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January 28, 2022

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

No. 2022AP91 Richard Teigen v. Wisconsin Elections Commission,
L.C. #2021CV958

Pending before the court is an emergency motion to vacate a stay ordered by the court of appeals and an emergency petition to bypass the court of appeals submitted on behalf of plaintiffs-respondents-petitioners, Richard Teigen and Richard Thom, together with responses filed by the Wisconsin Elections Commission ("Commission"), Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin, and the Democratic Senatorial Campaign Committee (collectively, "defendants"), and statements filed by the parties addressing timing issues associated with the 2022 statewide elections.

This case was initiated in Waukesha County circuit court on June 28, 2021, by two Wisconsin voters who challenge certain guidance issued by the Commission on March 31, 2020,

and August 19, 2020, pertaining to whether drop-boxes for the collection of absentee ballots are permitted, whether electors are required to mail or deliver their absentee ballots, and other matters. The plaintiffs sought, inter alia, a declaration that the challenged guidance contravenes Wisconsin law, specifically, Wis. Stat. §§ 6.87 and 6.855, as well as an injunction requiring the Commission to cease issuing such guidance. Several interest groups were permitted to intervene.

On January 13, 2022, the circuit court conducted a hearing and issued an oral ruling granting summary judgment to the plaintiffs and denying the defendants' request for summary judgment. The circuit court declared that the Commission's guidance on these matters contravenes the statutes and that the guidance documents constituted administrative rules under Chapter 227, which were invalid because they were not duly promulgated as rules. The court directed the Commission to withdraw the disputed guidance and to advise the clerks, no later than January 27, 2022, that the guidance had been declared invalid. The court then permanently enjoined the Commission from issuing future guidance conflicting with Wis. Stat. §§ 6.87 and 6.855. A written order incorporating this oral decision was entered on January 20, 2022.

Several defendants filed a motion asking the circuit court to stay its order pending appeal, which the Commission joined. After receiving the plaintiffs' response to the stay motion, the circuit court issued an oral decision on January 21, 2022, denying the motion for a stay pending appeal and, sua sponte, shortening the Commission's compliance deadline. The circuit court directed the Commission to comply with its order by the next business day, January 24, 2022. A short written order was entered on January 24, 2022, incorporating the circuit court's oral ruling.

The defendants appealed and moved for emergency relief pending appeal. On January 24, 2022, the court of appeals granted the requested relief and stayed the circuit court's order through February 15, 2022.

The plaintiffs now ask this court to vacate the stay issued by the court of appeals and to grant their emergency petition to bypass the court of appeals.

We first consider the plaintiffs' request that we vacate the court of appeals' stay of the circuit court's order that denied a stay of its order and injunction. An appellate court may reverse the circuit court's ruling on a motion for a stay pending appeal only if the circuit court applied the wrong legal standard or reached a conclusion not reasonably supported by the facts. State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995); State v. Jendusa, 2021 WI 24, ¶16, 396 Wis. 2d 34, 955 N.W.2d 777.

The legal standard for a stay pending appeal requires the court to determine whether the moving party has established four "interrelated" conditions, each of which is balanced against the others: (1) a "strong showing" that the movant is likely to succeed on the merits of the appeal; (2) irreparable injury absent the stay; (3) the other interested parties will suffer no substantial harm; and (4) the stay will not harm the public interest. Gudenschwager, 191 Wis. 2d at 440. The likelihood of success on the merits that must be demonstrated is inversely proportional to the degree of irreparable injury the movant will suffer absent the stay. Id. at 441. In other words, a

particularly grave harm may overcome a low likelihood of success on the merits. This court recently clarified the standard for granting a stay pending appeal in Waity v. Lemahieu, 2022 WI 6, ___ Wis. 2d ___, ___ N.W. 2d ___.

The Gudenschwager factors are interrelated; more of one excuses less of another. Waity, 2022 WI 6, ¶49. With respect to the circuit court's evaluation of the defendants' likelihood of success on appeal, in Waity we explained that circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with the circuit court's legal analysis. Id., ¶¶53-54. Here, the circuit court referred to its own statutory interpretation to conclude that it should not stay its order and injunction, but, as Waity instructs, the fact that the circuit court believes that its ruling is correct does not eliminate the potential that the court of appeals or this court might, on appeal, adopt an opposite interpretation of the relevant statutes. Id., ¶51. We thus conclude that the circuit court's analysis of the likelihood of success on the merits was too brief to satisfy what is required under Gudenschwager and Waity.

Vacating the stay would also likely cause substantial harm to the defendants and the public interest. The February 2022 election process is already underway. The statutory deadline for County clerks to deliver ballots to municipal clerks was Monday, January 24, 2022, see Wis. Stat. § 7.10(3)(a), and municipal clerks were in turn required to deliver absentee ballots to electors who have previously requested them by January 25, 2022, see Wis. Stat. § 7.15(1)(cm). Filings submitted to this court indicate that as of January 27, 2022, some 88,252 ballots had already been sent to electors, and United States Post Office records confirmed that some 61,266 ballots had been delivered. (Wolfe Aff. of Jan. 27, 2022 at ¶4). Withdrawal of existing guidance while an election is underway is likely to result in voter confusion and uncertainty in the administration of the election. See, e.g., Hawkins v. Wis. Elections Comm'n, 2020 WI 75, ¶¶5, 393 Wis. 2d 629, 948 N.W.2d 877 ("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."). These substantial harms to the defendants and to the public interest weigh against lifting the stay. Accordingly, the plaintiffs' emergency motion to vacate the temporary stay imposed by the court of appeals is denied.

As for the plaintiff's emergency petition for bypass, we grant it.

Accordingly,

IT IS ORDERED that the petition to bypass the court of appeals is granted, and the appeal is accepted for consideration in this court;

IT IS FURTHER ORDERED that, within 20 days of the date of this order, the plaintiffs-respondents-petitioners must file a brief in this court; within 20 days of filing, defendants-appellants must file a response brief; and within 10 days of filing of the response brief, the plaintiffs-respondents-petitioners must file either a reply brief or a statement that no reply brief will be filed;

IT IS FURTHER ORDERED that the parties will be notified of the date and time for oral argument in this appeal in due course; and

IT IS FURTHER ORDERED that the emergency motion to vacate the stay ordered by the court of appeals is denied.

BRIAN HAGEDORN, J. (*concurring*). As the court's order notes, absentee voting for the February 15 election is well underway. The court of appeals stayed the circuit court's order through that election; the circuit court's order is set to go into effect after that. Outside of the petition for bypass (which we grant), the only question before us at this stage is whether to reverse the decision of the court of appeals to stay the circuit court's decision, thereby changing the rules for the ongoing February 15 election. Whether the circuit court's decision to deny a stay constituted an erroneous exercise of discretion or not, further judicial relief would be inappropriate at this time. See Hawkins v. Wis. Elections Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877. The voting process is even further along now than it was last week when the circuit court made its decision. As a general rule, this court should not muddy the waters during an ongoing election. Id. Reversing the stay now would do precisely that. Therefore, I concur in the court's order.

REBECCA GRASSL BRADLEY, J. (*concurring in part, dissenting in part*). I concur with the court's decision to grant the petition to bypass the court of appeals but I dissent from its decision to deny the motion to vacate the temporary stay. The circuit court did not err in its determination that a stay of its order should not issue. The court of appeals' decision to stay the circuit court's order failed to comply with the law, which (as the majority acknowledges in its order) permits the appellate court to reverse a "circuit court's ruling on a motion for a stay pending appeal only if the circuit court applied the wrong legal standard or reached a conclusion not reasonably supported by the facts. State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam); State v. Jendusa, 2021 WI 24, ¶16, 396 Wis. 2d 34, 955 N.W.2d 777." (emphasis added). The court of appeals could not possibly have properly applied the factors set forth in Gudenschwager, or reviewed the circuit court's exercise of its discretion, because (among other things) the court of appeals did not even have a transcript of the January 21, 2022 hearing at which the circuit court explained the basis for its ruling before it stayed the circuit court's order.

In contrast to the circuit court's detailed analysis, with no briefing on the merits the court of appeals simply declared, with no analysis, that the first factor (likelihood of success on the merits) was satisfied:

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.

In hastily concluding the circuit court erred while turning a blind eye to the court of appeals' errors, the majority allows another election to proceed under the "guidance" of the Wisconsin Election Commission (WEC) rather than ensuring the election proceeds in accordance with the law, a substantial harm to the public interest the majority neglects to consider.

Astonishingly, Justice Hagedorn says it doesn't matter whether the circuit court properly denied a stay of its order or not; apparently, once again, it's simply too close to the election to undo the court of appeals' mistake. In Wisconsin, there is always an impending election. Under the logic of his concurrence, WEC may declare the rules as it wishes, the court of appeals may disregard the law when it wishes, and the majority will do nothing in response.

I am authorized to State that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice PATIENCE DRAKE ROGGENSACK join this concurrence/dissent.

Sheila T. Reiff
Clerk of Supreme Court

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