STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

KENNETH BROWN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION,

and

TARA McMENAMIN,

Defendants

and

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

Intervenor-Defendants.

Case No. 22-CV-1324
Case Code: 30703

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MOTION TO STAY AMENDED DECISION AND ORDER PENDING APPEAL

Intervenor-Defendant Democratic National Committee (DNC) moves this Court for a stay of its Amended Decision and Order (Dkt. 99) pending the ongoing appeal of that order. In support of this Motion, DNC states as follows:

BACKGROUND

1. Section 6.855 of the Wisconsin Statutes governs several details of how Wisconsin municipalities make in-person absentee voting (colloquially known as "early voting") available to eligible electors.

2. For years, Wisconsin election officials were limited to offering early voting at a single location within each municipality. This "one-location rule" was struck down by a federal court for violating federal statutory and constitutional guarantees. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 956, 959-60 (W.D. Wis. 2016).

3. In response to the *One Wisconsin Institute* ruling, the Legislature in 2018 authorized municipalities to "designate more than one alternate site," with no limit on the number of total sites. Wis. Stat. § 6.855(5). The Seventh Circuit recognized with implicit approval the overhaul resulting from the enactment of this new provision, declining to adjudicate the appeal of this portion of the Western District's decision because "[t]he one location rule is gone, and its replacement is not substantially similar to the old one." *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020).

4. While subdivision (5) sets no limit on the total number of sites, other provisions of section 6.855, enacted in concert with the original one-location rule, constrain the location of an early voting site. Subdivision (1) requires that an alternate early voting site be "located as near as practicable to the office of the municipal clerk" and proscribes any site that "affords an advantage to any political party." Wis. Stat. § 6.855(1).

5. Plaintiff Kenneth Brown alleges that the alternate early voting sites used by the City of Racine for the August 2022 primary election violated these restrictions in subdivision (1). (Dkt. 3, ¶¶1-2) After Defendant Wisconsin Elections Commission (WEC) dismissed Brown's complaint, he appealed to this court. (*Id.*, ¶3)

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6. On summary judgment, this Court held that Brown has standing to seek judicial review of WEC's no-probable-cause determination. (Dkt. 99 at 13-14) On the merits, the Court recognized that Wis. Stat. § 6.855(5) clearly authorizes a municipality to provide multiple early voting sites and that those sites need not each be "as near as practicable" to the Clerk's office. The Court simultaneously held, however, that Racine's placement of multiple sites had "clearly favored members of the Democratic Party or those with known Democratic Party leanings." (*Id.* at 15) Without remanding for the contested-case proceeding Brown had requested or providing any guidance on how municipalities may distribute the multiple early voting sites that § 6.855(5) expressly authorizes them to provide, the Court ordered WEC's dismissal of Brown's complaint "reversed as not being in conformity with the elections laws of this State." (*Id.* at 17)

7. This Court broadly accepted allegations made by Brown that were not tested in a contested-case hearing before WEC, which dismissed Brown's administrative complaint under Wis. Stat. § 5.06(1) for lack of "probable cause to believe that a violation of law or abuse of discretion occurred." (Dkt. 59 at 47, 60) The Court relied on a deeply flawed "statistical study" Brown had submitted to WEC without addressing the many "compelling arguments" spelled out in WEC's dismissal order for rejecting that study. (Dkt. 99 at 15; Dkt. 59 at 56-57)

8. The Court did not provide any guidance on how a municipality may exercise its authority under Wis. Stat. § 6.855(5) to provide multiple early voting sites distributed throughout its jurisdiction without running afoul of Brown's reading of the "no political advantage" language in § 6.855(1). The Court apparently adopted Brown's argument that "the alternate sites may not afford any political advantage that differs from the ward in which the Clerk's office is located." (Dkt. 86 at 11; *see* Dkt. 99 at 15) This reading severely undercuts and impairs the purpose of § 6.855(5). The Court's interpretation of the "no political advantage" clause effectively reimposes

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the one-location rule that has been adjudicated unlawful by a federal court and abrogated by the Wisconsin Legislature. *See* Intervenor Black Leaders Organizing for Communities' (BLOC) Mem. in Supp. of Pet. for Bypass at 4, 14-17, *Brown v. Wis. Elections Comm'n*, No. 2024AP232 (Wis. filed Feb. 16, 2024).

9. This Court's decision extends an open invitation for challenges to any Wisconsin municipality that offers multiple alternate absentee ballot sites, which will only result in further confusion and uncertainty in election administration, this year and beyond.

10. Several parties, including the DNC, have appealed the Court's ruling. (Dkt. 100, 104, 108, 111, 120) The Court of Appeals has declined to apply expedited treatment to the appeal. *See Brown v. Wis. Elections Comm'n*, No. 2024AP000232, unpublished order (Ct. App. Feb. 19, 2024).[1] BLOC and DNC have petitioned the Supreme Court to exercise bypass. (Dkt. 115)

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11. The deadline is quickly approaching by which municipalities must designate alternate absentee ballot sites for the August and November 2024 elections. Wis. Stat. §§ 6.855(1), 7.15(1)(cm) (deadline this year is June 12, 2024). Once that deadline passes, our statutes do not anticipate municipalities altering the list of alternate sites for the remainder of this year's elections. The process of designating alternate sites requires legislative action by each municipality that elects to offer this method of voting.

12. If this Court's order remains in effect and no appellate court has yet adjudicated the proper meaning of Wis. Stat. § 6.855(1) and (5), that is a recipe for confusion and disenfranchisement.

[1] DNC is filing copies of all unpublished orders cited herein simultaneously with this Motion.

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.

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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) (per curiam).

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." *Waity v. LeMahieu*, No. 2021AP802, unpublished order at 7 (Wis. July 15, 2021).[2] Instead, "the 'strong showing' is inversely proportional to the amount of

[2] The Wisconsin Supreme Court has repeatedly cited analogous unpublished, preliminary, procedural orders from other cases as precedential. *See, e.g.*, *Waity v. LeMahieu*, 2022 WI 6, ¶4, 400 Wis. 2d 356, 969 N.W.2d 263 (citing *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, unpublished order (Wis. Sept. 22, 2021, amend. Sept. 24, 2021)); *id.*, ¶57 (citing *Waity v. LeMahieu*, No. 2021AP802, unpublished order (Wis. July 15, 2021); *id.*, ¶¶57–58 (citing *Serv. Empls. Int'l Unions v. Vos*, No. 2019AP622, unpublished order (Wis. June 11, 2019)); *id.*, ¶90 (Dallet, J., dissenting) (citing *League of Women Voters v. Evers*, No. 2019AP559, unpublished order (Wis. Apr. 30, 2019)).

irreparable injury that the moving party (and the public) will suffer in the absence of temporary relief pending appeal." *Id.* (citing *Gudenschwager*, 191 Wis. 2d at 441). It follows that the party seeking a stay "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." *Id.*

16. "When 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, as discussed in further detail below. *Id.*, ¶53 & n.16.

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ARGUMENT

17. The factors this Court must consider, on balance, clearly satisfy DNC's request for a stay pending appeal.

DNC's irreparable harm absent a stay

18. The risk of irreparable harm to DNC absent a stay is substantial.

19. In adjudicating the dueling summary judgment motions, the Court had no occasion to consider the harm the injunction might inflict upon DNC (or any other defendant). But in the stay analysis, such considerations are necessary.

20. "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*, unpublished order at 11).

21. As DNC explained in briefing its motion to intervene, the relief Brown sought in this lawsuit "seeks to severely restrict Wisconsin voters' ability to successfully exercise their right to vote absentee." (Dkt. 19 at 7)

22. This Court's Amended Judgment and Order brings these threats to life and portends irreparable harm for DNC and its members as the November 2024 election draws near.

23. Indeed, voter disenfranchisement is the paradigmatic example of irreparable harm. "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).

24. 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).

25. The irreparable harm of disenfranchisement is indeed foreseeable here. Over the past handful of years, early and absentee voting have skyrocketed in popularity in Wisconsin. This increase coincides with the abolition of the one-location rule for early voting and the concomitant expansion of early-voting opportunities around the state. *See, e.g.*, Lawrence Andrea, *Absentee voting numbers in Wisconsin soar over the 2018 midterms,* Milwaukee Journal Sentinel (Nov. 8,

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2022).[3] A massive disruption to the settled patterns of early voting will be confusing to voters—and likely dissuasive to some.

26. Voters, and the political parties that organize those voters, will bear the consequences of the one-location rule being largely reimposed as a result of this Court's restrictive interpretation of the "no political advantage" clause. Those consequences will interfere with the constitutionally protected associational interests of DNC, its members, its candidates, and its voters who seek convenient access to early voting sites and will face increased obstacles to that access if municipalities have to scramble to apply this Court's order, which lacks clear standards or guidance.

27. This sudden change in the rules—contrary to both constitutional adjudication and legislative action—exacerbates the profound unfairness of the irreparable harm threatened here. It further militates in favor of a stay so that, if Brown does ultimately prevail, there is ample time, outside the heat of a relentless and high-pressure election cycle, for WEC, political parties, candidates, and civic organizations to educate voters about the sea change in early voting procedures.

28. Additionally, in the absence of a stay, DNC will 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. On top of the associational harms of disenfranchisement sure to befall DNC members, the financial impact of any attempt by the DNC to avoid those harms is also an irreparable harm. DNC has limited resources, and every dollar or hour spent responding to the Court's order is unavailable to be spent on the purposes for

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[3] Available at https://www.jsonline.com/story/news/politics/elections/2022/11/08/absentee-voting-numbers-in-wisconsin-soar-over-the-2018-midterms/69627990007/ (last visited Feb. 29, 2024).

which it has been earmarked. Resulting shortfalls in the resources available to execute DNC's plans between now and the November general election cannot be remedied later, as all of DNC's plans and efforts build toward Election Day. More specifically, "DNC would have to divert time and resources away from its core work of voter persuasion, education and 'get-out-the-vote' (GOTV) efforts and instead direct some of those limited resources toward additional efforts to assist absentee voters regarding the barriers imposed by Plaintiff's cramped reading of Wis. Stat. § 6.855." (Dkt. 19 at 7 (citing Dkt. 20, ¶7)) DNC explained that this diversion of resources necessarily means that "fewer resources could be dedicated to the basic blocking-and-tackling activities that go towards winning an election" and therefore "DNC's ability to invest in voter education and otherwise prepare for upcoming elections would be reduced, which would adversely affect DNC's turnout efforts on behalf of Democratic candidates." (*Id.*) Diversion of resources is thus its own irreparable harm.

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29. 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*, unpublished order at 11). In the absence of a stay, DNC faces several distinct irreparable harms. Those harms—individually and, beyond dispute, taken together—are significant, such that DNC 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).

<u>Likelihood of success on the merits</u>

30. This Court interpreted Wis. Stat. § 6.855(1) as a question of first impression. Appellate review of this Court's statutory construction will proceed 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). Review of this Court's standing analysis will also be conducted de novo. *See Friends of Blue Mound State Park v. DNR*, 2023 WI App 38, ¶5, 408 Wis. 2d 763, 993 N.W.2d 788.

31. Where, as here, 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*, unpublished order at 7. This 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 [the Supreme 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*, unpublished order at 8.

32. 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*, unpublished order at 8-9; *League of Women Voters*, unpublished order at 7; *Serv. Empls. Int'l Union*, unpublished order at 6. 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).

33. Put differently, under Supreme Court precedent, the prospect of de novo appellate review necessarily means that DNC has "more than the mere possibility of success on the merits." And given the severity of the irreparable harm at issue here—the disenfranchisement of voters—that surely is enough to warrant a stay in this case.

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No substantial harm to other interested parties

34. 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").

35. This factor turns on the relative harms facing DNC (and the other defendants) as compared to those facing Brown. There is no reason to believe that Brown faces disproportionate harm during the pendency of this appeal if his preferred construction is not immediately applied. This is particularly true given (a) Brown's choice to wait for years after the one-location rule was jettisoned in 2018 before bringing suit over the meaning of the prohibition on locations that confer a partisan advantage—an amorphous and debatable concept—and (b) the de novo standard of review that applies to the first-impression statutory interpretations that are the fundamental feature of this case.

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No harm to the public interest

36. 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.

37. 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.

38. Given that, the Court should vindicate the public interest by acting carefully to promote consistency, continuity, 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 order until an appellate court can make an informed determination on the merits.

Additional considerations

39. *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 v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)).

40. The Court may believe 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.

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41. Given that: (a) every one of Wisconsin's 1,852 voting jurisdictions has been authorized since 2018 to use multiple alternate early voting locations, and many have used this authority to build election-administration infrastructure that facilitates convenient and secure early voting opportunities throughout their jurisdictions;[4] (b) the appellate court applying de novo review very well might interpret the relevant statutes differently than this Court's novel interpretation of Wis. Stat. § 6.855(1) and (5); and (c) DNC and all voters who might use early voting sites will suffer significant, irreparable harms from this Court's order, the only

[4] A partial list of early voting locations appears at League of Women Voters of Wisconsin, *Local Absentee Ballot Return and Early Voting Locations*, https://my.lwv.org/wisconsin/local-absentee-ballot-return-and-early-voting-locations (last visited Feb. 29, 2024). Such sites include libraries, neighborhood and student centers, churches, government buildings, and other locations. *Id.*

comprehensible articulation of the status quo is the same election administration principle that has consistently applied in every election for the past six years.

42. This analysis is further amplified here by the fact that the deadline is quickly approaching by which municipalities must designate alternate absentee ballot sites for the August and November 2024 elections. Wis. Stat. §§ 6.855(1), 7.15(1)(cm) (deadline this year is June 12, 2024). Once that deadline passes, our statutes do not anticipate municipalities altering the list of alternate sites for the remainder of this year's elections. The process of designating alternate sites requires legislative action by each municipality that elects to offer this method of voting. Given the process and timeline, it is essential that the judiciary avoid providing inconsistent guidance, so that municipalities have the opportunity to administer elections efficiently and effectively.

43. Finally, there are profound and important due-process considerations at stake here. Procedures must be communicated to voters and not changed mid-stream, 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).

44. 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

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deprivation of their due process rights when election officials subsequently refused to count their votes).

CONCLUSION

45. The factors that this Court must consider, individually and balanced with each other, clearly support DNC'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, DNC's request for a stay should be granted.

Dated: February 29, 2024

Respectfully submitted,

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