



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

FILED
02-07-2024
CLERK OF WISCONSIN
COURT OF APPEALS

February 7, 2024

To:

Hon. Ryan D. Nilsestuen
Circuit Court Judge
Electronic Notice

Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Thomas C. Bellavia
Electronic Notice

David R. Fox
Electronic Notice

Leslie Anne Freehill
Pines Bach LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703

Steven C. Kilpatrick
Electronic Notice

Kevin M. LeRoy
Electronic Notice

Scott R. Letteney
Office of the Racine City Attorney
730 Washington Ave., Rm. 201
Racine, WI 53403

Lynn Kristine Lodahl
Electronic Notice

Lindsay Jean Mather
City of Green Bay
100 N. Jefferson St., No. 200
Green Bay, WI 54301

Amber R. McReynolds
Room 401
210 Martin Luther King Jr. Blvd.
Madison, WI 53703-3345

Emily O'Brien
Electronic Notice

Ian Pomplin
Electronic Notice

Makeba Rutahindurwa
Electronic Notice

Misha Tseytlin
Electronic Notice

Samuel Tucker Ward-Packard
Electronic Notice

Diane M. Welsh
Electronic Notice

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

2024AP165

Rise, Inc. v. Wisconsin Elections Commission
(L.C. # 2022CV2446)

Before Kloppenburg, P.J., Blanchard, and Taylor, JJ.

At the start of business this morning, the clerk of this court docketed a motion for relief pending appeal that was filed by the appellant Wisconsin State Legislature in this case after business hours yesterday. The appellant also moves for expedited consideration of its motion by February 9, 2024. The respondents oppose issuance of a decision by that date. In this order, we decline to decide the motion by February 9, and we set February 13, 2024, as the date for respondents to respond to the motion.

The order on appeal is the circuit court's declaratory judgment and injunction entered on January 30, 2024. By statute, absentee ballots must include a witness certification that includes the "address" of the witness. Ballots that do not comply with the statutory address requirement must be rejected. The Wisconsin Election Commission's existing guidance requires that, to qualify as an "address," the certification must include three components: street number, street name, and municipality.

In response to a suit filed by Rise, Inc., and Jason Rivera in September 2022, the circuit court's January 30 judgment declares that the commission's three-component guidance is erroneous because the word "address" does not require that any particular components or types of information appear in the witness address portion of a returned ballot. The circuit court concludes that an "address" is present "if the face of the certificate contains sufficient information to allow a reasonable person in the community to identify a location where the witness may be communicated with." The court's order directs the commission to rescind its existing guidance or revise and reissue it consistent with the order, and to advise municipal and

county election officials of the order by February 9, 2024. The order similarly enjoins the defendant clerks in this case.

The Legislature appeals that decision, and moves for relief pending appeal under WIS. STAT. RULE 809.12, in the form of an order staying the circuit court's order. That relief, if granted, would have the effect of halting the commission's informing election officials of the order's definition of "address" and rescinding the existing guidance or reissuing a revised guidance consistent with the order, and relieving the defendant clerks of their obligation to comply with the order. This would leave the existing guidance in place for the February 20 election, and beyond, until a final ruling in the appeal. The Legislature asks that we grant this relief by February 9.

The respondents oppose the motion to expedite a decision on relief pending appeal. They argue that the Legislature does not face any injury that requires such an expedited decision, that there is not enough time to litigate the motion by then, that the relevant transcript has not been prepared yet, and that by February 9 the commission may have already acted at its meeting set for February 8.

We decline to grant the relief ex parte, that is, without first obtaining a response. To grant ex parte relief on the types of issues presented by this case, we would require an extremely persuasive showing in the motion, persuasive to a degree that there appears to be no probability that a response could say something that would change that decision. The current motion does not meet that standard.

Therefore, we must set a time for a response to be filed. We do not regard the time remaining before February 9 as nearly sufficient to provide all of the following: a fair

opportunity for the preparation of a response to the motion; the ability of this court to digest all relevant material and legal authority so as to render a reasoned and careful decision; and a sufficient chance for the commission, operating properly within its rules for decision making and dissemination of information, to effectuate whatever decision is made. Accordingly, we decline to attempt to decide this motion before February 9.

We recognize that not doing so may result in the commission's issuance of guidance on February 9 to comply with the circuit court order that will be reviewed in this appeal. The spring primary election is February 20. Given the short time involved, we also will not attempt to issue a decision on the motion for relief pending appeal during that preparation period for the election. In the time between February 9 and February 20, which includes two weekends, election administrators must prepare for the election, which includes the training of staff who will process absentee ballots. Our decision on this motion could potentially have the effect of causing the withdrawal of the guidance that had just been issued on February 9, causing undesirable effects on election administration that should be obvious. Instead, our decision on the motion to stay will be issued after February 20. See *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (relief denied because "election has essentially begun [and] it is too late to grant petitioners any form of relief that ... would not cause confusion").

In other words, unless there is an order by some other court, the February 20 election will proceed on the terms provided in the circuit court's order. To the extent that this possibly could result in the use of election procedures on February 20 that we later conclude should be stayed pending appeal, that outcome would be less than optimal, but we conclude that it is necessitated by the timing of the circuit court's decision, combined with the timing of the motion we received this morning, relative to the February 20 election.

With that framework in mind, we set the date below for the filing of a response. We may issue a further order by February 9 that directs the respondents to address specific questions in that response. Beyond that, we anticipate setting a date for a reply in support of the motion. However, we will do that in a later order, which may also direct the movant to address specific topics.

The appellant's motion to expedite states that the appellant requested expedited production of the transcript of the circuit court hearing held February 2, 2024, on relief pending appeal. The motion states that the circuit court granted that request, but that the transcript has not been produced yet after the appellant's "repeated follow-up communications with the court reporter." This transcript is important because normally this court reviews the circuit court decision on relief pending appeal for an erroneous exercise of discretion, which requires that we understand the basis for the court's decision. While it is not clear why the transcript has not yet been produced, the appellant must provide it to this court once it is produced.

IT IS ORDERED that the motion for expedited consideration of the motion for relief pending appeal by February 9, 2024 is denied.

IT IS FURTHER ORDERED that the movant shall provide this court with a copy of the transcript of the circuit court hearing held February 2, 2024 when it is available.

IT IS FURTHER ORDERED that the response to the motion for relief pending appeal shall be filed by February 13, 2024.

Samuel A. Christensen
Clerk of Court of Appeals