STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

Michael White, Eva White, Edward Winiecke, and Republican Party of Waukesha County,

Plaintiffs,

Wisconsin Legislature,

Intervenor-Plaintiff,

v.

Wisconsin Elections Commission,

Defendant,

Waukesha County Democratic Party and League of Women Voters of Wisconsin,

Intervenor-Defendants.

Case No. 2022CV001008
Case Code: 30701

WAUKESHA COUNTY DEMOCRATIC PARTY'S NOTICE OF MOTION FOR STAY OF TEMPORARY INJUNCTION PENDING APPEAL

NOTICE OF MOTION

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PLEASE TAKE NOTICE that Intervenor-Defendant Waukesha County Democratic Party ("WCDP") will appear before the Honorable Michael J. Aprahamian, Circuit Court Judge, Branch 9, via Zoom or in his usual courtroom in the Waukesha County Courthouse, Courtroom C278, Waukesha, WI 53188, on September 13, 2022, at 9:00 am, and shall then and there present its motion to stay the temporary injunction (Dkt. 167) pending appeal.

Dated: September 8, 2022

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WAUKESHA COUNTY DEMOCRATIC PARTY'S MOTION FOR STAY OF TEMPORARY INJUNCTION ORDER PENDING APPEAL

Intervenor-Defendant, Waukesha County Democratic Party (WCDP) moves this Court for a stay of its Temporary Injunction (Dkt. 167) pending appeal of that order. In support of this Motion, WCDP states the following.

Background

1. In 2016, the Wisconsin Elections Commission (WEC) by a unanimous, bipartisan vote adopted the guidance document challenged by Plaintiffs here. (Dkt. 2 at 18-19) At least twelve statewide elections have been held since WEC's adoption of this guidance document.

2. Following the November 2020 election, Republicans, including former President Donald Trump, challenged the guidance document, arguing that it did not comport with Wisconsin's statutes. The Supreme Court of Wisconsin and every other court presented with this

issue uniformly rejected these challenges. *See, e.g.*, *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568; *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis.), *aff'd*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, No. 20-883 (U.S. Mar. 8, 2021).

3. The Wisconsin Legislature attempted to amend the Wisconsin Statutes to clarify the issue and add additional requirements for absentee-ballot witness addresses. *See* Wis. St. Leg. 2021-2022, S.B. 935.[1] None of the proposals advanced by the Legislature have become law.

4. In January 2022, more than five years after WEC adopted the guidance, the Legislature's Joint Committee for the Review of Administrative Rules (JCRAR) for the first time exercised its oversight authority under Wis. Stat. § 227.26(2)(b) and instructed WEC to promulgate the policy in the guidance as an administrative rule.

5. WEC complied with that directive, adopting a scope statement for an emergency rule similar to the guidance document. WEC's emergency rule took effect on July 13, 2022. One week later, on July 20, 2022, JCRAR held a public hearing, at the conclusion of which the Committee, by a vote of 6-4, temporarily suspended WEC's emergency rule pursuant to Wis. Stat. § 227.26(2)(d).

6. Plaintiffs initiated this lawsuit on July 13, 2022, to challenge the WEC guidance. (Dkt. 2) Plaintiffs waited another three weeks, until early August 2022, to file their motion for temporary injunctive relief. (Dkt. 13)

7. More than a week later, on August 11, 2022, the Legislature sought to intervene in this case as a plaintiff and filed its own motion for a temporary injunction, or, alternatively, for a writ of mandamus. (Dkt. 41, 45)

[1] https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb935

8. WCDP and the League of Women Voters of Wisconsin each moved to intervene as defendants and filed briefs in opposition to the pending motions for temporary injunction. (Dkt. 25, 54, 93, 97)

9. WEC filed separate briefs opposing each motion for temporary injunction. (Dkt. 95, 145)

10. The Court granted the pending motions to intervene and set a hearing on the motions for temporary injunction in the afternoon of September 7, 2022. (Dkt. 149)

11. After hearing argument by all parties, the Court issued an oral ruling granting the motions for temporary injunction. The Court issued a written order memorializing that ruling the next day. (Dkt. 167)

12. After the Court's oral ruling, but before the Court adjourned the hearing, WCDP made an oral motion for stay pending appeal. The Court denied the motion without prejudice, instructing WCDP to file a written motion on September 8, 2022, ordering Plaintiffs and the Legislature to file any opposition no later than September 12, 2022, and setting a hearing on whether to stay the temporary injunction pending appeal at 9:00 am on September 13, 2022.

Applicable Legal Standard

13. When evaluating a motion for a stay pending appeal, the Supreme Court of Wisconsin has instructed lower courts to consider four factors:

> (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) whether the movant shows that no substantial harm will come to other interested parties; and
>
> 4) whether the movant shows that a stay will do no harm to the public interest.

Waity v. LeMahieu, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263.

14. These factors "are not prerequisites but rather are interrelated considerations that must be balanced together." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

15. Thus, for example, where a moving party can show that the harm it "would experience absent a stay [is] significant, [the movant is] required to show only 'more than the mere possibility of success on the merits.'" *Waity*, 2022 WI 6, ¶57 (quoting *Gudenschwager*, 191 Wis. 2d at 441). Indeed, as the Supreme Court has explained, the first factor of the stay analysis

> does not require a particular chance or odds of success; it is not even a showing of being more likely than not of succeeding on appeal. Rather, the "strong showing" is inversely proportional to the amount of irreparable injury that the moving party (and the public) will suffer in the absence of temporary relief pending appeal. *Gudenschwager*, 191 Wis. 2d at 441. The movant is always required to show at least "more than the mere possibility" of success on the merits of the appeal, but the level of probability of success will vary depending on the facts of the case and the amount of irreparable harm present.

Waity v. LeMahieu, No. 2021AP802, Order at 7 (Wis. July 15, 2021).

16. Additionally, stays "are to be issued only when necessary to preserve the status quo." *Waity*, 2022 WI 6, ¶49 (quoting *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)).

17. Except for preservation of status quo, the factors courts consider in assessing a motion for stay pending appeal differ from those considered in determining whether to issue a temporary injunction in the first instance. *Compare, e.g.*, *Waity*, 2022 WI 6, ¶49, *with, e.g.*, *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶28, 403 Wis. 2d 539, 977 N.W.2d 756.

18. Moreover, "[w]hen reviewing a motion for a stay, a circuit court cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted. The

relevant inquiry is whether the movant made a strong showing of success *on appeal*." *Waity*, 2022 WI 6, ¶52 (emphasis in original) (citing *Gudenschwager*, 191 Wis. 2d at 440). "For questions of statutory interpretation, as are presented in this case, appellate courts consider the issues de novo," which itself satisfies the requirement that the movant show it is likely to succeed on the merits of the appeal. *Id.*, ¶53 & n.16.

Argument

19. The factors this Court must consider, on balance, overwhelmingly satisfy WCDP's request for a stay pending appeal.

Likelihood of success on the merits

20. This Court concluded that the WEC guidance is inconsistent with subdivisions (2), (6d), and (9) of Wis. Stat. § 6.87. Interpretation of these statutory provisions presents a question of first impression. Appellate review of this Court's statutory construction will be conducted under a de novo standard. *Waity*, 2022 WI 6, ¶53 (citing *Estate of Miller v. Storey*, 2017 WI 99, ¶25, 378 Wis. 2d 358, 903 N.W.2d 759).

21. Where de novo review applies, a circuit court must "acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant constitutional provisions and statutes." *League of Women Voters v. Evers*, No. 2019AP559, unpublished order at 7 (Wis. Apr. 30, 2019). The circuit court's conviction that it reached the right interpretation "does not eliminate the potential that three judges on the court of appeals or seven justices on this court, all of whom will be considering the legal interpretation questions for the first time without any need to defer to the circuit court's conclusion, will adopt an opposite interpretation." *Waity*, No. 2021AP802, unpublished order at 8.

22. For that reason, in *Waity* and prior stay analyses, the Supreme Court of Wisconsin has treated statutory interpretations of first impression that are subject to de novo review as de

facto meeting the first prong of the stay analysis. *See, e.g.*, *Waity*, 2022 WI 6, ¶57; *Waity*, No. 2021AP802, unpublished order at 8-9; *League of Women Voters*, No. 2019AP559, unpublished order at 7; *Service Employees International Union, Local 1 v. Vos*, No. 2019AP622, unpublished order at 6 (Wis. June 11, 2019). This is particularly true in cases where, as here, the movant will suffer significant irreparable harm in the absence of a stay, such that it is "required to show only 'more than the mere possibility of success on the merits.'" *Waity*, 2022 WI 6, ¶57 (quoting *Gudenschwager*, 191 Wis. 2d at 441). (It is also true in cases where, as here, the statutory provisions at issue are ambiguous, as Justice Hagedorn suggested the address requirement in Wis. Stat. § 6.87(6d) is. *See Trump v. Biden*, 2020 WI 91, ¶¶49-51 (Hagedorn, J., concurring).)

23. Put differently, under Supreme Court precedent, the prospect of de novo appellate review necessarily means that WCDP has "more than the mere possibility of success on the merits."

24. Here, a majority of the Wisconsin Supreme Court Justices have indicated support for an alternative interpretation of Wis. Stat. § 6.87, making success more likely. *See Trump*, 2020 WI 91, ¶¶34 (Dallet and Karofsky, JJ., concurring) and 49 (Hagedorn, J., concurring).

Movant's irreparable harm absent a stay

25. The risk of irreparable harm to WCDP absent a stay is substantial.

26. In adjudicating the temporary injunction motions, the Court had no occasion to consider the harm the injunction might inflict upon WCDP (or any other defendant). But in the stay analysis, such considerations are necessary.

27. "When considering potential harm, circuit courts must consider whether the harm can be undone if, on appeal, the circuit court's decision is reversed. If the harm cannot be

'mitigated or remedied upon conclusion of the appeal,' that fact must weigh in favor of the movant." *Waity*, 2022 WI 6, ¶57 (quoting *Waity*, No. 2021AP802, unpublished order at 11).

28. As WCDP explained in briefing its motion to intervene, the relief sought in this lawsuit "threatens the fundamental right to vote of WCDP's members and constituents and the electoral prospects of WCDP's candidates. Plaintiffs' requested relief would also require WCDP to expend significant resources reaching out to and assisting voters in curing minor issues on their ballots, diverting limited resources from other mission-critical efforts." (Dkt. 24 at 1)

29. This Court's temporary injunction brings these threats to life and portends irreparable harm for WCDP.

30. The temporary injunction prohibits WEC from displaying or disseminating its guidance related to witness certifications and requires that WEC notify all municipal clerks and election officials that the guidance is invalid and contrary to law. Without WEC guidance, nothing specifies the circumstances under which a witness address is "missing" such that "the ballot may not be counted" under Wis. Stat. § 6.87(6d). The resulting vacuum creates uncertainty and increases the risk that some absentee ballots will not be counted, despite no error on the part of the voter themselves (who, as the Court noted at the temporary injunction hearing, does not complete the witness certification).

31. Disenfranchisement is the paradigmatic irreparable harm. The right of eligible voters to vote is fundamental to our system of governance. "Nothing can be clearer under our Constitution and laws than that the right of a citizen to a vote is a fundamental, inherent right." *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 473, 190 N.W. 563 (1922). "[N]o right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613,

37 N.W.2d 473 (1949). When an eligible voter is stripped of that right, even in a single election, that is a profound and irreparable deprivation. There is no possible remedy that compensates an eligible voter who has been deprived of the right to vote. The voter has lost something immeasurable. "It is axiomatic that there is no post hoc remedy for a violation of the right to vote." *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1310 (N.D. Ga. 2018).

32. Such loss is even more problematic here for two aggravating reasons. First, the loss results not from an act or omission by the voter, but one by a third-party witness. The voter alone bears the consequences, but they do not follow from the voter's own eligibility or conduct. Nor can it be said that a concerned absentee voter should vouchsafe their own rights by checking the witness certification, as some eligible voters are simply unable to do so, whether due to blindness, illiteracy, lack of competence in English, or other circumstances that do not vitiate the individual's right to vote. Second, as noted at the temporary injunction hearing, voters in the imminent election are at risk of losing their right to vote even if they submit an absentee ballot in the same manner as they have done before—including in the primary held only four weeks ago and every election over the past six years—and in which instances that absentee ballot was accepted and counted. This sudden change in the rules, and the concomitant possibility of a different outcome even following the same conduct, exacerbates the profound unfairness of the irreparable harm threatened here. It further militates in favor of a stay so that there is ample time, outside the heat of a relentless and important election cycle, for WEC, political parties, candidates, and civic organizations to educate voters about the change in absentee voting procedures.

33. In the absence of a stay, WCDP will also be required to expend significant resources educating its members and supporters about a significant change in absentee-voting procedures, diverting limited resources from other critical efforts. This, too, is an irreparable harm, especially

at this late date in the election cycle, when plans and budgets have long since been set in motion. WCDP has limited resources, and every dollar or hour spent responding to the temporary injunction is unavailable to be spent on the purposes for which it has been earmarked. Resulting shortfalls in the resources available to execute WCDP's plans between now and the November 8th general election cannot be remedied later, as all of WCDP's plans and efforts build toward Election Day. Diversion of resources is thus its own irreparable harm.

34. WCDP, as a political party—an organization that exists to organize likeminded individuals and help them identify, support, and elect candidates of their choice—also faces an irreparable harm that this Court has already acknowledged. At the temporary injunction hearing, the Court identified the risk of unequal administration of Wisconsin election law as an irreparable harm that favored the issuance of a temporary injunction to protect the interests of the Waukesha County Republican Party. That same risk applies even more strongly in support of a stay pending appeal.

35. As explained above, the temporary injunction's requirement that WEC notify all municipal clerks and local election officials that its guidance was declared invalid without any declaration establishing the binding interpretation of Wis. Stat. § 6.87(6d) will create a vacuum, in which each of Wisconsin's 1,850 municipal clerks will be left to their own devices in interpreting and applying the statutory provision. Justice Hagedorn's *Trump v. Biden* concurrence, expressing uncertainty about the interpretation of Wis. Stat. § 6.87(6d) underscores this concern. If Justice Hagedorn finds the interpretation of the provision unclear, how are Wisconsin's 1,850 municipal clerks, most of whom have no legal training, to make heads or tails of the provision in the absence of guidance from WEC? Given Wisconsin's highly decentralized election

administration system, this vacuum will inevitably exacerbate inconsistent and unequal administration of Wisconsin election law.

36. Just as such inconsistency is an irreparable harm to Plaintiffs, so too it is an irreparable harm to WCDP. That matters here. Any harm to the party seeking a stay that "cannot be 'mitigated or remedied upon conclusion of the appeal,'" as a matter of law "must weigh in favor of the movant." *Waity*, 2022 WI 6, ¶57 (quoting *Waity*, No. 2021AP802, unpublished order at 11).

37. In the absence of a stay, WCDP faces several distinct irreparable harms. Those harms—individually and, beyond dispute, taken together—are significant, such that WCDP is "required to show only 'more than the mere possibility of success on the merits.'" *Waity*, 2022 WI 6, ¶57 (quoting *Gudenschwager*, 191 Wis. 2d at 441).

No substantial harm will come to other interested parties

38. The *Waity* decision makes clear that this factor does not require other interested parties be completely free from harm, but only that their harm not outweigh that facing the party moving for a stay. 2022 WI 6, ¶58 (addressing this factor "[b]y comparison").

39. It simply is not true to assert that the ultimate relief Plaintiffs seek in this litigation would be useless without the temporary injunction taking immediate effect. Plaintiffs seek to have Wisconsin's election law administered in accord with their preferred interpretation. Wisconsin holds multiple elections every calendar year. If Plaintiffs' views ultimately prevail, the relief that follows will be of significant benefit, whenever that may occur.

40. This factor turns on the relative harms facing WCDP and Plaintiffs. Whichever party prevails with its preferred construction of the law will benefit from permanent relief. But there is no reason to believe that Plaintiffs face greater harm in the interim if their preferred construction is not applied. This is particularly true given that Plaintiffs themselves chose to leave

the WEC guidance in effect for nearly six years before bringing suit, and given the de novo standard of review that applies to the first-impression statutory interpretations that are the fundamental feature of this case.

41. The other harm Plaintiffs assert is one of alleged vote dilution. This is wholly speculative; the only numbers provided to the Court come from the Legislative Audit Bureau report last fall, which found that, of a sample of 14,710 absentee ballots from the November 2020 election, only 15 did not have a witness address in its entirety. *See* https://legis.wisconsin.gov/lab/media/3288/21-19full.pdf. This rate is de minimis, too trivial to present any significant risk of harm from vote dilution. Furthermore, the *Waity* Court's analysis is illuminating here. That case involved a challenge to the Legislature's retention of private counsel prior to litigation. While the circuit court had identified the cost to taxpayers of the challenged retention as a harm, the Court held that the plaintiffs' share of that total cost was not significant and insufficient to overcome the Legislature's interest in having the counsel of its choice. 2022 WI 6, ¶59. The same logic applies here. In the imminent statewide elections, any dilution that might occur affects Plaintiffs' votes in a fractional way; the LAB analysis suggests just over 0.1% of absentee ballots might not have a witness address in its entirety (and absentee ballots are, of course, a subset of total ballots). Thus, even accepting Plaintiffs' premise for the purpose of argument, dilution is barely measurable and almost certain to have no effect on the outcome of any statewide race. By contrast, any member of WCDP who is disenfranchised due to confusion and/or unequal administration of Wisconsin election law arising from the temporary injunction will suffer the loss of their right to vote in this election which overwhelms any claimed harm Plaintiffs' may suffer from vote dilution.

42. With respect to the Legislature, the harm it claims is an institutional harm to JCRAR's role. Assuming arguendo that this is a cognizable harm here (while reserving all of WCDP's arguments for appeal), it does not outweigh the threat of disenfranchisement that WCDP's members and other voters whose interests it represents face. Here, too, the sincerity and profundity of the harm asserted by the Legislature is undercut by the JCRAR's long delay in invoking its statutory rights with respect to the WEC guidance, much less its delay of another seven months before challenging the WEC guidance in court. *See, e.g.*, *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff's claim that he or she will face irreparable harm if a preliminary injunction is not entered.").

No harm to the public interest

43. The final factor in the stay analysis is whether the stay will harm the public interest. Here, too, the proper inquiry involves balancing. *Waity*, 2022 WI 6, ¶60.

44. The public has an indisputable interest in full, fair, free elections administered properly under Wisconsin law. Because both sides here believe their interpretation of the relevant statutes is correct, both sides believe that their interpretation is in the public interest.

45. Given that, the Court should vindicate the public interest by acting carefully and with humility to promote consistency and avoid any chance of voter whiplash. Just as the first factor is satisfied by combining the magnitude of the irreparable harm and the significant chance that an appellate court applying a de novo standard of review will reach a different outcome than this Court has, the same principle applies to the fourth factor. The public interest is best served by consistency. And that is best served by staying the temporary injunction until the appellate court can make an informed determination on the merits.

46. When discussing public harm during its oral ruling, the Court mentioned "facts" allegedly supporting a showing of public harm that went well beyond information or argument contained in the record materials and which cannot be supported. For example, the Court made repeated criticisms of "unelected bureaucrats" at WEC and asserted that there was widespread mistrust about elections conducted in Wisconsin. The Court's opinions on these matters, unsubstantiated by record evidence, are not only improper considerations, but also cannot satisfy the fourth factor.

Additional considerations

47. *Waity* and the cases on which it builds make clear that status quo is also a key consideration in determining whether to grant a stay pending appeal. *See* 2022 WI 6, ¶49 (quoting *Werner*, 80 Wis. 2d at 520). The Court held that the statute is the status quo. But for purposes of a stay analysis, that does not hold water. The purpose of a stay is to avoid whiplash if there is a significant likelihood that the appellate court might reach a different outcome and the party seeking the stay would suffer irreparable harm in the interim. Where, as here, both conditions are met, the stay should vindicate the status quo, minimizing the number of times the law could reverse course on those who will be affected. Given that the past twelve statewide elections—including the August 9th primary—have been administered under the WEC guidance, that the appellate court applying de novo review very well might interpret the relevant statutes differently than this Court does, and that WCDP will suffer significant, irreparable harms from the temporary injunction, the only comprehensible articulation of the status quo is the same election administration principle that has consistently applied in every single election for the past six years.

48. Finally, there are profound and important due-process considerations at stake here. Procedures must be communicated to voters and not changed mid-election, such that a voter who

followed the first set of procedures would be disenfranchised under the second set. In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit held that "due process is implicated where the entire election process ... fails on its face to afford fundamental fairness." When "an officially sponsored election procedure" is "in its basic aspect ... flawed" and unfair, it violates due process. *Id*. at 1078. The *Griffin* court relied on an older Seventh Circuit precedent, *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970).

49. Similarly, courts have made clear that election procedures must not be changed to the detriment of voters who reasonably rely on the previously established procedures. *See, e.g.*, *Hoblock v. Albany Cnty. Bd. of Elections*, 487 F. Supp. 2d 90, 94-96 (N.D.N.Y. 2006) (holding that voters who should have been required to reapply to receive absentee ballots under state law reasonably relied on election officials' erroneous issuance of absentee ballots and suffered a deprivation of their due process rights when election officials subsequently refused to count their votes). That principle applies with particular force here, given that some voters requested absentee ballots for the August and November elections at the same time and could have their votes not counted for following the same exact procedure in November that resulted in their ballots being counted in August.

Conclusion

50. The factors that this Court must consider, on balance, overwhelmingly support WCDP's motion. So, too, do additional, essential considerations of preserving the status quo and vindicating the due-process guarantees contained in the federal and state constitutions. As such, WCDP's request for a stay should be granted.

Dated: September 8, 2022

Respectfully submitted,

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