**No. 22AP91**

# In the Wisconsin Supreme Court

RICHARD TEIGEN AND RICHARD THOM,
PLAINTIFFS-RESPONDENTS-PETITIONERS,

*v.*

WISCONSIN ELECTION COMMISSION,
DEFENDANT-CO-APPELLANT-RESPONDENT

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
INTERVENOR-DEFENDANT-CO-APPELLANT-RESPONDENT,

DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR JUSTICE, LEAGUE OF WOMEN VOTERS OF WISCONSIN,
INTERVENORS-DEFENDANTS-APPELLANTS-RESPONDENTS



On Appeal from the Decision of the Circuit Court
of Waukesha County, Honorable Michael Bohren Presiding
Circuit Court Case No. 21-cv-958

## BRIEF IN OPPOSITION TO INTERVENOR-APPELLANTS' MOTION TO EXTEND STAY*



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* Late on Friday, WEC filed its own motion to extend the stay. This brief responds only to the Intervenors' motion. Plaintiffs intend to file a short supplemental response to any additional arguments WEC raises—without repeating anything herein—by ***noon on Tuesday*** (or any other schedule this Court sets).

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## INTRODUCTION

Three Intervening Parties (Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin), (hereinafter "Intervenors") have filed an expedited motion to extend the temporary stay granted by the Court of Appeals. Intervenors argue that it is appropriate to extend the stay for the same reasons that the Court of Appeals granted the existing stay. But Intervenors completely ignore what the Court of Appeals actually said: "We agree that the necessity for relief past that point has not yet been established." Despite that admonition, Intervenors present nothing new. There are approximately sixty days until the spring election, and as a result, as the Court of Appeals itself acknowledged, the arguments that persuaded it to grant (and this Court to allow) a stay for the February 15 election do not apply to the April 5 election. This Court should reject the effort to obtain a stay simply by retreading the same ground.



Most significantly, Intervenors do not even attempt to show that they meet the standard for an extended stay, failing once again (as they did before the Circuit Court and Court of Appeals) to even brief their likelihood of success on the merits. While this Court concluded that the timing related to the February 15th primary was sufficient, by itself, to permit the Court of Appeals' stay to remain in place—when the stay question reached this Court, absentee ballots had *already been sent out*—the timing now cannot be independently sufficient, a full two months before the next election. As Intervenors admit in their motion, municipal clerks do not need to send out election notices until March 8, and the deadline for counties to deliver ballots to municipalities is March 14 Intervenors' Br. at 5–6, leaving more than enough time for clerks to comply with the Circuit Court's order and, more importantly, state law.

Again, the adjustments needed are not complicated. Clerks can simply remove or cover any illegal drop boxes, post signs on them (or where they used to be) that ballots must be mailed or delivered in person

to the clerk, and post notices on their websites, in papers, etc. This case has also been widely reported. And any voters who for whatever reason don't get the message and go to a drop box can simply read the sign and then drop it into a mailbox or deliver it to the clerk's office (or an alternate site under Wis. Stat. § 6.855). Indeed, the March 31, 2020, Memo, which itself altered the election rules, was issued by WEC just seven days prior to the April 7, 2020 spring election, proving the point that there is more than sufficient time to make adjustments to how absentee ballots can be returned.

Intervenors' failure to brief their likelihood of success is fatal to their motion—they cannot meet their burden without addressing all of the factors—and this Court should reject their motion for that reason alone. But even if this Court were to excuse their disregard of their likelihood of success, the merits are, respectfully, not close. State law is clear that absentee ballots must be "mailed" or "delivered in person, to the municipal clerk" and must be returned "by the elector." Wis. Stat. §§ 6.87(4)(b)(1), 6.855(1). And the Legislature has expressed as clearly as possible that these provisions must be strictly construed to prevent "overzealous solicitation of" and "undue influence on" absentee electors. *Id.* § 6.84(1). WEC's attempts to expand the methods for casting absentee ballots were not authorized by the Legislature and also were not promulgated as either regular or emergency rules.



Both the irreparable harm and public interest factors also cut heavily against extending the stay. As this Court has held, "[t]he erroneous interpretation and application of [Wisconsin's election laws] affect matters of great public importance." *Jefferson v. Dane Cty.*, 2020 WI 90, ¶ 15, 94 Wis. 2d 602, 951 N.W.2d 556. And Wisconsin "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). All Wisconsin voters have an interest in elections being held in accordance with state law, so that they and all other voters will have the benefit of the

safeguards and procedural evenhandedness that the Legislature long ago determined were appropriate. That interest will be further violated by extending the stay, since it will keep in place illegal directives that encourage clerks to administer elections in a manner not in accordance with the law. There is no repair for that harm, since an election conducted in violation of state law cannot be undone. *See Trump v. Biden*, 2020 WI 91, ¶ 1, 394 Wis. 2d 629, 951 N.W.2d 568.

## ARGUMENT

In *Waity v. LeMahieu*, 2022 WI 6, this Court held that courts (and thus parties) "*must* consider four factors when reviewing a request to stay an order pending appeal," namely whether the movant demonstrates: (1) "a *strong showing* that it is likely to succeed on the merits of the appeal"; (2) "irreparable injury" in the absence of a stay; (3) that "no substantial harm" will come to other interested parties; and (4) that a stay "will do no harm to the public interest." *Id.* ¶ 49 (emphasis added) (citing *State v. Scott*, 2018 WI 74, ¶ 46, 382 Wis. 2d 476, 914 N.W.2d 141). These factors are "interrelated considerations that must be balanced together." *Id.* (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995)).



### I. Intervenors Disregard Most of the *Gudenschwager* Factors

Intervenors have asked this Court for relief in the form of an extended stay. They therefore bear the burden of convincing this Court that those factors have been satisfied. Intervenors begin by committing the same mistake they've made in prior filings: they completely eschew any attempt, beyond conclusory statements, to demonstrate a "strong showing" of success on the merits of the appeal. In contrast, the Circuit Court explained its reasoning on the merits at length, Dkt. 174:27–34,

and Plaintiffs[2] have consistently and completely briefed and argued why the plain, unambiguous statutory language supports their position, along with the rest of the stay factors.

Intervenors attempt to invoke *Waity* as a basis for extending the stay, but they fundamentally misunderstand *Waity*. That case is about requiring lower courts to consider appellate review when assessing likelihood of success, 2020 WI 6, ¶ 53. Even if the Circuit Court committed a *Waity* error here (and it did not[3]), that does not mean this Court automatically does the opposite of whatever the Circuit Court did; it simply moves this Court from an erroneous-exercise-of-discretion standard of review into de novo review. But the moving party still must meet the standard for a stay to be entitled to one, especially where, as here, the moving party is asking for further relief than the lower courts considered (an extension of the stay).[4]



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[2] To avoid confusion, this Response refers to Richard Teigen and Richard Thom as "Plaintiffs." They are "Respondents" for purposes of the appeal, but WEC and the Intervenors were "Respondents" for the Petition to Bypass.

[3] While not as explicit as it could have been, the transcript reveals the Circuit Court was thinking about the likelihood of success *on appeal*. Plaintiffs emphasized that the standard is "likelihood of success *on appeal*," Dkt. 174:18, and the court concluded "there's not a great likelihood of success on the Defendant's behalf as to the merits *and the substance of the Court's decision*" (an obvious reference to its decision surviving an appeal), Dkt 174:31. Even if the Circuit Court committed a *Waity* error, it is deeply unfair for Movants to invoke *Waity*. Their stay motion below *did not even discuss or apply the stay factors*, but instead relied entirely on *Purcell*. Arguing now that the Circuit Court misapplied a standard that they themselves did not apply, explain, or discuss before the Circuit Court is the epitome of sandbagging and is barred by the forfeiture rule. *E.g.*, *State v. Counihan*, 2020 WI 12, ¶ 27, 390 Wis. 2d 172, 938 N.W.2d 530.

[4] Movants' motion below did briefly mention the April election, but their briefing and arguments focused entirely on the February 15 election, and both the Circuit Court and Court of Appeals understood it that way. *See* Dkt. 174:33 (stay hearing transcript) ("Attorney Kilpatrick said it well, that he looked at the proposed motion as going toward the February 15th primary election and not going toward the general

Intervenors have the wrong side of the law and lost below on every legal issue. As a result, they avoid discussing the merits in their brief, much less make a "strong showing," as required by *Waity*, that the Circuit Court was wrong on the law. Thus, this Court should deny their motion to extend the stay for failing to meet their burden.

## II. Intervenors Are Unlikely to Succeed on Appeal

Even if this Court were to excuse the failure to brief their likelihood of success, Intervenors are not likely to succeed on appeal. The issues in this case are not complicated, and Wisconsin law is clear. Wisconsin law explicitly requires electors to mail or deliver their own absentee ballots in person to the municipal clerk. Courts have a "solemn obligation" to "faithfully give effect to the laws enacted by the legislature." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Where, as here, the plain language of a statute provides a limited number of options for compliance, WEC may not create an additional avenues in conflict with the Legislature's intent. *See State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶¶ 70–71, 303 Wis. 2d 570, 735 N.W.2d 131. The Circuit Court correctly found that the methods set forth in the statutes, and not the additional return methods in the Memos, were the exclusive means by which an elector can validly cast an absentee ballot.



### A. Absentee Ballots Must Be Returned "By the Elector"

Wisconsin law is clear that absentee ballots must be "mailed *by the elector*, or delivered in person, to the municipal clerk." Wis. Stat. § 6.87(4)(b)(1); *see also* § 6.855 ("voted absentee ballots shall be returned *by electors* for any election."). This requirement is consistent with how voting is conducted on Election Day at the polls—each voter must cast

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election thereafter in April. So I looked at it from that standpoint, too."); Court of Appeals Stay Order ("The Commission's current request for relief seeks relief only through conclusion of the election set for February 15, 2022.").

his or her own vote. This ensures that it is actually the elector's vote, that voters take the exercise of the franchise seriously, and that there is no "overzealous solicitation of" or "undue influence on" absentee electors "who may prefer not to participate in an election." Wis. Stat. § 6.84(1).

There are many situations under state law where the Legislature has authorized an agent to act on a voter's behalf—none of which are called into question in this case—but in each the Legislature says so explicitly and provides protections, requirements, and limitations. *E.g.*, Wis. Stats. §§ 6.82; 6.875; 6.86(1)(b), 6.86(3). To give one example, the *very next subsection*, § 6.87(5), explicitly allows voters who are unable to read or write to "select any individual ... to assist in marking the ballot." But it imposes various restrictions: the voter must make a declaration that they are unable to read or write, the agent must sign the ballot, and there are limitations on who can act as an agent. *Id.* By contrast, there is nothing anywhere in the text of the law that allows *any* "other person" to return anyone else's ballot.



WEC's interpretation is also inconsistent with Wis. Stat. § 12.13(3)(n), which prohibits "receiv[ing] a ballot from or giv[ing] a ballot to a person other than the election official in charge." If electors can give their ballots to anyone else to deliver to the municipal clerk, that provision would effectively be nullified. Requiring *the elector* to mail or deliver the ballot in person furthers the Legislature's purpose in preventing fraud, abuse, and coercion in the absentee process. Wis. Stat. § 6.84(2).

Perhaps close family members should be permitted to return one another's absentee ballots. Perhaps there are voters who, for some reason, cannot hand a ballot to a mail carrier but can give one to a third party. But these are ultimately policy questions for the Legislature. The question in this case is the default rule under state law for returning an absentee ballot, and state law is clear that electors must return their own ballots, except where there is an explicit exception.

### B. Drop Boxes Violate Both § 6.87 and § 6.855

Intervenors also have little to no probability of success with respect to drop boxes in light of the plain language of the relevant statutes. The Legislature could have authorized drop boxes in the law or delegated authority to WEC to promulgate rules for such an option—but it did not. No reference to drop boxes can be found anywhere in the election statutes. The Legislature provided two and only two methods of return: (1) by mail; and (2) delivery in person to the municipal clerk. Wis. Stat. § 6.87(4)(b)(1).

WEC's interpretation authorizing unattended drop boxes violates the requirement in § 6.87 that ballots be "delivered *in person* to the municipal clerk." Dropping a ballot into an "unstaffed" drop box is not delivery "in person," as that phrase is commonly understood. Rather, an "in person" delivery requires the elector to deliver their ballot to another person, namely the "municipal clerk" (or an "authorized representative," per the definition of "municipal clerk," Wis. Stat. § 5.02(10)).



WEC's interpretation is also inconsistent with the requirement that the ballot be delivered "*to the municipal clerk* issuing the ballot or ballots." A drop box undoubtedly is not the "municipal clerk." While the definition of "municipal clerk" includes the clerk's "authorized representatives," in no manner of speaking can an inanimate object be considered an "authorized representative."

The requirement that a ballot be "delivered in person, to the municipal clerk," is important to ensure that the other requirement discussed above—that *electors* deliver their own ballot and only their ballot—is followed. If one person delivers multiple ballots at the same time, it would immediately raise concerns to a clerk.

Drop boxes also violate the location requirements in Wis. Stat. § 6.855. That section provides that a municipality "may elect to designate a site other than *the office of the municipal clerk* ... as the location ... to

which absentee ballots *shall be returned* by electors for any election." In other words, the default location "to which absentee ballots shall be returned" is "the office of the municipal clerk," unless a municipality follows the procedure and requirements for such alternate sites.

Wis. Stat. § 6.855 imposes important restrictions on alternate sites. First, if an alternate site is designated, "*no function* related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk" (emphasis added). The clerk must "prominently display a notice of the designation of the alternate site selected." The alternate site "shall be staffed by the municipal clerk ... or employees of the clerk." And, importantly, the sites must be "as near as practicable to the office of the municipal clerk" and "no site may be designated that affords an advantage to any political party." These restrictions demonstrate that alternate sites are to be narrow exceptions to the general rule that absentee ballots are to be mailed or returned in person to the municipal clerk's office.



A foundational principle of statutory interpretation is that the "express mention of one matter excludes other similar matters [that are] not mentioned." *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 35 (holding that local health officials lacked power to "close schools" because the statutes granted that authority only to the state health department.). Under that doctrine, "if the legislature did not specifically confer a power, the exercise of that power is not authorized." *Id.* Section 6.855 is the *exclusive* means to designate an alternate location "to which voted absentee ballots shall be returned." There is no other provision anywhere in state law for alternate locations, yet Intervenors argue, in effect, that municipalities can ignore the

requirements of § 6.855 by creating an unauthorized alternate location where only a subset of the absentee voting process is permitted.[5]

If, as Intervenors argue, absentee ballots can be returned *anywhere*, then there are no principled restrictions on where ballots can be gathered. A clerk could designate a union hall, the local Republican party headquarters, or a park in a historically Democratic-leaning neighborhood as a drop site. A municipality could even use a "mobile election vehicle" to drive around and collect ballots, as Racine has recently done.[6] It's not hard to see the potential for abuse of such a scheme.

WEC's directives leave open the possibility for unattended, unsecured containers to be scattered throughout a community, with no meaningful limits as to available locations, means of security, or (assuming a drop box is secured or staffed) who may staff them or retrieve the ballots from within. It provides no directives as to who may collect ballots, whether and how the number of ballots in a box are to be documented and whether and how records regarding the return of ballots from each box are to be created. The absence of any such requirements



[5] Plaintiffs' argument under Wis. Stat. § 6.855 is not the same argument raised in *Trump v. Biden*, 2020 WI 91. The argument there, as framed to the Court, was that certain park events *"were* illegal in-person absentee voting sites." *Id.* ¶ 55 (Hagedorn, J., concurring). The argument here is not that drop boxes *are* alternate sites under Wis. Stat. § 6.855, but that § 6.855 is the exclusive means under state law to establish a new location, other than the "municipal clerk's office," "to which voted absentee ballots shall be returned." Wis. Stat. § 6.855(1).

[6] Adam Rogan, *First of its kind in Wisconsin | Racine now has its mobile election vehicle, thanks to CTCL grant*, The Journal Times (June 27, 2021), https://journaltimes.com/news/local/govt-and-politics/elections/first-of-its-kind-in-wisconsin-racine-now-has-its-mobile-election-vehicle-thanks-to/article_c8581f0e-cbd2-54b4-8200-fa134ede78c9.html

is perhaps unsurprising since WEC is making up the entire process. There is no statutory authorization for drop boxes.

WEC's interpretation in the Memos writes the safeguards the Legislature put in place for alternate voting locations other than the municipal clerk's office (such as a prohibition on locating an alternate site in a place advantageous to one political party) completely out of the law. Wis. Stat. § 6.855. WEC's interpretation also undercuts the safeguards on who may participate in the election and its administration—for example, by retrieving ballots from the drop boxes and returning them to the clerk's office—because the Memos do not require (as the statutes do, Wis. Stat. §§ 5.02(4e), 7.30(2)) that only election officials and the electors themselves participate in voting process. [7]

### C. WEC's Memos Are Unlawful, Unpromulgated Rules

Finally, Intervenors are unlikely to succeed on appeal, as the Circuit Court recognized, because even if WEC had the authority to issue the directives it did in the Memos (and it did not), the agency undisputedly failed to promulgate the general instructions to all clerks as administrative rules, as required under Wisconsin law.



There can be no real dispute that, if drop boxes were authorized, WEC's Memos would represent the agency's "interpretation of a statute,"

[7] As noted above, the Legislature, in special circumstances such as facilitating voting in senior living communities, has created specific exceptions for individuals such as special voting deputies to assist with voting. *E.g.* Wis. Stat. § 6.875. Those exceptions are not at issue here, and are unaffected by the Circuit Court's ruling. There is no legislatively authorized exception permitting a librarian, grocery store employee, or other person who is *not* an election official to collect or keep custody of ballots for the municipal clerk.

requiring rulemaking under Wis. Stat. § 227.10(1).[8] WEC did not merely quote the plain language of the statutes; the agency decided that the statutory language meant something different altogether, then gave municipal clerks throughout the state the green light to act in accordance with its interpretation. Yet WEC followed neither the traditional rulemaking process nor the emergency process before issuing the Memos, and Intervenors seek to keep these directives in place for future elections.

WEC's Memos also have the "effect of law." While they do not *require* clerks to use drop boxes or *prohibit* anything, there are different kinds of laws—some impose duties, others prohibit conduct, and still others *authorize* conduct. WEC's memos fall into the latter category—they purport to authorize drop boxes and return of absentee ballots by any person. Given that WEC is charged with administering *and enforcing* Wisconsin's election laws, when WEC gives the green light to something, it has the "effect of law." Wis. Stats. §§ 5.05(1), (7), (12); Wis. Admin. Code § EL 12.04. More to the point, WEC trains clerks and election workers, and has responsibility for educating voters about voting procedures, so its memos directly affect how elections are conducted. The Memos authorized methods of ballot return not found in statute and these methods should have been promulgated as rules subject to public oversight, including the public's right to comment on the illegality of the new proposed policies.



If WEC need not engage in rulemaking—which provides the public notice and an opportunity to comment on the lawfulness of the proposed

[8] There is also no question that its interpretation "govern[ed] its enforcement or administration of that statute." WEC is responsible "for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns," Wis. Stat. § 5.05(1), and is charged with investigating and correcting violations of the elections laws, *id.* § 5.05(2m).

rules—and can simply create new election procedures through a written memo (which is itself not subject to any check or balance—the public cannot vote out the Administrator[9] who drafted the Memos), there is little to stop the agency from imposing or telling the municipal clerk that they need not enforce any other election requirement at its whim.

Allowing these unlawful directives to remain in place for yet another election is contrary to law, and perpetuating these methods of voting without legislative authorization undermines the integrity of each election held.

## III. Extending the Stay Will Cause Significant Irreparable Harm and Is Against the Public Interest

Both the irreparable harm and public interest factors also cut heavily against extending the stay. In *Jefferson v. Dane Cty.*, 2020 WI 90, this Court swiftly—and unanimously—enjoined election guidance issued by the Madison and Milwaukee clerks that conflicted with state law.[10] This Court subsequently explained that "[t]he erroneous interpretation and application of [Wisconsin's election laws] affect matters of great public importance." *Id.* ¶ 15. The United States Supreme Court has also recognized—in the very case Intervenors' invoke—that States "indisputably ha[ve] a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4. The Legislature has also stated explicitly that strict adherence to the absentee voting procedures is a matter of great public importance:

> The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In



[9] Like most of the election directives WEC issues, the Memos were not issued by the six appointed members of WEC. The March Memo was issued by Administrator Meagan Wolfe, while the August Memo was issued by Wolfe and Assistant Administrator Richard Rydecki.

[10] Order Granting Temporary Injunction, *Jefferson v. Dane County*, 2020AP557 (March 31, 2020).

> contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1).

As Plaintiffs have maintained throughout this litigation, there is significant harm to the conduct of elections that are not held in accordance with the law. To ignore concerns about election integrity is short-sighted and does a service to no one. To allow WEC to change the rules for elections without legislative approval harms the process and leads to mistrust—it begs the question as to who is helped and who is hurt by WEC's rules changes.



Continuing to administer elections in violation of the plain letter of the law is a very real and concrete harm to both Plaintiffs and the public at large that is irreparable each time it occurs. It undermines confidence in our elections, erodes the public discourse on whether legislative changes should be made, and prohibits holding those whose job it is to enact laws concerning election procedure to account. Intervenors have not answered this concern at any stage. They certainly have not done so in a manner that would justify elevating "voter confusion" above likelihood of success on the merits, or harm to the Plaintiffs and the public at large. Intervenors would not have this Court consider any of these other "interrelated factors" at all, but this Court's case law requires balancing them all, and cannot justify ignoring them. *Waity*, 2022 WI 6, ¶ 49.

## IV. There Is More Than Enough Time Before the April Election to Follow State Law

Intervenors place all of their proverbial eggs in the balancing of the harms basket, making the same arguments based on timing concerns raised in federal cases like *Purcell*, 549 U.S. 1, and *Democratic Nat'l Cmte. v. Wis. State Legislature*, 141 S. Ct. 28. *Purcell* does not apply here for the reasons Plaintiffs already explained in their previous motion to vacate the stay. They will not repeat those arguments in detail here, but briefly, *Purcell* applies only to federal courts, not state courts; and second, *Purcell* is designed to prevent federal courts from *changing* state laws, not to stop state courts from enforcing election laws when an unelected agency has attempted to change them.

Intervenors also cite *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, to support their position, but that case is not on point either. In *Hawkins*, two green party candidates sought a court order that their names be added to the ballot—but by the time they filed the case, many ballots had already been printed and sent out. *Id.* ¶¶ 3–10. The "confusion" this Court was concerned with had to do with that resulting from "send[ing] a second round of ballots to voters who already received, and potentially already voted, their first ballot." *Id.* Likewise, when this Court declined to vacate the Court of Appeals' stay, absentee ballots had already been sent out. This Court's decision on a stay now will be well before any absentee ballots are sent out. This Court in *Hawkins* also emphasized that the candidates waited *weeks* after receiving an adverse decision from WEC before taking any action with this Court. *Id.* ¶ 4. In this case, the *only* parties who have delayed are Intervenors.[11]



[11] Plaintiffs filed this case three days after the *Fabick* original action was denied, and sought an expedited schedule, but Movants pushed to delay summary judgment briefing until after their intervention motions were resolved, and requested a

In any event, extending the stay would simply further violate state law, whereas denying a stay will cause little, if any, confusion. There are two very easy options for returning an absentee ballot that are authorized under state law—mailing it, or delivering it in person to the municipal clerk. Clerks can notify voters of these methods before ballots are sent out, remove drop boxes, and post signs directing voters to mail or deliver their ballots. The elections prior to spring 2020 (when WEC changed the rules) were conducted without drop boxes and ballot harvesting with no problems. There is more than enough time for clerks to comply with state law before the election on April 5.

Faced with a timeframe that provides municipal clerks significantly more time to implement the Circuit Court's ruling than would have been the case had the ruling remained in place for the February primary, Intervenors simply have not demonstrated that the harm they claim will befall Wisconsin voters will occur or that it is not preventable by simple steps such as reminding voters of the proper methods of returning absentee ballots.



The Circuit Court analyzed the stay factors and initially declined to issue the requested stay of its ruling on January 21, twenty-five days prior to the February 15 election. In its decision, the Court explicitly tackled the issue of timing, noting that "There's plenty of time ... for the election clerks to be able to issue the necessary guidelines and to conduct their elections following these laws that the Court talked about and the Court enforced." Dkt. 174:31.

Intervenors now ask this Court to keep the directives in WEC's Memos, which the Circuit Court found after extensive briefing and

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discovery period—and took Plaintiffs' depositions—for information that was neither necessary nor relevant to the case, thus narrowing the timeframe between when summary judgment could be resolved and the upcoming elections. Moreover, WEC has known of the Circuit Court's ruling since January 13, 2022, giving it more than enough time to respond.

argument to be unlawful and without any foundation in the statutes, in place for yet another election in April. The stay should not be permitted to continue into perpetuity. There is no emergency created in permitting the Circuit Court's Order—which merely requires clerks to administer elections according to the statutes that have been on Wisconsin's books for decades—to go into effect on February 16, a full forty-eight days in advance of the April 5 election.

No doubt cognizant of this far larger gap prior to the spring election, Intervenors now argue that the February 15 primary election and the April 5 spring statewide election are, in reality, one and the same election. But obviously they are not. The language of the Wisconsin statutes completely undermines Intervenors' position.

Wisconsin's statutes define primary elections separately from other types of elections, making it crystal clear that these are considered separate elections. *See* Wis. Stat. §§ 5.02(5), (12s), (16) (separately defining general elections, primaries, and partisan primaries). Furthermore, the different types of elections have different timeframes and deadlines for collecting and filing signatures, for issuing notices of the candidates who will appear on the ballot, and for clerks at the county and municipal level to create and issue ballots. Wis. Stats. §§ 10.06(1), (2) (varying deadlines for certifying candidates by election); 7.10(3) (dates for county clerk to distribute ballots to municipal clerks varies depending on whether it is a primary, partisan primary, general election, or other election); 7.15(cm) (deadlines for municipal clerks to distribute absentee ballots varies depending on whether the election is a primary, partisan primary, general election, or other election).[12]



[12] Movants flag the campaign finance statutes (Wis. Stat. ch. 11) to argue that the primary and general elections are one unit, but WEC is expressly excluded by statute from any involvement in campaign finance reporting or administration, Wis. Stat. § 5.05(1), and there are no campaign finance issues otherwise involved in this case, so this argument is wholly inapplicable.

Intervenors urge that allowing the Circuit Court's Order to go into effect would be akin to changing the rules of a football game at halftime. Intervenors' Br. at 8. The analogy is not apt here. Voters who vote in the February election may choose not to vote in the April election, and vice versa, and the candidates and issues on the ballot are necessarily different in a primary than in a general election. While it is undoubtedly true that in locations where there is a primary, only those candidates who were on the primary ballot could possibly appear on the April ballot, this truism does not transform the two contests into a single election. To accept Intervenors' football analogy is tantamount to arguing that after the San Francisco 49ers defeated the Green Bay Packers in the NFL playoffs this year, the game the following Sunday against the Los Angeles Rams was just a continuation of the same game. But of course, the winning team faced a new opponent and the score started at zero-zero. The candidates in the spring general election will likewise have to start from scratch to get their supporters to the polling place for the April election. A candidate cannot show up on April 6 and claim he or she won because that their vote total from the February primary carried over.



Intervenors cannot reasonably argue that their main justification for the timing concern—alleged voter confusion—would be an issue for the April 5 election, or at least that any such concern could not be ameliorated over the course of the coming weeks. It is unreasonable to assume that municipal clerks are unable to cover drop boxes and post notifications about returning an absentee ballot by U.S. Mail or in person to the municipal clerk's office for all to see. The ballots for the April election have not even been created, much less distributed and available for return by voters, yet. The decisions in this case have been, and will no doubt continue to be, well publicized. Informing the public that they are required to follow the existing laws while the merits of the appeal remain pending, poses no hardship on anyone.

## CONCLUSION

This Court should deny Intervenors' request for an extension of the current stay.

Dated: February 7, 2022.

Respectfully submitted.

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## CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. §§ 809.81 for a document produced with a proportional serif font. The length of this memorandum is 5,662 words.

Dated: February 7, 2022.

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