

In the Wisconsin Supreme Court

RICHARD TEIGEN AND RICHARD THOM,
PLAINTIFFS-RESPONDENTS-PETITIONERS,

v.

WISCONSIN ELECTION COMMISSION,
DEFENDANT-CO-APPELLANT-RESPONDENT

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,
INTERVENOR-DEFENDANT-CO-APPELLANT-RESPONDENT,
DISABILITY RIGHTS WISCONSIN, WISCONSIN FAITH VOICES FOR
JUSTICE, LEAGUE OF WOMEN VOTERS OF WISCONSIN,
INTERVENORS-DEFENDANTS-APPELLANTS-RESPONDENTS

On Appeal from the Decision of the Circuit Court
of Waukesha County, Honorable Michael Bohren Presiding
Circuit Court Case No. 21-cv-958

APPENDIX TO PETITION FOR BYPASS

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**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. §§ 809.19(12)**

I hereby certify that I have submitted an electronic copy of this appendix, which is identical in content and format to the printed form of the appendix filed as of this date.

Dated: January 26, 2022.



LUKE N. BERG



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January 24, 2022

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

2022AP91

Richard Teigen v. Wisconsin Election Commission
 (L.C. # 2021CV958)

Before Blanchard, P.J., Graham, and Nashold, JJ.

The Wisconsin Election Commission and the intervenors (collectively, the movants) move for relief pending appeal in the form of an order staying the circuit court's order that the Commission withdraw, by Monday, January 24, 2022, certain guidance that it issued in 2020 to election administrators statewide. That guidance relates to drop-boxes for the collection of

absentee ballots, whether electors are required to personally mail or deliver their absentee ballots, and other matters. We now grant the motions and stay, through February 15, 2022, the circuit court's order.

The timeline for these motions for relief has been unusually compressed due to the timing and substance of the circuit court order in relation to Wisconsin's spring primary, which will be completed on February 15, 2022.

Just eleven days ago, on January 13, 2022, the circuit court held a motion hearing and issued an oral decision declaring the Commission's guidance invalid. The court also ordered that no later than January 27, 2022, the Commission must withdraw its guidance and issue a statement notifying clerks that the Commission's interpretation of applicable statutes has been declared invalid. Based on the filings in this court, we understand that the intervenors immediately sought a stay in the circuit court on the grounds that the February 2022 spring primary was already underway and that changing instructions about the lawful means of returning absentee ballots in the midst of an election would cause confusion for local clerks and electors alike. The circuit court scheduled the stay hearing for the afternoon of Friday, January 21. During the hearing, the court denied the requested stay. Additionally, upon learning that the statutory deadline for municipal clerks to deliver absentee ballots to voters is Tuesday, January 25,¹ the circuit court amended its order, moving up the Commission's deadline to withdraw its guidance to the following business day, Monday, January 24.

¹ According to the Commission, county clerks are required by statute to deliver ballots to municipal clerks by Monday, January 24, 2022, *see* WIS. STAT. § 7.10(3)(a), and municipal clerks are
(continued)

The Commission and the intervenors filed their motions seeking emergency relief in this court. In their motions, they represented that the Commission's first opportunity to meet to address compliance with the circuit court's order would be Monday, January 24, at 4:00 p.m. Due to the immediacy of the circuit court deadlines and the urgency of the matter, we ordered a briefing schedule over the weekend. The respondents have now submitted materials in response, and the Commission and the intervenors have submitted materials in reply. In these new materials, the Commission represents that as of 7:57 this morning, 8,398 ballots have already been sent to voters by municipal clerks, and that United States Post Office records confirm that at least 1,845 ballots have already been delivered or are currently out for delivery.

In considering a motion for relief pending appeal, this court reviews whether the circuit court erroneously exercised its discretion in deciding the motion. *State v. Gudenschwager*, 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). We affirm if the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 440. The movants must (1) make a strong showing that they are likely to succeed on the merits of the appeal, (2) show that they will suffer irreparable injury unless a stay is granted, (3) show that no substantial harm will come to other interested parties, and (4) show that a stay will do no harm to the public interest. *Id.*

Ordinarily, in considering whether a circuit court erroneously exercised its discretion in considering relief pending appeal, we would have the benefit of a written decision or a transcript of an oral decision that explains the court's reasoning. Here, because of the compressed timeline, we

required to deliver absentee ballots to electors who have previously requested them by Tuesday, January 25, 2022, *see* WIS. STAT. § 7.15(1)(cm).

have not been provided with a transcript. The movants provide a brief description of the court's ruling. The respondents assert that the description is incorrect, but they do not identify specific inaccuracies or provide any alternate description of the ruling. However, the parties clearly agree that the circuit court fully denied relief. In light of the short time period that has resulted from the circuit court's Friday order directing action by Monday, we decline to allow the absence of a transcript to stymie a review of the decision to deny relief pending appeal.

We first address the likelihood of success on the merits of the appeal. The respondents address the merits and they correctly point out that the motions for a stay do not include developed arguments on the likelihood of success. However, both movants filed reply briefs today and have now provided their arguments, which are consistent with the arguments reflected in the transcripts they previously provided of the circuit court's January 13, 2022 hearing. From all of these sources we are now familiar with the legal arguments that the parties will make in this appeal. We also note that the decision was made on summary judgment, so this appeal will not include review of whether any factual findings were clearly erroneous.

Having reviewed the arguments of the parties, we conclude that they show that the movants have "more than the mere 'possibility' of success on the merits," which is the minimum showing necessary to support a grant of relief pending appeal. See *Gudenschwager*, 191 Wis. 2d at 441. Because briefing on the merits has yet to occur in this appeal, we decline to discuss specific issues or our analysis more generally at this time, so as not to affect the briefing. Of necessity, our analysis is preliminary and has been conducted in a compressed time period.

We conclude that the other factors weigh heavily in favor of relief pending appeal. To summarize those arguments, the movants argue that the change in guidance ordered by the

circuit court, during the early stages of an election already in progress, will cause confusion among voters and create problems for state and local election administrators, as we discuss below.

As an initial point, the respondents contend that the circuit court's order does not effectuate a change, because the court did not change the law, but ordered only that the Commission withdraw guidance that did not comply with the law. This argument is not consistent with the respondents' own argument that the Commission guidance *does* have the force of law, and therefore was a rule that was not properly promulgated under WIS. STAT. ch. 227.

However, putting aside the question of whether the guidance does or does not have the force of law, there is no dispute that guidance by the Commission, in general, has the practical effect of guiding decisions made by election administrators statewide. That is its purpose. It is reasonable to infer that a change in guidance will cause a change in practice by those administrators. Causing that change is presumably why the respondents brought this suit in the first place. Having now prevailed, it is absurd for them to claim that no change has occurred.

Turning specifically to the second factor, whether the movants will suffer irreparable injury, the injuries that they describe are related to voter confusion and election administration, and can reasonably be regarded as injuries to the election system as a whole.² As the statewide agency charged with administering elections, we regard the Commission as standing in a position

² Although this order focuses on issues of voter confusion and election administration, we acknowledge that the intervenors are also claiming a more direct injury to the voting rights of disabled
(continued)

that enables it to seek protection from injury to those interests. *See* WIS. STAT. § 5.05. In other words, injuries to voters and to orderly election administration in general can properly be characterized as injuries that the Commission can defend against.

There are two forms of injury that concern us in particular. One is caused by the fact that the withdrawal of guidance that the circuit court has ordered to occur by today would come during an election process that is already underway. As stated above, the statutory deadline for county clerks to deliver ballots to municipal clerks is today, and tomorrow is the deadline for municipal clerks to deliver absentee ballots to electors (including military and overseas electors) who previously requested them.

The movants have provided evidence that some absentee ballots have already been mailed to electors with instructions that are consistent with the Commission guidance as it exists now, and as it existed when those materials were created and distributed, but will no longer be supported by guidance if the guidance is withdrawn. Specifically, an affidavit filed today from Megan Wolfe, administrator of the Commission, confirms that as of 7:57 this morning, clerks had reported that 8,398 ballots had been sent out to electors, and United States Post Office records confirm that at least 1,845 ballots have been delivered (or are out for delivery now).

The potential for voter confusion and uncertainty in administration is apparent in this situation. As the Commission notes, there may be voters who have already deposited their absentee ballots in drop boxes or given their ballots to a spouse, caregiver, or other person to

voters specifically. However, time constraints prevent us from fully developing a discussion of that argument.

mail or to otherwise return to the clerk. If the current guidance is withdrawn at this stage of the election process, there is significant uncertainty as to whether these votes would be counted. Given this situation, the risk of confusion—and possible disenfranchisement—is compelling.

The second form of injury is created by the timeline itself, particularly given the circuit court's decision late in the afternoon on Friday, January 21, to move up to today, Monday, January 24, the date by which the guidance must be withdrawn. 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. The Commission states that, as a result, the soonest it could hold such a meeting is 4:00 p.m. today. Once that meeting is held, all of the following must then occur by tomorrow in order to comply with the statutory deadline by which absentee ballots must be mailed to electors: (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;³ 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. Based on the information available,

³ For example, as the intervenors note, 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.

we can only conclude that it is implausible that, given this timeframe, the changes can be made without creating a high risk of inconsistent or incomplete guidance to voters.⁴

The respondents minimize the potential for such confusion or administrative difficulties. They assert: “Nor is there any serious challenge for clerks or risk of confusion in the upcoming election.” This assertion is simply not realistic.

On the third and fourth factors, whether a stay will cause harm to other interested parties or the public interest, we note that the respondents do not claim that there has been any showing in this litigation that holding elections in the manner provided in the disputed Commission guidance has any specific adverse effect on voters, election administration, or any other interest. Instead, they rely on the importance of adherence to election law in general: “Plaintiffs, like all Wisconsin voters, have an interest in elections being held in accordance with state law, so that they and all other voters will have the benefit of the safeguards and procedural evenhandedness that the Legislature long ago determined were appropriate.”

We naturally agree on the importance of adhering to Wisconsin election laws. However, the respondents’ reliance on that general proposition becomes circular when applied in the context of relief pending appeal, because it assumes that the respondents and the circuit court are

⁴ As the Commission notes, the United States Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), and our supreme court in *Hawkins v. Wisconsin Elections Comm’n*, 2020 WI 75, ¶¶2-5, 393 Wis. 2d 629, 948 N.W.2d 877, have expressed a shared set of significant concerns in addressing the risks that may attend court directives that address election procedures being issued during or shortly before the election process. See *Hawkins*, 393 Wis. 2d 629, ¶5 (“the 2020 fall general election has essentially begun” and therefore “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 both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot.”). We are not persuaded by the attempts of the respondents to explain why the shared reasoning of *Purcell* and *Hawkins* does not support the grant of the requested stay in this case.

correct in their interpretations of relevant law. That correctness cannot be assumed, because that is the very question to be decided in the appeal. As we discussed above, that assumption is countered by our conclusion that there is more than a mere possibility that the movants will prevail on those merits.

In summary, as to the third and fourth factors, the more concrete harms of voter confusion and administrative difficulty are not countered by the assertion of any similarly concrete harms that may occur by continuing with the guidance that has already been in place during recent elections. So far as is shown to us in this litigation, earlier use of that guidance has not produced evidence of specific harms.

For all of these reasons, we conclude that the circuit court erroneously exercised its discretion in denying the motion for a stay because the movants have shown more than a mere possibility of success on the merits, have identified irreparable injury to the election system as a whole for the February 2022 election in the absence of a stay, and have refuted the respondents' assertions that a stay will cause harm to other interested parties and to the public interest.

The Commission's current request for relief seeks relief only through conclusion of the election set for February 15, 2022. We agree that the necessity for relief past that point has not yet been established. In other words, the relief we grant in this order expires on February 15, 2022, at which point, in the absence of further relief the Commission will be obliged to comply with the circuit court order.

IT IS ORDERED that the motions for relief pending appeal are granted. The circuit court's order is stayed through February 15, 2022.

Sheila T. Reiff
Clerk of Court of Appeals

Plaintiffs filed a motion for summary judgment and a motion for preliminary injunction on October 15. Defendant Wisconsin Elections Commission, and Defendant-Intervenors Democratic Senate Campaign Committee (“DSCC”), Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin filed briefs in opposition on November 15, requesting summary judgment in their favor. Plaintiffs filed a reply on November 24. This Court heard arguments on the motions on January 13, 2022.

Having considered the parties briefs, affidavits, and arguments, and for the reasons stated on the record during the January 13 hearing, the Court HEREBY ORDERS that the Plaintiffs’ Motion for Summary Judgment is **GRANTED** on all claims, Plaintiffs’ Motion for a Preliminary Injunction is **DENIED** as moot, and Defendant’s and Defendants-Intervenors’ request for summary judgment in their favor is **DENIED**.

The Court HEREBY ISSUES a declaratory judgment and permanent injunction as follows:

DECLARATORY JUDGMENT

For the reasons set forth by the Court on the record at the January 13, 2022 hearing, the Court hereby declares that WEC’s interpretation of state statutes in the Memos is inconsistent with state law, to the extent they conflict with the following: (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 for 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, (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.

The Court further declares that WEC's Memos are administrative rules under Chapter 227 of the Wisconsin statutes and are invalid not only for the reasons described above, and but also because they should have been, but were not, promulgated as rules.

PERMANENT INJUNCTION

Defendant Wisconsin Elections Commission is **HEREBY** permanently enjoined as follows:

1. The Wisconsin Elections Commission shall not issue any further interpretations, to municipal clerks or anyone else, that conflicts with Wis. Stat. §§ 6.87 and 6.855, as described above.

2. No later than January 27, 2022, the Wisconsin Elections Commission shall withdraw the Memos and issue a statement to clerks notifying them that WEC's interpretation of Wis. Stat. §§ 6.87 and 6.855 in the Memos has been declared invalid by this Court, as described above.

THIS IS A FINAL JUDGMENT FOR PURPOSES OF APPEAL

on that motion on January 21. Defendant Wisconsin Election Commission and Intervenor – Defendant Democratic Senatorial Campaign Committee joined the motion.

Having considered the parties submissions and arguments, and for the reasons stated on the record during the January 21 hearing, the Court **HEREBY DENIES** Defendant-Intervenors' emergency motion for a stay.

Furthermore, for the reasons stated during the January 21 hearing, the Court **HEREBY MODIFIES** its prior order, Dkt. 142, such that the Wisconsin Elections Commission shall, **no later than January 24, 2022**, withdraw the Memos and issue a statement to clerks notifying them that WEC's interpretation of Wis. Stat. §§ 6.87 and 6.855 in the Memos has been declared invalid by this Court.

1 THE COURT: We should be back on the record
2 in the Teigen, et al. versus the Wisconsin Elections
3 Commission, et al., file 21-CV-958. I see everybody, so
4 I'm assuming everybody can hear the Court. I see
5 acknowledgments on it, so thank you.

6 During the brief recess we had, I took the
7 opportunity to review my notes, read through the
8 documents, read the memos again, looked at the statutes
9 and reflected on the status of the case and I'm prepared
10 to enter a ruling. During the course of my ruling, I'll
11 refer to the statutes involved and to the memos as well.

12 But I just want to begin with the issue of
13 standing. I'm satisfied that standing is controlled by
14 Section 227.40, declaratory judgment proceedings. When I
15 look at the -- just going to the two memos involved or the
16 two documents that really bring the matter to court is
17 that August 19, 2020 memorandum or memo or document from
18 the Elections Commission, and a March 31, 2020 document.

19 When I referenced at the beginning of the
20 hearing, I mentioned I had the affidavit with the two
21 documents attached to it. Actually, the affidavit doesn't
22 attach the August memorandum to it, so I have those
23 documents from the complaint. So just it's clear, I have
24 the right documents, the March 31, 2020 document and the
25 August 19, 2020 document.

1 In the March 31, 2020 document it talks
2 about -- it begins, "Due to the increase in by-mail
3 absentee ballots, clerks have inquired about options for
4 ensuring that the maximum number of ballots are returned
5 to be counted for the April 7, 2020 election. There are
6 several options the clerks can use to make the ballot
7 return more accessible and efficient. It is recommended
8 the clerks do the best they are able. To publicize
9 dropoff locations and options for voters, it's further
10 recommended that it be publicized to voters that under
11 state law ballots need to be received by 8 p.m. on
12 election day to be counted."

13 It then goes through a number of items. It
14 doesn't call it a guidance or a memo. It doesn't really
15 say anything. It just says, Here's the information, but
16 I'm satisfied it's a guidance issued by the commission.
17 The August 19th document that has been forwarded begins,
18 "This document is intended to provide information and
19 guidance on drop box options for secure absentee ballot
20 return for voters." So there the word guidance is used
21 specifically.

22 I refer to that because when you look at
23 Section 227.40(1), "Except as provided in (2), the
24 exclusive means of judicial review of the validity of a
25 rule or guidance document shall be an action for

1 declaratory judgment as to the validity of the rule for a
2 guidance document brought in to the circuit court for the
3 county where the party asserting the invalidity is."

4 I'm satisfied when I look at that and look
5 at the documents that are involved, the proper method to
6 proceed is under 227.40. That's the venue or the avenue
7 that was used to bring the lawsuit, so I'm satisfied that
8 the standing issue is met and the plaintiff prevails with
9 regard to the standing matter.

10 In looking then at the issues, we're
11 addressing how the elections are administered, and in
12 particular, we're referring to two particular statutes.
13 We're looking at Section 6.87(4)(b)1; and also 6.855.
14 Those are the two that I looked at and that the parties
15 concentrated on.

16 The language in Section 6.88 is -- it's a
17 long statute, but we've concentrated only on I think it
18 was 21 words that were used during the argument. And
19 that's toward the end of Subsection (1) and it says -- it
20 talks about the envelopes and how it's done, and then it
21 says, just looking at the pertinent language, The return
22 envelope shall then be sealed. The witness may not be a
23 candidate.

24 And then it goes on and states, "The
25 envelope" -- that's the envelope with the ballot, the

1 absentee ballot -- "The envelope shall be mailed by the
2 elector or delivered in person to the municipal clerk
3 issuing the ballot or ballots."

4 The second statute that's involved is
5 6.855. That deals with alternate absentee ballot sites,
6 and that states in Subsection (1), "The governing body of
7 a municipality may elect to designate a site other than
8 the office of the municipal clerk or board of election
9 commissioners as the location from which electors of the
10 municipality may request and vote absentee ballots and
11 which to voted absentee ballots shall be returned by
12 electors for any election. The designated site shall be
13 located as near as practicable to the office of the
14 municipal clerk or board of commissioners, and no site may
15 be designated to afford an advantage to any political
16 party."

17 In Subsection (3) it states, "An alternate
18 site under one shall be staffed by the municipal clerk or
19 the executive director of the board of election
20 commissioners or employees or the clerk or the board of
21 commissioners."

22 Sub. (4) significantly states, "An
23 alternate site under one shall be accessible to all of the
24 individuals with disabilities."

25 Sub. (5) states, "The governing body may

1 designate more than one alternate site under Sub. (1), but
2 there's a clear procedure. They call it alternate sites
3 to collect ballots, other than at what may be the actual
4 office of the municipal clerk.

5 There's another section that's important,
6 and that's Section 6.84. That address construction of the
7 election statutes. We talked about it briefly during the
8 presentation, but I want to emphasize the language in it,
9 and the public policy that the legislature has set forth
10 for the election statutes.

11 First, it says in Sub.(1), 6.84(1),
12 Legislative Policy, the legislature finds that voting is a
13 constitutional right, the rigorous exercising of which
14 shall be strongly encouraged. In contrast, voting by
15 absentee ballot is a privilege exercised wholly outside
16 the traditional safeguards of the polling place.

17 The legislature finds that the privilege of
18 voting by absentee ballot must be carefully regulated to
19 prevent the potential for fraud or abuse, to prevent
20 overzealous solicitation of absent electors who may prefer
21 not to participate in an election, to prevent undue
22 influence on the absent elector to vote for or against a
23 candidate, or to cast a particular vote in a referendum or
24 other similar abuses.

25 Subsection (2) is entitled Interpretation.

1 It states, "Notwithstanding section 5.01(1) with respect
2 to matters relating to the absentee voting process,
3 Section 6.86, 6.87(3) to (7); and 9.01(1)(b) (2) and (4),
4 shall be construed as mandatory. Ballots cast in
5 contravention of the procedures specified in those
6 provisions may not be counted. Ballots counted in
7 contravention of the procedures specified in those
8 provisions may not be included in the certified result
9 then of any election.

10 All important policy considerations to be
11 considered by the Court and by the attorneys in making the
12 arguments in this case. Certainly I want to thank the
13 attorneys for the briefing that was done, the intense
14 briefing and intense arguments today, the arguments, the
15 strength of the arguments from all parties is appreciated,
16 and I think it's been very well presented.

17 Your respective clients have been well
18 represented by each of the attorneys in presenting their
19 case today. We focused -- today we focus on absentee
20 ballots and how they're received and how they come to the
21 clerk. When I read through Section 6.84 on the
22 construction issue, I particularly look to what happens at
23 an election when they talk about the vigorous exercise --
24 voting is a constitutional right, the vigorous exercise of
25 which should be strongly encouraged.

1 I think then about voting. We haven't
2 talked about the process of in-person voting, but it's
3 really an adjunct to our process today. When a person
4 goes to vote, the person identifies who that person is,
5 checked off, the person is given a ballot. And I'm old
6 enough, I used to vote with paper ballots. They'd give me
7 a paper ballot, we'd go into the booth with a pencil and
8 check off what we wanted to do with the vote, and then
9 turn it back in. But we turned it in and it went into the
10 receptacle.

11 Today when we vote, it's usually by
12 electronic voting machines, but after you've been checked
13 in and been identified, the clerk gives the person the
14 ballot. The person goes in and votes, checks off whatever
15 they want to check off, do the voting, and then the person
16 comes back and the person puts it through the electronic
17 voting machine. He doesn't hand it to anybody else, puts
18 it through the voting machine. So the elector, the voter,
19 is always in possession of that ballot as it functions and
20 as it goes into the ballot box.

21 With absentee ballots, as the legislative
22 policy notes, they consider that a privilege. It's not
23 the same as coming in person. They're giving the ballot
24 to a person, the person votes, not at the voting place but
25 usually at their home or some other location, and then

1 that ballot has to get back to the voting operation, to
2 the municipal clerk, to the ballot clerk. That's what
3 we're talking about today and how important that process
4 is.

5 In looking at the first statute that we've
6 dealt with, which is (1) of 6.87, I have the wording
7 again, The envelope shall be mailed -- shall be mailed by
8 the elector or delivered in person to the municipal clerk.
9 There's been some disagreement between the parties as to
10 what delivered means.

11 I'm satisfied in reading that sentence that
12 when it says, "the envelope shall be mailed by the elector
13 or delivered in person," that means that it's the elector
14 that delivers it in person, not somebody else. I don't
15 see any language in the statute that provides a basis for
16 having agents, somebody other than the elector, actually
17 deliver the ballot.

18 And that's been a controversy that is key
19 to the Plaintiff's case and it's certainly key to the
20 Defense, to the Election Commissions's case and those that
21 support the commission. In reading that statute and
22 looking at the, if you will, the ritual for voting in
23 person, and if you will, the ritual for voting by
24 absentee, it requires the elector to be principally
25 involved. It doesn't require other people to be involved.

1 And one of the concerns with certainly the
2 public policy in 684 is that the elector has to control
3 the ballot and control how its cast. And on that basis
4 then, I'm satisfied that the provisions in the memorandums
5 that permit other individuals to take -- to receive the
6 ballot and then to bring it back into the municipal
7 clerk's office is contrary to the statute.

8 In the March 31, 2020 memo, on Page 1,
9 Section 2, the title of it is, Can voters return an
10 absentee ballot they received by mail in person at the
11 clerk's office, in-person absentee site, or polling place
12 on election day. In that paragraph that follows, it says
13 that ballots can be returned to the clerk's office in
14 person, absentee, or early voting site or the voter's
15 polling place on election day.

16 Then quoting, A family member or another
17 person may also return the ballot on behalf of the voter.
18 I don't see anything in the statute that says that. In
19 reading the statute, the statute is clear. It's not
20 ambiguous. It's not necessary to go to outside sources to
21 determine how that return of the ballot -- return of the
22 ballot is addressed.

23 In looking back a few minutes ago in my
24 discussion of the electoral process and the importance of
25 the elector's personal involvement in delivering the

1 ballot, to permit other people to bring the ballot in is
2 contrary to what I think is the clear wording of the
3 statute but also contrary to the policy behind the statute
4 and as it's worded.

5 So I'm satisfied that in that respect,
6 those portions of the memorandum that address that other
7 people may bring the ballot in, it doesn't have to be the
8 elector, are contrary to the statute.

9 What we spent considerable time on is the
10 issue of drop boxes. In looking at the statutes, there is
11 no specific authorization for drop boxes. The closest
12 that the Court has heard is that the statute for the
13 alternate ballot placement, the alternate sites, under
14 6.855 is an alternate ballot site, and the practicality of
15 proceeding with a ballot, with a secure ballot box in a
16 clerk's office, that's manned by a staffer or an alternate
17 absentee ballot site that's manned by a person from the
18 clerk's office or the voting governing body's office.

19 There's nothing else that authorizes the
20 use of a drop box. Now, when I look at, in particular,
21 both memos address drop boxes with some detail. There is
22 a -- somebody well thought out the issue of drop boxes,
23 well-thought-out issues then with regard to the security
24 of drop boxes, how they're to be managed in the August 19,
25 2020 memo. There's just details about how drop box are

1 handled, where they're put, types of drop boxes, outdoor
2 action -- outdoor options. I'm not going to read
3 everything that's in the memo, but it's the subtitles.
4 What is an absentee ballot drop box.

5 In looking at that first section, what is
6 an absentee ballot drop box, it never talks about it
7 really being in the clerk's office or the municipality's
8 office. It says, A ballot drop box provides a secure and
9 convenient means for voters to return their by-mail
10 absentee ballot. A drop box is a secure, locked structure
11 operated by local election officials.

12 It doesn't say where it is. It doesn't
13 follow the statute with regard to an alternate site. It
14 really, as we've talked today, it could be virtually
15 anyplace. Then it talks about the repurposing options,
16 then it goes to types of drop boxes, outdoor options,
17 indoor options, then security.

18 And then it shows, for instance, on Page 3
19 of the August 19 memo is a picture apparently from the
20 City of Waukesha of an official absentee drop box. All of
21 that is good and nice, but there's no authority to do it.
22 It would appear that the election laws in Wisconsin are
23 very specific, very detailed as to what happens. It's
24 not -- the law in the statutes don't say, we'll have an
25 election at certain times and we'll have ballots, and the

1 municipal clerk, it's up to the clerks to figure out how
2 to do it. That's really not the case. These are very
3 specific statutes on how to do things, primarily to
4 protect the integrity of the system.

5 I go back to the ritual, if you will, of
6 voting in person. It's really carried over to a great
7 extent to the ritual of voting with an absentee ballot.
8 So I'm satisfied there's no authority, no statutory
9 authority, to issue -- to have drop boxes used for the
10 collection of absentee ballots, other than as an alternate
11 absentee ballot site and following that process under
12 6.855.

13 In looking then at the nature of this
14 lawsuit, I'm satisfied that the Plaintiffs prevail on
15 their motion for summary judgment. I'm satisfied there's
16 no basis under the statutes. The statutes control for the
17 method to have others bring the ballots in, for the
18 elector, and to use drop boxes other than as set forth in
19 7.855.

20 I'm also concerned with the issue of the --
21 we've talked to some extent about the rule designations
22 and about making up a rule. I'm satisfied that this issue
23 is that the memorandums, that the guidance memorandums,
24 both that we've dealt with in this case are actually
25 rules, unpromulgated rules by the Elections Commission.

1 They should have gone through the process set forth in
2 Chapter 227, in particular in Section 227.10.

3 I'm just taking a moment to -- I just want
4 to review the issues with regard to the rule promulgation.
5 When you read the documents that the Elections Commission
6 issued, it really is a rule on how to conduct elections;
7 in particular, how in particular to conduct and collect
8 absentee ballots. With the specificity and the integrity
9 with which the legislature has addressed the issue of
10 absentee ballots, that the commission should be required
11 and ought to be required to more carefully follow the
12 traditional mandates of Wisconsin law when they make major
13 policy decisions.

14 And I see nothing other than the issue as
15 to who turns the ballot in and the drop boxes are major
16 policy decisions that alter how our absentee ballot
17 process operates. When I looked at these two memos and
18 the documents and the rules and the guidance that are
19 contained within them, I'm satisfied that they do
20 constitute a standard statement of policy and a general
21 order. I'm satisfied that they have general application.
22 They really cover elections across the state and they
23 cover them very specifically, altering what has been and
24 setting a new standard, if you will, and a new policy for
25 how absentee ballots are then collected.

1 They have the effect of law. Although it's
2 been argued and I think it's true that the municipal
3 clerks can follow or not follow it, but remember the
4 clerk, if they do it, they're going to say, I have this
5 memo that says I can do it. They're going to rely upon it
6 as a statement of law.

7 I'm satisfied these policy statements by
8 the commission were issued as, in fact, their view of
9 interpreting what the statute means and has the force of
10 law with regard to their interpretation. I'm satisfied
11 that reasonable municipal clerks who address elections
12 will adhere to those policies. I think as we went through
13 some of the briefing and the statements by others as to
14 how these policies have been implemented, that's what the
15 clerks did.

16 There is certainly -- it's issued by an
17 agency and it was issued to implement, interpret or make
18 specific legislative action enforced or administered by
19 the agency, but there is no legislation. There's nothing
20 there. This matter should have come through a rule, the
21 rule-making process. That is really to a great extent set
22 forth in -- there are two *Palm* decisions, *Tavern League v.*
23 *Palm*, 2021 WI 33, there's also one from 2020.

24 I looked at the case, the 2021 WI 33,
25 particularly at Paragraph 19, talks about these very

1 issues and the need to have documents like this policy
2 statement by agencies, either not used or adopted as a
3 rule, and give the legislative process and the entire
4 government an opportunity to review what the agency is
5 doing.

6 I just want to take a moment to look at the
7 *Palm* case. In Paragraph 19 of the *Palm* decision, the
8 court said, quoting, We further -- they're now referring
9 back to the first *Palm* decision in 2020 -- "We further
10 explained that agency action that exhibits all of the
11 following criteria meets the definition of a rule: One, a
12 regulation, standard, statement of policy, or general
13 order; two, of general application; three, having the
14 effect of law; four, issued by an agency; five, to
15 implement, interpret, or make specific legislation
16 enforced or administered by such agency."

17 That's clearly what happened in both of
18 these memos. They fit the definition of a rule exactly.
19 There was some discussion about when we talked about
20 standing as to the issues as to local municipalities
21 acting versus the State of Wisconsin Election Commission
22 acting. Well, here the commission regulates and governs
23 elections.

24 They issued these memos, I can only assume,
25 not because they had nothing better do, but they issued it

1 to give specific instructions to municipalities on how
2 they should conduct elections, and in particular, how to
3 collect absentee ballots, a critical issue obviously and a
4 critical issue from the standpoint of the intervening
5 parties in this case as well. The issue of election
6 security, the issue of election integrity is key, and when
7 you deal with -- when you address absentee ballots, it's
8 even more critical for all of the reasons that you have
9 absentee ballots.

10 So I'm satisfied that it is a rule. They
11 were proposed rules and they should have gone through the
12 rule-making policy. It's another basis for the Court to
13 grant summary judgment to the Plaintiff. I'll grant their
14 motion. I'll deny the motions for summary judgment filed
15 by the Defendant.

16 As part of the complaint, the Plaintiff's
17 complaint, they've also requested an affirmative
18 injunction requiring that the Wisconsin Elections
19 Commission cease and desist from failing to enforce 6.84,
20 6.855, and 6.87(4)(b)1. I'll include that in my order and
21 I grant that injunction. So ordered.

22 I'll ask Attorney Berg to draft the
23 necessary order and submit it to the court. I hold orders
24 for ten calendar days if they come in without a statement
25 that the other parties agree to it as to form or the other

1 parties communicate that they agree to it as to form.
2 Otherwise, I hold it for ten calendar days. Keep in mind
3 our system is all electronic, so when it comes in, if it
4 comes in without an assertion that it's been agreed to as
5 to form, it just gets put into the holding pattern in the
6 digital system.

7 So any questions from the Plaintiff?

8 MR. BERG: So the Court just articulated
9 the scope of the injunction that it intends to issue, so I
10 can fully represent that in an order?

11 THE COURT: Yes. You asked me, you said I
12 did or I should?

13 MR. BERG: Can you?

14 THE COURT: Well, the injunction I'm
15 issuing is to require the enforcement of the statute named
16 in your complaint. I'll prohibit -- part of the
17 injunction is I will prohibit the further distribution of
18 the two memos and further prohibit the distribution and
19 promulgation of the guidance contained in those two
20 memorandums.

21 Some of the wording in the memorandums may
22 not be objectionable. Most of the statements contained in
23 the memorandums are contrary to the Court's ruling today.
24 So ordered.

25 Anything from the commission?

1 MR. BERG: Your Honor, one more thing.

2 THE COURT: Go ahead.

3 MR. BERG: One further thing we requested
4 in our injunction is to order the commission to correct
5 their statement to the clerks within a certain amount of
6 time.

7 THE COURT: I'll require that the
8 commission promulgate a statement that the policy guidance
9 contained in the two memorandums is withdrawn and do so
10 within 30 days of today's date. So ordered. Thank you.

11 Anything from the commission?

12 MR. KILPATRICK: With that clarification,
13 Your Honor, no, nothing from the commission.

14 THE COURT: Anything from the Democratic
15 Senate Campaign Committee, Attorney Devaney?

16 MR. DEVANEY: No, thank you, Your Honor.

17 THE COURT: Anything from Mr. Thompson?

18 MR. THOMPSON: Yes, Your Honor. I
19 understand that this Court's order is -- well, let me
20 phrase it as a question. The interveners identified
21 *Purcell*, a United States Supreme Court decision regarding
22 election administration rulings that are issued
23 immediately prior to an election. As I am sure the Court
24 is aware, we're about 30 days from the upcoming spring
25 election, and the whole purpose of *Purcell* is sort of

1 avoiding confusion amongst the electorate as they go to
2 cast ballots.

3 So I am curious if the Court, based on that
4 30-day timeline that was just referenced, intends for any
5 sort of order to go into place before or after the spring
6 election?

7 THE COURT: Well, the spring election is,
8 what, the 16th or the 17th of February?

9 MR. THOMPSON: It's right around there.

10 THE COURT: Let me just look. It's a
11 Tuesday, so is it the third Tuesday of February?

12 MR. BERG: February 15th.

13 THE COURT: Well, I'm going to order that
14 the memorandum, the order withdrawing their statements
15 contained in these two memos -- I'm looking for my
16 calendar -- I'm going to order that it be issued within
17 14 days of today's date. That puts it closer to the
18 election, but I think within practicality I have to give
19 the commission time to work through it and get the
20 paperwork ready.

21 Fourteen days from today date, today is the
22 13th, that would be January 27th. Let me see what I've
23 got here, today is the 13th, so January 27th is a
24 Thursday. The election day is the 15th. That's the
25 third Tuesday. So I'm satisfied it gives sufficient time

1 for the clerks to get the message and to follow the
2 statutes.

3 You know, in reality, the statutes are not
4 difficult to follow. They may have -- clerks may have
5 perhaps improvidently focused on these memorandums without
6 thinking it through, but they now have fairly clear
7 guidance, so thank you.

8 MR. THOMPSON: Your Honor?

9 THE COURT: Do you have anything else,
10 Attorney Thompson?

11 MR. THOMPSON: Your Honor, I was just going
12 to say in order to preserve the record, that the
13 intervener defendants I represent would submit that such
14 an order is too adjacent or close to the upcoming election
15 to survive that *Purcell* decision. Thank you.

16 THE COURT: I am hopeful that our clerks
17 will be diligent and the Election Commission -- actually,
18 this is an Election Commission issue and that the Election
19 Commission will be diligent in moving forward.

20 Thank you again. The briefing was
21 excellent. The arguments were very good. From an
22 intellectual standpoint, I enjoyed the arguments and the
23 briefing. It's a good issue. It's a very important
24 issue. I want to thank you for your assistance with it.
25 Thank you. With that, everybody have a good week and stay

1 healthy.

2 MR. BERG: Thank you, Your Honor.

3 MR. CURTIS: Thank you, Your Honor.

4 MR. DEVANEY: Thank you, Judge.

5 MR. THOMPSON: Thank you.

6 THE COURT: We'll end the hearing then.

7 (Whereupon, proceedings were concluded.)

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4 STATE OF WISCONSIN)
5 COUNTY OF WAUKESHA) SS.
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9 I, ROSE MARIE RODERICK, certify that I am
10 the official court reporter assigned to report the
11 proceedings herein for the Circuit Court; that the
12 foregoing pages, numbered 1 through 100 inclusive, have
13 been carefully compared by me with my stenographic notes;
14 that the same is a true and correct transcript of all such
15 proceedings taken on the 13th day of January, 2022.

16 Dated this 20th day of January, 2022.
17
18
19

20 ELECTRONICALLY SIGNED BY:

21 *Rose Marie Roderick*
22 _____

23 ROSE MARIE RODERICK
24 Official Court Reporter
25

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

Branch 1

RICHARD TEIGEN, et al.,

Plaintiff,

-vs-

File No. 2021-CV-000958

WISCONSIN ELECTION COMMISSION,

Defendant.

MOTION HEARING

Proceeding held on January 21, 2022

BEFORE THE HONORABLE MICHAEL O. BOHREN
CIRCUIT COURT JUDGE, PRESIDING

A P P E A R A N C E S

LUKE N. BERG, Attorney at Law, appeared on behalf of the Plaintiffs.

STEVEN CARL KILPATRICK, Attorney at Law, appeared on behalf of Defendant, Wisconsin Election Commission.

JOHN M. DEVANEY, Attorney at Law, appeared on behalf of Defendant, Democratic Senate Campaign Committee.

SCOTT THOMPSON, Attorney at Law, appeared on behalf of Defendants, Disability Rights of Wisconsin, Faith Voices for Justice, and the League of Women Voters of Wisconsin.

COPY

ROSE MARIE RODERICK
Official Court Reporter

1 **TRANSCRIPT OF PROCEEDINGS**

2 THE COURT: The Court will call the matter
3 of Richard Teigen, Richard Thom versus Wisconsin Election
4 Commission; Intervening Defendant, Democrat Senate
5 Campaign Committee; Intervening Defendants, League of
6 Wisconsin -- League of Women Voters of Wisconsin;
7 Disability Rights of Wisconsin; and Faith Voices for
8 Justice, 21-CV-935. This is a motion hearing. All
9 appearances today are by Zoom. We are Live streaming the
10 proceedings as well.

11 So who appears for the Plaintiffs
12 today?

13 MR. BERG: Luke Berg with the Wisconsin
14 Institute for Law and Liberty on behalf of Plaintiffs.

15 THE COURT: Thank you. Good afternoon.
16 Who appears for the Elections Commission?

17 MR. KILPATRICK: Assistant Attorney
18 General, Steven Kilpatrick, with the Wisconsin Department
19 of Justice, for the defendant, Wisconsin Election
20 Commission.

21 THE COURT: Thank you. Who appears for the
22 the Democratic Senate Campaign Committee?

23 MR. DEVANEY: Good afternoon, Your Honor,
24 John Devaney on behalf of the DSCC.

25 THE COURT: Thank you. Good afternoon.

1 Who appears for the League of Wisconsin Women Voters of
2 Wisconsin, Disability Rights of Wisconsin, and Faith
3 Voices for Justice.

4 MR. THOMPSON: Good afternoon, Your Honor.
5 Scott Thompson from Law Forward appears on behalf of those
6 intervener defendants.

7 THE COURT: Thank you. Good afternoon.
8 Thank you for being able to come in a half-hour later.
9 The morning calendar lasted longer than we anticipated,
10 but we're here today on the motion filed by the
11 intervening defendants. I'm going to call them the League
12 Group just for shorthand. That's Attorney Thompson's
13 group.

14 We met here on the 19th, on Wednesday, to
15 schedule it. We put it off to this afternoon to give
16 Plaintiffs an opportunity to respond. I did receive
17 yesterday a timely Plaintiff response, and I have received
18 nothing else with regard to the motion.

19 So with that then, I'm prepared to
20 proceed and I'll hear from Attorney Thompson.

21 MR. THOMPSON: Thank you, Your Honor. Your
22 Honor, I'd just like to acknowledge here from the outset
23 that our two-page motion received an eleven-page response,
24 so I'm going to structure my argument to somewhat mirror
25 the way that Plaintiffs presented their arguments, mostly

1 for the Court's convenience, and sort of follow them in
2 that order.

3 THE COURT: Thank you.

4 MR. BERG: Of course. So your Honor, there
5 are three key issues I would like to rebut from the
6 Plaintiff's motion. They make three central arguments,
7 all of which this Court should disregard, and I'm going to
8 start with the first one. Defendants argue that *Purcell*,
9 which is the United States Supreme Court decision upon
10 which our motion is premised, that it applies only to
11 federal courts.

12 THE COURT: You said Defendants, I think
13 you meant the Plaintiffs.

14 MR. THOMPSON: I certainly did. Thanks for
15 catching me there, Your Honor. Late on Friday, hopefully
16 it will be the last one.

17 THE COURT: That's okay. We're all
18 understanding.

19 MR. THOMPSON: Appreciate it. Your Honor,
20 regardless, *Purcell* is not limited to federal courts.
21 That's true for four reasons: First, decisions of the
22 Supreme Court of the United States on voting rights issues
23 like this one are supreme in Waukesha County and
24 everywhere else in our country. *Purcell* weighs on the
25 protection of the right to vote. The core policy concern,

1 as Plaintiffs concede, is with threats to voter confusion,
2 that the voter is the issue. This is indisputably federal
3 constitutional grounds to which the Supreme Court has the
4 final say, and say it has.

5 Now practically speaking, this concern
6 about voter confusion exists, regardless of whether it is
7 a federal court or state court hearing the dispute. And
8 it makes sense that the Supreme Court's direction from
9 *Purcell* applies here today. Second, the *Purcell* decision
10 is not self-limiting. You will find nothing in the
11 language of the *Purcell* decision confining its rules too
12 federal courts.

13 Defendants have -- strike that. Plaintiffs
14 have not offered anything that would rewrite or limit
15 *Purcell*. Frankly, there is nothing that has rewritten or
16 limited *Purcell*. There is no subsequent decision
17 affirmatively ruling that it can be ignored by state
18 courts. That's just not the law.

19 Now relevant here, the operating language
20 from *Purcell*, what we're really concerned about, it
21 actually mirrors the scenario before this court. *Purcell*
22 concerned a situation like here where a lower court had
23 issued an injunction. The relevant portion reads: "Given
24 the imminence of the election and the inadequate time to
25 resolve the factual disputes, our action today shall of

1 necessity allow the election to proceed without an
2 injunction."

3 Now, the factual dispute in *Purcell*, at
4 least as it was pending at that moment, was largely over
5 potential voter disenfranchisement, so that's key. The
6 only difference here between *Purcell* and the instant case
7 weighs in favor of a stay and my clients, because the only
8 evidence in the record demonstrates that undoubtedly this
9 decision will trigger disenfranchisement in Wisconsin.
10 Third, although subsequent decisions generally describe
11 *Purcell* in relation to federal courts, this must not be
12 mistaken for a new decision that truncated or otherwise
13 limited *Purcell*.

14 Again, no one has rewritten that decision.
15 It makes sense, Your Honor, that subsequent decisions
16 would refer to *Purcell's* relationship with federal courts.
17 It makes sense as dicta. And that's because most
18 challenges to election law and voting rights are filed in
19 federal courts, who generally oversee this variety of
20 constitutional questions.

21 Finally, if there was any doubt, Your
22 Honor, on *Purcell's* application in Wisconsin, I argue that
23 our Supreme Court has removed it. The Wisconsin Supreme
24 Court has invoked *Purcell* repeatedly, once in a
25 controlling opinion that assessed the viability of the

1 state election statute, that was *Milwaukee branch of the*
2 *NAACP v. Walker*, 2014 WI 98, Paragraph 94; twice in a
3 dissents that were offered by Justice Grassl Bradley last
4 year. That was in *Zignego v. WEC* case and the *Trump v.*
5 *Biden* case.

6 In total, Your Honor, it's clear that
7 *Purcell* certainly applies in the circumstance, and the
8 practical concern, the policy concerns, about voter
9 confusion are going to be present, regardless if a federal
10 court is intervening in an election statute right before
11 an election or if it's a state court. We can all
12 recognize that no matter who's making the ruling, the
13 people of Wisconsin are going to be affected.

14 The second larger point, Your Honor,
15 Plaintiffs argue that *Purcell* is designed to prevent
16 changing the law. Plaintiffs argue that this court has
17 not changed the law, so *Purcell* is irrelevant. Ultimately
18 what this question is about, Your Honor, is about what the
19 world was like two weeks ago before this Court issued its
20 decision. What was the status quo and did it change, did
21 this court change the law.

22 In a case that the Plaintiffs cited out of
23 the Fourth Circuit, *Wise v. Circosta*, the court said it's
24 state decisions that establish the status quo. So Your
25 Honor, I want to take you through the state decisions that

1 demonstrate that the status quo is not the law in relation
2 to how this court ruled last week.

3 Former Governor Scott Walker signed the
4 2015 Wisconsin Act 118 in December of 2015. This act
5 created the Elections Commission. This act, this
6 decision, vested the Election Commissions with the power
7 to administer our elections. This body, through its
8 administrator, issued the guidance documents in 2020. The
9 status quo ante here, Your Honor, is in these guidance
10 documents. And the legislature of the State of Wisconsin
11 certainly agreed.

12 In a letter dated September 25, 2020, after
13 both the relevant guidance documents were issued through
14 Counsel Assembly Speaker Robin Vos and former State Senate
15 Leader Scott Fitzgerald wrote to the Municipal clerk of
16 Madison and said, I quote, Voters may deposit their
17 completed absentee ballots in authorized drop boxes, which
18 must be secured and locked at all times to protect ballot
19 integrity.

20 They went on, "We wholeheartedly support
21 voters' use of any of these convenient, secure, and
22 expressly authorized absentee ballot return methods." So
23 the governor authorized the Elections Commission to issue
24 this guidance. The state legislature clearly understood
25 that it complied with the law.

1 Now Plaintiffs, they try to conceal this as
2 best as they can, but even the language in their brief
3 reflects a change in the law. On Page 5 of their brief
4 they sort of inartfully claim that this court has, quote,
5 unquote, restored as opposed to changed the laws.

6 Anyone who has restored anything can tell
7 you the process of restoration is one of change. And
8 Plaintiff's other representations to this court confirm
9 this. Plaintiff's counsel went so far as to request that
10 this Court take judicial notice of the fact that drop
11 boxes exist in Plaintiff's community. Now, they had to do
12 this because Plaintiffs testified that they had no idea if
13 there were drop boxes in their community.

14 And again, one of the Plaintiffs doesn't
15 know who the Elections Commission is and, before he was
16 deposed, had never even looked at the guidance documents.
17 So drop boxes exist in our communities, it's undisputed.
18 I think our court might have taken judicial notice of that
19 fact. The status quo, Your Honor, will change as a result
20 of this Court's ruling.

21 Now, it's important to recognize that the
22 change here is the result not of a new statute, Your
23 Honor, but it's a result of how this court has construed a
24 statute. So until this Court ruled, this was not clearly
25 the law. Plaintiffs themselves submitted an affidavit in

1 support of their summary judgment motion to this court
2 where they said they were confused about what the law was.

3 Your Honor, other examples crystalize this
4 point. One that I think is extremely helpful is actually
5 qualified immunity. In qualified immunity, a court has to
6 ask two questions: First, was the constitution violated;
7 second, was it clear that the violation was known to the
8 police officer or the violator when it occurred. Now,
9 this is a perspective standard. It's overlooked. It
10 recognizes that when the Supreme Court of the United
11 States, for example, construes the Fourth Amendment, it
12 provides new standards that police officers must follow.

13 That doesn't mean that the language of the
14 Fourth Amendment is changing, but it certainly means that
15 the law is changing. The same is true here. When this
16 Court construes our election laws for the first time, our
17 understanding changes. The law has changed. Again,
18 former Governor Walker, in concert with the legislature,
19 made a decision to create the Elections Commission and
20 empower it to administer our election.

21 The State itself, through the Department of
22 Justice, is here defending the case. The legislature
23 itself has the power, if it so decides, to intervene on
24 its own and provide its own expression of its position.
25 It has refused to do so. The only people identified in

1 the record, Your Honor, who understood or believed this
2 law was as it is now construed under this Court's previous
3 ruling are the two voters in Waukesha, against literally
4 everybody else.

5 So in order to follow the direction of the
6 Supreme Court of the United States in recognition of the
7 change of the law, that is now just weeks away from the
8 next election, this Court should stay the decision as
9 requested.

10 And finally, Your Honor, I want to touch on
11 confusion. Plaintiffs make the argument that *Purcell*,
12 even if it does apply, there's no confusion in the record
13 because the state law is clear. Again, first, the
14 Plaintiffs themselves have testified in the complete
15 opposite direction, submitting an affidavit to this court
16 saying that they were confused about the law. So that's
17 just simply not true. In fact, its undisputed.

18 As was raised here during our summary
19 judgment motions, confusion is everywhere because we have
20 a direct conflict between our state law and a federal law.
21 52USC10508 is a controlling federal law signed into effect
22 by, I believe, President George W. Bush. It demands, "Any
23 voter who requires assistance to vote by reason of
24 disability may be given assistance by a person of the
25 voter's choice."

1 Now, that is in direct contravention of the
2 state of the law as it is today. There is certainly
3 confusion amongst certainly the people in this room, as
4 well as the clerks of the State of Wisconsin. So making
5 this problem worse, the Plaintiffs continue to just
6 gesture wildly at Wisconsin statutes, claiming that
7 somewhere in there, Your Honor, you're going to find
8 exceptions that are going to prevent the massive
9 disfranchisement that we're concerned about.

10 Now, as our affidavits identified for this
11 court, the key group who will lose the right to vote are
12 those who are confined in their homes and are unable to
13 use their limbs or body to return their ballots to vote,
14 to be counted. Now, Plaintiffs offer this court and
15 repeatedly offers a set of statutes that they claim will
16 resolve these problems.

17 To make this point crystal clear, I'm going
18 to go through all of them for everybody today. The first
19 one is 6.82(1). That's about helping someone vote at a
20 polling place. I don't think it has anything to do with
21 absentee ballots. The second is 6.82(2). That's in
22 marking a ballot at a polling place. Again, they have
23 submitted something that has nothing to do with absentee
24 ballots.

25 They then go to 6.86(1)(ag). That's about

1 aid in applying to simply receive a ballot. Again,
2 nothing about returning the ballot. Then they point to
3 6.86(2). That's about requesting a ballot to be delivered
4 to the place where you live. Nothing about returning the
5 ballot. Then they point to 6.86(3). This section has to
6 do only with hospitalized electors, not to those
7 Wisconsinites or to whom the right to vote requires
8 someone else to help them to return their ballot from
9 their house.

10 The next is 6.87(5). This only has to do
11 with marking a ballot, not returning it, which again is
12 the key provision being construed in this case. The next
13 provision, 6.87(5), has to do with a subset of residential
14 care facilities and retirement homes. Again, nothing to
15 help Wisconsinites who are in their homes who don't have
16 the same bodily capabilities to return a ballot in the
17 mail or in person as other folks in Wisconsin.

18 Those are all the provisions they've
19 offered this court. Literally none of them help this
20 situation, none of them. They do now identify a website
21 they found from the postal service about door delivery,
22 and I want to point this out as well. This has nothing to
23 do with ballot return as far as the submission to the
24 court, as far as the website they provided.

25 This has to do with making sure that mail

1 can be dropped off at someone's door. It has nothing to
2 do with going into someone's house and helping them
3 retrieve their mail, should they not be able to get to the
4 door on their own. And then I think they cross the line,
5 Your Honor, frankly.

6 Plaintiffs argue to this court that none of
7 the affidavits allege any confusion. No confusion. In a
8 country where voting is one of the most key aspects to
9 life for what it means to be an American, central to why
10 people volunteer for the armed services, these affidavits
11 demonstrate that these people cannot vote. And as the
12 Plaintiffs claim, there is no confusion. They cannot
13 vote.

14 Again, this is beyond the line. There
15 are -- it is undisputed in the record. There are people
16 across the State of Wisconsin who believe they cannot
17 vote. February 15 will come and go and they will be
18 disenfranchised. That cannot stand, Your Honor.

19 Now, in the interim, it's key that in line
20 with the Supreme Court decision from *Purcell*, that this
21 decision be stayed so this confusion can be resolved so
22 that we can figure out how these people can actually vote.
23 The Supreme Court is clear, the deadline is not disputed.
24 February 15th is the election. And I think the Court can
25 even take judicial notice of the fact that there is

1 confusion. There's been significant public coverage of
2 the fact that municipal clerks have no idea really what to
3 do. So all of the prerequisites of *Purcell* are met, the
4 risk of Wisconsin voters is extreme, and Your Honor, I
5 would encourage this Court to enter a stay to prevent such
6 confusion on the eve of an election. Thank you.

7 THE COURT: All right. Thank you. I'll go
8 to Attorney Kilpatrick.

9 MR. KILPATRICK: Thank you, Your Honor. I
10 will be as brief as I can. The Wisconsin Elections
11 Commission joins the league interveners' emergency motion
12 for stay of this court's ruling, at least -- in the
13 commission's position, at least through the
14 February 15th election.

15 The commission does not understand the
16 emergency motion to be a full motion for a stay pending
17 the entire appeal but an emergency basis only, and the
18 commission joins in that. The commission again agrees
19 with the defendant interveners that *Purcell* does apply and
20 the reasoning applies. The *Purcell* court has given the
21 opinion that courts should not change the election rules
22 close to an election.

23 And again, February 15th is election day
24 of the spring primary, but there are some statutes that
25 show that the election likely is already underway with

1 regard to absentee ballots. In the league's motion, they
2 referenced Wis. Stat. 7.15(1)(cm), and that is the statute
3 that talks about the deadline by which municipal clerks
4 send out absentee ballots for those electors who have
5 already requested one. And that's the deadline. It's not
6 the first day, it's the last day.

7 And another statute, 7.10(3)(a) governs
8 when county clerks deliver ballots to those municipal
9 clerks, and that deadline is 22 days before the spring
10 primary and that's January 24th. So it is quite
11 possible that, as of right now, according to the statutes,
12 county clerks have delivered absentee ballots to municipal
13 clerks and it is possible that municipal clerks have sent
14 out absentee ballots to those electors who have requested
15 some. By January 25th, that will be the deadline, and
16 we're almost guaranteed that that will happen.

17 So for those reasons, the commission urges
18 a stay, because not only is this close to an election, it
19 may be in the midst of an election as with regard to
20 absentee voters. And following the *Purcell* principle, the
21 Court should stay its decision to minimize voter
22 confusion. Thank you, Your Honor.

23 THE COURT: Thank you. Then on to the
24 Democratic Senate Campaign Committee.

25 MR. DEVANEY: Thank you, Your Honor. John

1 Devaney of the DSCC. I'll be very brief. We join in the
2 motion, and the only point I would add is we ask that if
3 the Court does grant a stay, that the Court make it
4 expressly clear in the stay order that the WEC's guidance
5 with respect to both issues involving the delivering of
6 ballots and use of drop boxes remain in effect while the
7 stay is in place. And that's all I have, your Honor.

8 THE COURT: Thank you. Then on to Attorney
9 Berg.

10 MR. BERG: Thank you, Your Honor. I just
11 want to begin by emphasizing that the change we're talking
12 about by the commission in these memos is a recent change.
13 It happened in the last two years during COVID.
14 Defendants would have this Court believe that hundreds and
15 thousands of voters are going to be disenfranchised if
16 this court returns the state of the law to what it was
17 before the commissioner illegally changed the law.

18 But people in Wisconsin voted in many
19 elections before these changes were made without drop
20 boxes and had no problem with voting. No cases were
21 brought alleging that people were disenfranchised under
22 the law that existed before the commission's illegal memo,
23 at least on this topic. So the idea that all sorts of
24 people will be disenfranchised if we return to the rules
25 that were in place for years before COVID just is not

1 possible.

2 As to stay, Your Honor, our position is
3 that the Defendants are applying the wrong standard. The
4 proper standard for a stay in Wisconsin courts is set
5 forth in *Gudenschwager*, it's a well-known standard,
6 likelihood of success on appeal, irreparable harm to
7 either side, and the public interest. The interveners
8 don't even attempt to apply that standard. Here they
9 argue only under *Purcell*, which is not even applicable
10 here for reasons I'll get to.

11 First I want go through the stay factors,
12 as they should be applied. First, the Defendants and the
13 defendant interveners have little-to-no likelihood of
14 success on appeal. The law is not complicated here. It's
15 only a few words, and those words are very
16 straightforward. Ballots have to be mailed by the elector
17 and delivered in person to the municipal clerk. It's not
18 a complicated case.

19 Second, the harm and public interest weigh
20 heavily against a stay. The legislature has already told
21 us in 6.84 that strict adherence to the absentee voting
22 procedures is critically important, so is the Wisconsin
23 Supreme Court. In *Jefferson v. Dane County*, it quickly
24 issued an injunction against unlawful guidance issued by
25 the Madison and Milwaukee clerks and then in its opinion

1 later stated that the proper interpretation and
2 application of election procedure is a matter of great
3 public importance.

4 *Purcell* too says that states have a
5 compelling interest in the integrity of their election
6 process. And they know that there is simply no way to
7 undo an election that's been conducted in violation of
8 state law. So for all those reasons, there's significant
9 irreparable harm and harm to the public interest if this
10 court grants a stay, because it will mean multiple more
11 elections conducted under rules that are inconsistent with
12 state law.

13 Finally, there's no harm from following
14 state law. This is not a particularly complicated issue.
15 It won't be hard for clerks to adjust. They can simply
16 remove any illegal drop boxes or cover them up. They can
17 put a sign on them, send a notice to voters, and if any
18 voter happens to show up at a drop box, they can read the
19 sign and they can deliver their ballot in one of two other
20 simple ways; they can mail it or they can drop it off at
21 the clerk's office.

22 Finally, I'll just emphasize *SCIU* and *Palm*,
23 which we cited in our brief, which both show how the
24 Wisconsin Supreme Court thinks about a stay in the context
25 of an ultra vires policy or law. It should be a very high

1 bar to allow such a policy or law to be in place when it's
2 been declared illegal.

3 Finally, turning to *Purcell*, as we've
4 argued in our brief, *Purcell* does not apply to state
5 courts. Now, Mr. Thompson argues that this is a U.S.
6 Supreme Court opinion and invokes the supremacy clause,
7 but he misunderstands our federal system. The U.S.
8 Supreme Court does not have general supervisory authority
9 over the administration of the state courts.

10 The *Purcell* principle is a pragmatic rule
11 of court administration about when to grant a stay, and
12 the U.S. Supreme Court certainly has control over federal
13 courts, but it does not have control over state courts.
14 State courts can have different rules for when to grant a
15 stay and when not to grant a stay.

16 Now, maybe *Purcell* applies when there is a
17 federal election coming up. Some justices and judges have
18 argued for that in dissents, but there is no federal
19 election at stake here. This is a state election. We're
20 talking about state election rules and we're talking about
21 the test for a stay in state court.

22 No Wisconsin court, certainly not the
23 Wisconsin Supreme Court, has adopted the *Purcell*
24 principle. Now, Mr. Thompson cites three cases that he
25 says did adopt the *Purcell* principle. There are three

1 cases citing *Purcell*, but not a single one of them
2 actually adopted the rule with respect to stays.

3 They cited *Purcell* only for general
4 principles of voter fraud. So the first case he cited
5 *NAACP v. Walker*, Paragraph 74, all it says is -- citing
6 *Purcell* -- voter fraud drives honest citizens out of the
7 democratic process and breeds distrust of our government.
8 It cited *Purcell* for the principle that we are bringing
9 this case forth, which is enforcing and following state
10 law. He did not cite *Purcell* to adopt its principle with
11 respect to the law. It's simply not true that Wisconsin
12 law has adopted that principle.

13 We've also cited a Fourth Circuit case, *en*
14 *banc*, which held that *Purcell* doesn't apply to state
15 courts, and we cited a U.S. Supreme Court case. There
16 were two Supreme Court cases actually, one that denied an
17 injunction and one that granted an injunction. The one
18 that denied an injunction was when the state court made a
19 change to election laws right before an election. The
20 court denied an injunction and Justice Roberts explained
21 that the rule is different when a state court makes a
22 change versus a federal court. So the first reason
23 *Purcell* does not apply is because it doesn't bind state
24 courts.

25 The second reason is it doesn't apply when

1 a court simply enforces state law. Defendants have not
2 cited a single case where *Purcell* has been applied in that
3 context. It doesn't make any sense in that context. The
4 justification for *Purcell* is separation of power
5 principles. The courts should not change the law on the
6 eve of an election. That's not what's happening here.
7 The court is simply enforcing state law.

8 Finally, even if *Purcell* applied, there is
9 no confusion here. This is, again, a simple change to
10 make. It's not hard for people to understand there are
11 two simple ways to return a ballot, mailing it or
12 delivering it person. And clerks can notify voters of
13 that, so there's no risk that voters will be confused in
14 the next month. And there's plenty of time to make this
15 change before the February 15th election.

16 Finally, the last point I would like to
17 make is that Mr. Thompson has alleged that it is
18 undisputed in the record that many voters will be
19 disenfranchised if this court does not grant a stay.
20 Presumably he is referring to the affidavits that he
21 submitted two days ago that we had less than 24 hours to
22 respond to.

23 Respectfully, Your Honor, our position is
24 that it is not appropriate for them to submit this
25 evidence at this late stage in the case, pad the record

1 for appeal, make it seem as if that evidence is undisputed
2 when we've had no chance or reasonable opportunity to
3 dispute it. That's simply not fair.

4 And none of the affidavits clearly show
5 that these voters would not be covered by some other
6 exception or provision under the law. The point for
7 citing the other exceptions under the law for disabled
8 voters is simply to show that there are a lot of different
9 ways for voters to vote. There are a lot of methods that
10 make it easier. So for each of these voters, what a court
11 would have to determine in an as-applied challenge -- this
12 is not it -- would be, is there some gap, are there some
13 voters for which none of these exceptions apply and they
14 truly have no way to vote under state law.

15 Interveners haven't shown that, and even if
16 they could show that, they would need to show that in a
17 separate case. And it would require, at most, an
18 as-applied exception for one or two voters, not a
19 wholesale change in state law. This case is about the
20 default rule under state law for all Wisconsin voters.
21 This Court has already declared the law and it should
22 allow the law to be in place for upcoming elections.
23 Thank you.

24 THE COURT: All right. Thank you. Back to
25 Attorney Thompson.

1 MR. THOMPSON: Yes, Your Honor. I'll try
2 to be brief. Thankfully, attorney for Plaintiff referred
3 to this exercise as a quote-unquote simple change to make.
4 Let it be clear for this court, that this would be a
5 change in election law.

6 Your Honor, I would like this Court to
7 understand, the justification of *Purcell* is not separation
8 of powers. I would encourage anyone to simply read the
9 case. It's not very long. It only has to do with voter
10 confusion. Counsel for Plaintiffs suggested there were no
11 suits before the 2020 election regarding access to the
12 ballots and that this is somehow a reason to suggest that
13 this would be a quote-unquote simple change to make.

14 Your Honor, the reason there weren't suits
15 about this issue before the 2020 election is people were
16 simply able to vote. I doubt you could find many, if any,
17 people in the State of Wisconsin who thought that it was
18 illegal for a spouse to put their absentee ballot in the
19 mail. This was a concept that became an issue only
20 recently because of the instant lawsuit.

21 Counsel for Plaintiffs also cite to *Palm*
22 and *SCIU*, two decisions that, frankly, don't complicate
23 the significant constitutional questions raised in
24 *Purcell*. Of course, they reached different decisions --
25 determinations. They have completely different facts at

1 issue. They were not dealing with the same *Purcell*
2 question, the same severity of it, that this Court has to
3 grapple with now.

4 Finally, your Honor, again, I'm surprised,
5 I suppose, Plaintiffs continue to argue that there will be
6 no harm. Again, the affidavits that this court has seen
7 demonstrate that upwards of 80,000 Wisconsinites require
8 assistance of others simply to be active in the community.
9 Plaintiffs themselves, in their submission to the court,
10 cited eight or ten of our affidavits that identified
11 individuals who in just a matter of days came forward to
12 the court expressing their concern that they're going to
13 lose the right to vote.

14 That is an incredible harm. I think that
15 everyone here on this hearing thinks that the right to
16 vote is quite important and consequential. Plaintiffs
17 have not carried their own burden to identify anything to
18 the contrary. There is nothing to suggest that a stay is
19 going to keep people from voting. It's just this
20 allegation, Your Honor, that these two individuals claim
21 some confusion and that their confusion about what the law
22 is is the harm. That pales in comparison to what, at
23 least according to the record as it stands today, is
24 massive disenfranchisement.

25 Finally, Plaintiffs are upset apparently

1 that they haven't been able to depose the people who
2 signed these affidavits or do any discovery. We would
3 welcome such depositions, because we think it might help
4 Plaintiffs understand the severity of the problem,
5 something that they seemingly insist on rejecting. Thank
6 you.

7 THE COURT: Thank you. Then on to Attorney
8 Kilpatrick.

9 MR. KILPATRICK: Thank you, Your Honor.
10 I appreciate you giving me one last attempt to speak on
11 the issue. I would just kind of piggyback on what counsel
12 for the league has said in regard to the statutes that the
13 Plaintiffs say expressly allow agents to assist electors,
14 as alleged by the Plaintiffs. It's the commission's
15 position that there likely be will be confusion with these
16 people.

17 If these people do not fit within the types
18 of statutes that cover folks who need assistance, well,
19 they are out in the cold. Life seems to be saying, too
20 bad, what you have to do is bring a lawsuit separately.
21 What would be easier and better and a more just resolution
22 is a stay of this Court's order through the
23 February 15th election. Thank you.

24 THE COURT: Thank you. Then on to Attorney
25 Devaney.

1 MR. DEVANEY: Thank you, Your Honor.

2 Nothing further, except to say that we join in the
3 rebuttal arguments of both the league and Elections
4 Commission.

5 THE COURT: All right. Thank you. In
6 listening to the arguments, the Defendants and the
7 Plaintiffs really come from two different perspectives.
8 The Defendants -- certainly, the defendant league speaks
9 of massive voter confusion. That's never been an issue in
10 this case. They submitted some affidavits which talk
11 about that, but there's been no fact-finding on it.
12 There's been no conclusions drawn. The issues in this
13 case were initially legal issues with regard to the nature
14 of the statute and the nature of the administrative
15 guidance that the Elections Commission then had issued.

16 The league and the Defendants then argue
17 from an entirely new perspective as to what took place in
18 this case. That, in fact, did not take place. There's
19 been no factual determinations with regard to confusion
20 with regard to the voters. There's been accusations
21 raised after the -- certainly if they were raised during
22 the initial hearing, they've been raised as the central
23 part of the Defendants' argument for a stay in this
24 proceeding based upon the affidavits that were filed.

25 This Court continues to look at the issue

1 as a legal issue, not as a fact issue, at this stage of
2 the proceedings. When the Court issued its ruling, it
3 looked to the statutes as to what the statute said, and
4 did the commission -- the Elections Commission follow it.
5 I concluded -- the Court concluded the Elections
6 Commission had not, that the guidance issued did not
7 follow the statutes. It was really a legislative action
8 by the Elections Commission with regard to the statute.

9 The changes were made by the Elections
10 Commission in how they looked at those statutes. In
11 reading them, the Elections Commission was really
12 responding to efforts to, if you will, make absentee
13 voting easier, to some extent, not to what the law said.
14 This isn't about whether the proposals for lock boxes is a
15 good idea or a bad idea. What it's about is, is there
16 authority to do it. It's plain and simple.

17 This Court found that not only was there
18 not authority for the Elections Commission to do it, the
19 statutes are unambiguous, they're clear. Nobody can be
20 confused in reading them. Nobody was apparently confused
21 in reading the statutes for a number of years. The Court
22 also found that the commission had acted in proposing --
23 in using the guidance, the commission had actually set
24 forth rules that needed to be adopted properly under
25 Wisconsin law, and they had not done that.

1 Evidence came in -- I don't know if it's
2 evidence, but it was a submission by the Plaintiffs from
3 action by a leg29 oversight committee when they were going
4 to look at one of the guidances and proposed that it
5 should come in as a proposed rule. That is the point that
6 the Plaintiffs made and that the Court recognized in its
7 initial decision.

8 There simply is no basis for the guidance
9 issued by the Elections Commission. It was challenged in
10 this lawsuit. In looking at *Purcell*, *Purcell* and the
11 cases under it, this Court is satisfied, from a procedural
12 standpoint clearly relate to federal courts interfering
13 with state election proceedings. *Purcell*, although it was
14 minutes ago argued that *Purcell* dealt with massive voter
15 confusion, that was -- I read the case a number of times.
16 I understand the issues in the case, but it never was laid
17 out quite the way as dramatically as Attorney Thompson
18 did.

19 Remember, in the *Purcell* case, it was about
20 Arizona law that required proof of citizenship to register
21 and then at voting there had to be an ID used to vote. In
22 that case the district court had -- the lawsuit was
23 started by the plaintiffs, the district court had
24 essentially denied the lawsuit, the defendants went to the
25 Ninth Circuit and had a stay issued. It was that stay

1 that was the focus of the *Purcell* decision, and the
2 Supreme Court said they were reversing the Ninth Circuit
3 with regard to the stay for a number of reasons that were
4 really procedural, didn't really go to the merits of the
5 issue, but it was clear that it was going to go back to
6 the state and the state law would prevail.

7 In the other cases that -- some Seventh
8 Circuit cases and other matters that were cited by the
9 Defendants, it's really the same issue. The federal
10 courts had taken some steps to change what the state law
11 was and how the state election laws were implemented, and
12 that action was stopped based upon the concept in *Purcell*
13 that the federal courts could not enjoin what was going on
14 in the states. That's a simplistic analysis. I'm not
15 going to brief each of the cases cited and go through it,
16 but that's essentially how this Court understands it.

17 *Purcell*, I'm satisfied, addresses federal
18 court interference with state election procedures. Now,
19 the concept in *Purcell* is just what the Defendants argue
20 and that is the issue of voter confusion. When you make
21 changes, does that throw off the election to the extent
22 that it becomes unfair to those who want to vote and
23 you're interfering with the right to vote.

24 That is a concept, but it doesn't mean that
25 just because it's alleged, that it's actually present. It

1 hasn't been proved in this case. This Court looked at the
2 statutes and adopted, this Court believes, a
3 straight-forward reading of what the statutes say, didn't
4 embellish it, didn't try and color it, didn't legislate
5 what the statutes mean.

6 *Purcell* doesn't stand for the proposition,
7 as I read it, that any change in the status quo all of a
8 sudden results in some disenfranchisement to the voters.
9 It's not present in *Purcell*. It's not present in the
10 other cases that were cited about *Purcell* and it's not
11 present in this matter, even with the affidavits that were
12 filed by the Defendants.

13 This Court enforced an existing statute.
14 It's the commission that entered these guidances that
15 changed the law. This Court simply ruled that the law
16 should be followed. There's plenty of time, in this
17 Court's view, for the election clerks to be able to issue
18 the necessary guidelines and to conduct their elections
19 following these laws that the Court talked about and the
20 Court enforced.

21 I'm satisfied, in looking at the basis for
22 a temporary injunction, the burden has not been met. This
23 Court is satisfied that there's not a great likelihood of
24 success on the Defendant's behalf as to the merits and the
25 substance of the Court's decision. The Court is satisfied

1 that in following the statutes, the public is not harmed.

2 Certainly in following the statutes, the
3 public is benefited by elected public officials who adopt
4 laws, having those laws followed, as opposed to
5 administrative appointees making changes to those laws and
6 then having those laws, if you will, foisted upon the
7 public without any type of legislative review by the
8 individuals and entities who should be making those policy
9 changes.

10 That's not what Wisconsin law provides for.
11 That's why there's a method to adopt rules through Chapter
12 227 of the Wisconsin statutes, and that wasn't done in
13 this case. This Court is satisfied that there's not
14 irreparable harm for the ruling to continue. There's not
15 a chance of success, and the public interest is really
16 benefited by the statutes being administered, according to
17 what they say as opposed to what other people think they
18 say and as opposed to what individuals try to and do to
19 change the process without going through the proper
20 legislative process.

21 The country, the United States, has a
22 system of due process in law that requires that laws'
23 policy changes be legislative, not that policy changes are
24 permitted by the appointed individuals trying to
25 administer those laws. What is somewhat of an affront to

1 society generally is that the Elections Commission took a
2 stance that didn't really modify the statute, they changed
3 it. They dramatically changed what the wording of the
4 statute is. That shouldn't happen through an
5 administrative body without the proper process. This
6 Court's ruling went to that. Does following that process
7 harm individuals generally in the public? This Court is
8 satisfied it does not.

9 So I'm satisfied that the basis for a
10 temporary injunction pending the election, the
11 February 17th election, has not been set forth by the
12 parties. Attorney Kilpatrick said it well, that he looked
13 at the proposed motion as going toward the February 15th
14 primary election and not going toward the general election
15 thereafter in April. So I looked at it from that
16 standpoint, too, but are we at that point when the Court
17 should issue a stay relative to the Court's decision based
18 on the February 15th primary.

19 In a way, it's an easier call for the
20 Court. If I wanted to make that call, I could say, sure,
21 let's do it and stay it. But that's not following the
22 law. I'm satisfied the law is clear. The communities,
23 the public, deserve to have the election in February
24 guided and administered according to the statutes adopted
25 by their elected representatives, not called out by the

1 individuals who were on the Elections Commission. So
2 I deny it as to that.

3 What I am concerned about is that Attorney
4 Kilpatrick I think said that the deadline for the election
5 clerks to send out their absentee ballot materials was
6 January 24th.

7 Attorney Kilpatrick?

8 MR. KILPATRICK: Yes, Your Honor, the
9 deadline for the county clerks to send out the ballots to
10 the municipal clerks. And then there's a different
11 deadline for the municipal clerks to send out the ballots
12 to the voters.

13 THE COURT: So the key is really the
14 January 24th date, or is it the 25th?

15 MR. KILPATRICK: The 25th, I believe.

16 THE COURT: In my order, when I issued the
17 order initially, I had said that no later than
18 January 27th the Elections Commission should withdraw
19 their memo and issue its statements to the court that the
20 memos were declared invalid by the court.

21 That would come late, and I'm going to
22 change that. I'm going to order that that be submitted by
23 January 24, 2022. And that's a Monday. That's this
24 coming Monday, but there's certainly been sufficient
25 publicity to be sure that that's done accordingly.

1 From the publicity that the cases had, I'm
2 satisfied that anybody who has an interest in elections is
3 aware of what the Court ruled and what the process is. So
4 that will be -- I'll make that modification to my order
5 that was signed by the Court on Wednesday.

6 MR. KILPATRICK: Your Honor, if I may, then
7 for the commission, because of this change, I believe
8 there is another need for me to ask for a stay of that
9 change because, pending appeal, the commission has filed
10 an appeal, but the change that the commission must act no
11 later than Monday, it does not give sufficient time for
12 the commission to file a stay motion with the Court of
13 Appeals before having to comply with your deadline.

14 So I'd ask that the Court reconsider
15 changing at least the deadline by which the commission
16 must withdraw its memoranda.

17 THE COURT: Any other responses?

18 MR. BERG: No, Your Honor.

19 THE COURT: I am going to deny that
20 request. I'm satisfied there's sufficient time for the
21 commission to act. And if they're filing an appeal,
22 there's still plenty of time to file it today and on
23 Monday. So I deny that request.

24 I'll ask Attorney Berg to draft the
25 necessary order and submit it to the court. I ask that

1 you submit it either later today or Monday morning.

2 MR. BERG: I will submit it as soon as
3 possible, Your Honor.

4 THE COURT: All right. Thank you.
5 Anything else from the Attorney Thompson?

6 MR. THOMPSON: No, Your Honor. Thank you.

7 THE COURT: Anything else from Attorney
8 Kilpatrick?

9 MR. KILPATRICK: No, Your Honor.

10 THE COURT: Anything else from Attorney
11 Devaney?

12 MR. DEVANEY: No, Your Honor.

13 THE COURT: Anything else from Attorney
14 Berg?

15 MR. BERG: No, Your Honor.

16 THE COURT: All right. Thank you.

17 MR. KILPATRICK: Your Honor, I do have one
18 more.

19 THE COURT: Sure, go ahead.

20 MR. KILPATRICK: In my request, what I
21 didn't factor in is that what we have here is a public
22 body that needs to get together and meet, and to take
23 action in order to fulfill the request or the directive of
24 of this court. And as I had said before, there was
25 possibly a meeting that was going to take place on the

1 28th to address the JCRAR's directive to promulgate
2 rules. That was, I believe, the last scheduled meeting of
3 the commission.

4 And with the Court's change in the 27th
5 deadline to the 24th, I simply cannot guarantee that the
6 commission would be able to get together and to meet and
7 to take any action. That would require -- it would be
8 required to follow this court's order, given that it is
9 late in the afternoon on a Friday, and we've got a
10 commission, a body of six separate commissioners. I feel
11 that that may be very difficult to do, so that's another
12 factor that I apologize for not raising sooner.

13 THE COURT: Well, one of the Court's
14 concerns is that with the initial deadline that the court
15 had said to the 27th, even though the knowledge of the
16 decision is known, that would permit the Defendants to
17 argue that the commission could send out documents under
18 the old directive without -- and then claim, well, we
19 didn't have to do it until the 27th, which is after our
20 mailing.

21 So I know that wasn't anybody's intent, but
22 in looking at that, I'm concerned with that; thus I looked
23 at those dates and thought that -- and still concluded
24 it's better to have the date there for the commission to
25 act by the 24th in order to provide the necessary

1 notice. Through e-mail, it's certainly it's easy to do.
2 Otherwise with the publicity the case has, I'm satisfied
3 that the commission knows about the case.

4 I note in looking at the court docket that
5 the commission, at least in the Circuit Court of Waukesha,
6 hasn't filed an appeal. The league parties filed an
7 appeal.

8 MR. KILPATRICK: We did file yesterday.
9 Looking at my computer screen, it may have just come
10 through e-mail notification. The commission did file the
11 notice of appeal yesterday. It may have just come through
12 now.

13 THE COURT: It wasn't filed with the
14 Circuit Court in Waukesha. It was filed with the Court of
15 Appeals.

16 MR. KILPATRICK: No, no, I'm sorry. The
17 notice of appeal was filed in this court, Your Honor, your
18 court, along with the docketing statement. I believe it
19 just came through e-mail notification. The other parties
20 will be able to confirm if they have theirs.

21 THE COURT: I was just looking at our court
22 records. But at this point I'll deny your request. So
23 ordered.

24 MR. KILPATRICK: Okay.

25 THE COURT: That should end our hearing

1 then. Thank you all. Everybody have a good day, good
2 weekend.

3 MR. THOMPSON: Thank you, Your Honor.

4 (Whereupon, proceedings were concluded.)

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STATE OF WISCONSIN)
) SS.
COUNTY OF WAUKESHA)

I, ROSE MARIE RODERICK, certify that I am the official court reporter assigned to report the proceedings herein for the Circuit Court; that the foregoing pages, numbered 1 through 40 inclusive, have been carefully compared by me with my stenographic notes; that the same is a true and correct transcript of all such proceedings taken on the 21st day of January, 2022.

Dated this 24th day of January, 2022.

ELECTRONICALLY SIGNED BY:

Rose Marie Roderick

ROSE MARIE RODERICK
Official Court Reporter