Appeal No. 22-AP-91

SUPREME COURT OF WISCONSIN

RICHARD TEIGEN AND RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,

Defendant-Co-Appellant,

DEMOCRATIC SENATE 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 the Circuit Court for Waukesha County
The Honorable Michael O. Bohren, Presiding
Circuit Court Case No. 21CV958

APPELLANTS' BRIEF IN SUPPORT OF EXPEDITED MOTION TO EXTEND STAY

INTRODUCTION

Two independent reasons support extending the stay currently in place until the February 15 nonpartisan primary through the April 5 nonpartisan general election and until this Court resolves the appeal.

First, this Court has already recognized the circuit court ruling, if allowed to take immediate effect, would "likely cause substantial harm to the

defendants and the public interest." Jan. 28, 2022 Order at 3. That is the rationale the Court gave for declining to vacate the short stay issued on an emergency basis by the court of appeals. The Court identified "voter confusion and uncertainty in the administration of the election" as "substantial harms to the defendants and to the public interest [that] weigh against lifting a stay." *Id.* The same harm and timing concerns will persist through the April 5 general election.

Second, this Court has consistently eschewed changing voting rules after an election has begun. Under Wisconsin law, the February 15 primary and the April 5 general are two parts of the same election. To have one set of rules for the February portion and a different set of rules for the April portion runs counter to the design of Wisconsin election law and contravenes fundamental principles of fairness for voters and candidates alike. Accordingly, the existing stay should be extended through April 5 to apply the same rules to the entirety of the election that is already well underway.

Thus, Appellants respectfully move this Court to extend the governing stay through the resolution of this appeal.

ARGUMENT

I. The same reasons that merit a stay through February 15 also encourage extending that stay through April 5.

Wisconsin courts consider four factors when reviewing a request for a stay pending appeal:

> (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 ---. These factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). "[M]ore of one excuses less of another." Jan. 28, 2022 Order at 3.

As this Court has already confirmed, the relevant factors favor a stay here. *See id.* at 1-3. In denying a stay, the circuit court failed to properly weigh Appellants' likelihood of success on appeal against the substantial harm that would befall the public and Appellants absent a stay. *Id.* at 3. The court of appeals, by contrast, recognized the significance of *de novo* review, as well as the several potentially dispositive legal issues that the circuit court failed to adjudicate, in holding that the likelihood of success favors a stay here.

The court of appeals also seized upon the significant private and public harms that would follow from immediately implementing the circuit court order. Enforcing the circuit court's ruling now, without a stay, would "chang[e] the rules" and upset an ongoing "voting process." Jan. 28, 2022

Order at 4 (Hagedorn, J., concurring). That is problematic because, as Justice Hagedorn recognized, "this court should not muddy the waters during an ongoing election." *Id.*

The Court's reliance on this general principle in its January 28 Order aligns with its own precedent and guidance from the U.S. Supreme Court. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; *Purcell v. Gonzalez*, 549 U.S. 1 (2006). "[C]ourts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J. concurring) (citing *Purcell*, 549 U.S. at 4-5). Moreover, where, as here, an election has already begun, it is "too late" for a court "to grant [] any form of relief that would be feasible and that would not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot." *Hawkins*, 2020 WI 75, ¶5.

The stay sustained by this Court's January 28 Order shields Wisconsin voters from the substantial harms that *Purcell* and *Hawkins* seek to prevent. That stay expires, however, after February 15, the day of the spring primary. Yet the very same concerns underlying the stay persist after the primary and therefore merit an extension of the governing stay through the general election and the resolution of this appeal.

As a threshold matter, only a very short window separates the expiration of the current stay from the April 5 general election. The stay is scheduled to lapse on February 16, triggering a change in the rules governing elections statewide that will by then be on the verge of beginning, if it has not already begun. Such changes are disfavored in the period leading up to an election because they can lead to "voter confusion and uncertainty in the administration of the election." Jan. 28, 2022 Order at 3. The Seventh Circuit confirmed that the *Purcell* principle generally precludes (though it does not categorically forbid) changes in voting rules within two months before election day. *Bostelmann*, 977 F.3d at 641–42. This Saturday—only three days after the filing of this motion—will already mark two months before the April 5 election. The *Purcell* principle merited the stay through the February 15 primary; because mirrored concerns exist beyond that deadline, this Court should extend the stay through the April 5 general election and the resolution of this appeal (which will presumably follow shortly after the general election).

This Court is already aware that the balloting process for the April 5 election will begin shortly after February 15. For example, municipal clerks must publish the formal notice on local absentee ballot procedure by the "4th Tuesday preceding" the election. Wis. Stat. § 10.01(2)(e). That 4th Tuesday falls on March 8, 2022, just three weeks after the current stay will expire. Six days later—no fewer than 22 days before the election—is the deadline by

which counties must deliver absentee ballots to municipalities. Wis. Stat. § 7.10(1), (3). By the very next day, municipal clerks must distribute all absentee ballots that have been requested up to that point. Wis. Stat. § 7.15(1)(cm). These are merely deadlines; as the letter brief submitted by the Wisconsin Elections Commission makes clear, many counties and municipalities begin these processes weeks or even months before the deadlines. *See* WEC Letter Br. at ¶¶2.a & c (filed Jan. 27, 2022).

These statutory deadlines now co-exist perilously with the briefing schedule this Court has set in this appeal. Briefing will close just over two weeks before the April 5 election, without considering the oral argument, yet to be scheduled. *See* Jan. 28 Order at 3-4. As such, this Court's merits decision is almost certain to be issued after the April 5 election. Under the briefing schedule, even if this Court adjudicated the merits of this appeal before the April 5 election, the decision would necessarily come after clerks begin distributing absentee ballots to voters and after voters begin returning completed absentee ballots to their municipal clerks. As noted above, this process begins weeks before election day. Under the logic of *Purcell* and *Hawkins*, as well as the law of the case established by this Court's January 28 Order, there would be no lawful way to apply the Court's merits decision to the April 5 election. *See State v. Moeck*, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783 ("[A] decision on a legal issue by an appellate court establishes the law of the case, which must be followed … on later appeal.")

Yet, if the circuit court order took effect on February 16 (amid a significant likelihood of Appellants' ultimate success), Wisconsin could suffer electoral whiplash—altered voting rules in the weeks preceding the April 5 election, with a jarring return to today's status quo thereafter. *See Bostelmann*, 977 F.3d at 641–42.

In accord with binding precedent and the law already applied in this case, and to ensure continued protection from "voter confusion and uncertainty in the administration of the election," the existing stay should be extended until this Court fully adjudicates the appeal.

II. The stay should be extended because, as a matter of law, the April 5 election is already underway.

There is a separate reason that the current stay should be extended through the April 5 election: that election commenced weeks ago. It follows that any change in election procedure would, at this point, amount to a rule change after the election process has commenced.

Under Wisconsin law, a general election and its affiliated primary are united in a "critical nexus." *State ex rel. La Follette v. Democratic Party of U. S.*, 93 Wis. 2d 473, 517, 287 N.W.2d 519 (1980), *rev'd sub nom. on other grounds, Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). As this Court has explained, "the primary is a part of the election." *State v. Kohler*, 200 Wis. 518, 228 N.W. 895, 910 (1930). "Elections are the means by which choices are made by the electors. *When*

the process of choosing begins, the election has been begun." *Id.* (emphasis added); *see also State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 243, 24 N.W.2d 504 (1946) ("There can be no doubt that under the laws ... of Wisconsin the primary election ... is an integral part of the election process. No person can become a candidate ... in Wisconsin unless he can be a candidate ... at a primary election."). Thus, when Wisconsin voters began returning their absentee ballots for the February 15 election, the "choosing' for the April 5 election begun. As a matter of law, that election is already underway.

This precedent makes intuitive sense. The primary and general elections involve contests for the same offices, featuring the same candidates. Indeed, to win elected office in Wisconsin, a candidate must advance through the primary and then win the general election. Under *La Follete*, *Kohler*, and *Wettengel*, the February 15 primary is one integral part of the April 5 general election contest. *See Moore v. Ogilvie*, 394 U.S. 814, 818 (1969). The February 15 primary and the April 5 election together therefore comprise a "single instrumentality for choice of officers." *Smith v. Allwright*, 321 U.S. 649, 660 (1944); *Ray v. Blair*, 343 U.S. 214, 227 (1952).

To alter the rules between the two steps would cleave that unified process into pieces; it would be akin to changing the rules of a football game while the teams are in their locker rooms for halftime. Such a change would not only be unprecedented and fundamentally unfair, but also confusing to

all involved: candidates, election administrators, and—most significantly—voters.

Our election statutes reinforce the unity of a general election and its primary. Consider:

- The primary and the general are both subject to the same, singular notice from the relevant clerk; that "Notice of Election" (a "Type A" notice) published by county clerks must identify, together, the date of both the primary and the general election. Wis. Stat. § 10.01(2)(a). The representation the statutes require municipal election administrators to make to voters thus confirms that these two events compose a singular unit.

- Wisconsin law mandates that alternate absentee ballot sites for the April 5 election must be designated "14 days prior to the time that absentee ballots are available for the primary." Wis. Stat. § 6.855(1). In other words, municipalities are legally prohibited from changing absentee ballot rules between the primary and the general.[1] The absentee-ballot process itself—the statutory regime at the heart of this dispute—thus confirms that the February primary and the April election exist as a unit.

- Wisconsin's campaign finance statutes reflect the same principle. The requisite spending "period" that governs candidates for office begins when *nomination* papers are filed and ends on the day before the candidate's term in office would commence if they are elected; these statute therefore treat the primary and general elections as a singular unit. Wis. Stat. §§ 11.1103(2), 11.0101(1)(a).

- Even statutory definitions confirm that the primary is merely the first step in a larger election process. The definition of "spring primary" describes its express purpose as an initial step

[1] Notably, the circuit court held Wis. Stat. § 6.855(1) is the lone statutory mechanism municipalities could follow to authorize drop boxes. (App. 12 ("[T]he use of drop boxes … is not permitted… unless staffed by the clerk… and located at a properly designated alternate site under Wis. Stat. § 6.855.")) But by the time the circuit court issued its ruling, the deadline under this provision had passed for any municipality to ameliorate the circuit court's ruling—for the February 15 primary *or for the April 5 general election.*

> in the general election: "the nonpartisan primary … to nominate nonpartisan candidates to be voted for at the spring election." Wis. Stat. § 5.02(22).

Wisconsin law clearly conceives of the primary and the general elections as component parts of a single unit. Were this Court to allow the stay to lapse after the February 15 election, the circuit court order would take effect and change the election rules, rupturing the process midstream. That would not only contravene this Court's precedent against interfering with elections already underway, but also would disrupt the statutory scheme.

CONCLUSION

Permitting the governing stay to expire would inject more, not less, uncertainty and chaos into the election process. Extending the stay through the April 5 election is appropriate under the circumstances and would allow this Court to adjudicate the merits of the instant case and issue its decision well in advance of Wisconsin's August partisan primary. Accordingly, Appellants respectfully request that this Court extend the current stay through the April 5, 2022 general election and until this Court's decision on the merits in this matter.

Dated: February 2, 2022

Respectfully submitted,

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