STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP0091

RICHARD TEIGEN
and RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

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.

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

DEFENDANT-CO-APPELLANT WISCONSIN ELECTIONS COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY THE CIRCUIT COURT'S FINAL ORDER

Defendant Co-Appellant Wisconsin Elections Commission (the "Commission") seeks an order staying the circuit court's final order through the April 5, 2022, Spring Election, or the conclusion of this matter before this Court, whichever comes later.

GENERAL BACKGROUND

I. The challenged Commission memoranda

Plaintiffs-Respondents-Petitioners Richard Teigen and Richard Thom ("Plaintiffs") challenge two memoranda issued by the Commission to local election officials, dated March 31 and August 19, 2020.

In both memoranda, the Commission advised that municipal clerks can authorize drop boxes in public locations, into which electors may return completed absentee ballots, subject to multiple measures to ensure ballot security. Both memoranda advised that such drop box locations do not have to be designated by the municipality as alternate absentee ballot sites under Wis. Stat. § 6.855.

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.

II. Limited procedural history

Plaintiffs commenced this action against the Commission in the Waukesha County Circuit Court. *See Teigen v. WEC*, No. 21-CV-958 (Wis. Cir. Ct. Waukesha Cty.). They alleged that the two memoranda did not correctly interpret state election law and were unpromulgated administrative rules. Democratic Senate Campaign Committee ("DSCC") subsequently joined the action as an Intervenor Defendant; and Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women

Voters of Wisconsin (collectively, "DRW") joined as a second set of Intervenor Defendants.

At the conclusion of a summary judgment motion hearing on January 13, 2022, the circuit court issued an oral ruling, granting summary judgment to Plaintiffs and denying summary judgment to the Commission and the Intervenors-Defendants. On January 20, 2022, the court entered a final order declaring 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."

Appeals were promptly filed by the Commission and by both sets of Intervenor Defendants.

On the afternoon of January 21, the circuit court heard an emergency stay motion. The court denied the motion in an oral ruling and later issued a written order. The Commission and the Intervenor Defendants promptly requested an emergency stay from the court of appeals.

On January 24, the court of appeals entered a written order staying the circuit court's final order through February 15, 2022, which is election day of the Spring Primary.

On January 26, Plaintiffs filed with this Court a bypass petition and an emergency motion to vacate the stay. This Court denied the motion to vacate the stay but granted bypass on January 28. (Order 3–4, Jan. 28, 2022.)

On February 2, 2022, DRW filed a motion to extend the stay through the April 5 election and the resolution of the merits of this appeal. This Court ordered Plaintiffs to respond by noon on February 7, and held the motion in abeyance. The

Court also issued a briefing schedule on the merits of the appeal, to conclude no later than March 21. (Order 1–2, Feb. 3, 2022.)

ARGUMENT

The circuit court order should continue to be stayed through April 5, 2022, or final resolution of this appeal, whichever is later.

The existing stay is scheduled to expire on February 16, 2022, at which point the circuit court's final order—including an injunction against the Commission—would immediately take effect. If that were to happen, permissible absentee voting procedures would be changed at a time when absentee voting either would already have begun or would be about to begin in very short order. Such an outcome is highly disfavored by this Court and the United States Supreme Court. Moreover, implementation of the circuit court's order and injunction would irreparably and significantly harm certain disabled electors' ability to cast absentee ballots for the April 5 election, thereby also harming the state election system as a whole. Further, this Court already determined that the circuit court erroneously exercised its discretion in analyzing the appellants' likelihood of success on the merits of this appeal, and the Commission has made a strong showing of success. The factors for obtaining relief pending appeal are met here, and a continuation of the existing stay is warranted and necessary.

I. The stay pending appeal 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); *see also Waity v. LeMahieu*, 2022 WI 6, ¶ 48 (Slip op. Jan. 27, 2022). "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Gudenschwager*, 191 Wis. 2d at 440; *Waity*, 2022 WI 6, ¶ 49. 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; *Waity*, 2022 WI 6, ¶ 50. "The circuit court's decision must be affirmed if it 'examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.'" *Waity*, 2022 WI 6, ¶ 50 (quoting *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W.2d 788).

II. The third and fourth *Gudenschwager* factors are met and sufficient to continue to stay the circuit court's order beyond February 15.

A. Allowing existing election procedures to remain in place would avoid disruption and confusion to the public.

This Court should extend the existing stay of the circuit court's final order. Courts should not issue orders that change the rules on the eve of an election, and allowing the circuit court's final order take effect here would do just that.

In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the U.S. Supreme Court reasoned 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.

This Court—without citing *Purcell*—adopted the same reasoning in *Hawkins v. WEC*, 2020 WI 75, ¶¶ 2–5, 393 Wis. 2d 629, 948 N.W.2d 877. The Court explained that last-minute election changes can "cause confusion and undue damage to . . . the Wisconsin electors who want to vote." *Id.* ¶ 5. And this Court again applied the same reasoning in the present case, when it denied Plaintiffs' motion to vacate the Court of Appeals' stay order. (Order 3, Jan. 28, 2022.)

Here, the absentee ballot voting process for the April 5 Spring Election may begin very soon if it has not started already. The earliest date on which municipal clerks may send absentee ballots to electors, and military and overseas electors, who have requested them can vary in different jurisdictions depending on both legal factors (*e.g.,* whether there was a February primary in that county) and practical factors (*e.g.,* when can the printing of ballots be completed). Consequently, there is no single date on which absentee voting can be said to begin. Instead, there is a range of possible dates. But that range of dates nonetheless shows that absentee voting for the April 5 election may begin immediately or very shortly after the February 15 Spring Primary.

In counties that do not have a Spring Primary, because the candidates for the April ballot have already been determined, municipal clerks may begin sending out absentee

ballots any time between February 16[1] and March 15, which is the deadline under Wis. Stat. § 7.15(1)(cm) for sending out absentee ballots to electors who have requested them by that date.[2] (Comm'n's Ltr. to Ct. of Appeals 2, Jan. 28, 2022.)

In counties that do have a Spring Primary at the county or municipal level, the earliest date is any time after the board of canvass meets for the applicable level of government involved in the election and the candidates are certified for the Spring Election. (Comm'n's Ltr. to Ct. of Appeals 2, Jan. 28, 2022.) In these counties, therefore, clerks can begin sending out ballots sometime between February 21 or 22 and March 15. *See* Wis. Stat. §§ 7.53(1)(a), 7.53(2)(d), 7.51(5)(b), 7.53(3)(a), & 7.60(3).

Based on the above, it is apparent that, with some variations from county to county, municipal clerks throughout the state can begin delivering absentee ballots to electors on dates ranging from February 16 through March 15. Thus, if the existing stay were to expire and the circuit court order were to take effect on February 16, it would effect precisely the kind of change that this Court rejected in this case, (Order 3, Jan. 28, 2022), and in *Hawkins*.

The reasoning of *Purcell* and *Hawkins* focuses on the status quo of practices that this Court is being asked to allow

---

[1] It is legally permissible in such counties for absentee ballots to be sent out as early as January 11, 2022. *See* Wis. Stat. §§ 5.72(1), 7.10(2), 10.01(2)(b), 10.06(1)(c). As a practical matter, however, it is unlikely that any clerks, even in those counties, would send out ballots for the April election until after the February primary.

[2] While March 15 is the date by which municipal clerks must deliver absentee ballots to electors, including military and overseas electors, who have requested them, *see* Wis. Stat. § 7.15(1)(cm), that is a *deadline* and not a start-date. Clerks can and typically do begin sending out ballots before that deadline.

to continue. 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 they have 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.

At present, electors are relying on (1) the ability to deliver their absentee ballot to their municipal clerk by depositing the ballot in a drop box designated by the clerk; and (2) the ability to give their ballot to a chosen helper who will assist them to vote by mailing the ballot or delivering it to the clerk. If this Court were to allow the circuit court order to go into effect on February 16, some electors may not be aware that they are no longer able to use a drop box or have a helper return their absentee ballot until it is too late—that is, until they are unable to make other arrangements for return of their absentee ballots. And it is not unreasonable to believe that some electors, after hearing about different sets of requirements blinking on and off like a stoplight, may feel so much uncertainty that they will be deterred from voting at all, for fear of violating state election law.

This Court has set a briefing schedule for this appeal that goes through March 21, to be followed by oral argument and a decision on dates that have yet to be determined. It is thus a certainty that this appeal will not be resolved before the scheduled expiration of the current stay on February 16, and it appears unlikely that the appeal will be resolved prior

to the April 5 election. Because the absentee voting process for the April 5 election may begin as soon as February 16, this Court should preserve the status quo by continuing the existing stay through the April 5 election or until this appeal is decided, whichever is later.

In addition, although this Court may continue the stay solely based on applying the *Purcell* and *Hawkins* principles to the facts here, (Order 4, Jan. 28, 2022) (Hagedorn, J., concurring (citing *Hawkins*, 393 Wis. 2d 629, ¶ 5)), those principles also satisfy the third and fourth *Gudenschwager* stay factors, (Order 3, Jan. 28, 2022). Changing the election rules during or immediately prior to the absentee voting process will generate confusion and disruption that will substantially harm the public interest and interested parties. The *Purcell* and *Hawkins* principles alone are thus of sufficient weight to tip the *Gudenschwager* balance in favor of extending the stay.

B. Significant and irreparable harm will come to certain disabled electors if the circuit court's final order takes effect.

If the stay of the circuit court order were lifted on February 16, not only would the change confuse voters and election officials and disrupt election administration; it would also cause serious and irreparable harm to the voting rights of certain disabled electors and to the integrity of the state election system as a whole.

Wisconsin law allows indefinitely confined electors (or electors disabled for an indefinite period) to receive absentee ballots through the mail. *See* Wis. Stat. § 6.86(2)(a) & (b). The circuit court held that even indefinitely confined voters must personally return their ballots to a mailbox or location where municipal clerk may lawfully accept the return of absentee ballots (which the court held must be the clerk's office or designated voting site). Among those voters are individuals

with physical illnesses, infirmities, or disabilities that make it impossible or unduly burdensome for them to personally travel to the location of a mailbox or clerk's office. The circuit court's order would make it impossible for such restricted-mobility voters to cast their absentee ballots—in other words, they would be disenfranchised. Furthermore, if that disenfranchisement were allowed to occur for the April 5 election, the harm would then be irrevocably completed and could not be unwound or undone by any subsequent decision of this Court resolving the merits of the present appeal.

This disenfranchisement, moreover, not only would irreparably harm individual voters, but also would seriously injure the public interest in ensuring that the state election system as a whole provides efficient, fair elections in which the voting rights of all electors are protected and the election process is administered in accordance with the equal protection guarantees of the federal and state constitutions, and the rights of voters under federal statutes such as the Voting Rights Act.[3] The Court of Appeals recognized that the Commission, as the statewide agency charged with administering elections, is in a position to seek protection from injuries to the election system as a whole. (Ct. of Appeals Order 5–6, Jan. 24, 2022.) The potential harm to the voting rights of certain disabled voters thus is also an injury to the election system as a whole that the Commission can defend against.

---

[3] Section 208 of the Voting Rights Act provides, in pertinent part, that "[a]ny 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. A disabled voter who is physically unable to personally deliver her ballot to a mailbox or to the clerk thus has a right to choose another person to assist her in submitting her ballot.

In addition, enforcement of the circuit court's order while the present appeal is pending could expose the Commission, the State of Wisconsin, and individual municipalities to court actions to enforce the federal rights of voters brought by the United States Department of Justice. Under the present circumstances, the only way to vindicate the public interest in protecting the integrity of the state election system and avoiding such potential liability is to continue the existing stay.

Plaintiffs have not denied that the circuit court's order would have this effect on such voters—instead, they have sought to sidestep its impact with ineffective counterarguments.

First, they have suggested that this Court can safely overlook the disenfranchising impact of the circuit court's decision because, they claim, state law provides exceptions and carve-outs for voters with physical challenges. They have cited Wis. Stat. §§ 6.82; 6.86(1)(ag), (2), and (3); 6.87(5); and 6.875. None of those statutory provisions provides meaningful relief to the broad category of 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.

These "exceptions and carve-outs" do not ensure that all are able to vote. Implicitly recognizing that fact, Plaintiffs have suggested that such electors seek a special service from the United States Postal Service ("USPS"). But that service is for receiving mail to one's door rather a curbside mailbox. It says nothing about assistance with delivering outgoing mail to a mailbox. It also 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."[4] This process is in no way an adequate or relevant remedy for a disabled absentee voter to personally mail her ballot.

Lastly, under its *Gudenschwager* analysis, the circuit court failed to weigh the harms of other parties against any harms to Plaintiffs, as required by this Court in reviewing a stay decision. *Waity*, 2022 WI 6, ¶¶ 57–58. The circuit court's ruling did not address any harm to Plaintiffs, let alone undertake 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 them, if they are unable to vote in the Spring 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.

III. The Commission has made a strong showing it is likely to succeed on the merits of its appeal.

A. This Court has already held that the circuit court's analysis of the Commission's likelihood of success on the merits did not satisfy *Gudenschwager* and *Waity*.

Aside from the harm to the public and voters under the third and fourth *Gudenschwager* factors, this Court has already determined that the circuit court erroneously exercised its discretion in analyzing the Commission's likelihood of success on the merits (*i.e.*, the first

---

[4] USPS, *If I have Hardship or Medical Problems, how do I request Dorr Delivery*, http://faq.usps.com/s/article/If-I-have-Hardship-or-Medical-Problems-how-do-I-request-Door-Delivery (last visited Feb. 4, 2022)

Gudenschwager factor). (Order 2–3, Jan. 28, 2022). The circuit court failed to consider the proper de novo standard of review on appeal, along with the possibility that appellate courts may reasonably disagree with the circuit court's legal analysis. (Order 3, Jan. 28, 2022 (citing *Waity*, ¶¶ 53–54).) This circuit court failure weighs in the Commission's favor on the first *Gudenschwager* factor.

B. Contrary to the circuit court's analysis, the Commission has a made a strong showing it is likely to succeed on the merits of this appeal.

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

The Commission's guidance as to who may return an absentee ballot conforms with state law. An elector "mails" or "delivers" her ballot under Wis. Stat. § 6.87(4)(b)1.[5] when an agent acting on her behalf 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 Feb. 4, 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 Feb 4, 2022) (emphasis added). So, as long as the elector begins the mailing process—that is, causing it to be sent through the mail through an agent—she complies with the statute's plain language. Throughout the case, Plaintiffs have offered no other provision of law where

---

[5] "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.

an individual must herself deposit an envelope inside a USPS mailbox in order to satisfy a statutory mailing or service requirement.

And the context and surrounding language of Wis. Stat. § 6.87(4)(b)1. itself supports the Commission's position. "Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory 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." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. Throughout this provision, the Legislature uses the active voice in describing what action the elector must take in the absentee voting process. A few examples:

- "The absent elector, in the presence of the witness, shall mark the ballot";
- "The elector shall then, still in the presence of the witness, fold the ballots";
- "[T]he elector shall also enclose proof of residence"

Wis. Stat. § 6.87(4)(b)1. But then the Legislature switches to the passive voice: "The return envelope shall then be sealed. . . . The envelope shall be mailed by the elector, or delivered in person." *Id.* This purposeful use of passive voice to the act of mailing reveals that while the Legislature intends for the elector to begin the mailing process, it does not intend to require that the elector herself actually place the absentee ballot in a mailbox or hand over to a postal clerk. This reading of the statute also conforms to the Voting Rights Act disability-assistance provision. *See* 52 U.S.C. § 10508.

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

The Commission's guidance on drop boxes also comports with state law. 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 than "clerk's office." *Pawlowski v. Am. Fam. 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.

Plaintiffs have complained that drop boxes do not comply with the alternate site process under Wis. Stat. § 6.855, but they do not need to. That statute provides a way to create 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. 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*, 2022 WI 6, ¶¶ 51–53. "[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 it is an erroneous exercise of discretion, warranting an extension of the Court of Appeals' stay order.

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 Plaintiffs' rule-making claim, because the two memoranda are "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." *Wis. 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*, 16AP2082, 17AP634, 2019 WL 3432512 (Wis Ct. App. July 19, 2019) (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*." 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.

Plaintiffs 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. 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." The memoranda merely "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").

Guidance documents do not have to be promulgated as rules do. Indeed, this Court held that the statutory procedure created in 2017 Act 369 governing the creation of guidance documents violated the constitutional separation of powers. *SEIU*, 393 Wis. 2d 38, ¶¶ 90, 105–08. So, guidance documents 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 on the merits of its appeal of the circuit court's final order.

CONCLUSION

The Commission respectfully asks this Court to grant its motion to stay the circuit court's final order through April 5 or the conclusion of this matter, whichever is later.

Dated this 4th day of February 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

Attorneys for Defendant-Co-Appellant Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 266-8690 (TCB)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us
bellaviatc@doj.state.wi.us