STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP0091

RICHARD TEIGEN
and RICHARD THOM,

Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATORIAL CAMPAIGN
COMMITTEE,

Intervenor-Defendant-Co-Appellant,

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

Intervenors-Defendants-Appellants.

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

DEFENDANT-CO-APPELLANT'S COMBINED RESPONSE IN OPPOSITION TO PETITIONERS' PETITION TO BYPASS AND EMEGENCY MOTION TO VACATE THE STAY ORDER OF THE COURT OF APPEALS

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GENERAL BACKGROUND

I. Statute at issue

Wisconsin Stat. § 6.87(4)(b)1. states in pertinent part:

> The absent elector, in the presence of the witness, shall mark the ballot in a manner that will not disclose how the elector's vote is cast. The elector shall then, still in the presence of the witness, fold the ballots so each is separate and so that the elector conceals the markings thereon and deposit them in the proper envelope. . . . The return envelope shall then be sealed. . . . *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.

II. The challenged Commission memoranda

Plaintiffs-Respondents, Petitioners here, challenged two 2020 memoranda issued by the Commission to local election officials, dated March 31 (Affidavit of Attorney Steven C. Kilpatrick, Jan. 27, 2022, ¶ 6, Ex. 1001) and August 19 (Kilpatrick Aff. ¶ 7, Ex. 1002).

In both memoranda, the Commission advised that drop boxes in public locations authorized by the municipal clerk[1] can be used for returning completed absentee ballots by electors, subject to multiple measures to ensure ballot security. (Kilpatrick Aff. ¶¶ 6–7, Ex. 1001 & 1002.) Both

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[1] As used in Wisconsin's election statutes, the term "municipal clerk" is statutorily defined as including not only a city, town, or village clerk, but also the clerk's "authorized representatives." Wis. Stat. § 5.02(10). Delivering an absentee ballot to such a representative is thus statutorily equivalent to delivering it personally to the municipal clerk.

memoranda advised that clerks may authorize drop box locations outside the clerk's office, without reference to the process for a municipality to designate an alternate absentee ballot site under Wis. Stat. § 6.855. (Kilpatrick Aff. ¶¶ 6–7, Ex. 1001 & 1002.)

The March 31, 2020, memorandum also advised clerks that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the voter. (Kilpatrick Aff. ¶ 6, Ex. 1001.)

III. Limited procedural history

On June 28, 2021, Petitioners Richard Teigen and Richard Thom, electors residing in Waukesha County, filed a complaint with the Waukesha County Circuit Court against Defendant Wisconsin Elections Commission. *See Teigen v. WEC*, No. 21-CV-958 (Wis. Cir. Ct. Waukesha Cty.). (Copy of Circuit Court Docket (01-21-2022).)[2] Petitioners alleged that the two memoranda did not correctly interpret state election law and were unpromulgated administrative rules.

Later in the litigation, Petitioners modified their claims. Petitioners do not challenge staffed drop-off locations situated either in the clerk's office or at an alternate absentee ballot site designated under Wis. Stat. § 6.855. (Pls.' Cir. Ct. Br. in Support of Motion for Summary Judgment, Oct. 19, 2021, 11 n.2.)

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[2] Because the record has not been transmitted to the Court of Appeals yet, and due to the emergency basis of Petitioners' motion, the Commission respectfully directs the Court's attention to the "Circuit Court Docket" document already filed with the Court of Appeals, and to the electronic docket of the circuit court, accessible through Wisconsin Circuit Court Access, https://wcaa.wicourts.gov.

Multiple parties successfully moved to intervene: Democratic Senatorial Campaign Committee (hereafter "DSCC"), and also Disability Rights Wisconsin (DRW), Wisconsin Faith Voice for Justice, and the League of Women Voters Wisconsin (LWVW) (hereafter collectively "DRW").

Petitioners filed a motion for summary judgment on October 15. Following briefing, a motion hearing took place on January 13, 2022. (Notarized Kilpatrick Aff. ¶¶ 8–9, Ex. 1003 (hearing transcript).) At the conclusion of that hearing, the court issued an oral ruling, granting summary judgment to Petitioners, denying summary judgment to the Commission and Intervenors-Defendants, and directing the Commission to withdraw its memoranda no later than January 27, 2022. The court subsequently entered a final order on January 20, 2022. (Petitioners' Appendix 11–13.) The order declared that the Commission memoranda conflict with state election laws, including Wis. Stat. §§ 6.87(4)(b)1. and 6.855, and directed the Commission to withdraw the memoranda no later than January 27, 2022. The court also declared that the memoranda were administrative "rules" under ch. 227 of the Wisconsin statutes and were invalid because (1) their interpretation of Wisconsin election law was incorrect, and (2) they were not promulgated as "rules."

On January 14, DRW filed a motion for an emergency stay of the subsequent judgment until after the April 5 election.

The Commission and DRW filed notices of appeal on January 20. DSCC filed a notice of appeal on January 23.

On the afternoon of January 21, the circuit court heard DRW's emergency stay motion. The Commission and DSCC joined the motion. The court denied the emergency motion in an oral ruling. (Petitioners' Appendix 38–76.) It rejected the argument that precedent counseled a stay of its final order because the Spring Primary election was effectively already

under way given that municipal clerks may have already mailed absentee ballots to electors who requested them.

Not only did the circuit court not stay its final order, it sua sponte modified the January 20 final order with respect to the permanent injunction issued against the Commission. The circuit court changed the date by which the Commission must withdraw its memoranda from no later than Thursday, January 27, to no later than Monday, January 24. Counsel for the Commission orally moved for a stay of this modified permanent injunction, but the circuit court denied it.

The circuit court issued a written order denying the stay motion and modifying the permanent injunction. (Petitioners' Appendix 14–15.)

On January 24, the court of appeals issued a written order staying the appeal through February 15, 2022, which is election day of the Spring Primary. (Petitioners' Appendix 1–10.)

Petitioners filed a petition for bypass and an emergency motion to vacate the stay on January 26. This Court ordered responses by 5:00 p.m. today, January 27.

ARGUMENT

I. The petition for bypass should be denied because it is premature and a transfer of the case to this Court now would be inefficient.

A. Legal standard for bypass.

This Court "may take jurisdiction of an appeal . . . pending in the court of appeals" upon "a petition to bypass filed by a party." Wis. Stat. § 808.05; *see also* Wis. Stat. § (Rule) 809.60. "A matter appropriate for bypass is usually one which meets one or more of the criteria for review [under

Wis. Stat. § (Rule) 809.62(1r)], and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues." Sup. Ct. IOP § III.B.2.

B. Bypass is unwarranted.

Petitioners' request for bypass should be denied for three reasons.

First, the petition is premature. The Commission and Intervenor-Defendants just very recently filed their notices of appeal. The circuit court record has not even been transmitted to the court of appeals. As this Court is aware, the Court of Appeals has asked the parties for input on setting an expedited briefing schedule. Generally, bypass is not granted until at least the parties have filed their initial briefs. *See Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 63, 387 N.W.2d 245 (1986) (explaining that bypass petition is premature because briefs on the appeal had not been filed). *See also* Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin § 24.3 (7th ed. 2016) ("Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent's brief is filed will be dismissed as premature."). Under this Court's policy, the petition is premature and should be denied.

Second, Petitioners' argument that the section 809.62(1r)(c)1. criteria is met here is unpersuasive. While a decision of this Court would help clarify the law, so will a decision from the court of appeals. If bypass is granted, this Court would be deprived of the benefit of a court of appeals' decision. *State v. Floyd*, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d 560; *State v. Kyles*, 2004 WI 15, ¶ 7, 269 Wis. 2d 1, 675 N.W.2d 449 ("We are not bound by a circuit court's or court of appeals' decision on this question of law, but we benefit from the analyses of these courts."). A three-judge panel would provide this Court with a comprehensive, written

legal analysis of the issues, which would assist this Court's ultimate determination of the case.

And there is no reason to believe that the court of appeals will delay these appellate proceedings. Quite the contrary, that court indicated in its January 25 order that it aims, if possible, to have briefing completed on a timeline that will allow it to issue an opinion fourteen days before the election process begins for the April 5, 2022. (Ct. App. Order of Jan. 25, 2022, at 2.) Even if the court of appeals ultimately cannot provide a decision before the absentee ballots are mailed out by municipal clerks for the April 5 election, the Commission still agrees that briefing should be expedited.

Third, even with bypass, it would be unlikely that all briefing could take place and this Court could render a decision in time for a decision to apply for the April 5 election. Absentee ballots theoretically could already have been sent out. (Letter to Clerk of Supreme Court from Defendant-Co-Appellant, Jan. 27, 2022.) But it is more likely that such ballots could begin to go out to electors who have requested them on February 21, the deadline by which municipal boards of canvass must meet and certify candidates from the Spring Primary, but they could meet earlier. *Id.* So realistically, whether there is first an expedited appeal in the court of appeals or not, the first election when this Court's decision could apply would be the August 9 primary election. Because the Court of Appeals will not delay this matter, and because this Court is no more likely than the Court of Appeals to be able to fully resolve this case in time for the decision to apply to the April 5 election, there is no compelling reason to grant bypass at the present time.

In short, it would be irregular and inefficient to transfer the case to this Court now. The Court can determine whether to accept this case through a petition for review, since the unsuccessful party or parties in the court of appeals will

assuredly file one. Petitioners' bypass petition should be denied.

II. Even if this Court grants bypass, Petitioners' motion to vacate the stay order of the Court of Appeals should be denied.

Given that the Spring Primary election is already underway, the Court of Appeals' decision to stay the circuit court's final order, as modified, was proper. Because there is hard evidence that municipal clerks have already mailed thousands of absentee ballots to electors who had requested them, and, as Petitioners even concede, "absentee voting has already begun," (Petitioners' Combined Memorandum in Support of Emergency Motion to Vacate Stay and Emergency Petition for Bypass (hereafter "Petitioners' Memorandum") 5), a vacatur of the stay would only create voter confusion, an outcome that is highly disfavored by this Court and the United States Supreme Court. Petitioners' emergency motion to vacate the stay order should be denied.

A. The stay legal standard.

This Court may stay a final order pending appeal under Wis. Stat. §§ 808.07(2)(a)1. and (Rule) 809.12. A stay can be granted if a movant "(1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest." *State v. Gudenschwager*, 191 Wis. 2d 431, 440–41, 529 N.W.2d 225 (1995). The movant need not satisfy "each of the four" factors as if they were "tests." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 25 n.15, 237 Wis. 2d 498, 614 N.W.2d 565. Instead, the court must "balance the relative strength of each." *Id.* "These factors are not prerequisites but rather are interrelated considerations that must be balanced

together." *Gudenschwager*, 191 Wis. 2d at 440. The *Gudenschwager* legal standard is a sliding scale; "more of one factor excuses less of the other." *Id.* at 441.

This Court reviews a trial court's decision on a stay for "an erroneous exercise of discretion." *Gudenschwager*, 191 Wis. 2d at 439. An appellate court will sustain a discretionary act if it concludes the trial court (1) examined the relevant facts; (2) applied a proper standard of law; and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 440.

B. The third and fourth *Gudenschwager* factors are met and sufficient to allow the Court of Appeals order to stay the circuit court's final order to remain in effect.

1. Enjoining existing election procedures after absentee voting has begun would cause disruption and confusion that would substantially harm the public and interested parties.

This Court should deny Petitioners' emergency motion to vacate the stay order of the Court of Appeals. That order, which stayed the circuit court's final order declaring the Commission's two memoranda invalid, should be allowed to remain in place for (at least) the duration of the Spring Primary election, ending February 15. The Court of Appeals correctly concluded that the circuit court erroneously exercised its discretion in denying the emergency stay motion because it ignored precedent holding that courts should not issue orders that change the rules of an election on the eve of or during an election. (Petitioners' App. 9.)

Here, the Court of Appeals correctly held that the third and fourth *Gudenschwager* factors are of sufficient weight to

tip the scales in favor of a stay: substantial harm will come to the public interest and interested parties by changing the election rules in the midst of an election. (Petitioners' App. 9.) These harms are squarely illustrated by the reasoning of the U.S. Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and by this Court's decision in *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877.

In *Purcell*, the U.S. Supreme Court reasoned, in pertinent part, that when a court is weighing the harm of enjoining or not enjoining a state election procedure shortly before an election, it must consider the fact that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. at 4–5. The Court further emphasized that "[a]s an election draws closer, that risk will increase. *Id.* at 5. This aspect of *Purcell* embodies the common-sense principle that it is contrary to both sound public policy and sound judicial policy for courts to change the rules for conducting an election immediately before the election is about to take place, when preparations and expectations for that election have already been established. And that principle carries even more compelling force where an election *after the election has begun*, which is the case here for the February 15, 2022, Spring Primary.

Petitioners argue that *Purcell* applies only to federal courts. (Petitioners' Memorandum 23–27); *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) ("For many years the Supreme Court has insisted that federal courts not change electoral rules close to an election date."). Petitioners' argument, however, is an overgeneralization. It is true that many cases applying the *Purcell* principle have emphasized the federalism concerns that arise when federal courts intervene in state election procedures, and it may even be true that the *Purcell* principle

applies with special force where such federalism issues are present, but it does not logically follow that the principle *only* applies to federal courts. To the contrary, as noted above, the *Purcell* principle embodies common sense, and it plainly is contrary to sound public and judicial policy for courts—whether state or federal—to be changing election rules immediately before the game is about to begin, or even after it has commenced. The reasoning of *Purcell* thus applies here, without regard to whether any specific holding in that case is legally binding on state courts, as well as federal courts.

Accordingly, this Court—without citing *Purcell*—adopted the same reasoning in *Hawkins*. 393 Wis. 2d 629, ¶¶ 2–5. In that case, the Court rejected a request for relief that would have disturbed an ongoing election mere days before the deadline to return absentee ballots. Just like the reasoning in *Purcell*, this Court explained that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Id.* ¶ 5.

Petitioners note that the particular source of voter confusion in *Hawkins—i.e.,* varying versions of absentee ballots—was different than the source of confusion here (Petitioners' Memorandum 25 n.13.) That factual distinction, however, is legally immaterial. The *Hawkins* Court did not base its decision specifically on that fact, but rather more generally recognized that changes to the election should not occur once absentee ballots have been sent to electors. *Id.* The circuit court order in the present case would make precisely the kind of change that this Court rejected in *Hawkins*.

Petitioners also argue that *Purcell* applies only where a court seeks to "*change*" a state's election laws but not when it "enforces" them. (Petitioners' Memorandum 23–24.) Their theory is that the circuit court is merely applying the relevant election statutes and it is the Commission's challenged

guidance that seeks to change state election law. That argument fundamentally misconceives what constitutes the relevant status quo for purposes of *Purcell* and *Hawkins*. The relevant status quo consists of the established election procedures—together with any supporting interpretations of state election law—that the court in question is being asked to enjoin.

Here, the status quo is the interpretation of the law in effect prior to the circuit court's ruling—*i.e.*, the Commission's interpretation as stated in the memoranda. Rather than keep the status quo, the circuit court's final order upends it. The court of appeals' stay here does exactly what *Purcell* and *Hawkins* counsel: prevent the voter confusion resulting from eleventh-hour changes made to election rules.

Petitioners suggest the last-minute change is no big deal because the memoranda were adopted "recently." (Petitioners' Memorandum 20.) The reasoning of *Purcell* and *Hawkins*, however, is not limited to long-standing election practices, but rather focuses on the status quo of practices that the court is being asked to enjoin. Moreover, the two Commission memoranda challenged in this case were not issued recently but have been in effect for 23 and 18 months, respectively. During the time that guidance has been in place, Wisconsin has conducted *five* statewide elections, including the general election of November 2020 (i.e., April 7, 2020; August 11, 2020; November 3, 2020; February 16, 2021; and April 6, 2021). Moreover, until the final order of the circuit court, there has never been a court ruling or other guidance notifying electors voting by absentee ballot that (1) they could not have another person mail or deliver an absentee ballot for them, or (2) that drop boxes—used throughout Wisconsin in the last several elections—were unlawful. Those rulings are

entirely new. Indeed, Wisconsin residents heard praise for drop boxes from the Legislature almost a year and a half ago.[3]

As in *Hawkins*, the election has essentially begun. As the Commission explained at the circuit court's January 21 hearing, each county clerk must deliver ballots to all the municipal clerks in his or her county *no later than* the 22nd day before the Spring Primary, *i.e.*, January 24, 2022. *See* Wis. Stat. § 7.10(3)(a). In turn, municipal clerks are statutorily required to deliver those absentee ballots to electors, and military and overseas electors, who have previously requested them, *no later than* the 21st day before the Spring Primary, *i.e.*, January 25, 2022, if the request is made before that day. *See* Wis. Stat. § 7.15(1)(cm). These two dates, therefore, *are deadlines*—the last day when these events can happen—not the first day. And, importantly, there is evidence that absentee ballots have indeed been mailed to electors. According to WisVote, where municipal clerks track their absentee ballots as they are issued, as of 3:00 p.m. CST on January 27, 2022, clerks had reported that 88,252 ballots had been sent out (based on the ballot-sent date they recorded in WisVote). (Affidavit of Meagan Wolfe ¶ 4.) In addition, some of those ballots have United States Postal Service (USPS) intelligent mail barcodes ("IMB"), that track the status of the ballot through the mail. As it relates to ballots with IMBs, the USPS reports that 61,266 ballots have been delivered (or are out for delivery now). (Affidavit of Meagan Wolfe ¶ 5.) As the Court of Appeals and Petitioners have recognized, the Spring Primary is therefore already underway.

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

2. Petitioners err in trying to minimize the harm to electors that would be caused by the circuit court's injunction.

Petitioners try to minimize the harm to electors that would be caused by changing absentee voting procedures at this late date, but their attempt fails. (Petitioners' Memorandum 20–23.) Electors who have already been mailed absentee ballots would know from the media that the court of appeals has stayed the circuit court's final order. At this time, they are relying on the ability to use drop boxes for absentee ballot deposit, either by them or a loved one, and to give their ballot to a loved one to take to the mailbox or to the clerk's office. If this Court were to vacate the Court of Appeals' stay order, what becomes of the votes of those electors who already had spouses place their absentee ballots in mailboxes or return them to the clerk's office? Will their votes be counted? Petitioners say yes, (Petitioners' Memorandum 5), but they do not know if the thousands of municipal clerks have the ability to correctly identify and segregate any returned absentee ballots that would have been issued before any order from this Court that would vacate the stay. And it is not unreasonable to believe that some electors, after hearing about a circuit court order, a court of appeals order, and an order from this Court, may throw up their hands and decide not to vote at all for fear of violating state election law.

A stay of the circuit court's injunction is also appropriate because many voters with physical mobility limitations would potentially be disenfranchised by that court's conclusion that Wis. Stat. § 6.87 requires an absentee elector either to personally place his or her own ballot into a mailbox or to personally deliver his or her own ballot to the municipal clerk. This Court may take judicial notice of the indisputable fact that some voters have physical illnesses, infirmities, or disabilities that make it impossible or unduly

burdensome for them to personally travel to the location of a mailbox, or to a location at which the municipal clerk may lawfully accept the return of absentee ballots. Under the circuit court's reading of Wis. Stat. § 6.87, however, those are the only legally permissible methods for returning an absentee ballot. That reading of the statute thus would make it impossible for such restricted-mobility voters to cast their absentee ballots—in other words, they would be disenfranchised.

Petitioners do not really even try to deny that the circuit court's injunction would have this effect on such voters—instead, they seek to sidestep its impact with ineffective counterarguments. (Petitioners' Memorandum 13.)

First, they suggest that this Court can safely overlook the disenfranchising impact of the circuit court's decision because "state law provides numerous exceptions and carve-outs for voters with physical challenges." (Petitioners' Memorandum 22 (*citing* Wis. Stat. §§ 6.82; 6.86(1)(ag), (2), and (3); 6.87(5); and 6.875.) None of those statutory provisions, however, provides meaningful relief to the broad category absentee electors who would be potentially disenfranchised:

- Section 6.82 applies to assisting electors at a polling place. It provides no relief to electors who are physically unable to get to a polling place, a mailbox, or a clerk's office.

- Section 6.86(1)(ag) applies to assisting certain electors in filling out an *application* for an absentee ballot. It provides no relief to electors who are physically unable to personally *deliver* their completed absentee ballot to a mailbox or to a clerk's office.

- Section 6.86(2) provides for absentee ballots to be automatically sent to indefinitely confined voters. It provides no relief to electors who are physically unable

to personally *deliver* their completed absentee ballot to a mailbox or to a clerk's office. It also does not apply to electors who have a physical illness, infirmity, or disability that does not entirely confine them to their homes, but that nonetheless makes it impossible or unduly burdensome for them to personally get to a mailbox or to a clerk's office.

- Section 6.86(3) allows a hospitalized elector to have an agent deliver the elector's completed absentee ballot, but it applies only to hospitalized electors, not to those who are not hospitalized, but who nonetheless have a physical illness, infirmity, or disability that makes it impossible or unduly burdensome for them to personally get to a mailbox or to a clerk's office.

- Section 6.87(5) allows some absentee electors to obtain assistance with *marking* their absentee ballot, but it provides no relief to voters who are physically unable to personally *deliver* their completed absentee ballot to a mailbox or to a clerk's office.

- Section 6.875 provides a special in-person absentee voting system for electors in certain residential care facilities and retirement homes and, where such electors are unable to vote using that special in-person system, it allows them to vote absentee by mail. However, the statute provides no relief to voters who do not reside in a qualified residential care facility or retirement home. It also provides no relief to an elector who does reside in such a facility, but who is unable to use the special in-person voting system and also is physically unable to personally deliver their completed absentee ballot to a mailbox or to a clerk's office.

It is thus clear that Petitioners' purported reliance on the above "exceptions and carve-outs" totally misses the mark. Implicitly recognizing that fact, they suggest that such voters seek a special service from the US Postal Service. But that service is for *delivery* of mail to one's door, rather than to

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

Lastly, the circuit court failed to weigh the harms of other parties against any harms to Petitioners, as required by this Court in reviewing a stay decision. *Waity v. Lemahieu*, 2022 WI 6, ¶¶ 57–58. The circuit court's oral ruling did not address any harm to Petitioners, let alone a balancing. Further, the circuit court did not consider the harms to other parties and the public, such as DRW and disabled electors, *during the pendency of the appeal*. *Id.* ¶ 57. For these parties and electors, if they are unable to vote in the Spring Primary election, because they cannot access a mailbox or the clerk's office, there is no remedy at the conclusion of the appeal for them. Thus, the risk of harm is substantial and irreparable. *Id.* ¶ 55. The circuit court erroneously exercised its discretion in denying the emergency stay request.

3. Petitioners' complaints about the speed of the proceedings in the circuit court do not provide a basis for ignoring the substantial harm the circuit court's injunction would cause to the public and interested parties

Petitioners' determination to ignore the harm to the electors continues with a series of gotcha-type arguments, noting that the intervenors took too long to litigate the case, or that the Commission filed only an oral motion for stay and joined DRW's emergency motion for stay in the circuit court. (E.g., Petitioners' Memorandum 10, 21 n.9.) They offer no support for their theory it is acceptable to harm the public because of the timetable of a case, or that the Commission's efforts to obtain an emergency stay in the circuit court required more than the steps it took. Petitioners also complain that the Commission did not raise an argument in support of having more than mere possibility of success on the merits before filing its reply brief. (Petitioners' Memorandum 4, 11.) For the purposes of an emergency motion for a temporary stay of the circuit court's final order and modified permanent injunction through the Spring Primary, *Purcell* and *Hawkins*, and certainly the harm to the voters, sufficed. Under the *Gudenschwager* sliding scale, those facets of the third and fourth factors counseled in granting the temporary stay. Regardless, as the Court of Appeals recognized, the transcript shows Commission raised the merits argument at the circuit court's January 13 hearing. (Petitioners' App. 4.) The Court of Appeals did not erroneously exercise its discretion in considering the first *Gudenschwager* factor in determining that a temporary stay was needed.

C. The Commission has more than a mere possibility of success on the merits of its appeal.

Aside from the harm to the public and voters under the third and fourth *Gudenschwager* factors, on the first *Gudenschwager* factor, the Commission has made a strong showing of success on the merits of its appeal. The circuit court erroneously exercised its discretion in holding otherwise, first by holding that it did not have a "great likelihood of success on the . . . merits," and second by not applying the appellate court de novo standard of review at the January 21, 2022, hearing on the emergency stay motion. *See* Petitioners' App. 68–69.

1. The Commission's memoranda regarding and who may return an absentee ballot conforms with the law.

As to who may return an absentee ballot, the Commission's memoranda conforms with state law. An elector "mails" or "delivers" her ballot under Wis. Stat. § 6.87(4)(b)1.[4] when an agent acting on behalf of an elector mails or otherwise delivers her absentee ballot to the clerk or an authorized representative. "To mail" means "to send by the nation's postal system." *See Mail*, Merriam-Webster, https://www.merriam-webster.com/dictionary/mail (last visited Jan. 27, 2022). And "to send" means "*to cause* a letter or package to go or to be carried from one place or person to another." *See Send*, Merriam-Webster, https://www.merriam-webster.com/dictionary/send (last visited Jan. 27, 2022) (emphasis added). As long as the elector begins the mailing process—causing it to be send through the mail—she complies

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

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

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

Petitioners' argument relies in part on Wis. Stat. § 12.13(3)(n), which makes it a crime to "receive a ballot from or give a ballot to a person other than the election official in charge." (Petitioners' Memorandum 13–14.) According to them, that prohibition is violated if an absentee voter permits a third party either to place the voter's completed ballot into a mailbox or to personally deliver the ballot to an authorized representative of the clerk. If Petitioners' interpretation were correct, it would criminalize the special absentee voting procedures on which they rely that were discussed in the preceding section. *See, e.g.*, Wis. Stat. §§ 6.86(3)(c) (authorizing an agent of a hospitalized elector to deliver the elector's ballot to the elector's polling place); 6.86(1)(b) (authorizing a judge to return a sequestered juror's absentee ballot to an authorized representative of the clerk). And Petitioners' reading could criminalize USPS employees' handling of Wisconsin electors' absentee ballots. The criminal prohibition in Wis. Stat. § 12.13(3)(n) does not support Petitioners' cramped reading of Wis. Stat. § 6.87(4)(b)1.

2. The Commission's memoranda regarding the use of drop boxes conforms with the law.

The Commission's guidance on drop boxes comports with state law, as well. Wisconsin Stat. § 6.87(4)(b)1. permits absentee ballots to be returned by "deliver[y] in person, to the municipal clerk." On its face, the statute does not say "clerk's office," as many other election laws do, *see e.g.*, Wis. Stat. § 6.87(3)(a) ("[i]f the ballot is delivered to the elector at the clerk's office"). Section 6.87(4)(b)1. says "clerk," so it must have a different meaning that "clerk's office." *Pawlowski v. American Family Ins. Co.,* 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67 ("When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings."). Where a municipal clerk has authorized a secure drop box, an elector delivers a ballot to the clerk by placing it in that authorized box. Under the Commission's guidance, authorized representatives of the clerk who are election officials under Wis. Stat. § 5.02(4e), and who are legally equivalent to the clerk under Wis. Stat. § 5.02(10), then retrieve the ballots and return them to the clerk's office.

Petitioners complain that drop boxes do not comply with the alternate site process under Wis. Stat. § 6.855, but they do not need to. (Petitioners' Memorandum 14–17.) That statute provides a way to creating alternate sites where the entire in-person absentee voting process takes place: a location where "electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned." Wis. Stat. § 6.855(1). In contrast, all that happens at a drop box is the *delivery* of ballots. Indeed, Justice Hagedorn noticed that difference in his concurrence in *Trump v. Biden*, noting that section 6.855 procedures covered "a location not only where voters may return absentee ballots,

but also a location where voters 'may request and vote absentee ballots.'" 2020 WI 91, ¶ 56, 394 Wis. 2d 629, 951 N.W.2d 568 (Hagedorn, J., concurring) (citation omitted). The circuit court erred in not considering this opinion in determining whether the Commission had more than a mere possibility of success on the merits of its appeal, given that Petitioners rely on Wis. Stat. § 6.855 for their position that drop boxes are unlawful. Instead, the circuit court merely reaffirmed *its own* summary judgment decision on the merits, which this Court has held is incorrect because that does not consider the de novo standard of appellate review. *See Waity v. Lemahieu*, 2022 WI 6 ¶¶ 51–53 (Slip op. Jan. 27, 2022). "[A] circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted." *Id.* ¶ 52. That is what the circuit court did here. And this is an erroneous exercise of discretion, warranting a denial of Petitioners' emergency motion.

3. The Commission memoranda are not administrative "rules."

The Commission also has made a strong showing that it is likely to succeed on the merits of its appeal as to Petitioners' rule-making claim because the two memoranda are merely "guidance documents" and not administrative "rules" under ch. 227.

"[A] rule for purposes of ch. 227 is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 942 N.W.2d 900. The memoranda are not rules because they do not have "the force of law." Wis. Stat. § 227.01(13); *Palm*, ¶ 22, 391 Wis. 2d 497 (using phrase "the effect of law").

"In determining whether a provision has the 'force of law,' the language of the purported rule will often provide the answer." *Papa v. DHS*, 2019 WI App 48, ¶ 16, 388 Wis. 2d 474, 934 N.W.2d 568 (unpublished), *aff'd in part, rev'd in part*, 2020 WI 66, ¶ 16, 393 Wis. 2d 1, 946 N.W.2d 17. When language in an agency document uses "express mandatory language," it is "more than informational" and is "intended to have the effect of law." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744 (Ct. App. 1992). Here, there is no express mandatory language contained in either memorandum. On the contrary, the first sentence in the August 2020 Memo states, "This document is intended to provide *information and guidance*." (Kilpatrick Aff. ¶ 7, Ex. 1002 (emphasis added)). Another instance where an agency material can have the force of law is "where criminal or civil sanctions can result as a violation." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W. 2d 118. Here, there is no penalty if municipal clerks do not follow the Commission's memoranda.

Petitioners have contended that because the Commission may order a municipal clerk to conform her conduct to comply with state election laws under Wis. Stat. §§ 5.05(1), these memoranda have the effect of law. (Petitioners' Memorandum 18.) This argument misses the mark. As explained above, the memoranda do not order municipal clerks to conform their conduct to the law. Only a Commission order issued at the conclusion of a Wis. Stat. § 5.06 complaint process would do that. *See* Wis. Stat. §5.06(6). But there is no section 5.06 order at issue here. And, even if there were a section 5.06 complaint filed against a municipal clerk to compel her to use a drop box to accept absentee ballots, the language of the memoranda reveals that a municipal clerk can use drop boxes but is not required to.

Rather than "rules" under ch. 227, the memoranda are mere "guidance documents." As noted above, the memoranda "guide" local election officials, they do not "order" or "direct" them. And guidance documents, unlike rules, do not have the force of law. *See* Wis. Stat. § 227.112(3) ("A guidance document does not have the force of law and does not provide the authority for implementing or enforcing a standard, requirement, or threshold."); *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 102, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*") (interpreting Wis. Stat. § 227.01(3m) to define guidance document as having no "force or effect of law").

Lastly, and importantly, guidance documents do not have to be promulgated like rules do. In fact, the Wisconsin Supreme Court held that the statutory procedure governing the creation of guidance documents violated the constitutional separation of powers. *SEIU*, 393 Wis. 2d 38, ¶¶ 90, 105–08. So, guidance document do not have to follow the statutory procedural requirement for adoption—as opposed to promulgation—at all.

For all these reasons, the Commission makes a strong showing that it will likely succeed in obtaining summary judgment on Petitioners' rulemaking claims.

CONCLUSION

Defendant-Co-Appellant Wisconsin Elections Commission asks this Court to deny Petitioners' Emergency Petition for Bypass and Emergency Motion to Vacate Stay. The appeal before the Court of Appeals should be allowed to continue.

Dated this 27th day of January 2022.

Respectfully submitted,

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