; or
- "The elector shall return the envelope to the municipal clerk by any of the following:
    - Mail.
    - Personal delivery."

The Legislature did not choose to write the statute in any of these ways. Instead, it chose to modify only the mailing provision with the qualifier "by the elector."

Interpreting the text to require personal delivery by the elector to the municipal clerk would read words into the statute that it does not contain, and thereby breach a bedrock principle of statutory interpretation. *See, e.g.*, *State v. Lickes*, 2021 WI 60, ¶24, --- Wis. 2d ---, 960 N.W.2d 855 ("[C]ourts may not add to the text. It is a fundamental maxim of statutory interpretation that we do not 'read into [a] statute language that the legislature did not put in.'" (quoted source omitted)); *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶25, 394 Wis. 2d 602, 951 N.W.2d 556 ("We will not add words into a statute that the legislature did not see fit to employ."); *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, ¶11, 394 Wis. 2d 33, 949 N.W.2d 423 (rejecting proffered interpretation that "adds words to the statute"); *State v. Schultz*, 2020 WI 24, ¶52, 390 Wis. 2d 570, 939 N.W.2d 519 ("We do not read words into the statute that the legislature did not write.").

Second, Petitioners' construction of the statute violates the common canon of statutory interpretation that language must be interpreted "reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46. This Court should not "read statutes in a way that produces absurd, implausible, or unreasonable results, or results that are at odds with the legislative purpose." *Anderson v. Aul*, 2015 WI 9, ¶51, 360 Wis. 2d 638, 859

N.W.2d 72; *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶30-43, 293 Wis. 2d 123, 717 N.W.2d 258 (lead opinion) (rejecting a literal interpretation that both "produce[d] absurd results and defie[d] common sense"). Yet Petitioners' reading of § 6.87(4)(b)1. asks the Court to do just that. The following hypotheticals crystalize this point:

- A voter who accompanies their spouse to the municipal clerk's office would be disenfranchised if their spouse handed their absentee ballot to the clerk or deposited it into a drop box, even if the voter expressed approval to the clerk as their spouse returned their ballot.

- A temporarily paralyzed voter, who cannot themselves hand-deliver their absentee ballot to the municipal clerk or put their absentee ballot in a drop box, would break the law by returning their ballot through a personal care assistant.

- A disabled voter who is unable to vote in person because of access issues and designates someone to return their absentee ballot on their behalf to the clerk's office would be committing voter fraud under Petitioners' interpretation.

Each of these hypotheticals reaches an absurd result that cannot accord with Wisconsin's longstanding commitment to the right to vote. "[N]o right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949). Yet each accords with Petitioners' proffered interpretation of § 6.87(4)(b)1.

Third, Petitioners' construction of § 6.87(4)(b)1. is at odds with other state statutes. Section 6.86(2)(a) carves out unique access to absentee ballots for indefinitely confined Wisconsinites. By way of this statute—recently reaffirmed by this Court in *Jefferson v. Dane County*, 2020 WI 90—the Legislature adopted a policy to make it easier for the indefinitely confined to access absentee ballots. Unlike the general procedure to request an absentee ballot, under § 6.86(2)(a) an indefinitely confined person need not supply a copy of photo identification to receive an absentee ballot. *Compare* Wis. Stat. § 6.86(2) *with* § 6.86(1). Yet returning a ballot "in person" can be a practical impossibility. This is true for "Wisconsinites for whom, due to their own age, illness, or disability, either permanent or intermittent, leaving their residence imposes a burden." (Dkt. 1:7, ¶4) Third-party assistance is necessary to protect their voting rights. (*See id.,* ¶¶1-9)

Regardless, Petitioners' interpretation of § 6.87(4)(b)1. demands that the Court assume the Legislature intended to restrict Wisconsin's indefinitely confined voters to return their absentee ballot only via the mail. This presumption goes too far. First, there is no statute that affirmatively limits absentee-ballot access to the indefinitely confined in this fashion. Welcoming such a construction threatens the right to vote altogether for

certain indefinitely confined voters. How could an indefinitely confined, paralyzed person use the U.S. Mail without some degree of third-party assistance? Quite simply, they often cannot. (Dkt. 117, ¶9) Again, this Court should reject a construction of § 6.87(4)(b)1. that is at odds with legislative purpose—as well as the guarantee of equal protection under both the federal and state constitutions. As Petitioners' construction of the statute would contravene Wisconsin's absentee-ballot process for the indefinitely confined, it should be rejected.

b. Petitioners' reading of Wis. Stat. § 6.87(4)(b)1. to prohibit drop boxes would lead to absurd results.

Petitioners assert that absentee ballot drop boxes are impermissible under § 6.87(4)(b)1. because "[d]ropping a ballot into an 'unstaffed' drop box is not delivery 'in person,' as that phrase is commonly understood." (Pet'rs' Br. at 14) According to Petitioners, a drop box "undoubtedly is not the 'municipal clerk' [and] … in no manner of speaking can an inanimate object be considered an 'authorized representative.'" (Pet'rs' Br. at 14-15)

This Court specifically cautioned against the narrow definition of "municipal clerk" upon which Petitioners hinge their argument. In Justice Hagedorn's separate concurrence to the majority opinion in *Trump v. Biden*,

2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, he rejected the narrow interpretation of "municipal clerk" that Petitioners push here. He explained:

> Even if "municipal clerk" were not a specially defined term, the only reasonable reading of the law would allow those acting on a clerk's behalf to receive absentee ballots, not just the clerk by him or herself. After all, many clerks manage a full office of staff to assist them in carrying out their duties. Accordingly, voters who returned ballots to city election inspectors at the direction of the clerk returned their absentee ballots "in person, to the municipal clerk" as required by § 6.87(4)(b)1.

Id., ¶54 (Hagedorn, J., concurring). It follows that absentee ballots placed into a drop box satisfy § 6.87(4)(b)1. so long as the ballots are retrieved by "those acting on a clerk's behalf." *Id.* Furthermore, it is important to recall that the definition of "municipal clerk" falls outside of the strict interpretation demanded by § 6.84.[4] "Municipal clerk," unlike the absentee ballot provisions of state statute, enjoys a much more broad application under the election statutes' general rule, which requires courts to construe provisions broadly "to give effect of the will of the voters." Wis. Stat. § 5.01(1).

The United States Supreme Court agrees:

> Returning an absentee ballot in Wisconsin is also easy. [A]bsentee voters who do not want to rely on the mail have several other options…they may place their absentee ballots in secure absentee ballot drop box[es]. Some absentee ballot drop boxes are located outdoors, either for drive-through or walk-up access, and some are indoors at a location like a municipal clerk's office.

[4] In considering § 6.84, the Court should be conscious of constitutional avoidance principles. *See* footnote 8, *infra.*

Democractic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 36 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *id.* at 29 ("[V]oters may return their ballots [to] various "no touch" drop boxes staged locally.") (Gorsuch, J., concurring).[5]

Petitioners' proffered statutory interpretation also fails because it reads words into the statute and leads to absurd and unreasonable results. Petitioners specifically argue that delivery to an "unstaffed" drop box cannot qualify as "in person" delivery. (Pet'rs' Br. at 14) This distinction between "staffed" and "unstaffed" drop boxes is noteworthy in that it appeared for the first time in Petitioners' summary-judgment filings below. (*See* Dkt. 63 at

[5] Notably, were Petitioners to succeed in upending the U.S. Supreme Court's understanding that Wisconsin law authorizes the use of absentee-ballot drop boxes, that could have broader effects on the application of other Wisconsin election laws. The Seventh Circuit has held that in challenges to election laws under the *Anderson-Burdick* framework, individual "electoral provisions cannot be assessed in isolation," but instead must be examined in the context of "the state's election code as a whole." *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020). Shortly after *Luft* was decided, a Wisconsin federal court issued a preliminary injunction altering several Wisconsin election laws for the 2020 general election. *See Democratic Nat'l Comm. v. Bostelmann,* 488 F. Supp. 3d 776, 800 (W.D. Wis. 2020). But the Seventh Circuit stayed that injunction, 977 F.3d 639 (7th Cir. 2020), and the U.S. Supreme Court affirmed, in part because absentee ballot drop boxes, among other measures accommodating voters, made it sufficiently easy for Wisconsin voters to cast their ballots without the need for the remedies imposed by the district court. 141 S. Ct. at 35 (Kavanaugh, J., concurring) (observing that "[t]o help voters meet the deadlines, Wisconsin makes it easy to vote absentee and has taken several extraordinary steps this year to inform voters that they should request and return absentee ballots well before election day," including the use of drop boxes). Were this Court to eliminate the safeguards offered by drop boxes that, in part, underpinned the Seventh Circuit's and U.S. Supreme Court's decision in *Bostelmann*, it would impact the *Anderson-Burdick* analysis in future cases assessing Wisconsin election law.

11, n.2 ("Plaintiffs do not challenge a drop box that is staffed and located at the municipal clerk's office (or properly designated alternate site). Putting a ballot into a secure box, if the clerk or an authorized representative is present, is 'in person' delivery.")) Petitioners' Complaint makes no such distinction.[6] This late-breaking change of heart suggests that Petitioners recognize the absurdity of their narrow statutory interpretation.

Again, this Court must interpret the statute "in the context in which it is used" and "reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46. As described above, Respondents' interpretation of the statute aligns with those from this Court and the United States Supreme Court. In comparison, even Petitioner Teigen admitted that Petitioners' preferred construction of § 6.87(4)(b)1. is absurd: "This is one of those issues where common sense has to prevail. And the statute really doesn't have to be so specific as to say the ballot at one point in time has to touch both my hand and the clerk's hand." (Dkt. 114 at 42:14-21) Indeed, this is Petitioners' aim: construing § 6.87(4)(b)1. in Petitioners' favor would create a nonsensical world wherein the elector would have to literally place their ballot into the

[6] "Thus, putting an absentee ballot into a drop box does not satisfy the mandatory requirements for casting an absentee ballot set forth in § 6.87(4)(b)1." (Dkt. 2 at ¶38)

clerk's hand. Petitioner Thom confirmed this is exactly the result he seeks, one where "a voter in Wisconsin [must] actually put the ballot into the clerk's hands." (Dkt. 115 at 24:15-25)

Yet common sense commands otherwise. The "staffed" or "unstaffed" distinction Petitioners advance has no statutory basis. Nor does the statute preclude the clerk from designating a drop box as her "authorized representative." Furthermore, the statute never forbids someone acting on a municipal clerk's behalf from retrieving absentee ballots from a drop box. The statute merely states that those acting on the clerks behalf may receive these absentee ballots. This Court should decline Petitioners' invitation to write these prohibitions into law on their behalf.

This is especially true given that the Legislature shares Intervenor-Defendants' understanding of the election statutes. If the Legislature held Petitioners' view, it would not have entertained proposals to rewrite the election code in ways that would accomplish what Petitioners insist is already law. For example, 2021 Wisconsin Senate Bill 209 and Assembly Bill 177 sought to prohibit the use of drop boxes, other than one box directly adjacent

to the primary municipal building.[7] Additionally, 2021 Senate Bill 203 and Assembly Bill 192 sought to limit who may return another voter's absentee ballot.[8] None of these proposals has been enacted into law.

As the Supreme Court of Wisconsin noted over 65 years ago, "[m]odern transportation has greatly affected our social and economic lives and many persons find it necessary or convenient to be away on election day. The number of absentee ballots is increasing rather than decreasing. Where possible our statute should be interpreted to enable these people to vote." *Sommerfeld*, 269 Wis. at 302. Commenting on the predecessor provision to Wis. Stat. § 6.87(4)(b)1., the Court reasoned that

> [i]f our statute is construed to mean that the voter shall himself mail the ballot or personally deliver it to the clerk, then the statute would defeat itself in the case of those who are sick or physically disabled. They would be unable to mail ballots except through an agent. Having made provision that these unfortunate people can vote, we cannot believe that the legislature meant to disenfranchise them by providing a condition that they could not possibly perform.

Id. at 303. *See also* Wis. Stat. § 5.01(1) (dictating that "chs. 5 to 12 shall be construed to give effect to the will of the electors.")[9]; *Hubbard v. Messer*,

[7] https://docs.legis.wisconsin.gov/2021/related/proposals/sb209; ********docs.legis.wisconsin.gov/2021/related/proposals/ab177.

[8] https://docs.legis.wisconsin.gov/2021/related/proposals/sb203; ********docs.legis.wisconsin.gov/2021/related/proposals/ab192.

[9] Respondents recognize that Wis. Stat. § 6.84 purports to exclude the absentee ballot process from the overarching principle that election statutes should be construed to give effect to the will of the voter. However, having already authorized voting by absentee

2003 WI 145, ¶9, 267 Wis. 2d 92, 673 N.W.2d 676 ("A cardinal rule in interpreting statutes is to favor an interpretation that will fulfill the purpose of a statute over an interpretation that defeats the manifest objective of an act.").

c. Wis. Stat. § 6.855 applies only to locations where ballots are collected and distributed.

Petitioners argue that absentee-ballot drop boxes must be pre-approved as "alternate absentee ballot sites" under Wis. Stat. § 6.855. (*See* Pet'rs' Br. at 14.) Once again, Petitioners contort the plain language of the statute to reach their desired result. Section 6.855(1) provides the mechanism by which a municipality may designate "the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." This statutory language is fatal to Plaintiffs' argument. "An alternative absentee ballot site

ballot, the Legislature cannot now impose procedures that make one authorized method of exercising the fundamental right to vote more difficult than another nor in any way treat absentee ballots as a lesser class of ballot. To do so raises serious constitutional concerns under the Equal Protection Clause of the U.S. Constitution. This Court should reconcile Wis. Stat. §§ 5.01(1) and 6.84, reading them together to avoid constitutional conflict. *In re Termination of Parental Rts. to Max G.W.*, 2006 WI 93, ¶20, 293 Wis. 2d 530, 716 N.W.2d 845 ("Where the constitutionality of a statute is at issue, courts attempt to avoid an interpretation that creates constitutional infirmities") (internal citation and quotation marks omitted). Should the Court so direct, Intervenors-Defendants welcome the opportunity to fully brief this issue.

… must be a location not only where voters may return absentee ballots, *but also a location where voters may request and vote absentee ballots*." *Trump*, 2020 WI 91, ¶56 (Hagedorn, J., concurring) (emphasis added; internal quotations omitted). Plaintiffs have not argued that ballot requests or ballot distribution occurred at any drop box. This is dispositive. "Ballots were not requested or distributed. Therefore, Wis. Stat. § 6.855 is not on point." *Id.*

3. The circuit court's order is preempted by both federal statute and constitutional guarantees.

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 that creates conflict with this federal statute, thereby inviting a preemption problem.

Additionally, Petitioners 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. (*See* Pet'rs' Br. at 20.) The circuit court relied heavily on this principle in its ruling. (App. 20-21) But this differential treatment of absentee voters violates the constitutional guarantee of equal protection. *See* footnote 8, *supra*.

Respondents raised both of these arguments in the circuit court (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 Respondents have a likelihood of success on their appeal to the court of appeals.

4. Petitioners' circuit court action is barred by sovereign immunity, a jurisdictional defect that Respondents raised below but the circuit court never addressed.

The action that Petitioners commenced in the circuit court suffers from a jurisdictional defect, which Respondents raised below but the circuit court never addressed. Fundamental principles of sovereign immunity hold that the state cannot be sued unless it has expressly consented. Here, Petitioners sued WEC, a state agency. To do so consistent with the state's limited 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 Petitioners, from seeking judicial review in the first instance. Respondents raised this clear jurisdictional defect in the circuit court (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. Petitioners' failure to exhaust their administrative remedies, which like any jurisdictional issue, must be reviewed *de novo* on appeal, provide yet another reason Respondents have a likelihood of success on the merits.

5. WEC did not need to engage in the statutory rulemaking process to publish the Memos.

Petitioners insist that Wisconsin law required WEC to go through the statutory rulemaking procedure before adopting the memos at issue here. (*See* Pet'rs' Br. at 17-18.) However, formal rulemaking was not required here because the memos are simple guidance documents—nothing more than "best practice" statements reiterating existing practice during the run-up to

the 2020 elections, when local clerks posed questions in the midst of a deadly worldwide pandemic.

This Court recently reaffirmed the propriety of "guidance documents" in *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶89, 393 Wis. 2d 38, 946 N.W.2d 35.[10] The Legislature defined a "guidance document" as:

> any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the following:
>
> 1. Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency.
>
> 2. Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected.

Id. (quoting 2017 Wis. Act. 369, § 31). As the *SEIU* Court made clear, a guidance document:

- "does not have the force or effect of law";
- "impose[s] no obligations, set no standards, and bind no one. They are communications about the law—they are not the law

[10] The *SEIU* case involved a series of constitutional challenges to 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370. There were two separate majority opinions. Justice Kelly authored the majority opinion, referenced here, regarding the set of provisions dealing with "guidance documents." That majority opinion concluded that two provisions seeking to limit guidance documents were facially unconstitutional. This included a provision seeking to impose more extensive procedures that an agency would have to follow before issuing guidance documents.

> itself. They communicate intended applications of the law—they are not the actual execution of the law … they represent nothing more than the knowledge and intentions of their authors"; and
>
> - "cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything."

Id., ¶¶ 100, 102, 105 (emphasis in original).

The WEC memos challenged here neither order nor instruct municipal clerks to take any action. Nor do the memos impose obligations or standards upon municipal clerks statewide. Moreover, these informational memos do not have the force of law or affect what the law is. In fact, the memos expressly state that any identified actions regarding drop boxes are conditional, mere suggestions, and at the sole discretion of municipalities: "If a municipality chooses to do alternate drop off boxes or locations for ballots it should be publicized to voters where they can go to deliver their ballots" and "drop boxes can be used." (Dkt. 2 at 15 (emphases added)) The information contained in the memos also makes it clear that they were written with respect to the 2020 elections and in response to questions WEC had received from on-the-ground election officials. WEC published the March memo in response to "clerks [who] have inquired about options for ensuring that the maximum number of ballots are returned to be counted for the April

7, 2020 election." (*Id.*) Additionally, the August memo opens by asserting that "[t]his document is intended to provide information and guidance on drop box options for secure absentee ballot returns for voters." (*Id.* at 18)

At his deposition, Plaintiff Teigen even conceded that the WEC memos were "not mandatory compliance documents" and that the municipal clerks themselves—not WEC—ultimately decided whether they would apply the drop box guidance from WEC: "[r]egardless of what the document says, the clerks can choose what they want to do." (Dkt. 114, at 43:16-23; 44:15-20) These are the exact type of agency communications that the *SEIU* court addressed and that fall exclusively within the province of the executive branch and do not require rulemaking. [11]

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

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

[11] Former Lt. Governor Rebecca Kleefisch has filed an original action in this Court regarding, among other things, WEC's rulemaking authority vis-à-vis absentee ballot drop boxes. Petition, *Kleefisch v. Wis. Elections Comm'n*, No. 2021AP001976–OA (Wis. Nov. 15, 2021). Respondents filed a nonparty brief in opposition to the petition for original action. The petition remains pending before this Court.

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

Petitioners 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*, 269 Wis. at 301 ("[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. (Dkt. 121 at ¶9) It is, therefore, false for Petitioners 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, in the midst of an ongoing election, unleashing confusion (among voters and election officials alike) and disenfranchising some unknown number of voters.

Petitioners claim this defies belief. (*See* Pet'rs' Br. at 21.) 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 (almost all of which coincided with the Martin Luther King, Jr. Day 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." (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 Petitioners' 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 Petitioners' insistence that the circuit court's order will not cause disenfranchisement be taken at face value. (*See* Pet'rs' Br. at 7-8.) Petitioners point to provisions of law that do not in any way answer the concerns that Respondents and WEC alike have raised. None of the statutes Petitioners 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, absent the stay, 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. Petitioners claim there is ample time to comply with the relevant order because the circuit court announced its oral ruling on January 13 (which was 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. ***That deadline has now passed.***

For their part, Petitioners make only an anemic attempt to demonstrate any harm will follow from a stay. Petitioners' central argument on this point

is an exercise in misdirection. They assert a generalized "interest in elections being held in accordance with state law." (Pet'rs' Br. at 3, 4, 12, 20) The truth, however, is that Petitioners themselves have little or nothing at stake; this uncontroverted fact was revealed during discovery.

Petitioner Thom, for example, does not know who the Wisconsin Elections Commission is. (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) Petitioner Teigen, a former practicing lawyer, 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. (Dkt. 114 at 55:12-18) It seems Petitioners 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 Petitioners 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 Respondents—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, Petitioners 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 deny Petitioners' motion to vacate the operative stay.

One example in particular lays this bare. While Petitioners 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 Petitioners' 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 Petitioners' blithe insistence, their interpretation was not the

governing one prior to WEC's March 2020 memo.) Perhaps Petitioners 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.").

Petitioners ask this Court to take the extraordinary step of vacating a stay so that the rules can change in the midst of an ongoing election—and they do not even know how those new rules would work in practice. This is not the rule of law. It does not serve the public interest.

CONCLUSION

For the foregoing reasons, Petitioners' Motion to Vacate Stay should be denied. Petitioners fail to show that the court of appeals erroneously exercised its discretion. And every one of the *Gudenschwager* factors, properly applied, favors the stay. It follows that Petitioners' motion fails.

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