FILED
03-22-2024
Clerk of Circuit Court
Racine County
2022CV001324

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY
BRANCH 2

KENNETH BROWN,

Plaintiff,

v. Case No. 22-CV-1324

WISCONSIN ELECTIONS COMMISSION and TARA MCMENAMIN,

Defendants,

and

WISCONSIN ALLIANCE FOR RETIRED AMERICANS, DEMOCRATIC NATIONAL COMMITTEE, and BLACK LEADERS ORGANIZING FOR COMMUNITIES,

Intervenors.

WISCONSIN ELECTIONS COMMISSION'S REPLY IN SUPPORT OF STAY PENDING APPEAL

INTRODUCTION

As explained in the Commission's opening brief, this Court's decision created two distinct risks of harm: (1) that voters and local election officials face uncertainty in light of this Court's decision, which will impede the effective administration of elections; and (2) that under this Court's decision, some municipalities may unnecessarily limit the number and location of absentee voting sites, thereby impinging voters' ability to effectively cast a ballot.

(*See* Doc. 134:8–11.) Both are irreparable, meaning they could not be remedied on appeal, and both are made all the more acute due to the impending, June 12, 2024, deadline for municipalities to designate alternate in-person absentee voting sites for the August 2024 primary election. *See* Wis. Stat. §§ 7.15(1)(cm); 6.855(1).

Brown's response underscores these very harms. And Wisconsin Alliance for Retired Americans' request for this Court to clarify the scope of its order still would not fix the problem, as a stay would still be necessary even with clarification.

Brown's response also does nothing to undercut the likelihood of success on appeal. He primarily seeks to assure this Court of the correctness of its decisions, but as the supreme court has cautioned, "[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." *Waity v. LeMahieu*, 2022 WI 6, ¶ 52, 400 Wis. 2d 356, 969 N.W.2d 263.

Here, as the Commission explained, there are multiple bases on which the appellate courts may disagree with this Court, including the interpretation of Wis. Stat. § 6.855, whether Brown has standing to bring this case, and whether this Court correctly held that mobile-voting units are statutorily prohibited, despite the lack of any statute saying so. Given the novelty of the

Court's holding, and the fact that each issue will be reviewed de novo, the likelihood of success further supports a stay.

The risk of irreparable harm without a stay, the likelihood of success on appeal, and the public interest all favor staying the Court's judgment throughout the pendency of all appeals in this case.

ARGUMENT

I. Without a stay, interested parties and the public will suffer irreparable harm.

A. Brown's response highlights the precise harms that may occur without a stay.

Far from refuting the harms likely to occur without a stay, Brown's response confirms that both uncertainty and unconstitutional restrictions on voting are likely if a stay is not granted.

Brown does not directly address the likely uncertainty caused by this Court's decision, but his argument illustrates the precise problem of uncertainty that is likely to occur. Brown claims that this Court's decision had sweeping, statewide effect, such that "WEC . . . now know[s] what the law requires because this Court just told them," and therefore must adjudicate any similar challenge to absentee sites under this Court's analysis. (Doc. 153:10.) Brown thus sees this Court's decision as a sweeping declaration that must govern the Commission's oversight of all elections and, necessarily, all clerks statewide. (Doc. 153:10.)

This illustrates precisely the uncertainty that necessitates a stay. As the Commission explained in its opening brief, while no other municipality would be formally bound by this Court's decision (*see* Doc. 134:10), Brown's response makes clear that he and others see the decision as having statewide effect, and are likely to challenge clerks who use multiple absentee balloting sites that violate this Court's novel theory of "partisan advantage." (*See* Doc. 153:10–11.) The lack of a clear decision on that novel theory, combined with the likely threat of legal action by Brown and others, creates substantial uncertainty for clerks.

This risk weighs heavily in favor of a stay while the appellate courts review this Court's decision. Because these risks pertain to quickly approaching elections, these "harm[s] cannot be mitigated or remedied upon conclusion of the appeal." *Waity*, 400 Wis. 2d 356, ¶ 57 (internal quotation omitted). This "fact must weigh in favor of the movant" for a stay. *Id.*

A second risk of harm supporting the stay is that, if municipalities do choose to limit absentee voting as apparently required under this Court's decision, many thousands of voters in larger municipalities risk having their access to voting unconstitutionally limited. Brown dismisses this risk, suggesting that there are multiple other ways that voters could cast a ballot if absentee balloting is limited. (Doc. 153:3–5.) Brown's arguments are exactly the arguments the federal court rejected in *One Wisconsin Institute v. Thomsen*

when it held that Wisconsin's former one-location rule was unconstitutional. *See* 198 F. Supp. 3d 896, 931–35 (W.D. Wis. 2016), *aff'd in part, vacated in part, rev'd in part sub nom Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020).

As explained in the Commission's opening brief, the practical result of this Court's decision is to reinstitute the same one-location rule that the federal court held unconstitutional based on the "profound" detrimental impacts that rule had on some voters in larger municipalities. *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 931, 934. Brown does not even acknowledge the decision in *One Wisconsin*, much less explain how this Court's rule differs from the one-location rule invalidated in that case. (*See generally* Doc. 153.) Brown's silence on response is telling and confirms that there is no way to read this Court's decision other than creating the constitutional problem the Commission identified. This risk of "profound" harm further confirms that a stay is warranted.

Brown also tries to minimize the harms at issue, claiming that harms to "interested parties and the public" "is not the standard" and, in any event "there is no harm to anyone." (Doc. 153:5; *see also id.* at 10–11.) For one, Brown's attempt to speak for the public rings hollow. (Doc. 153:10–11.) His argument on this point is nothing more than a refrain of his merits arguments which, as explained, are no reason to deny a stay.

More to the point, Brown's attempt to discount harms to the public is contrary to case law, which makes clear that "harm to the public interest" is unquestionably relevant to the stay analysis. *See Waity*, 400 Wis. 2d 356, ¶ 60. Moreover, where the state is involved in proceedings seeking a stay pending appeal, the state's interests and harms merge with those of the public. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (recognizing harm to public interest where law is enjoined). Thus, the interests of the Commission and the public weigh in favor of a stay.

Brown also claims that he "will suffer significant harm if a stay is granted," but other than his say-so about wanting to make sure "election laws are followed," he identifies no actual injury he will suffer. (Doc. 153:9.) Moreover, if Brown truly wishes to ensure that election laws are followed, he should support a stay so that the state's appellate courts may weigh in before thousands of voters are potentially disenfranchised under to this Court's decision.

B. Wisconsin Alliance for Retired Americans' request for clarification would not eliminate the need for a stay.

In its response to the motions for a stay, intervenor Wisconsin Alliance for Retired Americans' (WARA) says it views the Court's remedy as "very narrow" (Doc. 150:7) and asks the Court to confirm, in two ways, that the

Court's ruling does not mean what the movants fear. Neither of these suggestions alleviates the irreparable harm.

First, WARA points out that the Court did not issue a declaratory judgment (Doc. 150:6) and essentially asks this Court to confirm that fact.

The Commission agrees that this Court did not issue a declaratory judgment, but that proposed clarification would not eliminate the confusion for clerks or provide clerks any protection from complaints to the Commission under Wis. Stat. § 5.06. In the Commission's opening brief, the Commission recognized that the clerks are not legally bound to follow the Court's opinion and order. (Doc. 134:10.) It explained, however, the situation the order put clerks in: "While municipalities other than Racine are not legally bound by this Court's ruling, they also do not want to find themselves in a position where a voter in their area brings a Wis. Stat. § 5.06 complaint to the Commission based on the same theory as in this case." (Doc. 134:10.)

Clerks are in this position regardless of whether this Court clarifies that it did not issue a declaratory judgment binding on clerks around the State. Indeed, WARA's own view of the Court's order essentially confirms that clerks *do* face potential legal consequences. WARA describes the Court as ordering, at most, that upon receiving complaints, the Commission must "assess supporting evidence and apply [s]ection 6.855(1) to adjudicate that complaint." (Doc. 150:8.) While the Commission notes that the section 5.06 process does

not actually require it to "adjudicate" every complaint, as WARA assumes, WARA's view reinforces the problem for clerks in deciding whether to designate alternate sites for in-person absentee voting.

Second, WARA asks the Court to clarify that it did not endorse Brown's exact theory about alternate sites. (Doc. 150:7–8.) That clarification also would be insufficient to alleviate the identified harms. The Commission's motion recognized that the Court did not explicitly endorse or reject Brown's exact position. But the decision opined that Racine's designated sites violated Wis. Stat. § 6.855(1) based on Racine's failure to rebut Brown's information about how voters voted in particular wards. (Doc. 99:15.)

It does not fix the problem for this Court to clarify that a site need not be in a ward with the very same historical voting patterns as the ward where the clerk's office is located. The Commission's view is that Brown's whole theory of Wis. Stat. § 6.855(1) is incorrect: a municipality does not advantage a political party within the meaning of that statute based on any particular historical voting patterns in the ward where an alternate absentee voting site is located.

Without explaining why, this Court's order accepted Brown's basic premise that this is what Wis. Stat. § 6.855(1) is all about. So, absent a stay pending appeal, people who bring complaints to the Commission under Wis. Stat. § 5.06 will likely cite this Court's order and insist that a municipality is

required to muster evidence about voting patterns in the ward where a designated alternate site is located. And they can demand that the Commission treat such data as the legally relevant facts to evaluate whether the municipality is complying with section 6.855(1).

Given this position, clerks will be hard pressed to know whether to designate alternate sites based on the needs of voters voting in-person absentee or based on whether historical voting patterns in a neighborhood resemble those of the clerk's office ward—a set of facts the Legislature made no mention of in passing section 6.855(1). As discussed in the Commission's and other movants' opening briefs, municipalities will not easily find alternate sites that both serve voters' needs, particularly in large municipalities, and also are located in neighborhoods mimicking the voting demographics of the clerk's office ward.

A stay, not clarification, is therefore required to prevent these harms.

II. There is reasonable likelihood that an appellate court will reach a different result on the questions of standing or the merits, either of which would support reversal.

The Commission's opening brief explained the multiple, independent bases on which the Commission has a likelihood of success on appeal, as necessary to support a stay. (*See* Doc. 134:11–14.) Brown's response offers nothing persuasive to rebut those multiple avenues for likely success on appeal. (*See* Doc. 153:6–9.) Additionally, the likelihood of success is amplified

by the Wisconsin Supreme Court's recent partial grant of review in a separate case, in which the court will revisit the holding of *Teigen v. WEC*, which was central to this Court's analysis and holding. Finally, WARA's other reasons why this Court should have rejected Brown's claims underscore the likelihood of success on appeal, and thus confirm that a stay is warranted.

A. Brown fails to undercut the likelihood that the appellate courts may disagree with this Court's legal conclusions.

On de novo review, appellants have a likelihood of success on the merits on three of the foundational parts of this Court's decision: (1) that alternate sites must be chosen based on past voting histories of the wards where they are located; (2) Brown lacked standing to bring this case and his complaint therefore should have been dismissed; and (3) no statute prohibits clerks from using mobile voting units at properly designated alternate voting sites for in-person absentee voters. Given the possibility that an appellate court may disagree with this Court's decision on even one of these issues, the Commission has a likelihood of success on appeal sufficient to support a stay.

In response, Brown's primary theme is that this Court correctly decided his claims on the merits, seeking to reassure the Court that "an [a]ppellate [c]ourt is not going to disturb" this Court's analysis. (Doc. 153:8; *see also id.* at 6–9.) Brown thus urges this Court to commit the exact error that the Wisconsin Supreme Court rebuffed in *Waity*: "simply input[ting] its own

judgment on the merits of the case and conclud[ing] that a stay is not warranted." *Waity*, 400 Wis. 2d 356, ¶ 52. The court in *Waity* made clear that a circuit court deciding whether to grant a stay "*must consider* . . . the *possibility* that appellate courts may reasonably disagree with its legal analysis." *Waity*, 400 Wis. 2d 356, ¶ 53 (emphases added). As explained in the Commission's opening brief and herein, there is at the very least a *possibility* that the appellate courts may disagree with this Court on any of the three issues presented, each of which independently demonstrates a likelihood of success sufficient to support a stay.

Brown offers some additional arguments against the likelihood of success on appeal, but none is persuasive.

First, regarding the interpretation of Wis. Stat. § 6.855, the Commission explained in its opening brief multiple reasons that an appellate court may disagree with this Court, including that no Wisconsin court has ever interpreted the statute the way this Court did, reading the prohibition on partisan advantage to apply to *wards* as opposed to *sites*, contrary to the statutory text. (*See* Doc. 134:11–12.) Brown's response does not confront this incongruity at all.

Brown also argues that this Court simply "relied on the record" and that the decision is therefore correct (*see* Doc. 153:7), but that ignores two points that an appellate court is likely to find persuasive (and which the Commission

noted previously): that the record includes no evidence of partisan advantage at even a single absentee voting site, and, more fundamentally, the statute charges the Commission with fact-finding and this Court offered no viable explanation why the Commission was *required* to credit Plaintiff's statistical study, especially in light of the statutory standard (site v. ward). (*See* Doc. 134:11–12.) Given these fundamental errors, Brown's argument about this Court simply "rel[ying] on the record" (Doc. 153:7) is unlikely to persuade an appellate court.

Next, regarding standing, Brown argues that the supreme court's decision in *Friends of Black River Forest v. Kohler Co.* "does not control here," since that "was an administrative appeal of an agency decision brought under Wis. Stat. Ch. 227," unlike this case. (Doc. 153:7 (citing *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342, *recon. Denied sub nom. Friends of Black River Forest v. DNR*, 2022 WI 104).) But this case, too, is an action for judicial review of an administrative agency's decision, and Wis. Stat. § 5.06 explicitly provides that judicial review under the statute is governed by "the standards for review of agency decisions under Wis. Stat. § 227.57." Wis. Stat. § 5.06(10). Brown reads *Friends* far too narrowly, and offers nothing other than his say-so to explain why *Friends* does not apply here.

When he does apply that test, he claims that Wis. Stat. § 5.06 "confers . . . a legally protectable interest in ensuring his local election officials conduct

conforms with the law." (*See* Doc. 153:8.) But this fundamentally misunderstands the *Friends* test for standing. That test does not look to whether a procedural statute like Wis. Stat. § 5.06 allows a challenger to bring a complaint—if that were the case, there would never be any question about standing. *See, e.g.*, *Friends*, 402 Wis. 2d 587, ¶¶ 28, 31. Instead, for purposes of standing, the "relevant statute" is the one "whose violation is the gravamen of the complaint," *id.* ¶ 28 (quoting *Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 529 (1991); that is, a statute "protecting or regulating the interests they allege were injured by the decision," *id.* ¶ 32.

Here, the gravamen of Brown's complaint is that the Racine Clerk violated Wis. Stat. § 6.855(1). Section 5.06 was simply the procedural vehicle by which he brought his challenge.

With his focus incorrectly on the procedural statute, Brown offers nothing at all to suggest that Wis. Stat. § 6.855 "recognizes or seeks to regulate or protect" his asserted interest in ensuring that elections are conducted in accordance with his view of the law. *See Friends*, 402 Wis. 2d 587, ¶ 28 (quoting *Waste Mgmt.*, 144 Wis. 2d at 505). Instead, he claims, as a policy matter, that this Court should not "slam the courthouse doors shut" to claims like his attacking local election-administration decisions. (Doc. 153:8–9.) The supreme court, however, rejected the notion that standing is based on such judicial

determinations about who *should* have standing, and instead "centers on a textually driven analysis of the language of the specific statute cited by the [challenger] as the source of its claims to determine whether that statute 'recognizes or seeks to regulate or protect'" the asserted interest. *See Friends*, 402 Wis. 2d 587, ¶ 28 (quoting *Waste Mgmt.*, 144 Wis. 2d at 505). Brown does not even attempt that "textually driven analysis" of the relevant statute, Wis. Stat. § 6.855.

All this is to say that when an appellate court properly applies the controlling *Friends* test for standing, there is a strong likelihood that that court may reach a different conclusion from this Court.[1] That likelihood supports a stay.

Third, Brown also offers no meaningful response regarding the likelihood of reversal on the mobile-voting unit issue. (*See* Doc. 153:9.) Given the *de novo* standard of review and the fact that no appellate court has interpreted Wis. Stat. § 6.84 as prohibitively as this Court did, there is a reasonable likelihood that an appellate court will reverse. (*See* Doc. 134:14.)

[1] As discussed *infra*, II.B., this likelihood is increased by the fact that this Court's standing analysis was based on a three-justice plurality opinion in *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *recon. denied*, 2022 WI 104 (*see* Doc. 99:13–14), and the supreme court recently granted review to decide whether to overrule *Teigen*.

Finally, Brown argues that *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, and a concurrence in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, are "instructive" regarding whether this Court should grant a stay (Doc. 153:2–3), but the court's analyses in those cases are irrelevant here. For one, those cases involved injunctions of laws and orders, neither of which is at issue here. More to the point, the court's analysis of whether to stay its decisions makes clear that there was no need for any analysis of "likelihood of success on appeal," since the supreme court was the end of the line on the state-law issues presented. *See, e.g.*, *Palm*, 391 Wis. 2d 497, ¶ 120 n.10 (Kelly, J., concurring). Here, as discussed, with possibly two levels of appellate review ahead, the likelihood that "other reasonable jurists" may see the case differently amply supports a stay. *See Waity*, 400 Wis. 2d 356, ¶ 53.

B. The Wisconsin Supreme Court's recent order granting review regarding *Teigen* provides additional support for a likelihood of a different result on appeal.

On March 12, 2024, the Wisconsin Supreme Court granted review of a single issue in a separate case: "Whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks." *Priorities USA v. WEC*, No. 2024AP166 (Order, March 12, 2024),

https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2024AP000164&cacheId=9C30F1D0D50AE75D4F4604C513A75A9A&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC (last visited March 22, 2024).

The court's grant of review on the continuing validity of *Teigen* provides additional support for the possibility of a different result on appeal. As this Court is aware, *Teigen* was central to its analysis both as to standing (*see* Doc. 99:13–14) and on the question of when an election administration decision, like whether to use a mobile voting unit, may be invalidated (*see* Doc. 99:16–17.) If *Teigen* is overruled, the foundation of this Court's analysis falls away entirely. And even if *Teigen* is not overruled, the fact that review has been granted suggests that the court is likely to revisit *Teigen* in some respect, which would alter the law on which this Court's decision was based.

In either case, the recent grant of review in *Priorities USA* lends additional support for a stay.

C. The issues WARA discusses in its response offer additional reasons why appellants are likely to succeed on appeal.

As explained above and in the opening brief, the Commission is likely to succeed on appeal regarding its interpretation of Wis. Stat. § 6.855(1). In its response, WARA offers even more reasons why the decision is likely to be reversed. (Doc. 150:9–11.) WARA's reasons provide additional support for

appellants' likelihood of success on appeal, and thus further illustrate why a stay is warranted.

CONCLUSION

The Court should stay its final decision through the pendency of all appeals in this case.

Dated this 22nd day of March 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing brief with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of March, 2024.

Electronically signed by:

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