

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

**SUPPLEMENTAL BRIEF IN OPPOSITION TO WEC'S MOTION
TO EXTEND STAY**

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

RICK ESENBERG

BRIAN W. MCGRATH

LUKE N. BERG

KATHERINE D. SPITZ

330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202

*Attorneys for Plaintiffs-
Appellees-Petitioners*

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OF WISCONSIN**

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INTRODUCTION

The Wisconsin Elections Commission (WEC) filed a motion to extend the stay late on February 4, 2022. Because WEC makes many of the same arguments as did the Intervenor, Plaintiffs rely primarily on their initial response filed February 7, 2022, but file this supplemental response to address several discrete issues: (1) there is sufficient time for WEC and the clerks to operate an orderly April election without a stay; (2) the fact that several statewide elections have taken place since the Memos issued does not require further elections to take place under unlawful procedures; and (3) no eligible electors will be disenfranchised if the stay is lifted for the April election.

In addition, while WEC (unlike the other Movants) at least acknowledges that success on the merits of the appeal is a factor that this Court must consider in determining whether to grant an additional stay, WEC's submission falls far short of demonstrating a "strong showing" of that success. *Waity v. LeMahieu*, 2022 WI 6, ¶ 49. WEC does not demonstrate that the Circuit Court was wrong on the law or applied an incorrect legal standard. WEC cannot simply invoke the Court of Appeals' decision—which glossed over the merits—as a reason to believe the agency will have a higher chance of success here. And the few arguments they make are meritless.

SUPPLEMENTAL ARGUMENT¹

I. There Is Sufficient Time for Clerks to Operate an Orderly April Election Under Governing Wisconsin Law

WEC's primary argument is that the stay should be extended because the April election could be underway as soon as February 16th, the day after the February 15th primary and the expiration of the current

¹ The majority of WEC's brief makes the same arguments as the Intervenor did in their submission. Plaintiffs fully incorporate their arguments from their response to Intervenor's motion and do not repeat them here.

stay. WEC Br. at 6 (“absentee voting for the April 5 election may begin immediately or very shortly after the February 15 Spring Primary”).

But February 16th is not actually the day by which a decision must be made regarding the legal methods for casting absentee ballots. References to overseas and military electors have no bearing on whether to extend the stay—neither category of absentee voter could use a drop box or third party runner, but instead will necessarily be voting by U.S. Mail. Furthermore, any county that had a February primary in any of its municipalities would be unable to create ballots for the spring election until the election results are certified—following the municipal, county, and statewide canvass procedures. Wis. Stats. §§ 7.51—7.53, 7.60, 7.70. It is the county clerks who then create the ballots, which the municipal clerks then distribute. Wis. Stats. §§ 7.10(3), 7.15(1)(cm). Until those procedures are completed, the counties that had municipalities with primaries (sixty-one of Wisconsin’s seventy-two counties, including most significantly all of the most populous counties including Milwaukee, Dane, Brown, Kenosha, and Rock²), cannot issue or distribute ballots. As even WEC acknowledges, the earliest possible date that ballots could go out for these counties is February 21 or 22. WEC Br. 7.

Even for those counties that could conceivably create and print ballots as early as February 16, WEC has not submitted any actual evidence or reason to believe that any municipalities actually will send out ballots that early, rather than sending them closer to the deadline of March 15. And even if some county were to send out ballots by February 16, there is still ample time to inform the public that there are two ways to return their absentee ballots *for April*. Whether a stay is issued or not, the substance of the ballot, no matter the county, will not change, so the existence of printed ballots is irrelevant. The only thing that would change is whether a third party can deliver a ballot and whether drop

² See *2022 Spring Primary Polling Places*, available at <https://elections.wi.gov/> (last visited February 7, 2022).

boxes can be used. As WEC showed in 2020, changes can be made even one week prior to an election.

In any event, even if February 16 were the relevant date, this Court can deny the stay motion in time for WEC to notify clerks and voters that ballot harvesting and drop boxes are not permissible for the April 5th election, as even WEC seems to acknowledge. WEC Br. at 6 (“municipal clerks may begin sending out absentee ballots any time between February 16 and March 15”). This is further supported by the Court of Appeals conclusion that “the necessity for relief past that point [February 15th] has not yet been established.” *Id.* The Court of Appeals obviously knew that there was an April 5th election but determined that the Appellants had not made a showing that a stay was appropriate with respect to that election. Nothing in the subsequent filings by WEC (or the Intervenor) has provided any new facts, any new case law, or any new justification for a further stay. WEC is simply making the same arguments made in support of the February stay. It has also been aware of the rulings of the Court of Appeals and this Court limiting the stay to February 15 since January 24 and 28, respectively. If WEC has not prepared for the possibility that it may have to instruct clerks properly on the law on February 16, that failure is on them and does not justify a further extension of the stay.

II. The Fact That Several Elections Have Taken Place Under Unlawful Procedures Does Not Require That *Further* Elections Take Place Contrary to Law

WEC now argues that because five statewide elections have taken place since its illegal Memos were put in place, to avoid harm to the public, this Court should allow ultra vires directives to remain in place for the duration of this appeal. But as the Circuit Court pointed out, the public is not harmed, but actually *benefited*, by having the statutes “administered according to what they say.” App. 68-71, 72. And as Plaintiffs have argued extensively in past briefing, any such harm is both

concrete and irreparable because an election, once held, will not be undone. *Trump v. Biden*, 2020 WI 91, ¶ 1.

III. Allowing the Stay to Expire Will Not Disenfranchise Voters, Who Will Have the Same Access to the Ballot Box as Before the Procedures Were Unlawfully Changed

WEC also contends that thousands of Wisconsin voters will be disenfranchised if required to abide by the absentee voting procedures that have been in place for decades. As Plaintiffs and the Circuit Court below made clear, this is simply not true.

It is undisputed that prior to March 31, 2020, WEC never authorized the use of either drop boxes or third-party ballot harvesting, much less alleged that the absentee voting process in Wisconsin was somehow unlawful or discriminatory in their absence. The two methods of absentee voting authorized by the Legislature—mailing the ballot or delivering it in person to the municipal clerk—have been on the books in the state since 1972. 1971 Act 242. The Legislature has not altered or added to the two specified methods of absentee ballot return, despite periods of both Republican and Democratic control of that body.

WEC glosses over as insufficient the many provisions that the Legislature has adopted to ensure that those who could otherwise have difficulty accessing the ballot box have the opportunity to do so. For example, the law provides for special procedures for individuals in senior communities and retirement homes, those who are hospitalized, and even sequestered jurors. Wis. Stats. §§ 6.875(3) (residents of residential care facilities and retirement homes); 6.86(3) (hospitalized electors); 6.86(1)(b). The law also provides that those who have difficulty reading and understanding English, or who cannot write on their own, may have assistance filling out their ballots. Wis. Stat. § 6.87(5). Unlike WEC's Memos, all such provisions have protections in place to protect against the potential for fraud and abuse, an express concern of the Legislature. Wis. Stat. § 6.84(1). None of these legislatively-created exceptions are

challenged or affected by this case, and their presence in the statutes bolsters Plaintiffs' argument that when the Legislature intends to authorize an agent, it says so explicitly.

Even if there is some gap under state law, such that some voters do not fit into any of the many exceptions and truly cannot vote in any way under the various methods authorized by state law—even though apparently this was not a problem before March 2020—that would need to be resolved either by the Legislature or in a separate case where the facts and details of those particular voters could be tested and litigated. And the result would be, at most, an as-applied exception for those situations—not altering state law entirely for *all* voters, which is effectively what WEC asks for in their stay.³ The question in this case is the default rule under state law for all voters. WEC asks this Court to retain a policy, *for all voters*, that conflicts with state law.

This case is not, and never has been, about whether drop boxes or ballot harvesting are a good policy idea. That is a question for the Legislature. The only question here is whether WEC's decision to institute two new methods of absentee vote return via memos to clerks was lawful. The Circuit Court, having examined extensive briefing and argument by all involved, determined for several reasons that it was not. And neither WEC or the Intervenorers have provided any new reason for this Court to mandate that two methods of absentee ballot return that have been found as a matter of law to contravene Wisconsin statute should remain in place for another election.

³ WEC also cites section 208 of the Voting Rights Act, 52 U.S.C. § 10508. WEC never raised this provision before the Circuit Court, Dkts. 122–23, so its applicability to Wisconsin's *absentee* voting procedures has never been briefed or analyzed in this case (one the Intervenorers mentioned it briefly, but only in passing, Dkt. 118:11). But even if it applies, it at most creates an exception for *disabled* voters, and would not warrant changing the rules for *all* voters, effectively continuing to allow ballot harvesting by anyone, for anyone.

IV. WEC Does Not Make a “Strong Showing” That It Is Likely to Succeed on Appeal

WEC mostly relies on the prior stay as evidence of its likelihood of success, *see* WEC Br. 13–14, but it also raises two brief arguments that warrant a response.

First, WEC argues that the verbs “mail” and “deliver” allow “an agent acting on [a voter’s] behalf,” WEC Br. 14, but it cites nothing in the text to support that assertion. The text says “by the elector,” and § 6.84(1) makes clear that this must be strictly construed. There is no definition of the word “elector” that includes an authorized agent. By contrast, there *is* such a definition for the phrase “municipal clerk,” showing the Legislature knew to include that when that is what it intended. Wis. Stat. § 5.02(10) (definition includes “authorized representatives”). Nor is there any reference anywhere in § 6.87(4)(b) to an “agent” of the elector performing any of the requirements in that subsection. Notably, the *very next subsection*, (5), *does* explicitly allow an agent in certain circumstances: electors who are unable to read or write can “select any individual ... to assist in marking the ballot,” with certain limits. *Id.* § 6.87(5). So do many other provisions, as noted above. *Supra* p. 6. In the context of absentee voting—where the Legislature has told us that it is concerned that a vote be the free and independent choice of the elector—it cannot be presumed that an elector can delegate some or all of her rights and responsibilities to others.

Second, with respect to drop boxes, WEC argues that § 6.87 does not say the “clerk’s office.” WEC Br. 16. But § 6.855 does: “[T]he office of the municipal clerk” is “*the* location ... to which voted absentee ballots shall be returned,” unless an alternate site is designated under that section. And WEC makes no argument whatsoever that an *unattended* drop box meets the “in person” delivery requirement under § 6.87(4)(b)(1).

CONCLUSION

For the reasons set forth above and in Plaintiffs' brief filed on February 7, 2022, this Court should deny both WEC's and the Intervenor's motion for an extended stay.

Dated: February 8, 2022.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

RICK ESENBERG (#1005622)
rick@will-law.org



LUKE N. BERG (#1095644)
(414) 727-7361 | luke@will-law.org

BRIAN W. MCGRATH (#1016840)
brian@will-law.org

KATHERINE D. SPITZ (#1066375)
kate@will-law.org

330 E. Kilbourn Ave.,
Suite 725
Milwaukee, WI 53202
Phone: (414) 727-9455

*Attorneys for Plaintiffs-Respondents-
Petitioners*

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 2082 words.

Dated: February 8, 2022.



LUKE N. BERG

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