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February 11, 2022

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You are hereby notified that the Court has entered the following order:

No. 2022AP91

Richard Teigen v. Wisconsin Elections Commission,
L.C. #2021CV958

This case commenced in Waukesha County circuit court on June 28, 2021. Two Wisconsin voters, plaintiffs Richard Teigen and Richard Thom, challenged certain guidance that the Wisconsin Elections Commission (“Commission”) issued on March 31, 2020, and August 19, 2020, pertaining to whether drop-boxes for the collection of absentee ballots are permitted, whether electors are required to mail or deliver their absentee ballots, and other matters. The plaintiffs sought a declaration from the circuit court that the challenged guidance contravenes Wisconsin law, specifically, Wis. Stat. §§ 6.87 and 6.855, as well as an injunction requiring the Commission to cease issuing such guidance. Several interest groups were permitted to intervene.

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On January 13, 2022, the circuit court conducted a hearing and issued an oral ruling granting the plaintiffs' motion for summary judgment. The circuit court declared that the Commission's guidance on these matters contravenes the statutes and that the guidance documents constituted administrative rules under Chapter 227, which were invalid because they were not duly promulgated as rules. The court directed the Commission to withdraw the disputed guidance and to advise the clerks, no later than January 27, 2022, that the guidance had been declared invalid. The court then permanently enjoined the Commission from issuing future guidance conflicting with Wis. Stat. §§ 6.87 and 6.855. A written order incorporating this oral decision was entered on January 19, 2022.

Several intervenors filed a motion asking the circuit court to stay its order pending resolution of their appeal, which the Commission joined. On January 21, 2022, the circuit court orally denied the motion for a stay pending appeal and, sua sponte, shortened the Commission's compliance deadline. The circuit court directed the Commission to comply with its order by the next business day, January 24, 2022. A short written order was entered on January 24, 2022, incorporating the circuit court's oral ruling.

The intervenors and defendant appealed and moved for emergency relief pending appeal. On January 24, 2022, the court of appeals granted the requested relief and stayed the circuit court's order, but only through February 15, 2022.

The plaintiffs then asked this court to vacate the stay issued by the court of appeals and to grant their emergency petition to bypass the court of appeals. By order issued January 28, 2022, we denied the plaintiffs' request that we vacate the court of appeals' stay of the circuit court's order. We granted the petition to bypass. Briefing on the merits of the case is underway in this court.

This procedural summary brings us to the subject of this order. On February 2, 2022, intervenors-defendants-appellants, Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin, filed an expedited motion asking this court to extend the temporary stay granted by the court of appeals through the April 5, 2022 election and the resolution of the merits of the appeal. On February 4, 2022, the Commission filed a motion to extend the stay of the circuit court's final order in this matter through the conclusion of the April 5, 2022 election, or the conclusion of all appellate proceedings, whichever is later. Intervenor-defendant-co-appellant, Democratic Senatorial Campaign Committee, joins the respective motions to extend the stay.

On February 7, 2022, the plaintiffs filed a brief in opposition to the intervenors-defendants-appellants' motion to extend the stay. On February 8, 2022, the plaintiffs filed a supplemental brief in opposition to the Commission's motion to extend the stay. The intervenors-defendants-appellants filed a reply brief.

The circuit court's order is stayed through the February 15, 2022 election. The question before us is whether a stay should continue through the April 5, 2022 election or until the appeal

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is resolved. We consider the factors identified in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), and assess whether the moving party has established four "interrelated" conditions, each of which is balanced against the others: (1) a "strong showing" that the movant is likely to succeed on the merits of the appeal; (2) irreparable injury absent the stay; (3) the other interested parties will suffer no substantial harm; and (4) the stay will not harm the public interest.

We first consider the Commission and intervenors' likelihood of success on the merits of their appeal. Briefing is underway so we are reluctant to thoroughly analyze the merits at this time. Even if the appellants have "more than the mere 'possibility' of success on the merits," the other Gudenschwager factors weigh heavily against extending the stay. Id. at 441.

The Commission and intervenors have not demonstrated that irreparable injury or substantial harm to interested parties or the public interest will result if a stay is not extended through the April 2022 election and beyond. This is a different inquiry than the question facing the circuit court, which considered whether to grant a stay when absentee voting for the February 15, 2022 election had commenced, or the question facing the court of appeals which considered whether a stay was appropriate when absentee voting for that election was well underway. Nor is it the same as the question we faced when asked to vacate the stay imposed by the court of appeals, at a time when the record indicated that some 88,252 absentee ballots had already been sent to electors for the February election.

The circuit court's order remains stayed through the February 15, 2022 election. The request to extend the stay now looks forward to the April 5, 2022 election, and beyond. The record before us, including the timetable for making the necessary administrative changes as outlined by the court of appeals, indicates that the Commission can comply with the circuit court's order so as to ameliorate concerns about voter confusion and election administration before the April 5, 2022 election commences. The need for additional relief in the form of an extended stay has not been established.

The relief granted by the court of appeals in its January 24, 2022 order stays the circuit court order through February 15, 2022. At that point the stay will expire and the Commission will be obliged to comply with the circuit court's January 19, 2022 order. Therefore,

IT IS ORDERED that the motion of the intervenors-defendants-appellants, Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin, to extend the temporary stay ordered by the court of appeals, as joined by intervenor-defendant-co-appellant Democratic Senatorial Campaign Committee, is denied; and

IT IS FURTHER ORDERED that the motion of the defendants-co-appellants, Wisconsin Elections Commission, to extend the stay of the circuit court's final order in this matter through the conclusion of the April 5, 2022 election, or the conclusion of all appellate proceedings, as joined by intervenor-defendant-co-appellant Democratic Senatorial Campaign Committee, is also denied.

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ANN WALSH BRADLEY, J. (*dissenting*). Once again, a majority of this court makes it more difficult to vote.¹ With apparent disregard for the confusion it is causing, the majority provides next to no notice to municipal clerks, changing procedures at the eleventh hour and applying different procedures from those that applied to the primary in the very same election cycle.²

Municipal clerks will likely feel a sense of whiplash. Procedures that were in effect for at least the last two years regarding drop boxes and absentee voting are now no longer in effect, but may be again in a few months. The majority's order is seemingly oblivious to the practicalities of election administration. It neither recognizes nor appreciates the hard work that goes into election administration at the state and local level. But our concern isn't only for those on the administrative side of elections. Voters, too, once again have the rug pulled out from under them.

Voters may think they know how to vote by absentee ballot. Think again, says the majority. The United States Supreme Court has correctly observed that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006).

This case raises important issues of statewide concern. Yet, by reinstating the circuit court order, the majority allows the decision of a single circuit court judge to govern elections taking place across the state when this court hasn't yet had the opportunity to authoritatively interpret the statutes at issue. In a few months, this court will hear oral arguments on these very issues,³ which of course means that the statutes are still subject to our interpretation. Given that the majority's order today does not represent the last word from this court, why alter the status quo now if there remains the possibility that we will simply change it back again in several months' time?

Why indeed? The majority order doesn't tell us. Its entire substantive analysis is set forth in a single sentence tucked away in the middle of a paragraph toward the end of the order. And with this single sentence the majority risks both confusion and disenfranchisement in our election process.

¹ See, e.g., League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302; Milwaukee Branch of NAACP v. Walker, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262.

² To reiterate, WEC's guidance that has been challenged in this case is still in effect for the February 15 primary election. In other words, municipal clerks can still provide drop boxes if they so choose and voters can still return their ballots to those drop boxes for the February 15 election. Further, WEC's guidance regarding the return of ballots by a friend or loved one still applies for that election.

³ We granted a petition to bypass the court of appeals in this matter on January 28, 2022. Teigen v. Wis. Elections Comm'n, No. 2022AP91, unpublished order (Wis. S. Ct. Jan. 28, 2022).

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What is this single sentence of analysis upon which the entire order rests? It states: "The record before us, including the timetable for making the necessary administrative changes as outlined by the court of appeals, indicates that the Commission can comply with the circuit court's order so as to ameliorate concerns about voter confusion and election administration before the April 5, 2022 election commences."⁴

Reading the majority's meager analysis balancing the harms, I wonder if the majority read the same briefs that I did. Let me explain.

The grant of a stay pending appeal requires analysis of the four factors set forth by this court in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). Pursuant to Gudenschwager, a stay pending appeal is appropriate when the 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) demonstrates that a stay will do no harm to the public interest. Id.

These factors "are not prerequisites but rather are interrelated considerations that must be balanced together." Id. In other words, more of one factor excuses less of another. Id. at 441 (citing Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)).

Understandably, the majority does not dwell on the likelihood of success on the merits prong because we have yet to hear oral arguments, which will be addressing the merits of the issues. I, likewise, will refrain, except to say that the approach of the circuit court, which the

⁴ What is the substance of this "timetable" the majority refers to? Apparently, the majority fails to advise the reader because even a cursory examination of the timetable as set forth by the court of appeals reveals that it is unlikely, if not impossible, that the Commission can accomplish all the necessary steps to timely implement the circuit court's order.

As the court of appeals stated:

The Commission states that in order to take the steps necessary to comply with the circuit court's order, it must convene a meeting that complies with Wisconsin's open meetings laws, including notice requirements. . . . Once that meeting is held, all of the following must then occur . . . : (1) the Commission must, at a minimum, notify Wisconsin's municipal clerks that it has withdrawn the current guidance; (2) the Commission must determine whether, in light of this guidance withdrawal, it should provide municipal clerks with additional guidance, and if so, what that guidance should be; and (3) upon receipt of this information, municipal clerks who have not already mailed out absentee ballots must make the necessary changes to the absentee ballot instructions and then mail the absentee ballots to electors.

Teigen v. Wis. Elections Comm'n, No. 2022AP91, unpublished order, at 7 (Wis. Ct. App. Jan. 24, 2022) (footnote omitted).

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majority cavalierly allows to take effect, raises more questions than it answers. As relevant here, the circuit court determined that (1) "an elector must personally mail or deliver his or her own absentee ballot, except where the law explicitly authorizes an agent to act on an elector's behalf;" (2) "the only lawful methods of casting an absentee ballot pursuant to Wis. Stat. § 6.87(4)(b)1. are for the elector to place the envelope containing the ballot in the mail or for the elector to deliver the ballot in person to the municipal clerk;" and (3) "the use of drop boxes, as described in the Memos, is not permitted under Wisconsin law unless the drop box is staffed by the clerk and located at the office of the clerk or a properly designated alternate site under Wis. Stat. § 6.855."

Questions abound. For example, does a drop box located outside a clerk's office count as a "staffed" drop box? If so, what happens if the ballot is delivered after hours when the office is closed and no staff is present? Do law abiding citizens unwittingly break the law if they ask a spouse to drop a ballot in the mailbox for them? If a disabled voter gives the ballot to a relative to deliver to the clerk's office, is that an illegal vote? As the court of appeals indicated, clerks may need assistance from the Commission to answer some of these questions. Accordingly, the court of appeals observed, "there is the question of what, if any, guidance the Commission should give to municipal clerks regarding their responsibilities for enforcing the directive that the electors themselves must personally mail or deliver their absentee ballots." Teigen v. Wis. Elections Comm'n, No. 2022AP91, unpublished order, at 7 n.3 (Wis. Ct. App. Jan. 24, 2022). With such important answers now in a state of flux, shouldn't the stay of the circuit court order remain in place while this court works to answer these questions?

But even putting aside the first prong, the second through fourth Gudenschwager factors "weigh heavily in favor of relief pending appeal." Id. at 4. Namely, the Commission and intervenors describe injuries related to voter confusion, disenfranchisement, and election administration that would be occasioned on movants themselves, as well as on the public interest.

The harms of confusion and disenfranchisement alleged by the movants are serious, and they are irreparable. The February primary election will soon end, and when it does, it will be quickly on to the next—the April general election. Municipal clerks do not get a breather in between elections. There are over 1,800 municipal clerks in Wisconsin with varying resources and all juggling different needs and demands. Some are full-time, but in rural areas most work part-time, often serving only limited hours. The majority's order presents unnecessary obstacles for the hard-working clerks across Wisconsin who help make possible our free and fair elections.

Moreover, how is a clerk, as a practical matter, to communicate to all voters in a municipality such an abrupt change in procedure? I suppose there could be a post on the clerk's website. But this would require engaging in the tenuous assumption that a voter will check the clerk's website before returning a ballot, an assumption that rests on another assumption that the voter even has internet access at all. For some voters, such an assumption is divorced from reality. Many parts of the state lack readily available internet. There could also be a notice mailed. But again, there has been no showing that clerk's offices have either the time or the budget to send out notices via mail. If drop boxes are simply covered, as Teigen suggests, and a voter shows up at the previous site of a drop box to find it covered or unavailable, will the voter follow the written

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instructions on the drop box or simply give up, loath to jump over yet another hurdle to exercise their vote? In short, the potential for voter confusion is a near certainty, and the majority does nothing to alleviate it.

As to the circuit court's decision that only a voter, and not another person, must mail or deliver the elector's ballot, such an order, if not stayed, occasions a grievous harm. Even looking past the confusion it engenders, it could have the effect of disenfranchising some disabled voters who cannot otherwise mail or deliver their ballots themselves. Such voters would be completely foreclosed from participating in the April 5 election, a harm that cannot be undone. Putting aside the fact that the circuit court's restriction may violate federal law,⁵ that such disenfranchisement is a grave irreparable harm should be beyond debate.

The April election is imminent. Municipal clerks may begin to send out ballots for the April election any time between February 16 and March 15. In areas without a spring primary, that date is even earlier and has in fact already passed. Thus, voting in the next election begins almost immediately after the February 15 election, if it has not begun already. Cases both state and federal caution that when an election "has essentially begun, it is too late to grant petitioners any form of relief that would be feasible and that would not cause confusion and undue damage" to electors who want to vote. Hawkins v. Wis. Elections Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877; see Purcell, 549 U.S. at 4-5.

Nevertheless, the majority throws this caution to the wind. Simply put, the majority upends the status quo in a maneuver that necessarily brings with it confusion, harm, and uncertainty to both voters and election administrators. The municipal clerks and all voters of this state deserve better.

But the greatest harm of the majority's misstep may be the undermining of the election process itself. Indeed, the only parties not harmed by today's decision are those who would cast meritless doubt on our elections.

For the foregoing reasons, I respectfully dissent.

I am authorized to state that Justice REBECCA FRANK DALLET and Justice JILL J. KAROFSKY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

⁵ See 52 U.S.C. § 10508 ("Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.").

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